



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12547/2017

THE IMMIGRATION ACTS

Heard at Field House
On 26 June 2018

Decision & Reasons Promulgated
On 05 July 2018

Before

MRS JUSTICE MOULDER
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR T S K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Bond, Counsel, instructed by Freemans Solicitors
For the Respondent: Mr Kotas, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant, a national of Pakistan, has permission to challenge the decision of Judge NMK Lawrence of the First-tier Tribunal (FtT) sent on 4 January 2018 dismissing his appeal against the decision made by the respondent on 13 November 2017 to refuse his asylum and human rights claim and to confirm the deportation order served on 11 January 2017.

2. The basis of the appellant's asylum claim was that he was a bisexual who had been subjected to an attack by his friends when they discovered him behaving in a homosexual way towards his friend, M, whilst in the park playing cricket and had thereafter experienced bullying and threats because of his sexual orientation. The respondent rejected his claim because it was not considered he had given a credible account.
3. The judge gave four main reasons why he found the "core" of the appellant's account not credible: that he was vague about the nature of the sexual experience he claims to have had with M in the park; that he was inconsistent as to the date when this incident happened; that he had returned to Pakistan after having fled to Thailand; that he had been unable to produce any witnesses to confirm his having visited gay clubs in the UK. The judge also identified five other "peripheral matters" as telling against his credibility.
4. The appellant's grounds advance three main submissions. The appellant's principal ground contends that the judge's consideration of the evidence was "overly rigid" and failed to apply current guidance on assessing credibility in sexual orientation claims. Particular issue is taken in this regard with what the judge said at paragraphs 19 - 21 where "the judge has reached an adverse credibility finding on the basis that the [appellant] did not give information about sexual acts".
5. It is convenient at this stage to set out what the judge said about the incident in the park at paragraphs 18 - 21:

"18. In the account given in the AIR the appellant does not provide details of the encounter with M which discloses them '*bisexual*', or homosexual. In q52 of AIR he refers to an '*experience*'. In the next couple of questions he goes on to say the '*experience*' changed his life, brought fear in continuing to live in Pakistan.

19. The interview was stopped for an early lunch, at 10.40HRS. It resumed at 14.00HRS. In q66 the appellant was asked for the year of the '*experience*'. The appellant said '*It was not a full on experience*'. He went to say that there was a group of people etc. and that they noticed his sexuality. However, the appellant said nothing which indicates the exact nature of the act which discloses his '*sexuality*'. In q69 the appellant is specifically asked to '*How would you describe what happened?*' In answer to the question, the appellant repeats the question and says he '*liked it and that it was not a full-on thing but he liked it*'.

20. In this first part of the interview the appellant is being asked two specific things. The first, what was the nature of the sexual experience he claims to have had with M. Secondly, when it is said to have taken place. I find, with regard to the first, which is crucial to his case, the appellant is vague. Q69 is very specific. He is asked to describe '*what happened*'. The question was intended to elicit a description of the sexual act which demonstrates his

sexuality. Rather than answering the specific question the appellant repeats it and says he *'liked it'*. He goes on to say it was not a *'full-on thing'* but fails to say what that the *'thing'* was. The appellant appears to be experiencing difficulties in articulating what actually happened. In my view, if something had actually happened there should not have been any prevarication in answering a specific question to describe what had actually happened. Use of vague terms such as *"thing" ... 'not a full-on experience relationship'*, and the like, demonstrates the appellant did not have actual experience of the matter he claims to have had. He is making it up.

21. In answer to q74-80 the appellant claims the *'thing'* happened in a park; playing cricket; he and M were *'talking'* and *'touching'*. It is difficult to see how, in the context of men playing cricket in the park, *'touching'* and *'talking'* would be deemed as a sexual act. Of course each of these is dependent upon the context and it is the context which the appellant fails to give, repeatedly. In my view, the failure is because nothing happened which could be deemed as a sexual act, let alone a *'homosexual'* or *'bisexual'* act."
6. This reasoning was argued to betray a material error as it was contrary to the ruling of the Court of Justice of the European Union (CJEU) in cases **C-148/13** to **C-150/13** otherwise known as the **A, B and C** cases. Second the judge was said to have erred in treating the appellant's inconsistency as regards the dates of the incident in the park as a major rather than a minor one. Third, the judge was said to have erred in failing to consider that there were valid reasons why the appellant had not been able to produce witnesses or other evidence to support his claim to have visited gay clubs and accessed gay dating websites. Ms Bond produced a skeleton argument amplifying these main points. Her oral submissions focussed largely on the first ground.
7. We should record that the appellant's written grounds also set out a "ground" which alleged that the judge had erred in basing his rejection of the appellant's credibility on "general issues". Ms Bond did not pursue this ground before us and in our view she was sensible not to do so since the judge clearly did reject credibility for specific reasons.
8. Mr Kotas's skeleton argument and oral submissions contended that the appellant's first ground was misconceived because (i) what the **A, B and C** ruling proscribes is "detailed questioning of the [sexual] practices of an applicant"; whereas in the AIR the appellant was not being asked to provide a detailed account of his sexual practices at all and could not even manage to describe what took place in the park on a basic level; (ii) the guidance contained in the Asylum Policy Instructions was aimed at caseworkers, not the Tribunal; (iii) no issue is taken in the grounds with any of the questions posed by the Presenting Officer or the judge; and (iv) no direct challenge is made in the grounds to the fairness of the interview.
9. Dealing with the appellant's grounds in reverse order, we are not persuaded there was any material error in the judge's treatment of the appellant's failure to produce evidence to confirm his claims to have been visiting gay clubs and gay dating websites

in the UK. Ms Bond submits that the judge failed to appreciate that it would be a breach of his (and others') right to privacy if when in detention the appellant had given his legal representatives or sureties his passwords for gay dating websites and failed to recognise the difficulties being in detention put in the way of the appellant contacting potential witnesses. However, the appellant himself did not mention any concerns regarding his right to privacy as a reason why he had failed to obtain such evidence and in our judgement it was open to the judge to find that the appellant (who had legal help) had not taken reasonable steps to obtain and produce evidence to substantiate his claims regarding his gay activities in the UK.

10. As regards the appellant's second main ground, we consider it was entirely open to the judge to consider that the appellant's inconsistencies regarding the dates of the incidents in the park were more than peripheral. The appellant had said at two points in his asylum interview that this incident was in 1992/3 (Q60 and 62), but at another point that it was in 1994 (Q84). Given that on the appellant's account he had been stabbed and beaten almost to death, it was within the range of reasonable responses to treat adversely to the appellant that "the appellant cannot remember the year of the event which is said to have 'outed' him" (paragraph 25).
11. However, we consider that the appellant's principal ground is made out. It is established case law that when dealing with asylum claims based on sexual orientation decision-makers must focus on an applicant's sexual identity in the wider sense rather than on sexual practices. In **HJ (Iran)** [2010] UKSC 31 Lord Rodger at paragraph 66 cited with approval a passage from paragraph 81 of the Australian High Court decision in **Appellant S395/2002 v Minister for Immigration** (2003) 216 CLR 473 500 - 501:

"Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality."
12. Lord Walker cited the same passage with approval at paragraph 94 (see also Lord Hope at paragraph 22 and Lord Rodger at 48 and 63).
13. Likewise in **A, B and C** the CJEU regarded the proper focus as being not on a person's sexuality but "his sexual orientation, which is an aspect of his personal identity ..." (paragraph 52).
14. It is clear to us that the judge approached the issue of the credibility of the appellant's claim to be bisexual entirely in terms of his engagement in sexual acts.
15. Thus at paragraph 16 the judge wrote:

"16. In his 's/c' the appellant claimed he is 'bisexual'. In other places, such as his latest witness statement, he refers to himself as a homosexual (para 5

page 6 of 'App 1'). It appears he uses these two terms interchangeably. The 'confusion' is material at one level to his credibility. The term 'bisexual' means one is disposed to having sex with both men and women. 'Homosexual' is sex between men only. To use these two terms loosely could be deemed to demonstrate the appellant does not know what he is talking about. It matters not whether he claims to be a 'bisexual' or 'homosexual'. The essence of the case is that, if either is true, his life is likely to be in danger in Pakistan."

16. At paragraph 20 the judge construes the interview questions about the incident in the park as being specific to the issue of "the nature of the sexual experience he claims to have had with M". Further, at paragraph 21, the judge counts against the appellant his attempt at replying to interview questions about what happened in the park in terms of "talking" and "touching" as vague because "[i]t is difficult to see how, in the context of men playing cricket in the park, 'touching' and 'talking' would be deemed as a sexual act."
17. In focusing exclusively on the appellant's replies to questions about what happened in the park, the judge also disregarded other AIR questions designed to elicit his sexual orientation. By reducing the issue of sexual orientation to the appellant's sexuality the judge failed to weigh in the balance whether the appellant's answers to those other questions satisfactorily or otherwise established his claimed sexual orientation.
18. A further flaw in the judge's assessment as regards the appellant's account of what happened in the park is that he relied crucially on it being vague (see third sentence of paragraph 20). Vagueness and lack of detail is an established indicator of credibility assessment, but when it comes to claims based on sexuality it is incumbent on decision-makers to consider whether such vagueness might be due to what the CJEU referred to at paragraph 69 as "reticence in revealing intimate aspects of his life". This is salient because during the course of questions the appellant was asked at the interview about what he did when he spent time with M (Q74), he replied "we just shared our feelings touching this and that. Do I have to say the graphic things?" There is nothing to indicate that the judge took into account the appellant's own expression of reticence when characterising his replies to questions about the park incident as vague.
19. Mr Kotas has sought to resist the arguments set out in the appellant's principal ground by reference to a number of points. We do not consider any to have merit.
20. Mr Kotas highlights the precise wording of the CJEU's ruling at paragraph 64:

"... while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof."

21. Mr Kotas submits that the interview questioning of this appellant was not detailed, and the judge was entitled to regard the appellant's vagueness in answering questions about the incident in the park as adverse to his credibility. We think this argument wrongly downplays the CJEU's concern over questions focussing on sexual practices. Certainly as the judge understood the questioning at this point, it was all about trying to elicit details of the appellant's sexual practices on this occasion. We agree with Ms Bond that the judge's approach was contrary to the CJEU's ruling (and also in our view to the guidance given in **HJ(Iran)**). We also agree that this error was material because had the judge approached the appellant's evidence regarding his sexual identity correctly, he may have taken a different view of this questioning.
22. Mr Kotas is right that the Asylum Policy Instructions are directed at caseworkers, not judges but they broadly reflect established case law principles and it is the judge's disregard for the latter that is the problem.
23. Mr Kotas is right that no issue was taken in the grounds with either the Presenting Officer or the judge's questions of the appellant at the hearing, but the judge's adverse findings at paragraphs 18 – 21 relied exclusively on the asylum interview.
24. Mr Kotas is also right to say that the appellant's grounds take no issue with the fairness and the propriety of the asylum interview. Indeed, in our own view the interviewer closely adhered to the APIs on sexual orientation issues and, significantly, neither the interviewer in the interview nor the caseworker in the reasons for refusal decision mentions any concern about the appellant's failure to give clear details about the park incident. The integrity of the interview does not assist Mr Kotas's argument because the judge's error resided not in relying on the approach taken in the interview but in superimposing his own construction of the exchanges regarding the park incident by reference to the appellant's failure to identify any sexual act.
25. Mr Kotas submits that it cannot be wrong for a decision-maker in a sexual orientation case to try and elicit evidence about sexual acts, since their existence or not must be part of the overall assessment of sexual identity. Subject to the necessity for questioning to avoid details of sexual practices, we can agree but the judge's error in this case was on the one hand that he viewed adversely the appellant's failure to give details of sexual acts (in the park) (leading him to conclude at paragraph 20 that the appellant is "making it up"); and on the other hand failed to recognise that the answers given by the appellant to a range of other questions regarding his relationship with M were also relevant to the wider issue of his sexual identity.
26. Given the judge's flawed approach to credibility, it is not possible to preserve any of his findings of fact and we see no alternative to setting aside his decision for material error of law and remitting it to the FtT (not before Judge NMK Lawrence).

Direction

We note that Ms Bond refers in her skeleton argument to there now being in existence a draft report from Medical Justice. The appellant's representatives are directed to produce

this to the FtT (with a copy to the respondent) within fourteen days of this decision being sent).

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 3 July 2018



Dr H H Storey
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

Signed

Date: 3 July 2018

Dr H H Storey
Judge of the Upper Tribunal