Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09255/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st June 2019	**On 12th July 2019**

Before

DISTRICT JUDGE MCGINTY
SITTING AS A DEPUTY UPPER TRIBUNAL JUDGE

Between

MR A. H.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Fitzsimons of Counsel
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge N.M.K Lawrence promulgated on 26th April 2019 following a hearing at Hatton Cross on 11th April 2019 in which he dismissed the Appellant's protection and human rights claims.

2. The Appellant is a national of Egypt who was born on 1st September 1995. He had claimed asylum on three grounds. Firstly, it was said that he would be killed as a result of a blood feud if returned back to Egypt. Secondly, he stated that he did not wish to do military service and would

be at risk of persecution as a result of being a draft evader, and thirdly that he was homosexual/gay and that he would be at risk of persecution as a result.

3. given the nature of the asylum claim in this case it is important that there is an anonymity direction. No record, note or transcript of these proceedings is to identify the Appellant or any member of his family either directly or indirectly. This direction applies to both the Appellant and the Respondent. Failure to comply with this direction can lead to contempt of court proceedings.

4. The First-tier Tribunal Judge rejected the Appellant's account on all the grounds and also dismissed the Appellant's human rights claim under paragraph 276ADE of the Immigration Rules and Article 8 of the Human Rights Act. The Appellant now seeks to appeal against that decision in Grounds of Appeal dated 10th May 2019. Permission to appeal in this case has been granted by First-tier Tribunal Judge Grant-Hutchison on 30th May 2019 who did not limit the grounds which may be arguable and found that the grounds did reveal an arguable error of law.

5. I am most grateful for the help and assistance of both Ms Fitzsimons of Counsel who represents the Appellant today and Mr Bramble, Senior Home Office Presenting Officer, who appears on behalf of the Secretary of State.

6. At the appeal hearing before me today Mr Bramble concedes that there was an error made by Judge Lawrence, as set out in Ground 3 of the Grounds of Appeal in respect of the way that the judge dealt with the claim that the Appellant is gay. At paragraph 50 of the decision Judge Lawrence stated:

> "*Ms Capel drew the Appellant's attention to the details of witness statement dated 13th March 2019. She pointed out the Appellant claims to have had casual sex with many men but that no-one was at the hearing to support this part of his claim. The Appellant said 'he was busy'. Ms Capel ended her examination-in-chief. Mrs Khan picked up the point and asked the Appellant whom does he mean by 'he'. The Appellant said he was referring to 'Louis'. He was asked for his surname. He said he does not know his surname. It is conceivable that a person with whom the Appellant had casual sex may not be inclined to come to the hearing. However, 'Ali' is someone the Appellant claims he is in a relationship with. 'Ali' has not provided any evidence in support of their claimed relationship*."

7. At paragraph 51 the judge went on to note that Mrs Khan had asked the Appellant about 'Ali' and that the Appellant said he did not know his surname. The judge found that he did not believe the Appellant was in a relationship with a man, lived in his house, moved a number of addresses with him, and yet does not know his surname. The judge then went on at subsequent paragraphs to find that it was not credible that the solicitors may have asked Ali's surname but did not mention Ali's name to the

Appellant and referenced the fact that Ali had not attended the hearing and that the Appellant had said his solicitors did not require him to attend. The judge found that the Appellant was blaming Ali for not giving his full name and the solicitors for not requiring Ali to attend, and that the solicitors had contacted Ali and got his surname but they had not then told the Appellant his own boyfriend's name. The judge has therefore clearly approached that issue on the basis that Ali was the Appellant's boyfriend. It was conceded by Mr Bramble on behalf of the Secretary of State that the judge erred in that regard.

8. The actual evidence given by the Appellant in his statement dated 3rd April 2019 was that he had had a number of casual relationships including one with a Spanish man called Louis who he had had sexual relations with after meeting a few times on two occasions. At paragraph 9 of his statement he said that he did not want his friend Ali to find out about his sexuality as he does not know about this and he will not approve as he is a religious man. "This is why whenever I meet another man I would just call one of the numbers that I have for the purposes of casual sex". The Appellant's evidence was that as far as Ali was concerned, stated at paragraph 7 of his statement, Ali had just provided him with accommodation and had been a good person to him since. It was not being said that the Appellant was actually in a sexual relationship with Ali and in fact the Appellant's case was that Ali did not know of the Appellant's sexuality and was not his boyfriend.

9. The judge therefore has clearly mistaken the evidence on that regard and become confused regarding the Appellant's evidence in that regard, when proceeding on the basis that the Appellant was in a relationship with Ali and had been for a period of two years. That was not the Appellant's case before the First-tier Tribunal.

10. When assessing credibility regarding the Appellant's sexuality the evidence needs to be assessed in the round and holistically, as it does with the entirety of the evidence in the case, before the judge makes findings. The judge when considering credibility on the issues of the Appellant's sexuality was clearly mistaken on the nature of the relationship he has with Ali, yet explains that he could accept that casual relationships may not be asked to come to the Tribunal but then does not accept that Ali is not there, and that was a fundamental or significant reason as to why the Appellant's credibility was not accepted on that issue.

11. Quite clearly I cannot say the judge would have reached that same finding on the sexuality issue irrespective had that error not been made. That is therefore a material error of law.

12. In respect of Grounds 1 and Grounds 2 of the Grounds of Appeal those both relate to the way in which the First-tier Tribunal Judge dealt with the evidence of the consultant psychiatrist Dr Katona. In Ground 1 it is argued that there has been a misdirection by the judge in respect of the treatment of the report of Dr Katona and in Ground 2 it is argued that

there has been a failure to give adequate reasons when rejecting that evidence.

13. There are in my judgment errors in the way that the judge has actually dealt with the evidence of Dr Katona. As Mr Bramble correctly says the evidence of Dr Katona related to the issue as to whether or not the appellant suffered from post-traumatic stress disorder as a result of having witnessed the death of a young boy called Osama which is said to have led to the blood feud. Although Judge Lawrence, when dealing with the blood feud issue, has mentioned for example at paragraph 15 Dr Katona mentioned the custom of blood feuds and Dr Katona saying the Appellant remembered seeing the body of a child covered in blood at paragraph 17 and the prevalence of honour killings in Egypt at paragraph 21 and again saying he saw the body at paragraph 19 to Dr Katona. When actually making findings in respect of that issue regarding the blood feud the First-tier Tribunal Judge has not set out or dealt with the actual substance of the report of Dr Katona as far as actually the clinical diagnosis that the Appellant was suffering from post-traumatic stress disorder as set out in section 6 of the report, the mental state and presentation of the Appellant at section 5 of the expert report, or the clinical plausibility section at section 7 of that expert report.

14. In that regard I note for example at section 7.3 of the report Dr Katona considered the question of whether or not the Appellant might have been feigning or exaggerating his mental symptoms and the doctor noted that his opinion was based upon his objective clinical observations of the Appellant's speech and behaviour and not made simply on the symptoms described to him. The Doctor opined that his presentation was clinically plausible and he was neither feigning nor exaggerating his symptoms and that had he been feigning or exaggerating the doctor would expect him to claim more severe depressive symptoms and/or active suicidal intent.

15. The doctor had also considered other possible reasons for the PTSD as to whether or not it was as a result of having his experiences in Egypt upon seeing Osama being shot and killed and as to whether that was aggravated by more recent trauma of being forced to have sex against his will, as opposed to other factors such as his separation from his family and his country, being street homeless in the United Kingdom whilst a minor and his continuing immigration status uncertainty.

16. But when actually making findings on the blood feud issue the judge has not really dealt with those parts of the report of Dr Katona at all. He has mentioned about, as I said, the issue of the customary blood feuds and what the Appellant said to Dr Katona regarding seeing a child being covered in blood but has not when considering that issue taken account of the evidence of Dr Katona regarding what he says regarding the PTSD and potential reasons for it and whether or not that may or may not add credibility to the Appellant's account of actually having witnessed those events but that evidence has not been taken account of in that regard.

17. But when the judge did give reasons for rejecting Dr Katona's evidence, at paragraphs 56 and 57 of the statement, that was after the findings in respect of the blood feud the draft evasion and the sexuality issue had already been made. The First-tier Tribunal Judge considered the case of **R (On the application of AM) v Secretary of State for the Home Department [2012] EWCA Civ 521** and what was stated there in respect of scars and psychological injury. But went on at the bottom of paragraph 57 to find that in this case the psychological injuries are entirely based upon the oral accounts given by the Appellant and that:

> "*There are no physical injuries which an expert, such as Dr Katona, could draw upon and juxtaposition them with the Protocol and come to an expert opinion. The reports are not independent in that sense but entirely dependent upon the account given by the Appellant and the Appellant alone*."

18. Well it has been argued by the Appellant that that approach is a misdirection and a failure to give adequate reasons. As I stated previously Dr Katona set out that he was not simply relying in his report upon the oral evidence of the Appellant but had also considered his own assessment of the Appellant in terms of his presentation and undertaken psychometric testing of him and the expert had gone on to consider whether or not the Appellant was feigning or exaggerating and makes specific reference to the fact that he was not relying simply upon what he had been told as stated at paragraph 7.3 of his report. So for the judge simply to state that Dr Katona simply relied upon what the Appellant himself had said and the Appellant alone, misconstrues the expert evidence in that regard and fails to deal properly with that expert evidence and also fails to give adequate reasons as to the rejection of what the expert says in that report as to why he concluded that the Appellant was suffering from PTSD.

19. It also seems in that regard that what the judge has done here is made specific findings in respect of credibility and then dealt with the expert report as an addon which did not undermine the conclusions that he otherwise had previously come to. In that regard that is exactly what the Court of Appeal in the case of **Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367** indicated should not be done by First-tier Tribunal Judges and that the evidence needed to be considered holistically in the round. Judge Lawrence in this case has not indicated anywhere within his judgment that he has actually considered all the evidence in the round before making any findings of fact and appears to have made the specific findings of fact on the issues, before then going on to discount the report of Dr Katona. It may be that there were adequate reasons potentially discounting Dr Katona's evidence but the judge has not explored or stated fully what those reasons are. That also in my judgment amounts to a material error.

20. The other matter raised within the Grounds of Appeal in Ground 5 is an argument that when considering the risk of imprisonment for draft evasion the judge failed to have regard to the evidence in the Respondent's own

CPIN on Egypt Military Service from March 2017 which is said to have been cited in the skeleton argument at paragraph 15. Although within the Grounds of Appeal that CPIN is then extensively quoted, within the skeleton argument a brief reference was made to it, there was no quotation from it, it was simply referenced as one piece of evidence in respect of that issue. More substantively there was the Appellant's own expert report that had been commissioned in that regard from Dr Fatah.

21. The Appellant had actually gone to the trouble of not simply relying upon the CPIN but actually getting their own expert evidence, from a country expert Dr Fatah, dealing with the risk to the Appellant upon return for draft evasion. But what the judge noted from Dr Fatah's report was that although formally under the National Service Act, skipping military service may be subjected to imprisonment for up to two years or a penalty of between 500–1,000 Egyptian pounds' fine, and in practice it is said it could be between 2,000 and 5,000 pounds, prosecutions do not start until a person turned 47 years of age. Dr Fatah had said that in practice there was likely to be a fine and that although it is plausible he would face a fine or imprisonment but may in practice a prison sentence was rarely enforced and most violators pay a fine.

22. The judge also noted that Dr Fatah, when dealing with the conditions of service, said they may be demeaning and hard and pay may be low but were not such in themselves sufficient to amount to a contravention of the Human Rights Convention.

23. In the circumstances where the Appellant has actually got their own expert country evidence on the point dealing with the risk faced by this Appellant if he was to draft evade, and their expert concludes that in reality violators would be fined rather than imprison, that evidence did not disclose treatment amounting to a breach of human rights. There is no error on the part of the judge in seeking to rely upon that evidence. The evidence from the CPIN did not differ from that apart from saying that obviously giving examples when people have been imprisoned but when the Appellant has actually got an expert, and the judge relied upon that own evidence to say that he is not at risk. It cannot be an error for the judge to rely upon that evidence in preference to the more general evidence in the CPIN and on that basis, having considered that point, Ms Fitzsimons on behalf of the Appellant did not seek to proceed with that argument before me.

24. The only other Grounds of Appeal relate to the way in which the judge dealt with the Appellant's brother at Grounds 6 and 7 and the judge's failure to adopt a holistic approach to the evidence and misapplication in the case of **R (On the application of SS) v Secretary of State for the Home Department [2017] UKUT 00164** where the judge states that the Appellant's brother's statement bore the hallmarks of being 'written to order'.

25. As far as his brother's evidence is concerned it is argued in Ground 6 basically that the way the judge dealt with that is again contrary to the Court of Appeal case of **Mibanga v Secretary of State for the Home Department** and in that regard it also seems that the judge has made findings about each of the grounds of the asylum claim before then as an afterthought between paragraphs 58 and 59 dealing with the evidence of the brother. At paragraph 59 the judge states specifically:

> *"I find this statement materially mirrors the Appellant's account, insofar as the blood feud is concerned. I have found the Appellant's account is not a credible one and set out my reasons for that finding. In the context I find that this witness does not add anything new which leads me to depart from the findings already made."*

26. As Ms Fitzsimons submits that is not considering all of the evidence in thr round before making findings. There is therefore a material error also in that regard.

27. However, as has been agreed with both legal representatives the material errors in this case relates to the way in which the issues regarding the blood feud and the Appellant's claimed sexuality were dealt with and not in respect of the issue regarding the risk upon return for draft evasion. Indeed Ms Fitzsimons did not ultimately pursue the argument raised in Ground 5 in respect of the draft evasion findings. Those findings are wholly separate to the issues relating to the other two grounds of the asylum appeal, namely the blood feud and the sexuality issue. That in itself is a standalone issue and the findings on the draft evasion issue are to remain.

28. However in light of the material errors in respect of the other two Grounds of Appeal it seems to me that it is appropriate the case be remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Lawrence in order that credibility can be assessed again and all the evidence taken into account in respect of the other two grounds of the asylum claim, namely the blood feud and the sexuality issue. That will involve a complete reassessment of credibility on those issues and reassessment of the evidence including the expert evidence. It is therefore not a matter, given the substantial amount of fact-finding, that the case should be reserved and retained within the Upper Tribunal and it is appropriate in that case for the case to be remitted.

29. So I do preserve the findings in respect of the issue regarding the draft evasion but the findings in respect of the other two elements of the appeal, the blood feud and the sexuality, are set aside.

Notice of Decision

30. The decision of First-tier Tribunal Judge NMK Lawrence is set aside in respect of the findings on the issues of blood feud and the Appellant's

sexuality and the case is remitted back to the First-tier Tribunal for a rehearing on those issues before any First-tier Tribunal Judge other than First-tier Tribunal Judge Lawrence. The findings in respect of the discrete issue regarding draft evasion are to remain and therefore that is not a Ground of Appeal to be pursued at the renewed First-tier appeal hearing.

31. In light of the nature of the allegations in this case in the asylum claim it is appropriate for there to be anonymity order as stated above. I therefore do order that the Appellant is entitled to anonymity in these proceedings and no report, transcript or note of this decision is to identify the Appellant or any member of his family, either directly or indirectly. This direction applies to both the Appellant and the Respondent and to third parties. Failure to comply with this order may lead to contempt of court proceedings.

Signed DJ McGinty Date 3rd July 2019

District Judge McGinty sitting as a Deputy Upper Tribunal Judge