



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/09687/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 20 August 2019**

**Decision & Reasons Promulgated
On 3 September 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**SIJ
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Bellara, Counsel, instructed by Elaahi & Co Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, SIJ, is a citizen of Pakistan born on 25 November 1981. He appeals against a decision of First-tier Tribunal Judge Cameron promulgated on 25 January 2019 dismissing his appeal against a decision of the respondent dated 23 July 2018 to dismiss his claim for asylum, humanitarian protection and the associated human rights claim.

Background

2. The appellant's case is that he is a gay man and cannot return to Pakistan, for if he were to do so he would feel compelled to conceal his homosexual identity to avoid persecution. Judge Cameron dismissed the appellant's appeal on credibility grounds. Primarily, the judge based his assessment on what he considered to be the inconsistent lifestyle choices made by the appellant in this country, in particular by marrying a woman, from whom he is now estranged, shortly after his arrival.
3. The appellant claimed to have been in a relationship with a man called Ali in Pakistan for around ten years, prior to moving to Kuwait age 25. Upon his return from Kuwait, the appellant said he was devastated to find that Ali had decided to marry a woman and that the relationship could no longer continue.
4. In 2011, the appellant arrived in this country with leave as a student. Shortly afterwards, he met a lady, D, through an online dating agency and they began a heterosexual relationship later culminating in marriage. The appellant's case was that he did so to "cure" himself of his homosexuality. He said that he could not maintain a sexual relationship with her, and that when he tried he found it repulsive.
5. Judge Cameron was concerned that D did not attend the hearing. The appellant claimed to be estranged from her, and unable to make contact with her. The judge had credibility concerns with that contention, as previously the appellant's representatives had written to the Tribunal to request an adjournment specifically to secure D's attendance, writing in terms which suggested that they were in contact with her, and it was simply the case that she had an unavoidable commitment elsewhere on the date of the scheduled First-tier hearing.
6. Judge Cameron considered that it was that it was implausible and inherently unlikely that the appellant would be a gay man in circumstances when he had enjoyed a heterosexual relationship and subsequent marriage with D.
7. So much is clear from the following extracts from Judge Cameron's decision. At [72], the judge said that it was not clear why the appellant had sought female company in this country shortly after having ended a ten-year homosexual relationship before his arrival. Similarly, at [76] the judge said that it was "surprising" that once the appellant came to this country, where he would be able to explore his homosexuality without fear, that he in fact started a relationship with a woman. At [77] the judge said that it would be expected that the appellant would have formed a heterosexual relationship in Pakistan where his family would not have the same objections to his sexuality that he now claims they do have.
8. Permission to appeal was granted on two bases.

9. First, the judge imported submitted his own subjective expectation of the behaviour that a homosexual man would be likely to engage in in this country, primarily by reference to the nature of the relationships he expected the appellant to form, that is to say homosexual relationships rather than heterosexual relationships.
10. Secondly, the judge was said to have placed insufficient weight and not given sufficient reasons in relation to his analysis of the medical evidence which had been provided to him. At [60] to [70] of the decision the judge outlined a medicolegal report by a Dr Hussain, a consultant psychiatrist. Throughout the course of that report, as noted by Judge Cameron, Dr Hussain surveyed the appellant's sexual history as claimed by the appellant, culminating in the finding that the appellant suffers from posttraumatic stress disorder and depression with thoughts of suicidal ideation. This was said to have been caused by the appellant's attempts to suppress his homosexuality and to "cure" his own condition himself, as he perceived he had to.

Discussion

11. At the hearing, it was common ground that the judge had erred in relation to his treatment of the appellant's narrative concerning his homosexuality. The judge did not address any of the established background materials relating to the assessment of sexual orientation-based asylum claims. Rather, he imported his own subjective expectations of how a gay man would behave and the sort of activity in which he would engage.
12. There are many background materials relating to assessing asylum claims based on homosexuality. For present purposes, it will be sufficient simply to refer to the examples given in the grounds of appeal. For example, the UNHCR Guidelines on Sexual Orientation, 23 October 2013, state:

"Some LGB individuals, for example, may harbour deep shame and/or internalised homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles."

Similarly, the Court of Justice of the European Union in joined cases A, B and C v Staatssecretaris van Veiligheid en Justitie C-148/13 to C-150/13, ruled that decision makers must not rely solely on stereotypes when deciding a person's sexual orientation. To the extent that stereotypes may be a useful tool for decision makers, held the Court of Justice, that is only a matter of relevance or significance to the extent that they are applied by reference to the "individual situation and personal circumstances of the applicant for asylum" (see [62]).

13. For these reasons, the judge's approach to assessing the credibility of the appellant's claimed sexuality was infected by an error of law.
14. The question then arises as to whether this was a material error of law. The judge had other credibility concerns arising from the appellant's

account, in particular in relation to the absence of D from the hearing. The judge rightly and quite legitimately had credibility concerns arising from the reasons given for D's non-attendance, in light of previous correspondence between his solicitors and the First-tier Tribunal.

15. At [59], Judge Cameron quoted correspondence from the appellant's solicitors which expressed in clear terms an expectation that she would be available for the hearing on a future occasion, that she was in contact with them and that it was simply the case that she was unable to attend on that occasion. In my view, these were sound and clear credibility concerns which the judge was entitled to express in these terms. However, it is difficult to divorce this sound credibility analysis from the erroneous approach the judge took to determining the appellant's sexuality, which lay at the heart of his credibility assessment.
16. There is another reason why the judge's overall credibility analysis was flawed. Although the judge devoted ten paragraphs to summarising the evidence provided by Dr Hussain, as well as noting the contents of some of the appellant's medical records, it appears that the judge did not take into account the evidence provided by Dr Hussain until after he had conducted his substantive credibility analysis. It is trite law that in the context of cases before this Tribunal medical evidence, such as that in the appellant's case forms part of the overall assessment of the appellant's evidence and is not to be dismissed simply on account of the fact that the core account provided by the appellant has been found by the judge to lack credibility. The judge should have taken into account the evidence of Dr Hussain in a holistic fashion, explaining the significance or otherwise of the doctor's findings that the appellant suffers from posttraumatic stress.
17. Drawing this analysis together, in my view it is clear that there is a material error of law in the judge's approach to determining the appellant's sexuality.
18. This then raises the question as to whether or not, were it the case that the judge approached his analysis of the appellant's sexuality differently, a different outcome would have been called for.
19. The established authority for the determination of asylum claims based on sexual orientation is HJ (Iran) v the Secretary of State for the Home Department [2010] UKSC 31. The judge addressed only the first question enunciated by Lord Hope at [35]. The first question is to consider whether the applicant is gay?
20. For the reasons I have outlined, Judge Cameron's assessment of this issue was flawed. Were it the case that the appellant had been accepted to be gay by the judge, he would then have had to have considered what the likely risk factors would be facing the appellant upon his return. Central to that assessment, at [35.d] of Lord Hope's opinion, is the question of whether the appellant will conceal aspects of his sexual orientation if returned to Pakistan, and if so, why he will do so? If he would conceal his

sexual orientation out of fear for persecution, then he will succeed in establishing his claim for protection under the Refugee Convention. By contrast, if the reason that he would conceal his sexual orientation, or does not otherwise live an openly homosexual life, in Pakistan is different, perhaps for cultural, religious or other personal reasons then it will not be the case that the individual concerned faces a well-founded fear of persecution on grounds of sexual orientation.

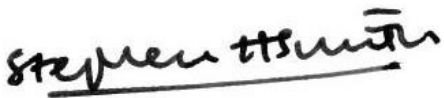
21. In this respect, the way in which the appellant conducted himself when living in this country is highly relevant to the assessment. The judge however did not consider the reasons why the appellant had not lived an openly homosexual life in this country, or the fact that he had married someone of the opposite sex and had lived an openly heterosexual lifestyle for a period of time, in the context of the HJ (Iran) analysis.
22. The judge should have addressed his analysis to this stage of the HJ (Iran) criteria, rather than focusing on the first limb of the test, concerning whether the appellant was gay.
23. I have considered whether it is possible to retain this matter in this Tribunal in order for a remaking decision. I have decided that that is not the appropriate course of action. The judge's analysis of whether the appellant is gay was flawed; it was infected by the judge's subjective expectations of how a gay man would behave, without reference to the background materials concerning such matters. It was also flawed because the judge did not consider the medical evidence in the round, but rather addressed in operative terms having already found the appellant to lack credibility.
24. In light of the flawed approach to determining the primary issue of whether the appellant is a gay man, there are no findings of fact which I can preserve in order to conduct the subsequent stages of the HJ (Iran) analysis in the Tribunal (if indeed a re-assessment of the appellant's credibility leads to a finding that he is a gay man; a fresh assessment would not necessarily lead to that conclusion).
25. The appropriate course of action is for a fresh credibility assessment to be conducted taking into account all the factors that were advanced on behalf of the appellant, and, if necessary, for the later HJ (Iran) questions to be addressed.
26. Therefore, I set aside the decision of Judge Cameron, and remit the matter to the First-tier Tribunal to be heard by any other judge, with no findings of Judge Cameron preserved.

Notice of Decision

The appeal is allowed. The decision of Judge Cameron is set aside. The matter is remitted to the First-tier Tribunal to be heard by any other judge.

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 their 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 23 August 2019

Upper Tribunal Judge Stephen Smith