



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

Appeal Number: PA/11557/2019

THE IMMIGRATION ACTS

**Remote Hearing by Microsoft Decision & Reasons Promulgated
Teams
On 1st June 2021** **On 23rd June 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**J O E
(Anonymity Direction Made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Imo, Chancery CS Solicitors

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

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

An anonymity direction was made by the First-tier Tribunal (“the FtT”). As the appeal raises matters regarding a claim for international protection, it is appropriate for an anonymity direction to be made. 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.

Remote Hearing

1. The hearing before me on 1st June 2021 was a remote video hearing held during the Covid-19 pandemic. Neither party objected to a remote hearing. The appellant was able to join the hearing from the offices of his solicitors. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I was satisfied: that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it is in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I am satisfied that a remote hearing will ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. No technical problems were reported to me by the parties representatives during the course of the hearing. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

Introduction

2. The appellant is a national of Nigeria. He arrived in the UK on 4th October 2019 and sought entry as a visitor. He was refused permission to enter, and removal directions were set for his removal to Nigeria on 5th October 2019. Prior to removal on 5th October 2019 the appellant claimed asylum. The appellant stated that the reason for his claim is due to his sexuality. The claim was refused by the respondent for reasons set out in a decision dated 12th November 2019.
3. The respondent accepts the appellant is a national of Nigeria. The respondent considered the appellant's account of his relationships in

Nigeria but rejected the appellant's claim that he is a homosexual or that he will be perceived to be gay. The respondent concluded the appellant would be able to return to his home area in Nigeria and would not be at risk of persecution or suffering serious harm upon return.

4. The appellant's appeal against the respondent's decision was dismissed by First-tier Tribunal Judge Hussain for reasons set out in a decision promulgated on 16th April 2020. Judge Hussain heard evidence from the appellant and his sister. His findings and conclusions are set out at paragraphs [28] to [49] of the decision. Judge Hussain refers to the respondent's consideration of the appellant's sexual orientation at paragraph [67] of the respondent's decision. The respondent noted the appellant has given inconsistent accounts regarding when he came to the realisation that he is gay. She noted the responses given by the appellant concerning his sexuality were vague and lacking in detail. At paragraph [30] of his decision, Judge Hussain states "I agree". Judge Hussain refers to the respondent's consideration of the appellant's relationships with two individuals that I shall refer to as [EG] and [WB] at paragraphs [69] and [70] of the respondent's decision. The respondent considered the appellant's claim that he had been in relationships with [EG] and [WB] to lack credibility. At paragraphs [32] and [33] of his decision, Judge Hussain again states "I agree". At paragraph [34] of his decision, Judge Hussain said:

"34. In paragraph 71, the respondent revisited the appellant's relationship with both [EG] and [WB], and noted that his oral account of his attraction and how he spent time both with [EG] and [WB], was vague and repetitive. He failed to go to any real detail about his attraction or emotional connection to either [EG] or [WB], which damaged his credibility. I agree. In paragraph 72, the respondent noted the appellant's claim that he got caught twice having sex with [WB]. The first was in July 2019 and the second on 2 October 2019. The respondent disbelieved the appellant because he would have been aware that his wife could come home at any time and the risk of being seen in public at the bar. He would have been aware of the consequences if he was to be caught, yet he carried out these activities. I agree that the appellant's behaviour is inconsistent with somebody who has already once been caught by his wife engaging in sex with another male."

5. In reaching his decision, Judge Hussain also considered the information provided by the appellant in his visa application concerning his wife, son, mother and other family members, together with the evidence relied upon by the appellant regarding his income. He found that the evidence undermines the appellant's claim that he has lost contact with his family. At paragraphs [37] to [40] of his decision, Judge Hussain referred to the other matters relied upon by the respondent in reaching the conclusion that the appellant's claim lacks credibility. At paragraphs [40] to [42] of his decision he said:

"40. I have considered, in addition to the appellant's testimony, evidence of his sister [J]. In her statement dated 29 October 2019, she states that his marriage did not work out because his wife discovered him having sex with his gay partner in July 2019. His wife was now threatening to report him to the police and gang members in the area, who he fears will kill him. That is a strange position to be in. It is not at all clear, why the appellant's wife would tolerate him in the matrimonial home after getting caught in July 2019 and after having him beaten up by the local boys, only to threaten to report him to the police and gang members. By far, the most significant discrepancy that has not been explained is the appellant's sister's claim that during her December 2018 visit, she saw the appellant, whilst he claims not to have met her during her trip. In his oral evidence, he went as far as to saying that she was incorrect in her assertion, which she in turn maintained was true. It seems to me either the appellant or his sister is being untruthful about this. Either way, I find neither of the witnesses are reliable.

41. For all the reasons given by the Secretary of State, with which I agree, I conclude that the appellant is not a truthful person. His claim, made at the time it was, is nothing of (*sic*) an opportunistic claim, to frustrate his removal.

42. It follows from above, that I find that the appellant has neither subjective nor objective fear of being treated in the manner amounting to persecution or contrary to Article 3 of the Human Rights Convention if returned to Nigeria."

The appeal before me

6. The appellant makes a number of criticisms in the grounds of appeal, many of which are incoherent and difficult to follow. The appellant claims the decision of Judge Hussain is "not compliant" with the test set out by the Supreme Court in HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31. He also claims, without any elaboration, that Judge Hussain failed to follow the guidance set out in KB and AH (credibility - structured approach) Pakistan [2017] UKUT 00491 (IAC) and the decision is

incompatible with the decision of the Court of Appeal in Demirkaya [1990] EWCA Civ 1654, at [20]. The appellant claims that in reaching his decision Judge Hussain referred to the reasons set out in the respondent's decision and simply stated "I agree", without any clear or adequate explanation as to why he agrees with the respondent's analysis of the evidence. The appellant claims it was unfair of the judge not to identify any concerns he had about the evidence and to invite the appellant or his representative to address those concerns. The appellant also claims that an appeal must be determined on the basis of the evidence before the Tribunal, and here, the appellant relied upon a Rule 35 report completed by Dr Sirajudeen Mumtaz on 29th October 2019, that the appellant claims, independently corroborated his account of being a victim of past persecution and lent weight to his claim that he would be at risk of future persecution on return to Nigeria. The appellant claims the respondent had failed to have any regard to the Rule 35 report when reaching her decision, and the failure of Judge Hussain to have regard to that independent expert evidence is such that his decision is infected by a material error of law. Finally, the appellant claims that there were "three photographs of threatening text messages" that formed part of the evidence before the First-tier Tribunal but do not feature in the judge's analysis of the appellant's fear of the 'area boys'.

7. Permission to appeal was granted by First-tier Tribunal Judge Robertson on 20th May 2020. She said:

"It is arguable, as stated in the grounds of application at para 6a, that the Judge has not referred to the rule 35 report within the decision to establish whether it is accepted or rejected, or if any weight is attributed to it, in the overall assessment of evidence. As to the other grounds, these have less arguable merit because, for example, in relation to the issues raised at para 4 of the grounds, it was open to the judge, in the absence of a reasonable explanation from the appellant as to the matters raised in the respondent's reasons for refusal letter (RFRL), to consider and accept that the respondent had raised legitimate reasons for rejecting the appellant's claim that he was gay, and to confirm that she agreed with the respondent's reasoning. Where issues are clearly raised in the RFRL, and are not addressed by the appellant or his representative, there is no need for the Judge to raise them at the hearing. Furthermore, as to paras 1 - 2 of the decision, having found that the appellant had not established that he was gay, there was no need for the judge to consider the further questions set out in HJ (Iran) [2010] UKSC

31, and it would follow that the judge did not accept that the appellant had been threatened or ill-treated by the 'area boys'. However, as permission has been granted in relation to para 6a of the grounds, it is not withheld on the other grounds. The appellant must not raise his hopes too high, however, as it may be found that a consideration of the Rule 35 report would not have made a material difference to the outcome of the appeal."

8. Given the way in which the appellant's grounds of appeal are formulated, at the outset of the hearing before me I invited Mr Imo to summarise the grounds of appeal relied upon by the appellant. Mr Imo submits the focus of the criticism is the Judge's adverse credibility finding and the conclusion that the claim for international protection made by the appellant is nothing but an opportunistic claim that was made to frustrate his removal. Mr Imo submits there was evidence before the Tribunal in the form of the Rule 35 report that was capable of lending support to the appellant's account of events and the failure to consider that report, has infected the overall consideration of the claim by Judge Hussain and impacts upon the adverse credibility findings made.
9. Before me, Mr Imo submits that although a Judge is not required to deal with every claim made by an appellant, there is an obligation upon a Judge to engage with the material evidence, particularly where that evidence is relevant to the core of the claim. He submits the respondent had failed to properly address the Rule 35 report in her decision, and Judge Hussain failed to consider the extent to which that Rule 35 report lends weight to the appellant's account of events. The Rule 35 was at Annex F of the respondent's bundle.
10. Mr Imo submits the appellant's account of events in 2008 is not unusual and at page 9 of the appellant's bundle, there was evidence before the First-tier Tribunal in the form of an article published on 13th August 2017 relating to the arrest of 15 students who were alleged to have beaten a classmate to death over his sexual orientation. Mr Imo submits that if Judge Hussain had referred to the Rule 35 Report and the background material, he would not have concluded that the appellant's claimed relationship with [EB] is not credible. He submits the appellant's account of events in 2008 is plausible. He submits Judge Hussain simply agreed

with the respondent's analysis of the appellant's relationship with [EB] and his claim that he had been beaten in 2008 without considering for himself, the extent to which the Rule 35 report lends support to the claim made. Mrs Imo acknowledges that at paragraph [5] of his decision, when outlining the appellant's claim, Judge Hussain refers to the Rule 35 Report when referring to the health of the appellant, but he submits, there was no further reference to the report when the Judge summarised the appellant's account of events in 2008 in paragraph [8] of the decision, or in his consideration of the appellant's relationship with [EB] at paragraph [32] of the decision.

11. Mr Imo submits that simply put, the appellant's claim that he was in a relationship with [EB] that resulted in him being attacked in 2008 is supported by the Rule 35 report and is an account that is plausible, based upon the objective material that was before the Tribunal. The events in 2008 formed the foundation of the appellant's claim and if Judge Hussain had properly considered the appellant's account based upon the evidence before the Tribunal, he would not have concluded that the appellant's claim lacks credibility and that he had made an opportunistic claim to frustrate his removal.
12. In reply, Mr Diwnycz submits the grounds of appeal amount to nothing more than a disagreement with findings that were open to the judge. He submits the Rule 35 report relied upon by the appellant had been considered by the respondent and was referred to in paragraphs [14] to [16] of the respondent's decision of 12th November 2019, and Judge Hussain was clearly aware of the Rule 35 Report having referred to it, at paragraph [5] of his decision.

Discission

13. There are two strands to the appellant's claim for international protection, albeit both arising from his sexuality. The appellant claims that in 2008 he formed a relationship with [EG], when he was in school.

He claims that in 2008 he was caught in a bush beside the school compound by a group of up to 7 senior students. They started to beat the appellant and [EG], and during that attack the appellant suffered a cut to his right eyebrow and the little finger of his right hand. Following the attack, he went to a nearby chemist and his cuts were treated with plasters. The appellant claims [EG] and he were taken to the school authorities where they were beaten, punished and then excluded from the school. The appellant claims that following that incident he was thrown out of the family home by his mother and went to Motor Park. The appellant claims that he had no further contact with [EG] following that incident. The appellant claims he worked as a conductor for a bus driver at Motor Park, and in 2016, he met and entered into a relationship with another individual, [WB].

14. Notwithstanding that relationship, the appellant married [S] on 17th December 2016. The appellant has a son from his relationship with [S], who the appellant said was about 2 years old, and was therefore born in or about 2017.
15. The appellant claims that in July 2019 and on 2nd October 2019, he was caught with [WB]. On the second occasion [WB] went to the appellant's house whilst his wife had gone to the market. When she came back, she caught the appellant and [WB] having sex. He claims "the boys" came to the house and started beating him but later allowed him to go for the sake of his son. News of the incident reached the appellant's place of work and his boss called him in and gave him until the end of August to start looking for another job. The appellant contacted his sister who lives in the UK and arrangements were then made for the appellant to visit her in the UK.
16. At paragraphs [18] to [23] of his decision, Judge Hussain summarises the oral evidence of the appellant and his sister, both of whom were cross-examined. The findings and conclusions of Judge Hussain are set out at paragraphs [28] to [42] of his decision.

17. The assessment of the risk upon return and the credibility of the claim advanced by an appellant is always a highly fact sensitive task. Judge Hussain was required to consider a number of factors. They include, whether the account given by the appellant was of sufficient detail, whether the account is internally consistent and consistent with any relevant specific and general country information, and whether the account is plausible. The ingredients of the story, and the story as a whole, have to be considered by reference to the evidence available to the Tribunal. Judge Hussain was required to resolve what had happened in the past, and whether the appellant would be at risk on return in the future.
18. I reject the claim that in considering the appellant's account of events in 2008 and in reaching his decision overall, Judge Hussain failed to have regard to the background material that was relied upon by the appellant. Judge Hussain expressly directed himself at paragraph [28] of his decision that he is required to have regard to the background evidence relating to the country concerned. He went on to say that he had looked at that evidence and found nothing there that is inconsistent with the appellant's claims. He therefore proceeds on the premise that there is nothing inherently implausible about the appellant's claims and went on to consider the particular claim made by the appellant.
19. I accept that there is no reference by Judge Hussain to the decision of the test set out by Lord Hope in his judgement in HJ (Iran) -v- SSHD [2010] UKSC 31. However that is not sufficient to establish that the decision is vitiated by a material error of law. As Popplewell LJ said, at [34] in AA (Nigeria) v SSHD [2020] EWCA Civ 1296, Appellate tribunals should assume that experienced judges in specialised courts were applying the principles, without the need for extensive citation, unless it was clear from what they said that they had not done so. Such appeals involve what is essentially an individual and fact-specific inquiry. There is nothing in the decision of Judge Hussain to suggest that the judge was unaware of what was said in HJ Iran or was applying some different criteria. To the

contrary, Judge Hussain rejected the appellant's claim that he is a homosexual male. The first stage of the test set out by Lord Hope in HJ (Iran) was not satisfied by the appellant and the appellant's claim fell away at the first hurdle without the Judge needing to consider the further questions that are directed to the risk upon return based upon the appellant's sexual orientation.

20. As Mr Imo properly submits, the issue at the heart of the appeal before me is what is said in paragraph 6(a) of the grounds of appeal. That is, the failure to have regard to the Rule 35 Report and the impact of that upon the Judge's consideration of the claim made by the appellant.
21. I accept Judge Hussain does not refer to the Rule 35 report in his consideration of the appellant's claim and in reaching his findings and conclusions at paragraphs [28] to [42] of the decision. There is a reference to the report in paragraph [5] of the decision, but the focus there, as Mr Imo submits, is upon the health of the appellant. Judge Hussain notes the Rule 35 indicates that a referral would be made for a mental health assessment, but there is no reference in that paragraph to the scars referred to in the report, or the view expressed by Dr Sirajudeen Mumtaz that the appellant's injuries are consistent with his narration of events.
22. Judge Hussain was clearly aware of the Rule 35 report and I must consider whether his failure to refer to what is said in sections 4 to 6 of that report, are material to the outcome of this appeal. At section 4, Dr Sirajudeen Mumtaz set out the account provided by the appellant of events in 2008; *"He was in a technical school in Nigeria in 2008, he was found with his partner in a bush in the school and was beaten by the other students in his school. He was hit with a stick on the right side of forehead and cut with a penknife on the right little finger. He was expelled from school."* In section 5, Dr Sirajudeen Mumtaz recorded a scar to the right side of the appellant's forehead and a scar on the little finger of his right hand. At section 6, Dr Sirajudeen Mumtaz states:

"His injuries are consistent with his narration of events and would need to be looked into in further detail.

He denies any current mental health problems but I have made a referral to the mental health team for an assessment."

23. I accept that where there is medical evidence corroborative of an appellant's account of torture or mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an "add-on" or separate exercise for subsequent assessment only after a decision on credibility has been reached on the basis of the content of the appellant's evidence or his performance as a witness.
24. The appellant's account of the incident in 2008 is set out at paragraph [8] of the decision of Judge Hussain. He noted the appellant's claim that he had been beaten and "sustained a cut to his right eyebrow and right pinky finger." He noted the appellant's claim that after the attack he went to a nearby chemist store and was treated with plasters on both cuts. In paragraph [32] of his decision, Judge Hussain refers to the respondent's consideration of the appellant's claim to have formed a relationship with [EB]. The respondent concluded that the appellant's account of that relationship is not credible. Judge Hussain agreed that the appellant's claim lacks credibility. The Judge reached his findings and conclusions having considered all the evidence in the round. Judge Hussain had noted, at paragraph [8], the appellant's claim that he had sustained a cut to his right eyebrow and right pinkie finger. There is nothing within the findings and conclusions set out by Judge Hussain that suggests he did not accept that the appellant has a scar on the right of his forehead and on the little finger of his right hand or that he rejected the appellant's claim because it was not corroborated in any way. As I have noted, Judge Hussain had considered the background material and concluded that there is nothing inherently implausible about the appellant's claim.
25. I have considered the Rule 35 Report and I am satisfied that the failure to refer to the report at paragraphs [28] to [42] of the decision was not

material to the outcome of the appeal. At its highest, section 4 of the report simply sets out in the briefest of terms, the account given by the appellant of the incident in 2008. It is simply a record of what the appellant said to the medical practitioner. Section 5 of the report simply confirms that the appellant has a scar on the right side of his forehead and on the little finger of his right hand. At section 6 of the report Dr Mumtaz simply states that the appellant's injuries are consistent with his narration of events, but importantly, goes on to say "... and would need to be looked into in further detail.". There is no further evidence before the Tribunal regarding the scars.

26. The primary purpose of a Rule 35 report is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The respondent had referred to the report in her decision dated 12th November 2020 and noted, at paragraph [15] that the appellant's injuries were found to be consistent with his narration of events. Dr Mumtaz adopted the Istanbul Protocol ("The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"). Under the heading "D. Examination and Evaluation following specific forms of Torture", the Istanbul Protocol states:

"186... For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution
...
(b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
..."

27. Dr Mumtaz therefore considered that the appellant's scars were "consistent with" his narration of events but that is not conclusive because it does not exclude many other possible causes for the injury to the forehead and on the little finger. Here, the only explanation for the scars referred to in the Rule 35 report came from the appellant. In my judgement Dr Mumtaz relied entirely upon the explanations given by the

appellant and there is nothing in the Rule 35 report to indicate that Dr Mumtaz stood back and considered them objectively. In fact Dr Mumtaz expressly stated that although the injuries are consistent with the appellant's narration of events, that "would need to be looked into in further detail". It is now well established that in the case of marks or injury which are inherently susceptible of a number of alternative or everyday explanations, such as the scars here, reference should be made to any physical features or "pointers" found which may make the particular explanation for the injury advanced more or less likely. There was no further investigation of the nature of the scars, their physical features or their age, and in the circumstances, the Rule 35 added nothing.

28. It follows that in my judgment, the failure to refer to the Rule 35 report was not material to the outcome of the appeal and accordingly, did not infect the adverse credibility findings made.
29. Judge Hussain considered the evidence before the Tribunal, including the appellant's evidence that he has lost contact with his family, and the evidence of text messages from the area boys threatening his life. He also had regard to the evidence before the Tribunal regarding the appellant's employment and the appellant's claim to be a 'ghost worker', taken together with the evidence that the appellant had his own tricycle business. Although the decision could have been better expressed, an appellate court should resist the temptation to subvert the principle that they should not substitute their own analysis of the evidence for that of the Judge by a narrow textual analysis which enables it to claim that the Judge below misdirected themselves. It is not a counsel of perfection. An appeal to the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits.
30. A fact-sensitive analysis of the risk upon return was required. In my judgement, the findings made by Judge Hussain were findings that were

properly open to him on the evidence before the FtT and it was open to him to conclude that the appellant is not a witness of truth and has advanced a claim for international protection that is nothing but an opportunistic claim to frustrate his removal. The findings reached cannot be said to be perverse, irrational or findings that were not supported by the evidence.

31. It follows that in my judgment, there is no material error of law in the decision of Judge Hussain, and I dismiss the appeal.

Decision

32. The appeal is dismissed. The decision of First-tier Tribunal Judge Hussain promulgated on 16th April 2020 shall stand.
33. I make an anonymity direction.

Signed **V. Mandalia**

Date:

10th June 2021

Upper Tribunal Judge Mandalia