



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06062/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 4 March 2019

Decision and Reasons Promulgated
On: 12 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR AMJAD MAHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr M Aslam, counsel (instructed by M R Solicitors LLP)
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan, born on 12 April 1971. He appeals with permission against the decision of First-tier Tribunal Judge Siddall promulgated on 17 October 2018, dismissing his appeal against the respondent's decision dated 22 February 2018, to refuse his application for further leave to remain.

Background to the appeal

2. The appellant entered the UK on 6 February 2011 as a student. He was granted an extension until 25 April 2014. Leave was curtailed on 10 December 2013 as his college's sponsorship licence was revoked.

3. He was granted further leave to remain as a student until 15 October 2016, but in October 2014 the respondent asserted that he had used deception to fraudulently obtain an English language certificate. He was served with a notice of removal. An application for judicial review was unsuccessful.
4. On 25 January 2016 he lodged a human rights claim on the basis of private life in the UK which was refused and certified as clearly unfounded on 13 April 2016¹.
5. On 25 May 2016, he made an asylum claim on the basis that his homosexuality would cause him to be persecuted in Pakistan. That was refused on 23 November 2016. He appealed that decision but there was no appearance by the appellant at his appeal hearing on 5 January 2017. On 13 January 2017 First-tier Tribunal Judge Greasley dismissed his appeal. He noted that the appellant's solicitors had withdrawn. He became appeal rights exhausted on 30 January 2017.
6. In May 2017 he was served with removal directions. In November 2017 he lodged a human rights application which was refused on 22 February 2018.

The decision of First-tier Tribunal Judge Siddall

7. He found on the balance of probabilities that the appellant had discharged the evidential burden placed upon him and had provided an adequate explanation to counter the argument that he had fraudulently obtained an English language certificate procured a false TOEIC test result. Accordingly, the respondent had not made out its assertion on this ground - [39].
8. Judge Siddall then considered at [41] the appellant's claim that he is gay. He took the decision of First-tier Tribunal Judge Greasley dated 13 January 2017, as his starting point [40]. He noted that Judge Greasley concluded, after considering the evidence before him at the time, that he could not be satisfied that the appellant is a gay person at risk on return. Neither he or any other third party individual attended the hearing where their accounts could have been tested and subjected to proper examination. The appellant also admitted that he obtained a number of entries for gay clubs and websites as he knew this would strengthen his claim to be gay, which Judge Greasley rejected.
9. He stated that Judge Greasley had regard to a number of factors, including the fact that in his application dated January 2016, the appellant made no mention of a fear of returning to Pakistan due to his sexuality. He also noted that in March 2016 the appellant had indicated that he wished to return to Pakistan voluntarily, although he later changed his mind [42]. Judge Greasley considered the record of the appellant's asylum interview and the matters relied on in the refusal letter. He noted that the appellant stated at his interview that he joined gay and LGBT groups in the UK to 'make his case stronger' [44]. The appellant had not set out who Mr Khan and Mr Arshad were. No evidence was provided of any activities or relationships that pre-dated the asylum claim [45].

¹ Judge Siddall incorrectly stated at [5] that it was certified on 25 January 2016

10. Judge Siddall stated at [49] that he has had the benefit of hearing the appellant. Apart from the photographs of the appellant at Gay Pride events, the evidence produced by him did not differ greatly from the evidence presented to Judge Greasley [49].
11. He noted that Mr Khan and Mr Arshad provided more detailed written statements and there is some significant additional material from them. Mr Khan claimed that he was in a relationship with the appellant for around four years and Mr Arshad stated that he was aware that the appellant had been disowned by his family in Pakistan [50]. Judge Siddall stated at [51] that if Mr Arshad was aware of this, it is surprising that he made no reference to it in the letter provided as part of the asylum application which would have supported the appellant's case.
12. Judge Siddall treated Mr Khan's statement with "some circumspection" as it was not signed and Mr Khan did not attend the hearing. He found at [52] that there were issues with the content of Mr Khan's statement. If he had been in a sexual relationship with the appellant for around four years, that relationship must have existed when he wrote his letter in 2016. Yet, in the letter he simply referred to Mr Mahmood as a "friend." In addition, his statement contradicted the appellant's evidence that they have not been in a relationship for three or four years because of the appellant's health. He accordingly discounted Mr Khan's evidence. He found that it is more likely than not that he is just a friend of the appellant's and has not had a relationship with him [52]. Even if the content of their statements are true, there was no reason why their more detailed evidence could not have been presented to the Tribunal in 2017 [53].
13. Nor were the photographs showing the appellant at Gay Pride events clear as to what year they were taken.
14. In the circumstances he concluded that he was bound by the earlier decision that the appellant had not demonstrated to the required standard that he was at risk on return because of his sexuality. He treated the later oral evidence of the appellant and Mr Arshad and the statement of Mr Khan with a strong degree of suspicion in accordance with paragraph 4 of the guidance in Deevaseelan. There was no reason why this evidence could not have been put before the First-tier Tribunal. There were in any event inconsistencies in the evidence which support the finding of the First-tier Tribunal and did not provide a basis for him to reach a different conclusion [55]. The appellant did not deal with the inconsistencies in his asylum interview record that were identified in the earlier decision. Judge Greasley noted that the account was inconsistent.
15. Judge Siddall then reminded himself that the appeal before him was a human rights claim. He considered the claim under Article 8. He adopted the approach in Razgar [2004] UKHL 27.
16. He found that the appellant would not face significant obstacles to his integration back into Pakistan because of his sexual orientation [59-60].
17. He accepted that the appellant is in poor health [61]. However, the respondent noted that there was treatment for kidney problems available in Pakistan albeit that

he may have to pay for it and that it may not be available on a national basis. The fact that the care available may not be as good or as available as in the UK did not amount to a very significant reason why he could not return [61].

18. He considered the public interest factors in s.117B of the 2002 Act. The appellant did not meet the Rules at the date of application. He overstayed since his asylum was refused in January 2017. He only made his latest application at the point at which he was threatened with removal. He found that his removal would be consistent with the public interest in the exercise of effective immigration controls [63].
19. The appellant is currently a significant burden on public funds. He receives the benefit of extensive treatment funded by the NHS including dialysis. There is also the possibility of a kidney transplant if he is given leave to remain. He considered that his private life was established at a time when his status was precarious.
20. In carrying out the proportionality exercise, he accepted on the one hand that the appellant is in poor health. He will face an uncertain future if he returns and may find it difficult to access healthcare. However, he had not been able to demonstrate that there would be no treatment available to him.
21. He had regard at [69] to the decision of the Court of Appeal in GS (India) and Others [2015] EWCA Civ 40 where it was held that Article 8 is only engaged in such cases where there are additional factual grounds that bring the matter within the parameters of that article. He referred to the judgment of Underhill LJ who stated that the absence or inadequacy of medical treatment, even life preserving treatment, in the country of return, cannot be relied on at all as a factor engaging Article 8: if that is all there is, the claim must fail. Secondly, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the “no obligation to treat” principle.
22. In the light of the above he stated that he did not take into account the level of treatment available in Pakistan for a kidney condition. It was contended on his behalf that because of his health, the appellant would not be able to work and will be destitute if he returns to Pakistan. Judge Siddall stated that he was not able to accept that. The appellant has family in Pakistan. Even if estranged from his wife, he has children there, a parent and siblings. Although life might be hard for him, he will not be without access to any support. [70].
23. He accepted that the appellant has established a private life in the UK, having lived here for about seven years. On his own evidence, however, he has no partner here and did not refer to any family members in the UK. Having taken all these factors into account, he concluded that the decision did not amount to a disproportionate interference with his right to a private life in the UK.
24. Similarly, with regard to Article 3, the appellant whilst in a serious condition had not produced any evidence to suggest that the diagnosis is terminal and that he is

facing death, nor that his condition is likely to worsen significantly if forced to return to Pakistan [73].

The appeal before the Upper Tribunal

25. On 23 January 2019, DUT Judge Chapman granted the appellant permission to appeal. She stated that whilst the grounds of appeal are poorly drafted:

“it is just arguable that the Judge may have erred in rejecting the appellant's sexual orientation based on a previous decision of the FTT when the appellant was not present at that hearing albeit he gave adequate reasons at [55] this may be infected by procedural unfairness and that he arguably erred in failing to provide adequate reasons for finding that the fact that the appellant suffers from ESKD does not constitute a very significant obstacle to his integration at [61]”.
26. Mr Aslam, who did not represent the appellant before the First-tier Tribunal submitted that the Judge could have departed from the decision of First-tier Tribunal Judge Greasley because there was new evidence. He erred in failing to come to his own findings regarding the appellant's sexual orientation. What was different before Judge Siddall was the fact that the evidence of the appellant could be tested. Nor was there any explanation given before Judge Greasley regarding the TOEIC deception. This is an important factor in respect of credibility.
27. Judge Siddall stated that in the light of the appellant's assertion that he is gay, and which formed the crucial part of the appeal bundle he made against the refusal of his asylum application in 2017, he obtained a copy of the determination that had been referred to [29]. Judge Siddall went into detail regarding the decision of Judge Greasley. He stated at [44] that Judge Greasley noted what the appellant stated at his interview, namely, that ‘he had joined gay and LGBT groups in the UK to make his case stronger’.
28. However, the appellant was given no opportunity to explain or explore that evidence. This should have been put to the appellant. The appellant should have had an opportunity to deal with what he is alleged to have stated at the interview. Nor did counsel on behalf of the appellant raise that issue at the time. All these documents should have been before the Tribunal at the hearing, especially when consideration has been given to the Deevaseelan principles.
29. With regard to whether there would be very significant obstacles under paragraph 276ADE(1)(vi), there was medical evidence before the Tribunal. There was a letter at page 25 from the CKD nurse specialist dated 20 September 2017 where the diagnoses are set out. It was discussed that he may need to start dialysis treatment. At page 14, there is a letter from the Department of Renal Medicine at the Northwick Park Hospital noting that the appellant presented with weight loss and end stage renal failure in March 2017. He was reviewed. He was a late presentation with Stage 5 CKD.
30. Mr Aslam stated that Article 3 is not relied upon.

31. He submitted that there was an insufficiency of reasoning at [61] of Judge Siddall's decision. A deeper analysis was required for the conclusion that his poor health does not amount to a very significant reason why he should not return. There was no proper consideration of what support he would have there.
32. The Judge needed to "do more" with regard to the issues raised under paragraph 276ADE(1)(vi). He failed to provide adequate reasons with regard to the issues raised under that paragraph.
33. On behalf of the respondent, Ms Cunha submitted that Judge Siddall dealt with paragraph 276ADE properly. He has considered the evidence "holistically". He has adopted a structured approach.
34. He referred to the relevant case law at [69]. He applied it properly at [70]. He noted that that appellant was presenting a substantially similar case to that put before First-tier Tribunal Judge Greasley. He accepted that his health may have deteriorated since the first decision and stated that he had noted the reports contained in the bundle from 2017, demonstrating that he has a serious kidney problem that requires dialysis. Any difficulty accessing treatment in Pakistan was not a reason to allow the appeal. He noted that the appellant has lived for most of his life in Pakistan and has family there.
35. She submitted that the Judge has considered the evidence carefully and adopted a structured approach. He took the earlier decision as his starting point [40]. He followed the approach set out in the Deevaseelan principles. Accordingly, she submitted that ground 2 has not been made out.
36. Judge Siddall did in fact depart from the earlier decision. He considered the medical evidence that was now produced. He had regard to the claim that the appellant is gay, and considered the LGBT evidence. He made findings on the basis of the new evidence before him. He also considered the evidence relating to the assertion of deceit used by the appellant to obtain his TOEIC certificate.
37. Ms Cunha submitted that in any event no evidence has been produced by way of a record of proceedings from the solicitors or counsel who represented the appellant at the hearing as to precisely what took place. The Judge found that there had been no challenge to the respondent's evidence in the asylum appeal. This included the interview record referred to in the respondent's asylum decision. He was accordingly entitled to refer to this. The asylum interview had not been disputed by or on behalf of the appellant.
38. In any event, she submitted that the Judge made "more significant findings" from [49-52]. He took into account the evidence before the First-tier Tribunal, noted what was different and considered the evidence since then.
39. The appellant was aware that Mr Khan's evidence was lacking. In his witness statement Mr Khan stated that they were in a relationship. That contradicted the appellant's statement that they had not been in a relationship for 3-4 years because of his health. Mr Khan did not attend the hearing to give evidence and be tested. Nor was there any reason why more detailed evidence could not have been given.

40. She submitted that in the circumstances, he was entitled to give little weight to that evidence [52]
41. She relied on the decision of the Court of Appeal in TK (Burundi) v SSHD [2009] EWCA Civ 40 at [16]: Where evidence to support an account given by a party is or should readily be available, a Judge is plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. This may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons. She also referred to the decision in Y v SSHD [2006] EWCA Civ 1223 at [25-27].
42. At [55] he treated the later oral evidence of the appellant and Mr Arshad with a strong degree of suspicion. That is a key paragraph. The appellant knew that the respondent had refused his asylum case based on inconsistencies in the interview. He engaged solicitors to appeal. The findings from Judge Greasley were not challenged.
43. Accordingly she submitted that the Judge has not been unfair as claimed. He has taken into account the live evidence produced and concluded why there should be no departure.
44. In reply, Mr Aslam again submitted that the Judge should have made his own findings as to whether or not the appellant is gay.

Assessment

45. I have set out the background to this appeal in some detail. Judge Siddal noted that the appellant claimed to be a gay person. He had regard to the appellant's application for asylum on 25 May 2016 on the basis that he is a gay man and would be persecuted as a result of a return to Pakistan. That claim was refused on 23 November 2016 and the appeal against that decision was dismissed by First-tier Tribunal Judge Greasley on 23 November 2016. He became appeal rights exhausted on 30 January 2017.
46. These facts are all referred to and set out in the skeleton argument on behalf of the appellant produced by counsel who represented him at the appeal hearing. The written submissions were placed produced to the First-tier Tribunal at the time. The appellant contended that he would face insurmountable obstacles of re-integrating into Pakistan on account of his homosexuality. Further, he would struggle to acquire treatment. Submissions were made under paragraph 276ADE(vi) as well as in the alternative under Article 8 of the Human Rights Convention. The relevant cases relating to his medical condition as a factor to be considered under Article 8 were referred to in the skeleton and were considered by the Judge as part of his decision.
47. The grounds seeking permission to appeal simply asserted that the Judge failed to appreciate "that the lack of documentary evidence" (sic). Further he erred in refusing the appeal on the basis of issues/matters that were not put to the

appellant. He was not given a fair chance to put his case. He had sent all the supporting evidence in support of the application which was not taken into account. The Judge speculated on matters which he used to dismiss the appeal. He was under an obligation to clarify matters which were of concern to him.

48. As noted, permission to appeal was granted on the limited basis as set out above.
49. Mr Aslam submitted that the appellant should have been given an opportunity to deal with what Judge Siddall's reliance on what the appellant stated at his interview, namely, that he had joined gay and LGBT groups in the UK 'in order to make his case stronger'.
50. That assertion was not made explicitly in the grounds seeking permission to appeal. In any event, as noted by Judge Siddall, the appellant was aware that his earlier appeal had been dismissed. Counsel who represented him before Judge Siddall pointed out that the appellant had not attended his appeal hearing in January 2017. Counsel was aware that his asylum claim, made on 25 May 2016 on the basis that he was a gay man, had been refused and that his appeal against that refusal was dismissed. These background facts were set out at paragraph 9 of counsel's skeleton argument produced at the hearing before Judge Siddall.
51. There had never been any suggestion that the findings of fact made by Judge Greasley regarding the appellant's interview were in any way incorrect. Nor was it contended before me that the appellant did not state at his interview what is recorded at [44] of Judge Siddall's decision. As Ms Cunha submitted, the asylum interview has never been disputed by the appellant or his solicitors.
52. I do not find that the decision of Judge Siddall has been 'infected by procedural unfairness.' Nor did Judge Siddall fail to provide adequate reasons in concluding that the fact that the appellant suffers from ESKD do not constitute a very significant obstacle to his integration. [61].
53. He has undertaken a detailed assessment regarding the appellant's sexual orientation. He was aware that the appellant's assertion that he is gay formed the crucial part of his bundle. He referred to Deevaseelan and has directed himself and applied the principles correctly [31].
54. He noted that the appellant claimed that his solicitors had told him that they were applying for an adjournment of his earlier appeal and that they took his money and did nothing, but confirmed that he had received the adverse appeal decision [32]. He noted however, that contrary to these assertions, Judge Greasley recorded that the appellant had failed to cooperate with his solicitors and make contact. His legal representatives had in fact written the Tribunal indicating that he had failed to cooperate with them and make contact and that they had taken themselves off the record [32].
55. Judge Greasley was thus satisfied that the appellant had adequate notice of the earlier hearing. Despite the appellant's failure to appear, Judge Siddall found that Judge Greasley had carefully considered the grounds of appeal and all the evidence available to him, including the statements of Mr Khan and Mr Arshad [33].

56. Judge Siddall heard evidence from both the appellant and Mr Arshad. Mr Khan's witness statement was not signed. Nor did he attend the hearing. The Judge treated his statement with some circumspection and found that it was more likely than not that he is just a friend of the appellant and had not had a relationship with him [52].
57. He also had regard to the photographs in the bundle showing the appellant at Gay Pride events. It was not clear what year these were taken. He also noted Judge Greasley's finding that the appellant had signed up for gay groups in order to bolster his asylum claim [54]
58. In the circumstances he was entitled to treat the witness statement of Mr Khan as well as the evidence of the appellant and Mr Arshad with a strong degree of suspicion in accordance with the guidance in Deevaseelan. He has given sustainable reasons for his conclusion at [55].
59. I consider whether Judge Siddall failed to provide adequate reasons regarding the appellant's assertion that he may find it difficult to access healthcare and treatment for his kidney problems in Pakistan.
60. In assessing the proportionality of the decision, he balanced the competing interests. He accepted that the appellant is in poor health and would face an uncertain future if returned to Pakistan. He may find it difficult to access healthcare. On the other hand, he had not demonstrated that there would be no treatment available to him for the condition from which he suffers. The respondent had asserted that treatment for kidney problems is available in Pakistan, albeit that the appellant might have to pay for it.
61. He concluded that the appellant was not able to demonstrate that there would be no treatment available for him for the condition from which he suffers [67]. He considered relevant Article 8 decisions, including the judgement of Underhill LJ in GS (India) and Others, supra. He did not accept that the appellant would be unable to work and that he would be destitute if he returns to Pakistan. He noted that the appellant has family in Pakistan and would not be without access to support. He concluded that refusal of leave to remain did not amount to a disproportionate interference with his Article 8 rights in the UK [72].
62. He has provided sustainable reasons for concluding that the decision to remove the appellant did not constitute a disproportionate interference with his Article 8 rights.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

No anonymity direction made.

Signed Deputy Upper Tribunal Judge Mailer

Dated 8 April 2019