Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/01968/2014

AA/06008/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On : 14 May 2015	**On: 22 May 2015**

Before

THE HONOURABLE MR JUSTICE EDIS
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR MG
MR FH

Respondents

Representation:

For the Appellant: Ms Savage, Home Office Presenting Officer
For the Respondents: Ms Lagunju, counsel instructed by Howe and Co Solicitors

DECISION AND REASONS

It has previously been found appropriate, given this appeal involves asylum issues, that the Appellant be granted anonymity unless and until the Tribunal directs otherwise. As such, no report of these proceedings shall directly, or indirectly, identify the Appellant or any members of his family. Failure to comply with this direction could lead to a contempt of court.

1. This is an appeal by the Secretary of State against a decision of M W P Harris of the First-tier Tribunal on 08 October 2014 following the hearing of

the appellant's appeal against the Secretary of State's refusal to grant asylum and her decision to give removal directions to each respondent, whom we shall call 'the claimants' as an illegal entrant.

2. The claimants' case is that they are both gay Pakistani citizens, who were in a relationship with one another in Pakistan, a relationship which has continued in the UK, that as a result of that position being known to their families they suffered persecution in Pakistan, and cannot return to Pakistan and live openly, as they wish to do, as a gay couple. They separately applied to come to the UK as students in order to evade that persecution, and subsequently sought asylum because of their fear of repeat persecutory treatment on return.

3. In the course of the Secretary of State's investigation of the claim the Appellants provided written statements and were interviewed. The Secretary of State noting the persecution of gays in Pakistan found that their account of their having expressed their sexuality there was implausible. Discrepancies between the written statements and interview accounts were noted. The claims were not made on arrival and were delayed without good cause. The claim was not believed.

4. At a hearing before Judge Harris the claimants appeared in person. They adopted recent witness statements, gave their accounts of their individual histories, and were subject to cross-examination by a Presenting Officer. In the course of their evidence, as is apparent from Judge Harris's determination, they provided explanations for a number of the factors that had caused the Secretary of State to reach the conclusions that she did. The judge found that many of the issues raised by the Secretary of State were inappropriate concerns about implausibility. Judge Harris found them credible in their claims to be gay, to have been discovered to be in a relationship in Pakistan, and to be in a relationship now and actively choosing to express their sexuality openly in the UK. The judge found that they fully intended to continue to live openly as gays. The assessment of risk on return is predicated on the judge concluding that the couple are genuinely in a gay relationship and would, absent threat of persecution, live openly as a gay couple in Pakistan.

5. Judge Harris's decision is challenged on the grounds that he erred in law by failing to give sufficient reasons for rejecting the credibility concerns of the Secretary of Sate.

6. Ms Savage relied on the elegant summary of the duty on a judge given in the case of Malaba v SSHD [2006] EWCA Civ 820 at paragraphs 19 and 20 as follows:

> *"It follows that at least in this important respect, there were significant discrepancies in the appellant's account. Indeed, the adjudicator said that she accepted the view of the Secretary of State that there were discrepancies. As we have seen, the Secretary of State had said that the*

discrepancies were so serious that they completely undermined the credibility of her claim. A number of possible conclusions were available to the adjudicator. First, she could have said that, accepting the discrepancies at face value (without taking account of the response statement), they did not undermine the core of her claim. Secondly, she could have said that, if taken at face value, the discrepancies completely undermined the core of her claim; but she accepted the explanations given in the response statement and for that reason concluded that the discrepancies were more apparent than real and did not undermine the core of her account. Thirdly, she could have said that she accepted that some of the alleged discrepancies had not been adequately explained by the appellant in the response statement, but that these did not undermine the core of the account. Fourthly, she could have accepted that some of the alleged discrepancies had not been adequately explained in the response statement, and that these did undermine the appellant's account.

In my judgment, the existence of these possibilities underlines the fact that it was imperative for the adjudicator to explain how she reached her main conclusion that, having regard to the response statement, the discrepancies did not completely undermine the core of the claim. It was insufficient simply to say that she had had regard to the response statement. She should have identified the discrepancies which she considered had been satisfactorily explained by the appellant and those which had not, giving short reasons for her findings, and explained why such discrepancies as had not been satisfactorily explained did not completely undermine the appellant's account. I agree with the conclusion of the IAT that the adjudicator did not give adequate reasons for her finding that the appellant was a credible witness, particularly in circumstances where she did not give oral evidence beyond the adoption of her witness statement. Even if it was open to the adjudicator to place any, still less "particular", reliance on the medical report of Dr Pilgrim, her reliance on that report to support her finding that the appellant's account was credible did not absolve her from the duty to provide adequate reasons for her finding in relation to the discrepancies."

7. The complaint is that the judge explicitly recognised the credibility issues raised, and agreed that there remained discrepancies in their accounts. He did not however identify them except by reference to the paragraph numbers of the Reasons for refusal letter. He did not, therefore, explain what their significance was, what the explanations were, or why he found them acceptable, or at least why the discrepancies did not undermine the core account.

8. Ms Savage did not take us to the individual discrepancies identified by the judge in this way as remaining but we have looked at them.

9. The Court of Appeal addressed a similar issue in AT (Guinea) v SSHD [2006] EWCA Civ 1889. Laws LJ (with whom Sir Igor Judge P and Leveson LJ agreed) said this at paragraph 18:

"Now I do not suggest that there may not be a credibility case in which the immigration judge is indeed obliged to provide a substantial explanation of his or her approach to discrepancies which are found to exist. That was the

position in Malaba [2006] EWCA Civ 820 (see the judgment of Dyson LJ at paragraphs 19 and 20) and also AK [2006] EWCA Civ 1182. But every case is of course different. Discrepancies may sometimes be more important where they are internal to a witness's evidence. The duty to give reasons is not a matter of ticking a checklist. Its essence is to ensure that the parties to a decision – and indeed any relevant appeal court - should understand why one has won and the other has lost. Here the immigration judge Mr Camp gave objective overarching reasons for accepting the appellant's testimony: its internal consistency in the face of thorough cross-examination (paragraph 17); its detailed nature; the support given on some points by documents found to be genuine; and a point about the date when he left the country. The three individual points on which the AIT founded on 21st November 2005 could (and I am bound to say should) have been dealt with more fully than they were, and it may be that a different immigration judge might have found them more damaging to the appellant's credibility. But in the end that is neither here nor there. Looking at the matter in the round, the parties reading the decision made by Mr Camp know why he accepted the appellant's evidence."

10. That is, in our judgement, the position here. This was not a situation, as in Malaba, where the Appellant did not give evidence and there were no sustainable credibility findings so that it was not clear that the judge had grappled with the disputed credibility points and to understand what he had made of them. In this case the Immigration Judge directed himself correctly as to the burden and standard of proof. The judge had the opportunity of seeing the claimants in person and seeing for himself their performance in cross-examination. Further, the credibility issue was, in this case, the only issue. There can be no concern that the Judge may somehow have decided this case without asking himself the direct question: are the claimants telling the truth?

11. Unlike the case of Malaba, we do not have the concern that the judge has not held the relevant issues in mind here. A full reading of the decision, particularly paragraphs 31 to 37, reveals that the judge gave sustainable reasons for finding that evidence of the claimants was credible. The judge clearly had regard to the Secretary of Sate's concerns: indeed much of the determination is devoted to seeing whether the reasons mentioned were truly matters which should affect his conclusion. The judge set out in some detail why he found that the implausibility factors relied upon amounted to nothing. Indeed he took an entirely contrary view to the Secretary of State, finding that the detailed accounts of the couple's behaviour in expressing their sexuality and of the discovery of their relationship by family in Pakistan, far from being implausible, were established as credible. He had before him two opposing possible conclusions and in our judgment he was entitled to make the choice that he did between them. The submission fails to read the decision in the round, and particularly to take account of the positive credibility findings as to their being gay, and having expressed their sexuality in Pakistan and in the UK and of being in a relationship.

12. The reality is that the credibility points that remained are not so serious as to undermine the core of the account. By way of example, and we do not find any need to be exhaustive, one claimant said their relationship started in January whilst the other said it was in September, both said it was four years ago. One said that they had been "discovered" in December 2009, and then in the next question said it was a month later, i.e. January 2010, and did not accept that he had said December, and the other said it was May 2010. One said the relationship started one or two weeks after they met and the other that it was two or three months after. The fact of those discrepancies was clearly noted by the Judge who nonetheless concludes, in the round, that the claim of fear on return as at the date of hearing is established i.e. to the low standard applicable in asylum claims.

13. It is not said by the Secretary of State, as we understand it, that the claimants' story, if true, would not give rise to a proper claim to asylum. The Secretary of State's position on the contrary is and always has been that the story simply is not true; and, indeed, that the claimants are not gay. Reading the decision overall it is clear to the Secretary of State that she lost the case because the judge disagreed, and whilst the adequacy of reasoning has been challenged, it is not suggested that there was no evidence upon which his conclusion could be based, so as to be perverse. Whilst we would expect to see a fuller analysis than we have in this decision, in our assessment the judge has done enough to explain to the Secretary of State why she lost. It would have been better to identify in terms the more significant discrepancies together with any explanations of them by the claimants. A short explanation of their ultimate significance could then have been included. Some of the discrepancies relied upon by the Secretary of State are truly minor points which pale into insignificance when compared with the probative force of the finding based on the oral evidence that the claimants are actually gay. An explanation of this kind from the FTT need not be long or detailed and may be valuable for the Secretary of State's officials when considering what kind of reasoning by them is likely to be upheld on appeal. This is another useful purpose which is achieved by giving sufficient reasons.

14. In XL China v SSHD [2010] EWCA Civ 575 Lord Justice Jackson made comments at paragraph 32 which we find apposite in this case, although we would not be quite as critical of the determination of the Judge in the present case:

> *I am bound to say that Immigration Judge Callow's determination falls some distance short of excellence. On the other hand, in my view the Immigration Judge has reached a decision that was open to him on the evidence. Also, although this is not an easy case, the Immigration Judge has gone just far enough to explain why he has reached the decision which he did. In the result, therefore, I conclude that there is no error of law in that decision which warrants it being set aside and the whole matter being reconsidered at a reconsideration hearing.*
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> *33. It follows from this conclusion that, although I have some sympathy for the criticisms expressed by Senior Immigration Judge McGeachy, I reject his conclusion that Immigration Judge Callow's decision was flawed by an error*

of law. In my view Immigration Judge Callow's decision, both in respect of past persecution and also in respect of the risk of future persecution ought to have been upheld upon reconsideration.

15. For the reasons above we have concluded that the judge's determination discloses no error of law and the First-tier Tribunal's decisions to allow these appeals accordingly stands.

E M Davidge
Deputy Upper Tribunal Judge

Immigration and Asylum Chamber

Date: 15 May 2015