

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 8th March 1987. He appealed against the decision of the Respondent dated 28th September 2016, refusing his application for asylum and humanitarian protection under paragraph 339C of HC 395.

The Appellant's Claim

3. The Appellant's claim is that he came in March 2010 on a Tier 4 Student visa to the UK, but the establishment at which he was to study at was not registered as a college, and therefore he did not study. The following year in September 2011 he was arrested and detained by Immigration Officers. At this stage he made a torture allegation which was refused, and the Appellant made a claim for asylum on alleged persecution by the Taliban in September 2011. This claim was refused, and the Appellant appealed before the First-tier Tribunal in March 2012, which was rejected, whereupon he made a fresh claim for asylum based on family and private life, which was also rejected in June 2012. Removal directions were set but these were then cancelled after a judicial review application was made. However, on 3rd November 2012, removal directions were issued again, and this time the Appellant was removed from the United Kingdom on 17th December 2012. On 16th June 2013, he re-entered the UK without a passport and claimed asylum again. On 28th September 2016 this was refused, for reasons that are set out in the refusal letter.

The Appeal Before Judge T. R. Smith

4. At the appeal before Judge Smith in Bradford on 10th July 2017, there was evidence consisting of two reports from Miss Emma Roberts, dated 26th November 2015 and 14th June 2017, which were described as medico-legal reports, because Miss Roberts is a therapist. There was also a supplemental statement from a [FA], who gave evidence before Judge T. R. Smith. What was claimed before the judge was that there was significant new evidence, such that the judge could now depart from the decision of First-tier Judge Gladstone, who had on 16th March 2012 refused the Appellant's appeal, when he had alleged persecution by the Taliban in an application made in 2011.
5. The judge noted that the claimed significant new evidence fell into three separate categories. First, there were two reports from Miss Roberts, which had not been available to First-tier Tribunal Judge Gladstone. Second, there was the feared persecution in Pakistan based on the Appellant's membership of a particular social group, namely, that he was gay, and this was also not before First-tier Tribunal Judge Gladstone. Third, the Appellant relied upon an alleged act of the Taliban that he claimed occurred after his removal on 17th December 2012, whereupon it was alleged that given the nature of the act, the Appellant was entitled to claim asylum owing to a well-founded fear of persecution, for reasons of imputed political opinion, namely, fear of ill-treatment by the Taliban. In addition to these three aspects of the claim, it was also alleged that the Appellant had a need to invoke Articles 2 and 3 of the Human Rights Convention.

6. With respect to the Appellant's sexual orientation, it was claimed that he was a single man, and that he "realised he was gay when he was aged approximately 11" (paragraph 49). In relation to the medical aspects of his claim, the reports from Miss Roberts diagnosed him as suffering from post-traumatic stress disorder and an obsessive compulsive disorder and psychosis, such that he was at risk of suicide and self-harm (paragraph 50). The Appellant claimed to have no relatives in Pakistan apart from an uncle and an aunt who he had lost contact with several years ago (paragraphs 51 to 52). The Appellant claimed that his family were murdered by the Taliban in 2008 and he had to flee home and began earning money as a sex worker and on occasions he was assaulted by clients (paragraph 57).
7. Judge T R Smith was invited by the Appellant's legal representative to treat him as a vulnerable witness and to consider the vulnerability to have impacted upon the Appellant's ability to give evidence (paragraph 84).
8. Following the Appellant's re-entry into the United Kingdom he had met a man by the name of [FA] in Manchester, and he had entered into a sexual relationship with him (paragraph 72). [FA] himself had delayed in making his own asylum claim, and it was submitted at the hearing before Judge T R Smith that this "was explicable on the basis that it may take many people time to adjust to their sexuality" (paragraph 89). Nevertheless, whether or not the Appellant was in a gay relationship with [FA], he ought to be granted asylum as "this was on the basis that if the Appellant was gay he would have a well-founded fear of persecution in Pakistan due to his sexuality" (paragraph 80). A particular feature of this aspect of the claim was that, "in Pakistan, he would openly live as a gay man" (paragraph 91).
9. As against this, the Respondent at the hearing argued that the Appellant had not shown that he would live openly as a gay man in Pakistan or that he was unwilling to be discreet about his sexuality (paragraph 97). A person who claimed that they feared returning to their home country due to their sexuality would raise it at the first available opportunity in a safe country and the Appellant had failed to do so (paragraph 98). Reliance was placed by the Respondent before Judge T R Smith on the determination of First-tier Tribunal Judge Gladstone on 16th March 2012, who had rejected the Appellant's previous claim as being incredible and found that the Appellant had fabricated his account of persecution by the Taliban to establish an asylum claim (paragraph 100).
10. It was not accepted by the Respondent Home Office that the Appellant had a genuine subjective fear on return to Pakistan of any sort. It was not credible that the Appellant did not know of the protection available to gay people at an earlier stage in the United Kingdom and the contention that he only became aware of this after he saw Prime Minister David Cameron on television announcing a bill to legalise gay marriage was simply not credible (paragraph 111). With respect to the two claimed relationships, the Respondent rejected these as being plausible. First, the claimed relationship with Mr [K] was not credible because the Appellant had taken no steps to try and contact Mr [K], "after the alleged kidnapping by the Taliban, given this was the man he was in a relationship with" (paragraph 115). Second, with respect to the claimed

relationship with [FA], it was stated that this too was not credible because, “the Appellant did not know [FA]’s surname when questioned in 2016” (paragraph 116).

11. The judge went on to give careful and detailed consideration to the applicable law (see paragraphs 119 to 161). The basis of the claims were rejected for the following reasons.
12. First, in relation to the two reports from Miss Roberts, it was maintained here that the medication that the Appellant was prescribed consisted of antihistamine (which is usually prescribed for allergies, and citalopram, an antidepressant) together with quetiapine (an antipsychotic drug). There was no reference to any medication prescribed by the Appellant’s general practitioner at all in the subsequent report (paragraph 237). The judge found that if the Appellant’s condition was as severe as Miss Roberts suggested one would have expected to see a history of regular medication which was not the case here (paragraph 239). Moreover, Miss Roberts was not a qualified doctor, and although the judge did “not wish to diminish the benefit of therapeutic interventions as part of a holistic care plan” the fact was that there was no evidence of any such holistic care plan here (paragraph 240). Conclusions drawn by Miss Roberts that the Appellant was at high risk of “further suicide attempts” were unwarranted (paragraph 243) because when the Appellant had first been questioned by the Respondent in interview (see question 205) as to whether he ever planned suicide, he had replied “no”. He was asked whether he had ever attempted suicide (question 203) and he had said “I can’t remember”. Such inconsistency was damaging to the Appellant (paragraph 244). In short, Miss Roberts had based her diagnosis on the Appellant’s own account and had “been innocently misled” (245). The plain fact was that there was no evidence whatsoever of any suicide attempts (paragraph 246).
13. Second, with respect to the Appellant’s claimed sexuality, this too was not credible. Miss Roberts had claimed that the Appellant had been prompted to hide his sexuality due to concerns over safety. The judge held that

“This does not correlate with the Appellant’s various accounts as to the delay in disclosing his sexuality. His explanations have ranged from a lack of knowledge that homosexuality was legal in the United Kingdom to a fear his name and address would be published in the newspapers by the Respondent. The Appellant has not hidden his sexuality in Pakistan. On his account, he has earned money as a sex worker” (paragraph 249).
14. Third, having rejected the tenor of Miss Roberts’ reports (paragraph 250), and having considered the evidence in the round (paragraph 252), the judge was not persuaded that the Appellant was in a gay relationship with [FA] (paragraph 253) and was not satisfied that the Appellant was himself gay (paragraph 254), such that there would be sufficiency of protection now for the Appellant in Pakistan (paragraph 255). He did not have a well-founded fear of persecution from the Taliban because it had not been objectively shown that there was a serious possibility of persecution by the Taliban.
15. The judge went on to conclude that the Appellant was a young man, was educated until he was 17 or 18, had undertaken a course in information technology, had run and

owned a shop with his brother, and would encounter no language difficulties in Pakistan, where he had lived for the majority of his life. To return to Pakistan would not be unduly harsh for him (paragraph 260). Any claim in relation to Articles 2 and 3 of the Human Rights Convention, based upon his health was also rejected given the applicable case law (paragraph 262). The Article 8 claims were also meticulously dealt with by the judge (paragraphs 265 to 271) and was rejected.

16. The appeal was dismissed.

Grounds of Application

17. The grounds of application state that the judge undertook a flawed approach to the medico-legal evidence of Miss Roberts. There was also a flawed approach to the consideration of the Appellant's sexuality. On 8th November 2017, permission to appeal was granted by the Tribunal on the basis that it was unclear how the judge had taken the medico-legal reports of Miss Roberts into account, and if he had done so, whether insufficient weight had been attached to the content of the reports. It had been suggested that the practitioner was not a qualified doctor. This was despite the judge stating that he did not wish to diminish the benefit of therapeutic interventions as part of a holistic care plan. Nevertheless it was arguable that the judge attached a reduced weight implicitly to the two reports. It was also arguable that greater weight should have been afforded to Miss Roberts' reports in the light of the qualifications of Miss Roberts set out in the report. Miss Roberts had specifically referred to observations of the Appellant's behaviour, expression, and speech in addition to the account given by the Appellant.
18. On 22nd November 2017, a Rule 24 response was entered by the Respondent Secretary of State to the effect that the judge did indeed give consideration to Miss Roberts' reports. Despite the fact that she works for Freedom from Torture, the judge was not remiss to have stated that she was not qualified to diagnose PTSD and indeed there was no formal diagnosis of PTSD by a consultant psychiatrist.

Submissions

19. At the hearing before me on 16th March 2018, Ms Mair, appearing as Counsel on behalf of the claimant, relied upon her two Grounds of Appeal. She submitted that these grounds overlapped with each other but nevertheless amounted to a significant challenge to the findings of the judge. First, there is the question of the medico-legal report. In stating that Miss Roberts was not a qualified doctor, and had no current up-to-date evidence of a medical specialist diagnosing the Appellant with PTSD, the judge had wrongly minimised the impact of this report on the Appellant's condition. Ms Mair drew attention to the Helen Bamber Foundation evidence (at paragraph 3.1) and submitted that, given the criticism made by the judge, the foundation should have been given the opportunity to respond. It could not be overlooked that Miss Roberts had expressly stated that the Appellant was not sophisticated enough to fabricate the symptoms that had been noticed. Furthermore, the 2017 report of Miss Roberts (see page 16) sets out all the physical manifestations that the Appellant had exhibited, and

Miss Roberts had properly drawn attention to these in order to support the conclusions that she had reached.

20. Second, the judge was wrong to have come to the conclusion that Miss Roberts was “innocently misled”. Indeed, in **AM v SSHD [2012] EWCA Civ 521**, there had been criticism by the Court of Appeal in the words of Rix LJ of a rejection of a medico-legal report for someone who was registered as a nurse, but who had considerable experience working with asylum seekers. In this case Rix LJ stated that the nurse had not just taken everything “at face value” as had been alleged, because she was reporting as an experienced assessor in such matters, and she was conducting a “health assessment”. Rix LJ went on to say that, “she was not medically qualified as yet, but she had a wealth of relevant experience” (paragraph 17). It was therefore unfair to say that Miss Roberts had been hoodwinked in this case.
21. Third the judge had also proceeded on an erroneous basis in relation to Miss Roberts’ reports because she had actually taken every care to ensure that she was not innocently misled, as alleged. She had in fact gone on to say, of the Appellant that, “I consider it unlikely that he is sufficiently psychologically educated to know and manipulate his presentation to what is typical of a person suffering from PTSD” (AB/34 at paragraph 49). The entire tenor of the judge’s approach was contrary to what the Upper Tribunal had already established in **JL (medical reports - credibility) China [2013] UKUT 145**, where it had been held that the practitioner there had worked for a centre which was acknowledged “to have relevant experience” (paragraph 36).
22. Finally, Ms Mair submitted that the judge had adopted a flawed approach to the consideration of the Appellant’s sexuality. The judge had wrongly proceeded on the basis that the Appellant had not raised his sexuality earlier (see paragraphs 203, 204, 205, and 208). He had ignored well-established guidance in relation to the fact that gay individuals will often fail to disclose their sexuality for fear of the repercussions arising from this. Disclosure may take many years later. In short, submitted Ms Mair, it was simply not credible that the Appellant, who had been described as not being sophisticated enough by Miss Roberts, had for four and a half years been able to put up a very persuasive front before her as well as to be able to deceive her into writing a favourable report on him. The plain fact is that sexuality is a difficult matter to bring out at the best of times and the judge was wrong to have criticised the manner that this was brought out in this case.
23. For his part, Mr McVeety submitted that the grounds amounted to nothing more than a disagreement with the conclusions of the judge. He made the following submissions. First, the judge was perfectly entitled to be sceptical about the Appellant’s condition, his medical health, and his suicidal tendencies. The evidence that the Appellant had given to the Medical Foundation, as recounted by the judge from paragraphs 237 to 240, is to be considered in the light of the fact that the Appellant in his own witness statement had absolutely nothing to say about his desire to commit suicide. In fact, Miss Roberts herself relates the account of “further suicide attempts” to the fact that it was the Appellant himself who had told her that he had made several attempts at

suicide by taking overdoses in his life, together with an urge to jump in front of traffic (at paragraph 243 of the determination).

24. Second, it was not the case that the judge just had simply rubbished the Medical Foundation and the reports of Miss Roberts because the judge observes that, "I have still examined the two reports from Miss Roberts carefully" (paragraph 241), before coming to the conclusion that

"Miss Roberts' report contains several factual statements such as, 'Mr Jehangir required a high level of support in managing basic tasks such as shopping, cooking and travelling to essential appointments'. No evidential basis for the totality of this conclusion is given" (paragraph 248).

25. Third, it is not the case that there is any objective evidence to the effect that reports from the Medical Foundation and any such organisations are totally infallible. Indeed, the case of **JL (medical reports - credibility) China [2013] UKUT 145** is expressly to the effect that credibility is a matter for the judge with respect to such reports. That being so, the judge was entitled to put what weight he wanted to the report.
26. Fourth, in truth, the psychiatrist is the only person who can diagnose PTSD, and the judge is not wrong in so stating. The fact was that there was a total lack of any NHS involvement in this case. That was something that the judge was entitled to refer to.
27. Fifth, the judge has properly gone on to criticise the reports, after having stated at the outset that he was going to consider this "carefully" (paragraph 241), because it is stated that, in relation to "impulsive suicide attempts" that "there is no evidence of any such attempts. The only evidence is from the Appellant and the Appellant has given a different account to the Respondent" (paragraph 246).
28. Finally, the judge's approach is best demonstrated by his statement that in looking at the medico-legal evidence he had reminded himself that "it is wrong to make adverse findings of credibility first and then dismiss that evidence in the light of them. In looking at the Appellant's evidence I have regarded the evidence of Miss Roberts as a part of my findings rather than a simple add-on" (paragraph 153). That being so, the grant of permission, on the basis that the judge had simply added on a consideration of the medico-legal evidence, after having reached firm conclusions on the Appellant's credibility, was simply not tenable. The judge had done the opposite. The evidence had been considered together in the round.
29. In the same way, the judge was perfectly aware of the fact that sexuality is something that many people struggle with, and that a delay in coming out as gay, was not automatically to be taken against the Appellant. What the judge makes clear is that the "Appellant did not raise his sexuality before First-tier Judge Gladstone although he knew he was gay, he claims from an early age". The judge then goes on to say that, "at this stage, I merely record that the failure to raise the issues is a factor that I take into my overall assessment of the Appellant's credibility" (paragraph 179) that demonstrated a careful and circumspect approach to the way in which sexuality had been raised by the Appellant in this case.

30. However, when the judge does begin to look at the Appellant's sexuality, he concludes, quite independently of the aspect of the delay in raising sexuality, that the Appellant is not gay as he claims. This is because the judge observes that, "there were inconsistencies in the Appellant's evidence as to his relationship with Mr [K]" and that when the Appellant was interviewed he went so far as to say that he did not know Mr [K]'s address, which was odd given that he had been in a relationship with Mr [K], as he claimed from April 2008 (see paragraph 200).
31. In short, the judge had given a remarkable number of reasons for why the entire claim was not credible. The decision of First-tier Tribunal Judge Gladstone remained unchallenged. This meant that under **Devaseleen** principles that decision was the starting point. The Appellant was not a witness of truth as found by Judge Gladstone. The only evidence that was new before this Tribunal now was of the Appellant's delayed claim to homosexuality, but that too had to be assessed in the context of the fundamental finding by Judge Gladstone, that the Appellant was not a witness of credibility.
32. In reply, Ms Mair submitted that the judge had picked up on just one or two statements said here and there which are adverse to the Appellant, and concluded that because of the paucity of evidence on the Appellant's sexuality, he was not believable as a whole. However, this does not get around the fact that the expert, Miss Roberts, was assessing the Appellant in relation to how he reacted under controlled conditions. Miss Roberts did not say that she needed the Appellant's hospital admission records. She did not say that the Appellant needed to be seen by an NHS consultant. Had she done so, the matter may have been different. What Miss Roberts did do was to give numerous examples herself of the difficulties that this Appellant had in relating to his sexuality before her. The judge was actually quite wrong to say that
- "Given Miss Roberts has based her diagnosis on the Appellant's account and given my extensive findings as to the Appellant's lack of credibility, I have concluded that she has been innocently misled. Her diagnosis assumes the Appellant's account is credible. It is not" (paragraph 245).
33. That paragraph in itself shows, submitted Ms Mair, that the judge was adopting the wrong approach by treating the report of a person who was not medically qualified, as an adjunct to the judge's independent credibility findings. The fact was that this was not a one time assessment by Miss Roberts but a four year assessment carried out by a senior practitioner working for a respectable organisation. The judge was wrong to have cherry-picked parts of the report to support the conclusions that he came to.

No Error of Law

34. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

35. First, it is not the case that the judge has adopted a flawed approach to the report of Miss Roberts. On the contrary, the judge states early (at paragraph 153) that, "I have regarded the evidence of Miss Roberts as part of my findings rather than a simple add-on". A large amount of evidence is then referred to and the judge observes that "the above evidence is some five years old" (paragraph 236). Immediately thereafter, the judge draws attention to Miss Roberts' report "dated 26th November 2015 to the medication that the Appellant was being prescribed", but this is in circumstances where the judge rightly observes that he has "no direct evidence of what, if any, medication the Appellant is currently being prescribed" (paragraph 237).
36. Reference was made to the fact that there was no evidence "that the Appellant has been referred by his GP to a mental health trust" (paragraph 238), and what is noteworthy here is that the judge observes that "if the Appellant's condition was as severe as Miss Roberts suggests one would expect to see a history of the regular medication coupled with the referral to a mental health trust" (paragraph 239). Whilst these observations are being made, the judge is clear to point out that, whereas it is the case that the report before him is that of a practitioner who is not a qualified doctor, nevertheless, "I do not wish to diminish the benefit of therapeutic interventions as part of the holistic care plan but I have no evidence of any such holistic care plan" (paragraph 240). There is nothing whatsoever improper about these observations.
37. However, it does not end there. When the judge does consider, even in the context of there being no holistic care plan, what Miss Roberts had stated, the most serious of her findings are that the Appellant was a person who was assessed at a high risk of "further suicide attempts", but, in circumstances where the Appellant in his witness statement had made no reference to suicide attempts, the only evidence in relation to this is that which the Appellant himself has reported to Miss Roberts (paragraph 243-244). In these circumstances, the judge was right to note that,
- "Given Miss Roberts has based her diagnosis on the Appellant's account and given my extensive findings as to the Appellant's lack of credibility, I have concluded that she has been innocently misled. Her diagnosis assumes the Appellant's account is credible. It is not" (paragraph 245).
38. The judge proceeded then to further explain the conclusion that he has come to, which is properly only a conclusion for him to make, namely, that "there is no evidence of any such attempts. The only evidence is from the Appellant and the Appellant has given a different account to the Respondent" (paragraph 246). In addition to this, the judge points out that there were "several factual statements" by Miss Roberts which cannot be substantiated, including that the Appellant "required a high level of support in managing basic tasks" because "no evidential basis for the totality of this conclusion is given" (paragraph 248).
39. Second, the starting point, in any event, in circumstances where there was a previous decision by Judge Gladstone, were the findings of the earlier Tribunal of inquiry in relation to the Appellant's credibility, on those matters that had been raised at that

particular point in time. With respect to this, Judge Gladstone had found the Appellant to be devoid of credibility. In Devaseleen [2002] UKIAT 00702, it was made clear that the first Adjudicator's determination should always be the starting point. It is the authoritative assessment of the Appellant's status at the time it was made. However, facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the Appellant makes his case, so be it. The principle that lack of truthfulness in one case may be relevant to the truthfulness on another is an obvious one.

40. That said, however, the judge in this case did not proceed expressly on this basis. Indeed, the judge did not start with Devaseleen as the starting point, but considered the evidence as a whole, including the report of Miss Roberts, before coming to the conclusions that he did. He cannot be faulted in this. On the contrary, the determination is careful, comprehensive, and thoroughly well reasoned.
41. Third, there is the issue of the Appellant's sexuality. This was the only new aspect of the Appellant's claim that had not featured before when Judge Gladstone made his decision. However, the judge in the instant case gave it proper consideration. The Appellant began by saying that he knew he was gay, from an early age, and although this was something that had not been raised by the Appellant before, the judge did not fall into the error of treating it as fatal to the Appellant's claim. On the contrary, what the judge stated was that, "I merely record that the failure to raise the issue is a factor that I take into my overall assessment of the Appellant's credibility" (paragraph 179).
42. The judge rejected thereafter, that the Appellant was in a gay relationship with [FA] or that he was gay at all (paragraph 183). The Appellant could not remember [FA]'s second name, even though he claimed to have been in a relationship with [FA] since 2014 (paragraph 186). Yet, he claimed to see [FA] between once a day to once a week (paragraph 187). He was also contradictory in how he met [FA], and whether it was at a club, or whether he was taken there by [FA] (paragraph 188). The reasons for [FA] moving in with the Appellant, are not to do with his having an affection for him, but to do with the fact that he had lost his accommodation (paragraph 192). The same inconsistencies arise in relation to the Appellant's claim that he was in a relationship with a Mr [K] (paragraph 200).
43. In short, the Appellant's sexuality is very sensibly analysed and commented upon by the judge. Ultimately, the judge concludes that, "having considered all the evidence in the round, including the medico-legal reports, the Appellant had not satisfied me to the lower standard that he is gay for the reasons already set out in this decision" (paragraph 242).

Notice of Decision

44. There is no material error of law in the original judge's decision. The determination shall stand.
45. An anonymity Order is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

7th July 2018