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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JK
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE HOME OFFICE TO REMOVE
THE APPLICANT FROM THE UNITED KINGDOM

MAGUIRE J

Introduction

[1] In this case the applicant is JK ("the applicant"). He is a man of 35 years of age and is a national of Pakistan. It is asserted on his behalf that while in Pakistan in 2004 he married a lady called YB. The couple, it appears, had a son but it is not clear when that son was born.

[2] The key chronology for the purposes of this case is as follows:

2009-2011	During this period and on the strength of a visa the applicant visited the United Kingdom unaccompanied.
26 April 2012	A further visit to the United Kingdom unaccompanied but with the benefit of a visa.
13 January 2013	The applicant's visa expired but he remained in the United Kingdom.

8 May 2013	The applicant claimed asylum on the basis that due to his homosexual orientation he would be persecuted if he was returned to Pakistan.
4 June 2013	The applicant's asylum claim was refused by the Home Office.
21 June 2013	The applicant appealed the above refusal to the Lower Tier Tribunal.
12 March 2014	Appeal heard by Immigration Judge Gillespie.
10 April 2014	Immigration Judge dismisses the applicant's asylum claim.
28 April 2014	The applicant's appeal rights became exhausted.
14 January 2015	Further submissions sent by the applicant's solicitor to the Home Office.
5 July 2016	Home Office provided a "further submissions" decision indicating that on consideration the further submissions did not amount to a fresh claim.
9 August 2016	This judicial review began as an urgent application to prevent the applicant's removal from the United Kingdom to Pakistan.

Background Facts

[3] It is not easy in this case to establish the background facts with complete precision. In the summary of the applicant's evidence contained in Immigration Judge Gillespie's decision the following points emerge:

- The applicant asserted that he came from a village some 200kms away from Rawalpindi.

- For a time the applicant worked in Rawalpindi. No dates appear in the decision but it looks probable that this may have been in a period just before 2000. In Rawalpindi the applicant was a practising homosexual but did his best to conceal this and appears to have conducted his sexual life largely in secret.

- In or about 2000 there is a reference to the applicant's father having suspected that the applicant was a homosexual. The basis for this suspicion is unknown. There is reference, however, to the father beating the applicant with a rod and in the process sustaining a fractured leg.

- The applicant appears to have gone to the United Kingdom leaving his wife and child back in Pakistan. How this came about is not clear.

- As a result of visits to the United Kingdom the applicant spent time living in Birmingham and then Belfast. He, in fact, seems to have had an uncle in Birmingham with whom he lived for a time. He left the uncle, it appears, to go to Belfast. This may have been around January 2013.

- In Belfast the applicant for a period had a partner called "Mark", a national of Morocco. However, this relationship ended when Mark threw the applicant out of his house. For a time thereafter (dates unclear) the applicant was homeless but at some point he was taken in by a Pakistani woman living in Bangor. This woman, he told Immigration Judge Gillespie, happened to be from his mother's village in Pakistan which was just a short distance from his father's home.

[4] It is clear from Immigration Judge Gillespie's written decision of 9 April 2014 that the Judge did not believe the applicant's account of his background as given to the Tribunal. In particular, he made the following findings:

(i) The applicant's claim to be a homosexual was rejected. In fact, the Immigration Judge found he was "not gay" and was not entitled to be treated as a member of this social group.

(ii) However, if this was wrong, the Judge considered that the applicant would conduct himself discreetly as he had claimed to have done so in Pakistan in the past.

(iii) If the applicant needed to relocate to Pakistan he could do so to any of the large cities and could in those cities maintain a lifestyle consistent with his sexual orientation.

(iv) The applicant had not proved that he was at a real risk of persecution and all his claims were dismissed.

The Further Submissions

[5] It is against this background that the applicant's solicitor in 2015 provided further submissions to the Home Office. The further submissions were provided without any accompanying contextual information. Three documents were provided but there was no information given in respect of:

(a) how these documents came to be compiled;

(b) when they were compiled;

(c) how they had been received; and

(d) when they were received.

[6] The court will refer to the documents by letter designation.

Document A

This document has imprinted on it a fax number and a date. The date given is 19 December 2008 with a time 6:12pm. The court has no explanation as to what this information relates to or means. The rest of the document is in Urdu. It seems to be accompanied by some form of photocopied identification document. This document has a fax date of 19 December 2008 6:07pm. The court has been told that Document A has come from an uncle of the applicant. The court cannot say whether this is an uncle in Pakistan or the uncle the applicant lived with in Birmingham. There has been provided what purports to be a translation of the document. It is headed "For your eyes only". The document as translated contains the following statements which the court highlights:

> "I want to let you informed about the way the hornet's nest has been disturbed in the village due to your out of mainstream sexual behaviour …
>
> The entire village is hell bent to teach lesson not only to you but also to your parents on the ground that they have given birth to such immoral person who believes in homosexuality …
>
> The entire village is waiting for day when you will come back and would be lynched …
>
> [Your father] was openly insulted and physically thrashed as in a wind whipped city where your errant homosexual behaviour has become hot topic being discussed in every nook and corner …
>
> Fatwa was issued by the Mosque of village Iman … declared that anyone who will kill you the moment you enter Pakistan would be awarded a comfortable place in paradise …
>
> It is not advisable you return to Pakistan as coming back would be a recipe for death …"

Document B

This is said to be from the applicant's father. It is in the form of an undated affidavit cutting the applicant off in terms of family ties "due to disobedience". The key part of the document reads:

> "[AB] who is United Kingdom has not been obedient but has been a constant source of irritation and problem for me … that, notwithstanding my effort to the least possible limit, he has not mend his ways leaving me with no option but to cut off all of my family ties with him …"

Document C

Document C is an A4 page with three items on it. It is claimed to be the content of three text messages sent by the applicant's brother on a date unknown, one assumes from Pakistan. The document reads:

> "1. If you try to come home or try to phone we will kill you. We have no place for you at home.
>
> 2. We have no relationship with you. And don't try to phone either.
>
> 3. Our paths were different, and they will remain different. Do you think we will forgive you after you switch off your mobile phone? Never. You are wrong. We will never forgive you for the path you have chosen."

The Home Office Decision

[7] As noted earlier, the further submissions have elicited a response from the Home Office dated 5 July 2016. It contains a consideration of the submissions made which goes on for some 13 pages.

[8] While the court has considered the totality of the Home Office decision, for present purposes it will refer only to the main themes relevant to this judicial review. These appear to be:

(a) That given the conclusions of Immigration Judge Gillespie the submissions received do not disturb the judge's findings which are considered to be sustainable and valid.

(b) Nor do the submissions deserve to command a status by which they can be relied on or to give anything other than "little weight".

(c) The documents fail to deal with the context in which they were made and pose a range of questions which are left unanswered.

[9] A passage in the Home Office decision which summarises the decision maker's view on the submissions, in terms of them having "no realistic prospect of success" indicates as follows:

- "The statement entitled "For your eyes only", written by Mr Hassan, is self-serving in that it has been written by a person claiming to be your uncle".

- "The text messages, you claim have been sent by your brother, show no date that the claimed texts were sent on, whom they were sent by and whom they were intended for. You have failed to provide the original copy of the transcript, given that at the back of the A4 size paper translated copy of the "document", there is a stamp showing that the copy you have provided is the certified translation of the original document by Flex Language Services".

- "Little weight is attached to the statement or the text message transcript provided to substantiate your claim that you would be at risk on return to Pakistan, because of your sexual preference".

- "The affidavit is not dated, nor does it note the reason for its issue is that of you being gay, nor does it indicate that you would be at risk on return to Pakistan. It merely refers to you being "cut off" from any family ties and from any claim to your father's property in Pakistan that you may have had".

- "Your claim to fear your family in Pakistan because of you being gay has been considered at appeal. The First Tier Judge still concluded that you were not at risk of persecution for a convention reason, nor at real risk of unlawful killing and inhumane treatment on return to Pakistan".

- "With regards to your affidavit regarding the cut off from family ties of son in United Kingdom due to disobedience that you have submitted, it is noted that objective evidence shows that such documents are easy to obtain. Indeed, the current objective evidence from Pakistan

indicates that corruption is a major problem. These issues would limit the ability of a judge to place any weight upon these documents".

- "Although it is noted that affidavit, text message transcript and the "For your eyes only" statement may not have been made before the First Tier Judge when he made his findings on 10 April 2014, it is clear that the First Tier Judge had fully considered the objective information available at the time of the asylum appeal hearing on 12 March 2014, alongside your own evidence i.e. asylum interview of 22 May 2013 and reasons for refusal letter dated 4 June 2014".

- "It is therefore not accepted that you have a well-founded fear of persecution in Pakistan or that returning you there would expose you to a real risk of violation of your Article 3 rights".

The Legal Framework

[10] The court has had reason to set out the relevant legal framework for a judicial review of this sort in recent times. Both parties have had the opportunity to consider the court's judgment in the case of in Re Jahany's Application [2016] MAG 9857. Each party has indicated that the legal description of the framework found in this judgment is accurate.

[11] The key portions of the judgment dealing with the legal framework are contained at paragraphs [12] to [18]. These state as follows:

> "[12] It is not in dispute between the parties that the applicant's submissions sent by his solicitor to the Home Office fell to be considered in accordance with Rule 353 of the Immigration Rules. This Rule states as follows:
>
> > "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn…and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material which has previously been considered. The submissions will only be significantly different if the content:

> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection".

[13] The correct way for the decision maker to address rule 353 has been the subject of considerable judicial guidance. A commonly cited passage is that found at paragraph 6 *et seq* of the court's judgment in WM (Democratic Republic of Congo) v SSHD; AR (Afghanistan) v SSHD [2006] EWCA Civ 1495:

> "6… [The Secretary of State] has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed…If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. …the Secretary of State in assessing the reliability of the new material, can of course have in mind where that is relevantly probative, any finding as to honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when…the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.
>
> 7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before the adjudicator, but not more than that.

> Second…the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution".

[14] The approach of the court on review of such a decision was described in the same authority as follows:

> "First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return…The Secretary of State of course can and no doubt logically should treat his own view of the merits as a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision".

The judicial review test

[15] At the hearing of the judicial review, there was some argument about what test the court should apply when determining the case as between what may be described the "Wednesbury" approach and what the court described as a "substitutional" approach, under which the court could substitute its view for that of the original decision maker. The case law historically had

oscillated between the two but there was general agreement that the Wednesbury test is that which has been applied uniformly since the decision of the Court of Appeal of England and Wales in MN (Tanzania) v SSHD [2011] 2 AER 772. The court must therefore apply a rationality standard to the issue of the lawfulness of the conclusion reached by the decision maker in respect of whether the putative fresh claim in this case had a realistic prospect of success before a tribunal.

Realistic prospect of success

[16] The above phrase is referred to in various authorities. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535 Toulson LJ (with whom Ward and Tuckey LJJ agreed) said that "a case which has no reasonable prospect of success…is a case with no more than a fanciful prospect of success". Thus "reasonable prospect of success" means only more than a fanciful prospect of success.

[17] Another formulation is found in ST v SSHD [2012] EWHC 988 Admin where His Honour Judge Anthony Thornton QC, acting as a High Court Judge, said at paragraph [49]:

> "In deciding whether the claim has a reasonable prospect of success, the decision maker must consider whether he or she considers that the claim has a reasonable prospect of persuading an immigration judge hearing an appeal to allow the appeal from the decision of the same decision maker who has just rejected the fresh representations or submissions".

Anxious scrutiny

[18] The notion of anxious scrutiny has also been the subject of discussion in the case law. For example, in a recent case, R (Kakar) v SSHD [2015] EWHC 1479 Admin, Foskett J at paragraph [32] referred to ML (Nigeria) [2013] EWCA Civ. 844 in this connection. In that case Moses LJ said:

> "Of all the hackneyed phrases in the law, few are more frequently deployed in the field of

> immigration and asylum claims than the requirement to use what is described as 'anxious scrutiny'. Indeed, so familiar and of so little illumination has the phrase become that Carnwath LJ in R (YH) v SSHD [2010] EWCA Civ. 116, between paragraphs [22] and [24], was driven to explain that which he had previously explained namely what it really means. He said that it underlines 'the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account'. It follows that there can be no confidence that that approach has been taken where a tribunal of fact plainly appears to have taken into account those factors which ought not to have been taken into account."

KJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31

[12] The leading authority on the test to be applied when considering whether a gay person who is claiming asylum has a well-founded fear of persecution in the country of his or her nationality based on membership of that particular social group is KJ (Iran). The correct approach is described by Lord Hope at paragraphs [35] and [36]. These, in material part, read as follows:

> "(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.
>
> (b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if

returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in Januzi v Secretary of State for the Home Department [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum.

> [36] It should always be remembered that the purpose of this exercise is to separate out those who are entitled to protection because their fear of persecution is well founded from those who are not."

The position of homosexuals in Pakistan

[13] It seems to be accepted that in the case of a person determined to live a conspicuous gay lifestyle in Pakistan, that person would undoubtedly encounter persecutory treatment capable of exciting a well-founded fear of persecution.

[14] In the most recent Home Office Country Information and Guidance in respect of Sexual Orientation for Pakistan (April 2016) there is plain reference to the following:

(i) That homosexual activity in Pakistan is contrary to the criminal law.

(ii) That prosecutions rarely, however, are taken.

(iii) That it is the case that gay persons in Pakistan can be subject to societal discrimination as well as harassment and violence – most commonly within the family.

(iv) That gay persons from privileged backgrounds may enjoy a degree of openness and some level of acceptance from their family and close friends provided they live discreetly but if their sexual orientation becomes known outside of these close circles they may be exposed to abuse or blackmail.

(v) That gay people will not be able to avail of the protection of the authorities in Pakistan as by doing so they may be at risk of prosecution, persecution or serious harm.

(vi) That there is unlikely to be any place in Pakistan to which a gay person, who would be identified as such, could safely relocate. However, if the person would not be identified as gay in a different location internal relocation may be viable.

The court's assessment

[15] The further submissions submitted on the applicant's behalf in this case suffer from the infirmities already referred to. This would cause any reader to approach them with a degree of scepticism especially as regards their reliability. This, when set alongside the outcome of the applicant's appeal before Immigration Judge Gillespie, in which the Judge simply did not believe the applicant's account of being a homosexual, would be likely to have the effect of causing any decision maker to treat the applicant's case with great caution.

[16] However, all that said, the contents of the three newly submitted documents, if true, appear to support the following:

(a) That the applicant may indeed be a homosexual. The contents of document A and, to a lesser extent, document B, can be read as supporting such a conclusion.

(b) That the applicant may be at risk were he to return to his family in Pakistan. Document A could be read as supporting this as, in different degree, could documents B and C.

[17] The documents notably do not speak to the risk that the applicant might be at if he was returned to Pakistan other than in respect of a return to the area where his family resides.

[18] The Country Information and Guidance, dated 2016, it seems to the court, can be viewed as generally helpful to the applicant's case in that it supports the proposition that a person in the applicant's position (assuming it is as the applicant claims) could be the subject of harassment and violence as a homosexual from within his family circle and would be unlikely to be able to rely on the protection of the authorities in Pakistan. It also appears to support the view that relocation within Pakistan for a gay person who could be identified as such would not be safe.

[19] The key issue, looking at the case as a whole, appears to the court to be whether the documents which have been submitted could be viewed as capable of grounding an appeal which would enjoy a realistic prospect of success.

[20] In this regard the court acknowledges that in a case of this sort the onus of proof is on the applicant. Where he seeks to rely on a document he must show that it can be relied on, albeit that such a judgment *viz* as to whether a document can be relied on will depend on a consideration of the evidence in the round. While there is some suggestion in the Home Office's decision in this case that the documents may be forgeries there is insufficient evidence to establish this and advance the matter beyond the realm of suspicion where proof is lacking.

[21] In the court's opinion, it is arguable that the correct approach in this case should be one which treats the documents made as possibly reliable and as material not already considered. To dismiss them out of hand, in the court's view, arguably is too sweeping and is inconsistent with the application of anxious scrutiny. The next question should therefore be whether when read with previously considered material the documents create a realistic prospect of success before a tribunal. As is clear from the authorities this hurdle is not a high one and has been described as a "modest test". In respect of this assessment also there is a need to ensure that anxious scrutiny is given to the issue.

[22] Approaching the "reasonable prospect of success" issue in the proper manner, it seems to the court that it is also arguable that the decision maker's decision on this issue, given the potential risk of persecution on return to Pakistan which is vouched for by the Home Office's recent Country Information and Guidance document, adopts an unduly rigid view of what might occur before an experienced immigration Judge. It would not take a miracle for the Judge to view the matter differently than the way it had been viewed in 2014 and in these circumstances it appears to the court to be arguable that the applicant may enjoy a more than fanciful prospect of success if the matter was to be the subject of consideration by a tribunal. This, of course, is not to say that it is the court's view that the applicant would succeed at a further tribunal hearing but it is to say that the court, applying anxious scrutiny, could not rule out such an outcome.

Conclusion

[23] In view of the above assessment the court has decided to grant leave to apply for judicial review in this case. The court is grateful to Mr Summers BL who appeared for the applicant and Ms McDermott BL who appeared for the intended respondent for their helpful oral and written submissions at the leave hearing.