



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

Appeal Number: AA/07288/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 20 November 2013**

**Determination
promulgated
On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL RASHID

Respondent

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr K Forrest, Advocate, instructed by Maguire, Solicitors

DETERMINATION AND REASONS

- 1) This determination refers to parties as they were in the First-tier Tribunal.
- 2) The SSHD appeals against a determination by First-tier Tribunal Judge Quigley, promulgated on 12 September 2013, allowing the appellant's appeal against refusal of recognition as a refugee.
- 3) Paragraphs 1 and 2 of the grounds contend that the judge either (a) failed to resolve whether the appellant's 9 year delay in claiming asylum was damaging to his credibility in terms of section 8 of the 2004 Act, or (b) should have not resolved that point in his favour without his previous representative having been given an opportunity to comment on the assertion that he gave advice discouraging the appellant from making an asylum claim.

- 4) Paragraph 3 criticises the judge for finding that the lack of evidence that the appellant is openly gay or has been involved in same sex relationships is not a good reason for disbelieving his account. Mrs O'Brien did not press this point. It suffices to say that the judge's view is not irrational or perverse. Paragraph 4 is similarly of little merit.
- 5) The second substantial point in the grounds is at paragraphs 5-7. It is argued that the judge failed to resolve contradictions between the evidence as it emerged from (a) a First Information Report (FIR) and a newspaper article which the appellant produced on the day of the First-tier Tribunal hearing and (b) his evidence in his statements and orally.
- 6) Finally, at paragraph 8 the grounds suggest that the judge misapplied HJ (Iran) [2010] UKSC 31 because she failed to consider whether, in the absence of involvement in same sex relationships in the UK over the last 9 years, the appellant would "act discreetly for reasons other than the desire to avoid persecution".
- 7) Having heard from the Presenting Officer on the matter of the previous representative not having been asked to comment on advice allegedly given, I indicated that I found this ground strained and far-fetched. It did not appear that any relevant submission was made by the Presenting Officer in the First-tier Tribunal. It is possible that the appellant might have been advised that a claim based on being a homosexual from Pakistan was not promising, particularly prior to HJ. That would not necessarily have been bad advice. The matter is far from so clear that the appellant's current representatives should have perceived a professional duty to put it to previous representatives for comment. I doubt whether anything useful would have emerged from such an exercise.
- 8) I indicated to Mr Forrest that there was only one point of possible substance on which I required to hear from him. That concerned the judge's approach to the documents. Paragraph 37 relates that the Presenting Officer made submissions on inconsistency arising from the documents produced on the day. The FIR said that Mr Akbar's father had taken the appellant to the police, but the appellant said that the police discovered him having sexual relations with Akbar in a field. The appellant speculated (apparently in oral evidence) that perhaps the FIR was framed to protect Akbar, but the Presenting Officer submitted that if his parents had such influence the FIR would never have been served. The judge at paragraph 38 noted that it was possible that fraudulent documents could be obtained from Pakistan. She then made her finding that the appellant is homosexual, and noted the background evidence about homosexuals in Pakistan. At paragraph 42 she said, "I find that this appellant has been the subject of adverse attention in the past by reason of his sexual orientation". That conclusion does not appear to be supported by any reasoning, and there is no apparent resolution of the points put by the Presenting Officer.

- 9) Mr Forrest had provided a skeleton argument. In relation to the documentary evidence, this argues that there was no duty on the judge to conclude that every document from Pakistan was unreliable, and there was no reason why she might not conclude in the circumstances of this case that documents produced by the appellant were reliable.
- 10) That is correct as far as it goes, but it does not deal with the judge's failure to deal with the case put to her for the respondent.
- 11) Mr Forrest submitted that the judge was entitled to find that the appellant had suffered adverse attention in the past in Pakistan because of his sexual orientation, and the precise circumstances under which that arose were not the crux of the case. There was only an inconsistency which could be disregarded, and which did not require a specific finding.
- 12) I reserved my determination.
- 13) Neither party referred directly to the documents. They made their submissions on the basis that there were an FIR and a newspaper report, and that these do diverge from the appellant's written and oral statements.
- 14) I find that the judge failed to explain why any weight should be placed on the documents (or, indeed, why they were not adverse to the case). The failure was crucial, because the finding that the appellant had been subject to adverse attention is the reason for finding that he would resort to concealment of his sexual orientation as a result of a genuine fear of persecution.
- 15) It seems that the appellant's behaviour in the UK has always been discreet and low-key. Without a finding based on past adverse attention, it might not follow that the approach explained in HJ leads to an outcome in his favour. He has not argued that it suffices to prove that he is from Pakistan and is homosexual.
- 16) The Presenting Officer's submission was that if material error of law was found, the determination should be set aside in its entirety and a fresh hearing directed in the First-tier Tribunal.
- 17) There was no suggestion for the appellant that if some findings of fact were set aside, others might be preserved. I find no scope for that. It would lead to an artificial and difficult exercise in rehearing, and I do not think that favourable findings can be disentangled from those reached through error.
- 18) After the hearing I located on file the copy FIR, with translation. This narrates that Akbar's father reported to the police that the appellant and his son were committing an unnatural offence in a field of maize, following which "at hue and cry we reached the spot and witnessed the occurrence". A copy extract, with translation, from the "Daily Jang Multan" reports that Akbar's father told the newspaper that his son's friend, the appellant, took

his son from his house and sodomised him against his will, leading to his arrest and release. The father complains that the police have not [re]arrested the appellant but “are putting pressure on us to compromise”. He appeals through the newspaper to the Chief Minister of Punjab and other authorities to order the appellant’s arrest.

- 19) The appellant’s statement on the other hand is that the police were passing by the fields when they spotted the appellant having sexual relations with his friend. The police kept them both overnight and beat them. They released his friend “because his parents were wealthy and bribed the police officer”. The appellant then arranged for his friend to pay a bribe and permit his escape, which was followed by the police notifying all local police stations and advertising for his capture.
- 20) It is not surprising that the Presenting Officer in the First-tier Tribunal thought that evidence raised some issues. Direct reference to it reinforces my view that its nature, and the respondent’s submissions, required analysis and resolution by the judge, which is missing from her determination.
- 21) The determination of the First-tier Tribunal is set aside. The nature of its error is such that none of its findings can stand. Under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Quigley.
- 22) No anonymity order has been requested or made.



20 November 2013
Judge of the Upper Tribunal