



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

Appeal Number: AA/05221/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 13<sup>th</sup> May 2015**

**Determination  
Promulgated**

**On 1<sup>st</sup> June 2015**

**Before**

**THE HONOURABLE LORD MATTHEWS  
DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR ZEESHAN AFZAL  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Ms E Daykin, Counsel instructed by AH Law Limited

**DECISION AND REASONS**

1. The Respondent, Mr Zeeshan Afzal, whom we shall call the Claimant, is a citizen of Pakistan whose appeal was allowed on asylum grounds, humanitarian protection grounds and human rights grounds by First-tier Tribunal Judge Coutts in a decision promulgated on 12<sup>th</sup> February 2015. As the judge put it, the issue before him was whether the Claimant was a gay man and whether, in consequence, he would be at risk of persecution if he returned to Pakistan. The Secretary of State had accepted that if the

Claimant was gay then he would face persecution in Pakistan. The judge's findings were that he was satisfied to the lower standard that the Claimant was a gay man and he therefore allowed the appeal.

2. The Secretary of State appealed on three grounds. Ground one was that the judge had failed to take into account a previous decision of the judiciary, namely that a judge of the Upper Tribunal had made a number of concerned comments on the nature and timing of the Claimant's EEA application and clearly did not believe the Appellant.
3. The second ground was that the judge had failed to adequately deal with the Claimant's history of litigation and his failure to mention his claimed sexuality particularly given his case was that when he came to the UK in 2010 it was for his safety. The judge had accepted his account regarding the issues he had with his former advisers and had therefore failed to follow the authority of **BT (former solicitors, alleged misconduct) Nepal [2004] UKIAT 00311** which provided that if an appeal was based in whole or in part on allegations about the conduct of former representatives there must be evidence that those allegations had been put to the representatives. The judge had therefore wrongly accepted the Claimant's account that he had been let down by his previous advisers. In addition the judge had failed properly to apply Section 8 of the 2004 Act.
4. The third ground is that the judge erred in allowing the appeal under asylum and humanitarian protection in that they are mutually exclusive – we interject here that Ms Daykin for the claimant readily agreed that the judge had erred in that regard.
5. Permission to appeal was granted on the basis that the third ground was made out and the other grounds were arguable although it was said that the second ground had “little merit”.
6. We received a Rule 24 response from Ms Daykin on the day of the hearing. Its terms are as follows.
7. The decision to grant permission appeared to be on the basis of the judge's failure to follow **Devaseelan (second appeals - ECHR - extraterritorial effect) Sri Lanka\* [2002] UKIAT 00702** but the Upper Tribunal decision was *not* (Ms Daykin's emphasis) an appellate decision. As such **Devaseelan** did not apply. Even if it did apply the judge had adopted the correct approach. The judge had gone on to consider the evidence before him including the Claimant's full witness statement regarding his sexual orientation and the actions of his previous advisers. The challenge under the first ground amounted to no more than a disagreement with the findings.
8. In terms of the second ground the judge had considered copies of two letters of complaint the Claimant had sent to his former representatives and he had detailed in oral evidence the steps he took to obtain a response but to no avail.

9. In terms of the third ground it was conceded that in light of the finding that the Claimant met the criteria of a refugee the judge should not also have allowed the appeal on humanitarian protection grounds.
10. Before us Mr Jarvis for the Secretary of State relied on his grounds. It was important to note that at item "I" of the Home Office bundle there was a decision by Upper Tribunal Judge Kebede which indicated that the Claimant's application was no more than a cynical attempt to frustrate removal. She had referred to the fact there was no previous mention of the Claimant being homosexual. Whilst this was not strictly a **Devaseelan** point the Secretary of State viewed the comments of an Upper Tribunal Judge as significant.
11. In terms of the second ground of appeal it was highly relevant to obtain the advice of the solicitors when their conduct was challenged. The solicitors required to be put on notice and while the Claimant had produced two letters before the First-tier Tribunal indicating that he was complaining about their conduct and inviting their comments, it was a material error in law of the judge not to state what the contents of the letters were and go on to make a factual finding on whether they were actually sent to the solicitors concerned. Finally, Mr Jarvis asked that he be allowed to amend his grounds of appeal to include the fact that the Secretary of State had made some fifteen credibility points in the refusal letter which the judge had not satisfactorily dealt with. On the basis of the extreme lateness of the proposed amendment and having regard to fairness to the Claimant we refused to allow the grounds to be amended in this way.
12. For the Claimant Ms Daykin relied on her Rule 24 notice. The judge had properly taken account of the fact that the Secretary of State had raised a number of credibility issues against the Claimant and had noted them in paragraph 19 of her decision. He had given clear reasons for concluding that the Claimant was gay in his sexual orientation. The judge had noted that the evidence supported his involvement with Stonewall which was his choice (paragraph 26). The judge had found this was an indication of the Claimant's confidence to be able to express his sexual orientation freely.
13. In terms of the second ground the Claimant had sent two letters to the agents dated 15<sup>th</sup> August 2014 and 20<sup>th</sup> November 2014. They called for a response from the agents and none was forthcoming. It was correct to say that no specific findings had been made in that regard but the judge had clearly accepted the Claimant's evidence to be true.
14. After a brief adjournment we indicated to parties that we were dismissing the Secretary of State's appeal for reasons which we would give in writing and which we now do.

## **Conclusions**

15. While it is very clear that strong views were expressed by Upper Tribunal Judge Kebede in dealing with an application on the papers before her it is accepted by Mr Jarvis that this could not be construed as an appellate decision and therefore does not fall within the ambit of **Devaseelan** requiring the judge to use that decision as a starting point. There was therefore no obligation in law for the Judge to comment on the views expressed by the Upper Tribunal Judge and as a result the first ground of appeal cannot succeed.
16. The judge accepted that it might be that the Respondent was correct in that the number of credibility issues taken by her should be held against the Claimant (paragraph 20). However he noted that the contrary might well be the case in that the Claimant had now provided a full account and in particular in his latest witness statement dated 16<sup>th</sup> January 2015 where he talked of his sexual orientation and his experiences both here and back home in Pakistan. He explained that his previous advisers had let him down.
17. The judge looked at the Claimant's case in the round (paragraph 23). He noted it was entirely plausible, given his background and coming from a country where gay men were persecuted, that he should feel shy or reticent about expressing his sexual orientation. He noted how the Claimant explained how he felt different to other boys, describing himself as effeminate; preferring to help his mother cook the family meals and taking care of his appearance by plucking his eyebrows - something which caused a conflict with his father, who insulted him as a result (paragraph 23).
18. The judge accepted the Claimant's evidence that his feelings about himself and towards men came on slowly and developed. He found it was not implausible that the Claimant's family would have arranged his release from police custody by a bribe nor did he find it incredible that after that time the Claimant remained in Pakistan to consider his future. The judge went on to say (paragraph 25) the Claimant had explained and he accepted his account regarding the issues he had with his former advisers. For the sake of completeness it would have been better if the judge had referred to the terms of the letters of complaint but the only reasonable inference to draw from all the judge's findings is that he accepted that the letters were sent by the Claimant and that no reply had been received. On this basis the second ground of appeal falls away. He accepted the Claimant's evidence that he was in a relationship with Tasweer Iqbal (paragraph 26) for reasons he gave.
19. He correctly applied the lower standard of proof (paragraph 27) concluding that the Claimant was a gay man. Contrary to the grounds, he took into account Section 8 of the 2004 Act finding the Claimant's evidence to be credible for the reasons given.
20. As we pointed out to parties it would be fair to say that other judges might not have accepted that the Claimant was a credible witness. However

Judge Coutts gave a number of sound and cogent reasons why he was accepting the Claimant's account was reasonably likely to be true to the low standard required in this jurisdiction. There is therefore no error of law in his findings in relation to his allowing the appeal on asylum and human rights grounds. The only correction required is that we must alter the decision in respect of the third ground of appeal as stated above.

## **Decision**

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in relation to allowing the appeal on humanitarian protection.
22. We therefore set aside the decision and remake the decision in the appeal by allowing the appeal on asylum grounds and on human rights grounds.
23. No anonymity direction is made.

Deputy Upper Tribunal Judge J G Macdonald

Dated