



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/06357/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 19 April 2018

**Decision & Reasons
Promulgated
On 3 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR M I

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N. Ahmed, Counsel instructed by Pambrook Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 4 June 1988. He first entered the UK on 31 July 2010 with a student visa which was subsequently extended to 5 April 2013. He then became an overstayer and applied for an EEA residence card as an extended family member on 10 February 2015, however this application was withdrawn on 23 March 2015. On 1 April 2015 he applied for leave on the basis of his private life stating he was intending to marry. This application was refused on 14 July 2015 with a right of appeal. On 22 December 2016 the Appellant made an asylum claim on the basis of his sexual orientation. In a decision dated 20

June 2017 the Respondent refused the application. She did not accept that the Appellant is a gay man or that he would be at risk of harm in Pakistan.

2. The appeal came before Judge of the First-tier Tribunal Trevaskis for hearing on 1 August 2017. In a decision and reasons promulgated on 14 August 2017 the judge dismissed the appeal essentially on the basis that he did not accept that the Appellant was a gay man.
3. An application for permission to appeal was made on the basis that the judge misdirected himself in law in that he failed to reach proper findings on the totality of the evidence or on material matters with reference to the Appellant's claimed sexual orientation.
4. Permission to appeal was granted upon renewal to the Upper Tribunal by Upper Tribunal Judge Allen in a decision dated 15 January 2018 on the basis that it is arguable that the findings of the judge concerning the credibility of the Appellant are flawed for the reasons set out in the further grounds.
5. A brief Rule 24 response was filed on behalf of the Respondent asserting the judge's decision was sustainable.

Hearing

6. At the hearing before me, I heard submissions by Mr Ahmed of Counsel on behalf of the Appellant. He submitted the only issue essentially before the First-tier Tribunal was credibility, it having been accepted at [28] that there was no effective state protection in Pakistan for gay men. He submitted it was imperative for the judge to give the case anxious scrutiny. The judge's reasoning is set out at [39] to [47] of the decision and is clearly flawed. At [39] the judge held as follows:

"The credibility of his claim depends upon his own account. There is no support for his claims regarding the difficulties which he faced in Pakistan. Regarding his activities in the United Kingdom, I have heard evidence from two witnesses who claimed to have known the Appellant as a gay man in the United Kingdom for at least a year, and one of them claims to be in a sexual relationship with the Appellant. It has not been suggested that either of these witnesses is lying or mistaken about the Appellant, but it may be that they are doing their best to assist the Appellant in his claim. An Appellant who wished to advance a claim of sexual orientation which was not true may well seek the friendship of gay or transgender people in order to bolster his claim, and may even engage in sexual intimacy, but that does not amount to evidence of a genuinely gay lifestyle".

7. Mr Ahmed submitted that not only were there two witnesses who gave evidence to the First-tier Tribunal, there was also a supporting letter from NAZ, a support organisation, and photographic evidence. It is clear that the evidence of the two live witnesses was not challenged by the

Respondent and corroborated the Appellant's claim. He submitted that the judge's findings at [39] were thus unsustainable.

8. At [40] the judge relies on the issue of the delay in making the claim, in that the Appellant arrived in the United Kingdom in 2010 but did not seek asylum until 2016. He noted the Appellant's explanation that he did not need to do so as he was being supported financially by his family and had not at that stage disclosed to them his sexual orientation. In this respect Mr Ahmed sought to rely on the judgment of the CJEU in A, B and C v Staatssecretaris van Veiligheid en Justitie Cases C-148/13 to C-150/13 where the court held Article 4(3) of Directive 2004/83 and Article 13(3A) of Directive 5/85 must be interpreted as precluding in the context of that assessment the competent national authorities from finding that the applicant for asylum lacked credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution. He further relied on the judgment of the Court of Appeal in NR (Jamaica) [2009] EWCA Civ 56 that it is the date of the hearing that is material for the assessment of the Appellant's sexual orientation.
9. At [42] the judge held as follows:

"Identification of sexual orientation is not to be decided on evidence of sexual activity, but as a result of a rounded assessment of all the evidence presented by and about the Appellant. I have assessed both the quality of the evidence, and its quantity, and I have attached appropriate weight to it. In particular I would expect an Appellant in the circumstances to express more about their feelings as a gay man than the Appellant has done. It was suggested by his representative that he has difficulty in expressing his feelings, but I have not seen evidence of that difficulty, rather an inability to express feelings about a sexual orientation which is not genuine".

This finding was impugned by Mr Ahmed on the basis that the judge was applying far too high a standard of proof in light of the evidence of the Appellant's friendships, relationships and photographic evidence of attending gay clubs. He submitted there was clearly sufficient evidence to show that the Appellant is a gay man.

10. The judge further held at [43]:

"I have considered the letter from NAZ; in my judgment it adds very little to the Appellant's claim; if he seeks to advance a claim based upon his gay orientation, whether it is true or false, I would expect him to engage with support groups such as this, and therefore such engagement does not enhance the credibility of his claims, absent further evidence from the organisation, or attendance by a representative to give evidence".

This finding was impugned on the basis that the letter from NAZ, which is at page 40 of the Appellant's bundle, makes clear that he is a service user. That letter, which is dated 12 July 2017, provides as follows:

"I am writing to confirm that Mr MI is a service user of NAZ. He first accessed our services in September 2015 and has been in regular contact through phone calls, one to one support sessions and support group sessions till present. He identifies as a gay man of Pakistani heritage and I believe this to be true.

He regularly accesses monthly NAZ outreach stalls at South Asian LGBT nightclubs such as Club Kali and Disco Rani. He also regularly attends Dost, our monthly support group for South Asian gay and bisexual men".

Mr Ahmed submitted it was difficult to reconcile the contents of that letter with the judge's finding at [43] that it adds very little to the Appellant's claim.

11. At [47] the judge further found that he was not satisfied the Appellant was suspected of being gay in Pakistan because he did not accept his account of events there prior to coming to the United Kingdom. Mr Ahmed submitted that applying the required standard of proof it is clear that the Appellant is gay and thus would be persecuted for being gay if he were returned to Pakistan.
12. In his submissions Mr Melvin sought to rely on the Rule 24 response. He submitted the determination should be considered in a holistic way. The judge has assessed all the evidence and given his conclusions at [37] through to [49] and has made every attempt to give reasons. He submitted that homosexual activity does not make a person gay and that the Appellant had previously in 2015 sought leave on the basis of a heterosexual relationship. He submitted that the findings in respect of the letter from NAZ at [43] were open to him, nobody from NAZ attended the hearing and little weight can be attached to it. He submitted it was a matter for the Appellant to prove to the judge that he is a gay man. The judge had assessed the statements of the witnesses and the evidence and made sustainable findings. He submitted it was open to the judge to reject the Appellant's reasons provided for seeking to marry a woman and that Mr Ahmed was essentially attempting to re-argue the case. He submitted if returned to Pakistan there was no reason to suspect the Appellant of being gay and that the judge's decision taken as a whole was legally sustainable.
13. In his reply, Mr Ahmed submitted that there were two live witnesses attesting to the Appellant's sexual orientation and their evidence had not been rejected. In respect of the letter from NAZ there was no adverse finding in relation to that either. He submitted the judge had failed to give anxious scrutiny to the case as a whole and contains material errors of law.
14. I reserved my decision, which I now give with my findings.

Findings

15. I find material errors of law in the decision of First-tier Tribunal Judge Trevaskis. I consider that the judge fell into error in a number of respects, perhaps most crucially in his understanding of and application of the House of Lords judgment in HJ (Iran) [2010] UKSC 31. The Appellant's evidence of his sexual orientation was supported by two witnesses who gave evidence and were cross-examined. That evidence was not challenged by the Respondent, as the judge records at [39] of the decision. One of those witnesses claimed to be in a sexual relationship with the Appellant, albeit not as a monogamous partner. The test the judge appears to apply at [39] is whether the Appellant has shown evidence of a genuinely gay lifestyle however that is not the correct test, which is, applying the lower standard of proof, whether the Appellant's sexual orientation is gay. In light of the fact that one of the witnesses asserted that he has had, and continues to have a same-sex relationship with the Appellant, I consider the judge fell into error, given that evidence was unchallenged, in failing to find that the Appellant is a gay man on that evidence alone.
16. I further find the judge fell into error at [42] in his finding that identification of sexual orientation is not to be decided on evidence of sexual activity, but as a result of a rounded assessment of all the evidence. Whilst of course a finding on sexual orientation should be based on the evidence in the round, the judge went on to make an adverse finding in part on the basis that the Appellant has failed to express his feelings as a gay man. I find that is not a necessary requirement in order for the Appellant to show that he is a gay man and is essentially an irrelevant consideration, particularly in light of the other evidence that was before the judge.
17. In respect of [43] and the letter from NAZ, whilst of course it is a matter for a judge as to what weight should be attached to material pieces of evidence, again the contents and veracity of this letter were not challenged by the Respondent and was accepted by the judge. On that basis I accept the submission by Mr Ahmed that the judge has failed to factor properly the contents of the letter from NAZ into his holistic assessment of whether or not the Appellant is gay. The fact that the judge expected the Appellant in seeking to advance a claim based on his sexual orientation to engage with support groups does not mean that no weight should be placed on such a letter, particularly given that the Appellant had been involved with NAZ for almost two years at the date of writing; he had regular contact with the organisation; he has accessed a number of services, including one to one support sessions, group sessions, telephone calls, NAZ outreach stalls at LGBT discos, and has regularly attended at a monthly support group for South Asian gay and bisexual men.
18. For the reasons set out above, I find that the judge's assessment of the Appellant's sexual orientation is flawed and unsustainable.
19. I have taken into account the fact that there were adverse credibility findings identified by the Respondent in the refusal decision and also that the Appellant has previously made an application for leave based on an

intention to marry a woman. I also take account of the fact that there was a delay in applying for asylum on the basis of sexual orientation, but I accept Mr Ahmed's submission in that respect based on the CJEU judgment in A, B and C.

20. Whilst it may be the case that the judge was entitled to reach adverse findings in respect of the Appellant at [44], those are unspecified and unparticularised as to why the judge was upholding the Respondent's adverse credibility findings, and I do not find outweigh the errors of approach in respect to the Appellant's sexual orientation.
21. For the reason set out above, I find material errors of law in the decision of First-tier Tribunal Judge Trevaskis. I set aside that decision and remit the appeal for a hearing *de novo* before a different judge of the First-tier Tribunal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Rebecca Chapman

Date 29 April 2018

Deputy Upper Tribunal Judge Chapman