Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/01726/2015
PA/01733/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd June 2016	**On 21st July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

SA – FIRST APPELLANT
KA – SECOND APPELLANT
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Ahmed (Counsel)
For the Respondent: Ms A Brocklesby-Weller

DECISION AND REASONS

1. The appellants are citizens of Pakistan. Their appeals against refusal of their protection claims were dismissed by First-tier Tribunal Judge A Baldwin ("the judge") in a decision and reasons promulgated on 15th February 2016. The appellants claimed to be at risk on return to Pakistan as homosexuals, in a relationship together.

The judge found that their core claims, regarding their sexuality and their relationship, were not made out and concluded that they would not face any risk of persecution or ill-treatment on return. He also dismissed the appellants' human rights grounds of appeal, finding that neither could succeed under Article 8 of the Human Rights Convention.

2. Permission to appeal against the decisions was refused by a First-tier Tribunal Judge on 11th March 2016 but granted by a Judge of the Upper Tribunal on 6th April that year. The Upper Tribunal Judge found that it was arguable that the judge applied too high a standard of proof in the light of the quantity of evidence apparently supporting the appellants' cases. In directions made by the Principal Resident Judge at Field House, the parties were advised that they should prepare for the forthcoming Upper Tribunal hearing on the basis that it would be confined to considering whether the decision of the First-tier Tribunal should be set aside for legal error.

3. In a Rule 24 response from the Secretary of State made on 26th April 2016, the appeals were opposed on the basis that the First-tier Tribunal Judge directed himself appropriately and made adequate findings of fact which resolved the asylum claims against the appellants. An appropriate standard of proof was applied.

Submissions on Error of Law

4. Mr Ahmed said that the judge's findings were inconsistent and undermined the overall conclusions reached. At paragraph 34 of the decision, he made a clear finding that the appellants' interest in joining and attending LBGT events and gatherings seemed to have begun after they decided to claim asylum. The asylum claims were made in April 2015. The appellants' bundle, which was before the judge, showed clearly at page 167 that SA had relied on services from NAZ ("Sexual Health for Everyone") since 7th January 2014. A letter from NAZ dated 1st February 2016 showed that he had attended DOST, a support group for South-Asian gay and bi-sexual men, long before the asylum claim, and his relationship with KA was expressly mentioned. The respondent's bundle contained a similar letter regarding SA, at page E7, from the same organisation, dated 3rd July 2015 and recording that SA first used services at NAZ in January 2014. In the same bundle, at E11, was a letter from Ana Macelaru written at about the time of the substantive asylum interview in August 2015. Ms Macelaru stated that she had known SA for about a year and met him in "Club Heaven". There was a similar supporting letter from Mr S U Ahmad at page E11 in the respondent's bundle, dated 17th August 2015.

5. Mr Ahmed said that this evidence showed how the appellants conducted themselves in the United Kingdom long before they made their claims for asylum and contradicted the judge's adverse finding at paragraph 34 of the decision. The appellants' use of services for gay men pre-dated the asylum claims by about a year but the judge did not take this evidence into account. It followed that the overall assessment of the evidence was flawed.

6. A second salient feature of the decision was the judge's analysis of the timing of the asylum claims by SA and KA. The judge found, broadly, that the asylum claims could have been made far sooner. SA gave an explanation in answer to question 76 in the substantive asylum interview. The asylum claims were triggered by an incident on 2nd March 2015 in which the appellants were threatened. In SA's case, his leave expired only in September 2015. No curtailment of his leave had taken place. There was no substance to a point made under section 8 of the 2004 Act and the judge's adverse finding in this context was not soundly based. So far as KA was concerned, his visa expired in September 2014. He said in evidence before the judge that he had applied for further leave to remain. The Secretary of State's decision letter noted an application made in November 2014, whereas KA said it was made in September that year. Either way, the application was refused in June 2015, after the asylum claims were made in April 2015 and after the appellants discussed matters with NAZ.

7. Mr Ahmed moved to ground (iv), the focus being on paragraph 30 of the decision. This part of the decision concerned evidence given by those who lived in the same accommodation as the appellants. The judge found that this evidence could not be given real weight in view of apparent inconsistencies. One of the witnesses, Mr Raza, was key. Mr Raza told the judge that the signature at the end of his statement was not his and the number of his particular accommodation was incorrect. Those were largely the reasons why the judge attached little weight to his evidence. The judge recorded Mr Raza as saying that he had known the appellants since June 2015 and had occasionally met them. However, Mr Raza's evidence went further than that. He described meeting the appellants at a NAZ event, a dinner, and as seeing the appellants at NAZ events monthly. He gave evidence regarding the attachment between SA and KA. He also saw others in the appellants' accommodation, including Ms Nur and the Lithuanian gentleman. None of that evidence appeared to have been taken into account, the judge giving little weight to the evidence because of Mr Raza's volunteering that the signature on his statement was not his. There was no attempt by the judge to clarify why it was that someone else had signed the statement in Mr Raza's name.

8. At paragraph 32 of the decision, the judge selected a photograph, one of a very large number provided, showing one of the appellants asleep. No questions were put to the witnesses about this particular photograph whereas fairness required such a step before an adverse finding was made. At paragraph 32 of the decision, the judge concluded that little weight could be given to a police report at page 162 in the appellants' bundle, as only one page of the document appeared, out of a total of nineteen pages. Questions about the single page were not put to any of the witnesses. The document was taken from a police officer's notebook. The appellants had been given a carbon copy of the page in which their names and details of the incident in March were taken. The judge found it odd that words were added to the final box in the document, for the police contact number for the incident, but failed to take into account the letter from the Community Safety Unit at page 161 of the appellants' bundle and the Victim Care Card at page 163.

9. At paragraph 33 of the decision, the judge drew an adverse inference from KA's answers in interview regarding where he lived in Pakistan. He had mentioned in the asylum interview a relationship in Karachi in 2010, after having stated that he had always lived in Jhang, where he was born. However, his answer to question 52 in the interview showed that his Jhang address was his permanent home and his address in Karachi was temporary. He was transferred to Karachi for work purposes. The judge's finding that the flight between Karachi and Faisalabad took only 45 minutes was speculative. At the end of that paragraph of the decision (33) the judge noted an inconsistency regarding how frequently the appellants met each other, based on their answers in interview. There was no engagement with the evidence given at the hearing, which was entirely consistent. The judge was required to at least take that evidence into account, even if he were then to conclude that greater weight should be given to the answers in interview.

10. Ms Brocklesby-Weller said that the evidence given by the appellants was properly engaged with by the judge, as was the NAZ evidence. This was clear, for example, from paragraph 18 of the decision which expressly recorded the letter from NAZ as confirming that KA had been a user of services in January 2014, that letter accompanying KA's claim for asylum. The judge was alert to the letters in the respondent's bundle and elsewhere but there was no oral evidence from their authors. The judge did have oral evidence from three witnesses and he found inconsistencies in their testimony, set out in paragraph 23 of the decision. Two of those claimed to have lived in the same accommodation as the appellants did not know about each other, which was peculiar and one of the appellants could not recall his precise address. The judge was entitled to find, at paragraph 30 of the decision, that the evidence was entirely unsatisfactory. The confusion regarding Mr Raza's signature was a red herring as the judge said that Mr Raza's evidence had to be viewed in the light of the evidence given by the other two witnesses, Ms Nur and Mr Smatovas. Mr Raza had only known the appellants for a relatively short period of time.

11. So far as the police report was concerned the copy of the page was very poor. The judge was entitled to find it odd that it appeared that someone had complained about an incident which was not recorded as a crime. The letter at page 161 of the appellants' bundle made mention of domestic violence and women's refuges, which were not relevant to the appellants' case.

12. So far as the timing of the asylum claims was concerned, the judge accepted that SA's student leave had not expired but, even so, SA was not studying at the time and so his presence was not in accordance with the leave granted to him. The judge was also entitled to find that the appellants' claim that they had no knowledge of how to claim asylum was implausible. This dealt with question 76 in the asylum interview. The judge had a plethora of documents before him, including many photographs. The NAZ letters fell to be weighed with the inconsistent evidence from the three supporting witnesses and the judge's rejection of events in Pakistan. So far as KA's move from Jhang to Karachi was concerned, there was no evidence of the employment said to explain this move although this might have been provided.

13. In a brief response, Mr Ahmed said that paragraphs 18 and 34 of the decision appeared to contradict each other. In the former, the judge did indeed clearly record documentary evidence regarding the use of sexual health services and services for gay men long before the asylum claim. This could not be reconciled with his adverse findings in the latter paragraph. The supporting letters described the appellants as a gay couple and this evidence required engagement. The NAZ letters were not determinative but they amounted to relevant evidence and directly supported the claim that the appellants were in a relationship with each other. That evidence was simply not assessed at all.

14. In a brief discussion regarding the appropriate venue, should an error of law be found, the representatives agreed that the appeals should be returned to the First-tier Tribunal, in view of the judge's conclusion on the credibility of the particular claims.

Conclusion on Error of Law

15. The decision has been prepared by a very experienced judge and his findings of credibility and fact are clearly set out, at paragraphs 28 to 34 of the decision. Much of the analysis is thorough and cogently reasoned, including the judge's adverse findings regarding the three witnesses, Mr Smatovas, Ms Nur and Mr Raza, and the inconsistencies which emerged. His assessment of the single page from the police report is also clear and shows a full engagement with that documentary item.

16. Nonetheless, it is clear from paragraphs 30, 33 and 34 of the decision that the judge's overall conclusion that the appellants' core claims were not to be believed largely flowed from his assessment that the asylum claims were made late and were, to an extent, opportunistic and his finding that the evidence showing the appellants' use of services largely intended for the gay community and their attendance at LBGT events and gatherings occurred only after the appellants decided to claim asylum. It is in relation to these particular parts of the analysis that I conclude that Mr Ahmed's submissions are well made.

17. So far as the use of NAZ services and attendance at DOST, an organisation catering for the needs of South-Asian gay men, are concerned, each of the appellants produced documentary evidence supporting their cases. So far as KA is concerned, the judge expressly referred to a letter from NAZ describing KA's use of the services in January 2014 and to a relationship with SA. The appellants' bundle at page 162 contained a similar document regarding SA. The respondent's bundle also contained similar items, all tending to show that the appellants identified themselves as a homosexual couple at least a year before the asylum claims were made. That evidence, although some of it was expressly noted by the judge, appears not to have been carried into the overall assessment and does not sit well with the judge's findings in paragraph 34 regarding attendance at LBGT events only after the appellants decided to claim asylum.

18. So far as the timing of the asylum claims is concerned, Mr Ahmed drew attention to the expiry of SA's leave in September 2015, months after the claims were made and to the application for leave made by KA in September or November 2014 as having

been decided by the Secretary of State only in June the following year, again after the asylum claims. Although the judge was clearly aware that SA's leave was still valid in the Spring of 2015, the weight given to the apparent failure to claim asylum "a good deal sooner" overlooks that each appellant had a rational basis at the time for thinking that there was no prospect of imminent removal from the United Kingdom, albeit that their presence was technically precarious. Moreover, the assessment does not appear to take into account the "trigger" of the incident referred to by SA in his asylum interview in answer to question 76.

19. Finally, although, as noted above, the judge made a thorough assessment of the single page from the police report, I accept Mr Ahmed's submission that the overall credibility of the claim regarding contact with the police, following threatening behaviour directed against the appellants, required the documents at pages 161 and 163 of the appellants' bundle to be taken into account and weighed. Ms Brocklesby-Weller mentioned that the Community Support Unit letter included domestic violence and similar community groups, but the same letter also provides details of victim support and the community safety unit itself, of obvious direct use to the appellants.

20. Overall, I conclude that the decision does contain errors of law, in the assessment of the evidence regarding the appellants' engagement with services directed at the LBGT community and in relation to the timing of the asylum claims. In order to reach sustainable adverse findings on these matters, the decision required an express engagement with evidence which supported the appellants' case.

21. The decision of the First-tier Tribunal is set aside and will be re-made. In the light of the agreement of the parties, and taking into account the Practice Statement made by the Senior President, the appropriate venue is the First-tier Tribunal, at Hatton Cross, before a judge other than First-tier Tribunal Judge A Baldwin.

DECISION

The decision of the First-tier Tribunal is set aside. It will be re-made in the First-tier Tribunal at Hatton Cross, before a judge other than First-tier Tribunal Judge A Baldwin. No findings of fact are preserved and the appeal will be re-heard de novo.

ANONYMITY

The First-tier Tribunal Judge made an anonymity direction and it shall continue in force, until a Tribunal or court directs otherwise.

Signed Date **21st July 2016**

Deputy Upper Tribunal Judge R C Campbell