



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

Appeal Number: PA/03845/2015
PA/03844/2015

THE IMMIGRATION ACTS

**Heard at Field House
on 22 July 2016**

**Decision & Reasons Promulgated
on 29 July 2016**

Before

**UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE GARRATT**

Between

**FAISAL BAIG
SHAFIQE MALIK MUHAMMAD ADNAN
(Anonymity direction not made)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Cooke instructed by Milestone Solicitors
For the Respondent: Mr C Avery Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Kaler promulgated on the 23 May 2016 following a hearing at Hendon Magistrates Court on the 16 May 2016.

2. The appeals have been linked as they involve a common theme. Mr Baig, a national of Pakistan born on the 5 December 1983 and Mr Adnan, also a national of Pakistan but who was born on the 3 May 1987, claim to be at risk on return to Pakistan as gay men. They claim to be in a relationship with each other in the UK.
3. Judge Kaler set out the assessment of the merits of the case from paragraph 19 of the determination. The Judge did not find the claim to have been proved by either appellant.
4. Permission to appeal was granted by First-tier Tribunal Judge Robertson on the 15 June 2016.
5. Although a number of the challenges to the determination are without arguable merit there is one key challenge which leads to the decision we have made below.
6. At paragraph 30 of the decision Judge Kaler finds:

30. I consider the Appellant's immigration history. It is clear to me that both of them wished to continue living in the UK after expiry of their leave. Baig tried to remain by making a Tier 1 application but it seems to have been a hopeless application and he did nothing after it was refused. At that time, he did not realise he was gay and so he had no further reason to remain in the UK. He did not leave and that indicates to me that it is not his wish to return to live in Pakistan, and it was not his wish to do so even before he realised he was gay.

7. The issue in the case for both appellants was that of credibility. The Judge was clearly of the opinion that Mr Baig had attempted to remain in the UK for other reasons, only making the asylum claim on 14 June 2015 as he realised by then that he is gay. What the Judge fails to do is to adequately reason this finding by reference to all the available evidence which includes Mr Baig's replies to questions put to him at interview, at questions 40-45, which are as follows:

No	Question	Reply
40	When did you first begin to identify yourself as a homosexual? The very first time you identified yourself in this way?	Here or in PAK I was 17 or 18 years old
41	How did you discover this?	Because I was studying in a mixed co-ed school. My friends used to talk to girls but I never had any interest in that.
42	Did this happen gradually or was there a particular situation that led you to realise this?	It was gradual, because I did not have any brothers, I only had sisters and I was always with them and their friends. I had friends who used to go and see girls. I also went a few times but I did not have any feeling for them.
43	What was it in particular about girls that you were not attracted to?	Because as I said I had male friends who used to go and see girls. I also went a few times and tried but I did not have any such feelings.
44	My question was what was it about girls that you were not attracted to? Was there	I used to have male friends and when I used to touch them, I used to have feelings within myself for them. At the same time, when I used

	anything in particular?	to touch girls, I never had any feelings for them.
45	How did it make you feel when you realised this?	I was actually scarred thinking that how am I going to tell anyone about it. I used to watch some video clips and stuff to reduce my frustrations about it.

8. The Judge may have been entitled to reject this evidence when considering matters in the round but the lack of any reference to it and the specific terms of paragraph 30 lead us to conclude that this is not material that was considered by the Judge. The starting point in this case is the first question posed by Lord Hope in HJ (Iran) v SSHD [2010] UKSC 31 which is 'Is the appellant gay?' It is an arguable legal error not to consider all evidence relevant to this issue without the required degree of anxious scrutiny, as appears to have been the situation in this appeal.
9. Ms Cooke also raised a further issue which she submitted showed the Judge had made a factual error and inconsistent finding on a material issues. This relates to paragraph 32 of the determination under challenge in which the Judge records:

32...In his interview he said he had been threatened when his father was told by him that he was gay. However the wording of paragraph 19 of his statement suggests that his father does not know about the Appellant's sexuality. I am not persuaded that the Appellant's father does know about his claimed sexuality. The failure to claim asylum for such a long time does have an adverse impact upon their credibility.

10. Whilst the comment regarding delay in claiming asylum may have been reasonably open to the Judge on the facts there is a clear misunderstanding of the evidence. Paragraph 19 of Mr Baig's witness statement is his reply to paragraph 20 of the Reasons for Refusal letter. This is clear from the wording of that paragraph:

19. In paragraph 20 SSHD states that my answers were indirect when I talked about how I felt when I was unable to speak to people about my sexuality. I submit that when I realised I was a homosexual I was scared and confused. I knew this is forbidden and a sin in Islam. My father was very strict and religious man. I had to be very careful. I knew if my father ever came to know of my sexuality he would have killed me with his bare hands.

11. Question 140 of his interview, that referred to by the Judge, is as follows:

No	Question	Reply
140	How did your family find out about your sexuality?	In 2012/13, they were asking me to go back because they wanted me to get married. Finally, my partner and I decided to get married and we told our family members. Since then I haven't had contact. If it didn't tell them, they would have arranged a marriage for me.

12. Ms Cooke's submission that there is no contradiction as the witness statement related to the time before Mr Baig entered the UK, which

was in 2008, and the reply to question 140 to 2012/3 has arguable merit, although in isolation this may not have been material.

13. We cannot be satisfied that Mr Baig has had a fair hearing of his claim in which a judge of the First-tier Tribunal has considered all the available evidence with the required degree of anxious scrutiny. This is important, for had this been the case and adequate reasons given for the findings that showed all the evidence had been properly considered the adverse credibility findings may have been reasonably open to the Judge, as the weight given to the evidence would have been a matter for the Judge. As it is, and this is an appeal in which the credibility of the appellants' is the key element, we find legal error proved as submitted. The appeals of both appellants are linked in fact and law and so neither can be maintained.
14. We find legal error material to the decision to dismiss the appeals of both appellants' proved. The determinations shall be set aside. There shall be no preserved findings. As the appellants' have still to receive a fair hearing at which all available evidence is considered with the required degree of anxious scrutiny, we consider there is no option in this case other than to remit to the First-tier Tribunal sitting at Hatton Cross for the matter to be heard afresh by a judge nominated by the Resident Judge, but excluding Judge Kaler.

Decision

15. **The First-tier Tribunal Judge materially erred in law. We set aside the decision of the original Judge. We remit the appeals to the First-tier Tribunal sitting at Hatton Cross for rehearing.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 25 July 2016

