



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/05374/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester CJC

**Decision & Reasons
Promulgated**

On 18 September 2018

On 01 October 2018

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**MR N S
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Mottershaw, Counsel, instructed by First Law Solicitors

For the Respondent: Mr A Tan, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent on 23 May 2018 Judge A J Parker of the First-tier Tribunal (FtT) dismissed the appeal of the appellant, a citizen of Pakistan, against the decision of the respondent made on 5 April 2018 refusing his protection claim. The basis of the appellant's claim was that he would be at risk on return to Pakistan because of his gay sexual orientation. His previous appeal raising the same basis of claim had been dismissed by Judge James of the FtT on 22 April 2016, but he was granted a further right of appeal upon his submission of further representations. Judge James had comprehensively disbelieved the appellant's claim to be gay. It is Judge

Parker's approach to the findings made previously by Judge James that is at the heart of the appellant's grounds of appeal.

2. It is unnecessary to set out the grounds in any detail as both parties were in agreement that the judge's decision was vitiated by legal error and I am in concurrence with them regarding this. The first of three obvious errors in the judge's decision was that he failed to note that there was new evidence relating to his history of sexual relationships at the time of the previous appeal in the form of a witness statement from Mr Z A dated 15 March 2018 referring to his gay relationship with the appellant dating from circa 2004. The judge's statement at paragraph 34 that there was no evidence from any of the appellant's previous partners predating the previous hearing was simply incorrect and it was wrong of the judge to rely on the total absence of such evidence as a significant factor adverse to the appellant.

3. A second obvious error arises at paragraphs 35 and 36:

“35. I would therefore find the appellant is not gay and secondly if he is gay he would not live openly.

36. I do not find the appellant would live openly on return and be open about his sexual orientation and at best he would live discreetly. This is not because he fears persecution”.

The judge gives no reasons whatsoever for these findings and in particular why, if the appellant were to live discreetly, none of the reasons for doing so would be due to fear of persecution.

4. A further evident failing was the judge's failure to make any clear findings on the evidence of the witnesses. Simply to clarify them as “self-serving” (see paragraph 47) was insufficient.

5. I would add (since the next judge dealing with the case will need to bear it in mind) that the judge's undue preoccupation with the appellant's sexual history is troubling. In light of the guidance given by the CJEU in the **A, B, C** judgment and what was said by the Supreme Court in **HJ (Iran)**, it is necessary to consider sexual orientation more broadly and not just in terms of sexual acts. The **A, B, C** case also cautions against treating delay in the making of a claim based on sexual orientation as a reason in itself to disbelieve it.

6. I do not make any definitive finding on whether the judge treated the previous decision of Judge James as an end-point rather than as a starting point, but it will certainly be important for the next judge to clearly identify what evidence is now being relied on that was not before the judge and, within that body of evidence:

(a) what related to his sexual orientation prior to the hearing before Judge James; and

(b) what related to his sexual orientation has come into existence since.

It will be important in respect of (a) for the appellant to explain why it was not produced earlier.

Nothing I have said above should be taken as implying a view as to the merits of the appeal.

7. For the above reasons:

The decision of the FtT Judge is set aside for material error of law.

The case is remitted to the FtT (not before Judge Parker)

No anonymity direction is made.

Signed:

Date: 26 September 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'S' at the end.

Dr H H Storey
Judge of the Upper Tribunal