Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12989/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2018	**On 6 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

AAS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Nwaekwu, of Moorehouse Solicitors
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Paul, who in a determination promulgated on 18 July 2017, dismissed his appeal against a decision to refuse to grant asylum. The judge did not make an anonymity order but I consider in the light of the facts in this case that it is appropriate to do so.

2. The appellant arrived in Britain in 2009 as a student and had leave in that capacity until 17 August 2015. His leave was curtailed in December 2014

when he was detained whilst undergoing a marriage ceremony. He then claimed asylum, on the grounds that he would face persecution on return to Pakistan because he was gay. His application was refused in May 2015 and his appeal against that refusal was dismissed by Immigration Judge Seelhoff on 5 February 2016.

3. On 28 October 2016 he made further submissions that he would face persecution on return to Pakistan. As new documentary evidence was provided it was decided, when his application was refused, that it would be appropriate that he should be granted a further right of appeal. The appeal came before Immigration Judge Paul on 29 June 2017. The basis of the appellant's claim to asylum was again that he would face persecution as a gay man in Pakistan and that he was in a relationship with another Pakistani man, his cousin, SFA. Judge Seelhoff had dismissed the first appeal because he had found that there were certain discrepancies in the evidence. He found that the appellant had not discharged the burden of proof upon him to show that he was gay. It is of note that Judge Seelhoff did not state in terms that he did not accept that the appellant was gay. When the further evidence was submitted in the second application the appellant put in a bundle of documents showing that he was now married to SFA and that he had become involved with a large number of gay organisations. There were also witness statements from two friends, both of whom stated that they believed that the appellant was gay. Moreover, there were a large number of photographs showing the appellant and SFA at their marriage ceremony as well as attending a number of gay events.

4. The judge, when hearing the appeal correctly referred to the determination of the first judge under the principles set out in **Devaseelan**, stating that if an appellant was proceeding to rely on facts that were not materially different from those put to the first judge, then the second judge should regard the issues as settled by the first determination rather than allowing the matter to be relitigated. He noted that the first determination had recorded a delay in claiming asylum despite the fact that the appellant said that he had entered into a homosexual relationship in 2011 and, moreover, that there was a lack of corroborative evidence. There had been no evidence to show that the appellant was gay in the period of three years prior to his arrest. It was also pointed out that the appellant and SFA were first cousins and it was stated that the appellant's partner had given evidence that was designed to mislead the Home Office.

5. The judge did refer to the consideration of the further documents made by the respondent and to the witnesses and also set out further evidence given at the hearing. In paragraphs 24 onwards he set out his conclusions and reasons. In paragraph 27 he said that, from a close reading of the letter from the respondent, granting the appellant permission to marry, did not indicate that the Secretary of State accepted that it was a genuine marriage.

6. The judge went on to say that what was striking by the evidence that had been adduced before him was that nothing had been provided to deal with the situation of the appellant and his partner in the period prior to the first Tribunal decision and that there was no corroboration of their claims prior to that decision. The two witnesses who had been called stated they had met the appellant and his partner in June 2016 through ELOP, a gay organisation, and he stated that that did not provide corroborative evidence to the standard required. He said that: -

> "It is self-evident that the contact with ELOP has all the hallmarks of being a self-serving process, and in any event these two witnesses cannot speak about the appellant's relationship prior to that."

He stated that the evidence of the witnesses added nothing to the case.

7. He then went on to refer to a joint bank account on which there had been no activity, stating that he believed that that bank account had only been opened in January 2017 and until 5 June 2017 there had been no activity therein. He said that it was inconsistent that the appellant and his partner were living as a married couple "so to speak" if they had a joint bank account which was not being used.

8. Finally, in paragraphs 30 and 31 the judge said:-

> "30. Taken as a whole, therefore, I am satisfied that the decision of the first judge involved an exhaustive and careful examination of all the evidence that was properly adduced at the time. The appellant and his partner have clearly had the advantage of legal advice, at the point of which they attended the original marriage interview, and were fully aware as to what evidence they needed to produce. They failed to do so.
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> 31. None of the evidence that has been produced at this appeal is corroborative of the alleged relationship in the period up and until the first decision of the Tribunal. In my view, it is also self-serving and of an extremely tenuous nature. It follows, therefore, that I am not satisfied that the appellant has established, to the requisite standard, that they are engaged in a gay relationship."

9. He therefore went on to dismiss the appeal.

10. The grounds of appeal on which Mr Nwaekwu relied argued that the judge had misinterpreted the guidance in **Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* [2002] UKAIT 00702** where in paragraphs 37, 38 and 39 it was stated that findings of fact made by a first Adjudicator could be built upon and as a result the outcome of the hearing before the second Adjudicator might be quite different from that which might have been expected from a reading of the first determination only and that it was important that the second Adjudicator must be careful to recognise that the issue before him is not the issue before the first Adjudicator.

11. Paragraph 39 of that determination stated:-

> "39. In our view the second Adjudicator should treat such matters in the following way.
>
> (1) The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.
>
> (2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
>
> (3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them."

12. The grounds argue that the judge had erred in his consideration of the further evidence and in particular the fact that the appellant and his partner were now married. They refer to the fact that Judge Seelhoff had stated:-

> "Assessing all the evidence in this case in the round I find that while I cannot exclude the possibility that the appellants are gay and in a genuine relationship with each other I do not consider that they have proved that this is likely to be the case with reference to the lower standard of proof and accordingly I do not consider that it is likely that either would be at risk of persecution on return to Pakistan on account of their sexual orientation. I do consider it likely that the claim has been manufactured so as to avoid the appellants having to return to Pakistan."

13. It was argued that the further evidence was crucial in that the Secretary of State had investigated the appellant's relationship with his partner and found it to be genuine before issuing a letter of entitlement to marry and secondly, the fact that the marriage itself went ahead in light of instructions given to registrars to report suspicious marriages cast doubt on the original findings made by the first judge. It was therefore argued that the judge had not properly weighed up the further evidence before him. It was also argued that it was unfair for the judge to raise the issue of the bank statements and that had not been put to the appellant.

14. Ms Pal when replying to the submissions made stated that the judge had noted the evidence of the civil partnership and was clearly aware of that development and had also set out details of the evidence which he had considered. He had also referred to the evidence of the two further witnesses. She asked me to find that he had reached a conclusion which was fully open to him on the evidence.

Discussion

15. I consider that there is a material error of law in the determination of the Immigration Judge. While I consider that there is no merit in the assertion that the Home Office must have accepted the marriage as genuine before issuing the certificate of entitlement as that is clearly not the case and, further, I do not place weight on the fact that the judge did not put to the appellant the fact that there had been no movement in the joint account, I do consider that the judge erred in law in his consideration of the additional evidence.

16. He heard evidence from supporting witnesses, both of whom stated that the appellant was gay. The judge does not say whether or not he considered that those witnesses were knowingly not telling the truth or that what they said was not credible nor did he give reasons why he did not accept their evidence. Indeed, there does not appear to be any record of what evidence they gave, let alone the judge's conclusions thereon. Moreover, there is a vast quantity of additional evidence of the appellant and his partner taking part in gay organisations and events. The judge merely dismisses this as self-serving. I do not consider that that conclusion is sufficient, given the membership of the various groups which the appellant and his partner have joined. There is nothing whatsoever to indicate that the appellant was put on notice that that evidence would not be accepted or why it was considered to be self-serving. Similarly, the evidence of the photographs of the marriage and the events leading thereto does not appear to have been analysed.

17. Given the low standard of proof, I consider that the judge did not analyse sufficiently the evidence before him and in fact did place inappropriate weight on the evidence of Judge Seelhoff. For these reasons I set aside the determination of the judge and direct that this appeal proceed to a hearing de novo.

18. Given the terms of the Senior President of Tribunal's direction I consider it appropriate that this appeal proceed to a hearing afresh on all issues in the First-tier.

19. It is appropriate that the appellant's representatives produce a further indexed bundle of documents with a skeleton which lists the various events which the appellant attended and their dates as well as details of the organisations of which he is a member. I would add that I have made this decision in the knowledge that SFA's appeal, PA/10249/2017, was

dismissed and that an application for permission in the First-tier has been refused.

Notice of Decision

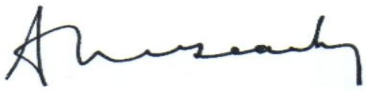
The decision of the Judge in the First-tier is set aside and the appeal is remitted to the First-tier for a hearing afresh on all grounds.

Direction

The appellant must serve a indexed bundle of documents together with a skeleton argument which will contain a list of the events the appellant as attended cross reference to the photographs and other documents in the bundle.

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 his 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:  Date: 2 February 2018

Deputy Upper Tribunal Judge McGeachy