



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

Appeal Number: AA/07101/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 7 January 2016**

**Decision & Reasons Promulgated
On 23 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**S A
(ANONYMITY ORDER MADE)**

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Bellara, instructed by AH Law Limited

For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION & REASONS

1. The Appellant is a national of Pakistan, born on 4 June 1982. He first entered the United Kingdom as a student on 14 September 2008. He subsequently extended his leave to remain as a student and as a post study worker until 19 December 2013. On 17 December 2013, he made an application for asylum. The basis of his claim is that is a gay man who had suffered persecution in Pakistan and feared persecution if returned. On 7 April 2015, the Respondent refused to grant the Appellant asylum on the basis that he did not find his account of persecution credible. The Appellant appealed against this decision but indicated that he wished his appeal to be determined

on the papers. He submitted documents in support of his appeal, including witness statements from himself and his civil partner, Manzoor Ahmed, a copy of his civil partner certificate and photographs of the Appellant and his partner.

2. His appeal was, however, listed for hearing before Judge Whitcombe of the First-tier Tribunal on 16 September 2015. The Appellant was neither present nor represented but the Respondent was represented by a Presenting Officer. In a decision promulgated on 23 September 2015, the Judge dismissed the appeal on all grounds, finding at [66] that he was not satisfied that: (i) the Appellant is a gay man; (ii) he is currently in a genuine and subsisting relationship with Manzoor Ahmed; (iii) he suffered persecution in Pakistan, whether because of his sexual orientation or at all; (iv) he would face a real risk of persecution for a Refugee Convention reason if he were now to be returned to Pakistan.

3. An application for permission to appeal was made in-time on 5 October 2015. The grounds in support of the application contended that the Judge failed to address the Appellant's Article 8 claim and in particular did not give adequate reasons for finding that there was no family life in the United Kingdom and failed to give detailed reasons as to why the documents submitted by the Appellant could be held to be false; that the civil marriage certificate and photographs of the Appellant and his partner were before the Judge, were not in dispute and had not been challenged by the Respondent but in finding at [66] that the Appellant is not a gay man the Judge failed to give proper reasons and failed to give this aspect of the case proper consideration and similarly in respect of his finding at [70] that the Appellant is not in a genuine relationship with his partner.

4. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 27 October 2015 on the basis that it was "*arguable that the Judge gave no proper assessment to and has not given adequate reasons for finding (a) why the Appellant's father's death certificate was false and (b) why the Appellant is not a gay man and is not in a genuine relationship with his partner when their marriage certificate dated 18 October 2013, photographs of their wedding and evidence that their relationship began about 7 months after they met in 2011 was detailed at paragraph 33 of the Decision & Reasons.*"

5. The Respondent filed a rule 24 response in which it is asserted that there was a plethora of negative credibility findings at [58]-[65] of the determination; documentary evidence was considered in the round as per Tanveer Ahmed and having concluded that the Appellant was neither gay nor has a genuine and subsisting relationship there can be no doubt that he does not satisfy the Article 8 Rules and there was no reason for the Judge to venture into a proportionality assessment as there were clearly no compelling circumstances.

Hearing

6. At the hearing, Mr Bellara sought to rely on the grounds of appeal, in particular the second ground and the absence of reasons in respect of the Judge's findings regarding the Appellant's relationship. He noted that the Judge

had before him the civil partnership certificate. I sought Mr Whitwell's views on the civil partnership certificate and he stated that the Respondent has always challenged the Appellant's sexuality; the Appellant and his partner did not attend the hearing and the civil partnership certificate was not sufficient in itself to prove that the Appellant is gay. Mr Bellara submitted that the fact a civil marriage took place between the Appellant and his partner was an important issue and that when making adverse findings on the asylum claim there is a leap in that the Judge overlooks the fact that there is a certificate and photographs and this is not properly dealt with as part of the Article 8 assessment and is simply not referred to as part of the proportionality assessment. In respect of the other ground of appeal regarding the death certificate of the Appellant's father, the Judge does not give any reasons as to why certificate itself is impugned and does not assess the certificate in the round at [63]. He invited me to find a material error of law and submitted that the matter needed to be heard afresh by the Tribunal because the Appellant's relationship needs to be carefully assessed by the Tribunal, given that the Respondent has not expressly disputed the civil partnership or the photographs.

7. In response, Mr Whitwell submitted that in respect of [63] and the issue of the Appellant's father's death certificate no more needs to be said about this. There is a death certificate for the Appellant's father at F2 of the Respondent's bundle and the date of death is 11.12.10. At A11 of the Respondent's bundle, Q 16, the Appellant says that his uncle is sponsoring him as his father is dead. The date given at the interview is 5.3.05 which is clearly prior to the date of death certificate. He submitted that the FIR was also false and that the Appellant has a history of submitting false documents. In respect of the Judge's findings at [69] onwards in respect of article 8, he submitted that these were parasitic on his earlier findings. Mr Whitwell submitted that there was no challenge to the findings in respect of the asylum claim and this is clear from paragraph 2 of the grounds of appeal and that the grounds of appeal were little more than a disagreement with findings which were open to the Judge. He submitted that an assessment of the relationship could not be made in the absence of findings and the Appellant's sexuality was clearly in dispute in the refusal at [29].

8. By way of reply, Mr Bellara accepted that a challenge to the findings on asylum had, although not expressly raised in the grounds was hinted at [2] of the grounds of appeal and the Judge has not gone far enough in respect of his assessment of the documentary evidence and the Respondent has not discharged the burden of proving that the documents are false. Although there is a DVR the Judge should have made clearer findings on this. He submitted that the Judge should have trodden with caution in terms of finding that because he found there were false documents, the relationship is also false. Mr Bellara submitted that the fact of the civil partnership was not challenged: the parties are legally together and that is not in dispute. He submitted that the Judge misdirected himself in applying his findings on the asylum claim to the civil partnership.

Findings on error of law

9. I reserved my decision, which I now give with my reasons. I find that the First-tier Tribunal Judge materially erred in failing to give reasons for material findings *viz* the Appellant's sexual orientation and his relationship with Manzoor Ahmed, in light of the evidence before him which comprised witness statements, a certificate of civil partnership with Manzoor Ahmed and photographs of the two men. Whilst the Judge was clearly not assisted by the fact that the Appellant and his partner did not attend the hearing and so did not give evidence and could not be cross-examined, it is not clear to me why, since the Appellant requested that his appeal be determined on the papers, it was listed for an oral hearing at all. It is also not clear whether or not the Appellant was informed or aware that his appeal was listed for an oral hearing. Mr Bellara was not able to assist on this point as his solicitors were only instructed on 2 October 2015, after the promulgation of the decision and reasons of the First-tier Tribunal Judge on 23 September 2015. It is the case that the Appellant was unrepresented at the time of his appeal.

10. Be that as it may, in light of the fact that there was before the First-tier Tribunal Judge *prima facie* evidence that the Appellant is a gay man in a subsisting civil partnership with Mr Ahmed, I find that more was required by way of reasoning to justify his conclusions at [66] that the Appellant is not a gay man nor that he is currently in a genuine and subsisting relationship with Mr Manzoor Ahmed. This evidence was simply not addressed by the First-tier Tribunal Judge at all, who appears to have reached his findings based solely on his negative credibility findings regarding the Appellant's asylum claim. As a consequence of his findings, the Judge then proceeded to find that his removal would be proportionate.

11. I find the First-tier Tribunal Judge further erred in his Article 8 assessment in that he failed to consider whether or not there are exceptional or compelling circumstances that justify consideration of Article 8 outside the Rules on the basis that removal would result in unjustifiably harsh consequences *cf.* Singh [2015] EWCA Civ 74. Further, whilst neither party raised this issue, on the basis of the evidence before the First-tier Tribunal Judge it would appear that Mr Ahmed is not settled in the United Kingdom but had on 18 December 2014 succeeded in winning an appeal against a decision by the Respondent refusing to vary his leave to remain as a Tier 4 student. Mr Ahmed's status at the date of hearing was simply not considered as part of the Article 8 assessment although it is clearly a material consideration.

12. In respect of the consideration by the First-tier Tribunal Judge of the documents submitted by the Appellant in support of his asylum claim, the grounds of appeal at [5] challenge the Judge's findings in respect of the Appellant's father's death certificate. I do not find that the First-tier Tribunal Judge made a material error of law in this respect. As Mr Whitwell correctly submitted, there was a clear contradiction between the Appellant's previous account given at an entry clearance interview that took place on 5 March 2005 that he was sponsored by his uncle because his father had died [A11 of the Respondent's bundle at Q 16] and F2 of the Respondent's bundle which is a copy of his father's death certificate where the date of death is given as 11 December 2010. I find that, absent any explanation by the Appellant of this

discrepancy, it was open to the First-tier Tribunal Judge at [63] to reject the Appellant's evidence as to the date of his father's death and not to accept the death certificate at face value. This finding is preserved.

13. Mr Whitwell pointed out that there is no direct challenge to the findings of the First-tier Tribunal Judge on the asylum claim in the grounds of appeal, aside from the challenge to the Judge's findings in respect of the documents submitted in support of his claim. However, at [7] the point is made in respect of the finding that the Appellant is not a gay man at all, that the findings on credibility "*may well be relevant to the asylum claim.*" I find that this is the case in that the Appellant's sexual orientation is essentially the basis of his asylum claim. Even if the issue were not raised in the grounds of appeal, it is a Robinson obvious point, given my finding that the First-tier Tribunal Judge erred materially in law in finding that the Appellant is not a gay man, this necessarily impacts on the safety of his finding in respect of the asylum claim, in addition to Articles 3 and 8 of ECHR.

Decision

14. Therefore, for the reasons set out above, I find that the First-tier Tribunal Judge materially erred in law and the appeal is remitted to the First-tier Tribunal for a re-hearing, not to be heard by First-tier Tribunal Judge Whitwell.

Directions

15.1. The finding of the First-tier Tribunal Judge as to the Appellant's father's death certificate is preserved.

15.2. The hearing before the First-tier Tribunal should focus upon the following issues:

- (i) whether or not the Appellant is a gay man;
- (ii) if so, whether he would face persecution or treatment in breach of Article 3 of ECHR if returned to Pakistan,
- (iii) whether the Appellant is in a genuine and subsisting civil partnership with Manzoor Ahmed;
- (iv) if so, whether there are exceptional circumstances that justify consideration of Article 8 of ECHR outside the Rules;
- (v) if so, whether his removal to Pakistan would be proportionate.

16. Whilst the Appellant and his partner were not present at the hearing before First-tier Tribunal Judge Whitcombe they were in attendance at the hearing before me on 7 January 2016. Whilst I cannot and do not direct that they attend the remitted hearing of the Appellant's appeal before the First-tier, given the Appellant's credibility is very much in issue it would clearly be in his interests for both of them to attend that hearing and to make themselves available for cross-examination by the Respondent.

Deputy Upper Tribunal Judge Chapman

18 February 2016