IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07461/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th April 2016	**On 28th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR HUSNAIN SAEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Richards (LR)
For the Respondent: Ms Willocks-Briscoe (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Bannerman, promulgated on 12th August 2015, following a hearing at Manchester on 31st July 2015. In the determination, the judge allowed the

appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 6th March 1994. He appeals against the decision of the Respondent Secretary of State dated 15th April 2015, refusing his claim to asylum and to humanitarian protection, on the basis, as the Appellant alleges, that he is a gay man, who would suffer persecution and ill-treatment if he had to return to Pakistan.

The Judge's Findings

3. The judge allowed the appeal on the basis that "The Appellant's claim for sexuality is honest and must be taken into account in deciding upon the Appellant's asylum claim to remain in the United Kingdom as a refugee" (see paragraph 18). The judge took into account the following factors. First, that, although the Appellant's alleged sexual partner, Mr Muhammad Usama Abide, had not attended court to give evidence on the Appellant's behalf, this was because the Appellant and Mr Abide had the previous night had a row, whereupon, despite Mr Abide knowing that there was a Tribunal hearing the next day, Mr Abide had walked out of the house and then not attended court, but the judge was satisfied about the explanation in this regard given by the Appellant at the hearing.

4. Second, that although there was a previous promulgated decision in the case of Mr Muhammad Usama Abide (although in that case the reference to his surname is Abid), whereupon Judge Ransley had on 18th June 2015 (AA/04794/2015) dismissed the appeal of Mr Abide on the basis that the entire claim was fabricated of his relationship with the Appellant, the "Appellant's witnesses' accounts had a clearing of truth about them and the Appellant's presentation and evidence was convincing as to his homosexuality" (paragraph 17). The judge observed that,

> "Clearly he was not present at the hearing, though I note there were a number of other areas of concern regarding Mr Abide's case which cast doubt upon his credibility" when the claim of Mr Abide was rejected by Judge Ransley (see paragraph 17).

5. Third, the judge heard evidence of two witnesses, Mohammad Attif Bin Taj and Imran Ahmed Chaudri, both of whom were drag queens, and one was from London and the other was from Birmingham (though none from Manchester where the Appellant actually lived with his alleged gay partner Mr Abide). The judge found their evidence to be persuasive.

6. Fourth, that although the Appellant had actually then returned back to Pakistan during 2011 and 2014, after describing his homosexuality, "His family had not found out about that until after he had returned from

Pakistan", whereupon, "It was only when they contacted him, after his return, to make clear the dislike of his sexuality and to make threats towards him, that he had claimed asylum" (paragraph 17). The judge stated that, "I had regard to the stage at which the Appellant made his asylum claim, having been in the UK for a number of years, but accepted his explanation regarding the same as being credible ..." (paragraph 17).

7. For all these reasons, the appeal was allowed.

The Grounds of Application

8. The grounds of application state that the Appellant's partner was found to have fabricated his relationship with the Appellant and it must follow that the Appellant was not in a genuine relationship with that partner either now. The judge had failed to give adequate reasons for finding that the decision in the partner's appeal had no effect on the outcome of the present appeal.

9. On 20th October 2015, the Upper Tribunal granted permission to appeal on the basis that given the adverse credibility findings in relation to the Appellant's partner, the judge had failed to give adequate reasons.

Submissions

10. At the hearing before me on 4th April 2016, Ms Willocks-Briscoe, appearing on behalf of the Respondent Secretary of State submitted that the fundamental problem with the determination of Judge Bannerman was that it does not deal with the fact that the Appellant's relationship with his partner was found in the appeal decision in the determination of Judge Ransley to have been fabricated (see paragraphs 51 – 53). Yet, what was being relied upon in the determination made by Judge Bannerman now was exactly the same evidence that was being relied upon in the determination of Judge Ransley on 18th June 2015.

11. Whilst it was accepted that res judicata does not apply in immigration appeals, the Tribunal had made it clear in **Mubu [2012] UKUT 00398**, that the guidelines set out in **Devaseelan [2002] UKIAT 00702** are always to be applied to the determination of the factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an early immigration decision involving the same parties. The judge in this case does not even refer to the case of **Devaseelan** and had obviously not given adequate heed to it.

12. My attention was also drawn to the case of **TK (Georgia) [2014] UKIAT 00149** where it was held that those matters must be taken into account (see paragraphs 5, 17, 20 and 22). The binding effect of unappealed decisions has also been made clear in the recent case of **Chomanga (Zimbabwe) [2011] UKUT 00312**, which confirms that the parties are bound "by unappealed findings of fact in an Immigration Judge's decision".

13. Finally, since the Appellant does not in the instant appeal take issue with the way in which the judge has recorded the evidence, and there is no cross-appeal from the Appellant in relation to the evidence, this Tribunal should make a finding of an error of law and remake the decision.

14. For his part, Mr Richards submitted that the case of **Devaseelan** stands for the proposition (see paragraph 39) that the earlier decision of a judge should be a starting point. However, this only meant that it was a starting point. It was open to another judge, having heard the evidence from two witnesses as in this case, who were not available to give evidence in the earlier case, to form a different view.

15. Second, before Judge Ransley on 18th June 2015, the Appellant's partner, Mr Abide, was unrepresented, and not being a lawyer, he did not see it fit to call the Appellant to confirm the homosexual relationship that was the basis of the appeal, even though he was sitting in the back of the courtroom.

16. Third, it is incorrect to say that the judge did not give adequate attention to a previous decision. He in terms refers to the decision by Judge Ransley at paragraph 17 and states that, "I do, however, take account of ... albeit ...". What weight the judge was going to give to the previous decision was entirely a matter for him. It may be that the judge only dealt with this in a single paragraph, but if one looks at the size of this paragraph, it is a weighty and lengthy paragraph.

17. Therefore, so long as the judge had addressed the point of the previous determination, and taken it on board, it was open to him, having heard the evidence from two witnesses who were not earlier present, to take a contrary view in his own findings of fact in relation to this particular Appellant. This he did do. There was no error of law.

18. In reply, Ms Willocks-Briscoe submitted that Judge Bannerman was required to take everything into account, but **Devaseelan** makes clear that where in a case such as the present, the two witnesses could have been called earlier, but were not, that is a relevant matter, because the facts are not materially different from the first determination of Judge Ransley.

19. Second, it was not enough for Judge Bannerman to simply refer to the earlier determination of Judge Ransley and say, "Clearly I was not present at the hearing, though I note there were a number of other areas of concern regarding the subject's case which casts doubt upon his credibility" (paragraph 17), without actually engaging with that earlier determination. There was no evidence here that Judge Bannerman had engaged with the determination of Judge Ransley.

20. It is for this reason that no adequate reasons are given. For example, at paragraph 11 of Judge Bannerman's determination, of the day in question, the Presenting Officer had raised serious concerns about the claim being

put forward by this Appellant, and the judge does not adequately deal with each and every aspect of this.

Error of Law

21. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows. First, this is a case where the judge has not engaged with the findings of Judge Ransley's earlier determination of 18th June 2015 (AA/04794/2015). This is contrary to the rule in **Devaseelan [2002] UKIAT 00702**. Judge Bannerman does not refer to this case. However, it is evident from this case that the principle is established that, if before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and *make his findings in line with that determination* rather than allowing the matter to be re-litigated (see paragraph 41(6)). In this case, a lot has persuaded the judge, if not the evidence of the Appellant's partner, who did not attend at the hearing, but the evidence of two witnesses, one of whom was from London, and the other from Birmingham, but neither from Manchester, to give evidence on the Appellant's behalf, but on facts which are essentially the same. The fact that the judge does not have regard to **Devaseelan** and the strictures therein is an error of law.

22. Second, this is a case where it could be said that, "In the present case, no such compelling new evidence is alleged to have been available ..." see **TK (Georgia) [2004] UKIAT 00149** (at paragraph 20) as to have materially changed the analysis of the facts by Judge Ransley on an earlier occasion, given that there are very serious concerns raised at paragraph 11 of Judge Bannerman's determination from the Home Office Presenting Officer, in respect of this claim.

Remaking the Decision

23. I have remade the decision on the basis of the findings of Judge Bannerman and Judge Ransley and the submissions that I have heard before me today. I am dismissing this appeal bearing in mind Practice Statement 7.2 makes it clear that, "The Upper Tribunal is likely on each occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal ...", bearing in mind that the two determinations of Judge Ransley in the first instance, and Judge Bannerman in the second instance, comprise all the essential facts, based on the evidence

submitted on each occasion which is not dissimilar with respect to one from the other. My reasons are as follows.

24. First, there is the rule in the determination of **Devaseelan** that if before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, then the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination. The issues in this case were the same both before Judge Ransley and before Judge Bannerman.

25. Second, whereas **Devaseelan** is best known for the proposition that the earlier decision is the starting point, it does leave scope for a subsequent judge to depart from that decision if the facts have materially changed. In this case the facts have not changed. Before Judge Ransley the Appellant himself did not give evidence on behalf of Mr Abide, even when he was expressly invited to do so by the judge (see paragraph 53). Judge Ransley held that,

> "I do not believe the Appellant is a gay man, or that he has received death threats from his family and there was an extremist in Pakistan who threatened to kill him if he returned to Pakistan due to his sexuality. The Appellant has fabricated an asylum claim after abandoning his studies" (see paragraph 52).

This was in relation to the Appellant's partner, Mr Abide. The judge, indeed, gave reasons for why the Appellant's partner lacked all credibility (see paragraphs 46 to 50).

26. Third, the Appellant's partner himself has not given evidence on this occasion and the explanation that he had a quarrel with the Appellant the night before because he thought he may have had sexual relations with somebody else, who had turned up to give evidence on his behalf at this hearing, is simply implausible. As paragraph 11 of the determination makes clear the Appellant's partner knew that the Appellant had a court hearing the next day, and he knew that in his own determination by Judge Ransley, the fact that his partner had not given evidence, had been fatal to his claim, and yet he had chosen, with all that was at stake, not to attend to give evidence, simply because of a quarrel.

27. Fourth, the evidence of the two witnesses who attended to give evidence on the Appellant's behalf, cannot in the event amount to dispensing all the other doubts that had arisen in this claim. This is so for at least two reasons. First, both claim to be drag queens. However, as the Presenting Officer made clear (see paragraph 11) not all drag queens are also gay. Second, it is not clear why, if the Appellant is living in Manchester, evidence has had to be called from one witness from London and the other from Birmingham, for this can hardly be more compelling than evidence from someone who actually lives in Manchester with the Appellant and

knows him intimately. No other person could have been well positioned to do that than the Appellant's own partner. He chose not to attend.

28. Finally, there are serious question marks about the Appellant's entire claim, and the manner in which it has been raised for asylum status, with his studies having been abandoned. The Appellant's claim was that, "In Pakistan the extremists know who he is and if he went to Pakistan bad things would happen to him" (see paragraph 5). There is simply no basis for this contention. It is simply thrown in. It was simply thrown in also in the claim in the determination before Judge Ransley made by the Appellant's partner. In the same way, this is a case where the Appellant actually when returned to Pakistan in 2011 and 2014, whilst knowing that he was gay, and doing so in circumstances where the principal source of threat he claims comes from his own family, whom he was visiting. Nothing happened to him in Pakistan. The Appellant conveniently puts forward the theory that, "It was only when they contacted him, after his return, to make clear the dislike of his sexuality and to make threats towards him, that he had claimed asylum" (see paragraph 17 of the determination). It is simply not plausible that the Appellant would go to Pakistan to visit his family, and not face any threats from them or ill-treatment, but only do so after he had arrived back in the UK away from their eyesight, allegedly because it was now that they had found out that he was gay, with his father even threatening to stone him to death. None of this is remotely plausible. Accordingly, for all the reasons that I have given above, this claim is a fabrication and cannot succeed. It is dismissed.

Notice of Decision

29. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed

30. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 27th April 2016