



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25136/2015
IA/25148/2015

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 17 April 2018

Decision & Reasons Promulgated
On 18 May 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

S

S

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Sesay of Duncan Lewis & Co Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants in this case are a sister (the first appellant) and her brother (the second appellant), both of whom are nationals of Pakistan. The first appellant was born in 1995 and the second appellant some twenty months or so later in May 1997. Both of them applied for asylum/humanitarian protection, the first appellant in November 2014 and the second appellant in June 2015 but both their applications were refused.

Their appeals were heard together before First-tier Tribunal Judge Callow, sitting at Taylor House on 27 February 2017, but in a Decision and Reasons promulgated on 20 March 2017, he dismissed their appeals, both on asylum and humanitarian protection grounds and also under Article 8.

2. The appellants appealed against this decision to this Tribunal, permission having been granted by Upper Tribunal Judge Canavan on 14 November 2017.
3. This appeal was first before me on 11 January 2018, when I was sitting together with Deputy Upper Tribunal Judge McGinty, and I gave the Tribunal's decision as to error of law orally immediately following the hearing, and also gave further directions. I made it clear within these further directions that they were given orally at the hearing and that they would take effect regardless of when the written decision went out to the parties. We found that there had been an error of law in Judge Callow's decision, for reasons which will be set out briefly below, and amongst the directions which were made were that the decision would be remade, but that it would be remade by the Upper Tribunal, which was likely to be myself sitting alone due to listing difficulties concerning Judge McGinty. I gave in my decision very full reasons as to why we considered that Judge Callow's decision contained a material error of law and much of the decision which I gave then will be incorporated into this decision.
4. I repeat the background of the appeal which was summarised in my earlier decision. The appellants' parents divorced when they were very young and they lived with their mother and grandparents in Lahore. In 2009, their mother came to the UK as a student, leaving the appellants in the care of her parents, that is the appellants' maternal grandparents. Thereafter their mother successfully applied for a post-study work visa and has lived in this country lawfully ever since. Her immigration status is currently unknown. The appellants' grandparents became too ill to care for them and they came to the UK in 2011 with entry clearance (for both) valid until 26 May 2013 as a Tier 1 (General) Child (which route of entry was withdrawn with effect from 1 October 2013).
5. The appellants apparently lived with their uncle and mother until regrettably there was a breakdown in the relationship between their mother and the rest of the family. The mother wished to remarry and have the appellants, contrary to what they wanted, return to Pakistan to live with their father. The appellants did not wish to return as their father was said to be a violent man amongst other grounds of complaint. Having apparently sought advice from their uncle (a witness statement from whom was contained in the bundle before the First-tier Tribunal and has been updated before this Tribunal), both appellants applied for asylum in February 2013 and they were subsequently cared for by the local authority and placed with foster parents, until they were returned to live with their uncle, which they still do. The mother is estranged from her children and is said to have remarried.
6. The respondent refused to recognise the appellants as refugees in January 2013 and refusal letters were sent out dated 19 April 2013. The claim made is set out within Judge Callow's decision from paragraph 5 onwards and I briefly summarise it here. The appellants claimed that if they returned to Pakistan to live with their father they

feared that one or both of them might be trafficked and also that there would be difficulties with regard to the first appellant because children in Pakistan were on occasion sold or trafficked. The first appellant relied on background evidence addressing the situation facing women on return to the area in Pakistan where they came from. The respondent had contested the claim pointing out that because the appellants would not be returned until the oldest was 18 it was reasonable to expect them to relocate to another area within Pakistan and they were healthy and it would not be unduly harsh for them to return to Pakistan and relocate. The respondent granted further discretionary leave to the appellants until 31 July 2013, which is a day after the first appellant had been due to complete her A levels. It was noted by the respondent that by then the second appellant would have completed his GCSE exams, which would assist him in his life in Pakistan. Neither appellant would be returned to Pakistan until they were both over 18. Subsequently the appellants made renewed applications and by June 2015 they were both over the age of 18. Further consideration was given to whether either appellant qualified for leave in those circumstances and in July 2015 the second appellant for the first time raised a fear of persecution founded on his sexuality as a gay person.

7. In her statement prepared for her appeal to the First-tier Tribunal the first appellant refers to how both appellants and her mother had been victims of domestic violence. Apparently their father had burnt their mother with cigarettes. She also gave evidence that she suffered from depression and had been referred for psychiatric treatment. The claim is dealt with more fully in Judge Callow's decision, which I will not set out in full but it is necessary to set out what is said about the second appellant's claim regarding his sexuality, which is dealt with at paragraph 14 as follows:

"14. In his evidence the second appellant who gave evidence first described the circumstances of his sexuality. He had no interest in females. While he believed, he was gay he had yet to engage in a gay relationship and did not know when he might do so. He was once aroused about three years ago, when he was touched by another male when playing football, and he once saw two men kissing one another in a public park. When in a gay relationship, he would wish to conduct that relationship openly. This would not be possible in Pakistan in the event of his return to his home country."

8. In their evidence both the first appellant and their uncle described the circumstances of the second appellant's disclosure about being gay.
9. As I noted in my decision, the appeal which was before Judge Callow was to the latest decision of the respondent dated 23 June 2015 and Judge Callow considered both appellants' appeals together although the decision with regard to the first appellant had been made earlier.
10. At the hearing before Judge Callow, the main element of the second appellant's claim for asylum was that he had now come to realise that he was gay. In addition to the appellants and his uncle there was also evidence from the appellant's teachers to the effect that he had discovered that he had sexual feelings towards men and he had told people about this. In particular he had sought advice from his school because he was

worried that he might be bullied by reason of his sexuality. At no stage had he ever claimed to have had any gay (or indeed any other) sexual relationship, but he believed that that was what his sexuality was. As I noted in my earlier decision, an important finding made by Judge Callow is set out at paragraph 26 of his decision as follows:

“It has been established in evidence, attaching weight to the statements of former teachers and the evidence of the uncle and the first appellant, that the appellant thinks he is gay”.

11. Nonetheless, the judge found against the second appellant because although it had been accepted that he “thinks he is gay”, “he is yet to decide when he might engage in a gay relationship, if ever”. Having set out (still at paragraph 26) what was said by the Supreme Court in *HJ (Iran) v SSHD; HT (Cameroon) v SSHD* [2010] UKSC 31, (at paragraph 82) that

“... when an applicant applies for asylum on the ground of a well-founded fear of persecution because he was gay, the Tribunal must first ask itself whether it was satisfied that he was gay, or that he would be treated as gay by potential persecutors in his country of nationality ...”

the judge when considering this question concluded that “I have reached the conclusion that the appellant has not established he is gay or that he would be treated as such by potential persecutors in his home country”. For that reason the appeal failed.

12. It was the second appellant’s case that this finding was inadequately reasoned, because no reason had been given for making this finding other than the lack of evidence of any gay relationship.
13. With regard to the first appellant, the judge accepted that sufficient psychiatric evidence had been advanced that she should be regarded as a vulnerable witness. Although she has successfully passed her A levels and was on any view a very intelligent young lady, there was certainly evidence that suggested she was vulnerable. Although the first appellant had not advanced either in the skeleton argument before the hearing or in oral argument during the hearing that she presented as a suicide risk, nonetheless there was evidence of an acute psychotic episode and she had shown symptoms of depression and anxiety. Considering that evidence in light of cases such as *GS (India)* the judge considered that that evidence was not sufficiently strong that she could succeed on the basis of that medical evidence alone; with regard to whether or not there would be serious obstacles to her re-integrating into Pakistan or indeed whether in general her Article 8 rights would be affected to such an extent that it would not be proportionate to return her, at paragraph 28 of his decision, the judge found as follows:

“The appellant is a young woman who has three A levels and is fluent in English. There is no reason why she and the second appellant cannot return to live with the grandparents in Lahore, failing which there remains the choice of internal relocation: *Januzi* [2006] UKHL 5. Within her grandparents’ home, **assisted by the second appellant** [my emphasis], she can live a relatively normal life without undue hardship.”

14. There was no discussion within Judge Callow's decision as to the evidence regarding the grandparents' health. Also I noted that the consideration of the first appellant's Article 8 claim was predicated on the assumption that she would be returning to Pakistan with her brother. It was submitted on behalf of the first appellant that if the Tribunal was to decide that the decision in respect of the second appellant was not sustainable then the decision with regard to the first appellant had been made on a false premise.
15. We found that the decision that the second appellant "has not established he is gay or that he would be treated as such by potential persecutors in his home country" was not adequately reasoned. Mr Melvin (who represented the respondent before the Tribunal on the earlier occasion as well as today) argued that it was not sufficient for an applicant merely to state that he believed he was gay and that such a statement should not necessarily be taken at face value. People sometimes make self-serving statements such as this one in the hope that by so claiming (to be gay) they will be granted asylum to which they are not entitled; not all people who claim to be gay are in fact gay and some people falsely claim to be so merely to bolster their claim to asylum. Mr Melvin submitted that the second appellant might have been expected to be able to show that he had attended Gay Pride events or joined other groups in support of his claim that he was truly a gay person.
16. We found then (and I stand by that finding) that while Mr Melvin's submissions might have been pertinent if the issue with which the Tribunal was concerned was whether or not the second appellant's claim to be gay was a genuine one or whether it was made up, that was not now the issue, because Judge Callow had made a positive finding at paragraph 26 that "it has been established in evidence, attaching weight to the statements of former teachers and the evidence of the uncle and the first appellant, that the appellant thinks he is gay". In other words, the second appellant's evidence in this regard was accepted. The only reason given for suggesting that the appellant "has not established he is gay" is because "he is yet to decide when he might engage in a gay relationship, if ever". We found that the judge had not appeared to consider what weight should be given to a person's belief that his sexuality was a gay one and to what extent any further evidence might or might not be of assistance in this regard. We considered this was a material error such that the decision would have to be remade.
17. We also considered that given the lack of consideration beyond what appeared to be a straightforward finding that absent any evidence of a relationship the Tribunal could not accept that a person has established that he is gay a further hearing would be necessary where this aspect of the claim can be properly considered. It was also the case that because the judge had dismissed the second appellant's belief that he was gay as "not established" he had not then gone on to consider whether or not, if he was indeed gay as he believed he was, he would identify as such on return, and if the answer to that question was that he would not whether or not this would be by reason of his fear of being persecuted on account of sexuality if he did or whether this would be for social reasons as suggested by the Supreme Court at paragraph 82 of *HJ (Iran)*.

18. We decided that because there was no reason to interfere with the finding made by the judge that the second appellant's belief that he is gay was a genuine one (and we had in mind in particular the evidence that he had given, which did not appear to have been factored into the findings, that he has been aroused sexually towards other men) it was not necessary to remit his appeal back to the First-tier Tribunal, but that the matter could be considered further at a resumed hearing within the Upper Tribunal.
19. With regard to the first appellant, as we had found that the decision in respect of the second appellant was not sustainable, we considered that the finding with regard to the first appellant was also not sustainable. As already noted above, the factor which the judge had considered most material, at paragraph 28, was that the first appellant "could live a relatively normal life without undue hardship ... within her grandparents' home, assisted by the second appellant". The judge had not factored in what would happen if the second appellant did not return to Pakistan and does not appear to have given adequate consideration as to what the situation was truly with regard to their grandparents, and in particular their health. He also at paragraph 28 floated the idea that even if the appellants "cannot return to live with the grandparents in Lahore" there "remains the choice of internal relocation". If that is to be regarded as a viable option, then this also would have to be considered on the basis that the first appellant might be returning as a potentially vulnerable lone female to a country which in these circumstances might present considerable obstacles to her re-integration into that society. We considered that these are all matters which would have to be considered at the resumed hearing but which had not been considered to date. Accordingly we set the decisions aside in respect of both appellants and gave directions for the rehearing. We noted that the first and second appellants live together and "may very well be found to have a family life together which goes beyond the normal emotional ties to be expected between adult brother and sister" such that it would not be appropriate for their cases to be heard separately.
20. On behalf of the Tribunal I gave directions orally at the hearing and these directions included the following:
 - (1) We retained the finding made by the First-tier Tribunal at paragraph 26 with regard to the second appellant that "it has been established in evidence, attaching weight to the statements of former teachers and the evidence of the uncle and the first appellant, that the appellant thinks he is gay".
 - (2) The Tribunal will consider at the resumed hearing whether the second appellant would be perceived as gay on return and if not, whether that would be by reason of his fear that if he did not behave discreetly he would be at risk of persecution or because of his wish to do so for social reasons (as per paragraph 82 of *HJ (Iran)*).
 - (3) We gave directions as to the service of further evidence and in particular that the first appellant could adduce further medical evidence having regard to the length of time which had passed since the last medical evidence had been given **provided such evidence was served on the respondent and filed with the Tribunal by no later than Friday, 2 March 2018**. We also considered (and stated in the directions) that further oral evidence would be helpful but that to the extent that the appellants wish to rely on such further oral evidence they must in respect

of such evidence by the same date also supply witness evidence capable of standing as evidence-in-chief.

- (4) The appellants were directed that they must by 9 March 2018 file with the Tribunal and serve on the respondent a paginated and indexed bundle containing both the respondent's bundle and every other document upon which either party intended to rely.
 - (5) We directed that both parties must file with the Tribunal and serve on each other written submissions, setting out the basis of their respective cases, by no later than Friday, 23 March 2018.
21. The reason why I had stated specifically within the directions that they were given orally at the hearing was because it was understood that due to administrative typing difficulties within the Tribunal the written directions might not be sent to the parties quickly and in the event as feared they were not sent until 14 March. However, as acknowledged at the hearing before me today, the parties had made a note of the directions I had given orally and they should have been complied with. Regrettably a bundle was not served on behalf of the appellants until 20 March 2018 and it was only on the day of the hearing or the day before that a response was received from the respondent. Further, although the bundle which was served on behalf of the appellants contained new witness statements from the appellants and their uncle, reference was made within the statements of the appellants to statements they had previously made, none of which were contained within the bundle and so it was necessary during the course of the hearing to refer back to the earlier bundles. It also proved necessary to make reference to other documents contained within the earlier bundles which also had not been contained within the consolidated bundle as they should. However, notwithstanding that the hearing would have been more easily conducted had the directions been properly complied with, this did not result in the Tribunal being unable properly to consider all the submissions; rather, it made the hearing lengthier than it otherwise would have been.

The Hearing

22. As already noted, in the documents contained within the bundle which was submitted there were new witness statements on behalf of both appellants as well as their uncle and both appellants in their statements placed reliance on the earlier witness statements which they had made. Despite being invited by the Tribunal to cross-examine the appellants if he sought to challenge their evidence, Mr Melvin chose not to cross-examine either of them. Regrettably, the uncle was not present although Mr Melvin had not indicated an intention to cross-examine him if he had been. Medical certificates were submitted to the Tribunal with regard to the uncle which showed that he had been signed off work from 10 April because he had "leg pain and depression" and that on 16 April he had been treated at hospital because he had chest pains although it does not appear that anything was discovered during investigations on that day. Certainly there is nothing within any of the medical evidence to suggest that the uncle would not have been able to attend the Tribunal, and it is regrettable that, if indeed this was the case, proper medical evidence was not submitted to this effect.

Submissions on Behalf of the Respondent

23. I have set out above the directions which were clearly given by the Tribunal on the last occasion as to the findings of Judge Callow which had been retained to the effect that it had been accepted that the appellant believed that he was gay. Notwithstanding this fact Mr Melvin's primary submission was that the Tribunal should take the view, in his words, "that this is not a gay man and he is pretending to be gay purely on the basis that it will assist his asylum appeal before you".
24. In discussion I suggested to Mr Melvin that given that I had directed that the hearing was to proceed on the basis that he genuinely believed that he was gay the Tribunal could not now make a finding that he was making it up, to which Mr Melvin submitted that the Tribunal could make such a finding. He submitted there was no indication that he has engaged with the gay community in the UK or entered into any relationships with likeminded individuals, and so despite the Tribunal having made a decision that Judge Callow's finding that the second appellant thinks he is gay would be retained, this was not borne out by the evidence.
25. With regard to the evidence adduced on behalf of the second appellant, this was not a person who genuinely had an interest in the gay scene and there was no evidence that he had joined any gay clubs or had any interest in them. If he genuinely had visited such a club as he claimed there would be proper evidence with regard to that club and so on. So far as the uncle's evidence was concerned this was merely an assertion that his nephew was a gay person and the uncle was not here and there was no evidence that he could give apart from that that was what he had been told by the second appellant; he was supporting his nephew and niece in their combined asylum claim to remain in the UK.
26. The new evidence which was contained in the latest witness statement made by the second appellant that he had visited a gay club was vague to say the least and should not lead the Tribunal to find that his belief that he was gay was a genuine one.
27. With regard to the appellant's reference to the earlier incident (referred to above) that he had been aroused in the park and so on, this evidence was also very vague and gave little reason for the Tribunal to reach the conclusion that this appellant was a gay man and would be so perceived. Even though the second appellant stated that he was caring for his sister he would have had ample opportunity to pursue a private life in the UK either at university or at private clubs in this country but he has made the choice not to engage with any of the organisations which would have enabled him to integrate into the gay community in the UK of either sex. Accordingly also the Tribunal should find that there was nothing to suggest that he is or would be perceived as gay on return to Pakistan.
28. With regard to the evidence given by the first appellant, his uncle and the teacher this should be regarded as merely an attempt by the second appellant to create an asylum claim which did not truly exist.

29. In relation to the second appellant, in summary, Mr Melvin submitted that notwithstanding that Judge Callow's finding that he believes he is gay was maintained by the Tribunal the respondent's case was that he was not actually gay and had made no attempt to engage with the gay community. He had not made any attempt because he was not actually gay and had made this claim purely to establish an asylum claim.
30. Mr Melvin then turned to the position of the first appellant and noted that in 2015, a little after her asylum claim, she was being treated for "acute psychiatric episode with mixed existing and depressive disorder" for which she was receiving some medication and fortnightly counselling sessions. During this time she had attended school and there was reference to a headmaster's report in the bundle (that is the bundle before the First-tier Tribunal, which had not been included in the consolidated bundle) from July 2016 in which there was no reference to any medical problems suffered by her and which gave a glowing report of her academic achievements noting that she had obtained A levels and obtained a place at university on her merits. She was currently attending college where she was undertaking a BTEC in accountancy at level 2. That is what she had told the consultant psychiatrist in February of this year.
31. The respondent's submission was that on return to Pakistan the first appellant would be able to receive the same if not commensurate treatment for her medical health problems. Although this might not be exactly the same as the treatment she would be receiving in this country, that is not the test. What the Tribunal should consider when it was considering an Article 3/asylum claim, as made clear in the Court of Appeal decision in *GS (India)* was whether treatment would be available. Even if it would be at a cost, if it was available, then an Article 3 claim could not succeed. There was in the bundle new evidence from a Dr Obuaya, who, in Mr Melvin's words, "generously attended Duncan Lewis on 13 February to complete an assessment". It was unclear from the report how long that assessment had taken, who it was in the presence of or what tests Dr Obuaya had performed with the first appellant in order to reach, in Mr Melvin's words, "what we say is an extraordinary elevation of her medical health problems to conclude that she is a paranoid schizophrenic".
32. The experts who had been treating the first appellant for anxiety and depression over a number of years did not make this finding. The latest psychiatric report was based on what the psychiatrist had been told by the first appellant and there is no reason given as to why he has elevated the previous reports now to a diagnosis of paranoid schizophrenia which is treated differently from the treatment she now receives from the NHS.
33. Mr Melvin asked the Tribunal to note that Dr Obuaya in his report stated that there was currently only a low risk of suicide and that he did not believe that removal would lead to increased stress such as to increase that risk. Dr Obuaya also found that she made good progress provided she was compliant with her medical treatment. Mr Melvin then asked the Tribunal to take account of a recent article in Medical News Today that without family history the chances of a person developing paranoid schizophrenia was less than 1%, although he acknowledged that this article had not been put before the Tribunal.

34. Mr Melvin then asked the court to note that there were family members in Pakistan who could assist the appellants and in particular that the mother had returned to Pakistan and wished her children to return to be with her there. When it was pointed out to Mr Melvin that the evidence before the Tribunal was that the appellants' mother had abandoned her children and wanted them to go back to Pakistan where their father was present (a man who had abused them), Mr Melvin on further consideration, having looked again at the refusal letter, in which it had been stated that the mother wished to return the children to the father, apologised for incorrectly stating the position earlier. Nonetheless, it was not accepted despite the current psychiatric diagnosis that the first appellant was suffering from paranoid schizophrenia. We did not know what tests Dr Obuaya carried out, "only his fee". It was not clear how he had elevated her symptoms from acute anxiety disorder to paranoid schizophrenia.
35. Also, even though Dr Obuaya had accepted that there will be no heightened risk of suicide on return the respondent did not even accept that she had attempted or self-harm at all in the past, as there was no record of any hospitalisation which could corroborate this claim.
36. With regard to the general Article 8 argument on behalf of the appellants, both of them could live with their grandparents, who, although elderly, would provide accommodation. They did not need to rely on them to look after them; they were both young enough to work or attend further college or university in Pakistan. So far as the first appellant was concerned, her anxiety and depression was largely caused by her immigration status and when that was settled the likelihood is that this would alleviate her anxiety and depression. Mr Melvin suggested that even if she lost her appeal, this would "take away the worry about her having to attend court etc.; she would have to accept that she would be returned to her home country". It was the respondent's case that this in itself would make her less anxious, although he accepted that if she won her claim she would be "doubly less anxious, because she would have secured a place in the UK".
37. Accordingly, to summarise the argument with regard to both appellants, with regard to the second appellant, he would not have a problem in Pakistan because he would not be perceived as a gay person and so far as the first appellant was concerned she could return to Pakistan with her brother.
38. Mr Melvin was asked then to make submissions to the Tribunal with regard to the first appellant as to whether or not she would have any claim under Article 8 in the event that the Tribunal was to find that the second appellant, her brother, would be entitled to refugee protection/humanitarian protection on the basis that he would be at risk on return because of his sexuality. In this regard, the respondent did not accept that the first appellant was "fully depending" on her brother - per *Kugathas*. He specifically then stated that "we do not accept the evidence that he sleeps in her room" and so on. He invited the Tribunal not to accept that evidence and to find accordingly that such emotional ties as might exist between the siblings were not sufficient to make removal disproportionate. I noted at this stage during the discussion that Mr Melvin had

chosen not to cross-examine either appellant on their evidence, but he maintained nonetheless that the evidence should not be accepted by the Tribunal.

39. I then heard submissions on behalf of the appellants by Mr Sesay. He reminded the Tribunal that this hearing was on the basis that it was accepted that the first appellant believed he was gay. The test was not whether or not he had actually engaged in any sexual activity but what it was found his position would be on return to Pakistan. He referred specifically to the witness statements of the appellant, to which reference will be made below, and in particular to paragraphs 5 to 11 of the first appellant's most recent witness statement contained within the latest bundle. The primary submission on behalf of the second appellant was that he wished to live a gay life but would not do so within Pakistan because of his fear that he would suffer persecutory treatment if he did and in those circumstances he was entitled to asylum, in reliance on what was said in the House of Lords in the judgments within *HJ (Iran)*.
40. So far as the first appellant was concerned, it was conceded that the evidence of her medical condition was not sufficient to maintain a claim under Article 3, the test for which was a very high one. However, reliance was placed in particular on *MM (Zimbabwe)* [2012] EWCA Civ 279 and in particular to paragraph 23, to which reference will be made below. Essentially, what the Court of Appeal decided in that case is that there can be cases where although the medical treatment is not sufficient to found a case under Article 3, nonetheless taken in conjunction with other evidence of family life and so on it might be sufficient that an applicant can succeed under Article 8. It was accepted that if the Tribunal considered that the second appellant could safely be returned to Pakistan, being realistic the first appellant's case must fail under Article 8. However, if this Tribunal were to find that the second appellant could not safely be returned to Pakistan then the first appellant's position had to be considered on the basis that she would be returning alone to a country where she knew no-one now apart from her very elderly grandparents, where she would lack the support which is currently essential to her within this country from her brother. Not only could it be said that there would be very serious obstacles to her integration into Pakistan but also it would not be proportionate to remove her from the person to whom she is so close and with whom she has such a powerful family life. To sever the relationship with her brother would be disproportionate. In support of her claim to have a meaningful family life with her brother, she relied on *Kugathas*, and *Ghising*, and also (after the case was considered over the adjournment) on the recent Court of Appeal decision in *Rai*.
41. In reply, Mr Melvin submitted first that there was no family life in this country; both appellants had come to the UK aged 14 and 16 respectively on a dependent Tier 1 visa and therefore their immigration position was precarious. They were not financially independent, and may or may not have had a right to medical treatment. With regard to the first appellant's education, she had A levels in maths, English and chemistry, and the principal of Newham Sixth Form College in July 2016, six months after she had begun treatment for mental illness, said that she had high levels of attendance, ambition to study aero-engineering and was highly motivated and looking forward to starting her degree at Kingston University. With regard to the second appellant, he had achieved the highest grades possible in his BTec exams, having gained distinction.

With regard to *Ghising* and *Rai* these were essentially cases concerning Gurkhas and whether entry clearance should be granted to adult family members of Gurkha residents, and had little bearing on whether or not removal in this case would be proportionate. Even if the second appellant won his appeal, if the first appellant went back on her own, the second appellant could support her financially and emotionally “from here”.

42. So far as country guidance on Pakistan was concerned, there was none, but the respondent’s policy was set out within her policy statement, especially at paragraph 3.1.1, which was contained within the files. The respondent accepted that gay men would suffer systematic and societal discrimination amounting to harassment, which might amount to persecutory treatment, but although homosexual conduct was illegal in Pakistan, there was very little evidence of any prosecutions in that country. The Tribunal was invited to have reference to the policy when making its decision.

Discussion

43. I turned first to consider the position of the second appellant. I should at this stage add that although he was not cross-examined by Mr Melvin he was asked very briefly some questions by the Tribunal and in particular whether he had had any sexual experience at all with anybody of either sex, to which he had responded that he had not. His reasons for not having a sexual relationship at all to date was that he does not currently have a sexual life and his focus at the moment is on looking after his sister. The Tribunal also asked him as to how old he was when he thought he was gay to which he replied that he could not remember precisely when it was but it was when he was quite young and it was something he knew about then. He also, again, referred to having been aroused a few years ago when he had been in the park and had seen two men kissing and touching each other.
44. I have regard also to the witness statements which he made and in particular to what is contained at paragraphs 4 to 11 of his most recent witness statement as follows:
- “4. I fear for my life in Pakistan because of my sexuality as a gay person. Pakistan is a very close society where people live in communities and within families. I fear that as an adult returning to Pakistan and unmarried, people will start to feel odd about me.
5. The culture and custom in Pakistan is for adult men to be married and form families. If I return without be seen [sic] with a woman or forming a family or get into a relationship, this would make people think that I am [odd]. I would be put under pressure to explain about why I not getting married or in a relationship. I will be asked a lot of questions frequently and everywhere about why I am not married or getting into a relation. If as is custom, my community provides me with a woman to get into a relationship, I would be forced to lie about who I am. This would make me unhappy. It would make me hide my true feelings and who I am. I am a gay people who wishes to form a relationship with another man when I am settle and able to. I have this opportunity in the UK. I will never have this

opportunity in Pakistan because I will not be tolerated as a gay person. I would be killed for being a gay or living a life as a gay person.

6. Due to the expectation that people in Pakistan will have of me about grown-up men to be married or formed a family, I will not be able to live my life openly as a gay person. I will be hurt by people if I disclose that I am a gay person. In Pakistan people see and consider being gay as a sin and against Islam. I will not be tolerated if my sexuality is known or if I lived openly.
7. I believe and fear that it is impossible for me to live for normal life in Pakistan as a gay person. Pakistan is a deeply homophobic society where the expectation and norm is women and men to be married or live family relationships. It is against the beliefs of Islam for people to be anything other than heterosexual.
8. I live without fear of my sexuality in the United Kingdom. Although I have not formed any relationship with a man in the UK, I have plans to be in a relationship in future. If I am returned to Pakistan, I will not be able to form a relationship with a man. This is because I fear for my life in Pakistan if I am manifested my sexuality.
9. When I was in Pakistan, I hid my sexuality. I also suppressed my inner feeling solely because I would not dare to say or disclose who I was. I feared that I will be killed for being gay. I did not know anything about gay communities in Pakistan. Even if there are, I could not venture to be part of the gay community because I will put my life in real danger by being part of a group that everyone including the government is anti-Islam and sinful.
10. I am aware that gay people as considered to be weird in Pakistan. Gay people are said to require treatment because they are widely believed to have something wrong with them. Pakistan is an Islamic and very theocratic state. Homosexuality is deeply believed to be a sin and crime against Islam. I was brought up in the Pakistani culture and Islam. I heard all too often preaching's against homosexuality. I was told that homosexuality is the greatest evil against Islam. A lot of people have this strong belief.
11. I do not think that going to live in another part of Pakistan is a solution for me. This is because, the whole Pakistani society have the same attitude. The attitude is hostility to homosexuality. As a result of this, I will make hide my sexuality because of fear that I will be killed. If I hide my sexuality, I will not be able to form any relationships. If my sexuality is known, this would be fatal to my existence. If I am returned to Pakistan, hiding my sexuality will not be an option as I can only do that so far and people will begin to question me. Even I were to go elsewhere within Pakistan and live openly as a gay, I am certain to be killed by the community around me. I say that because everyone shares the same homophobic hate and hostility towards gay people".

45. Then at paragraphs 12 and 13 the appellant continued as follows:

- “12. As I am growing older, my sexuality is growing too. I have since the last appeal hearing in the first Tribunal joined and attended a LGBT club. The reason I did that is because I wanted to create an opportunity to meet someone. However, I did not like my first experience in the club. I observed that although people there were friendly and welcoming, all I saw was a sense of sadness in them. Maybe it a different culture to that I am use to in Pakistan. My happiness is being with family, forming a relationship and hanging out together. I am able to do this in the United Kingdom with time. I will not be able to do this in Pakistan.
13. I also did not continue to visit the gay club because of my sister Talia. I look after and help Talia as much as I could. I am very protective of Talia. She is my sister and vulnerable because of her condition. My bond with Talia is a particularly strong one because of her vulnerability”.
46. Having regard to the second appellant’s evidence, which, as noted, although this Tribunal was invited in many respects not to rely upon, nonetheless was not challenged in cross-examination during this hearing, I refer to the respondent’s Country Information and Guidance on Pakistan with regard to sexual orientation and gender identity dated 2016, where, at paragraph 3.1.1, it is stated as follows:
- “3.1.1 Although same sex sexual acts per se are criminalised in Pakistan, in practice the authorities rarely prosecute cases and in general gay men, lesbians and transgender people are not at real risk of prosecution.
- 3.1.2 There is widespread and systematic state and societal discrimination against LGBT persons in Pakistan, including harassment and violence. This treatment may, in individual cases, amount to persecution or a risk of serious harm. No effective protection is provided by the authorities.
- 3.1.3 Some LGBT persons do however enjoy a degree of openness within their immediate social and/or family circles provided they live discreetly and their sexual orientation does not become known outside of these close circles. Most LGBT do not live openly as LGBT due to the social stigma attached. Each case must therefore be considered on its individual facts.
- 3.1.3 Gay rights activists and other individuals who openly campaign for gay rights in Pakistan are likely to be at real risk of persecution or serious harm from non-state societal actors. They would not be able to seek or obtain effective protection from the authorities or internally relocate to escape any such threat. They are therefore likely to qualify for a grant of asylum”.
47. I have considered the second appellant’s case carefully having regard both to the background evidence contained within the respondent’s own country information just cited and also the second appellant’s own evidence, which was not challenged in cross-examination. It is accepted, as already noted, that the second appellant’s belief that he is gay is a genuine one. It is not in these circumstances open to the respondent to suggest that this “belief” is not a genuine one but is expressed merely for the sake of advancing an asylum claim which otherwise would be likely to fail. That argument

has already been considered and Judge Callow's decision that the belief is genuine was a finding open to him and there is no reason for that finding now to be displaced. I have already expressed the Tribunal's concern at the conclusion that Judge Callow then drew that because the second appellant was honest enough to state that he had not actually had any gay relationship the Tribunal could discount his claim to be gay. I have in mind of course that the test in asylum/humanitarian protection claims is not whether or not on the balance of probabilities an applicant has proved that he is gay but whether or not on the evidence I consider he or she would be "at risk" on return. This is sometimes referred to as the lower standard of proof. I would go further than the lower standard of proof in this case, because I am satisfied on the evidence before me, which, as I have stated, has not been challenged by cross-examination as it should have been were it to be contested, that the second appellant has established that his sexuality is indeed a gay one. His answer to the question from the Tribunal that he has known from a relatively young age that he was gay is consistent with learning on this topic, which has been considered by many Tribunals, and I also do not regard the appellant's honesty in stating that he has had no sexual experience to date as material which could lead a Tribunal somehow to disregard the appellant's evidence as to his own sexuality. He has not had any heterosexual relationships or experience either, but it is not suggested on behalf of the respondent that therefore the court should somehow discount that he is heterosexual. He has given evidence as to why he has not yet embarked on an active sexual life, which is essentially that his focus at present is looking after his sister, and there is no reason in my judgment why the Tribunal should not accept that that is indeed the case.

48. The Home Office in its Country Information and Guidance regarding homosexual people in Pakistan have noted, as set out above, that gay people in Pakistan will suffer widespread and systematic state and societal discrimination, which will include harassment and violence, which may give rise to persecution or a risk of serious harm and that no effective protection is provided by the authorities. Although some gay people are able "within their immediate social and/or family circles" to live as homosexual people that is only so if they "live discreetly and their sexual orientation does not become known outside of these close circles". What the second appellant has stated in his evidence, which in the absence of cross-examination I accept as honest and genuine, is that if he is returned to Pakistan "I will not be able to form a relationship with a man ... because I fear for my life in Pakistan if I am manifested my sexuality". In other words, the reason why he will not live openly as a homosexual is because of his fear of persecution, and, following the guidance given in *HJ (Iran)*, he is accordingly entitled to refugee status in this country. He belongs to a social group, namely male homosexual people, who do face a risk of persecution in Pakistan; although he would live discreetly that is only because of fear of such persecution.
49. It follows that his claim for asylum must succeed and I will so find.

First Appellant

50. I accordingly now turn to consider the case of the first appellant on the basis that if she is returned it would be on her own, without her brother, because her brother is entitled

to protection in this country. It is accepted on her behalf that the evidence advanced on her behalf is not such that she would be entitled to protection under Article 3, and so the sole issue is whether or not her return would be in breach of her Article 8 rights.

51. I turn first of all to the Rules and in particular to paragraph 276ADE(1), which sets out the “Requirements to be met by an applicant for leave to remain on the grounds of private life”. The issue is whether or not she is entitled to remain under paragraph 276ADE(1)(vi), which provides as follows:

“276ADE(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the time of application, the applicant:

...

- (vi) ... is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s integration into the country to which he [or she] would have to go if required to leave the UK”.

52. Accordingly the first question I have to ask myself (before considering whether in any event the removal of the applicant would be disproportionate under Article 8 outside the Rules) is whether or not there would be “very significant obstacles” to the first appellant’s re-integration into Pakistan.

53. In my judgment, there would be. Before considering this I have in mind what is said at paragraph 23 of *MM (Zimbabwe)* referred to above, in which it was stated as follows:

“23. The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish ‘private life’ under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported”.

54. *MM (Zimbabwe)* was of course a deportation case but what is made clear in that decision is that the fact that an applicant is not entitled to relief under Article 3 does not mean that evidence regarding an applicant’s medical condition and the treatment he or she receives is to be discounted for the purposes of Article 8.

55. What is said at paragraph 23 of *MM (Zimbabwe)* will be relevant to my consideration of whether or not in any event the first appellant would be entitled to remain under Article 8 outside the Rules.

56. In my judgment, the first appellant would very likely (again, beyond the balance of probabilities) face very serious obstacles indeed were she to be returned to Pakistan. I have in mind in particular the evidence given by both of them (again, evidence which Mr Melvin chose not to test under cross-examination) that the relationship and bonds between the brother and sister in this case are very strong indeed. I note in particular what is said by the first appellant at paragraphs 5 to 11 of her most recent statement (contained in the bundle served on 20 March) as follows:

- “5. Due to mental health, even in the UK, I could not go out alone. I am very scared of being alone and of strangers. I often hear voices telling me things. I also see strangers as people against me. I am very scared of them. This is why I can’t go out alone. I have been fortunate to have my brother, Muhammad around me all the time.
6. When I go out when I am able to, I have to be in the company of Muhammad. He is my rock. He is my life support. Muhammad protects me from strangers and people I see are hostile to me. I often hear voices telling me that bad people are coming for me. This scares me and keeps away. Muhammad is always around me to make me feel secure.
7. Muhammad is my best friend. I trust him. He looks after me very well and understands my condition completely. When my health is bad, he is always around to help me with my medication, food and, moving round the house. When I am not well and my health deteriorates, it is Muhammad that looks after me. He makes food for me. He controls my medication and ensures that I take the correct dosage. Without his involvement, I will overdose myself and risk death as I have done previously.
8. When I feel well, I go to college with Muhammad. Due to my condition, Muhammad is enrolled in the same college and programme with me. He steps in frequently when people are not nice to me. These people often think that I am anti-social or weird. This upset me. I am different because of my mental health. I would like to mingle with people but I am scared of strangers. The voices control me often.
9. At college, I am considered to be anti-social and withdrawn from people. This is not the case. It is my condition that makes me that way. I am also very scared of other people. It is something that I could not help. Muhammad is always around to help and support me.
10. I also see people standing outside the window at home often. This keeps me away. Muhammad is always around telling me that he is awake and watching that no-one comes around to me. He is always ready to listen to me. He believes in me and what I say. Muhammad does not judge me. His support and assistance to me is life or death for me.
11. I sincerely say that without Muhammad, I will not be able to function and enjoy any form of life in the United Kingdom. I am inseparable from him. I believe that without Muhammad, my relapses would be often and lasting”.

57. I refer again to the statement of the second appellant, in the context of what he says about his relationship with his sister, from paragraph 14 onwards:

- “14. I am the first port of call for Talia. When she is bad as in her mental health deteriorating, I look after her. Talia takes regular medication. She is often bad. I am always there for her making sure that she is safe, looked after and cared for. I ensure that Talia takes the right medication. She previously overdosed herself when she is ill; she takes any medication without regard to dosage. I ensure that I control her medication. When Talia is ill, I accompany her to the hospital. I also often accompany her to see her support services.
15. When Talia is better, I am also with her. I attend the same college with her. I am also in the same course she [is in]. This is because she constantly needs my support. I regularly intervene on her behalf when people try to question her behaviour including teachers. I am there to explain her condition which results in better understanding and interaction with Talia.
16. When Talia goes out, I also go out with her. Our lives are intertwined. Talia is often scared of people. She thinks that people are always looking at her and oddly. This is not the case but this perception. In her own eyes, this is what she believes or what the voices tell her. When people don't understand her, I step in and explain her situation. I protect Talia always. She feels safe and assured by my presence. Talia is my best friend. She also considers me her best friend. Talia is so attached to me that I am inseparable from her. This has always been the case and more now due to her medical condition.
17. At home, I guide Talia and am an instant source of help. I observe the reality of living and being with Talia always. Her condition is challenging and it is life or death situation for her. Sometimes, she has difficulty negotiating stairs. I help her go down the stairs and get back upstairs. Due to Talia's fear of being alone and of seeing people watching, I stand outside even when she uses the ladies. I prepare food for Talia and ensure that she has food on the table at the right times. This is very important for Talia due to her medication. My uncle assists as much as he can when he is home. This is the only time that I have a break. I am the primary source of support for Talia. Talia trusts me and she relies on my support. She is aware and understands that I don't judge her.
18. I share the same room with Talia. We have separate beds. Talia is afraid of being alone. She hears voices and sees people from the window. This keeps her from sleeping. I wake up frequently when she can't sleep because of the voices that she is seeing or the people she believes are standing over the window watching her. I assure her that there is no-one watching her and that I am around to protect her. I say to her not to worry that I am awake watching her sleep so that no-one comes to her. This reassures Talia and makes her sleep. Talia suffers frequently from panic attacks. I am always around to help her. If it is bad that I could not manage, I have an emergency

number to call. This was given to me by her support services. I am very happy and proud to do this for my sister, my confidante and trusted friend.

19. I am known to Talia's support services. I accompany her often to her appointments. I do this because of her fear of being alone. Talia always tells me that she is always seeing people as being hostile to her. She hears voices telling her to do something. I fear that if she is alone, she will do something that will hurt her or hurt other people. With me around her, she is always assured and given the support that she requires.
20. As much as I worry about my life in Pakistan, I am equally worried about Talia. I worry about how she would cope if she is returned to Pakistan. I worry because there is no-one to help Talia in Pakistan. If she relapses, there would be no-one to help her. If Talia falls in the street or at home at our grandparent, I fear that she would be considered to be possessed by demons. She would be locked up by the authorities".

58. In his witness statement, the uncle of the appellants stated with regard to the relationship between the first and second appellants as follows:

- "3. I confirm that Muhammad and Talia live at the above address with me. Because I am often not home due to work, Muhammad looks after and takes care of Talia. Without Muhammad, I believe that Talia would be in a worse situation than she is now. I consider Muhammad's help to Talia very significant and invaluable. I am not sure if Talia has any life without Muhammad.
4. I am aware that Talia has a fear of being alone and of strangers. Muhammad stays home with her at all times. He goes to college with Talia and they are in the same class and course. When Talia is poorly and her health deteriorates, it is Muhammad who assist her with food, going up and down the stairs at home, and standing outside the bathroom which is the only time that she is alone. However, the assurance that Muhammad is outside looking for the people Talia believes are after her. Muhammad's presence reassures Talia. I believe also that this helps her not to act on what the voices tell her.
5. I am not able to accompany Talia to college or when she is out for her appointments. Muhammad does that. The two are inseparable and have a very tight bond. This has been the case since they were in Pakistan. However, the depth of Talia's dependency on Muhammad increased tremendously due to Talia's illness".

59. Although I place little weight on this, I also observed during the hearing that even when there was a discussion in which they were not involved, the second appellant throughout the hearing appeared extremely solicitous of his sister's wellbeing. Certainly, there was nothing in the behaviour of either of them during the hearing to cause me to doubt that the evidence which has been consistent throughout as to the very deep bond between brother and sister is genuine and true.

60. I doubt whether Mr Melvin would have been able to challenge effectively this evidence in cross-examination but, as there was no cross-examination at all, there is no basis upon which I could properly find that the evidence which the appellants have given as to the dependence that the first appellant has on her brother is not genuine. Although some of their fears might not in the event prove to be well-founded, it is clear that the relationship between them goes so far beyond what might be considered to be the “normal emotional relationship” between adult siblings as clearly to amount to family life. I am entirely satisfied that Article 8(1) of the ECHR is engaged in this case by reason of the family life which these appellants enjoy together.
61. As I have already stated, I believe that there would be very significant obstacles facing the first appellant were she to be returned on her own to Pakistan. Her grandparents are elderly, her main support would have been taken away from her and it is very likely indeed that she would face considerable difficulties in Pakistan.
62. However, even were I not so satisfied, I would also be entirely satisfied that this was one of those rare cases where the circumstances of the first appellant are so compelling that exceptionally she ought to be granted permission to remain under Article 8 outside the Rules. Of course I have to have regard to what is set out within paragraph 117B of the Nationality, Immigration and Asylum Act 2002, inserted by Section 19 of the Immigration Act 2014 with effect from 28 July 2014 onwards, which is as follows:

“117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,that is established by a person at a time when the person is in the United Kingdom unlawfully.

- (5) Little weight should be given to a private life established by a person at a time when that person's immigration status is precarious.

...".

63. If an applicant satisfies subparagraphs (2) and (3), that is that they can speak English or are financially independent, neither of these are positive reasons sufficient to displace the public interest in maintaining effective immigration control; rather, the fact that somebody does not speak English properly or is not financially independent might be a negative factor. However, in this case both appellants do speak English, and although they cannot be said to be necessarily financially independent, neither are they in receipt of any public benefits, because they are being maintained by their uncle, and so neither of these factors are of any significance in this case. The appellants are both here lawfully, and so I do not have to consider (4). With regard to (5), although the immigration status of both these appellants were precarious, I am not concerned with the "private life" established by the first appellant but to the disruption to her family life which she has with her brother (as I have found), which is intense and upon which she depends, and I have to consider whether the disruption to that family life is proportionate. I have in mind also that this case is unusual because both of these appellants were effectively abandoned by their mother at a young age in really quite ghastly circumstances such that their mutual dependence was entirely understandable and might well have been very deep even had the first appellant not been ill.
64. This is a case where for a number of years now both appellants have focused their lives on each other. I am satisfied that it is certainly much more likely than not that at least one of the reasons why the second appellant has not yet taken the very large step of establishing an independent sexual life is because of his concern for his sister. Equally I am satisfied that the first appellant depends for her emotional support almost entirely on her brother. In the circumstances of this case, I would regard the removal of the first appellant from the UK in circumstances where her brother, for reasons I have given, has a right to remain, as wholly disproportionate, and that the disruption to her family life in these circumstances outweighs the public interest in enforcing effective immigration control (which is of course an important and weighty public interest) by a very wide margin.
65. It follows that I am entirely satisfied that the first appellant's appeal should also be allowed, under Article 8.
66. My decisions are accordingly as follows:

Decision

I set aside the decision of First-tier Tribunal Judge Callow as containing a material error of law and remake the decisions as follows:

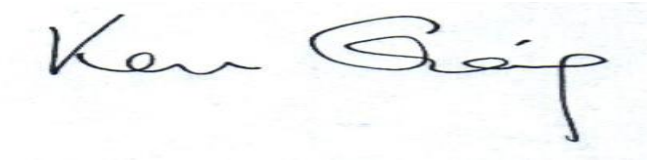
The second appellant's appeal is allowed, on asylum grounds.

The first appellant's appeal is allowed, on human rights grounds, Article 8.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:



Upper Tribunal Judge Craig

Date: 30 April 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable.

Signed:



Upper Tribunal Judge Craig

Date: 30 April 2018