Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07668/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 February 2018	**On 11 May 2018**

Before

THE HONOURABLE MR JUSTICE NICKLIN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

SNA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jones, Counsel instructed by Connaughts
For the Respondent: Mr Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is an unusual case. The appellant is a national of Pakistan born in September 1983. The Secretary of State refused his claim for asylum on 31 July 2017. The basis of that claim was that he had a well-founded fear of persecution in Pakistan on the basis of his membership of a particular social group, i.e. a gay man from Pakistan. It is not necessary for us to go into the details for the refusal. The appellant sought to appeal that decision. The appeal came before First-tier Tribunal Judge Anstis on 11 September 2017 and the decision was promulgated on 19 September 2017. It was part of this appellant's case that he had been in a relationship with a BLQ for a period

of over two years and that that was clear proof that he was gay and that therefore he had a well-founded fear of persecution if he were to be returned to Pakistan.

2. The Judge heard the evidence. He did not hear from BLQ, and we will come back to that in due course, but the conclusion of the judge was that he did not accept that the appellant was gay. In paragraph 40, the Judge said

> "I have come to the conclusion that the Appellant has not shown, to the lower standard of proof, that he is gay and therefore at risk of persecution on a return to Pakistan. This is because of a combination of the following factors:
>
> (i) The lack of any substantial documentary evidence in relation to his sexual orientation (including his relationship with Henry or [BLQ]) prior to late 2016 (around the time his asylum claim was lodged)…
>
> (iii) The lack of any evidence from [BLQ], or an explanation for the lack of that evidence."

The fourth factor was evidence given by the appellant's brother and the judge treated that evidence some scepticism. On that basis the appeal was dismissed.

3. Ordinarily, an appellant would face an uphill challenge to the findings of fact made by a Tribunal Judge on the basis of the evidence that he had heard. This was an unusual case and here is why. After the hearing in the appellant's case, the very next day, on 12 September 2017, before Tribunal Judge Aziz, BLQ appealed the decision of the Secretary of State refusing his asylum claim. We are told that the two, BLQ and this appellant, made their applications for asylum together on the same basis: that they were gay. That point was not picked up, or it certainly was not picked up by the Tribunal. BLQ's asylum claim was refused by the Secretary of State on 4 August 2017 and BLQ lodged his notice of appeal on 14 August 2017. It was part of his case that he had a well-founded fear of persecution were he to be returned to Pakistan because he was gay and that he relied upon his relationship with this appellant.

4. BLQ relied on his relationship with the appellant in his case. Tribunal Judge Aziz, who allowed the appeal and quashed the decision of the Secretary of State refusing his asylum claim, was satisfied that BLQ did have a well-founded fear of persecution because he was gay. In paragraph 69(4) of his decision the Judge was satisfied that, since his arrival in the United Kingdom, BLQ had had a number of homosexual relationships:

> "They have included a relationship with a man called Adam which lasted nine months. He was also in a four-year relationship with an Australian man called Steven. His last relationship was a man called SNA between March 2015 and April 2017."

Those dates tally with the dates recorded in Judge Anstis's decision of the relationship with BLQ alleged by the appellant.

5. A strange aspect of this case is that the two appellants had the same solicitors and counsel. I have been told that the relationship between BLQ and the appellant was not good and that they were not co-operating in relation to each other's asylum claim or appeal. Nevertheless, it should have been obvious to the solicitors that there was a risk of inconsistent decisions if the claims were not heard together because central to both of the appeals was the relationship between BLQ and this appellant. The Tribunal should have been alerted to the connection between the two cases even if the appellants in each case were not co-operating with one another. It is clear that BLQ relied on other evidence, but it was unwise to have two separate Tribunals assessing essentially the same question and, as it turns out, reaching different conclusions. Miss Jones who has appeared for the appellant today has given us a perfectly acceptable explanation. She, as a busy immigration barrister, was instructed in relation to both of these claims, but it had not become clear to her when preparing for this appellant's claim, that BLQ was the very person who was himself going to advance a similar claim in his own case. Although in hindsight the solicitors should probably have given more thought to this and taken action to avoid the situation we are now in, we are where we are.

6. We are quite satisfied what result must be achieved today. It is simply not right that two different Tribunals can reach two different conclusions as a matter of fact on the same point, particularly where that point would be highly material if not determinative in this appellant's appeal. I accept that lawyers – applying the law of evidence in an adversarial system - can rationalise and justify two contradictory Tribunal decisions on the same factual issue. That is to look at matters through the eyes of a lawyer. Against that there is the view of the person in the street who might find it difficult to accept how such decisions could stand together. We have been referred to the case of ***AA Somalia and AH Iran*** **[2007] EWCA Civ 1040**. In that case, the Court of Appeal reviewed the relevant authorities and Lord Justice Ward said this:

> [73] This appeal raises an interesting and, as far as I am concerned, a troublesome problem. Take the hypothetical example I put in argument. There is a meeting of political dissidents in Ruristan at which A and B are present. The security police raid the meeting. A and B dive out of a window and flee to England where they claim asylum. The other dissidents are rounded up and summarily executed by the police. Immigration judge X hears A and B give evidence, believes them, and grants A asylum. Immigration judge Y, who has X's decision before him, hears A and B give exactly the same evidence, but disbelieves them and refuses B asylum. Can that be right?
>
> [74] I have no doubt that the man in the street would answer, '*Of course it cannot be right. Either X or Y has got it wrong. Both cannot be right. Justice has not been done.*' The logic is unassailable. On the other hand, the lawyer would reply, '*There is no estoppel and the important principle of judicial independence demands that each judge try every case on the evidence before him or her.*'

> [75] It seems to me, after careful reflection, that the apparent conflict between those two positions is met within the ***Devaseelan*** principles to which my Lords have referred and that they should be held to apply in a case such as this.
>
> [76] The guidelines, as such, were approved by this Court in ***LD (Algeria)*** **[2004] EWCA Civ 804**, with the emphasis on the flexibility of the approach. They were then extended by this Court in ***Ocampo -v- SSHD*** **[2006] EWCA 1276** to apply to a case where there is '*a material overlap of evidence*', the guidelines to be adapted as might be needed '*according to the nature of the new evidence, the circumstances in which it was given or not given in the earlier proceedings and its materiality to securing a just outcome in the second appeal along with the consistency in the maintenance of firm immigration control*'."

7. For reasons we will explain, it is relevant that the Secretary of State has not sought to appeal the decision of First-tier Tribunal Judge Aziz in BLQ's case. We accept Mr Wilding's submission that the absence of an appeal is not necessarily the same as an acceptance of the factual determinations. It is well-known that the avenues of appeal from the First-tier Tribunal are fairly limited and the Secretary of State would need to show an error of law. In light of that, it was perfectly open to the Secretary of State to decide not to appeal the decision on the basis that it was based upon factual findings of the Tribunal after hearing evidence. In our judgment, the relevance of the fact that BLQ's decision has not been challenged is this. There are two decisions of different First-tier Tribunal Judges that make findings of fact that are inconsistent with each other. The position is not quite the same as the circumstances outlined by Lord Justice Ward because neither BLQ nor the appellant gave evidence in the other's appeal, so the evidence before each Judge was not the same. Nevertheless, the fundamental principle seems to us to be that, if a single Judge had heard both appeals at the same time, s/he would have had to make a single finding as to whether the appellant and BLQ had been in a relationship for some 2 years. If a relationship was found to have existed then, barring some very unusual circumstances, that would have led to the conclusion that both were gay. As things stand, in my judgment we are left with two irreconcilable decisions on matters of fact. The question therefore is what to do about it.

8. In fairness, Mr Wilding has, as he is required to do, pointed to the potential difficulties in the path of allowing an appeal. Principally, he says that there is no error of law in the decision of Judge Anstis. He says that this appellant cannot impeach the decision based upon the Judge's assessment of the evidence. Those submissions would, for the reasons we have already given, have some force. But we are not in the position of studying Judge Anstis' judgment in isolation.

9. It appears to us there are two bases on which it is appropriate to allow the appeal in this case and to remit the matter for rehearing. The first is that we consider that procedural unfairness has arisen as a result of these two claims not being heard together. We are not in a position to attribute blame as to why this has happened. In an immigration case, where anxious consideration is being given to asylum rights, unless the court were driven to the conclusion that there had been a calculated

decision by an appellant to try and overreach the process, no Tribunal would put the blame at the foot of the asylum seeker. We do not find it necessary to attribute blame in this case. We are where we are, but the reality is that it now appears, and it has become clear, that there has been a procedural irregularity. These claims should have been heard together. They should have been considered by one judge that had all of the evidence and the findings of fact would then been binding on all parties. That has not happened. The two Tribunals have come to different decisions. In our judgment it is plain that this situation cannot stand. There is no question - because there has been no appeal against it – that the decision in BLQ's case is going to stand. That means that it is this decision that will have to be reconsidered. We are satisfied that there has been an error of law arising from the procedural unfairness of these irreconcilable decisions.

10. If we were wrong about that, the second basis on which we would allow the appeal and remit the matter for reconsideration would be on the ground of fresh evidence. The evidence relating to the decision in BLQ's case can be admitted on this appeal under the Tribunal's power in Rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This provides that the Upper Tribunal may:-

    (a) admit evidence whether or not:-

        (i) the evidence would be admissible in a civil trial in the United Kingdom; or

        (ii) the evidence that was available to a previous decision maker…

11. Had First-tier Tribunal Judge Anstis had available the findings of Judge Aziz, his decision may have been influenced by them, particularly in light of his findings about the credibility SNA. The evidence may have had a material impact on his decision and, viewed that way, the decision is unsafe and that there has been therefore an error of law. Put another way, evidence has now become available to the appellant that would have been potentially material to the decision made by the First-tier Tribunal Judge and fairness requires that this fresh evidence be considered at a re-hearing.

12. In our judgement there is no absolutely no doubt as to what the answer should be and that is that the decision of Judge Anstis should be set aside and the matter remitted for a rehearing. Borrowing from Lord Justice Ward's judgment, we think it is more important that the court system commands respect in the eyes of the public generally than to a limited circle of lawyers who can see good legal reasons why irreconcilable decisions on the facts should be allowed to stand. In the context of asylum claims, any doubt about this should be resolved in favour of the person claiming asylum.

13. What happens next is a matter that will require some thought. It is true that the decision in BLQ's case is not binding on any Tribunal that were to rehear this matter. Having said that, all we can do is leave it to the best judgment of the First-tier Tribunal Judge that hears the case. It may very well be that, when this matter is reheard, BLQ will give evidence in support of SNA's appeal. We do not know. Whatever happens, in our view, however, the Secretary of State should give separate

and fresh consideration to the conclusions of First-tier Tribunal Judge Aziz in BLQ's case and their impact on SNA's claim for asylum, particularly in light of the fact that she is not challenging the findings in BLQ's case. We have not reached a concluded view about this, but there might be fairness arguments were the Secretary of State to advance a positive case at the rehearing of SNA's appeal that BLQ and SNA were not in a relationship for some 2 years. We are quite sure, however, that the Secretary of State would have carried out a review of SNA's case in any event now that the decision in BLQ's case has been drawn to her attention because she will be as astute as the Tribunal to ensure that anxious consideration is given claims for asylum based on an alleged well-founded fear of persecution.

14. For these reasons the appeal is allowed.

Notice of Decision

(1) The decision of the First-tier Tribunal is set aside.

(2) The matter is remitted for a rehearing by a judge of the First-tier Tribunal other that Judge Aziz .

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

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

Signed:  **Date:** 27 February 2018

Mr Justice Nicklin