



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03707/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9 August 2018

Determination Promulgated  
On 14 August 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MUHAMMAD ISHTIAQ  
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms N Ahmad of Counsel, instructed by Buckingham Legal Associates

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant challenges the decision of First-tier Tribunal Judge C H Bennett to dismiss his asylum appeal. He is a Pakistani national born on 22 November 1985 who entered the UK as a student on 22 April 2011. Thereafter his leave was curtailed, a further application for Tier 4 leave was refused and when served with papers as an overstayer, he claimed asylum.

2. The appellant's case is that he is gay and feared harm from his own family if he returned. Additionally, he would be unable to live freely as a gay man and would be at risk from the community and the authorities because homosexuality was against the law.
3. The judge did not accept the claim and dismissed the appeal in an extraordinarily lengthy determination promulgated on 15 May 2018.
4. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 5 June 2018.
5. **The Hearing**
6. I heard submissions from the parties at the hearing before me on 9 August 2018. The appellant was present.
7. Ms Ahmad submitted that the judge had been confused over the evidence of the appellant's witness, HH, who had said that he had seen the appellant engaging in gay sexual activities in the dark room of the XXL Club. This oral evidence is confirmed by the contemporaneous notes of the Home Office presenting officer and Ms Jones of Counsel who represented the appellant at the hearing before the First-tier Tribunal. Regrettably, the judge's own record of proceedings is largely illegible. The appellant himself had also given evidence to this effect but the judge found that he had not claimed to have engaged in such activities at Club Kali where HH worked as a drag queen and that this therefore showed that HH was an unreliable witness. Ms Ahmad submitted that the judge's confusion with the two clubs undermined his finding that the appellant and HH had given contradictory evidence. Further, the judge's rejection of the claim that dark rooms existed and his lengthy analysis of the criminal law on brothels was undermined by the independent documentary evidence that the XXL Club did indeed have such rooms.
8. The second argument centred on the judge's rejection of the evidence of another witness, WA, seemingly because he was not employed in a professional capacity. Ms Ahmad submitted that it was wrong to judge a witness on his profession.
9. The third complaint was the judge's finding that the appellant need not have disclosed his sexuality to his family in order to avoid the marriage they were arranging between him and his first cousin. The judge suggested that the appellant could instead have told his family that first cousin marriages resulted in congenital birth defects. It was argued that it was not for the judge to speculate on what the appellant could or should have told his family and that

this finding did not take account of the strong cultural norm of cousin marriage in Pakistan even amongst the educated elite.

10. In reply Mr Walker conceded that the judge had confused the two clubs but submitted that this was not a material error as the judge had made a finding that the appellant had not been active in either of the two clubs. He agreed that the phrasing with regard to the evidence of WA was unfortunate but submitted that findings were made on the other evidence and that the appellant's claim of being gay was not accepted.
11. Ms Ahmad maintained that the errors were material as the judge's confusion and rejection of the dark room had led to his finding that the appellant and HH had given untruthful evidence.
12. That completed the submissions. At the conclusion of the hearing I formally reserved my determination but indicated that I would be setting aside the determination in its entirety. I now give my reasons for doing so.

### **Discussion and Findings**

13. Three points are made by the appellant. In considering whether the judge erred in the manner claimed, I have considered his determination and the evidence.
14. It is plain that the judge was wrong in his understanding of the evidence regarding the two clubs. It was the XXL Club that had the dark room not Club Kali and the relevance of this is that the judge used a factual error to reject the evidence of the appellant and HH. He was also wrong to reject the claim of a dark room as the documentary evidence shows that the club did indeed have such a facility. The judge's own discussion of brothels and of associated law was unnecessary given that such objections had not been raised by the respondent.
15. The judge's treatment of WA's evidence is unacceptable. Whether or not a witness holds a professional position should not impact upon the evidence given. It may be that the judge used unfortunate phraseology as Mr Walker suggested but I cannot see any other sustainable reasons given for the rejection of his testimony.
16. That leaves the final argument. The judge was apparently aware of the prevalence of cousin marriage in Pakistan as he refers to this in his determination. In that context it is difficult to understand how he expected the appellant to raise issues of congenital birth defects arising from such marriages as an excuse to avoid being married to his cousin. Even if that were to have

accepted by his parents, which is unlikely given the norm, it would only have delayed the inevitable arrangement of another marriage partner.

17. For these reasons I am unable to uphold the judge's decision which I find is unsafe and unsustainable. It is set aside in its entirety and shall be re-made after a fresh hearing. No findings are preserved.

**Directions**

18. All further documentary evidence shall be served and filed no later than five working days prior to the hearing. This shall include full statements of evidence from all witnesses.

**Decision**

19. The First-tier Tribunal made a material error of law which necessitates the setting aside of the decision. The appeal shall be re-heard by another judge of the First-tier Tribunal and the decision shall be re-made.

20. **Anonymity**

21. I continue the anonymity order made by the First-tier Tribunal.

Signed

A handwritten signature in black ink, appearing to read 'R. Keir' with a small dot at the end.

Upper Tribunal Judge

Date: 9 August 2018