



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

Appeal Number: AA/04808/2013

THE IMMIGRATION ACTS

Heard at Field House

On 13th May 2014

Determination

Promulgated

On 2nd July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

**MR AHMED ALI
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pretzel, Counsel instructed by Harris Ali Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

**DETERMINATION AND REASONS
EX TEMPORE JUDGMENT**

1. The Appellant appeals the decision of First-tier Tribunal Judge Morgan by which in a determination promulgated on 13th September 2013 he dismissed the Appellant's appeal against the Secretary of State's decision of 9th May 2013 to refuse him asylum on the grounds of his homosexuality and to remove him to Pakistan.

2. The First-tier Tribunal Judge found that the Appellant although homosexual and being returned to a country where homosexuals are persecuted would live discreetly to avoid societal pressure rather than persecution and so in any event avoid any real risk of persecution.
3. Permission to appeal was sought on the basis that there was evidence before the First-tier Tribunal Judge that the Appellant would live discreetly in Pakistan because of his fear of persecution, and that the Judge had failed to take the evidence into account. The grounds refer specifically to the evidence of the Appellant's witness statement at paragraphs 18, 20, 23, 27 and 28. Upper Tribunal Judge King, on assessing the grounds, found that it was arguable that the judge had overlooked that evidence and identified as being problematic in that regard, paragraphs 17 and 18 of the First-tier Tribunal Judge's determination.
4. I have had regard to the decision and the evidence. I find that the judge has failed to explain how he has treated the evidence of the reasons for discretion and how, in the light of that evidence, the questions posed in the context of the case **HJ (Iran)** are answered. The evidence goes to the very core of the issues to be decided, I am satisfied that the omissions in reasoning must be characterised as material so that it requires that the decision be set aside.
5. The parties' representatives were both in agreement today that in the event of my making such a finding I am in a position to remake the decision without hearing further evidence.
6. Mr Nath submits that the Appellant would be able to live discreetly in Pakistan as a homosexual as he does here and refers me to paragraphs 18 to 22 of the reasons for refusal letter of May 2013 and submits that the contents of those paragraphs, which includes anecdotal evidence of a gay journalist who describes little difficulty in living as a homosexual in Lahore, a city in Pakistan, so long as discretion is observed. However, I find that the position of this Appellant is somewhat different. The Appellant's witness statement evidence is to the point that he has made efforts to conceal his sexuality amongst the Pakistani community here in order to avoid upsetting social mores and to avoid ostracism. Mr Nath says that that is evidence that would be his chosen position untrammelled by issues of persecution. However, that is only part of the picture. The unchallenged witness statement particularised in the grounds at 18, 24, 26, 27 and 28 is that the Appellant in other contexts is an openly gay man who has been a practising homosexual for many years, and who, in his words has "obvious homosexual mannerisms", and who is actively engaged in the gay scene in the United Kingdom. In effect he has compartmentalised his life here. I am satisfied on the basis of his unchallenged witness evidence that, all things being equal, he would continue to act openly and engage with the gay scene as he does here, i.e. with a public context, but that on a return to Pakistan he would not do so because of his fear that the risks of persecution if he were "caught" are too high, including a possible risk to his life.

7. I am satisfied that the country background evidence set out in the Appellant's bundle including from the COI Report of 2013 shows that there is objective evidence which supports the Appellant's subjective fears.

8. I have considered the case of **HJ (Iran)** and found particularly instructive paragraph 82 which in its latter part guides me as follows:

"If, on the other hand, the Tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution."

9. I also note paragraph 62 of the judgment which in its last part states:

"It follows that the question can be further refined: is an applicant to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, in addition to any other reasons for behaving discreetly, he would have to behave discreetly in order to avoid persecution because of being gay?"

10. I am satisfied on his evidence that this Appellant would feel compelled to live discreetly, in part at least to avoid persecution.

11. I am satisfied from the country evidence to which I have been referred that a homosexual such as this Appellant, who would on return feel compelled to behave discreetly in order to avoid persecution because of being gay, is entitled to international protection.

12. For all the reasons that I have set out above the Appellant's appeal succeeds on Asylum and Articles 2 and 3 grounds, and I remake the decision, allowing his appeal.

Decision

13. The decision of the First-tier Tribunal was vitiated by an error of law such that I set it aside and remake it, allowing the Appellant's appeal on international protection grounds.

Signed

Date 25.06.2014

Deputy Upper Tribunal Judge Davidge