



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01889/2018

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 25 June 2018

On 26 June 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

I A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(ANONYMITY DIRECTION MADE)

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. 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.

**Representation:**

For the appellant:

Ms P. Yong, instructed by M & K Solicitors

For the respondent: Mr P. Duffy, Senior Home Office Presenting Officer

### DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 24 January 2018 to refuse a protection and human rights claim. The appellant claimed to fear persecution in Pakistan for reasons of his sexual orientation as a gay man.
2. First-Tier Tribunal Judge Dhanji ("the judge") dismissed the appeal in a decision promulgated on 16 March 2018. The judge accepted that the appellant was gay, but came to the following conclusion.

"7.13 The real question in this appeal is about how the appellant would likely conduct himself on return, and if he would be discreet, why. I find that it is likely that the appellant would be discreet about his homosexuality, because of social disapproval and threats from his family. I accept that the appellant did have two relationships in Pakistan as he claimed, but I find that he was entirely discreet about it because he feared societal disapproval. I also find that the appellant has been largely discreet about his sexuality even in the United Kingdom. I do not find it likely that he has told his brother, and there is no evidence to suggest that he has told anyone other than people in the gay community. Indeed, the appellant's own evidence (questions 83 and 84 of the asylum interview), is that he has been discreet in relation to his sexuality in the UK for the same reason as in Pakistan because "if the Pakistani or the Muslims come to know they may harm me or beat me"."

3. The appellant appeals the First-tier Tribunal decision on the following grounds:
  - (i) The background evidence did not support the judge's finding that gay men living openly in Pakistan were not at risk of persecution.
  - (ii) The judge failed to consider material evidence produced by the appellant, including evidence from two witnesses.
  - (iii) The judge misapplied the test in *HJ (Iran) v SSHD* [2010] UKSC 31.

### Legal Framework

4. The relevant legal framework was summarised by Lord Roger in the Supreme Court decision in *HJ (Iran) v SSHD* [2010] UKSC 31:

"82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

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. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

### Decision and reasons

5. The judge made detailed findings of fact that were open to her to make on the evidence. She rejected some aspects of the appellant's evidence because it was inconsistent or lacking in credibility. However, she accepted the core aspect of the appellant's claim i.e. that he is a gay man. In doing so she took into account the evidence given by the two witnesses who supported the appellant's claim. She correctly identified the relevant legal framework set out in *HJ (Iran)* and went on to consider the background evidence contained in the "Country Information and Guidance - Pakistan: Sexual Orientation and Gender Identity" (April 2016).
6. The judge referred to background evidence, which showed that LGBT people may be subject to "societal discretion as well as harassment and violence, most commonly within the family." [7.11] She also noted evidence to show that some LGBT people from the educated higher socio-economic groups may "enjoy a degree of openness and some level of acceptance from their family and close friends, provided they live discreetly." In the big cities two unmarried people of the same sex can live together "but even there they may be exposed to violence or blackmail if the nature of their relationship becomes known." [7.12]
7. At [7.13] the judge directed herself to the correct question, which was to ask herself why the appellant might act discreetly about his sexual orientation if returned to Pakistan. Her conclusion that the appellant would act discreetly because of societal disapproval rather than a fear of persecution is not borne out on her own findings. The judge found that he would act discreetly "because of societal disapproval and threats from his family" and then went on to quote the appellant's evidence in interview where he explained that he acted discreetly in the Muslim community in the UK

because “if the Pakistani of the Muslims come to know they may harm me or beat me.” The conclusion that the appellant would live discreetly solely because of societal disapproval is irrational in light of the appellant’s evidence, which showed that he would live discreetly, not only because of societal disapproval, but because he feared that he would be subject to physical violence from his family or other members of the community if he lived openly as a gay man.

8. I conclude that the First-tier Tribunal decision involved the making of an error of law. The decision is set aside. It follows from the judge’s own findings that the appeal should be remade and allowed. The appellant can live with some degree of openness within the gay community in the UK. He is discreet about his sexual orientation in the Muslim community in the UK, and would be if returned to Pakistan, but the reason why he would be discreet is because he fears that he would be at real risk of serious harm if he were to be open about his sexual orientation. His fear is borne out by the background evidence outlined above.
9. I conclude that the appellant has a well-founded fear of persecution for reasons of his membership of a particular social group if returned to Pakistan. The appellant’s removal would breach the United Kingdom’s obligations under the Refugee Convention.

## **DECISION**

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The appeal is remade and ALLOWED on Refugee Convention grounds

Signed  Date 25 June 2018  
Upper Tribunal Judge Canavan