



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/04133/2019

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 October 2019

Decision & Reasons Promulgated  
On 16 October 2019

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

B A (PAKISTAN)  
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Alex Burrett, Counsel instructed by Rahman & Company solicitors

For the respondent: Mr Steven Kotas, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Anonymity order**

*The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court*

*directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties.*

***Any failure to comply with this order could give rise to contempt of court proceedings.***

## **Decision and reasons**

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him international protection under the Refugee Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds.
2. The appellant is a citizen of Pakistan. His claim is based on his alleged sexual orientation as a gay man and on a relationship developed with another man while in the United Kingdom.
3. The respondent accepts that homosexuality is unlawful in Pakistan and that a person who is known or perceived to be gay is at risk of persecution there. This appeal therefore turned on whether the appellant is a gay man, or whether he would be so perceived if he were to be returned to Pakistan.
4. A claimed breach of Article 8 ECHR was not relied upon before the First-tier Tribunal and I am not seised of any challenge to that concession.

## **Background**

5. The appellant came to the United Kingdom, on his account, on 27 February 2013. He claimed asylum on 19 June 2013, on the basis of a claimed fear because he had assisted his sister to leave Pakistan in order to avoid an arranged marriage. That application was unsuccessful. The appellant exercised his in-country right of appeal.
6. The decision of the First-tier Tribunal on 30 October 2013 (the 2013 Tribunal decision) is the *Devaseelan* starting point for any Judge considering the present appeal. The appellant told the 2013 Tribunal that he had first come to the United Kingdom in 2010 with his mother, to visit an uncle here, and again in November 2011 to visit his uncle and aunt, the only family he had here; that there was a further application for a visit visa in May 2012 to visit the same uncle, and that he finally came to the United Kingdom in 2013, around the time his mother died in Pakistan.
7. He had lost contact with his father two weeks after arriving here; a friend in Pakistan said that they could not find his father anywhere and the appellant feared that his father might have been kidnapped or murdered. The appellant and his sister considered that their mother had been killed by the same brother who was a risk to his sister, following her marriage to an unapproved husband outside their religion. There was a suggestion of a *fatwa* in Pakistan, but no copy was provided. There were serious discrepancies in the appellant's account and that of his sister.

8. At [6.30], the 2013 Tribunal held that the appellant was not a credible or reliable witness. The Judge rejected the core account and dismissed the appeal. The appellant's appeal rights were exhausted on 1 December 2014. The appellant did not mention his claimed sexual orientation in his 2013 asylum claim nor during that appeal process.
9. Following the exhaustion of his appeal remedies against the decision of the 2013 Tribunal, the appellant remained in the United Kingdom unlawfully and did not seek to regularise his position until May 2017, when he lodged further submissions, which were refused without a right of appeal on 4 August 2017.
10. On 7 September 2018, that judicial review application was withdrawn, the respondent having agreed to reconsider her decision. I was the Judge who granted oral permission on the judicial review: the parties reminded me of this, and I offered to recuse myself but neither Mr Burrett nor Mr Kotas wished me to do so. I have no recollection of the judicial review hearing and I proceeded to hear the appeal.
11. On 3 April 2019, the respondent made a new decision, with an in-country right of appeal. That is the decision under challenge in this appeal.

#### **Refusal letter**

12. In her refusal letter, the respondent set out the appellant's account. He was born in 1990; in 2009, when he was 19 and still at school, he realised he was gay and had a three-year relationship with another student, meeting during school time in empty classrooms when they got the opportunity.
13. In 2013 he came to the United Kingdom and here the appellant lives openly as a gay man. He met another man from his home village at a wedding in the United Kingdom in 2014: they began their relationship in January 2016 when the other man invited the appellant to stay at his home, while his wife and children were away. The appellant made his feelings clear to the other man, and they began a relationship.
14. His partner is married with children, and the wife is aware of their relationship now, though initially she was not. The appellant's account was that after he was arrested, his partner had told his wife about the relationship and she had told both her family and the partner's family, back in Pakistan, leading to threats being made to the appellant and an allegation that a *fatwa* had been issued against both of them in Pakistan. The appellant contends that, given that homosexuality is illegal in Pakistan and that there was a *fatwa* against them, there would be no internal relocation option for him if he were returned: he was likely to be killed because of his orientation.
15. The appellant had not told anyone else in the United Kingdom that he was gay, nor about his relationship, because he considered it to be a private matter between the two of them, and also, he feared that nobody would talk to him if he said he was gay.
16. The appellant and his partner had now fallen into a pattern of spending their weekends together, with the appellant's partner spending weekdays with his wife

and family. The appellant asserted that this was family life and that his removal would breach his Article 8 ECHR rights.

17. The respondent began with the 2014 First-tier Tribunal decision as her *Devaseelan* starting point. She noted that the First-tier Judge in 2014 had not considered the appellant to be a reliable or credible witness, and that his account was fabricated and he was not at real risk on return to Pakistan.
18. Moving to the SOGI (sexual orientation or gender identity) element of the appellant's new claim, the respondent referred to her April 2016 CPIN on SOGI in Pakistan and accepted at [15] in the refusal letter that some LGBT persons are at risk of societal discrimination amounting to persecution, whereas others might be able to live openly, provided they did so discreetly.
19. The respondent then considered the account in more detail. She did not consider it reasonably likely that the appellant would make advances to the man who is now said to be his partner, in a situation where he had told nobody else in the Pakistani community in London about his sexual orientation. There was no documentary evidence of the Pakistani *fatwa* against them. She dismissed a number of photographs produced by the appellant because they were undated and there was no explanation of how they had been taken, where or by whom.
20. She also dismissed telephone bills and hotel invoices produced in support of the relationship as not proof of cohabitation and adding no significant weight to the claim. The hotels in question were very near where the appellant lived and the invoices were discreet, giving no indication whether his partner had stayed there also.
21. The respondent rejected the appellant's account of his gay sexual identity and in the alternative, considered that as he lived discreetly in the United Kingdom, he could be expected to do the same in Pakistan. *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31 was mentioned but the reason for the appellant's discretion in the United Kingdom was not examined.
22. Articles 2 and 3 ECHR fell with the Refugee Convention claim. The appellant's claimed family and private life in the United Kingdom with his partner was rejected on the basis that the partner was still living with his wife during the week. The appellant was not considered to be a partner as defined in paragraph GEN1.2 of the Immigration Rules and the appellant could not show that the marital relationship had broken down.
23. The appellant's private life did not meet the requirements of paragraph 276ADE (1)(iii)-(vi). The respondent did not consider that there were 'very significant obstacles' to the appellant's reintegration in Pakistan if he were to be returned. No exceptional circumstances were advanced engaging Article 8 ECHR outside the Rules or paragraph 353b, and the application was refused.
24. The appellant appealed to the First-tier Tribunal.

### First-tier Tribunal decision

25. The First-tier Judge set out at [5] a number of preliminary matters which were settled at the beginning of the appeal:

- (i) Although there was a rather poor translation of the alleged *fatwa* in the papers, the original was not available and Mr Briddock for the appellant indicated that he did not seek to rely on the *fatwa* document;
- (ii) The appellant had provided Mr Briddock on the morning of the hearing with a USB stick containing sexually explicit videos of himself and his partner. This was new evidence and the First-tier Judge was minded to adjourn so that the respondent could consider it. Mr Briddock then indicated that he was instructed to proceed without the video evidence rather than adjourn the hearing and incur additional expense; and
- (iii) Mr Briddock confirmed that Article 8 ECHR was no longer relied upon. The First-tier Judge was seised only of the asylum and humanitarian protection claims.

26. On that basis, the Judge set out the written and oral evidence and reserved her decision. At [15], she set out the burden of proof on the appellant, but limited her explanation of the standard of proof to that applicable to the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, and the ECHR:

“15. The burden is on the appellant to show as at the date hereof there are substantial grounds for believing that the appellant meets the requirements of the Qualification Regulations and further that the appellant is entitled to be granted humanitarian protection in accordance with paragraph 339C of the Immigration Rules and that returning him to Pakistan will cause the United Kingdom to be in breach thereof and/or insofar as applicable the decision appealed against is a breach of his protected human rights under the 1950 Convention.”

There is no self-direction in the decision on the burden and standard of proof for the main claim made by the appellant, an international protection claim under the Refugee Convention 1951.

27. At [22] and [24], the Judge directed herself that the appellant’s failure to claim asylum on arrival affected his credibility, with reference to section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, although she stated that section 8 was not the starting point for her assessment of credibility. The *Devaseelan* guidance was set out at [26].

28. At [30], the Judge set out the test in *HJ (Iran)*: the first stage was to consider whether the appellant was indeed gay, or would be so perceived in Pakistan if returned. The self-direction continued:

“30. ... The appellant must establish this first part of the test before I go on to consider the effect on him, if he returned to Pakistan, of whether if he was openly gay, and thus liable to persecution in Pakistan, or if he would in fact live discreetly and so avoid persecution in his country of origin.”

[*Emphasis added*]

29. At [31] in the decision of the First-tier Tribunal, the Judge found that it was 'unlikely' that the appellant would have been able to maintain a sexual relationship in empty school rooms as a student in Pakistan for 3 years without detection, and that it was not credible that the relations between the appellant and his school friend were casual and opportunistic, rather than a proper partnership; and that it was 'unlikely' that the appellant was in a homosexual relationship with his school friend as he claimed.
30. In relation to the appellant's adulterous affair with his United Kingdom partner, whom he met in 2014 but with whom he did not claim to have been in a relationship until 2016, the appellant's account was that he was living as an openly gay man, but the account of both partners was that they kept their relationship secret because the other man was married with children. They were enjoying their relationship, despite those constraints.
31. The Judge was not satisfied that the appellant was 'cohabiting' with the other man at the weekends, and dismissed the hotel receipts, which primarily related to a period after he made his 2017 further submissions, not the period between January 2016 and December 2017, when the relationship was already under way but the submissions had not yet been made.
32. The Judge considered the hotel, bank statement and invoice evidence at some length. She also considered the photographs produced (not the sexual videos on the USB) but considered that the appellant and his claimed partner looked like friends rather than lovers in the photographs, and that the photographs added no weight to the claim by this appellant that they were in a gay relationship or attended gay clubs. The videos were not produced and no weight was placed on them.
33. The Judge considered the *fatwa* question: the appellant claimed that a friend of his partner had telephoned and told him that it had been filed. There was no statement from that friend before the Judge. The First-tier Judge placed no weight on the *fatwa* issue, finding it 'improbable' that the *fatwa* existed or that the appellant was of interest to the police or the Pakistani authorities. In the light of all the evidence the Judge did not accept that the *fatwa*, if it existed, was evidence of people in Pakistan knowing of the appellant's claimed sexuality, and that it was 'unlikely that the appellant's claimed sexuality is known or suspected in Pakistan'.
34. The First-tier Judge found that the appellant was not living an openly gay life in the United Kingdom and dismissed both the asylum, humanitarian protection and Article 3 ECHR elements of the appeal, reminding herself that Article 8 ECHR was no longer relied upon.

### **Permission to appeal**

35. The grounds of appeal asserted that the appeal was decided on the balance of probabilities, not to the lower standard applicable in international protection claims. As regards the rejection of the appellant's account of his sexual activities with

another classmate at school, the appellant contended that it was an error of law for the Judge to reject that evidence for the reason she gave, without reference to the potential for differences of culture and social background (see *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 at [29] in the judgment of Lord Justice Neuberger (as he then was)).

36. The appellant further contended that in relation to the *fatwa*, the Judge made her decision after she had already reached a negative conclusion on the appellant's claimed sexuality (the *Mibanga* error). The second ground of appeal challenged the Judge's reasoning for rejecting the appellant's account of sex with a classmate, and her failure to make it clear that both the appellant and his partner gave oral evidence of the partner giving the appellant a Valentines' Day card.
37. The appellant contended that at [32] in the decision, the Judge so conflated her findings that it was not clear whether she intended to find that the appellant was not living openly as a gay man in the United Kingdom, or that he was not in fact gay.
38. Permission to appeal was granted by First-tier Judge Holmes, on the basis that:
  - "3. It is arguable that some of the Judge's use of language may indicate the application of the wrong standard of proof, and as such it is a challenge that is best ventilated fully in oral argument. It may also be arguable that the Judge was wrong to look at the *fatwa* only after concluding that the appellant was not gay as claimed, although it is also arguable that this was the correct approach pursuant to *Tanveer Ahmed*. There appears to be little merit in the complaint that the Judge failed to give adequate reasons; it is clear to the reader that the Judge did not consider the account credible, but this too may be argued."

#### **Rule 24 Reply**

39. There was no Rule 24 Reply from the respondent.
40. That is the basis on which this appeal came before the Upper Tribunal.

#### **Upper Tribunal hearing**

41. For the appellant, Mr Burrett said that there was only one, lower standard of proof applicable to international protection claims, that of a real risk or reasonable degree of likelihood (see *STARRED Kacaj (Article 3, Standard of Proof, Non-State Actors) Albania* [2001] UKIAT 00018 at [12]). Where a Judge applied a higher threshold, as in this case where it seemed that the standard of balance of probabilities had been used, the facts found were of no assistance in assessing the international protection claim. The alleged contradictions in the appellant's evidence were not, properly seen, discrepant at all and the First-tier Judge's reasoning was unsound and could not be sustained. The decision should be set aside and remade afresh in the First-tier Tribunal.
42. For the respondent, Mr Kotas observed that the video evidence of sexual activity between the appellant and his claimed partner was irrelevant. He relied on *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11 at [15]

and argued that the application by the First-tier Judge of the correct standard of proof was not to be confused with her observation that various matters were 'unlikely': she was simply separating out one of the four types of evidence, as *Karanakaran* required.

43. The First-tier Judge had heard the oral evidence and was entitled to refer to it, including the evidence about the hotel, if it was relied upon. It had been the appellant's case that he and his partner lived together at the weekends and the Judge had been entitled to make findings on whether they were cohabiting. The appellant had been content to rely on his relationship with his claimed partner, and the Judge had not erred in focusing thereon.
44. The arguments before the Upper Tribunal amounted to an attempt to relitigate the facts: the First-tier Judge had applied the correct standard of proof, had correctly directed herself in relation to section 8 of the 2004 Act and had been entitled to find the appellant not to be a credible witness overall.
45. I reserved my decision, which I now give.

### Analysis

46. The reasoning in this decision is inadequate. It is striking that although there is a self-direction on the standard of proof for Council Directive 2004/83/EC (the Qualification Directive) and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, as well as for human rights, there is no self-direction on the standard and burden of proof in asylum claims. Nor is the Judge's summary of the *HJ (Iran)* guidance accurate or sufficient.
47. The *Karanakaran* point is not well taken by Mr Kotas on behalf of the respondent. The burden of proof is on the appellant in international protection claims, but the correct standard of proof is whether there is a real risk or reasonable degree of likelihood, as has now been settled for many years.
48. Even if the guidance at [55] in the judgment of Lord Justice Brooke in *Karanakaran* (with whom Lord Justice Robert Walker and Lord Justice Sedley agreed) were relevant, the reasoning of the First-tier Judge in this appeal could not be so characterised. The approach there commended was as follows:
  - "55. ... when assessing future risk decision-makers may have to take into account a whole bundle of disparate pieces of evidence:
    - (1) evidence they are certain about;
    - (2) evidence they think is probably true;
    - (3) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true;
    - (4) evidence to which they are not willing to attach any credence at all."
49. It cannot be said that such an approach was taken in this appeal, in which the Judge's findings are a mixture of supposition (she does not believe that the appellant and



another school friend had sexual relations in empty classrooms at school when the opportunity presented) and of application of an unadjusted balance of probabilities test (she finds the appellant's claims 'unlikely').

50. If the Judge had given herself a proper self-direction on burden and standard of proof in international protection claims, she would not have fallen into error as she did and might have found that some or all of the evidence rejected at the higher standard was credible to the lower international protection standard.
51. The correct approach to consideration of sexual orientation claims was set out at [82] in the opinion of Lord Rodger JSC in *HJ (Iran)* (with whom Lord Hope JSC, Lord Walker JSC, Lord Collins JSC, and Sir John Dyson SCJ agreed): the Tribunal should make findings of fact on whether an appellant was gay, or would be perceived to be gay on return, whether he was living openly as a gay man here in the United Kingdom, and how he would behave on return to the country of origin.
52. The Tribunal should then go on to consider, if the appellant would act discreetly, the reason why he would do so:

"82. ... 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."*

[*Emphasis added*]

53. The summary of that test by the First-tier Judge at [30] is inadequate:

"30. ... The appellant must establish [whether he is gay] before I go on to consider the effect on him, if he returned to Pakistan, of whether if he was openly

gay, and thus liable to persecution in Pakistan, or if he would in fact live discreetly and so avoid persecution in his country of origin.”

[*Emphasis added*]

54. The emphasis on section 8 (despite the Judge’s insistence that it is not treated as a starting point) suggests that the Judge was minded to find the appellant not credible before any of the oral or written evidence was considered. Although the *Devaseelan* guidance is briefly (and not entirely accurately) set out in the decision, there is no sign that the First-tier Judge in the present decision did actually begin from the findings in the 2013 Tribunal decision and decide whether, for example, she should diverge from the negative credibility findings there made.
55. The decision of the First-tier Tribunal conflates whether the appellant’s partner is open about his relationship, given that he is a married man with children, with whether the appellant lives an openly gay life in the United Kingdom. There are no findings at all as to how he would be perceived or how he would behave in Pakistan if he were returned there, nor why.
56. If the Judge had applied the lower standard of proof, and had considered the appellant’s sexual orientation rather than his sexual activity, and whether and why he behaves discreetly (if he does), the outcome of this appeal may well have been different.
57. This decision is legally erroneous and cannot stand. The decision of the First-tier Judge is set aside, with no findings of fact or credibility preserved. The next Judge to consider this appeal is reminded that the findings of fact and credibility in the 2013 Tribunal decision are the *Devaseelan* starting point for any future Tribunal.

## DECISION

58. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision.

The decision in this appeal will be remade afresh in the First-tier Tribunal.

Signed   
Upper Tribunal Judge Gleeson

Date: 11 October 2019