



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

Appeal Number: PA/08401/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 15th December 2020**

**Decision & Reasons
Promulgated
On 14th January 2021**

Before

**THE HON. MR JUSTICE FORDHAM
UPPER TRIBUNAL JUDGE JACKSON**

Between

**MST
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Sanders of Counsel instructed by Duncan Lewis Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before us to remake the Appellant's appeal against the Respondent's decision dated 18 June 2018 to refuse his protection and

human rights claim. Both members of the panel have contributed to this decision.

2. The Appellant is a national of Pakistan, born on 2 June 1983, who first arrived in the United Kingdom on 6 October 2012 with valid entry clearance as a Tier 4 (General) student, with leave to remain to 6 November 2013. The Appellant made an application for leave to remain outside of the Immigration Rules on 12 November 2014 and following his detention on 18 December 2014, he claimed asylum on 30 January 2015 on the basis that he was at risk on return to Pakistan of persecution because of his sexuality and because his family had disowned him (for the same reason).
3. The Respondent refused the Appellant's protection claim on 23 June 2015 and an appeal against refusal was dismissed by First-tier Tribunal Judge Courtney in a decision promulgated on 27 November 2015. In that decision, the First-tier Tribunal found that there was a serious possibility that the Appellant is gay, but that on return to Pakistan he would exercise reserve in the expression of his sexual orientation and that in any event, he would not be at risk of persecution per se as a gay man in Pakistan. Further, it was found that the Appellant had not been disowned by his father and that his removal would not be a disproportionate interference with his right to respect for private and family life. The Appellant sought permission to appeal which was refused by the First-tier Tribunal on 12 January 2016 and by the Upper Tribunal on 3 February 2016.
4. The Appellant made further submissions on 1 June 2018 which were refused by the Respondent but accepted as a fresh claim under paragraph 353 of the Immigration Rules on 18 June 2018. Those further submissions were on the basis that the Appellant was at real risk of persecution on return to Pakistan because of his sexuality, supported by a country expert report and background country information; further information about the Appellant's activities in the United Kingdom; and written statements from a number of friends in support.
5. The Respondent refused the Appellant's fresh claim on the basis that the issues raised had already been carefully considered in his earlier claim and appeal, which was dismissed by the First-tier Tribunal on all grounds. The Respondent refers to and relied upon her 'Pakistan country information and guidance – sexual orientation and gender identity' dated April 2016 in which it is concluded that gay men per se are not at risk of persecution in Pakistan, either from state authorities or members of the public and in any event it had previously been found that the Appellant would act discreetly on return to Pakistan. We pause to note at this point that this has been superseded by a later version in July 2019.
6. The Appellant's appeal against refusal was initially dismissed by First-tier Tribunal Judge Baldwin in a decision promulgated on 16 August 2018 and no error of law was found in that decision by the Upper Tribunal in a decision promulgation on 11 September 2019. The Appellant was granted

permission to appeal to the Court of Appeal on 12 February 2020, which included the following statement:

“There is no dispute that the Appellant is a gay man. Nor is there any dispute that gay men who live openly in Pakistan are liable to persecution. In a nutshell the FTT reasoned that (1) the Appellant lives discretely in the UK, where he is not subject to persecution, and therefore (2) he would behave in the same manner in Pakistan for the same reasons, and therefore (3) he would not have a well-founded fear of persecution in Pakistan. Taken at face value, this reasoning correctly applies HJ (Iran) [2010] UKSC 31 as the UT held. I consider that it is arguable, however, that the basis for this reasoning is flawed, given the FTT’s acceptance of evidence from four witnesses who are gay men that the Appellant has been open with them about his sexuality and that he has attended a variety of events as a gay man. The FTT concluded that the Appellant only revealed his sexuality to those whom he knew to be homosexual, and that this demonstrated discretion on his part. It is debatable whether this is necessarily so. ...”

7. On 13 May 2020 the appeal was settled by consent on the basis that the First-tier Tribunal erred in its approach to the discretion point (and thus so did the Upper Tribunal in upholding that decision) and remitted to the Upper Tribunal with the decisions of 16 August 2018 and 11 September 2019 set aside. The appeal therefore returns to us to re-make.

appeal

Relevant law and background country information

8. It is for an Appellant to show that he is a refugee. By Article 1A(2) of the Refugee Convention, a refugee is a person who is out of the country of his or her nationality and who, owing to a well-founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion, is unable or unwilling to avail him or herself of the protection of the country of origin.
9. The degree of likelihood of persecution needed to establish an entitlement to asylum is decided on a basis lower than the civil standard of the balance of probabilities. This was expressed as a “reasonable chance”, “a serious possibility” or “substantial grounds for thinking” in the various authorities. That basis of probability not only applies to the history of the matter and to the situation at the date of decision, but also to the question of persecution in the future if the Appellant were to be returned.
10. Under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, a person is to be regarded as a refugee if they fall within the definition set out in Article 1A of the Refugee

Convention (see above) and are not excluded by Articles 1D, 1E or 1F of the Refugee Convention (Regulation 7 of the Qualification Regulations).

11. The test to be applied to claims based on a person's sexuality is set out in HJ(Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31, at [82] as follows:

"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 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."

12. The Respondent's 'Country Policy and Information Note Pakistan: Sexual orientation and gender identity or express', version 3, dated July 2019 sets out background country information in relation to Pakistan and concludes as part of the guidance to the Respondent's decision makers the following:

2.4.18 Whilst each case must be considered on its own facts, with the onus on the person to demonstrate that they face a risk, persons who openly express their sexual orientation or gender identity are likely to be at real risk of treatment, which by its nature and repetition, amounts to persecution and/or serious harm.

2.5.5 In general, the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of the protection of the authorities.

2.6.2 Given that homophobic attitudes are prevalent throughout the country and state protection is not generally available there is unlikely to be any place, in Pakistan, to which an LGBTI person could reasonably relocate without making fundamental changes to their behaviour. Each case must be considered on its individual merits.

13. The Appellant has also submitted a country expert report from Usma Moeen dated 5 March 2018 which is consistent with the conclusions directly above and the contents of which were not specifically challenged by the Respondent.

The Appellant's claim

14. The Appellant's claim is, in summary, that he is a gay man who would not be able to live openly as such in Pakistan for fear of persecution if his sexuality became known. The Appellant's claim is set out in his screening interview, substantive asylum interview, written statement made with his further submissions and two written statements for the purposes of this appeal.

The evidence

15. In his statement signed and dated 27 July 2018 (which is materially very similar to his fresh claim statement made on 22 May 2018), the Appellant sets out his family and immigration history and describes his life in Pakistan, where he did not live openly as gay man and was beaten by his father because of it; and in the United Kingdom where he does live openly, telling friends, attending gay clubs, having casual encounters with men and being a member of the Croydon Area Gay Society, Rainbows Across Borders and the UKLGIG, also attending Croydon Unitarians Church LGBT

meetings. The Appellant refers to suffering from depression and anxiety for which he has received medication and counselling.

16. In his final written statement, signed and dated 23 November 2020, the Appellant states that he has continued to live openly as a gay man in the United Kingdom and is still a member of the same clubs; albeit Covid-19 has restricted his normal life in the United Kingdom in this regard. The Appellant expressly states in paragraphs 7 and 8 of his statement that he would have to hide his sexuality in Pakistan because it is forbidden there and he would be killed because of it. He describes Pakistan as a Muslim country which does not accept gay people and that he wants to continue to express himself as he has in the United Kingdom.
17. The Appellant describes mental health problems which were worse at the initial peak of Covid-19, with concerns that he would not survive if he caught the disease and he was worried that he would not get a dignified Islamic burial. In this time of stress, which included concern that his father was particularly at risk due to his age and he wanted to see him one last time, the Appellant applied for voluntary return to Pakistan, out of fear of Covid-19 rather than because he had stopped fearing persecution on return due to his sexuality. The Appellant spoke to friends, realised he was making a mistake and did not pursue the application further.
18. The Appellant attended the oral hearing, confirmed his details and adopted his three written statements dated 22 May 2018, 27 July 2018 and 23 November 2020. He gave oral evidence through a Court appointed Urdu interpreter.
19. In cross-examination the Appellant confirmed that he had previously lived in Lahore and Kasur city and did not publicly reveal his sexuality in either place. When asked if this was to conform to social norms in society, the Appellant stated that it was because people did not like it.
20. The Appellant stated that he was Muslim and had previously made an application on 23 March 2020 to voluntarily return to Pakistan because he was depressed and very concerned that if he died during the Covid-19 pandemic, he would not get a proper Islamic burial. After about 14 days, the Appellant felt more comfortable, thought he would stay alive and no longer wanted to return to Pakistan. He denied withdrawing the application because he was unable to provide the travel documentation requested by the Respondent on 25 March 2020.
21. In the United Kingdom, the Appellant lives openly as a gay man and his friends know he is gay. On return to Pakistan he would not do this, other people get upset, it comes back to the gay community and they are not liked. The Appellant stated that there is danger in Pakistan for him, serious danger if his sexuality is exposed and he fears that he would be killed if he lived openly.

22. Within the evidence before the Upper Tribunal were written statements from a number of the Appellant's friends; made at the time of the further submissions, for the First-tier Tribunal hearing and for the hearing before us. Four of these individuals attended the hearing to adopt their written statements and give evidence; with an additional witness who would have attended but for the need to self-isolate awaiting a test for Covid-19. At the hearing, Mr Tufan confirmed that he did not wish to cross-examine any of the additional witnesses who had attended and we therefore accepted their evidence as unchallenged and released the witnesses without the need to formally call each one.
23. In summary, those statements consistently describe the Appellant has an openly gay man in the United Kingdom who is involved in a number of groups and organisations including Rainbows Across Borders and the Croydon Gay Area Society; and with whom the Appellant socialises and attends gay clubs.

Closing submissions

24. In closing on behalf of the Respondent, Mr Tufan set out the relevant questions in HJ (Iran) and confirmed that it was accepted that the Appellant is gay and that those who live openly as gay in Pakistan would be at risk of persecution in accordance with the Respondent's own country information. As to the third question, it was submitted that the Appellant had not previously revealed his sexuality in Pakistan because he was conforming to social norms and not wanting to upset anyone and had strong religious beliefs. On return, Mr Tufan submitted that the Appellant would do the same, not living openly solely for religious and societal norm reasons. It was however accepted that if the Appellant would not live openly because of a fear of persecution, as long as a material reason, his appeal should be allowed.
25. The Appellant had not claimed that he would be at risk of persecution from the state and in any event the background country information did not suggest any such fear would be well-founded, in particular that prosecutions were rare and there was no state targeting or persecution. Further parts of the guidance referring to a gay scene in Pakistan and certain members of society identifying as LGBT; as well as a very high proportion of men who have sex with men, were highlighted.
26. Finally, there had been no further evidence or submissions as to the Appellant's relationship with his family and his claim to have been disowned by them was not found to be credible by the First-tier Tribunal in 2015; a finding which should therefore stand and as such the Appellant would not be at risk on return to his home area from his family.
27. On behalf of the Appellant, Ms Sanders relied on her skeleton argument and submitted that this was a clear case on the evidence that the Appellant was entitled to refugee status. The only issue in this case is why the Appellant would conceal his identity on return to Pakistan and it is

enough that a material reason is due to a fear of persecution. It is the Appellant's evidence that he would be in serious danger if his sexuality was exposed and he may be killed. It is relevant, although not determinative, that the Appellant lives as an openly gay man in the United Kingdom, on which there was unchallenged evidence.

28. Although it is accepted that the finding that the Appellant was not disowned by his family stands; that does not affect the Appellant's claim to fear persecution from non-state actors and the background country information shows that there is no sufficiency of protection. The same issues arise as to concealment of the Appellant's sexuality throughout the country such that there is no option of internal relocation.
29. Finally, in response to the parts of the background country information referred to by Mr Tufan, it was submitted that there was only limited evidence of gay events, no evidence of an openly gay community and that there is a substantive difference between men who have sex with men and men who identify as homosexual or have homosexual relationships; the latter not being acceptable in Pakistan.

Findings and reasons

30. By the end of the hearing before us, there was no dispute that the Appellant is gay; that he lives openly as a gay man in the United Kingdom (his and the other evidence on this being unchallenged by the Respondent); that openly gay men in Pakistan are at a real risk of persecution; and on return to Pakistan the Appellant would conceal his sexuality. The only issue before us is as to why the Appellant would conceal his sexuality on return to Pakistan, whether solely because of societal and religious norms or whether at least in part it was due to fear or persecution. If the latter, there is no dispute between the parties that the Appellant's appeal should be allowed on asylum grounds having satisfied the test in HJ (Iran).
31. We had before us clear and consistent statements from the Appellant that he would conceal his sexuality on return to Pakistan not only because it upset other people who didn't like gay people but also because he feared serious harm and/or being killed if his sexuality was exposed. The Appellant maintained this in cross-examination which involved only a relatively limited challenge to his evidence on this point and without any broader challenge to the Appellant's credibility. Although there have been adverse findings against the Appellant on specific matters in the past, including as to his family situation by the First-tier Tribunal in 2015; much of his claim has now been accepted and the majority of his evidence is unchallenged by the Respondent. There is nothing before us at this time to doubt or undermine the Appellant's evidence on his reasons for concealing his sexuality on return to Pakistan.

32. Whilst we find that a significant part of the reason for the Appellant concealing his sexuality on return are societal and religious norms, homosexuality (as opposed to men having sex with men) being unacceptable in Pakistan, we also find that a material reason for doing so is fear of persecution. In so finding we have taken account of the fact that such a fear is, in accordance with the Respondent's own background country evidence and guidance, objectively well-founded.
33. In these circumstances, the Appellant's appeal is allowed on asylum grounds on the basis that he would be at real risk of persecution on return to Pakistan as an openly gay man and because he would conceal his sexuality on return in part for fear of such persecution. In accordance with the Respondent's own background country evidence and guidance, there is no sufficiency of protection and the no option of internal relocation because the Appellant would face the same issues of concealing his identity anywhere in the country.

Notice of Decision

For the reasons set out by the Court of Appeal in the decision dated 13 May 2020, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and that decision was set aside.

The appeal is remade as follows: the appeal is allowed on asylum grounds.

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 their 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 G Jackson
2020

Date 21st December

Upper Tribunal Judge Jackson