



IAC-FH-CK-V1

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

Appeal Number: AA/02656/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 11th February 2016**

**Decision & Reasons Promulgated
On 1st March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**J H
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan, Counsel instructed by Wilsons Solicitors

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

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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.

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. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State of 3rd February 2015 to refuse his application for asylum. First-tier Tribunal Judge Callow accepted the core of the Appellant's claim that he is gay but concluded that the Appellant would be able to live discreetly in Pakistan by choice and because of social pressure and therefore would be at no risk on return to his home area or elsewhere in Pakistan and dismissed the appeal.
2. Following a grant of permission to appeal the appeal came before the Upper Tribunal and, in a decision dated 17th November 2015, an Upper Tribunal panel comprised of Upper Tribunal Judge Storey and Upper Tribunal Judge Rintoul found errors in the First-tier Tribunal Judge's decision and set it aside.
3. In summary the panel found that the First-tier Tribunal Judge erred in that his finding of fact were not sufficiently reasoned and that, given that the judge found the Appellant credible, it is not clear why he did not accept his evidence that he has a fear of being killed and of being persecuted in Pakistan. The panel considered that there was insufficient evidence as to the relevant background country conditions relating to risks to homosexuals in Pakistan and that there was not a full set of findings of fact relevant to the assessment that must be made in line with the guidance given in **HJ (Iran) [2010] UKSC 31** and **Y and Z [2013] WLR (D) 427, [2013] EUECJ C-199/1**.
4. Having found that there was a material error of law the panel therefore set the decision of the First-tier Tribunal aside and adjourned the consideration of the appeal for a hearing to be conducted in light of the following directions:
 - “(a) This case will be set down for a further hearing in the Upper Tribunal. The Appellant will be required to give oral evidence. It is open to him to call witnesses if he notifies the Tribunal of his intention to do so in accordance with standard Tribunal directions to follow.
 - (b) The next Tribunal will take the First-tier Tribunal Judge's findings of fact as a starting point but as no more than that and it will be open to the Respondent to seek to displace those through cross examination, including questions seeking an explanation for discrepancies in the Appellant's evidence as identified in the reasons for refusal letter. In light of the procedure as just outlined, it will then be a matter for the next Tribunal to decide whether to preserve and build on the First-tier Tribunal's findings of fact or to substitute findings of their own based on an overall assessment of the further and earlier evidence.”

The Resumed Hearing

5. As a starting point I set out the background facts which the First-tier Tribunal Judge considered had been established as summarised at paragraph 5 of the panel's decision, which states as follows:
 - “5. Those 'facts' were in summary that the appellant was a homosexual whose home area was [M-]. He had found himself attracted to other males at school but did not act on his attraction to men of the same sex until he came to the UK in November 2010 as a student. He did not reveal his sexuality to his local

community in the UK, only to two friends. However in early 2012 when he contacted his parents to provide him with further funds, his father told him he should return to finalise an arranged marriage with a cousin. The appellant then told his family he was gay and did not wish to marry the cousin. His father and brother became very abusive and threatened to kill him. By this time the appellant had begun a gay relationship in the UK with a man called A. In an affidavit dated 3 May 2014 the appellant's father stated that he had disowned the appellant by reason of his sexuality. The appellant could not return to [M-] as his potential parents-in-law were well-connected politically. The appellant conceded that he might be able to live in other areas if he lived discreetly, for example in Peshawar. In finding these facts the judge noted that the appellant's evidence was supported by a friend, FM, who gave evidence."

6. In advance of the hearing before me the Appellant submitted a further bundle of evidence. The material elements of this bundle are an up-to-date witness statement from the Appellant dated 9th February 2016 and a supporting witness statement from a friend made on the same date.
7. At the hearing before me Mr Walker confirmed that he intended to cross-examine the Appellant in relation to the affidavit from his father, this being a matter raised in the reasons for refusal letter, and in relation to the question as to how he would conduct himself upon his return to Pakistan. Both parties agreed that the background evidence remained the same as that which was before the First-tier Tribunal Judge and set out at paragraph 2 of the panel's decision, which is that paragraph 2.2.2 of the Pakistan penal code criminalises homosexuality. Mr Walker also submitted Home Office country information guidance entitled "Pakistan: Sexual orientation and gender identity" from 2014. Mr Walker accepted that, if the Appellant establishes his claim, he would be at risk on return in Pakistan.
8. The Appellant gave oral evidence and, in examination-in-chief, he confirmed the contents of his witness statement. He also said that he received the affidavit from his father around the end of May 2012 and this was because he had informed his father that he was gay. He said that he believed that his father had sent the affidavit to him to prove that he had disowned him. He said that there were a lot of fights back home, that he had been threatened and he had been thrown out of the family. He also said that in his affidavit his father had deprived him of all of his rights including rights to family property and his right to use the family name and he said that the affidavit meant that the family did not want to keep its relationship with him.
9. When asked what he would do if he were to be returned to Pakistan he said he could not live there because all of his family members knew about him and if he went there they would find out where he was living. When asked why he could not live there without telling anyone about his sexual orientation he said that he is a human being with feelings, that he wanted to establish a relationship with someone and he would prefer it to be someone who was like him and that he could not hide his sexuality from anyone.
10. When asked what would happen if he lived openly in Pakistan he said that it is an Islamic country, that there is no legal protection for gay people and that if he informed anyone about himself they would lash him and hurt him. He said that he

would not be in a position to find a house because a landlord would not let him a property and that he would not be able to find a job because people would find out about his sexuality through himself and through his family.

11. In cross-examination the Appellant said that he had received the affidavit from his father through the post. He said that he was first informed by his father on the phone that he had disowned him and afterwards he received the affidavit by post. He said that the conversation with his father on the phone was before he made the application in March 2012 and he thinks that the conversation took place in around February or March 2012. He said that he received the letter containing the affidavit by post after he made the application. He no longer had the envelope in which it came.
12. He said that when family members came to know about him they threatened him by telephone and that there was a dispute going on between his family and the family of the girl he was meant to marry as that marriage had been arranged during his childhood. He said he received threatening phone calls from his family during that time and was informed about the arguments. He received phone calls from his family and then from members of the girl's family as well including her brothers.
13. He did not know whether it was his father or mother but he knew that his family had told other family members about his sexual orientation because the marriage had been arranged and they had to inform them that he was gay. He said that his friends in the UK know that he is gay. He shares a house and he does not have much contact with the landlord of the house. He said that he does not attend the local mosque. He accepted that the population of Pakistan is around 120,000,000 people but he said that he could not live his life in hiding there. He said that he has certain feelings and wants more in his life. He said that he believed that wherever he would go some of his family members would be there and they would know where he was.
14. He said that in Pakistan all of the population are Muslims and that he would not get any protection. If anyone did anything to him he could not be protected or saved. He said that he currently lives in the UK in a Muslim community and he wants to get out of that community but in any event in the UK he can be protected, he can live an open life and he can select his life partner. He cannot move to another area at the minute because of financial restrictions. He is not working. Some of his friends who are working help him financially.
15. In re-examination the Appellant said that he arranged his current accommodation through his friend who knows the landlord. He believes that he would be known in Pakistan if he went to seek accommodation.
16. I asked the Appellant a number of questions by way of clarification and he said that he shares a room in a house in the UK, that two other people live there and that they know about his sexual orientation. In response to questions from Mr Walker the Appellant confirmed that the other people he shares a house with are from Pakistan and that they know about and accept his sexuality.
17. In submissions Mr Walker relied on the reasons for refusal letter dated 3rd February 2015. He relied on paragraph 43, which indicated that there was contradictory

evidence as to when the affidavit was received. The affidavit from the Appellant's father is dated May 2012 but there is evidence that it was received before that. He submitted that the Appellant has lived in the UK discreetly in relation to his sexual orientation because that is what he wants to do. He submitted that the Appellant says that everyone would find out in Pakistan and he could not live safely but he could live within a large city and work discreetly as he has chosen to do in the UK and that would be a matter for him. He submitted that the Secretary of State has doubted the Appellant's sexuality, believing that it was a vehicle used to claim asylum when his further leave to remain application was refused. The Secretary of State maintains that none of the evidence indicates that the Appellant would be in danger in Pakistan. Mr Walker submitted that the Appellant would be able to live in Pakistan the way he lives here and that would not give rise to fear of persecution.

18. Mr Khan submitted that the Secretary of State has not shown any contradictory evidence put forward by the Appellant in relation to when he obtained his father's affidavit. He submitted that a copy of the Appellant's father's passport is attached to the affidavit and this indicates that it was not fraudulently obtained. He also submitted that in a strict social and cultural environment such as Pakistan it is more likely that the Appellant's father would make an affidavit such as this disowning the Appellant in these circumstances. He submitted that there is no conflict in the Appellant's evidence in relation to the timing of receipt of the affidavit from his father. He submitted that in his oral evidence the Appellant said that he received telephone calls and threats from February or March of 2012 and there is nothing to support the assertion in paragraph 43 of the Reasons for Refusal letter that the Appellant said that the affidavit was sent to him in April 2012 and there is therefore no inconsistency. In any event he submitted that at paragraph 18 the First-tier Tribunal Judge found that the core of the Appellant's claim was credible.
19. Mr Khan submitted that the test in HJ (Iran) is not simply whether the Appellant would live discreetly but it is necessary to go on to ask why he would live discreetly. He submitted that the Appellant lives discreetly in the UK but friends and people he lives with are aware of his sexuality and that the Appellant benefits from equal rights in the UK. He submitted that the Appellant's oral evidence was that if he returns to Pakistan he wants to have relationships, that he cannot hide and that he wants to live openly. He submitted the Appellant's oral evidence that he could not live freely because of the strict Islamic laws and there was no law to protect him and that he believes that he would have difficulties and would be prosecuted or persecuted. The Appellant may hide initially but when he forms relationships people would come to know. If he sought accommodation a landlord would know. If he applied for a job it is likely that those employing him would know and if he was subject to discrimination there would be no law to protect him. He therefore submitted that the second limb of the test in HJ (Iran) is met.
20. Mr Khan referred to the panel's directions and submitted that there was nothing in cross-examination to contradict the First-tier Tribunal Judge's finding that the Appellant is gay. He submitted that, looking at the situation in the round, the Appellant's account is credible, the core of his story still stands and that if he is returned he would not live discreetly, he wants to live openly and HJ (Iran) applies.

Findings

21. I have considered all of the oral and documentary evidence before me. In relation to the directions made by the panel I note that Direction (b) indicated that I should take the First-tier Tribunal Judge's findings of fact as a starting point and that it would be open to the Respondent to seek to displace those through cross-examination. I am satisfied that cross-examination did not displace the finding made by the First-tier Tribunal Judge that the core details of the Appellant's claim are credible.
22. Mr Walker cross-examined the Appellant in relation to his father's affidavit. I find that there is no contradiction in the Appellant's evidence in relation to when and how he received that affidavit and I also take account of the fact that the affidavit was accompanied by a copy of the Appellant's father's passport. I therefore do not accept that there is sufficient evidence to show that the affidavit is fraudulent and I take it into account in the round along with the other evidence.
23. I am satisfied on the basis of all of the evidence that the Appellant has established that he is gay as claimed and that he has been disowned by his family. He has been consistent in his account and I accept the Appellant's evidence that his family and the family of his former fiancée are aware of his sexual orientation and I accept that this would mean that people in his home area would know about his sexuality. I accept that he has been disowned by his family and has been threatened by his father and by his former fiancée's family. The Appellant would therefore be unable to live discreetly in his home area.
24. In light of the finding that the Appellant is gay the issue to be determined is whether the Appellant would live discreetly upon return to Pakistan and, if so, why he would do so.
25. It is clear from his evidence that the Appellant lives discreetly to a certain extent in the UK. However, those with whom he lives and his friends know that he is gay. Whilst he lives fairly discreetly in the UK he has been involved in a relationship here and he also was clear in his evidence that he wishes to develop relationships in the future and that he values the legal protection he enjoys in the UK.
26. I take account of the Appellant's oral evidence that it would be difficult for him to live discreetly elsewhere in Pakistan in the longer term. I accept that if he were to find accommodation and a job and develop relationships that he believes that it is likely that his sexual orientation would become apparent.
27. In any event I take account of the Appellant's evidence that if he were to live discreetly in Pakistan, even in the short term, the reason for him doing so would be because of a fear of discrimination and persecution whereas the reason for him living somewhat discreetly in the UK is more about social and cultural pressures. Whilst it is apparent that social pressures would be relevant to how he would live upon return to Pakistan I accept on the basis of his oral evidence that a material reason for his living discreetly on return would be a fear of persecution which would follow if he were to live openly as a gay man.
28. I have considered the guidance in HJ (Iran). Lord Hope set out the test as follows:

“35. This brings me to the test that should be adopted by the fact-finding tribunals in this country. As Lord Walker points out in para 98, this involves what is essentially an individual and fact-specific inquiry. Lord Rodger has described the approach in para 82, but I would like to set it out in my own words. It is necessary to proceed in stages.

(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum.

36. It should always be remembered that the purpose of this exercise is to separate out those who are entitled to protection because their fear of persecution is well

founded from those who are not. The causative condition is central to the inquiry. This makes it necessary to concentrate on what is actually likely to happen to the applicant. As Lord Walker says in para 88, the inquiry is directed to what will happen in the future if the applicant is returned to his own country. An approach which disregards what is in fact likely to occur there in the case of the particular applicant is wrong and should not be adopted.”

29. I take into account the fact that it was accepted that if the Appellant were to return to Pakistan the penal code at paragraph 2.2.2 criminalises homosexuality and I note from the country information and guidance submitted by Mr Walker that in Pakistan there is no effective protection from the state for those from the LGBT community. I note that the background evidence demonstrates that a person in the position of the Appellant is likely to be in fear of persecution in Pakistan.
30. I accept on the basis of the Appellant's evidence as set out above that if he was returned to Pakistan he would be at risk of persecution and physical harm in his home area. I accept that if he relocated away from his home area he may live discreetly in the short term but that he would be unable to conceal his sexuality in the longer term. I accept his evidence that if he were to live discreetly it would be because of the fear of physical harm and persecution. The evidence before me shows that such fear is well-founded. In these circumstances the Appellant is entitled to protection.
31. I therefore remake the decision in this case by allowing the Appellant’s appeal.

Notice of Decision

The appeal is allowed on asylum grounds.

Signed

Date: 24th February 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 24th February 2016

Deputy Upper Tribunal Judge Grimes