



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2023-001059

First-tier Tribunal number: PA/53835/2021

IA/10936/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

On 12 December 2023

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

Between

MS

(Anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M West, counsel

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

Heard at Field House 2 November 2023

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Pakistan born on 9 November 1982. He appealed against a decision of the respondent dated 8 July 2021 to refuse his application for international protection. His appeal against that decision was dismissed in the First-tier Tribunal (FTT) by a decision dated 2 February 2023. Permission to appeal that FTT decision was granted and by a decision dated 20 July 2023 the decision of the FTT was set aside and the appellant's appeal was ordered to be re heard in the Upper Tribunal. Thus it came before us sitting as a panel on 2 November 2023. Attached to this determination is a copy of the decision of Upper Tribunal Judge Blundell finding a material error of law and setting aside the decision of the FTT.
2. We hear this appeal de novo. We remind ourselves that because this is an appeal against the refusal of international protection, the burden of proof of establishing that he is entitled to international protection rests upon the appellant. This being a case in which the appellant claimed asylum before section 32 of the Nationality and Borders Act 2022 came into force on 28 June 2022, the standard of proof is the so-called lower standard. There has to be demonstrated "a reasonable degree of likelihood" that the appellant will be persecuted for a Refugee Convention reason if returned to Pakistan.

The Appellant's Case

3. The appellant's case is that he is bisexual and that if he returns to Pakistan he would be unable and/or unwilling to live discreetly so as to avoid the adverse attention of the society around him (including his family) and the authorities. In consequence he would be persecuted, the penalties for homosexuality being particularly strict in Pakistan. The respondent takes issue with the appellant's credibility and does not accept that he is bisexual but even if he is he could live discreetly in Pakistan as she says he has lived discreetly in the United Kingdom.

The Evidence Before Us

4. Appearing before us the appellant gave oral testimony in English. There were no other live witnesses. The appellant adopted his witness statement dated 16 May 2022 in which he said that he entered the United Kingdom on 13 December 2011 when he was then aged 29 years. He described how he was attracted to males and how his parents found a bride for him. He agreed with his wife that he would go to the United Kingdom to study and they would divorce as he did not wish to be married. The longest relationship he had had with another man was with an Italian gentleman which lasted for approximately six months. He feared return because his family would want him to marry again and because being bisexual was a criminal offence in Pakistan.
5. The appellant underwent a very lengthy interview with the respondent on 12 April 2021 which lasted over six hours and comprised over 252 questions. Towards the end of the interview the appellant stated that he had informed a second cousin, who lived in the United Kingdom that he

was bisexual. Although the second cousin was in touch with the appellant's father he did not think the second cousin had told the father. On 20 October 2023, just under two weeks before the hearing before us the appellant wrote to his ex-wife asking her to help him with a written statement adding that he would explain in detail what was to go in the written statement. He had had no reply to that email.

6. In cross-examination he said he had passed some papers for his accountancy examinations but not papers five and six which he had failed. He had not claimed asylum until he was arrested in 2020 because up till then he had wanted to do things in the correct way. He had not sought advice from friends about how to claim asylum as he did not want to share with anyone that he was bisexual. He had not kept pictures of his friends because he did not know he would have to show proof of his relationships. He no longer saw any of the people with whom he had had relationships. The Italian gentleman Marco had left to go to Italy.
7. He did not keep pictures on his mobile phone for security reasons. Asked to clarify why that was so, he said that people in the house where he lived sometimes borrowed his phone. They did not know that he was bisexual. This last remark appeared to contradict what he had said in interview when at question 49, he said he wished to hide from his family that he was bisexual but not the from the people who he lived with in the United Kingdom because "it's fine". He feared his family would force him to marry by telling him things like he would not go to heaven unless he was married.
8. The second cousin (who was not himself bisexual) to whom the appellant said he confided his sexuality, was not called to give evidence before us and had not made a statement. When asked what the reason was for this the appellant replied "no reason". He had not felt a statement was necessary. At question 200 in his asylum interview, he said he had not joined any clubs. In oral testimony he said he could not afford to join any although he had joined a bisexual outdoor club on 10 February 2023 (some eight days after the negative decision at first instance) on a free trial membership. In this club he could contact people but he was hampered by the fact that he could not speak to somebody in "a proper English way" as he put it. He had deleted material on his phone about this.
9. In answer to questions from the panel the appellant said he lent his mobile phone to people who we lived with, it was not just the children in the household who borrowed his phone. People might want it to make calls. Asked to clarify how his parents had forced him to marry when he was then aged 27 he said that they told him he needed to get married. He was now a member of an outdoor club and was asked what outdoor activities he had been on. He replied that he had gone to the shopping centre at Bicester Village.

10. In re-examination he said he was able to afford the rent on his accommodation because he worked (illegally) for three days a week in a shop.

Closing Submissions

11. In closing the presenting officer said there was a substantial issue under section 8 of the Asylum and Immigration (Treatment of claimants etc) Act 2004. It was only today that the appellant provided a document to show he had used a mobile phone app called Happn. There was no evidence about Happn itself. The only other evidence the appellant had provided was membership of a bisexual outdoor club which he joined eight days after his appeal was dismissed at first instance. There was no evidence of anything else about this club or the appellant's membership of it. The appellant had not thought of calling his second cousin. In answer therefore to the first question in **HJ Iran [2010] UKSC 31**, the appellant was not bisexual.
12. The respondent conceded that if the appellant was bisexual and chose to live openly in Pakistan as such he would be liable to persecution but on his case even in the United Kingdom he was living discreetly. The appellant had sent an email to his wife in a belated attempt to contact her but this too had not produced evidence. It was not credible that he would have deleted telephone numbers if he was bisexual and those numbers were going to be of use to him. The appeal should be dismissed.
13. For the appellant Counsel relied on his skeleton argument which addressed the refusal letter. No issue had been taken with the age when the appellant became aware of his sexuality and he had been consistent on that point. He had also been consistent on a number of other aspects of his evidence for example that his family were not aware of his sexuality. Whilst the interview itself was not the easiest document to read the appellant's answers were very detailed. For example at question 50 in the interview he talked about how he felt left out of things when the other boys talked about girls.
14. Citing the recent Court of Appeal authority **MAH (Egypt) [2023] EWCA Civ 216** at paragraph 52 thereof, counsel argued that less than 50% perhaps even a 10% chance of risk on return may satisfy the necessary test to the lower standard. Counsel accepted that one key area of contention was the lack of evidence to support the appellant's claim but the appellant had attempted to contact his ex-wife recently and had given a spontaneous answer when asked what he had done to follow up that enquiry. The marriage between the appellant and his wife was a relatively short one, they divorced in 2015. The panel noted that the appellant had apparently cleansed his telephone of telephone numbers even though by

themselves they would not have given any indication of the appellant's sexuality. Counsel conceded that this was a contradiction, all he could say that was that it was not necessarily reasonable to expect human being to act rationally.

15. Counsel acknowledged that Happn was not an organisation for members of the LGBT community as such, it was a dating app. The appellant had not sought to embellish the actual position in his evidence, when asked whether he had furthered contact with anyone from Happn by meeting people, he had said no, he had only spoken over the telephone with contacts. If on return to Pakistan the appellant did choose to behave discreetly it would be because of pressure and fear of persecution. This fear would be a material reason for his decision to live discreetly and he should be granted asylum. The appellant's case met the lower standard of proof.

Discussion and Findings

16. At paragraph 82 of **HJ Iran** the Supreme Court laid out a series of questions to which a Tribunal must direct itself in a case where the appellant claims to be gay. "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 , or that he would be treated as gay by potential persecutors in his country of nationality." If the Tribunal is satisfied that an appellant is gay, it must go on to consider whether gay people are persecuted in their country of origin and how in those circumstances an appellant would live upon return and why.
17. This case largely turns on an assessment of the credibility of the appellant and in particular the answer to the first question in **HJ Iran**, is the appellant bisexual? In the previous hearing at first instance the judge drew attention to the lack of detail in support of the claim supplied by the appellant. Whilst we appreciate the point made in submissions to us that during the course of a lengthy interview the appellant did give answers to the questions about how he felt, nevertheless there remained a distinct lack of supporting evidence. It is not of itself necessary for an appellant to provide supporting evidence in an asylum claim but where such evidence can be reasonably obtained, a tribunal is entitled to take account of the absence of such material as potentially damaging to the individual's credibility: ST (Corroboration - Kasolo) Ethiopia [2004] UKIAT 00119, at [15] we bear in mind that, on the appellant's case, he has spent almost twelve years in the United Kingdom, a country where he would have been free to live as a bisexual man. We therefore proceed to examine what evidence the appellant has supplied and his explanation for that evidence.
18. The appellant states that he has had casual relationships with men but has never kept any phone numbers or other documents such as photographs to support that claim, save for the two photographs of his work colleague Marco. The appellant says that he has had to be discreet in the United

Kingdom and had to cleanse his mobile phone of any potentially incriminating evidence because his phone is borrowed by other people in the house where he lives to make calls. This is contradicted by what the appellant himself said in interview where he indicated that he had no qualms about the people in his household knowing about his sexuality. There appears no reason why the appellant would delete telephone numbers of people he might wish to maintain contact with since the numbers by themselves would have no meaning to other people borrowing his phone, assuming that that takes place. We formed the view that the appellant was embroidering his account in saying he had “cleaned his phone” to deal with difficulties within the claim about not having anything to show bisexual relationships but in doing so merely made more difficulties for himself. We note also that the appellant retained email records from February 2023 about his membership of the Bisexual Outdoor Club.

19. As we note above, the appellant has produced photographs of the man he identifies as Marco and with whom he worked in a catering job. It is not clear why he would keep such photographs if he was otherwise deleting the photographs on his mobile telephone. In interview the appellant said he had not joined any clubs for example which catered for the LGBT community. Then approximately eight days after his appeal was dismissed he joined such a club. The timing appears to be more than a mere coincidence. Nevertheless the evidence of his membership and the evidence of activities in this club is almost non-existent. It is difficult to see how or why a trip to a local shopping centre would be within the range of activities of an outdoor club devoted to walking, hiking and other outdoor activities, see [9] above. Although counsel argued that the appellant was able to answer questions spontaneously, that answer indicated that the appellant struggled to master the details of his own case.
20. The appellant states that he has confided in someone about his sexuality namely a second cousin who lives in the United Kingdom. That person has not been approached to give evidence, even in the form of a witness statement. The appellant was unable to give any good reason why that should be so. It is difficult to say that the witness would have refused to attend if he has never even been asked to attend. It is also difficult to avoid the conclusion that either no such conversation ever occurred or the second cousin himself does not exist. Either way this was evidence, if it ever existed, that could reasonably be expected to have been produced but was not. The appellant states that very late in the day he attempted to contact his ex-wife to see if she would make a supporting statement for him. It appears there has been no reply to that request although the terms expressed by the appellant indicating that he would tell her what to say would have meant that little if any weight could have been afforded to anything thus produced.
21. If the appellant’s activities in the United Kingdom have been as extensive as he claims it is reasonable to have expected him to produce something more concrete than the rather vague assertions contained in the witness

statement and in his interview. The appellant was put on notice by the dismissal of his appeal at first instance that the tribunal had taken an adverse view of the lack of supporting evidence. As will be seen from paragraphs 19 and 20 of the decision setting aside the decision of the First-tier Tribunal:

“The judge was entitled to take account of the absence of evidence of the appellant's activities in the UK. The appellant stated he had had various encounters with men in the UK. It was reasonable and lawful, in the circumstances, to observe that these “hook ups” were not supported by any evidence.

“The judge was perfectly entitled to remark on the absence of relevant evidence and to attach weight to that absence. The appellant and his representatives should have been alive to this obvious lacuna.”

22. Yet it must be said, the appellant has done very little to correct that adverse view. The evidence on the appellant's activities in an outdoor club or on the dating site Happn, was vague as was much of the remainder of the appellant's evidence. Given the length of time the appellant has had to prepare his case since he has been in the United Kingdom, the failure to support his claim undermines its credibility. In saying this, we bear in mind the authority of **MAH Egypt** which turned on a finding by the Upper Tribunal that the appellant in that case could have done more to support his claim of risk of persecution. For example the Appellant was criticised for having no reasonable explanation for the absence of evidence from the family in Egypt or elsewhere "to corroborate the two arrests (and indeed the reasons for apparently leaving Egypt)."
23. The situation in the instant case before us is very different. Here the appellant has lived in the United Kingdom for twelve years, having had, he says, bisexual relationships in that time but with no evidence to support the claim that any of that has taken place. His reasons for not having such evidence strain credulity. Obtaining supporting evidence from a country where one's family may well be under observation by the authorities is very different to obtaining supporting evidence from what has happened in the United Kingdom where homosexuality has been lawful for a many years. It is also important to note that the main witness who could support the appellant's claim (but who was not called) is not a family member perhaps hiding in a foreign country but someone who still lives in the United Kingdom. At paragraph 62 of **MAH** the court reminded decision makers that they were not expected to suspend their own judgment. "In appropriate cases, [the tribunal] is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief."
24. We also bear in mind that there was a considerable delay on the appellant's part in claiming asylum. The appellant unsuccessfully sought a student Visa in 2006. He finally entered the United Kingdom on a Tier 4

student Visa, valid until 31 October 2012. Once in the United Kingdom he applied to extend this and it was extended until 4 June 2013. Thereafter he made no further applications to extend his leave and only came to attention of the authorities when he was encountered on 21 January 2020.

25. It was shortly after that arrest that he claimed asylum. An issue under section 8 of the 2004 Act cannot be the starting point for a tribunal. It is, instead, potentially damaging to an appellant's credibility. Nevertheless the appellant's immigration history indicates that he was aware what he needed to do to be able to stay in the United Kingdom. Due to lack of success in his studies he did not apply again for a student visa. His argument that he delayed claiming asylum because he wanted to do things properly (see [6] above) is not therefore correct. What in fact happened was that after his last grant of leave expired he sought to evade the authorities for several years. This indicates that his eventual claim for asylum was motivated by a desire to remain in the United Kingdom than a fear of the consequences if returned to Pakistan.
26. The appellant had a sufficient knowledge of the immigration system in this country to be able to have made an application to remain rather earlier than following his arrest. That he did not do so we find also undermines the credibility of the appellant's account. Overall we find that the appellant has not given a consistent account nor do we accept that he can show to the lower standard that he is bisexual and fears return to Pakistan for that reason. The appellant could and should have supplied supporting evidence to both the respondent and the tribunal if indeed his claim to be bisexual had any foundation. Since we find the appellant not to be a credible witness and that he has not given a credible account of his sexuality, we find that the first question in **HJ Iran** must be answered in the negative and the remainder of the questions thereafter fall away.
27. There is no claim in this case under article 8 of the Human Rights Convention. That must be right since the appellant does not have a family life here and such private life as he has established was established at a time when he was here illegally. We were told by counsel that the appellant does not pursue his claim to fear persecution on account of having lost his Muslim faith. Articles 2 and 3 of the Human Rights Convention stand or fall with his asylum claim and therefore fall with it. We therefore dismiss the appeal against the respondent's decision to refuse international protection.

Notice of Decision

The appellant's appeal under the Refugee Convention and the Human Rights Convention is dismissed.

We continue the anonymity order made at first instance.

Signed this 21st day of November 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appeal there can be no fee award.

Signed this 21st day of November 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001059

First-tier Tribunal No: PA/53835/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MS (PAKISTAN)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Michael West, instructed by Commonwealth Solicitors

For the Respondent: Nicholas Wain, Senior Presenting Officer

Heard at Field House on 3 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or

address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. The First-tier Tribunal granted the application for anonymity, and it is appropriate to continue that order in force because the appellant is an asylum seeker.

DECISION AND REASONS

1. The appellant appeals, with the permission of Upper Tribunal Judge Keith, against the decision of First-tier Tribunal Judge Shakespeare (“the judge”). By her decision of 2 February 2023, the judge dismissed the appellant’s appeal against the respondent’s refusal of his claim for international protection.

Background

2. The appellant is a Pakistan male who was born on 9 November 1982. He arrived in the UK lawfully, as a student, on 15 December 2011. He secured an extension of his leave until 4 June 2013. On the expiry of his leave to remain, the appellant chose to overstay. He was finally arrested on 21 January 2020 and served with a notice which told him that he was liable to removal from the UK as an overstayer. He claimed asylum shortly thereafter, claiming that he would be at risk on return to Pakistan because he was bisexual and had renounced Islam.
3. The respondent did not accept that the appellant was bisexual or that he had renounced his faith and she refused his claim accordingly. The appellant appealed against that decision to the First-tier Tribunal.
4. The appellant’s appeal was heard by the judge, sitting in Taylor House on 13 January 2023. The appellant was represented by Mr West of counsel, as he was before me. The respondent was represented by a Presenting Officer (not Mr Wain). The judge heard oral evidence from the appellant and submissions from the representatives before reserving her decision.

The Decision of the First-tier Tribunal

5. The judge did not believe the appellant’s account, which she considered to be lacking in detail in important respects. She also found the account to be materially inconsistent and unsupported by evidence which might easily have been obtained from witnesses in the UK. Nor, having rejected the appellant’s claim as to his sexual orientation, did the judge accept that the appellant had renounced Islam. The judge considered that the appellant would in any event live discreetly for reasons unconnected with a fear of persecution. She dismissed his appeal accordingly, finding that he would not be at risk on return to Pakistan.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal. The grounds were settled by Mr West. At nine pages, the grounds are as long as the decision under appeal. That is unacceptable. The grounds of appeal are the well from which the arguments must flow and it is unhelpful and discourteous for arguments to be fully particularised in a document which is not for that purpose. The point has been made by the Court of Appeal on various occasions, *Harvey v SSHD* [2018] EWCA Civ 2848 being one, but it seems that some practitioners are unwilling to take note.
7. There are two grounds of appeal. The first is that the judge misdirected herself in law in considering the fourth limb of the test in *HJ (Iran) v SSHD* [2010] UKSC 31; [2011] 1 AC 596. The second is that the judge erred in leaving material matters out of account in reaching

her credibility findings. Judge Keith found both grounds to be arguable, and observed that the judge may have overlooked answers in the appellant's interview when finding that he had failed to give a plausible level of detail regarding events in Pakistan. He considered that this was arguably a material error, given the arguable flaw in the judge's finding that the appellant would live discreetly in Pakistan.

8. In submissions, Mr West acknowledged that the second ground fell logically to be addressed first. He submitted that the judge had clearly overlooked a material matter when she found that the appellant had failed to provide any detail about the cousins to whom he was attracted as a teenager. Contrary to the judge's suggestion, he had named a cousin and had given details of the aspects of his looks and personality which the appellant found attractive. The second part of ground two concerned the judge's observation that the appellant had not provided documentary evidence of his encounters with men in the UK. The point had not been raised and it was in any event difficult to see what evidence the appellant could have adduced of these matters. I suggested to Mr West that this point might not be his strongest, since the judge had been entitled to consider whether the appellant had provided evidence which was reasonably available to him in the United Kingdom, whether from dating sites or otherwise, in order to discharge the burden of proof. Mr West acknowledged the force of that observation and submitted that his first complaint in ground two was nevertheless correct.
9. As for ground one, Mr West submitted that the judge had erred in failing to consider whether the appellant's decision to live discreetly in Pakistan was prompted *in material part* by a fear of persecution. Given what he had said in interview, there could be no doubt that the appellant had suggested that this was a material reason for his decision to hide his sexual orientation but the judge had overlooked those matters in reaching her conclusion. This was another 'unfortunate example' of the judge failing to examine the interview record with proper care, Mr West submitted.
10. For the respondent, Mr Wain acknowledged that the judge had potentially overlooked matters when expressing the conclusion in [24] about the vagueness of the appellant's account. When that section of the decision was considered as a whole, however, the judge had given cogent and detailed reasons for concluding that the appellant's account was a fabrication. The judge had been entitled to take account of the lack of evidence of the appellant's encounters in the UK for the reasons she gave. As for the judge's finding in the alternative, Mr West accepted that there was no express reference to the relevant answers in the interview but he submitted that the judge was not required to set out all the evidence.
11. In reply, Mr West submitted that it had clearly been incumbent on the judge to consider what the appellant had said in interview about public stoning of homosexuals before deciding that any decision to live discreetly was prompted by other considerations. In relation to the second ground, he submitted that Mr Wain had failed to engage with the judge's reasoning or the evident defect within it.
12. I reserved my decision at the conclusion of the submissions.

Analysis

13. For the reasons which follow, I have reached the clear conclusion that the judge's decision is vitiated by material legal error and that it cannot stand.
14. Because ground two targets the judge's credibility findings, it is appropriate to start with that ground. The judge began her analysis of the appellant's claim at [22]. That paragraph

contained self-directions on the law. In the following paragraph, the judge rejected the respondent's assertion that the appellant's account had been inconsistent. She found that he had given a consistent account of becoming attracted to boys between the ages of fourteen and sixteen.

15. At [24], the judge stated that 'the difficulty' for the appellant was the lack of detail in his account. She stated that he had made 'generalised statements' about being attracted to his cousins at that age but that there was a lack of detail about this formative time in his life. She found that this lack of detail demonstrated a lack of plausibility in the appellant's account.
16. The judge criticised the appellant in [24] for failing to provide the names and ages of the men concerned, or of 'what they looked like and what attracted [the appellant] to them'. As Mr West submitted, however, it is difficult to square these aspects of the judge's reasoning with various answers given by the appellant in interview.
17. The interview is one of the longest I have ever seen, in fairness to the judge. It spans 63 pages of single spaced A4, containing a total of 252 questions. Whilst it might be fair to say that the appellant failed to give many details of his attractions to his cousins in the earlier stages of that interview, the interviewer returned to the theme in the closing part. The appellant was asked the name of the cousin to whom he was attracted at question 238. He gave the name of the man and stated that he was five or six years the appellant's senior. He said that this cousin was now a pilot who lived in Canada. The appellant said that he had been attracted to his long face, his high forehead and his light brown eyes. He also said that he was attracted to his light complexion and said that he had a face like a drawing in a magazine. He said that this cousin was kind-hearted and that he was involved in charitable work.
18. Insofar as the judge criticised the appellant for failing to provide various details about the boy to whom he was attracted as a teenager, therefore, it seems that all of those details were in fact provided in the closing questions of the interview. I am therefore driven to accept Mr West's submission that the judge erred in overlooking material answers which were given in the interview when she reached these conclusions in [24] of her decision. In fairness to Mr Wain, he recognised that he might be in some difficulty in attempting to defend against this criticism of the judge's decision, and he was constrained to submit that any identified error in this respect was immaterial.
19. The second part of ground two is not in my judgment made out. The judge was entitled at [25] to take account of the absence of evidence of the appellant's activities in the UK. As she explained in that paragraph, the appellant stated that he had had various encounters with men in the UK. It was reasonable and lawful, in those circumstances, to observe that these 'hook-ups' were not supported by any evidence.
20. Mr West at one point in his submissions queried what evidence might properly have been available but the answer is clearly provided by the judge's [29]; she thought that she might have seen evidence of the appellant's profile on dating sites or evidence of the exchanges between the appellant and the men he met on such sites. The judge stated expressly that she did not require the appellant to corroborate his account. She considered that she was entitled to attach weight to the absence of such evidence, however, and she cited *TK (Burundi) v SSHD* [2009] EWCA Civ 40 in support of her approach. Nothing in these sections of the decision represents an error of law, whether procedurally or otherwise. The judge was perfectly entitled to remark on the absence of relevant evidence and to attach weight to that absence. She was not required to alert the appellant to that concern, since it was for him to

adduce relevant evidence and he and his representatives should have been alive to this obvious lacuna.

21. The only established error of law in the judge's assessment of the appellant's credibility is therefore her failure to turn her mind to the parts of the interview in which he had given the very details which she found to be lacking. Mr Wain invited me to find that any such error was immaterial. I am unable to accede to that submission. The judge's process of reasoning began with the flawed observation that the appellant's account was lacking in detail in these respects. She then compared that purported lack of detail with the detail which the appellant had been able to give when talking about his relationship with his wife and their marriage. The evident flaw in [24] therefore infects all of that process of reasoning and it is far from inevitable, in my judgment, that the judge would have come to the same conclusion if she had not erred as she did.
22. Nor do I accept Mr Wain's rather tentative submission that the decision can be saved by the judge's subsequent *HJ (Iran)* analysis. I accept Mr West's first ground of appeal in this regard. At [32], the judge considered that the appellant's 'main motivation' for living discreetly in Pakistan was based in societal considerations and his family's disapproval. In reaching that finding, however, the judge overlooked what the appellant had said in the interview about the treatment of gay men in Pakistan and she failed to ask herself whether the fear of persecution was a *material* reason for the appellant's decision to live discreetly in the past. The question she posed for herself at [32] was incorrectly framed, therefore, and the answer to it failed to take account of material evidence provided by the appellant. The alternative finding which appears at [32] of the judge's decision is therefore tainted by separate legal errors and cannot render immaterial the error at [24].
23. I am accordingly satisfied that the judge's decision is vitiated by legal error and that it cannot stand. The proper course is for the decision to be set aside and remade de novo. Given what was recently said in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 46 (IAC), that exercise should take place before the Upper Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. That decision is set aside in full. The decision on the appeal will be remade in the Upper Tribunal following a further hearing.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 July 2023