



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38530/2013

THE IMMIGRATION ACTS

Heard at Field House
On 16 December 2015

Decision & Reasons Promulgated
On 3 February 2016

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

S A M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A. Jones, Counsel instructed by Milestone Solicitors

For the Respondent: Mr N. Bramble, Home Office Presenting Officer

Anonymity

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

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

DECISION AND REASONS

Background

1. The appellant entered the UK on 27 September 2012 with entry clearance as a student. The respondent curtailed his leave to remain on 03 June 2013 after his Tier 4 sponsor withdrew sponsorship due to non-attendance. On 02 August 2013 the appellant claimed asylum and an initial screening interview was carried out. On 27 August 2013 he was interviewed in detail about his reasons for claiming asylum. The appellant claimed that he was a member of ISO (Imamia Student Organisation), a Shia religious organisation. He claimed that members of Lashkar-e-Jhangvi (a banned Sunni group) shot him in November 2008. He feared that he would be at risk from this group if returned to Pakistan.
2. The respondent refused the application in a notice of decision dated 31 August 2013. It is not necessary to set out the reasons for refusal for the purpose of this decision. On appeal the appellant raised a further reason for fearing to return to Pakistan on the ground of his sexual orientation. The appeal was adjourned for the respondent to consider the issue but was eventually heard by First-tier Tribunal Judge Malins (“the judge”) on 20 January 2015.
3. The judge found that there was no evidence to show that the appellant had ever intended to study in the UK and concluded that this damaged his credibility. She rejected the appellant’s claim that he was an active member of ISO in Pakistan. In the alternative she found that the appellant had failed to produce sufficient evidence to show that he would be at risk from Lashkar-e-Jhangvi in any event. The core of the appellant’s original claim was rejected. However, the judge went on to consider whether the appellant had produced evidence to show that, as a gay man, he would be a risk if returned to Pakistan. The judge accepted that he is “a practicing homosexual” who had been able to conduct his private life in Pakistan in the way that he wanted without suffering past persecution. She concluded that he would be able to return to Pakistan and live his life as he did before without any risk and found that he could reasonably be expected to tolerate any restrictions (although the judge found that there was no credible evidence that he was so restricted in this case). The judge dismissed the appeal.
4. The appellant applied for permission to appeal the decision. On 15 October 2015 Upper Tribunal Judge Pinkerton found that the First-tier Tribunal decision involved the making of an error of law. The fact that the appellant had not suffered past persecution did not necessarily indicate that he would not be at risk on return. The judge had failed to evaluate the background evidence, which indicated that there might be a risk of discrimination, harassment and violence in circumstances where it was possible that a person could not seek effective state protection. The First-tier Tribunal decision was set aside and the appeal listed for further hearing in order to remake the decision.

Decision and reasons

5. The issue for determination in this appeal has been narrowed to consideration of the risk on return for reasons of the appellant's openly gay sexual orientation. The appellant did not seek to challenge the First-tier Tribunal findings on the political aspect of the claim. The First-tier Tribunal's credibility and factual findings are preserved. The submissions made at the hearing concentrated largely on the background evidence relating to Pakistan.

Legal Framework

6. The relevant legal framework was summarised by Lord Roger in the Supreme Court decision in *HJ (Iran) v SSHD* [2011] 1AC 596:

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

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

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

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

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

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

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

7. In *X, Y and Z v Minister voor Immigratie en Asiel* [2014] 3 WLR 770 the Court of Justice of the European Union considered the proper interpretation of Article 9 of the Qualification Directive. The applicants came from countries where homosexual acts are criminalised. The court noted that the right to respect for private and family life under Article 8 of the European Convention of Human Rights was not a fundamental right from which no derogation is possible. The court concluded that the mere fact that there is in existence legislation criminalising homosexual acts does not affect an applicant in a manner so significant that it reaches the minimum level of severity required to constitute persecution within the meaning of Article 9(1) [55]. But a term of imprisonment that accompanies a legislative provision would be capable of constituting an act of persecution “provided that it is actually applied in the country of origin” [56]. The court went on to state that, in considering whether a protection claim is well-founded, the national authorities should undertake an assessment of the relevant facts concerning the applicant’s country of nationality “including its laws and regulations and the manner in which they are applied” [58].

Background evidence relating to Pakistan

8. I was referred to the most recent Home Office Country Information and Guidance (“the CIG report”) “Pakistan: Sexual orientation and gender identity” (dated 14/07/14). At paragraph 1.3.4 the respondent makes reference to a European Court of Justice decision ([2013] WLR(D) 427, [2013] EUECJ C-199/12) but does not give the full citation. The references in fact refer to the decision in *X, Y & Z*. The appellant does not dispute the fact that homosexual acts are criminalised in Pakistan and accepts that the evidence shows that prosecutions are rare. No argument is put forward that the appellant would be at risk solely as a result of criminalisation. The guidance contained in the CIG report is as follows:

- “1.3.5 Lesbian, gay and bisexual (LGBT) persons in Pakistan can be subject to societal and state discrimination, harassment and violence and, depending on the facts of the case, would not be able to seek effective protection from the authorities.
- 1.3.6 Transgender persons (hijras) are often rejected by society and experience discrimination, intimidation and abuse, despite being granted equal rights as Pakistani citizens by the Supreme Court in 2012.
- 1.3.7 Same-sex sexual acts are illegal in Pakistan. The Penal Code does not explicitly refer to homosexuality. However, ‘carnal intercourse against the order of nature’ (see paragraph 2.2.2) is punishable by a fine and/or imprisonment for a period of two years to life. The Hudood Ordinance provides punishment for sodomy and extra-marital sex. In practice the authorities rarely prosecute cases, but police use the laws for harassment and extortion.
- 1.3.8 LGBT persons from privileged backgrounds enjoy some degree of openness and some level of acceptance from their family and close friends provided they live discreetly, but this does not cover the vast

majority of the population and most same-sex relationships tend to remain secret due to the social stigma attached.

- 1.3.9 Gay rights activists and other persons who openly campaign for gay rights in Pakistan would be at real risk from non-state societal actors and would not be able to seek effective protection from the authorities.
- 1.3.10 LGBT persons would not generally be able to seek and obtain effective protection from the state against acts perpetrated against them by non-state actors.
- 1.3.11 Given that homophobic attitudes are prevalent throughout the country, there is unlikely to be any place in Pakistan to which an LGBT person could safely relocate without making fundamental changes to their behavior.
- 1.3.12 If an individual chooses to live discreetly to avoid persecution then, following HJ (Iran), they are a refugee."

9. The CIG report goes on to outline the source material for the policy statements made in the early part of the report. At paragraph 2.2.6:

"2.2.6 The President of Neengar Society [an NGO promoting rights for LGBT person and religious minorities] stated that, although Section 377 and 294 laws were rarely enforced, they were 'used to threaten and blackmail people. Since social stigma and discrimination against LGBT community is more severe in Pakistan, police and other community members threaten the members of LGBT community that they will have them arrested and thrown in jail.' The President of Neengar Society stated that LGBT people are mostly arrested for extortion purposes and that cases may be altered after the police are bribed. The IGLHRC concurred, stating that police raids on gay "cruising areas" may be a "common phenomenon," but charges are rarely pressed as it is common for the police to be bribed with money or sexual favours."

10. The CIG report goes on to cite various pieces of evidence relating to the treatment and attitude of the state authorities in Pakistan:

"2.3.1 According to the US State Department 2013 Human Rights Report for Pakistan, gay men and lesbians rarely revealed their sexual orientation. Systematic discrimination against lesbian, gay, bisexual, and transgender persons was widely acknowledged privately, but insufficient data existed for accurate reporting on these forms of discrimination, due in part to severe societal stigma and fear of recrimination for those who come forward.

2.3.2 The Immigration and Refugee Board of Canada (IRBC) noted in January 2014 that the IGLHRC country advisor considered that, if an LGBT person who faced threats from family or community members went to the police, that the police 'may become an accomplice rather than protector.' The IRBC further reported that 'According to the President

of Neengar Society, incidents of threats or violence from family members against LGBT people are usually unreported and are resolved within the family; there is usually an unspoken agreement that no one will involve the police, and an LGBT person will not report incidents, even if they are “badly beaten”.’ The BBC indicated that LGBT issues were usually addressed within the family.

...

2.3.4 A representative of the Women Employees Welfare Association (WEWA) reported, in 2011, that discrimination by the state of Pakistan against LGBT persons is “encoded, institutionalized and enforced”, due to legal provisions that criminalise same-sex relationships, and the fact that there were no laws prohibiting discrimination on the basis of sexual orientation. The WEWA added that LGBT persons were not accepted legally or socially at either local or national levels, and their rights were infringed within daily existence, employment and education.”

11. In relation to wider societal attitudes and treatment of LGBT people the CIG report contains the following relevant passages:

“2.4.1 The Immigration and Refugee Board of Canada reported in January 2014 that, according to Inter-Press Service, Pakistan's “conservative Muslim society” views homosexuality as a sin. According to a survey conducted by the Washington-based Pew Research Center published in June 2013, 87 percent of respondents in Pakistan said that homosexuality should be rejected by society. The IRBC further noted that, according to several sources, gay men and lesbians are rarely open about their sexual orientation and that “it is difficult for a member of the LGBT community to access housing, a good job, or health care without concealing their sexuality or taking extra precautions with a fear of discrimination.” According to the Neengar Society President, LGBT people in Lahore, Karachi, Islamabad, and elsewhere in Pakistan have been subject to violence and “no one can openly claim to be gay or lesbian in Pakistan as it can still cost them their life to announce their sexuality in public”. According to the IGLHRC country advisor, LGBT people in these cities are commonly subject to harassment and psychological violence from within or outside the family.

2.4.2 Several sources consulted by the Immigration and Refugee Board of Canada reported that the gay community in Pakistan is “underground” and same-sex relationships tend to remain a secret due to the social stigma attached. Although the notion of being gay is taboo, in some circles it is possible to have a gay social life provided it is “discreet and under the radar”, particularly in more affluent urban communities, but for LGBT Pakistanis who are poor, not well-educated, and lack internet access it is difficult.

2.4.3 The President of Neengar Society stated that social media groups and organised meetings in larger cities such as Lahore, Karachi and Islamabad, do exist for LGBT persons; however, this culture exists only among the more socially and intellectually elite classes of Pakistan, and there are no openly gay communities in these cities. Neengar Society provides an emergency shelter to LGBT people who face threats or exclusion. According to the President of Neengar, there were a total of 70 LGBT people seeking shelter in 2013; of these, 10 were lesbians, five were transgender and 55 were gay or bisexual men.

12. The CIG report then goes on to highlight evidence that discusses the cultural context in which gay and bisexual men, in particular, live:

“2.4.4 The Immigration and Refugee Board of Canada (IRBC) reported that, according to various media sources, Pakistani society and families expect men to get married and have families regardless of sexual orientation. According to The Post, in September 2012, a man in Karachi was killed because of his sexual orientation; acid was thrown on his face and other body parts and he was shot twice. In April 2014, The Express Tribune reported on the murder of three gay men in Lahore by a father of two, who said he wanted to ‘send out a message about the “evils” of homosexuality.’ According to the IGLHRC country advisor, young men or boys that identify as gay typically face expulsion from the family home if they do not relinquish their sexual orientation.”

13. I was also referred to a report prepared by Landinfo, an independent country of origin information centre based in Norway. The report is titled “Pakistan: Homosexuals and homosexuality” (03 May 2013). The summary of the report is as follows:

“This report examines the legal framework related to sexual relationships between persons of the same sex and its implementation in Pakistan, as well as general societal attitudes towards homosexuality and the authorities’ protection of homosexuals. Sex between men is illegal, both according to law and religion. No civil rights legislation exists to protect gays and lesbians from discrimination.

In Pakistan, as in many other gender-segregated societies, homosocial behaviour is considered normal and homosexual sex between men is widespread and accepted under a condition of discretion and secrecy; everybody knows what is going on, but nobody talks about it.

At the same time the general climate for sexual minorities is hostile, and a person who comes forward as a homosexual will risk sanctions from the family, societal isolation, legal problems and violence.”

14. The Landinfo report is consistent in saying that there are a low number of reported prosecutions under the criminal code. Prosecutions usually involve cases where adults have abused minors. Where the law is enforced it tends to be directed towards

cases where abuse occurs and not towards voluntary sexual relations between adults of the same gender [3.2]. In common with the CIG report the Landinfo report also outlines evidence to show that those from poorer socio-economic backgrounds are generally more at risk of harassment and extortion under threat of prosecution from the police. Paragraph 3.3 concludes:

“Therefore, as Landinfo understands the situation, MSM [men who have sex with other men] do not have problems related to criminal prosecution. Those who are most visible in public, however, risk being harassed by the police, a harassment that seems to be both economically and sexually motivated. The harassment probably primarily affects persons of low socio-economic background and hijra. The ban works as a basis for threats; threats which lead to extortion.”

15. The Landinfo report goes on to discuss what is acceptable in terms of interaction between the genders in Pakistan. While social and physical contact between men and women, especially when unmarried, is unacceptable, the report makes clear that displays of affection between men is socially acceptable [4.2.1]:

“On the other hand, persons of the same gender (most often men) can relatively openly display emotion to each other. In Pakistan, one can often see young boys who hold hands and act in a way that probably would be perceived as an expression of homosexuality in Western countries. While women and men cannot even shake hands in many cases, it is not uncommon to see men who almost act in a courtship manner. When it comes to opportunities for persons of the same gender to show affection towards each other in public, it seems that the relationship between intimacy and social background is the opposite of what is the case for the same between women and men. Hugging, holding hands and physical contact between men seems to primarily be prevalent in lower socio-economic layers. The middle class and upper class, however, have adopted the Western notion that such behaviour may be indicative of homosexual attraction – which seems to be a trend in many communities around the world where showing affection towards someone of the same gender has traditionally been fine.

The moderate sections of the upper and middle class have mixed-gender gatherings and young men from this background do not hold hands as they are aware of the association this behaviour holds with homosexuality (IHEU 2008).

IHEU indicates that the acceptance of affectionate behaviour between men means that «It is very easy for homosexuals to disguise their relationship in this manner» (IHEU 2008).”

16. The report goes on to state that gender segregation and control over women are likely to provide a partial explanation as to why sex between men “is relatively widespread and tacitly tolerated” [4.2.2]. The report goes on to provide further evidence to support the statement:

“It is probably relevant to understand this tolerance in light of that homosexual acts, in isolation, do not represent a threat to the basic institution of Pakistani

culture, family. A stronger focus on stricter levels of punishment for extramarital heterosexual intercourse (zina) than homosexual intercourse, may be a reflection of the same. The anthropologist Unni Wikan also points to the traditionally high degree of tolerance for homosexuality in many Muslim societies, and this should be seen in light of the uncompromising demand that women should be sexual pure and chaste. Sexuality between men is considered a safety valve that protects women (Landinfo 2012).

The researcher Badruddin Khan suggests the following about the background of a general tacit tolerance of homosexuality in an interview on Queer Jihad:

Private sexual conduct is really not a big issue. In fact, from a pragmatic point of view, it is probably better for a young man to have sex with other men before marriage than a woman, since the only women available would presumably be prostitutes (Khan, n.d.)."

17. The Landinfo report goes on to conclude:

"There is no room for exposure of a gay identity in Pakistan. Landinfo believes that this, as with the tacit tolerance for homosexual acts, can be seen in the light of ruling family and marriage traditions. Unlike homosexual acts, homosexuality represents a permanent threat to marriage and reduces a family group's opportunity for consolidation through marriage. Homosexuality carries a sense of and is in itself a source of the destruction of the patriarchal extended family. Homosexuality violates the Pakistani community's most important institution and it would probably be perceived as far more serious to come out with a homosexual identity than if homosexual acts were to come into public awareness." [5]

"It is established above that persons of the same gender can live together, but if they have a homosexual relationship and it becomes known, they risk serious abuse, according to both sources in Islamabad. Hina Jilani categorically established that it is not possible «to come out of the closet» in Pakistan, it would expose the person to risk of serious violence from private parties. There is no empirical data available, so Jilani's viewpoint is regarded as a qualified assessment. Landinfo believes that there is no reason to question the assessment; the lack of empirical data is probably a confirmation that it is correct.

Landinfo also believes that it is reasonable to assume that the strongest reactions will come from the immediate family, because a family member who is characterised as homosexual would clearly weaken the family group's moral status and honour. As an extension of homosexual acts having an element of zina, one cannot ignore that publicly known homosexuality within a traditional and religiously conservative environment would represent a risk of serious reactions. Risk of reactions and the seriousness of the reactions would probably vary along several dimensions, including geography, religious/cultural climate, network, political influence/power, economics and education, etc.

It is furthermore possible that other parties would react, primarily conservative religious environments which could take action and represent a threat of serious abuse.” [5.1]

18. There is other background evidence before the Tribunal but it was not referred to in detail. In any event, it is in general accord with the evidence outlined above. Both parties asked me to assess the appeal based on the background evidence.

Conclusions

19. The First-tier Tribunal Judge accepted that the appellant is a gay man from Pakistan who has given an account of sexual relationships conducted with several cousins and school mates during his childhood and adolescent years. In light of this the judge concluded that it was not possible that the appellant was not known to be gay when he lived in Pakistan. She concluded that the appellant was able to conduct his “homosexual activities” in Pakistan in the way he wanted without a serious detriment to his private life. There was no evidence to show that he had been persecuted in the past by friends or family or any one else in Pakistan.
20. In order to assess whether the appellant would be at risk on return his evidence must also be placed in the context of the background evidence outlined above. I have considered his witness statement in some detail. It is possible that he may have been able to conduct sexual relationships with other young men in Pakistan without attracting too much adverse attention. The background evidence shows that sex between men is likely to be tolerated by family members and wider members of the community. Sex between men is perceived as a sexual ‘safety valve’ in a society where pre-marital sex between heterosexual couples is taboo.
21. Nothing in the description of the appellant’s sexual relationships with young men in Pakistan suggests that they developed into relationships with an openly homosexual identity. The early encounters that he had were as a young boy. The more serious relationship he had with a young man at college, who he wanted to marry, ended when that young man refused to make the relationship open. Consistent with the background evidence, his boyfriend Z told him that he would marry a girl that his parents had already found for him. Even in the UK he found that his first boyfriend, who was also Pakistani, wanted to be discreet about his sexuality. In light of the background evidence it is likely that this was a result of him wanting to respect Pakistani social mores because it would have been possible to conduct an open relationship in the UK without fear. At the date of the hearing before the First-tier Tribunal the appellant said he was in a relationship with another man, who encouraged him to live openly as a couple. He says that they are well known in the gay community in London and Manchester. He says that his new partner encouraged him to embrace his sexuality rather than be ashamed of it.
22. The evidence shows a progression in the appellant’s relationships over time. While he was able to conduct sexual relationships in Pakistan, and perhaps those relationships were known and tolerated by those who knew him, it is only since he came to the UK that he has been able to develop a relationship with an openly gay

identity. The evidence shows that in the context of Pakistani culture a distinction can be made between 'homosexual acts' and a 'homosexual identity'. While sex between young men might be tolerated to a certain extent, the background evidence makes clear that core family values are seen to provide essential cohesion in Pakistani society. An openly gay identity is seen to threaten or undermine those core values. It is at this point that an openly gay man is likely to be at risk of ill-treatment ranging from discrimination, harassment or violence by members of his own family or other members of society. The CIG report recognises that where an LGBT person is at risk they would not generally be able to seek and obtain effective protection from non-state actors and that internal relocation would not be available given the prevalence of homophobic attitudes throughout Pakistan.

23. In concentrating on the fact that the appellant had been able to conduct sexual relationships with other men in Pakistan the First-tier Tribunal failed to appreciate that the mere fact of conducting a sexual relationship is not the same thing as being able to live openly and express a gay identity. While the former is tolerated to some extent in Pakistan the latter is seen as a threat to the core social values that govern Pakistani society. The evidence shows that if the appellant sought to live in Pakistan with an openly gay identity there is a reasonable degree of likelihood that this could place him at risk from members of his family or from wider members of the community. In such circumstances effective protection would not be available. As Lord Roger made clear it is "his right to live freely and openly as a gay man without fear of persecution" that engages the protection of the Refugee Convention.
24. For the reasons given above I conclude that there is a reasonable degree of likelihood that the appellant would be at risk of treatment amounting to persecution for reasons of his membership of a particular social group.

DECISION

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

The First-tier Tribunal decision was set aside

I re-make the decision and ALLOW the appeal

Signed



Date 02 February 2016

Upper Tribunal Judge Canavan