



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

Appeal Number: PA/08801/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 7th June 2017**

**Decision & Reasons Promulgated
On 9th June 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**BM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paramjorthy, Counsel instructed on behalf of the
Appellant

by way of Direct Access

For the Respondent: Mr K Norton, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

2. 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.
3. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who in a determination promulgated on 9th January 2017 dismissed her claim for protection. The Appellant's immigration history is set out within the determination at paragraph [1] and in the decision letter issued by the Secretary of State. It can be summarised briefly as follows. The Appellant arrived in the United Kingdom on 6th October 2010 on a visa as a student valid until 2011. A grant of further leave to remain was made in 2012, but a further extension was refused. She, however, made a subsequent application in April 2012 which was granted which gave her leave until 30th January 2014. Whilst the determination refers to a return to her home country in September 2014, it appears that this is a typing error and that the Appellant went to Spain, returning to the United Kingdom in or about December 2014. Her leave had been cancelled on 23rd September 2014. That led to an appeal which was dismissed. It is recorded that on 3rd August 2015 she became appeal rights exhausted. On 8th February 2016 the Appellant made her application for protection which resulted in a substantive interview and a decision letter issued by the Secretary of State dated 5th August 2016 in which her application for asylum was refused.
4. The basis of the Appellant's protection claim is recorded in the decision of the First-tier Tribunal at paragraphs [2] to [7] which is also referred to in the detailed reasons for refusal at paragraph [3]. Her claim for protection related to fear on return to Pakistan as a result of her membership of a particular social group, namely that of sexual orientation based on her relationship with another woman whom she had met in the United Kingdom. There was no dispute in the decision letter that an applicant in her position was capable of being a member of a particular social group for the purposes of the 1951 Convention. It was accepted that her claim that she had a same sex partner and that she would face persecution in Pakistan due to her sexuality did give rise to the basis for a claim for asylum for a Convention reason, namely that which I have set out, membership of a particular social group. However, as the decision letter went on to consider at paragraphs [13] to [24] the Secretary of State, taking into account the available evidence provided, did not accept that the Appellant had given a consistent account of her sexuality, thus it was not accepted that she either had any problems in Pakistan previously as a result of her sexuality or on return (see paragraphs [24] and [29]). Thus, as to assessment of future fear set out at paragraph [30] onwards, as the Secretary of State did not accept her claim to be in a same sex relationship it was considered that she had failed to meet the test set out

in **HJ (Iran) v SSHD [2010] UKSC 31**. In the alternative, at paragraphs [32] to [36] the Secretary of State considered that even if it were accepted that the Appellant was “interested in same sex relationships”, the Secretary of State did not accept that she would be at risk upon return on the basis that she would choose to live discreetly.

5. Consideration was also given to risk on return as a single female at [35] and also in relation to Article 8 and consideration of discretionary leave based on medical grounds (see paragraphs [52] to [71]).
6. The Appellant exercised her right to appeal that decision and the appeal came before the First-tier Tribunal on 1st December 2016. It is common ground between the parties and as set out in the Grounds of Appeal settled by Counsel that the Home Office was not represented at the appeal hearing, thus the judge considered the appeal in the absence of the Presenting Officer and on the material that was presented to the Tribunal. There is also no dispute that the Appellant provided a bundle of documents including witness statements from both herself and her partner and a number of other documents that were provided, including a summons and a letter from a friend in Pakistan. Earlier documents had been set out in the Respondent’s bundle.
7. It is recorded in the determination at paragraphs [9] to [13] that the Appellant gave evidence by adopting her written statement in the Respondent’s bundle and also the statement in the indexed bundle to which I have referred. There is no reference to any questions asked by Counsel, although Mr Paramjorthy makes reference in his submissions to this Tribunal that there were some additional questions asked in-chief. The judge does record responses made by the Appellant to questions asked by the judge at paragraphs [10] to [11]. At paragraph [12] the judge records that the second witness to give evidence was the Appellant’s partner who adopted her statement as evidence-in-chief. It appears to be common ground that no questions were asked of the Appellant’s partner who had provided a witness statement at pages 6 to 12 of the indexed bundle. The judge heard detailed submissions from the Appellant’s Counsel (see paragraph [13]).
8. The judge set out his findings at paragraphs [17] to [46] and made the point that whilst the Secretary of State had accepted that homosexuals in Pakistan would constitute a social group, the issue was whether the Appellant had demonstrated from the evidence that she was at risk as a result of her sexuality. At paragraph [20] of the determination the judge made reference to the difficulties an applicant would have being able to provide direct evidence of it, and that “whether or not an applicant is homosexual is largely one of considering indirect evidence from which inferences will be drawn as to whether the Appellant is indeed a homosexual.” The judge went on to state:-

“When assessing indirect evidence, the credibility of the individual concerned plays a crucial role. If the individual is found to be lacking in

credibility, then it will become very hard for them to satisfy a Tribunal of the truth of their claims.”

9. The judge then went on to make reference to Section 8 of the 2004 Act relating to assessment of credibility and made a number of findings of fact which were adverse to the Appellant. In summary the judge at [26] concluded that he did not find the Appellant to be a witness of truth and that she had not been able to satisfy the judge that her sexuality was such as to put her life and liberty at jeopardy if returned to Pakistan (see [26]). The judge also did not find the Appellant had been truthful with regard to the claim that she was previously married in Pakistan against her will. The judge rejected the court summons (see paragraphs [40] to [43]) and at paragraph [46] the judge rejected her account as to her sexuality. In reaching this conclusion at [44] the judge made reference to the Appellant’s partner but found that it was more likely than not that she had “agreed to assist the Appellant in pursuing her asylum claim”. Thus the claim for protection was dismissed on all grounds.
10. The Appellant sought permission to appeal that decision and the grounds are set out in the papers dated 23rd January 2017. In essence those grounds make reference to the well-known **Surendran** guidelines which apply to procedures adopted by the Tribunal in the absence of Home Office representation (see **MMN v SSHD (OO/TH/02423) [2000] INLR 576**). The grounds in summary submit that the guidelines set out in that case were not followed and that matters that went to the core of the appeal and the findings of fact were not put to the Appellant, which therefore amounted to an error of law. The points that were not put to the Appellant but which were relied upon to support findings of fact are then set out in those grounds. In particular, at paragraph [14] the grounds make reference to the lack of consideration of the supporting witness’s written evidence which was set out in a lengthy detailed witness statement at pages 6 to 12 of the bundle.
11. At the hearing before this Tribunal Mr Paramjorthy, who represented the Appellant in the First-tier Tribunal, relied upon the grounds that were before the Tribunal. He relied upon the grounds as pleaded taking the Tribunal through those grounds by reference to the determination and where necessary by reference to the decision letter. In doing so he identified the areas in the findings of fact which were not raised in the refusal letter and thus, he submitted, it was necessary for the judge to raise matters in evidence before making an adverse credibility finding. By not doing so, he submitted, was procedurally wrong and did not give the Appellant the opportunity to provide any explanation.
12. Within those submissions he made reference to paragraph [44] of the judge’s determination. In that paragraph the judge made reference to the supporting evidence of the Appellant’s partner and the photographic evidence that had been produced. The judge recorded in that paragraph the following:-

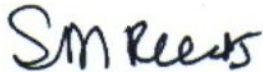
“Whilst I do not totally discount them, set against the adverse findings I have made, they do not assist the Appellant in persuading me that she is in fact in a homosexual relationship. The photographs show the Appellant and her partner in situations which do not self-evidently demonstrate that they are in an intimate relationship. In my view, it is quite likely that the Appellant’s claimed partner is practically and emotionally dependent on her ... It is more likely than not, that xxx agreed to assist the Appellant in pursuing her asylum claim.”

13. In respect of that paragraph Mr Paramjorthy referred the Tribunal to the decision letter at paragraph [23] which made reference to there being two statements from the Appellant’s partner. It recorded that the account could not be considered to be an “objective account of events surrounding your sexuality”. The Secretary of State gave no weight to that document. The submission made was that the evidence of the Appellant’s partner went to the core of her account concerning her sexuality and her relationship in the United Kingdom. This was further relevant to the issues set out in the refusal letter but were considered in the alternative by the Secretary of State at paragraphs [30] to [36]. It was submitted that the witness had been tendered before the court and if there were any questions relating to her account that they ought to have been asked of the witness. However, no questions were asked of any kind. He further submitted that the closing comments made at paragraph [44] gave the appearance of the judge, in polite terms, suggesting that the witness had given a statement solely to assist her in pursuing her claim; the inference he submits was that this was “an allegation of fraud” (see paragraph 14 of the written grounds). He submits that the judge attached no weight to the detailed account of their relationship in reaching findings of fact on the core issue and rejected the evidence on the basis of the previous adverse findings that had been made in the preceding paragraphs. Mr Paramjorthy submitted that the case had been advanced on the basis of the Appellant being a member of a particular social group which had been accepted by the Secretary of State at paragraphs [19] and [20] of the decision letter, thus the corroborative evidence from the Appellant’s partner was pivotal and central to the overall credibility of the claim that the judge had not given consideration to it, and when making a self-direction at paragraph [20] as to assessment of evidence, the evidence of her partner formed a central role in the overall finding. Thus he submitted that was both an error of law which went to the core of the claim.
14. Mr Norton by way of response made reference to the difficulties that a judge faces in a protection appeal of this kind when the Secretary of State was not represented before the First-tier Tribunal. He submitted that credibility of both the Appellant and the Appellant’s partner was central to the overall findings that were made and in this context, in the light of the Secretary of State not being represented, it was open to the judge to consider the issues raised in the refusal letter alongside the evidence given by way of rebuttal. However, whilst he submitted that there were adverse credibility points which were properly made by the judge, some of those did not go to the core of the claim. However, significantly, he

submitted that the core part of her claim as to her sexuality and the supporting evidence of her witness had not been properly considered by certain matters not being put to the appellant, and as this went to the core of the claim that it was an error of law and that the determination should be set aside. He reiterated that there was no criticism of the judge who was having to decide a protection appeal without the assistance of a Presenting Officer. Nonetheless, he considered that there was a material error of law and that in those circumstances he invited the Tribunal to set aside the decision and for the appeal to be reheard so that all issues relating to credibility could be considered.

15. In the light of that concession made by Mr Norton that there is a material error of law in the determination of the First-tier Tribunal, it is the case that both parties agree that the determination cannot stand and must be set aside. I am satisfied that the central submission made on behalf of the Appellant to which I have made reference to which concerns the core issue relating to the Appellant's sexuality and the evidence of her partner was such that it was necessary for the judge to give full regard to the evidence in that witness statement which had been adopted as the witness's evidence-in-chief. It was a substantial witness statement that went into detail about their relationship and made reference to the Appellant receiving threatening calls via the telephone (see page 11). As set out earlier, the core of the Appellant's claim related to her sexuality, and whilst the decision letter appeared to reject the witness's account on the basis that it could not be seen as "an objective account" (see paragraph [23]) which was reflected in the findings at paragraph [44], it is difficult to see how evidence from a partner relevant to a relationship could ever be considered if such evidence is discounted as not being "objective" or "self-serving". Mr Norton is right to observe that there were some adverse credibility findings made by the judge which were not challenged in the grounds, for example the findings set out at paragraph [36] which made direct reference to other documentation that was before the Secretary of State. However, I am satisfied for the reasons given by both advocates, that the central issue relating to the Appellant's sexuality was not considered in the light of all of the evidence which included, and importantly the Appellant's partner, in the light of the evidence that had been given. Thus the decision cannot stand and will be set aside.
16. As to the remaking of the decision, both advocates submitted that the correct course to adopt in a case of this nature would be for the appeal to be remitted to the First-tier Tribunal because it would enable the judge to consider the Appellant's evidence and that of her partner; this is a case in which the adverse credibility findings are therefore unsafe and cannot be preserved although as Mr Norton submitted the determination is a record of the evidence given by the appellant at that time.
17. In the light of those submissions, I am satisfied that this is the correct course to take and therefore I set aside the decision of the First-tier Tribunal and it will be remitted to the First-tier Tribunal to hear afresh.

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 her or any member of her family. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed
Upper Tribunal Judge Reeds

Date: 8/6/2017