Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07894/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 19th February 2018	**On 16th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MUHAMMAD [A]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Tariq, Legal Representative
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 16th of November 1990. He appeals against the decision of Judge of the First-tier Tribunal Bennett sitting at Hatton Cross on 14th of September 2017 who dismissed the Appellant's appeal against a decision of the Respondent dated 4th of August 2017. That decision was to refuse the Appellant's application for international protection.

2. The Appellant last entered the United Kingdom in October 2014 on a family visa which had been valid for five years from 2009 until 11th of November 2014. The Appellant overstayed thereafter and he was found working illegally in Slough on 13th of November 2016. He was detained pending removal but claimed asylum on 16th November 2016. It was the refusal of this application on 4th of August 2017 that led to the present proceedings.

The Appellant's Case

3. The Appellant claimed that he was at risk of serious harm upon return because of his sexual orientation. Appearing in person, he told the Judge that he came from a very religious family. One of his brothers, MAA, was a religious scholar. The Appellant discovered his own bisexuality in 2003 when he started a relationship with a friend called Faisal. He and Faisal would have sexual relations in the Appellant's parents' house or in Faisal's house and would watch pornographic films together. The relationship lasted until 2004. He then had another relationship with Farook, which started in 2005 and ended in 2006 when the Appellant's parents moved.

4. After the move the Appellant had a relationship with a male called Taimur which lasted from 2006 until December 2013 when he was found in bed with Taimur by MAA. The Appellant was locked in his room for 5 days after which his family told him he must not do that again and he had to start wearing Islamic dress. The Appellant was attacked on two occasions in 2014 which were reported to the police. The Appellant thought his brother MAA was responsible for these attacks. After the 2nd attack the Appellant's mother secretly arranged for the Appellant to leave Pakistan with help from another brother. Whilst in the United Kingdom the Appellant visited a gay club in central London and had physical relations with a man called Alex. The Appellant produced 3 first information reports (FIRs) to show that his life was in danger, the first was issued in Fabry 2009 before the Appellant's family discovered the Appellant's sexuality.

The Decision at First Instance

5. The Judge noted at [40] that the Appellant's sexuality was very much in issue in the appeal. The Appellant's way of life in the United Kingdom was the logical starting point for considering this question because the Appellant was free to live openly in the United Kingdom and it should be easier for him to produce evidence about his life here than about his life in Pakistan. The Appellant had been living in the United Kingdom for almost three years by the time of the hearing yet there was very little evidence that the Appellant had lived as a gay person since coming here. The Appellant did not claim to have had any lasting relationships in this country although he had claimed to have had such in Pakistan. The Judge did not accept that the Appellant's lack of status was the primary reason why the Appellant had been unable to have a stable relationship.

6. There was very little documentary evidence to show that the Appellant had had any casual relationships. The available evidence related to the period after the Appellant claimed asylum and therefore to a period when the Appellant had an interest in generating evidence to establish that he was sexually active. The Judge considered at [42] the evidence produced by the Appellant to establish a relationship with Alex (who was not called to give evidence at the hearing). The Appellant produced printouts of WhatsApp communications with Alex. Alex had returned to Europe but it was unclear how the Appellant knew this because the printout produced by the Appellant did not record any effective communications between the two men after 9th of May 2017 and gave no reason to believe why Alex should intend to return to Europe.

7. The Judge did not accept that the Appellant had brought the FIRs with him when he came to the United Kingdom in October 2014. Each of the translations was stamped with an attestation stamp by a notary public in Pakistan on 24th of November 2014. The Appellant must have arrived before 11th of November 2014 because his entry clearance expired on that day. In any event the FIRs did not support the Appellant's claim that the Appellant's father and MAA had orchestrated the two attacks in 2014 but ran counter to that claim. The first FIR was in fact a complaint by MAA that he, MAA, was being threatened. The Appellant's evidence was that he had gone with his father to report the 2nd incident which made little sense if the Appellant's claim, that his father had instigated the attack, was correct.

8. The Appellant's evidence about his family's political involvement lacked credibility. The Judge noted at [52] that the Appellant was "highly evasive" when asked whether he had any documents to show that his father and uncles were involved in politics in Pakistan. The late stage at which the Appellant claimed political asylum also damaged his credibility.

9. At [45] the Judge indicated he did not accept that it was reasonably likely that the Appellant have been living in the United Kingdom as a bisexual or gay person. Although the Appellant would not necessarily have any documentary evidence about a one-night stand, it was very surprising that there was so little independent evidence to substantiate what the Appellant said about himself. It was not reasonably likely that the Appellant had had any form of sexual encounter with Alex or with Alex's friend. Photographs produced by the Appellant were probably taken for the purpose of the Appellant's application and this probably explained why the Appellant had kept the bills issued by the KU club. At [48] the Judge noted three areas in the Appellant's evidence where the Appellant had contradicted himself. These involved where the Appellant had allegedly had sex with Taimur, how long he had worked for MAA and the dates on the FIRs themselves (see paragraph 7 above). The Judge dismissed the appeal.

The Onward Appeal

10. The Appellant appealed against this decision arguing that it was unreasonable for the Judge to have sought extra evidence in support of the claim to be gay just because the Appellant had been living in the United Kingdom for almost three years. The explanation that he could not hold on to a lasting relationship because of his uncertain immigration status was quite reasonable. There was no requirement in law upon him to show that he was sexually active. The documentation relating to Alex was not provided to show any sort of long-term relationship but to prove that the Appellant was gay. The photographs taken whilst he was partying in gay clubs were genuine. The Appellant had evolved as a person since leaving Pakistan due to the freedom he had witnessed in this country. Any assessment of his behaviour upon return should be assessed accordingly.

11. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 15th of December 2017. In granting permission to appeal he found it arguable that the Judge had overlooked the distinction between sexual activity and the Appellant's sexuality being very much in issue in the appeal. It was arguable that the Judge's approach to the available evidence had been affected if the Judge considered that the Appellant had an interest in generating evidence. It was arguable that the Judge fell into error in the approach taken to the availability or otherwise of corroborative evidence. It was unclear whether the Judge had attached undue weight to the absence of corroborative evidence. The Judge did not refer to the totality of the available evidence.

12. Those conclusions inevitably affected the way in which the Judge viewed the Appellant's evidence about relationships in Pakistan. It was arguable that the Judge had fallen into error in the sequential approach which the Judge had adopted and that the totality of the evidence had not been assessed in contradistinction to severing parts of the chronology. The Judge at [48] had referred to three areas in the Appellant's evidence where the Appellant had contradicted himself. However, the Judge's analysis of credibility in this context had arguably been affected by the introduction to [46] of the decision, [I note here that this appears to be a reference to the Judge's comment that the Appellant had obtained evidence for the purposes of this application which inevitably affected the way in which the Judge viewed the Appellant's evidence about relationships in Pakistan]. The Respondent did not reply to the grant of permission.

The Hearing Before Me

13. As a consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the determination such that it fell to be set aside and the case reheard. If there was not then the decision at first instance would stand.

14. For the Appellant it was argued that an error had occurred due to the treatment of the evidence. There were two tests to be applied. The first was whether the Appellant was gay. The second was whether he would be

perceived as gay. The determination had not followed that procedure. The Judge's focus was on the Appellant's activity commenting that there was little evidence that the Appellant had lived as a gay person. However, the evidence produced by the Appellant showed that the Appellant was known to Alex and that the Appellant had visited the gay club. Alex had confirmed in the correspondence that he knew who the Appellant was. That was in the context of a gay relationship between the two men. The exchange between the two was a clear indication that the Appellant was trying to persuade Alex to come to court to give evidence. The Appellant had explained why he could not do this.

15. There were incorrect procedures in the substantive asylum interview. For example, at question twelve the Respondent had jumped to a question about the involvement of the Appellant's father in politics. At question ninety-five the Appellant had explained how it felt to live openly in the United Kingdom but the refusal letter had been more concerned with the Appellant's sexual activity. The Appellant had produced background material of what happened to people in Pakistan who came out as gay. There was no mention in the determination of a keychain which had a photograph of someone other than Alex. There had been insufficient consideration of the evidence.

16. For the Respondent it was argued there was no material error of law. There had been no mention of a keychain or indeed a stab wound in the Appellant's statement. Following the structure required by the case of **HJ Iran**, the Tribunal must first satisfy itself that the Appellant was gay. It was easier for the Appellant to provide evidence about his sexual activity in the United Kingdom but there was no such evidence. All there was, was a WhatsApp print out that did not show anything. The grounds of onward appeal were a mere disagreement with the determination. The Judge had gone through the Appellant's circumstances in the United Kingdom. It was open to the Judge to look at the case in the way he had.

17. In conclusion it was argued that it was not just whether the Appellant was gay but whether he would be perceived as gay. I queried with the Appellant's representative [55] of the determination in which the Judge had said that there were no significant obstacles to the Appellant's integration into Pakistan upon return and he could return to the family home if he so wished. That suggested that the Judge did not find the Appellant was likely to be perceived as gay. In reply the Appellant's representative submitted that the Appellant had been actively attending gay bars in United Kingdom and it needed to be analysed whether the Appellant would be forced to live discreetly upon return.

Findings

18. The issue in this case was whether the Appellant could establish to the lower standard that he was gay or would be perceived as gay upon return to Pakistan. The Judge did not find the Appellant to be a credible witness and gave detailed reasons (some of which I have summarised above) for

this conclusion. The Appellant's case was that he had had lengthy relationships in Pakistan and had some sexual activity in the United Kingdom. The grounds of onward appeal and oral submissions criticised the Judge's emphasis on the Appellant's lack of sexual activity but in the absence of evidence that the Appellant had engaged in relationships with other men, it is difficult to see how the Judge could have answered either of the two questions in **HJ Iran** in the affirmative. Without some evidence that the Appellant had engaged in relations with other men, it was difficult to see how the Appellant could show that he was gay or would be perceived to be gay.

19. The problem for the Appellant was that the Judge did not accept the evidence which the Appellant put forward. There were inconsistencies in the Appellant's account of his activities in Pakistan, no good explanation why the Appellant was unable to call any witnesses (such as Alex) to support his claim and the Appellant had made an asylum claim based on imputed political opinion which had no merit whatsoever. That the WhatsApp correspondence indicated that Alex remembered the Appellant added little to the case, since the WhatsApp exchanges did not take the case significantly further for the cogent reasons given by the Judge at [42] and [43].

20. Taken cumulatively all of these factors undermined the Appellant's credibility in the Judge's mind. Whilst it is the case that supporting evidence is not a mandatory requirement in an asylum appeal, where evidence could reasonably be expected to be obtained without undue difficulty and yet that evidence has not been obtained it is open to a Judge to take an adverse view of the credibility of the evidence before him or her. It did not assist the Appellant's case that he produced FIRs which contradicted the claim for asylum.

21. The grant of permission in this case is not entirely easy to follow. The Judge of necessity had to set out his conclusions in some form of order. I do not read the determination as being the case that the Judge formed a conclusion and then looked for evidence afterwards to support that conclusion. The Judge was required to consider the strength of the evidence being put forward and he did so. He came to the view that much of the evidence which the Appellant did rely on had been generated solely for the purposes of the hearing and in consequence little or no weight could be attached to it. This was not a sur place claim where the Appellant's motives for his actions would be irrelevant. The conclusion that the evidence had been generated for the purposes of the appeal was not a conclusion arrived at in a vacuum but was the result of a carful examination of that evidence itself.

22. The Appellant produced some evidence to the Judge to show sexually related activities (for example his oral testimony that he had had affairs in Pakistan). It was a matter for the Judge looking at the evidence in a holistic way to decide whether that evidence supported the Appellant's claim or whether it was of little value because of the circumstances in which it had

been produced namely to bolster an otherwise weak claim. This is a perfectly straightforward way for a Judge to proceed and the references made in the grant of permission to appeal to arguable errors in the determination do not in my view carry weight. It is not clear to me for example what Judge Hollingworth meant at [5] of his decision to grant permission in saying that the Judge had not referred to the totality of the available evidence. Leaving aside the fact that it is not necessary for a Judge to set out each and every piece of evidence put before him or her, this was a very thorough determination in which the Judge analysed the relevant evidence in some detail. The Judge came to a very clear conclusion that the Appellant was not gay. He gave adequate reasons for that decision and the grounds of onward appeal are a mere disagreement with that conclusion. The Judge also explained why the Appellant would not be perceived as gay and the argument that the Judge has overlooked the alternative tests in HJ Iran has no merit. Similarly without merit are the criticisms of the refusal letter. The Appellant was given a full opportunity to put his case across in interview, the difficulty was that the case was not credible.

23. The Judge had not begun his determination with a finding that the evidence produced by the Appellant existed because the Appellant had an interest in generating evidence. When the Judge made that remark, he had already at that point in the determination dealt with the argument that the Appellant's immigration status prevented him from establishing gay relationships of any significant duration (he had rejected the argument). When considering whether the Judge made a material error of law in the determination it is necessary to read the determination as a whole and not take individual sentences from the determination out of context and place undue weight on their position in the overall structure of the determination. I do not consider that there are any material errors of law in what was a carefully written determination prepared by a very experienced Judge.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 15th of March 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 15th of March 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge