



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

Appeal Number: PA/07345/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 18th December 2018**

**Decision & Reasons
Promulgated
On 29th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**UY
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. C Talaacchi, Counsel instructed by Buckingham Legal Associates

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

DECISION AND REASONS

1. Although an anonymity direction was not made by the First-tier Tribunal (“FtT”), and no application is made before me, as this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction

applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a Pakistani national. He first arrived in the United Kingdom in September 2010 as a student. He returned to Pakistan for a short period in 2013 and returned to the UK lawfully, in September 2013. At the time of his return to the United Kingdom, the appellant had the benefit of leave to remain until 27th December 2013. In December 2013, he applied for further leave to remain as a student. That application was initially refused in February 2015, without a right of appeal. The respondent reconsidered that decision and on 9th June 2015, respondent again refused the application for leave to remain but this time, the decision attracted a right of appeal. It would appear that the appeal was dismissed by the First-tier Tribunal (“FtT”), but that decision was set aside by the Upper Tribunal.
3. In any event, on 23rd January 2017 the appellant claimed asylum. The claim was refused by the respondent for the reasons set out a decision dated 21st July 2017. The appellant appealed, and his appeal was dismissed for the reasons set out in a decision of FtT Judge Phull promulgated on 12th October 2017. The appellant was granted permission to appeal by Upper Tribunal Judge Plimmer on 29th January 2018. The decision of FtT Judge Phull was set aside by Deputy Upper Tribunal Judge Doyle for the reasons set out in a decision promulgated on 30th of April 2018 and the matter was remitted to the FtT for hearing afresh. The appellant’s appeal was heard by FtT Judge Young-Harry and the appeal was dismissed for reasons set out in a decision promulgated on 16th October 2018. It is that decision that is the subject of the appeal before me.

The decision of FtT Judge Young-Harry

4. The FtT Judge refers at paragraphs [8] to [10] of the decision, to the evidence before her. A summary of the matters relied upon by the

appellant is to be found at paragraphs [13] to [16] of the decision. The Judge's findings and conclusions are to be found in paragraphs [18] to [39] of the decision. The Judge noted, at [18], that there are a number of matters which caused her to doubt aspects of the appellant's claim. At paragraphs [19] and [20], the Judge states:

"19. I accept the appellant's evidence regarding his sexuality. I accept also, that it is likely he had a long-term relationship in Pakistan before he left. I do not believe that the appellant is bi-sexual, he did not seem to fully understand or grasp the difference; I find it is likely he is a homosexual male.

20. I found the appellant's two witnesses credible. Although there were some minor variations between their accounts, such as how long they had known each other and how often they communicate, I found them generally consistent. They both confirmed that the appellant is either gay or bisexual but that he certainly prefers men. They described the parties that they regularly hold and attend. They confirmed that they both see the appellant with men during the parties and have often seen him leaving with men."

5. However, the Judge rejected the appellant's claim that his ex-partner, ("AA") was arrested and the police discovered compromising photographs of the appellant, on his phone. The Judge also rejected the appellant's account that his home had been raided. The reasons for rejecting those aspects of the appellant's claim, are set out at paragraphs [22] to [25] of the decision. At paragraphs [25] to [28], the Judge states as follows:

"25. ... I do not accept the appellant's far-fetched explanation regarding the police and members of the community seeing photographs on AA's phone. Neither do I accept that the appellant and AA would exchange such photographs and carelessly leave them on the phone, given the climate in Pakistan.

26. I therefore reject the appellant's evidence regarding AA's arrest, the authorities raid on his home, or that the authorities have any interest in him. I do not find the appellant will face any risk from the authorities on return. Neither do I accept that his family or the local community are currently aware of his sexuality, thus no risk will arise in this regard. I do not reach this conclusion in isolation rather, taken cumulatively, these matters lead me to doubt his account.

27. Based on the appellant's evidence, I find he has chosen to live discreetly while in the UK. The appellant described only attending private intimate parties with friends. He has not had a committed open

relationship in the UK but rather, from his description, only discreet encounters.

28. I do not find the appellant has provided any evidence to show that he has lived an openly gay life in the UK or has openly expressed his sexuality in any way, despite bringing free to do so. I find his behaviour on return is likely to mirror his behaviour in the UK.”

6. The FtT Judge referred to the decision in HJ (Iran) -v- SSHD [2010] UKSC 31, and having accepted that the appellant is gay, went on to consider whether the appellant would be at risk upon return. The Judge accepted, at [31], that those who choose to live openly in Pakistan, face persecution. At paragraphs [31] to [32], the Judge states as follows:

“31. I am satisfied, based on the country evidence, that those who choose to live openly in Pakistan, face persecution. I find, given the appellant has thus far chosen to live discreetly in the UK, despite being free to live openly and the fact that he lived in a similar way when he was in Pakistan, I find the appellant will choose to live discreetly on return.

32. He has shown no desire to live an openly gay life. I find his behaviour thus far does not support the suggestion that he would wish to live openly on return. In line with Amare [2005] EWCA Civ 1600, my finding that the appellant is likely to conduct himself discreetly or return, is based on his past behaviour. Accordingly, I find the appellant has not shown that he is entitled to international protection.”

The appeal before me

7. Permission to appeal was granted by FtT Judge Buchanan on 12th November 2018. The matter comes before me to consider whether the decision of the FtT involved the making of a material error of law, and if so, to remake the decision.
8. The appellant makes three broad criticisms as to the findings reached by the Judge and I shall deal with each of them in turn. As Brooke LJ observed in the course of his decision in **R (Iran) v The Secretary of State for the Home Department [2005] EWCA Civ 982**, “unjustified complaints” as to an alleged failure to give adequate reasons are all too frequent. The obligation on a Tribunal is to give reasons in sufficient detail to show the principles on which the Tribunal has acted and the

reasons that have led to the decision. Such reasons need not be elaborate, and do not need to address every argument or every factor which weighed in the decision. If a Tribunal has not expressly addressed an argument, but if there are grounds on which the argument could properly have been rejected, it should be assumed that the Tribunal acted on such grounds. It is sufficient that the critical reasons to the decision are recorded.

9. The appellant criticises the decision to reject the appellant's claim that his ex-partner was arrested and that the police discovered compromising photographs of the appellant on his phone.

10. It is claimed that the discrepancy identified by the judge at paragraph [22] of her decision, is not adequately reason. It is said that the Judge fails to give clear reasons as to why the appellant's fear of the police, expressed during the screening interview, could not properly have arisen following the conversation between the appellant and his brother when the appellant intended to return. That fear was exacerbated, it is claimed, when the appellant subsequently found out that the police had raided his house. I have carefully read the screening interview, completed on 23rd January 2017, that is referred to by the Judge at paragraph [22] of the decision. The appellant was asked, at Q4.1, to briefly explain all the reasons why he cannot return to Pakistan. He stated that he is bisexual and that his family had found out after January 2016. He claimed his life was in danger "*.. From the police and the community.*". He claimed that his family in Lahore, had been told by someone about his sexuality. The appellant claimed, at paragraph [37] of his witness statement, that it was when he spoke to his brother the last time (*on 17th January 2017 according to the interview record*) that his brother had stated that the appellant was gay and the whole world knows what he and AA did. The appellant claims in his witness statement that as soon as he heard AA's name, he hung up. The appellants account of events is that a friend had travelled to Pakistan and that he had not

known of AA's arrest or the police interest in him, until May 2017. It was in my judgement open to the Judge, on the evidence, to be concerned that the appellant had in January 2017, claimed that his life was in danger from the police, when he did not know of any police interest in him until some months later.

11. The appellant also criticises the Judge's consideration of the claim regarding the photographs found by the police. The appellant claims that he provided a clear and coherent account with regards to his understanding of how those photographs were found. At paragraph [39] of his witness statement, the appellant claimed that his friend had travelled to Pakistan and the appellant had asked his friend to let him know of the situation in Pakistan. The appellant states:

".. He is from my home area and told me that the whole community know I have been with men and that my family have been disreputed because of me. He told me that my ex-boyfriend (AA) I was in jail, as he was caught with his new partner that I was next if I came back as the police found pictures that me and AA had taken in his house. I remember that I sent pictures to AA and he had kept them but I did not know he kept them this long. ("SZ") also told me that he came to know that the police had raided my house but could not say when. My friend told me that the matter was serious and he would not be involving himself in this as he too may get into some trouble."

12. At paragraph [41] of his witness statement the appellant explains that his friend has refused to help him further. The appellant claims that when the appeal was listed for hearing, he had begged his friend to come and give evidence, but was told that he cannot, because if people in Pakistan or the authorities come to know that he has helped the appellant, he and his own family would suffer problems.
13. It is clear in my judgement that at paragraphs [23] to [25] of her decision the Judge considered in the account advanced by the appellant. The Judge rejected that account for the reasons that are set out at paragraph [25] of the decision and in my judgement it was open to her to do so. In my judgement, the findings reached by the Judge were neither irrational nor unreasonable in the *Wednesbury* sense, or findings that were wholly

unsupported by the evidence. The assessment of such matters is always a highly fact sensitive task. The FtT Judge was required to consider the evidence as a whole. In assessing the credibility of the claim advanced by the appellant, the Judge was required to consider a number of factors. They include, whether the account given by the appellant was of sufficient detail, whether the account is internally consistent and consistent with any relevant specific and general country information, and whether the account is plausible. She clearly did so. The findings, in my judgement, arise from a combination of factors including a consideration of evidence that lacked detail or sufficient explanation, and matters that appeared to the Judge, to be implausible.

14. The appellant also criticises the findings of the Judge that the appellant has thus far chosen to live discreetly in the United Kingdom, and will choose to live discreetly on return to Pakistan. It was the Judge's consideration of this aspect of the appellant's claim that was the focus of the submissions made by Mr Talaacchi before me. He submits that the Judge had found the two witnesses called by the appellant, to be credible. He submits that the conclusions reached by the Judge at paragraphs [27] and [28] of the decision are against the weight of the evidence. He refers me to the matters set out at paragraphs [34] and [35] of the appellant's witness statement in which the appellant claims that he has lived openly in the UK as a bisexual man, although he has not had any relationships. His evidence is that he has had casual encounters with men throughout the time that he has been in the United Kingdom. At paragraph [61] of his witness statement the appellant confirms that he is open about his sexuality in the United Kingdom, whereas he was not open about that in Pakistan. He submits that the only proper inference to be drawn from that evidence, is that the appellant would have to live discreetly in Pakistan because he is unable to live openly. Mr Talaacchi submits that the Judge failed to give adequate weight to the evidence of the appellant and his witnesses in this respect. He claims that the Judge erred, at paragraph [31] of the decision, in finding that the appellant

would choose to live discreetly upon return to Pakistan. He submits it would be wrong to expect the appellant to conceal his sexuality in all the circumstances.

15. I have carefully considered the matters set out in the witness statement of the appellant and the witness statements made by the two witnesses called in support of the appeal. Although it is right to say that at paragraph [34] of his witness statement, the appellant confirms that he has lived openly in the UK as a bisexual man, he confirms that he has not had any relationships, but has had casual encounters with men throughout the time that he has been in the UK. The appellant simply states that he does not have evidence of the encounters because he knew that he had to go back to Pakistan. He does not in fact deal with the situation on return. Mr Talaacchi submits that an inference can be drawn from what is said by the appellant at paragraph [61] of his witness statement. I disagree. The appellant accepts that he was not open about his sexuality in Pakistan. There was no evidence before the Judge he will conduct himself differently, upon return to Pakistan now. For obvious reasons neither of the two witnesses, could give any evidence as to how the appellant would conduct himself upon return. Neither sought to do so. The fact that the two witnesses were found to be credible by the F&T Judge, adds nothing. They do not, and could not, give evidence as to the way in which the appellant will conduct himself upon return.
16. I remind myself of the test set out by Lord Hope in his judgement in **HJ (Iran) -v- SSHD [2010] UKSC 31**. Such appeals involve what is essentially an individual and fact-specific inquiry. At paragraph [35], Lord Hope set out the test in the following way:

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

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

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

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

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

persecuted, it will be necessary to consider whether that fear is well founded.

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

17. The FtT Judge found that the appellant is a homosexual male. The first stage of the test set out in HJ (Iran) is satisfied by the appellant. The next stage is to examine what the appellant's situation will be on return. The question is how the appellant looked at individually, will conduct himself if returned and how others will react to what he does. The appellant cannot and must not be expected to conceal aspects of his sexuality which he is unwilling to conceal, even from those whom he knows may disapprove of it. As Lord Hope emphasised in HJ (Iran), the fact that the appellant will not be able to do in Pakistan, everything that he can do openly in the UK is not the test.
18. The FtT Judge rejected the appellants account of the arrest of his ex-partner AA and the account of the appellant that the police had discovered compromising photographs of the appellant. The Judge also rejected the appellant's account that his home had been raided. The Judge did not accept, at paragraph [26], that the appellant's family or the local community is aware of his sexuality. Although the appellant claimed in his witness statement that she has lived openly in the UK as a bisexual man, and has had casual encounters, the appellant accepts that he has had no relationships and that he did not keep evidence of the encounters, because he knew he had to go back to Pakistan. In reaching her decision, the Judge was entitled to consider the appellant's past behaviour, particularly insofar as his relationship in Pakistan was concerned. The Judge accepted that it is likely that the appellant had a long-term relationship in Pakistan before he left. On the appellant's own account of events, he conducted himself discreetly for the duration of that long-term relationship. The Judge states, at [32] that "*.. My finding*

it that the appellant is likely to conduct himself discreetly on return, is based on his past behaviour.”. The Judge’s findings at paragraphs [31] and [32] of the decision must properly be read together with what is said at paragraph [27].

19. Adopting the test set out in HJ (Iran), the next stage, if it had been found that the applicant will in fact conceal his sexuality if returned, is to consider why he will do so. In order to reach this stage, there must be a prior finding that the appellant will in fact conceal aspects of his sexuality if returned to Pakistan. The Judge did not find that the appellant will conceal aspects of his sexuality. Carefully read, the Judge found that the appellant had been able to have a long term relationship previously, and would be able to continue doing so, upon return.
20. Having carefully considered the findings made by the Judge against the test set out in HJ (Iran), I reject the claim that the Judge failed to properly consider the issues in accordance with the decision of the Supreme Court in HJ (Iran). On the evidence, in my judgment, it was open to the Judge to find that the appellant was not prevented from living as a bisexual male, undetected for many years without any problems. There was no evidence of the appellant drawing attention to himself and he was able to enter into a relationship that endured for some years. There is no evidence that he will conduct himself any differently now, if returned.
21. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really cannot understand the original judge's thought process when he or she was making material findings. In my judgement, the Judge identified and resolved key conflicts in the evidence, and gave a brief explanation of the conclusions on the central issue on which the appeal was determined. The findings made by the Judge were findings that were properly open to the Judge on the evidence before her. The findings cannot be said to be perverse, irrational or findings that were not supported by the evidence. The appeal was dismissed after the Judge

had carefully considered the facts and circumstances of the claim and all the evidence before her.

22. In my judgment, the appellant is unable to establish that there was a material error of law in the decision of the FtT and it follows that the appeal is dismissed.

Notice of Decision

23. The appeal is dismissed and the decision of the First-tier Tribunal Judge stands.

24. No anonymity direction was made by the First-tier Tribunal. As this is a protection claim, it is appropriate that a direction is made. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
2019

Date

30th January

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

25. I have dismissed the appeal and therefore there can be no fee award.

Signed
2019

Date

30th January

Deputy Upper Tribunal Judge Mandalia