Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13964/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 May 2019	**On 15 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MUHAMMAD [J]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M McHardy, Counsel
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 15 September 1991. He appeals against the decision of Judge of the First-tier Tribunal Cohen sitting at Taylor House on 18 January 2019 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 5 December 2018. That decision was to refuse to grant the Appellant asylum and humanitarian protection.

2. The Appellant applied for a tier 4 student visa to enter the United Kingdom on 18 June 2012. This was granted with an expiry date of 30 November 2013. Further leave to remain was extended until 30 July 2015 but the Appellant's leave to remain was curtailed after the licence of his sponsor college was revoked. Leave was reinstated on 18 September 2014 but curtailed again with no right of appeal on 24 November 2014. After the curtailment the Appellant made no further attempt to regularise his immigration status and he was marked as an absconder by the Respondent on 9 March 2017 for failing to comply with reporting restrictions. The Appellant claimed asylum on 7 June 2018.

The Appellant's Case

3. The Appellant's claim was based on his sexual orientation. He first had thoughts about his sexuality when he was approximately 16 years old having sexual feelings towards boys. He did not have any sexual relations whilst in Pakistan. He accepted his sexuality at the age of 22 whilst he was in the United Kingdom when he met a boy in Manchester and developed a relationship with that person which lasted until May 2013. The Appellant did not participate in any LGBT activities or join any support groups or attend LGBT pride events. The Appellant went on the Grindr website at the beginning of 2018 when he moved to London and had the app on his mobile phone. He spoke to people on this app for one-night stands. In May 2018 he informed his family that he was bisexual after they had asked him to return to Pakistan. His family reacted very badly and were aggressive towards him, he was verbally abused, and they said they would not accept him back. The Appellant feared his brothers, general society and the government upon return to Pakistan as he was bisexual. The Respondent did not accept the Appellant's credibility.

The Decision at First Instance

4. At [44] the Judge found that if the Appellant had come from a country, Pakistan, where he was unable to freely live any kind of open bisexual life to the United Kingdom which was a free and open society, he would take that opportunity to investigate the possibilities of claiming political asylum shortly after arrival. Failure to do so for almost six years damaged the Appellant's credibility. The Appellant had failed to produce any witnesses in support of his claim with whom he had had a relationship. That the Appellant had been unable to produce such witnesses despite claiming to be sexually active undermined the Appellant's credibility. The supporting witnesses he had called gave poor evidence which contained discrepancies when compared with the Appellant's evidence. The Appellant had said he was in a relationship with a man called [I] in 2012/2013 but one of the Appellant's witnesses Mr [Q] indicated that he had met [I] in 2018 but then sought to backtrack from this evidence. The

Appellant's account of the realisation of his sexuality was vague and lacking in cohesive detail.

5. There was no supporting evidence of the alleged threats from the Appellant's family. The Appellant was aware his family would disapprove of his sexuality yet chose to tell them anyway. The Appellant had claimed to be in contact with someone on the Grindr website 2 or 3 days before the appeal and yet the Appellant's phone demonstrated the Appellant not been in contact with anyone since December. There were no screenshots of conversations from the beginning of the year 2019. He was unable to show any conversations which led to a sexual hook up or meeting when asked to provide this. The Appellant had given discrepant evidence about whether he did or did not go to gay nightclubs in Manchester.

6. The Appellant was working in the United Kingdom and had sought asylum for reasons of economic benefit rather than a genuine fear of persecution. The Appellant had been encountered by the police working illegally as a pizza delivery driver. The Appellant's depression had arisen due to the uncertainty about his immigration status rather than any reason connected with the core of his asylum claim. The Judge dismissed the appeal.

The Onward Appeal

7. The Appellant appealed against this decision arguing that the Judge had given inadequate reasons for his findings. [69] of the determination stated that the Judge was satisfied the Appellant had a well-founded fear of persecution for a convention reason and yet had gone on to dismiss the appeal. Throughout that paragraph the Judge had maintained the Appellant had a well-founded fear of persecution.

8. At [42] the Judge had applied the wrong standard of proof stating that the Appellant had to show that there were substantial grounds for believing that the Appellant met the requirements of the qualification regulations. Rather the test was to the lower standard.

9. The Judge had started his credibility findings at [44] by referring to the delay in claiming asylum but that should not have been the starting point of the assessment process. The delay in claiming was due to having valid leave and later a fear of being detained. The Respondent's own guidance said this could amount to a reasonable explanation.

10. The Appellant had clarified his position about the witness statements. His most recent partner had failed to provide the Appellant with any support as they were no longer on good terms. [I] had his own immigration matter pending and did not wish to co-operate with the Appellant. The discrepancies pointed to by the Judge were not materially significant. One of the witnesses Mr [N] confirmed that he was aware of the Appellant's sexuality and had seen him intimately involved with other men. The

witness Mr [Q] had not stated that the Appellant was in a relationship with [I] in 2018 when he, the witness, came to London. The Appellant had confirmed he was still in touch with [I] as they were still friends.

11. The Judge's finding that the Appellant was working when he was encountered in November 2018 was insufficiently reasoned. The Appellant's representatives had asked the Respondent for full disclosure of this allegation which had not been provided. It transpired that the Appellant had been stopped by the Metropolitan police but there was no evidence of any action taken against the alleged employer and the Appellant was left free to go without repercussions. That suggested the Appellant was not engaged in unlawful employment.

12. That the Appellant had been unable to name any nightclubs in London applied too high a threshold. The Respondent's own asylum policy instructions indicated that ignorance of commonly known meeting places and activities for LGBT groups was not necessarily indicative of the claimant's lack of credibility. The Appellant had provided an explanation why he had not taken part in LGBT activities. This explanation had been overlooked by the Judge. A heterosexual person would not be required to provide evidence in the form of attendance at particular places and events and requiring this level of evidence from a bisexual person was unreasonable and discriminatory. The Appellant claimed asylum after he was aware of the threats to his life due to his disclosure to his family. He would not have qualified for asylum earlier as the Respondent's policy stated that being a member of a particular social group as an LGBT person was insufficient by itself to be recognised as a refugee.

13. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Robertson on 4 April 2019. He found some arguable merit in the grounds despite the well-reasoned credibility findings because the Judge had allowed the appeal of the Appellant which was inconsistent with his findings and the decision at [70] and at the end of the determination on page 15. It was likely that although permission was granted at this stage the Upper Tribunal might find that error did not amount to a material error of law because the rest of the decision made it clear that the Judge's intention was to dismiss the appeal on asylum grounds and the Judge had simply failed to amend his standard template.

14. There was little arguable merit in the rest of the grounds because the standard of proof used by the Judge was that set out by Lord Justice Templeton in the leading case of Sivakuraman. An Appellant had to show a real and substantial danger upon return. It was open to the Judge to find the significant delay in claiming was damaging to the Appellant's credibility. The Judge had not started his credibility findings with this point, he had not made any section 8 findings until [65] of the determination.

15. It was open to the Judge to take into account that none of the Appellant's partners were present to give evidence despite the Appellant's evidence that he was still in touch with them. The submission about the discrepancy

between the witnesses and the Appellant was no more than a disagreement with the Judge's findings which were open to him on the evidence and were not unreasonable. This was also true of the Judge's findings in relation to the nonparticipation by the Appellant in LGBT activities. There was no evidence beyond the Appellant's own assertion that his family had threatened him.

The Hearing Before Me

16. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law such that the determination fell to be set aside, and the appeal reheard. If there was not, then the decision at first instance would stand.

17. For the Appellant counsel argued that the Judge had contradicted himself in the course of the determination. He did not find the Appellant credible and yet found that the Appellant had a well-founded fear of persecution and that the Appellant's removal would breach the provisions of the qualification directive. The Respondent might argue that what had happened at [69] was a typing error but that would be to make an assumption and it would be equally valid to argue that it was not a typing error. The Judge found that the threshold had been met and yet had dismissed the appeal. As a result it was not a safe determination. This was a material error of law and the correct course of action would be to remit the appeal back to the First-tier to be reheard. The Judge's error went to the very heart of the case.

18. In terms of the other grounds, the Appellant would argue there was a general lack of scrutiny. It was the Appellant's case that he was bisexual whereas the Judge referred to him as a homosexual. If that was just once it might be acceptable, but it was repeated in [66] to [68]. At [49] the Judge characterised the Appellant's evidence as vague and lacking in detail but did not say against what standard that conclusion was measured. The nature of sexuality was that there was not a lightbulb moment when one realised one's sexuality, it was more complicated than that. That the Appellant had said he was happy with his sexual identity did not mean that he could then tell his family as he knew what his parents view would be of his bisexuality.

19. At [50] the Judge had criticised the Appellant for failing to submit evidence from his family of the threats but that was asking for the impossible. At [57] it was the Appellant's explanation that he and [BA] had met on the Grindr app, that was the explanation given by the Appellant at the time. At [59] the Judge stated that the photographs produced were not of an intimate nature but had not explained what intimate nature meant. There was no requirement on the Appellant to put in intimate evidence and the Judge had set the bar too high. Similarly, at [62] where the Judge criticised the Appellant for failing to join any LGBT groups, there was no requirement on an Appellant that they had to join such organisations and again the bar

was set too high. When all the errors were taken into account it demonstrated a lack of scrutiny.

20. There was one further point concerning the reference in the determination to the Appellant being encountered by the police. All there was, was a hearsay email in support of the allegation that the Appellant was working and yet the Judge had placed a great deal of weight on that whereas little weight should have been placed thereon. The appropriate thing to do in the event of a material error of law being found was to remit the appeal to the First-tier.

21. In reply the Presenting Officer argued that it was clear from the preceding paragraphs to [69] and the following paragraphs after it that the Judge had rejected the homosexual element of the Appellant's claim. The Judge had made a vast array of permissible findings on the Appellant's core claim. The other complaints made against the determination were no more than disagreements. The relevant partners had not attended to give evidence, there had been a delay in claiming, there was a discrepancy over the timing of when the Appellant accepted his sexuality and no reasonable explanation why the Appellant had waited six years to inform his family. This was not a binary decision. At [51] to [54] the Appellant had used the Grindr app to fabricate a gay identity. The Judge was not elevating the standard of proof. The adverse findings were strong, the appeal should be dismissed.

22. In conclusion counsel argued that it was not an answer to the core claim to say the Appellant was not homosexual. The photographic evidence referred to at [59] described as showing the Appellant with other men and groups of men in various locations including restaurants had to be considered in the round.

Findings

23. The challenge in this case falls into two parts. The first is the error at [69] of the determination where the Judge states that applying the lower standard of proof he was satisfied: "that the Appellant has a well-founded fear of being persecuted for a Convention reason if he had to return to Pakistan. Accordingly, I find that to return the Appellant to Pakistan would be a breach of the United Kingdom's obligations under the qualification regulations. Therefore, I find that the decision of the Respondent was not in accordance with the law and the immigration rules".

24. Had the determination stopped there, there might be more force in the Appellant's argument that it was not possible to see what the Judge's decision in this case was from the wording of that paragraph. However, it is important to point out that the paragraph did not stop say at the point where the Judge said the decision of the Respondent was not in accordance with the law because the Judge went on in the same sentence to conclude that paragraph by saying: "I dismiss the asylum aspect of the

appeal". There then followed in bold a subheading: "The Appellant's appeal (on asylum grounds) is dismissed."

25. The test of whether adequate reasons have been given in arriving at a decision is whether the losing party can reasonably understand why they have lost. The Judge had given extensive reasons why he did not find the Appellant's account to be credible and why he was dismissing the claim. The aberration at [69] indicated an element of muddle which strongly suggested that the Judge had inserted wording from a template which in the circumstances of this case was inappropriate. At the end of the determination under the heading "Decision" the Judge had again dismissed the appeal on asylum grounds as well as humanitarian protection and human rights grounds. The extensive reference to discrepancies and implausibilities in the Appellant's account and the clear wording at [68] where the Judge rejected the claim that the Appellant was homosexual could have left a fair-minded reader in no doubt that this was an appeal which the Judge intended to dismiss.

26. During the course of argument, I raised with the parties the jurisprudence which is to the effect that it is not possible to utilise the slip rule to amend the wording of a determination if the effect is to change the decision in the case. When one considers the determination in this case the utilisation of the slip rule would not in fact have resulted in a change of the decision since the decision was that the appeal should be dismissed and that was undoubtedly the intention of the Judge when one looks at the determination as a whole. The slip rule if used in this case would have been to have deleted a paragraph that had crept into the determination perhaps from another precedent or template.

27. By contrast it would not have been appropriate to set the determination aside under rule 35 of the Tribunal Procedure Rules since the overall intention of Judge Cohen was clear and Judge Robertson was correct not to do that. The latter was of the view that the Judge had given cogent reasons for the decision that the Appellant's claim should be dismissed but in all the circumstances it was appropriate that the Upper Tribunal should rule on the anomaly at [69]. I have some sympathy for that view, but one has to read the determination as a whole and it is clear from the tenor of the determination and those parts of the determination in bold giving the actual decision that in this case the Judge intended to dismiss this appeal.

28. As for the remainder of the grounds, these are in truth a mere disagreement with the decision. The argument as to whether the Judge had used the correct standard of proof quite rightly was not pursued before me. Nor, again rightly, was the argument made that the Judge had begun his credibility findings with the section 8 delay point. It was a matter for the Judge to assess the factors in the case including the delay in claiming and the absence of potential witnesses. The assessment of those witnesses who did give evidence, the Appellant's lack of involvement with LGBT groups and the fact that the Appellant put forward evidence in the

form photographs which did not take the case any further at all as the Judge pointed out at [59] were all matters which the Judge could and did assess. The Appellant provided no evidence beyond his own assertion that his family had threatened him. At the very least the Appellant could have indicated what efforts at contact with other family members he had made to confirm what he claimed were threats against him.

29. The Appellant claimed to be using the Grindr app but when this was scrutinised in the course of the Appellant's oral testimony it was evident that the Appellant was unable to show any conversations which had led to a hook up or meeting or indeed anything recent to support his claim of recent activity. It was open to the Judge to find that this further damaged the Appellant's credibility. Judge Robertson characterised Judge Cohen's findings as reasonable. I would go further and say they were cogent and well argued.

30. The Appellant makes one further point which is that the finding that he was working illegally when encountered by the police on 7 November 2018 was not a finding open to the Judge. It is accepted that this finding does not bear directly on the merits of the Appellant's asylum claim but for the sake of completeness I will deal with it here. The Appellant was encountered riding a moped marked in the colours of a delivery company (Basil Woodfired Pizzeria) and carrying a pizza. The Appellant's explanation was that he had borrowed the moped and was collecting not delivering a pizza but he was unable to provide any supporting evidence for example from the claimed owner of the moped. In those circumstances it was open to the Judge to find as he did at [60] that the Appellant was working illegally and that the surrounding circumstances strongly indicated that. The Appellant's argument appears to be a mere denial of the allegation. It was reasonable to have expected the Appellant to have provided something more to support his claim of innocence, but he did not do that.

31. This issue does not directly impact on whether the Appellant is entitled to apply for international protection on the grounds of sexual orientation, but it was the Appellant who wished to raise the matter during the course of the hearing before me. To the extent that [69] of the determination is an error, I do not find that it is a material one for the reasons I have given (and Judge Robertson has given) and I dismiss the appeal against the decision of the First-tier Tribunal.

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 15 May 2019

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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 15 May 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge