IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-002566
UI-2022-002567

First-tier Tribunal Nos: PA/50253/2021
IA/04004/2021
PA/50254/2021
IA/03557/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(i) Mr M A
(ii) Mr G S

(ANONYMITY ORDER MADE)

Appellants

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellants: Mr Bellara (Counsel)
For the Respondent: Ms A Ahmed (Senior Home Office Presenting Officer)

Heard at Field House on 27 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Mulholland, promulgated on 6th April 2022 following a hearing at Taylor House on 7th March 2022. In the determination, the judge dismissed the appeals of the first and second Appellant, whereupon they subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The first Appellant is a male, a national of Pakistan, and was born on 1st March 1972. The second Appellant is a national of India, a male, and was born on 5th March 1983. Both appeal against the decision of the Respondent refusing them asylum on the basis that they were in an intimate sexual relationship as gay persons, under a decision made by the Respondent on 15th January 2021 and on 16th December 2020, respectively.

The Appellants' Claims

3. The Appellants' claim is that they are a couple in a same sex relationship, as explained in their respective witness statements and oral evidence given at the Tribunal hearing before Judge Mulholland, and that they stand to have their human rights infringed under Articles 2 and 3 of the ECHR if returned back to their respective countries, as well a risking persecution and ill-treatment.

The Judge's Findings

4. In what is a lengthy and detailed determination (of 129 paragraphs) the judge first dealt with the first Appellant. The Respondent had refused the claim on the basis that it was vague and lacking in specification, but the judge held that, "I do not find the 1st Appellant's account of realising his sexual orientation at the age of around 15 years remarkable" (paragraph 31). The judge noted the Appellants' claim that they have lived together since they met in April 2012 for some three years before commencing their same sex relationship in January 2015 (paragraph 45). A selection of photographs were provided but the judge held that these had been taken on less than ten occasions over a relatively short period of time (paragraph 46). There was no tenancy agreement or letter of support from the landlord confirming that the second Appellant had been residing with the first Appellant since 2012. The Appellants, notwithstanding the length of time that they had been in the UK, had never engaged with LGBT support groups (paragraph 49). The judge was not satisfied that the Appellants would be at a high risk of being discovered by immigration officers if they joined LGBT groups (paragraph 52). Nor was the judge satisfied that there was any evidence to demonstrate that the Appellants lived an openly gay life in in the UK (paragraph 53). There had been a delay in claiming asylum, even though the first Appellant arrived in the United Kingdom on 26th September 2006, but did not attempt to regularise his stay until August 2013 (paragraph 55). The judge was clear that the first Appellant did not have a well-founded fear of being persecuted if he were to be returned to Pakistan (paragraph 63).

5. With respect to the second Appellant, who had come on a student visa but only attended college for three months and then stopped because of problems regarding his tuition fees, the judge observed how he claimed to have realised he

was gay when he was 15 years of age. He had very short-term casual relationships in the United Kingdom with both men and women. The judge held that he had not produced any supporting statements from previous sexual encounters that he may have had (paragraph 74). The second Appellant had been in the UK for eleven years and had not produced any evidence of his previous sexual encounters (paragraph 75). Once again, the judge had regard to a selection of photographs that had been produced by the second Appellant, but again observed that these had been taken on less than ten occasions over a relatively short period of time (paragraph 76). The judge was unconvinced that the second Appellant's father's friend would make enquiries about the Appellants' living arrangements with a neighbour and that this neighbour would speak openly to a stranger about the Appellants' same sex relationship as was being claimed (paragraph 81). Although the second Appellant had produced medical records from his GP, to attest to his sexuality, given that he had requested a full sexual health screening from the GP, this was only a month after lodging his application for asylum (paragraph 83). His leave had expired in 2011 and he had not provided any evidence to show that he sought advice from any LGBT organisation (paragraph 85). The judge did not accept that the second Appellant was gay, or that his father knew him to be gay, or that his father would kill him if he returned back to India. Whilst the judge had to accept that the Appellant had gone to see his doctor and mentioned that he was gay, this was self-serving because of the timing of the disclosure of this information (paragraph 89). The judge was not satisfied that the second Appellant had demonstrated to the lower standard of proof that he was a member of a particular social group (homosexual) or that his removal would lead to any treatment or persecution or a violation of his human rights upon return.

6. Finally, with respect to both Appellants' Article 8 rights, the judge was not satisfied that these stood to be infringed were they to be required to return back home to their respective countries.

Grounds of Application

7. The grounds of application state that the judge did not engage in a fact-sensitive enquiry as required by **HJ (Iran) v SSHD [2010] UKSC 31**. Permission to appeal was granted on the basis that the judge failed to demonstrate that he drew upon the principles in **HJ (Iran) v SSHD [2010] UKSC 31** in an explicit fashion (although at paragraph 19 there was a reference to "*HJ (Iran) principles*"). Permission was also granted on the basis that the judge may have arguably erred in requiring documentary corroboration that went beyond what might reasonably be expected, as had been argued in the Grounds of Appeal at paragraphs 15, 19, 20 and 26, such as to fall foul of the decision in **TK (Burundi) [2009] EWCA Civ 40**, at paragraph 16.

Submissions

8. At the hearing before me on 27th July 2023, Mr Bellara, appearing on behalf of the Appellant, submitted that the judge's determination had failed to provide adequate reasons for its findings on credibility, even bearing in mind that these were two linked appeals, which required two separate decisions to be made. First, the judge appears to have made a clear finding in favour of the Appellants' credibility when looking at his account of when the first Appellant found out that he was gay. The first Appellant had said that at the age of around 15 he became aware that he was attracted to other boys and not girls (paragraph 29). The interviewing officer did not press for more information and the judge was clear

that "the 1st Appellant has provided a satisfactory account here" (paragraph 30). The judge also observed that, "I do not find the 1st Appellant's account of realising his sexual orientation at the age of around 15 years remarkable" (paragraph 31). However, if such a finding had been made, this meant that the principles in **HJ (Iran)** had been engaged, and it then fell upon the judge to adopt the template approach in that decision, and ask himself whether the first Appellant could safely be returned to Pakistan or be safely returned to live a normal life. Second, as for the second Appellant, there is no clear finding that he was gay, but only that his father did not accept that he was gay (see paragraphs 88 to 89). The reasons given by the judge were muddled and he had failed to apply anxious scrutiny. The decision in **HJ (Iran)** was clear that a court must not form its own view but this is what appears to have been done in this case.

9. For her part, Ms Ahmed submitted that the fact was that the judge did not find the first Appellant to be gay (at paragraphs 29 to 31). The only acceptance by the judge was that the narrative account as presented was not vague or lacking in specification. That was not to say it was credible. The judge had only accepted the consistency of the narrative account put forward by the first Appellant that he had realised his sexuality first when he was 15 years of age. However, the judge had then gone on to make a clear finding that on the facts of the case he had not been able to demonstrate that he was actually gay. The judge was therefore clear that, "I do not accept that if he is returned to Pakistan that there is a real risk that he will be tortured or face inhuman, degrading treatment or punishment contrary to Article 3" (paragraph 62). As for the second Appellant, the judge was clear that "he has not produced any supporting statements from the previous sexual encounters he may have had" (paragraph 74).

10. In reply, Mr Bellara submitted that it was essential for the Appellants to know why they are being refused in their protection claims. For the first Appellant, the findings (at paragraphs 30 to 31) that the claim being put forward was not one that could be said to be vague or lacking in specification, suggests that the Respondent is not right in rejecting what was found to be *prima facie* credible. The determination, when read as a whole, demonstrates an imbalance and a lack of adequate reasoning. If the first Appellant had said that from the age of 15 he had felt himself to be gay, and the judge had found this to be a credible account, it was difficult to see why it was not then accepted. For the second Appellant, there simply were no clear findings as to whether or not he was gay, but only that his father would not have seen him as such, despite the second Appellant's claims to the contrary. The error with respect to the first Appellant was a major one, because in gay relationship cases one of the first questions asked of a party is when they discovered that they were gay and in this case the first Appellant had given a clear answer. This part of the interview would carry more weight than any other because it explains how such an Appellant got to the position where he is today from his early beginnings.

No Error of Law

11. I am satisfied that the making of the decision by the judge below did not involve the making of an error of law. My reasons are as follows. First, with respect to the first Appellant, the judge observes how the Respondent is of the view that the account of the time when he realised he was gay is vague and lacking in specification (paragraph 29). The judge does not agree with this, pointing out that in his substantive interview, between questions 100 and 108 and in his statement submitted in support of the application, the first Appellant explains

how at the age of around 15, he became aware that he was attracted to other boys (paragraph 29). The judge not only states that "it is difficult to understand why the Respondent finds this part of the account vague and lacking in detail", but also adds that, "It has to be appreciated that it must be difficult to talk about sexuality when being interviewed during an asylum interview by an authority figure and to understand just how far to go in describing the time when he realised that he is gay without being explicit" (paragraph 30). All of this, however, is a critique by the judge of the Respondent's manner of approaching the evidence. It is not an acceptance by the judge of the truthfulness of the evidence. Similarly, when the Respondent asserts that the realisation that one was gay at the age of 15 would be unusual as most people would realise this much earlier, the judge observes that, "the Respondent has not produced any supporting evidence to show that is the case" (paragraph 31), which is again a critique of the Respondent's assertion that is made without any objective proof being provided. Although it may be said that when this analysis is read as a whole it comes quite close to an acceptance by the judge that the first Appellant was indeed gay a closer examination of this detailed determination shows this not to be the case because at no stage does the judge expressly come to that conclusion. On the contrary, much later on in the determination the judge observes that, "having considered all the evidence, I do not accept that the 1st Appellant has demonstrated to the low standard of proof that he is a member of a particular social group (homosexual)" (at paragraph 60).

12. With respect to the second Appellant, it is not the case, as Mr Bellara submits, that the judge makes no clear findings in relation to his sexual orientation. The judge is clear (at paragraph 89) that, "having considered all of the information individually and in the round, I do not accept that the second Appellant is a member of the LGBT community". In relation to the judge having fallen into error, in expecting there to be documentary corroboration that has gone beyond what may reasonably be expected in a case involving sexual orientation rights, I note that this is also asserted in the Grounds of Appeal by the Appellant at paragraphs 15, 19, 20 and 26. However, the judge's reference to "supporting evidence" (paragraph 82) or "supporting letter" (at paragraph 81) being absent does not suggest that the judge was applying a higher standard to a protection claim because in circumstances where the selection of photographs provided were found by the judge to have been taken on less than ten occasions and over a relatively short period of time (paragraph 46), the judge was entitled to ask why there was no tenancy agreement or letter of support from the landlord confirming that the second Appellant had been residing with the first Appellant since 2012. That is a period of over ten years and yet there was no such letter. The judge was also entitled to ask why the Appellants had never engaged with LGBT support groups in all this (paragraph 49), and he did not accept that the Appellants would be at a high risk of being discovered by immigration officers if they joined LGBT groups (paragraph 52) which he was entitled to in the circumstances. No less importantly, in the context of **HJ (Iran)** was the judge's finding that there was no evidence to demonstrate that the Appellants lived an openly gay life in the UK (paragraph 53). On top of that, there had been a delay in claiming asylum, even though the first Appellant arrived in the United Kingdom on 26th September 2006, and yet he made no attempt to regularise his stay until August 2013 (paragraph 55), so that there could not have been a well-founded fear of being persecuted if the first Appellant were to be returned to Pakistan (paragraph 63).

Notice of Decision

13. The decision of the First-tier Tribunal did not involve the making of an error of law such that it falls to be set aside. The determination shall stand.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber **12th September 2023**