



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

Appeal Number: PA/07547/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 7<sup>th</sup> August 2018**

**Decision & Reasons**

**Promulgated**

**On 18<sup>th</sup> December 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**[M H]  
(ANONYMITY ORDERED)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Uddin (Counsel)

For the Respondent: Mr D Clarke (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. The appellant's appeal against a decision to refuse his protection claim was dismissed by First-tier Tribunal Judge A K Hussain ("the judge") in a decision promulgated on 14<sup>th</sup> May 2018. The judge found the appellant to be an unreliable witness and disbelieved his claim to have been kidnapped in Pakistan. So far as a fear of the authorities because of his sexual orientation was concerned, the judge disbelieved parts of the appellant's account and found that he was not at real risk of adverse attention from the authorities in Pakistan, as a homosexual. The judge also found that the appellant's removal would not breach his Article 8 rights, accepting

that he had, as at the date of hearing in May 2018, been in a relationship with a male partner for about three months.

2. Permission to appeal was granted by a First-tier Tribunal Judge on the basis that although the appellant had always lived discreetly, as found by the judge, it was arguable that the principles and guidance derived from HJ (Iran) [2010] UKSC 31 were misapplied. There was no Rule 24 response from the Secretary of State.

### **Submissions on Error of Law**

3. Mr Uddin said that the judge erred in his partial reading of country evidence and his finding that prosecutions on the basis of homosexuality were rare, at paragraph 17 of the decision. The country evidence before the Tribunal went further. So far as HJ (Iran) was concerned, the judge failed to properly apply guidance given in that case.
4. The respondent accepted that the appellant is homosexual. At paragraph 21, the judge found that he has always lived discreetly and continues to live discreetly as a gay man, because of societal pressures. However, at paragraph 26 of his witness statement, the appellant provided a different account. He referred there to having lived as an openly gay man, stating that he was good at hiding his sexuality from others in Pakistan to avoid judgment, as well as harm to himself. Having lived openly as a gay person in the United Kingdom, he cannot live as he did when he was in Pakistan. The judge gave no reasons for rejecting this account and the appellant's oral evidence and there was no reasoning in paragraph 21 regarding why the appellant concealed his sexuality in Pakistan. The third of the critical questions in HJ (Iran) was not answered. Even if the judge were able to find that the appellant lived discreetly in the past, he failed to ask why this was so. The evidence before the Tribunal showed that the appellant would conceal his sexuality because of the risk of harm. This was sufficient to meet the HJ (Iran) test. Paragraph 21 was essentially unreasoned.
5. The evidence before the Tribunal did not show that the appellant had always lived discreetly because of societal pressures and to avoid distressing his parents. The appellant had another reason for acting in that way, to avoid harm. The Country Information and Guidance showed that social elites might live openly in Pakistan but not people in the appellant's circumstances. Discretion was required in the case of someone like the appellant.
6. The judge went on to reject the authenticity of the FIR relied upon but the finding in this context neither added nor detracted from the appellant's credibility regarding his sexuality and made no difference. The respondent accepted that the appellant was gay. The judge found that Article 8 was not engaged, in the family life context but the appellant had been in a relationship with a male partner for some three months by the date of the hearing. The appellant's partner was a refugee whose claim

was based on sexuality and the judge should have found that Article 8 was engaged in these circumstances.

7. Mr Clarke said that the appellant's credibility was at large in the appeal. At paragraphs 6 to 13 of the decision, the judge gave reasons for rejecting the appellant's claim to be of adverse interest by reason of his political opinion. At paragraph 14, he began to engage with the claim based on sexual orientation and raised the appellant's credibility as a salient issue. He considered the incident described by the appellant in which a report was made to the police and an FIR prepared. The appellant claimed that his family found out about his sexuality at this point. A witness statement appeared in the appellant's bundle, dated 23<sup>rd</sup> August 2014, four years after the incident described in the FIR. The FIR was apparently filed by someone who described himself as a friend of the appellant, whereas the appellant referred to a "religious guy" as responsible. The judge moved on, at paragraph 18, to maintain the focus on whether the appellant practised his homosexuality discreetly in Pakistan and without difficulty. The credibility findings were made in the round and the judge was entitled to conclude as he did. So far as Article 8 was concerned, the judge had in mind the appellant's case, as clearly shown at paragraph 27 of the decision. The finding that Article 8 was not engaged in this context was open to him in view of the short duration of the relationship at the time.
8. In a brief reply, Mr Uddin said that the rejection of the case based on political opinion had no real bearing on the appellant's claim to be at risk in the light of his sexuality. Even if the kidnapping incident claimed to have occurred did not, in fact, occur at all, this was of no real import. The appellant was living discreetly because of his fear of being caught by the authorities.

### **Findings and Conclusions on Error of Law**

9. I find that the decision contains a material error of law. My reasons for so concluding are as follows.
10. At paragraphs 17 and 21, the judge referred to the April 2016 Country Information and Guidance on Pakistan, concerning sexual orientation and gender identity. He accurately recorded that this guidance states that the authorities rarely prosecute individuals for homosexuality and that in general, gay men are not at real risk of prosecution. This is taken from the summary at paragraph 3.1.1 of the document. However, the judge makes no mention of paragraph 3.1.2, also in the summary, where the guidance states that there is no effective protection provided by the authorities against widespread and systemic state and societal discrimination, including harassment and violence. This treatment may, in individual cases, amount to persecution or a risk of serious harm.
11. At paragraph 21, the judge summarises what he describes as the objective evidence in the Country Information and Guidance as showing that

homosexuality is tolerated in the community so long as it is practised discreetly. This is a partial reading of the guidance. At paragraph 7.1.5, for example, evidence drawn from EASO (and drawn in turn from sources reporting to EASO) shows that even in large cities, those in the LGBT community are at risk of exposure to violence or blackmail if they seek to live together in same-sex or similar relationships and this becomes known. There is some tolerance, according to these sources, where a claimant is urban, well educated and from the middle or upper middle classes.

12. The absence of a real risk of prosecution by the authorities does not, of itself, show an absence of a real risk of persecution.
13. Furthermore, paragraph 26 of the appellant's witness statement supports the submission made by Mr Uddin that the appellant did not hide his sexuality and live discreetly merely because of societal pressures and a desire not to distress his parents or embarrass his friends. That paragraph refers expressly to a fear that return to Pakistan would require him to hide his sexuality "to avoid persecution" and a statement that when he lived in Pakistan, he was good at hiding his sexuality "from others to avoid judgment as well as harm to" himself. The case he presented engaged the Refugee Convention.
14. The decision contains insufficient reasoning to fully explain the conclusion that the appellant was not at real risk of persecution on return to Pakistan. Although the judge might have reached the same overall conclusion, greater engagement with the country evidence and with the particular case advanced by the appellant was required.
15. The decision of the First-tier Tribunal contains a material error of law and must be set aside and re-made. In a brief discussion with the representatives, both were agreed that as full fact-finding would be required, and as the credibility of the appellant's core claims would be in issue, the appropriate venue is the First-tier Tribunal.

### **Notice of Decision**

The decision of the First-tier Tribunal is set aside. It will be re-made in the First-tier Tribunal, before a judge other than First-tier Tribunal Judge A K Hussain, on the first available date. No findings of fact are preserved.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

**ANONYMITY**

The First-tier Tribunal Judge made no order or direction prohibiting the identification of the appellant. I make an order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant, his partner or any member of his family. Failure to comply with this order may amount to a contempt of court. This order applies to both parties.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell