



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

Appeal Number: PA141652016

THE IMMIGRATION ACTS

**Heard at Field House
On 11 July 2017**

**Decision &
Promulgated
On 28 July 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**SK
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Slatter, Counsel instructed by Wimbledon Solicitors
For the Respondent: Mr. C. Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Baldwin, promulgated on 2 May 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant asylum.
2. As this is an asylum appeal, I make an anonymity direction.

3. Permission to appeal was granted as follows:

“The second and weightier ground is that the judge, having found the appellant was homosexual, was arguably wrong to conclude that he would not be at risk on return due to his preference for behaving discreetly. As the grounds point out it may be that the appellant’s written evidence that he has been open about his sexuality here and how he would wish to conduct himself in Pakistan but for fear of ill-treatment was unchallenged. It is also arguable that the Judge failed to deal appropriately with the appellant’s practice of casual sex – see paragraph 11 and 12 of the grounds. On the basis of what is said in the second ground it seems to me that the judge may have erred in law.”

4. I heard submissions from both representatives following which I announced that I found the decision involved the making of a material error of law and that my full reasons would follow. I stated that I would remake the decision.

Error of law decision

5. I will first consider Ground 2. The judge found that the Appellant was homosexual [29]. Having concluded this he then states:

“The questions which fall to be addressed are whether the Appellant would openly live as a homosexual in Pakistan and, if he would not, why he would not do so. In order to address this question it is necessary firstly to consider to what extent the Appellant is open about his sexuality in the UK where he has now lived for over a decade and where very large numbers of homosexuals do live openly.”

6. The judge then goes on in [30] to consider the evidence of the Appellant and Mr. M. At the end of [30] he makes a finding that it is unlikely that Mr. M conducts his homosexual life openly. The need to make a finding that Mr. M did not conduct his homosexual life openly is not entirely clear, especially given the nature of his relationship with the Appellant. Indeed the judge states that “The fact that Mr. M. is probably not openly homosexual does not of course necessarily mean that the Appellant is not openly homosexual, an issue to which I now turn.”

7. Especially given the acknowledged reluctance of Mr. M. to give evidence, as set out by the judge at [28], and having found that Mr. M.s’ evidence “removes the shadow of doubt” concerning the Appellant’s homosexuality, I find that to make findings about the way in which Mr. M. leads his life was not necessary. The issue was whether the Appellant wished to live an openly gay lifestyle in Pakistan, not whether an individual with whom he had had a casual sexual relationship was open about his homosexuality.

8. At [31] the judge states:

“It is clear that fuller degrees of sexual intimacy have been practised in the open air but practising openly is not the same thing as having sex in the open air in woodland.”

9. The judge has accepted that the Appellant goes to meet men in order to have casual sex in the open air. These men include Mr. M. He refers to woodland near Snaresbrook and Epping Forest [30]. Neither of these are private spaces. However he finds that seeking these encounters is not the same as practising his homosexuality openly. He has failed to explain how seeking casual sexual encounters in a public place is not being open about one’s homosexuality and living an openly homosexual lifestyle. I find that the judge has failed to give reasons for his finding that the Appellant’s having sex in the open air in a public place does not equate to practising homosexuality openly.

10. In the same paragraph the judge states:

“Furthermore, if he wants to be openly homosexual it is strange that he makes no mention of having gone to Gay Clubs/Pubs/Parties during his decade in the UK, particularly during the years when he was working”.

11. Ground 3 refers to the Appellant having provided a supplementary bundle. There was evidence that it was filed and served. The Appellant adopted the contents of his supplementary witness statement at the hearing. However, in paragraph 8, when setting out the evidence before him, the judge has not referred at all to the supplementary bundle.

12. Paragraph 7 of the supplementary witness statement states:

“By comparison, in the UK, I can have casual sex and go to gay bars/parties if I wanted to. There is usually a meet up every weekend where lots of gay men gather and we party. This happens at [Lea Bridge Road, E17]. It is easy for me to approach men and be open to them about my sexual preferences and identity.”

13. I find that there was clear evidence before the judge that the Appellant goes to gay bars and parties, but the judge has stated that there is no such evidence. I find that the evidence of practising casual sex in public places, and the evidence of attending gay bars and parties, are two pieces of clear evidence of the Appellant living his life openly as a homosexual.

14. At the end of paragraph 31 the judge states:

“I find that the Appellant has not proved he ever had a longstanding partner with whom he conducted an openly homosexual relationship.”

15. It is not necessary for the Appellant to show this. It is perfectly possible to live an openly gay, or indeed heterosexual, lifestyle without ever having a longstanding relationship.
16. In paragraph 32 the judge states that the Appellant's "desire to have casual sex is not manifested here openly". This appears to be a finding that the Appellant has a desire to have casual sex, which does not sit easily with a desire to live a discreet gay lifestyle. He then states that the Appellant's desire to have casual sex is practised "behind closed doors or in woodland". He finds that this is "practising discreetly" but he has again failed to give reasons for this.
17. The Appellant's evidence of wishing to live his life as an openly gay man was not challenged. The evidence before the judge was that the Appellant lived an openly gay lifestyle here. The errors of law in the treatment of the evidence mean that the judge's assessment under HJ (Iran) [2010] UKSC 31 is therefore flawed.
18. Ground 1 submits that the judge has failed to make findings about the Appellant's treatment in Pakistan. In paragraph 32, having considered the behaviour of the Appellant in the United Kingdom, the judge states:

"This is in essence no different to what he did in Pakistan, the only exception being when he was raped and sexually abused by older boys".
19. The judge appears to accept the evidence that the Appellant has been raped and sexually abused by older boys in the past in Pakistan. However, this is the extent of the consideration, and there are no further findings regarding this mistreatment in Pakistan.
20. I was referred by Mr. Slatter to the Respondent's Country Information and Guidance Pakistan, Sexual Orientation and Gender Identity, April 2016, (the "CIG") paragraph 7.1.4. This quotes an IGLHRC advisor (International Gay and Lesbian Human Rights Commission advisor) as follows:

"The IGLHRC advisor added that gang violence against people who appear to be gay or transgender was common. He explained that in the gay cruising areas of Islamabad, Karachi and Lahore, gay or transgender people were frequently lured into cars and taken to groups who beat and/or raped them. According to the IGLHRC there were three cases in 2014 in which men were picked up in the gay cruising areas in Lahore and then killed."
21. This is consistent with the Appellant's evidence of what happened to him in Pakistan, that he was raped and sexually abused by older boys. The judge has not considered the Appellant's evidence of what happened to him in Pakistan. I find that this is a material error of law, especially given its relevance to risk on return.

22. I find that the judge has made material errors in law in failing to make findings on a material matter, failing to give adequate reasons for his findings, and failing to take into account evidence which was before him. The Appellant's evidence was that he wished to live his life as an openly gay man, and the judge has failed to give adequate reasons for why he has rejected this.

Remaking

23. I do not intend to repeat all that is set out above. I have taken into account the case of HJ (Iran).
24. I find that the Appellant is gay. I find that he lives an openly gay lifestyle in the United Kingdom, both in attending gay bars and parties, and also by seeking casual sexual encounters in public at "cruising locations".
25. I find that the Appellant's evidence as set out in his witness statement is that he wishes to live an openly gay lifestyle in Pakistan. The Appellant said "I do not want to live a secret life. I am an open gay man here and have any sort of relationship I desire with men. I could not do this in Pakistan" [38]. I have found that the Appellant lives an openly gay lifestyle here, which is consistent with this statement, and given that he lives an openly gay lifestyle in the United Kingdom, there is nothing inconsistent about wanting to be able to do the same in Pakistan.
26. I find that the only reason that the Appellant would conceal his sexuality would be through fear of persecution. In his supplementary witness statement he said that he would live discreetly because Pakistan "does not allow gay men to live openly and be safe" [6].
27. The Appellant has already suffered sexual violence in Pakistan. He has been raped and sexually abused by older boys, although clear findings were not made by the First-tier Tribunal. In the absence of any challenge, I find as a fact that the Appellant was raped and sexually abused in Pakistan. This is consistent with the background evidence set out above [20]. He stated in his supplementary witness statement that he would struggle to openly practise his sexuality even if it were allowed in Pakistan due to what he had already experienced there [7]. I find that this is further evidence that he would only be discreet due to fear of what might happen to him based on what has already occurred.
28. The policy summary in the CIG states as follows:
- "There is widespread and systematic state and societal discrimination against LGBT persons in Pakistan, including harassment and violence. This treatment may, in individual cases, amount to persecution or a risk of serious harm. No effective protection is provided by the authorities."
[3.1.2]

29. In relation to protection, paragraphs 2.4.1 and 2.42 of the CIG state:

“Where the person’s fear is of ill treatment/persecution at the hands of the state, they will not be able to avail themselves of the protection of the authorities.

If the person’s fear is of ill-treatment/persecution by non-state actors an LGBT person will not be able to avail themselves to the protection of the authorities. This is because same-sex sexual acts are prohibited in Pakistan, and it would be unreasonable to expect a person identifying as LGBT, who fears persecution or serious harm by non-state actors because of their sexuality, to seek protection from the authorities because they may in doing so be at risk of prosecution, persecution or serious harm.”

30. In relation to internal relocation, paragraphs 2.5.1 to 2.5.3 state:

“Where the person’s fear is of ill treatment/persecution at the hands of the state, they will not be able to relocate to escape that risk.

Decision makers must also take account that the Supreme Court in the case of HJ (Iran) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution.

With regard to those in fear of non state actors, given that homophobic attitudes are prevalent throughout the country, there is unlikely to be any place in Pakistan to which an LGBT person who would be identified as such could safely relocate. However, if the person would not be identified as LGBT in a different location internal relocation may be viable.”

31. The Appellant said in his supplementary witness statement that he would not be safe in his village as “people are narrow minded”. He said wherever he went in Pakistan he would be in danger living openly as a gay man [6]. I find that this is supported by the Respondent’s own guidance.

32. Taking all of the above into account, I find that the Appellant, as a gay man who lives an openly gay lifestyle now, and who wants to live as an openly gay man on return to Pakistan, and who has previously been raped and suffered sexual abuse in Pakistan, would be at risk on return to Pakistan on account of his sexuality. There is no sufficiency of protection, and he would not be able to internally relocate.

33. I find that the Appellant has demonstrated that there is a real risk that he will suffer persecution on return to Pakistan, and so his claim succeeds on asylum grounds. Following my finding in relation to his asylum claim, I find that he would also be at risk of treatment contrary to Articles 2 and 3 of the ECHR such as to put the United Kingdom in breach of its obligations. The appeal is therefore also allowed on human rights grounds.

Notice of Decision

34. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside.

35. I remake the decision allowing the Appellant's appeal on asylum and human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 27 July 2017

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT **FEE AWARD**

I have allowed the appeal. I have considered making a fee award if a fee has been paid or is payable. Further evidence was provided for the appeal. In the circumstances I do not make a fee award.

Signed

Date 27 July 2017

Deputy Upper Tribunal Judge Chamberlain