Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08670/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th March 2018	**On 27th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR H J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Gilbert, (Counsel)
For the Respondent: Mr A Brocklesby-Weller (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Fowell, promulgated on 12th October 2017, following a hearing at Taylor House on 5th October 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on [ ] 1992. He appealed against the decision of the Respondent Secretary of State, dated 23rd August 2017, refusing his application for asylum and for humanitarian protection under paragraph 339C of HC 395 on grounds that he had a well-founded fear of persecution on account of the fact that he was a member of a particular social group, namely, that he was a gay man.

The Appellant's Claim

3. The Appellant's claim is that, having arrived in the UK as a student from Pakistan in February 2012, and with his visa expiring in October 2014, he had remained in the UK, and had subsequently applied for leave to remain, relying on his private and family life rights. He had put in a substantive asylum claim which was refused on 23rd August 2017. The basis of the claim was that he was gay. His case was that he discovered his sexuality only while in the UK, where he had a relationship of some length with a man called Ahmed. While he was studying, he was working at Papa John's Pizza Restaurant and sharing a house with Ahmed as friends, when in August 2013 Ahmed told him he was gay. This prompted the Appellant himself to recognise his own sexuality and in May 2015 he confided in his gay sexuality with his friend, Ayesha. He began a relationship with Ahmed in July and they were together until March 2016. The key part of his claim, as identified by the judge (see paragraph 5) is that the Appellant feels that he would be pressured into an arranged marriage in Pakistan and that his father would kill him if he saw him again and his mother felt the same. His uncle in the UK, on whom he had claimed to have been dependent, was more sympathetic (paragraph 5).

The Judge's Findings

4. The judge set out the central part of the relevant judicial authority, namely, **HJ (Iran) [2010] UKSC**, at the outset of the determination (see paragraphs 11 to 13) with large extracts of the judgment of Lord Rodgers and of Lord Hope quoted. He then also set out the Home Office country guidance note from April 2016 in relation to Pakistan and the sexual orientation claims emanating from that country (at paragraph 14). He had regard to the documentary evidence before him (paragraphs 16 to 20). Thereafter, he considered the oral evidence at length (paragraphs 21 to 32).

5. The judge noted that a key part of the submissions of the Home Office Presenting Officer was that there was a complete absence of a threat from the Appellant's family in the evidence presented. There were no text and no social media extracts the Appellant could point to. It was also submitted that the only witness who could confirm the attitude that would be taken by the Appellant's family back in Pakistan, namely, his sympathetic uncle, did not turn up to give evidence (paragraph 36). It was

also submitted by the Presenting Officer that the Appellant's homosexuality in the gay social scene in Karachi would be protected (paragraph 34). Moreover, despite the evidence of his recent openness, the Appellant had only referred to one meaningful relationship, which was with Jawed, and this ended in 2016 (paragraph 35). There was no further evidence.

6. The judge concluded that the Appellant, on the evidence before him, was a person who was of a shy disposition (paragraph 44) and was a person who was "a naturally reserved person" (paragraph 50). Assuming he wanted to practice his sexuality, he was not a person who was "needlessly open about his sexuality and will only reveal it in places and with people with whom he feels at home and supported" (paragraph 50). This being so, the judge concluded, that upon the application of the Supreme Court decision in **HJ (Iran)** that he would not be inhibited from expressing his sexuality due to reasons of "social pressure" because there was already evidence before the judge of "his long period in the UK essentially concealing his sexuality despite the much great freedoms he enjoys" (paragraph 51) in this country. On the other hand, were the Appellant to be subjected to social pressure then this would certainly be enough "to dissuade him from any open mention of sexuality", although in his case the social pressure in itself would not amount to persecution given his inhibitions that the judge had noted (paragraph 51).

7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge misdirected himself as to the law because he failed to ask whether there was a "material reason" for non-disclosure of the Appellant's sexuality in Pakistan that would amount to a fear of harm being visited on the Appellant. Social pressure in itself was not the full story. There may be an additional feature to the Appellant's evidence which could be that he was also fearful of persecutory harm. In the Appellant's case, his fear of disclosure was supported by evidence of attitudes and behaviour towards gays in Pakistan, which was well-known.

9. Secondly, Judge Fowell had considered that the Appellant would not live openly as a gay man in Pakistan, but in doing so acted irrationally, by reliance upon previously closeted nature of the Appellant's sexuality. This was because the Appellant was now "out" and the judge was bound to consider risk of harm to the Appellant as at the date of the hearing. The judge was simply wrong to assess risk on the basis of previously stifled expression of his sexuality until quite recently (see paragraphs 49 to 50). Third, the judge was wrong to say that it was "not necessary to enter into a detailed examination of the background evidence" (paragraph 53) because this amounted to a failure to apply "anxious scrutiny" which was a feature of all protection claims. Fourth, the judge failed to give adequate reasons why the Appellant would not face a real risk of

persecution as a gay man where it had been found that, “the restrictions on him would clearly be much less in his case then the majority of the gay community in Pakistan” (paragraph 52), and that the Appellant would “take advantage of the increased freedoms to be found in big cities” (paragraph 53). This was because the COIS Report (2016) makes it clear that “young men or boys that identify as gay typically face expulsion from the family home if they do not relinquish their sexual orientation” (see paragraph 6.2.1). Fifth, the failure to enter into a detailed examination of the background evidence (set out at paragraph 7 of the COIS Report 2016) was a material factor where the Appellant lived openly in a gay relationship and had been found to be someone who sought such relationships (paragraph 49 of the determination). Sixth, the finding that the Appellant was a sufficiently wealthy person, from a well-off family so as to enable him to face lesser restrictions was neither supported by evidence and nor did that equate to a sufficiency of protection. Seventh, the judge speculated about the Appellant’s former partner, Ahmed, having returned to Pakistan because his life circumstances would be immaterial to those of the Appellant. Finally, the judge failed to give adequate reasons in general.

10. On 15th December 2017 permission to appeal was granted on the basis that the judge’s recital of the principle in **<u>HJ</u> (Iran)** was “unduly restrictive” given that the Appellant was living now an openly gay lifestyle. He was, after all, accepted as having a shy disposition. Further scrutiny was required of the background material. This was also a case where the Appellant was now “out” as a homosexual person which was not previously the case.

<u>Submissions</u>

11. At the hearing before me, Mr Gilbert, of Counsel, relied fundamentally upon the detailed grounds of application. He began by emphasising that it was accepted by the judge that the Appellant was gay, had been in a gay relationship for a reasonably long period of time with a man by the name of Ahmed, and that he was now “out”. However, the judge had applied the wrong test in **<u>HJ</u> (Iran)** by making it unduly restrictive in relation to someone who was of a shy disposition but was also at the same time now “out”. For a proper explanation of the case law there had to be an enquiry into what other material factors may prevent the Appellant from living his sexuality openly in Pakistan, quite aside from the “social pressures” that the judge had already noted.

12. Second, on the question of how the Appellant would behave, the Appellant had already said that he was now an openly gay man, and it was therefore wrong to review his position from that of stifled sexual expression, which was his previous condition.

13. Third, the judge was wrong to have stated that he was not required to necessarily ”embark on a detailed examination of the background evidence”.

14. Finally, an undue importance was attached by the judge to the fact that the Appellant came from a family which was "relatively affluent and live in Lahore" (paragraph 52). This did not necessarily mean that the Appellant would be able to find means available to him in order to exercise his sexuality in more liberal and an uninhibited social environment.

15. In making these submissions of Mr Gilbert of Counsel, who had also appeared before Judge Fowell below, relied upon his well-prepared skeleton argument of 21 pages (paragraphs 36 to 37) which I have taken into account.

16. For her part, Ms Brocklesby-Weller submitted that the judge's statement of the law, emanating from **HJ (Iran)**, could not have been misunderstood if it was seen for the nuanced manner in which it was given at paragraph 51. Before the judge recited the principle there, he had noted that the Appellant's claim that he was now "overt in his enjoyment of the gay club scene" was to be treated with scepticism, and the judge rejected that the Appellant would live openly in Pakistan (paragraph 43). Similarly the fact that it was recognised (at paragraph 44) that "Mr Jawed is essentially a shy person" meant that he would not on account of his own human nature, be impelled to celebrate his sexuality openly, regardless of whether or not there were social pressures. This was not how he behaved as a person. The reason for this quite simply was because he was a shy person by nature. Furthermore, the judge rejected the Appellant's account, that when he came to the UK, he had not realised that homosexuality was legal, and remained unaware of it for over a year, "despite mixing with numerous people of his own age at university in London". As the judge said, this claim could not be accepted, "even to the lower standard, and it follows that knowing that sexuality was at least a known feature of UK life, he did nothing to explore it" (paragraph 45).

17. It was, submitted Ms Brocklesby-Weller, in these circumstances that the judge referred to what would be the applicable principle deducible from **HJ (Iran).** The judge made reference to the Appellant's evidence given "with unusual clarity", which confirmed, "his long period in the UK essentially concealing his sexuality despite the much greater freedoms he enjoys" (paragraph 51). It was for this reason, that the judge held that given, "his innate privacy, which appears to have stifled any expression of his sexuality until quite recently, without encountering any social pressure" (paragraph 51) the Appellant would not encounter an infringement of his fundamental rights.

18. In short, submitted Ms Brocklesby-Weller, whatever the situation is in Pakistan, it would not infringe upon the way in which the Appellant expresses his sexuality. He is a naturally shy person. He did not express this sexuality overtly, (despite maintaining so in a manner which was rejected by the judge below), and all that one had was simply the "social pressure" which he could evade, in much the same way as he evaded it in the UK.

19. In reply, Mr Gilbert submitted that at heart here was the question of whether the judge could properly have rejected the Appellant's credibility. The judge had rejected the Appellant's evidence that he was being forced into a marriage by his conservative thinking family, and required corroborating evidence, but this was unnecessary. Much of the judge's conclusion in this respect was speculative and the Appellant's evidence should have been taken at face value, given what we know about Pakistan.

No Error of Law

20. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law such that I should set aside the decision (under Section 12(1) of TCEA 2007) and remake the decision. My reasons are as follows.

21. First, in what is a closely reasoned and carefully constructed determination, the judge highlights two aspects of this appeal, which have so far not been mentioned. First, whether the Appellant ever told his parents about his sexuality. He observed that there was no evidence whatsoever of any written contact with the family. Even more significantly, his uncle, upon whom he depended for his day-to-day support, did not attend the hearing to give evidence. There is not even a line of support from either of his sisters to confirm that he was fearful of his parent's attitude. As against this, the Appellant was putting forward a claim that his family was simply setting out to arrange a marriage for him, select a date, and expecting him to attend, without ever there having been a meeting with his intended spouse, and all of this without any written communications with him. The judge was entitled to conclude that this was intrinsically improbable. (See paragraph 41).

22. Second, it was no less significant that the Appellant, made his asylum claim on the basis of his sexuality very late in the day, "over a year after he says he found out about the possibility of asylum", and this despite the fact that "there were also two previous applications, one of which was withdrawn, and one (the EEA application) refused" (paragraph 42).

23. In the light of these two highly significant issues, the judge concluded that this was an Appellant who

> "Has attempted to graft his additional branch on to the central and truthful stem of his claim, that he is gay. In the same way, I am sceptical about his claims to be now very overt in his enjoyment of the gay club scene, and this touches on the key aspect of the appeal, whether he would live openly in Pakistan" (paragraph 43).

24. It is only after focusing on these serious reservations that the judge has about the Appellant's claim, that he then goes on to consider the aspect of the Appellant's personality that he is an "essentially a shy person" (paragraph 44). Even then, the judge cannot accept how it could be that the Appellant when, mixing with numerous people in the university in

London and having a room-mate, could say that he remained unaware of it for over year that homosexuality was legal in this country (paragraph 45).

25. Third, that leaves the question about the judge having misconstrued the relevant legal principles in **HJ (Iran)**. This was not the case at all. The judge refers to the Appellant's "innate privacy" (paragraph 51) on account of which he had already held that the Appellant was not now going to set out to be "very overt in his enjoyment of the gay club scene", a claim which he found to be "sceptical" (paragraph 43). In these circumstances any existence of "social pressure" was irrelevant to the Appellant's condition (paragraph 51). Moreover, the judge referred to the fact that the Appellant came from a relatively affluent family living in Lahore "so the restrictions on him would clearly be much less in this case than for the majority of the gay community in Pakistan" (paragraph 52). It would seem to me that this inference was entirely for the judge to draw from the objective evidence before him. As for the statement that the judge felt that it was not necessary for him "to enter into a detailed examination of the background evidence", this overlooks the fact that this was only part of the statement that the judge made because he went on to say,

> "Since although it pointed to a contrast between the affluent in major cities and the situation generally, the contrast was consistently described and there was in fact little disagreement. It appears to me that Mr Jawed would be in a position, by virtue of his youth, education and background, to take advantage of the increased freedoms to be found in the big cities, should he wish to do so".

26. In fact the person that he had a claimed relationship with, namely, Ahmed, was one, "who was clearly more open in his sexuality, and was happy simply to return to Pakistan" (paragraph 53).

27. I do not accept Mr Gilbert's submission that the circumstances of Ahmed are irrelevant to those of the Appellant. The judge is simply stating that just as it was open to Ahmed to return, who prefers to have a more open sexuality, it would have been open for the Appellant to do so as well, particularly given the other findings that the judge had made. For all these reasons, there was no error of law in this determination.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

An anonymity order is made.

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 their 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

Deputy Upper Tribunal Judge Juss 24th March 2018