Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08401/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 July 2019	**On 18 September 2019**

Before

MR C. M. G. OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE BLUNDELL

Between

MST
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms H Short, instructed by Duncan Lewis & Co Solicitors.
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer.

DETERMINATIONS AND REASONS

1. The appellant is a national of Pakistan. He claims to have a well-founded fear of persecution as a gay man if returned to Pakistan.

2. The appellant arrived in the United Kingdom on 6 October 2012 on a Student visa. His leave expired in November 2013. He was arrested and detained, having been found working illegally, on 18 December 2014. On 13 January 2015, he claimed

asylum. His claim was refused. His appeal was dismissed and permission to appeal was refused by both the First-tier Tribunal and the Upper Tribunal. He became appeal rights exhausted on 9 February 2016. He remained in the United Kingdom. On 1 June 2018 he lodged further submissions. These were treated as a fresh claim and on 18 June 2016 the Secretary of State refused his claim. He appealed to the First-tier Tribunal, where his appeal was heard by Judge A J M Baldwin. His appeal was dismissed. Permission to appeal was refused by the First-tier Tribunal and the Upper Tribunal, but then granted following the quashing of the latter decision by order of the High Court.

3. We do not need to set out the evidence relating to the persecution of homosexual men in Pakistan. There is no doubt of it, and save in relation to what is described as new evidence of homophobia (to which we shall refer again later), it does not feature in the grounds of appeal. The issue that the judge needed to address was set out in his decision, correctly in our view, as follows:

> "27. In HJ (Iran) v SSHD [2010] UKSC 31 the Supreme Court set out the questions which need to be addressed when considering the issue of persecution in relation to an asylum claim by a gay person. Assuming a person is indeed gay, but conducts himself discreetly, the question which needs to be asked is "Why?" If it is for cultural or religious reasons of his own choosing, an asylum claim must be rejected. However, if it is out of fear of persecution and that fear is well-founded, a grant of asylum is appropriate, however unreasonable the refusal to resort to concealment may be.

4. Judge Baldwin set out the appellant's history, noting that at his previous appeal it had been accepted that he was gay, but that he had not been believed in relation to various aspects of his account of difficulties with family members. The previous judge had concluded that although there was widespread homophobia in Pakistan, that of itself did not amount to persecution; and that the appellant would "exercise reserve in the expression of his sexual orientation if returned to Pakistan". So far as the evidence before the judge on the present claim is concerned, it was summarised in paragraph 14 of the determination, in a manner not now challenged, as follows:

> "14. The Appellant realised when he was 24/25 he was homosexual. Prior to that, he was pre-occupied with study and home affairs. He first suffered as a result in August 2007 when his father and brother beat him, leaving him with scars on his right cheek and head. He left home and has not spoken to his father since, though he has had occasional contact with his mother and one of his sisters, none of which contact now takes place. He went to Lahore where he had sex with lots of unknown males, as there are lots of homosexuals there. He also had occasional sex when he moved to Kasir where he resumed contact with his mother. Since being in the UK, he has had no proper sex with males and his long-standing friends don't know he is gay as they are not homosexuals. He has, however, made friends with homosexuals he meets at his Church and Refugee Organisation who believe he is homosexual."

5. In his witness statement before Judge Baldwin, he repeated his history of previous homosexual encounters in Pakistan, which he kept hidden from family and friends due to "society pressure and religious views on sexuality". He had had casual

encounters in the United Kingdom and was a member of various homosexual societies. He also attended the Unitarian Church's LGBT meetings. In cross-examination he said that he had been living openly as a gay man since he arrived in the United Kingdom and therefore was doing so at the time of his last appeal. However, he had not had much knowledge or organisations or same-sex people as he had been busy studying (though he now accepted he was neither studying nor working). His friends, who he said all knew of his sexuality, support him, and he said that he hides it from no one, not even the Pakistani community here.

6. Four witnesses from the Unitarian Church gave evidence about him which for the most part appeared to be repetition of what the appellant had told them. As we understand the matter each of those witnesses is a gay man to whom the appellant had been open about his sexuality. On the other hand, as the judge notes at paragraph 24, another individual wrote to say that he had been providing the appellant with food and other expenses since January 2018 at the property at which they both live, but the author of that letter says nothing about the appellant's sexuality.

7. The judge's conclusions on the asylum claim are in paragraphs 31-33 of his determination:

> "31. The starting point for my consideration is the previous Determination which was challenged twice unsuccessfully. It was accepted the Appellant was homosexual but found that he would behave discreetly in Pakistan due to "social pressures". The Judge did not accept that his father had disowned him but, in any event, family disapproval in which the State played no part fell outside International Protection and the Appellant had been able to live subsequently unmolested in Lahore and Kasir for five years. There was no evidence to show that he could be tracked down, even assuming his family would be motivated to do so. Further, there was no real risk he would be prosecuted.
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> 32. It is not suggested that the situation in Pakistan has changed appreciably in relation to homosexuals since the first Determination and there is no new evidence relating to what happened to the Appellant in Pakistan as the witnesses called to give evidence before the Tribunal confirmed that they had no personal knowledge of what had happened to the Appellant in Pakistan and they had relied upon what he had told them. The question is whether the Appellant's approach to his sexuality has genuinely changed since his first Appeal was dismissed and he had exhausted all Appeal avenues. I accept that shy people who behave very discreetly can and do sometimes become confident and outgoing people over time and in a supportive environment. However, the Appellant had already been in the UK for three years when his first Appeal was determined – and he made it clear he came here, partly at least, because of the sexual freedom this country allowed. Furthermore, he was not a teenager still finding his way in the world, as he was already 29 when he arrived here. A homosexual asylum-seeker does not have to prove he is sexually active but this Appellant has been here for nearly six years and there is no evidence from a single person who can attest to a relationship with the Appellant and no-one

who can say they know of anyone with whom they believe he has been in a relationship. That strongly suggests that the Appellant has been incredibly discreet in his homosexual contacts throughout his time in the UK. The Appellant maintains that everyone he knows is now aware he is openly homosexual. However, it is I find telling that the very person with whom the Appellant lives and is said to be the person providing him with accommodation, food and other expenses is completely silent as to the Appellant's sexuality, still less whether he is open about it – "openly" being the key issue in this case. Corroboration is not an evidential requirement in Asylum cases but that does not mean that an absence of evidence on a point of crucial importance from someone who should be able to give such evidence cannot be regarded as significant. In this case it is, I find, highly significant and notable. The witnesses called do appear to believe that the way in which the Appellant conducts himself in their company is such that his behaviour has not been contrived and represents the Appellant's genuinely open approach to his sexuality. In the context and timing of this wholly different approach since he became Appeal Rights exhausted, I have no hesitation in concluding that this Appellant is not being open to the wider world about his sexuality and continues to keep it from those he does not know to be homosexual. He acted discreetly in Pakistan in relation to people he did not believe were homosexual before he came here and I have no doubt that he would continue to act discreetly whether he is in the UK or in Pakistan – other that is than in the presence of those he knows to be homosexuals. He is one who suffers from anxiety and depression, but neither the Maudsley nor his treating GP have suggested his symptoms might provide a diagnosis for PTSD and it is clear from his Medical Records and the Maudsley Assessment that he has worried about all manner of symptoms he has had over the last six years. The Appellant's issues fall well short of founding an Article 3 claim, as they do the medical condition of Paposhvili.

33. Judge Courtney did not believe that the Appellant had been disowned by his father for the reasons given – not because he conclude that in Pakistan homosexual children would not be disowned in such circumstances. Even if the Appellant has been disowned, which I do not accept, the Appellant has stated he lived away from his family for several years in Pakistan. The Expert Report indicated that the family could probably locate the Appellant elsewhere in Pakistan, but the question which arises is whether the family would wish to do so if he has been disowned and none of them has been in contact for many years. More than a decade has passed since the Appellant moved away in 2007 and I find that it is unlikely in the extreme that his father or brother would have any interest whatsoever in tracking him down or learning anything about him if they still feel as strongly about his sexuality as the Appellant claims."

8. The grounds of appeal assert that the judge's findings "are undermined by the following errors of law":

"5 a. The Judge accepts the evidence of the Appellant's four witnesses (who were all gay men, two of whom were originally from the UK and two from Pakistan) that the Appellant is open with them about his sexuality. It is submitted that this evidence clearly suffices to show that the Appellant lives openly in the UK as a gay man. There is no principled or reasonable basis for the distinction

the Judge makes between openness towards persons whom the Appellant "knows to be homosexuals" and others. This is particularly so given the background evidence which demonstrates the lack of public LGBT community in Pakistan, a factor which the Judge fails to consider.

b. In any event, there is no proper basis for the Judge's finding that the Appellant is only open about his sexuality to those whom he "knows to be homosexuals". The Judge's reasoning on this point displays the following errors:

    i. The Judge focuses excessively and unreasonably on the absence of positive evidence about the Appellant's expression of his sexuality from one particular individual (the Appellant's housemate).

    ii. The Judge relies on the fact that the Appellant has not been in a relationship in the UK as evidence that he has been "discreet". This approach is unreasonable. There are clearly many reasons why a person may not have found a romantic partner.

    iii. The Judge fails to take into account the evidence that the Appellant has attended events as an openly gay man which are attended by persons of all sexualities: see [23], where th4e Judge discusses the evidence about the Unitarian Church, where "the majority of the congregation were not gay".

c. The Judge fails to properly apply the test in HJ Iran, as he makes no assessment of the reasons why the Appellant would conceal his sexuality in Pakistan (only one of which need be a fear of persecution, according to the test). The Judge fails to address the submission set out in the Appellant's skeleton argument at [17(c)] that:

> *The view that the Appellant does not fear persecution in Pakistan is similarly unsustainable in the light of the fact that he has consistently and repeatedly expressed such a fear. For example, in his asylum interview, he explained that he feared being killed, thrown out of his village or beaten if his relationship with a man became known (at question 95); he was scared of being caught by the authorities when engaging in clandestine sexual activity in Lahore (at question 189); he feared being killed in Pakistan by his family or by others if his sexuality became known (at questions 253 and 254). In his current Appeal Statement, he reiterates that he fears being persecuted and killed (at [32]).*"

d. The Judge fails to address or make any findings in relation to the following submissions set out in the Appellant's skeleton argument at [17(a))] to [176(b)], in relation to (a) the proper approach to the previous determination of Judge Courtney, and (b) the effect of recent country background evidence, including the Respondent's *Country information and guidance: Pakistan: Sexual orientation and gender identity Version 2.0 April 2016* (also cited in the skeleton argument at [14]) and the Appellant's expert report prepared by Uzma Moeen:

a. *Judge Courtney's reasoning was that although "there is a homophobic climate in Pakistan which prompted the Appellant to keep his sexual orientation a private matter", the Judge considered that this amounted to "social pressures" and that discrimination in Pakistan did not amount to persecution (at [65]). Therefore, the Judge defined the reasons for the Appellant's "discretion" by reference to his assessment of the situation in Pakistan, rather than by reference to the Appellant's subjective fears.*

b. *The conclusion that the levels of societal and state-sponsored homophobia in Pakistan do not amount to persecution is quite clearly unsustainable in light of the evidence now presented by the Appellant in this appeal. The Appellant has provided ample evidence in the form of Uzma Moeen's Expert Report, current country background materials, and indeed the Respondent's own CPIN, to demonstrate that gay men who live openly in Pakistan are at real risk of persecution.*

Indeed, the Judge wholly fails to assess the new country background evidence put forward by the Appellant. Notably, Uzma Moeen discusses the possibility of a gay man such as the Appellant being required by his family to enter into an arranged marriage and therefore deny his sexuality (at [54]). In addition to the errors already identified, the Judge's discussion of "discretion" fails to encompass the risk that the Appellant would be compelled to actively conceal his sexuality in Pakistan."

9. Ms Short expanded on those grounds before us. She made additional submissions. She asserted firstly that "we say" that the appellant lives openly as a gay man in the United Kingdom. In her discussion of grounds A and B she asserted that the judge's conclusion that he is discreet about his sexuality in the United Kingdom was irrational, and that there was no proper basis for finding that he was not being open to the wider world. She reminded us that even if he is discreet in the United Kingdom, there remains a need to determine why he would be discreet in Pakistan. This was accompanied by the submission, remarkable in the light of H J (Iran), that even if he would be discreet entirely of his own choice, he is entitled to status as a refugee. Mr Bramble submitted simply that the judge was entitled to reach the conclusions he did and that no error of law had been shown.

10. We bring two overarching principles to the determination of this appeal. The first is that the decision of the First-tier Tribunal is not a legislative instrument, to be pored over to see whether it would be possible for an uninformed person to misunderstand it: it is a determination of the issues before the judge, addressed to the parties, to be read as a whole and in its context. The second principle is that an appeal to the Upper Tribunal lies on an error of law only. A judge may commit an error of law if he fails to take into account relevant material, or takes into account irrelevant material, or reaches a conclusion which is irrational when compared with the material before him as a whole. The assessment of the persuasive power of individual items of evidence, and their weight in contributing to his ultimate conclusion are, however, matters entirely for the judge. Neither of these principles was very obvious in the way that the appellant's case was presented to us or, apparently, to the High Court.

11. So far as concerns the judge's conclusions on the question of "why?", we do not think that there is any real scope for misunderstanding. By the time the judge came to make his decision, the appellant had been in the United Kingdom as a gay man for very nearly six years. The judge's conclusion was that, contrary to the appellant's assertions, he had revealed his sexuality to, and discussed it with, only those he "felt comfortable" with, by which he meant other gay men. There cannot be the slightest suggestion that any motive connected with persecution could have been influencing his choices in this matter over the last six years. As a result, there is simply no reason to suppose that if one added the risk of persecution to the factual matrix, the appellant's choices, and his conduct, and his wishes, would be any different.

12. It is inherent in HJ (Iran) that the mere fact of the persecution of homosexuals in a country does not mean that all homosexuals are entitled to status as refugees. It cannot therefore be said that, for all individuals, the addition of the risk of persecution to the factual matrix will make them refugees. It will if either they will be known to be homosexual, or if the fear of persecution causes them to be discreet about their sexuality. If their discretion (if any) arises from other factors, their claim is not made out.

13. The judge set out the HJ (Iran) test and, as it appears to us, applied it to the factors he found them in such way as is impossible to misunderstand. The appellant makes his own lifestyle choices in the absence of any risk of persecution: he has accordingly failed to show that those lifestyle choices are motivated by a fear of persecution.

14. So far as concerns the suggestion that the judge failed to answer the "why?" question posed by HJ (Iran), we reject it.

15. We turn then to the attack on the judge's factual conclusions as the appellant's lifestyle choices themselves. We reject the submission made in the grounds that there is "no principled or reasonable basis for the distinction the judge makes between openness towards persons whom the appellant "knows to be homosexuals" and others. The difference is precisely that between discretion and openness. In his oral evidence the appellant appears to have claimed that he was open to everybody about his sexuality, but there was clearly evidence to the contrary; in particular, as we have noted, the judge recorded the appellant's evidence that "his longstanding friends don't know he is gay and they are not homosexuals". The fact that he is not a party to an openly gay relationship is clearly a factor to take into account: obviously, the absence of such relationship does not of itself prove either discretion or the wish to be discreet; but it is properly taken into the balance in determining whether the appellant's evidence demonstrates that he is, as he claims, open. Looking at the evidence as a whole, we cannot see any proper basis for challenging the judge's conclusion that the appellant is open about his sexuality only with other homosexuals.

16. We turn then to the argument raised at ground d. as set out above. The existence in Pakistan of societal homophobia does not, as it seems to us, really arise in this case. As we have said, the appellant's lifestyle choices are sufficiently demonstrated by

what he does in the United Kingdom. Societal pressures not present in the United Kingdom do not influence his choices in the United Kingdom, and there is no reason to suppose that they would influence his choices anywhere else. And Judge Baldwin's treatment of Judge Courtney's decision was that he took it as a starting point, that he noted the facts Judge Courtney had found; but there is really no sign of his having determined a present risk on the basis of anything other than the evidence before him, despite his reference to nothing having materially changed since the appellant's appeal before Judge Courtney. In this context it is right to say that the assertions made in the report by Uzma Moeen are not very different from those that were part of the evidence before Judge Courtney.

17. One new feature of the evidence is asserted in the grounds. As we have noted above, the grounds submitted to the First-tier Tribunal say that:

> "Uzma Moeen discusses the possibility of a gay man such as the Appellant being required by his family to enter into an arranged marriage and therefore deny his sexuality (at [54])".

The grounds of appeal to the Upper Tribunal say that, before Judge Baldwin, the following submission was made:

> "The country background evidence and the Expert Report illustrate that gay men in Pakistan are ostracised if they do not present a heterosexual narrative of e.g. marriage to a woman."

18. What Uzma Moeen actually says at paragraph 54 is this:

> "I must also point out that once back in Pakistan there would be only one way for an individual like [the appellant] to seek reconciliation with his family, and that would be to agree to an arranged marriage of their choice, and to deny his sexual orientation. I therefore consider [the appellant's] claim that his family will not let him live as he pleases, and would seriously harm him if they got the chance to be entirely plausible and consistent with the country situation in Pakistan."

19. It does not appear to us that Uzma Moeen is there making either of the general statements attributed to the report in the two sets of grounds of appeal. The conclusion is predicated on the appellant's wishing to seek reconciliation with this family. The appellant's relationship with his family is a matter upon which his evidence has not been believed, and there is no proper basis for conclusions about it. If he is estranged from his family, he has not given any indication that he would seek reconciliation.

20. A further matter is raised on the grounds, although it was not addressed orally by Ms Short. It relates to the judge's dismissal of the appeal on grounds other than asylum. The ground is put as follows:

> "e. The Judge's findings on Articles 3 and 8 are infected by the errors set out above. Further, the Judge's failure to adjourn the hearing to allow the Appellant to obtain the psychiatric report was unfair. The Judge's reasons for refusing the

> adjournment (at [5]) were inadequate. The Appellant's GP notes plainly do not constitute an expert psychiatric assessment of the likely effects of the Appellant's mental health of removal to Pakistan."

21. The position is that, as we have already noted, the appellant's appeal rights were exhausted in June 2016. He made his further submissions 28 months later, in June 2018. It is said that only in July 2018, after the refusal of those submissions, did he assert psychiatric problems. The most recent medical evidence before the judge did not support a claim that he was at risk of suicide, as the judge noted at paragraph 5. In these circumstances it seems to us that the judge was entitled to decide, as he did, that there was no good reason for deferring the hearing. As he noted, on the basis of evidence derived from five and a half years of medical records "the appellant has had a great variety of issues of which the only ones described as "significant" are ones recorded as lichen planus and fracture of malar or maxillary bones, in 2007 and 2013 respectively". The judge summarised the rest of the medical evidence and concluded in paragraph 34 that "his medical issues fall far short of founding an article 3 claim and his own GP clearly believes that he is not currently a suicide risk".

22. We have already determined that the judge did not err in law as argued in grounds a to d. No such error therefore infected his assessment of the claims under article 3 or article 8. His consideration of the request for an adjournment was wholly adequate, and he took into account the medical evidence that was before him. There was no error of law in his treatment of the non-asylum parts of the appellant's claim.

23. For the foregoing reasons we conclude that there was no error of law in Judge Baldwin's decision. We therefore dismiss this appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 11 September 2019

Pursuant to Rule 14, we order that no person shall disclose or publish any matter likely to lead members of the public to identify the appellant.