



IAC-FH-CK-V3

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

Appeal Number: PA/05183/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 7 November 2019
And 4 February 2020**

**Decision & Reasons
Promulgated
On 12 March 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**FMS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Dar, Archbold Solicitors

For the Respondent: Mr T Lindsay, Home Office Presenting Officer (7
November)

Ms R Bassi, Home Office Presenting Officer (4 February)

**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.

DECISION AND REASONS

I have made a direction anonymising the Appellant in accordance with the Upper Tribunal Guidance Note 2013 No 1: Anonymity Orders and Rule 14 (7) of The Tribunal Procedure (Upper Tribunal) Rules 2008.

The Appellant is a citizen of Pakistan. His date of birth is 23 May 1989. He came to the UK on 5 January 2010, having been granted entry as a student. He was granted periods of leave until 30 October 2012. He then became an overstayer.

On 5 August 2016 the Appellant made an application for asylum on political grounds and on grounds of his sexuality. This application was refused on 20 May 2019. The Appellant pursued an appeal against this decision on the ground that he would be at risk on return based on his sexuality. His appeal was dismissed by Judge of the First-tier Tribunal (FtT) C Chapman in a decision promulgated on 12 August 2019, following a hearing on 6 August 2019. Permission was granted by FtT Judge Nightingale on 9 September 2019. The matter came before me on 7 November 2019 to decide whether Judge Chapman had made an error of law.

The hearing before the FtT

The judge heard evidence from the Appellant and three witnesses. They were all cross-examined by the Presenting Officer. They all gave evidence relating to the Appellant's sexuality. The evidence was that the Appellant realised that he was gay in 2016 when he had sex with a man called Sunny. They had a relationship until 2017. The Appellant has had several relationships since then. The judge recorded the Appellant's evidence as follows:

- “19. He first realised he was gay in November 2016, when he met a man called Sunny at a nightclub. Sunny did not get angry like other men when a drink was spilled so the Appellant was attracted to him. They became drunk and ended up at Sunny's house where they had sex. They then saw each other several times until the end of January 2017 when Sunny ended the relationship because he wanted to have casual sex with other men.
20. The Appellant describes having conflict between his religion and his sexuality since discovering he is gay. He continues to practice his religion, but feels happier being gay and living as a gay man. Since Sunny, he has had several casual relationships with men, but always prefers to keep his sexuality hidden from the community. He can express himself openly with other gay men but not with people in the community.
21. Atif confronted the Appellant about his sexuality having seen him with men when he took him to nightclubs. Atif told him to refrain otherwise he would tell his family, and eventually, in December

2016, Atif did tell the Appellant's brother. In turn, his brother informed his father. One night, his father's friend came into a club and saw the Appellant kissing a man. There was a telephone call with his father in which his father threatened to kill him and said he was dead to them. He also received a call to the same effect from his uncle.

22. The Appellant fears he will be killed by his family because of his sexuality if he is returned to Pakistan.
23. In support of his appeal, the Appellant has provided letters and statements from people who know him as a gay person. He has also provided Grindr chat messages between himself and other gay men, photographs of himself with other men, and e-mails of LGBT and PRIDE events.
24. The Appellant has also provided a 'disinheritance affidavit' from his father, disowning and disinheriting the Appellant from his land and properties in Pakistan."

The judge made the following findings:

- "44. I am satisfied that, since November 2016, shortly after his release from detention, the Appellant has involved himself in the 'gay scene' by attending gay nightclubs, communicating with other gay people on Grindr, meeting gay people at nightclubs, and having casual sexual relationships with gay men.
45. The Appellant's evidence to this effect is supported by the three witnesses who gave evidence at the hearing and whose evidence I accept. One of these confirmed that their relationship had been intimate. The Appellant claims to have had around ten such casual relationships but the witnesses could not confirm the number. Indeed, other than the one witness who had personally been intimate with the Appellant, their oral evidence was that they had not seen the Appellant with someone they considered to be his partner or anyone with whom he was having a relationship. They confirmed, however, that he was seen behaving with other gay men at nightclubs as if he was gay by dancing with men and kissing other men. Their evidence was to the effect that the Appellant is not open about his sexuality other than on those occasions when he frequents gay clubs.
46. The Appellant's own evidence was limited as to how he lived his life as a gay man other than his association with other gay men at nightclubs. He has provided evidence that he chats on Grindr, but this, in itself is not proof of sexuality. He told me that he has lived with another Pakistani man throughout the period in question. His housemate is not gay but the Appellant said his housemate knew he was gay because of the friends who came to their house. The Appellant said, however, that they had not discussed his sexuality. I do not find it credible that such a

conversation has not occurred given that the Appellant lived with this man before he began his gay activity and given that homosexuality is such a big issue for many Pakistani males.

47. Overall, the impression I gained from the experience of the Appellant and his witnesses was that he behaves in a gay manner when surrounded by gay people in, for example, nightclubs, but that he is not very open about being a gay. There is nothing wrong in this as some people choose not to be open about many things, including their sexuality, but it did strike me that this was a feature of the Appellant's circumstances. It leads me to doubt his commitment to living life as a gay person, rather than merely acting out the role from time to time, even if this has involved relationships with other men.
48. Another aspect of his claim to strike me from the outset was the suddenness with which he declared himself to be gay, and based on only a few contacts over a very short period with Sunny. The Appellant confirmed that he had not considered himself to be gay before, and I would have thought that the sudden realisation that he might be, contrary to everything he had known before, might cause some form of emotional turmoil. Yet this does not come across in the Appellant's evidence. Although he speaks of the conflict with his religion, again he does not demonstrate the emotional turmoil I might have expected in a man who suddenly realises he is gay against all the principles he has known before.
49. I note that there is medical evidence to show that the Appellant suffers from anxiety and depression, but this is being treated by his doctor with a relatively low dosage of anti-depressant. There is no evidence that the Appellant has discussed his sexuality with his doctor or any LGBT support group. He agrees that he has not sought help from any organisation. This, of course, is not determinative of whether or not he is gay, because everyone deals with things differently, but, again, the lack of the evidence of the Appellant going through conflict and turmoil because of such a significant change in his sexuality is an indicator that he was not going through these emotions.
50. I must also consider the Appellant's account to be gay in the context of his life generally at the time, and his immigration status in particular. I find, when considering his immigration history, that this is an Appellant who has done everything in his power to avoid removal from the United Kingdom. He has overstayed, he has appealed decisions when they have gone against him, and he has made new claims when his removal from the country has been threatened.
51. He has also been dishonest in doing so. This was the finding of Judge Rose in 2014. It is suggested that I can depart from that finding because the Appellant was not present at the hearing,

but, as can be seen from the decision of Judge Rose, the Appellant voluntarily absented himself from the hearing, and he did not appeal the decision at the time. I find these not to be reasons for departing from the decision, and I therefore take into account that the Appellant is a man who is prepared to be dishonest to say in the country.

52. I find that the Appellant's history is relevant to his credibility in this appeal. Although I find he has engaged in gay activity and casual gay relationships, this activity began within only a short time of being detained and threatened with imminent removal. His obvious strong desire to stay in the United Kingdom suggests a motivation to do whatever is necessary in order to do, including building a profile as a gay person knowing that, if accepted, this is a likely ground on which refugee status will be granted.
53. Looking at the appeal in the round, I am not satisfied that the Appellant's gay activities are anything more than that, namely 'activities'. They do not suggest or demonstrate the sort of behaviour that might show the Appellant is gay in the sense of there being any enduring pattern of emotional, romantic or sexual attraction towards people of the same sex. I find it more likely than not that the Appellant has engaged in gay activity in order to found yet another claim to remain in the United Kingdom, and to stay in this country. I do not find his evidence about his sexuality (rather than his activity) to be credible. I find that he has not discharged the burden of showing that he is gay.

...

55. In this respect, I have the Appellant's evidence that his family believe him to be gay. There is no evidence about this apart from the Appellant's own evidence, and the 'disinheritance' affidavit from his father. So far as the Appellant's account about how his father discovered his sexuality, I do not find his account credible for the same reason as I reject his account to be gay. I do not find the Appellant credible and find that this part of his account is to bolster the claim.
56. Regarding the affidavit, I accept Mr Darr's point that the Respondent's DVR carries no weight because it is not claimed that the affidavit is a genuine court document. However, the Appellant was unable to explain where it came from. The Appellant said he received it in late 2017, which was several months after he said his father discovered he was gay. There is no explanation why his father waited for so long to send the affidavit to the Appellant. If his father wanted the Appellant to know of his thoughts in writing it is more likely he would have ensured the Appellant received it immediately. If the father had intended the letter to be a document to protect his reputation in Pakistan, as Mr Darr suggested, then there would be no reason to

send it to the Appellant. The affidavit does not assist in terms of the Appellant's sexuality because this is not mentioned in it."

The grounds of appeal

The grounds are lacking in focus. They comprise ten pages and are insufficiently particularised. In summary, they assert that the judge applied the wrong standard of proof. They assert that the judge made findings which were not open to him. They challenge the decision on *Devaseelan* grounds (*Devaseelan* [2002] UKAIT 702). They assert that the judge misapplied *HJ (Iran) v Secretary of State for the Home Department* UKSC 31 [2011] 1 AC 596. It is asserted that he did not consider the evidence including an affidavit from the Appellant's father.

Error of law

Mr Lindsay conceded at the start of the hearing that the judge made a material error. Although he properly directed himself on the burden and standard of proof, he failed to apply his self-direction. Mr Lindsay drew my attention to [53] where the judge said, "I find it more likely than not ..." and [57] where the judge said, "I suspect ...". He referred me to [58] where the judge said, "I find it more likely ...". Finally, my attention was drawn to [47] where the judge said "overall, the impression I gained from the experience ...".

While the judge materially erred for the reasons identified by Mr Lindsay, it is my view that there are more problems with the findings regarding the Appellant's sexuality. They are irrational. The judge accepted evidence of what he described as "gay activity". He effectively accepted that the Appellant had, since 2016 (over a period of three years), attended gay clubs, had sex with men and been on the gay scene. He accepted the evidence of three witnesses. Their evidence corroborated the Appellant's. One of the witnesses had had a sexual relationship with the Appellant. However, the judge did not accept that the Appellant is gay. He found that that the Appellant has been "acting out a role" for three years. He doubted his "commitment" to living life as a gay person. This is irrational and wholly misconceived. One does not commit to sexuality as one would commit to a belief or a faith. Furthermore, it was not reasonable for the judge to expect "an enduring pattern of emotional, romantic or sexual attraction towards people of the same sex." This not only shows a misapplication of the standard of proof in asylum appeals, it discloses a fundamental misunderstanding of sexuality and sexual identity.

The judge applied a too high standard of proof and made irrational findings. I set aside the decision of the judge to dismiss the appeal in its entirety.

Re-making

Applying the correct standard of proof, I accept that the Appellant is gay and that he has been disowned by his family and disinherited. In this regard the grounds raise an issue relating to the affidavit produced by the Appellant in order to support his case that he would be at risk from his family on return to Pakistan as a result of his sexuality. The judge rejected the reliability of the evidence because the Appellant was unable to explain where it came from and

that he said he received it several months after his father had discovered that he was gay. The judge said that there was no explanation why his father waited so long in order to send the affidavit. Mr Dar drew my attention to findings made by the FtT at [56]. He said that the findings of the about the affidavit are not sustainable.

I accept the Appellant's evidence relating to how his family found out that he is gay (see paragraphs 23-27 of the Appellant's witness statement). I have considered that the Appellant has in a previous decision been found to have relied on a false document in order to support a student application. However, considering the evidence in the round, it is credible that the Appellant's father is aware of his sexuality, which led to the affidavit. I find that the Appellant is gay and that he would be at risk on return to his home area. This is consistent with the background evidence.

I must consider whether relocation is safe and, if so, reasonable. I accept that the Appellant's family is wealthy, but there is no cogent evidence that they would wish to or be able to track him down to another part of Pakistan. However, I accept that he has a subjective fear that they would do so.

On 7 November 2019 Mr Lindsay drew my attention to what the judge said at [29] about the reasons for refusal. The FtT stated that; "The Respondent does not suggest that, if credible, the Appellant should be returned to Pakistan." Mr Lindsay indicated that the Respondent made no such concession in the Reasons for Refusal Letter. If such a concession has at any time been made Mr Lindsay sought to withdraw it. Mr Dar did not comment upon this. He did not seek to persuade me that the Respondent made such a concession or that if such a concession was made it would be unfair to withdraw it. From the background evidence, there is no support that someone who is gay, is without more, at risk. This was not argued by Mr Dar. From the Appellant's grounds, I understand that the Appellant accepted that an assessment should be made in accordance with HJ (Iran). I raised with the parties the possibility of going on to remake the decision based on HJ (Iran), bearing in mind that the Appellant did not seek to rely on further evidence served (in accordance with the directions of the Tribunal). There was no application by Mr Dar to adjourn or to submit any further evidence. I heard brief submissions from the parties.

Following the hearing on 7 November, I decided to adjourn the matter because I considered that I did not have sufficient evidence concerning how the Appellant would live in Pakistan and why to be able to make proper findings applying HJ (Iran). I issued directions and gave the parties the opportunity to serve further evidence. On 4 February the hearing resumed. I have taken into account the submissions made by the parties at both hearings.

The Evidence

15. The Appellant's evidence in his first witness statement is as follows:-

"21. Since discovering my sexuality, I have felt a lot of confusion due to the conflict between my religion and my sexuality (my emphasis). I continue to practice the religion by saying my Friday prayers and other prayers when I can. I believe that

religion is all about being a good person and not about your preferences. I am happier being gay and living as a gay man makes be a better person.

22. I have had many casual relationships with men since my relationship with Sunny. *Although I prefer to keep my sexuality hidden from the community, I can express myself openly to other homosexuals or people not from the community (my emphasis).*
23. My friend, Atif, who used to drop me to clubs, once saw me with Sunny outside a club whilst he was doing taxi. He confronted me and told me that he saw the way I was with a guy outside the club. I told him that it was just a friend.
24. Sometime later, he saw me once again and he told me that I must refrain from my homosexuality as it is forbidden in Islam. He said he would tell my family if I did not stop. I was annoyed with him, so I told him to mind his own business and let me live my own way.
25. Atif is from my village in Pakistan and he informed my brother in December 2016. My brother called me, but I told him that Atif was lying and he believed me. Once Atif found out my brother believed me he informed my father and I told him the same thing I told my brother.
26. One day I went out to meet a guy in a gay club who I was speaking to on Grindr. We were getting along really well, he was kissing me on my neck and cheek, when suddenly my father's friend came in the club with another man and saw me. They took me out of the club and called my father. They told him that I was a Gandu (a term used for gay people in Pakistan). The phone was on loud speaker and my father started swearing at me and told me that he would kill me as I spoiled the family respect. He told me that he did not want anything to do with me and that I was dead for them.
27. I was terrified after speaking to my father as I knew he would definitely kill me. I also feared my uncle, who has Islamic schools and is a lot more stricter. My family is very wealthy, and they have the resources to track me down and kill me without worrying about the authorities in Pakistan. My father's political career is everything for him and he would not think twice to kill me to maintain his respect and honour.
28. I felt as my whole world had collapsed as this was not something I would ever disclose to my family. It is not because of shame but due to the fear of them killing me.
29. In Pakistan, there was not an atmosphere in which people could discuss homosexuality. I came from a highly religious family and within our community homosexuals were hated and killed. We

were always told that we would marry a girl from our family, and we did not have the option to choose for ourselves.

30. I feel certain that due to his political position my father would carry out his threat if I returned to Pakistan. Both my father and uncle are strict adherents to Islam and hold Islamic Teaching Schools in the country.
31. After that incident my father told my uncle about my activities and that these activities were not forgivable. My uncle called me and informed me of the same. At that time, I had nothing to fear as my family knew and told me that I was dead to them, so I told him that I am what I am, and I could not stop. My uncle started swearing at me and threatened to kill me. My uncle, FAS is a well-known scholar. He belongs to the Tehreek Labaik, which is an organisation that causes a lot of problems in Pakistan. He is very resourceful, and he told me that he will bring me to Pakistan and kill me. Sometime later I received a letter from them which stated I am no longer a part of the family. This is shown here **EXB.FS.03**.
32. The refusal letter states in paragraph 55 that the disinheritance letter is not genuine and not a valid court document. I am not aware why the document was not presented to court. My family is very wealthy and due to my activities, my father most likely wanted to me to know that they disown me and that I do not try to claim my share, which is why he probably had this document sent to me.
34. *I cannot return and relocate as Pakistan is a Islamic country and I would not be able to live my life as an open gay man anywhere in Pakistan without the fear of being persecuted as it is not just my family I fear, I also fear the society and the authorities due to being gay (my emphasis).*
- ...
37. I sent chats from Grindr to the Home Office, however, they returned some of them saying they were too explicit. I do not know what was explicit as it was just conversations with other guys, which confirms that I am openly telling other people that I am gay, and I am casually dating other men. Evidence of this is shown here as **EXB.FS.06**
- ...
43. *In paragraph 47 the respondent states that unclear how I managed to maintain casual relationships with other men, whilst refraining from living openly. In question 58 of the AIR I did not understand the question as I answered thinking the question was about going out, to which I answered, no, because I was not able to afford. In the answer to question 59 I did mention that I fear*

from telling my community, but I do tell people who I am chatting with. I can confirm that I live openly as a gay man in the UK and I do tell openly that I am gay. However, I keep hide it from people from my community who seem like strict Muslims (my emphasis)

...

49. My family is really powerful and rich in Pakistan. My father and uncle are well known and regularly in the news and social media. They are politically active and are part of the ruling party in Pakistan. Evidence of this is shown here as **EXB.FS.12**.

50. I attend events and parties of the LGBT community and even take part in Pride. I receive emails to stay up to date with LGBT events in order to attend and meet other gay people so that I can explore my sexuality more. I know these emails do not show my sexuality, but I joined because I want to explore my sexuality. Everyone I meet at these events is gay and I enjoy spending time with them. Evidence in the form of emails of events are show here as **EXB.FS.13**.

51. I have made many friends whilst in the UK and I love spending time with them. I believe that I have developed so much as a person whilst being in the UK. After finding out my true self as a gay man I have been able to explore my sexuality and generally feel better about myself. Even though I am still suffering from depression and mental health problems, when I go out to LGBT events, I feel better.

52. I enjoy going to LGBT night outs and events and socialising with other gay people. My photographs of events in the UK are shown here as **EXB.FS.14**.

...

54. I do not wish to leave the UK as I am able to live comfortably as a homosexual here. I have many friends within the LGBT community and I attend LGBT events. I have no fear that I will be harmed for being who I am in the country. Although I originally intended to move to Saudi Arabia after completing my studies in the UK, I am now unable to go there as it is an Islamic country. My family have vowed to end my life if I set foot in Pakistan, and I have been disowned by my father who does not wish to establish any contact with me."

16. At the resumed hearing the Appellant relied on a supplementary bundle which was sent to the UT on 19 January. There was a second statement from the Appellant of 16 December 2019. He gave oral evidence before the UT. The thrust of the Appellant's evidence was that he lived openly here in the UK. He did not tell strict Muslims here about his sexuality because he fears mistreatment. His oral evidence before me was

consistent with his statements. There was a further witness statement from Mr Soaib Dastgir of 16 December 2019 (he was one of the three witnesses who gave evidence before the FtT). He gave oral evidence before the UT. His evidence was that the Appellant lived openly as a gay person. He had advised the Appellant not to be open within the community because there were people who hated them for being gay. The Appellant relied on additional letters of support and photographic evidence. There was also evidence from Birmingham LGBT of 23 November 2019 confirming the Appellant’s engagement with the organisation.

The AIR

The salient parts of the Appellant’s interview are relevant; -

“58.Question (required)

Have you lived openly gay in the UK?

58. Response (required)

No, because my friend have left me and I cant afford, which I could in the past. In my community they don’t even talk to me. Only one or two friends are friendly with me

59. Question (required)

If someone was to ask you about your sexuality, what would you tell them?

59. Response (required)

I fear from my community but when I am chatting with somebody, I can give my feelings there. I am keeping it discreet at the moment between the community. I feel quite safe at the moment here, nobody can challenge me” .

The Country Policy and Information Note Pakistan: Sexual orientation and gender identity or expression Version 3. July 2019.

The main points from the background evidence can be summarised. Pakistan is a conservative Muslim society in which homophobic attitudes persist. LGBTI persons face societal discrimination as well as family and societal pressure to conform to cultural and religious norms, including marriage. Strong and widespread cultural, religious and social intolerance of homosexuality means it is not widely discussed or acknowledged in Pakistan.

The Pakistan Penal Code (PPC) does not explicitly refer to same-sex sexual activity, but ‘carnal intercourse against the order of nature’, which is punishable by a fine and/or imprisonment for a period of two years to life. The Offence of Zina (Enforcement Of Hudood) Ordinance of 1979 criminalises any form of penetration outside of marriage, but voluntary sexual acts between persons of the same gender are not covered by the provisions although they

suggest that non-heterosexual sexual acts that involve penetration could be prosecuted and sharia law provisions may punish same-sex sexual acts by death. The authorities very rarely prosecute cases, but Sections 377 and 294 ('Obscene Acts and Songs') of the PPC has sometimes been used by police as a pretext to arrest, threaten to arrest, harass, intimidate and extort LGBTI persons, particularly men who have sex with men. Homophobic attitudes negatively affect how the police handle complaints by LGBTI persons. The government does not target persons because of their sexual orientation although rogue officials discriminate and commit abuses against LGBTI persons. In general, there is no real risk of persecution by the state.

LGBTI persons are, in general, reluctant to be open about their sexuality as they may face abuse, humiliation, societal discrimination and harassment, including in the workplace, in the family and in renting an apartment. Some persons from a higher socio-economic background may 'come out' to their family or friends and have access to the 'gay scene' albeit 'underground' but if their sexuality is known, they may be exposed to violence or blackmail. Reasons for not being open may be because the person wishes to conform to societal norms but may also be due to fear of discrimination and/or violence.

In general, a person will not be able to avail themselves of the protection of the authorities. Where the person has a well-founded fear of persecution from non-state actors, State protection is not generally available. It is unlikely that there is any place in Pakistan, to which an LGBTI person could reasonably relocate without making fundamental changes to their behaviour. It would not, in general, be unreasonable for a gay man, who has chosen to live discreetly due to social or religious pressures, to relocate internally within Pakistan.

It is difficult for gay men to maintain same-sex relationships, because 'sex between men will be overlooked as long as no-one feels that tradition or religion are being challenged'.

The extent of familial and societal discrimination and violence faced by lesbian, gay, bisexual, transgender and intersex (LGBTI) people tends to be inversely proportional to their socio-economic status. Nonetheless, even wealthy individuals face high levels of discrimination, and their families often force them into a heterosexual marriage to preserve the family's reputation and social standing.'

HJ (Iran) v Secretary of State for the Home Department UKSC 31 [2011] 1 AC 596

The Supreme Court gave guidance at [35] and [82] on the questions that the Tribunal should ask itself when determining an appeal brought by an asylum seeker who claims to have a well-founded fear of persecution because he is gay. Lord Rodger described the approach at [82] as follows: -

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

At [77] and [78] the Supreme Court gave guidance on living discreetly and sexual identity; -

"77. At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the

circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

78. It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 500-501, para 81:

“Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense ‘discreetly’) may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality” In short, what is protected is the applicant’s right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. *Mutatis mutandis* – and in many cases the adaptations would obviously be great – the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.

Submissions

Mr Lindsay drew my attention to [20] of the decision of the FtT. He drew my attention to [47], which represents the judge's "overall" impression of the evidence. I was also drawn to [45] where the judge stated that the witnesses confirmed that the Appellant was seen behaving with other gay men in nightclubs as if he was gay by dancing with men and kissing with other men. However, their evidence was to the effect that the Appellant is not open about his sexuality other than on those occasions when he frequents nightclubs. He relied on the Appellant's first witness statement (at [21] and [22]) and Qs 58 and 59 of the AIR.

On 4 February 2020, on behalf of the Respondent, Ms Bassi submitted that the witnesses had all seen the Appellant kissing and dancing at nightclubs. The evidence is that the Appellant chooses only to live openly amongst other gay people at gay nightclubs. Only a handful of people are aware of his sexuality. She referred me to [45] of the decision of the FtT. He joined LGBT Birmingham after his appeal was dismissed, contrary to his oral evidence which was that he joined in 2017. He was not a member at the time of his asylum interview in 2018. The Appellant said in his asylum interview (see Qs 58 and 59) that he lived discreetly. At no time throughout the proceedings has he said that he does this in order to avoid harm. He is now trying to bring himself within HJ (Iran). He will continue to live discreetly in Pakistan.

Mr Dar addressed me. He said that there was no clear definition of living openly and it is a matter of degree. There is sufficient evidence that the Appellant lives openly here. He did not say in his interview that he lives here discreetly. He chooses not to tell some people here of his sexuality because he fears persecution. He openly attends gay clubs here and openly socialises with gay men in public. The people who attend gay nightclubs are not exclusively gay. There is evidence from heterosexual Muslims aware of the Appellant's sexuality.

Conclusions

I found the Appellant and Mr Dastgir to be credible witnesses. The Appellant's evidence is that he lives openly to a significant degree here in the UK. He would want to live openly in Pakistan. He would not do so on account of being in fear of persecution. From the background evidence, I find that if he lived openly to the extent that he does here in the UK in Pakistan, he would be at risk. Whilst he is from a relatively wealthy family, he has effectively been cut off. His family's wealth would not support him to live openly in safety. Considering the evidence in the round, any discrepancy relating to the date the Appellant joined the LGBT Birmingham is not material.

Whilst throughout the evidence the words "open" and "discreetly" or variations of these words have been used, it cannot be inferred that an Appellant or witnesses have read and understand HJ (Iran). I have analysed the Appellant's evidence in order to determine how he would live in Pakistan and why. In order to establish that an Appellant is living openly it is not rational to expect

there to be evidence of the Appellant kissing and dancing with gay men outside gay nightclubs or, as the FtT described, behaving in a “gay manner” in public. It is not rational to conclude that in the absence of such evidence, he is living discreetly in the sense envisaged in HJ (Iran).

It is clear from reading the answer that the Appellant gave at Q58 of the asylum interview that he did not properly understand the question. I accept the Appellant’s evidence at [43] of his first witness statement. With reference to Mr Lindsay’s submission, I have no regard to the FtT’s “overall impression” of the evidence because of the material errors made.

Whilst the Appellant does not tell everyone in his community about his sexuality, this does not amount to living discreetly. I find that the people here that he chooses not to tell are strict Muslims. I find that the primary reason he is not open with these people is that he has a subjective fear of persecution. In answer to Q59 in the AIR he expressed fear from the community. His evidence is that he is religious and attends the mosque. I find that it is in that context that he fears being open about his sexuality. I find that reference to “community” in his asylum interview and elsewhere is a reference to strict Muslims with whom he worships. However, he openly attends public events on the gay scene here. He mixes with gay people within the wider society. He attends night clubs here which are not exclusively for gay people. He has relationships with other gay men which he makes no effort to hide from the wider society. His evidence before the FtT was that he lives with a heterosexual male who is aware of his sexuality. The FtT found that it was not credible that the Appellant would not have discussed his sexuality with his housemate. However, this is not a rational finding. It was not the Appellant’s evidence that he was attempting to hide his sexuality from his heterosexual housemate who according to the Appellant is aware of his sexuality in any event. His evidence is that he is open about his sexuality to people who are not strict Muslims (the majority of the population here). There was no challenge to the evidence from the Appellant’s heterosexual friends here.

I find that the Appellant is, to a significant extent, living openly here in the UK. He is not living discreetly in the sense envisaged at paragraph 77 in HJ (Iran) nor would he want to on return. He would however not live openly to any extent on return to Pakistan. He would live discreetly. He would seek to avoid any expression of his sexuality most of the time (save when he is in a small and trusted group of other gay men) to avoid persecution. Properly applying HJ (Iran) this makes him a refugee.

The FtT made a material error of law. I remake the appeal. The appeal is allowed on protection grounds.

Notice of Decision

The appeal is allowed on protection 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 Joanna McWilliam

Date 25 February 2020

Upper Tribunal Judge McWilliam