



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: PA/12047/2019 (P)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 18 September 2020

On 22 September 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

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(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr S Galiver-Andrew, instructed by Sindhu Immigration Services

For the Respondent: Mr A Tan, Senior Presenting Officer,

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Pakistani national with date of birth given as 7.7.71, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 28.1.20, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 28.11.19, to refuse his claim for international protection made on 31.7.19 on the basis of his sexual orientation as a gay man. The judge accepted that the appellant was a gay man but concluded that he was not at risk of persecution on return to Pakistan because he would behave discretely, as he had done in the UK.
2. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge erred in finding that the appellant would not live an openly gay life in Pakistan due to a fear of persecution. It was also considered arguable that the judge's assessment overall was in error as throughout the decision and reasons all the adverse findings are on the basis they are implausible; not incredible.
3. Following directions issued on 26.5.20 and the appellant's response of 8.6.20, on 23.7.20 the Upper Tribunal directed that the error of law issue should be determined at an oral hearing to be held remotely.
4. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions, the grounds of application for permission to appeal to the Upper Tribunal, and the skeleton argument and documents placed before the Tribunal.
5. It will be useful to first summarised what the First-tier Tribunal found.
6. At [50] of the decision, despite finding his credibility damaged by the manner and timing of his application, the judge concluded for the reasons set out earlier in the decision that the appellant is a gay man. At [41] the judge accepted that he had been in a non-exclusive same sex relationship with Mr Coelho for around 2 years.
7. However, at [44] the judge found the appellant's approach to his sexual orientation in the UK has been to largely conceal it, even though he was aware that he can be open in the UK where LGBT rights are protected. It was accepted that he had struggled to come to terms with his situation and was affected by feelings of shame and stigma associated with attitudes to same sex relationships in Pakistan. The judge stated,

"Whilst the reasons for that stem from a difficult past, growing up in a country where he knew same sex relationships were forbidden and a source of shame, he has conducted his relationship life in the UK in a discrete manner even though he no longer has to. I accept he is affected by that feeling of shame and stigma but in practice that is the discreet way he has lived his life in the UK and given his age and history I find that that approach would continue if returned to Pakistan where he would not live openly as a gay man. This would not be because he fears persecution but because of the social pressures meaning that this is the way he has always lived his rather dual life (including in his own community when living in Southall)."
8. At [45] the judge noted that the appellant had given limited details of any private life beyond his current relationship and attending Disco Rani once a month.

“He is not actively involved with any groups or clubs reflecting any other interests he has. The Appellant does not give in his witness statement any other details of the life he has built up in the UK amongst other friends, or in work or cultural or religious activities, though he said at his interview that he worked in the UK.”

9. At [52] the judge concluded that,

“the reason the appellant would not live openly as a gay man in Pakistan is the social pressures he would face and pressure from his own feelings about his sexual orientation which he has struggled with. It is not a fear of persecution which is a material reason for living discretely. The appellant’s life in any event would change as a result of moving but even if his current circumstances were replicated in Pakistan he would not be living life as an openly gay man, as he is not doing so in the UK, where there is no fear of persecution.”

10. Addressing the grounds as drafted, the first ground asserts that the judge misapplied HJ (Iran). It is submitted that the ‘societal pressures’ identified by the judge as to why the appellant has behaved discretely in the UK is in fact a manifestation of fear of persecution on return to Pakistan. It is argued that any anxiety about living openly as a gay man in front of the South Asian community in London needs to be considered in this regard, and that the judge effectively mischaracterises what it means to live openly as a gay man.

11. However, much of the lengthy grounds amounts to little more than a disagreement with the decision and an attempt to reargue the appeal. For example at C3, an aspect of the first ground, it is submitted that the judge erred in concluding that the appellant does not live openly as a gay man in the UK. Reference is made to the appellant being naturally shy, coming from a conservative society, living in a multiple occupancy house with people who do not know his sexual orientation and with whom he was not close. It is argued that the appellant asserted that he was not attempting to conceal anything and his behaviour would not be regarded as unconventional from a heterosexual perspective. With respect, it is clear that all these issues were carefully considered by the judge. It appears to me that cogent reasons were given for the findings made and conclusions reached that the appellant had and would continue to behave discretely.

12. In reaching this conclusion, I have carefully considered the various submissions made to me at the remote hearing. Mr Galiver-Andrew concentrated his submissions into what he described as two key points. First, that the judge misdirected herself as to what it means for a gay man to live openly; second, that the judge failed to take account of the underlying reasons for ‘societal pressure’ as a precursor to the finding of living discretely, which reasons are because of a fear of persecution. Mr Galiver-Andrew submitted that the appellant was an introverted man who attended a LGBT club and had participated in Pride, and who adduced supporting evidence from friends he associates with in the gay community. He rhetorically asked, ‘what more could the appellant do to demonstrate that he lives openly?’

13. Reference was made to paragraph [29] of LC (Albanian) v SSHD & Anor [2017] EWCA Civ 351, in respect of which I am satisfied that the judge correctly directed herself on at [11] of the decision. The point being pursued by Mr Galiver-Andrew is that the test of whether an individual will live discretely as a gay person is not whether the person would avoid certain overt behaviour which might identify that person as gay but whether the individual would behave in such a way that he will not, in fact, be identified as gay. It was suggested by Mr Galiver-Andrew that the judge was looking for such overt behaviour. However, the judge also summarised paragraph [52(iv)], stating,

“‘Living openly’ is not restricted to where there is overt behaviour which might identify the individual as gay, it involves consideration of whether the individual will be behaving in such a way that there is a real risk that the individual will be identified as gay. If the individual would keep his sexual orientation concealed wherever he lived, it is not right to say that in order to conceal it he would be modifying his behaviour.”

14. In the light of that self-direction and the careful way in which the judge considered the evidence, I do not accept that the judge misdirected herself in law.
15. It was also submitted to me that what was missing from the decision was an analysis of where the appellant’s discrete behaviour in the UK comes from. It was urged on me that he emanates from a society in Pakistan where LGBTs are persecuted and homophobic attitudes are instilled from childhood, and that his uncertain and precarious immigration status was always going to affect his behaviour in the UK. Mr Galilver-Andrew submitted that there was in fact nothing discrete about the way in which the appellant conducted himself in the UK, just that he was not overt about it. Put another way, he did not need to be overt to be living openly.
16. However, as Mr Tan submitted, it is clear from the decision that the judge had taken account of the appellant’s difficult history and cultural background, particularly referenced at [38] and [44] of the decision, and the potential causal connection between that and his behaviour in the UK. I accept Mr Tan’s submission that in essence Mr Galiver-Andrew was attempting to reargue the case. In reality, there was very limited evidence to support the claim of living openly and that it was entirely open to the judge on the evidence to conclude that he was not living openly and would not do so, for the reasons given in the decision. His relationship with Mr Coelho was effectively a closed, secret relationship. His limited activities outside this relationship did not define him as gay, as non LGBT persons can and often do attend such, including Pride. I am satisfied that it was open to the judge to conclude, applying the law to the facts found, that the appellant was living discretely in the UK and would continue to do so in Pakistan not from a fear of persecution but because that is the way he chooses to live his life with regard to his sexual orientation.
17. The second ground asserts procedural unfairness in making findings of fact that were not put to the appellant in evidence. This was not pursued in Mr Galiver-Andrew’s oral submissions. However, reference is made the judge’s rejection at [33] of the decision of the alleged incident where the appellant claimed to have been

caught with Imran by his brother Khalid, as being implausible and the conclusion reached at [35] that he did not leave Pakistan after this incident, and was not estranged from his family, as claimed. However, I am satisfied that it was entirely open to the judge to accept or reject the account, provided cogent reasons were given, and that there was no obligation on the judge to put findings on the evidence to the appellant for comment.

18. It is also argued that in rejecting the plausibility of this account the judge fell into the 'plausibility trap'. However, a reading of the decision reveals that it was not the implausibility alone which led the judge to find the account not credible. The judge also noted the inconsistency between the claimed circumstances of his departure from Pakistan with the delay in claiming asylum once in the UK, which did not take place for some 9 years and only after being arrested as an overstayer, and considered the matter in the light of the findings that he had successfully concealed his sexual orientation from his family in Pakistan and that he had not lived openly as a gay man in the UK. These were cogent reasons open to the judge on the evidence, which appears to have been carefully assessed in the round. I am satisfied that the findings did not raise any new issue and did not require the appellant's comment or response. In the circumstances, no error of law arises in respect of this ground.
19. The third ground asserts that "there are a number of aspects of the Judges findings which do not appear to flow from the findings of fact," and which are relevant to the risk on return. As drafted, it is not clear what is meant. Neither do the arguments under the two sub-headings of E1 and E2 demonstrate any error of law.
20. It is first argued under this ground that the finding that the appellant was completely successful in concealing his sexuality over multiple years is not sustainable. At [31] of the decision the judge found that the appellant had two relationships in Pakistan before he came to the UK. The appellant claimed that they were secret relationships but also that his family had suspicions about him. However, the judge rejected the claim to have been caught by his brother in a relationship with Imran and concluded that the narrative of his family being suspicious had been embellished. The judge did not accept that there were any particular family concerns and concluded that the appellant had been successful in concealing his sexual identity from his family.
21. In this regard, E1 of the grounds suggests that to the lower standard of proof it is not implausible that the family would have had "some inkling" of his sexual orientation, even if the account has been embellished. It is also argued that it was entirely plausible that his eventual marriage was forced upon him by gossip about his sexuality. It is submitted that the judge has either applied too high a standard of proof, or not properly considered plausibility, or failed to assess the evidence in the round. It is also submitted at E2 that the second aspect did not necessarily follow from the first. Again, it is argued that the appellant's account was plausible. Frankly, these submissions are mere disagreements and speculation, an attempt to reargue the appeal. They do not identify any error of law in the decision. The findings were open to the judge and justified by cogent reasoning.

22. Although reminded of them by Mr Tan, Mr Galiver-Andrew did not address his oral submissions to the final two grounds which are in essence further disagreements with the decision, disclosing no error of law.
23. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 18 September 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

“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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 18 September 2020