IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2021-000832
First-tier Tribunal No: PA/01726/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 April 2023

Before

UPPER TRIBUNAL JUDGE PITT

Between

Secretary of State for the Home Department

Appellant

and

Shaban Shaukat
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the appellant: Mr Tufan, Senior Home Office Presenting Officer
For the respondent: Ms Daykin, Counsel instructed by Elaahi and Co

Heard at Field House on 3 April 2023

DECISION AND REASONS

1. This is an appeal against the decision issued on 20 September 2021 of First-tier Tribunal Judge Davey which allowed the appellant's protection and human rights claim.

2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to Mr Shaukat as the appellant, reflecting their positions before the First-tier Tribunal.

3. The appellant is a national of Pakistan and was born on 2 April 1993.

© CROWN COPYRIGHT 2023

4. The appellant came to the UK on a visit visa on 23 February 2019. He returned to Pakistan on 7 March 2019. He returned to the UK on 17 March 2019. His visa expired on 10 July 2019 and on the same day he made a protection claim. The application was refused on 28 January 2020.

5. The appellant maintained that he was gay and would be at risk of persecution on return to Pakistan. The respondent did not accept that the appellant was gay. This remained a live issue in the appeal before the First-tier Tribunal. It is uncontentious that the First-tier Tribunal was required to conduct an assessment in line with the guidance in paragraph 82 of HJ (Iran) v SSHD [2010] UKSC 31:

> “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.”

6. The First-tier Tribunal allowed the appeal. The respondent maintains, in Ground 1, that there were inadequate reasons given in the decision explaining why the appeal was allowed. The judge did not make a finding on whether the appellant was gay, a fundamental issue in the appeal. There was no assessment of what the appellant's conduct would be on return to Pakistan or why he would conduct himself in that way. The respondent also maintains, in Ground 2, that the 8 month delay between the hearing of the appeal and the decision being issued was material and that there was nexus between the delay and the failure to address properly the appellant's claim to be gay.

7. I deal with Ground 2 first as it can be dealt with relatively easily. The first page of the First-tier Tribunal decision states that it was prepared on 1 February 2021. That is 4 days after the hearing. The respondent's grounds did not dispute that the appeal was prepared 4 days after the hearing. Given that it is obviously entirely timely to prepare a decision within 4 days of a hearing and that this is not disputed by the respondent, there is, in my view, no delay here. The fact of the decision being signed on 20 September 2021, on the same day that it was issued, appeared to me to arise from the administrative problem that led to the 8 month delay in promulgation and added nothing where the respondent does not dispute that the decision was prepared 4 days after the hearing. Ground 2 does not have merit, therefore. The parties were correct to point out that the grant of permission dated 2 November 2021 is somewhat opaque as to whether permission was limited and not granted on Ground 2. Given that I find that this ground has no merit, there is no need to proceed to resolve that issue.

8. Ground 1 maintains that the First-tier Tribunal failed to make a finding on whether the appellant is gay and on whether the appellant would live discretely or not on return and his reasons for that conduct. I found that this ground had merit. As the respondent set out in her grounds, there is a requirement for a decision to "identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."; Budhathoki (reasons for decision) [2014] UKUT 000341 (IAC). After reading the decision as a whole with some care and after considering carefully the written and oral submissions of the party I did not find that the decision showed that the First-tier Tribunal provided sufficiently clear reasons enabling the respondent to understand why she lost.

9. There is no dispute that there is no clear-cut finding that the First-tier Tribunal accepted that the appellant is gay. The appellant's Rule 24 response does not seek to suggest this but maintains that the First-tier Tribunal set out the evidence and submissions on the adverse issues raised by the respondent in the refusal letter and in the same paragraphs rejects the respondent's reasons for finding that the appellant's claim to be gay is not credible. Ms Daykin submitted that because the judge rejected the respondent's credibility points against the appellant and went on to assess risk on return, read as a whole, the decision showed that it

was accepted that the appellant was gay. The rejection of the respondent's case was reasoned and was adequate.

10. The core assessment of the evidence was set out in paragraphs 12 to 17:

> "12. The Reasons for Refusal Letter it seemed to me rather raised the threshold to be expected in establishing a protection claim under the Refugee Convention, insofar as the letter seemed to criticise the absence of direct and clear evidence of past or present sexual relations, rather than the sense in which a person may have feelings about his sexuality and wish to live a future life that way.
>
> 13. The Respondent also criticised the Appellant for answers given in the Asylum Interview Record, which rather focused on physical aspects of the relationship between the Appellant and Asfand and criticised the insufficiency of detail throughout the asylum interview of an emotional attachment or a journey pertaining to his claimed sexuality. That is one way to view the Asylum Interview Record but it seemed to me much of the absence of that information was rather driven by the process of the interview and the questions posed. The fact that the Appellant was being asked questions essentially about the physical relationship in the main indicated to me that what was criticised as being superficial was probably, on balance, the product of the way the interview went, rather than the failure of the Appellant to articulate the emotional aspects of that relationship.
>
> 14. The Reasons for Refusal Letter essentially criticised the Appellant's credibility on the basis that the Appellant had not in the time available to him established any significant relationship and had done little more than provide photos to demonstrate the claimed relationship and therefore doubted the presence of the Appellant at a Badminton club frequented by LGBT persons was simply no more than effectively an attempt to bolster a claim which the Secretary of State rejected. As to the inconsistencies in the account, it seemed to me that those were of little real significance if one looked at all the evidence in the round and the fact that there were inconsistencies did not necessarily mean the account was not true but I took those points into account when assessing the evidence as a whole in the round, bearing in mind as I also did the fact of the late claim for protection and the fact that, on the face of it, the Appellant came to the United Kingdom and returned to Pakistan before coming back again, which did not seem to me consistent with someone who was in fear of ill-treatment on return but it may be consistent with his true sense that few knew he was so inclined.
>
> 15. I therefore did not find the existence of a pre-existing ticket to return to the United Kingdom as at odds with his general claim to his sexuality. However, in assessing all this in the round, I have also considered whether I accept the manner in which the Appellant said he wished to live his life and choose his partner on a return to Pakistan .There was no substantive cross-examination of those aspects of his claim and rather it seemed to me the

thrust of the cross-examination was essentially directed at disputing his claimed sexuality, rather than how he would live were he to be found to be homosexual on a return to Pakistan.

16. Accordingly I find that, against the background information, if the Appellant wished to live openly as a gay person then he faced the real risk of both societal ill-treatment, ill-treatment from his family if they became aware of his return and persecution illtreatment from the state through the criminal process and the criminal law as far as it likely to be brought against him. There was also the likely lack of domestic protection, in the Horvath sense, to which he could have recourse. The background evidence did not suggest the Pakistan police were likely to protect his human rights to exercise his sexuality.

17. I therefore concluded, with regard to the background evidence on Pakistan that the Appellant did not have a reasonable course to internal relocation and that there was no sufficiency of protection in the Horvath sense that he could have recourse to."

11. These paragraphs show that Ms Daykin was correct in her submission that the judge considered and found no force in the respondent's criticisms of the appellant's evidence. There was still a requirement for the First-tier Tribunal to set out why the claim was credible or sufficiently well evidenced as well as finding that the respondent's reasons were not sustainable, however. The burden remained on the appellant to show that the claim was made out and the First-tier Tribunal still had to make a positive finding that the appellant was gay and there is no finding to that effect in the decision. The First-tier Tribunal does not set out anywhere what it was about the appellant's case that showed that it was credible.

12. I thought at some length about whether it was possible to "read into" the decision a finding that, to the lower standard, the appellant was gay where the First-tier Tribunal did not find that the respondent's reasons for rejecting the claim had force and where the judge went on to assess risk on return. The latter assessment might indicate that the judge did find that the appellant was gay as it would have been unnecessary if he had found otherwise. It did not appear to me that it was possible to do so. Certainly the First-tier Tribunal did not consider that the respondent's arguments carried weight. That did not inexorably lead to a conclusion that the claim had to be or was accepted as credible, however, and the decision does not set out adequately why the appellant succeeded.

13. Further, notwithstanding that the appellant had lived discretely in Pakistan in the past and that there was limited evidence on how he would behave in the future (see the final sentence of paragraph 15), the decision does not address if the appellant would behave differently and in a more open way if he returned to Pakistan now or why he would do so. The judge said in paragraph 15 that " I have also considered whether I accept the manner in which the Appellant said he wished to live his life and choose his partner on return to Pakistan" but does not go on to set out any details of this consideration or reasons for finding in the appellant's favour. In paragraph

16 he only considers what would be the case "If the Appellant wished to live openly" not whether or not it was credible that he would do so against his evidence of his past behaviour and current stated intentions.

14. It was therefore my conclusion that the decision of the First-tier Tribunal disclosed a material error on a point of law such that it had to be remade afresh as the core assessments of the appellant's claim to be a gay man and of risk on return were not adequately reasoned. Where the core findings and issues in the appeal are to be remade it is appropriate for this to take place in the First-tier Tribunal.

Notice of Decision

15. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade afresh in the First-tier Tribunal.

Signed: S Pitt Date: 3 April 2023
Upper Tribunal Judge Pitt