



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case Number: UI-2023-004459  
First-tier Tribunal No: PA/00390/2023

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 February 2024**

**Decision & Reasons  
Promulgated**

**On 7 February 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**SA (PAKISTAN)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr F Aziz, Solicitor Advocate instructed by The UK Law Firm

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to**

**identify the appellant. Failure to comply with this order could amount to a contempt of court.**

## **DECISION AND REASONS**

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Hollings-Tennant promulgated on 28 July 2023 (“the Decision”). By the Decision, the Judge dismissed the appellant’s appeal against the refusal of his fresh claim for asylum.

### **Relevant Background**

2. The appellant is a national of Pakistan, who first arrived in the United Kingdom on 10 September 2010 with valid entry clearance as a student. On 31 August 2012 he was served with IS151A papers as an overstayer. Thereafter, the appellant claimed asylum on 18 January 2013. However, on 17 March 2015 his asylum claim was treated as withdrawn by the respondent because (it was asserted) the appellant had absconded. The appellant was subsequently served with removal papers as an overstayer, and on 23 February 2022 he lodged further submissions on protection grounds.
3. The appellant claimed that he faced persecution on return to Pakistan at the hands of his family and wider society because he was bisexual. He said that when he came to live in the UK he began to live as a bisexual man because he felt safe to express his sexuality. Since his arrival, he had engaged in sexual relationships with males whom he had met through gay dating Apps. He was currently in an open relationship with a British national, SH, and he had formed a close circle of friends within the LGBT community. He claimed that his family had threatened to kill him when they found out about his sexuality.
4. As summarised by the Judge in the Decision at para [11], in the reasons for refusal (“RFRL”) the respondent did not accept that the appellant was bisexual as claimed. It was argued that he had arrived in the UK on a student visa in September 2010, but he did not mention his sexuality until he lodged further submissions in 2022, and he had failed to provide evidence to corroborate his assertions that he had received death threats from his family. Despite the various letters of support, it was argued that there was very limited credible evidence to support the appellant’s claim that he was in a genuine same-sex relationship with SH.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

5. The appellant’s appeal came before Judge Hollings-Tennant sitting at Manchester on 12 July 2023. Both parties were legally represented.

6. The Judge gave a brief account of the hearing at paras [14] and [15] of the Decision. He recorded that both parties agreed that the sole issue to be decided was whether the appellant was credible in his assertion that he was bisexual.
7. The Judge's findings of fact and reasons began at para [16]. At para [17] he said that the crux of the appeal turned on whether the appellant had provided sufficient evidence to establish, to the lower standard of proof, that he was bisexual. He claimed to have come to realise his sexuality whilst living in Pakistan, and he said that he had lived as a bisexual man since arriving in this country in September 2010. However, despite his assertions that he feared persecution in Pakistan, he did not claim asylum on arrival. Nor was any evidence before him to indicate that he raised his sexuality as a reason for being unable to return to Pakistan until he was served with removal papers as an overstayer on 9 February 2022 and subsequently lodged further submissions some two weeks later. He agreed with the respondent's position that the timing of the appellant's claim undermined his credibility.
8. At para [18], the Judge said that, in her submissions on behalf of the appellant, Ms Barton argued that he should not hold it against the appellant that he did not mention his sexuality on his student application form because there was no evidence to suggest that there was a question about sexuality and the form had not been adduced in evidence. The Judge said that while there was some merit in this assertion, that was not the point the respondent was making. There was no suggestion that the appellant ought to have referred to his sexuality on the visa application form, but rather it should be taken to be damaging to his credibility that, after arriving here as a student in September 2010, he did not raise his sexuality for nearly 12 years. As such, the question was whether there was any reasonable explanation for such a lengthy delay.
9. At para [19] the Judge said that Ms Barton had highlighted the fact that the appellant sought to regularise his status in 2013, but there was no information from the respondent about the asylum claim lodged in January 2013. The Judge observed as follows:

"However, it is not in despite that the appellant was served papers as an overstayer in August 2012 after his student visa expired, or that his subsequent asylum claim was treated as withdrawn because he was deemed to be an absconder."
10. At the hearing before him, Ms Tariq confirmed that the appellant was invited to attend an interview about his claim in March 2015, but he failed to attend. There was no evidence to suggest that he had pursued the matter thereafter, or made any further attempt to regularise his immigration status between January 2013 to February 2022. The Judge considered that the appellant had had ample opportunity to properly explain why he failed to attend his interview, and why he had made no

effort to regularise his stay thereafter or to chase up what he believed to be an outstanding asylum claim. The Judge continued:

“Whilst he was not specifically asked about this during cross-examination, I do not consider that there are any issues of fairness arising. The point was clearly made in the RFRL and the appellant could have addressed the issue in his written witness statement. He provides no evidence whatsoever as to why he failed to attend his interview, the basis for his initial claim for asylum, why or whether he absconded in March 2015, why he failed to make enquiries or seek to regularise his stay thereafter, and what he has been doing to support himself in this country whilst living here unlawfully for over 10 years. I consider that the lack of such evidence significantly undermines his credibility.”

11. The Judge went on to make adverse credibility findings about other aspects of the appellant’s evidence. At paras [24] to [31], the Judge addressed the corroborative evidence provided by the appellant’s supporting witnesses. He concluded that the evidence should be accorded little weight. At para [32] the Judge said that the appellant had provided numerous photographs in support of his claim, and he noted that the witnesses SH and MRR were depicted in some of the images. He observed that the photographs might have carried more weight if there was cogent evidence as to when they were taken, and the time-frame. He concluded that limited weight should be placed on the photographs as being corroborative of the appellant’s sexuality.
12. At para [33], the Judge said that he must also consider whether the appellant’s credibility was damaged by virtue of behaviour falling within the scope of section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. On two separate occasions, the appellant had been served with papers as an overstayer before claiming asylum. On the first occasion he failed to attend an asylum interview, for which there was no explanation. And it was several years later that he had lodged further submissions, having once again being notified of his liability to removal as an overstayer. As such, it seemed to him that section 8(5) of the 2004 Act plainly applied to him. Whilst he noted that the respondent did not appear to have raised this explicitly, he was nonetheless required to take account of any behaviour to which section 8 applied as damaging to the appellant’s general credibility. He found that the appellant’s failure to pursue his initial claim, and him only making his subsequent claim after being served with removal papers, further undermined his credibility.
13. At para [34] the Judge said that he had considered whether there was a reasonable explanation for late disclosure. However, the appellant’s evidence was that he had been living as a bisexual man since he arrived in this country, or at least since 2015 - depending on which account was to be believed. The appellant said that he felt safe in this country and able to express his sexuality. As such, it seemed to him that there was no discernible reason why the appellant could not have raised such grounds by telling the Home Office well before he lodged his further submissions in February 2022.

14. At para [35], the Judge said that, having carefully considered all the evidence in the round, he found that the appellant had not discharged the burden of proof upon him to demonstrate that he was bisexual. He found his evidence to be vague, inconsistent and unreliable in respect of matters going to the core of his claim, and there was a lack of cogent evidence to corroborate his assertions. There were numerous discrepancies within the various witness statements and letters of support which undermined the extent to which such evidence could be relied upon. He did not accept that the appellant had been threatened by his family as claimed, because there was very limited detail provided in respect of such, and he did not find it credible that he would tell his family about his sexuality after keeping it to himself in Pakistan, and for several years thereafter, having been well aware of the risks if he disclosed his feelings to anyone.

### **The Grounds of Appeal to the Upper Tribunal**

15. The grounds of appeal to the Upper Tribunal were settled by the appellant's representatives. Ground 1 was that the Judge had failed to assess the issue of credibility fairly. Ground 2 was that the Judge had been wrong to apply section 8 of the 2004 Act as there was no mention of section 8 of the 2004 Act in the RFRL. Nor did the respondent assert that the section applied to the present case. It was never accepted by the appellant that his subsequent asylum claim was treated as withdrawn because he was deemed to be an absconder. Nor was it addressed in his witness statement, as there had been no mention of section 8 in the RFRL. It was clearly unlawful for the Judge to assume that the appellant did not claim asylum in 2013 because of his sexuality. The RFRL simply stated that he had absconded - nothing further. The appellant was never asked any questions regarding this in cross-examination. So, it was not open to the Judge to find that the appellant had failed to claim asylum because of his sexuality until his further submissions in 2022.

### **The Reasons for the Grant of Permission to Appeal**

16. On 21 September 2023, First-tier Tribunal Judge Aldridge granted permission to appeal on Ground 2 only. His reasoning was that the Judge said that he was required to take account of any behaviour to which section 8 applied as damaging to the general credibility of the appellant. However, it appeared that no such grounds were raised by the respondent, and this was accepted by the Judge in the decision. Accordingly, it was arguable that the Judge may have erred in law by taking such a consideration into account, without an assertion to this effect by the respondent, and this may have materially affected the outcome of the decision. However, the other grounds of appeal that had been raised were not arguable.

### **The Hearing in the Upper Tribunal**

17. At the hearing before me to determine whether an error of law was made out, Mr Aziz developed Ground 2. On behalf of the respondent, Mr Walker

submitted that the Judge had directed himself appropriately when giving reasons as to why he was applying section 8, notwithstanding the fact that it had not been expressly raised by the respondent in the RFRL. He submitted that there was no procedural unfairness as submitted by Mr Aziz. After hearing from both representatives as to their views on the appropriate course if an error of law was made out, I reserved my decision.

## **Discussion and Conclusions**

18. Although the respondent did not raise section 8 in the RFRL, at para 14 of the RFRL the respondent said as follows: *“It must be noted that you stated to have arrived in the UK in 2010 on a student visa, however, you made no mention of your sexuality until you lodged further submissions in 2022. This ultimately impacts the credibility of your claim.”*
19. Section 8(1) provides that, in determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant’s credibility, of any behaviour to which this section applies.
20. Section 8(2) states that this section applies to any behaviour by the claimant that the deciding authority thinks – (a) is designed or likely to conceal information; (b) is designed or likely to mislead; or, (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.
21. Section 8(3) provides that without prejudice to the generality of subsection (2), the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead.
22. Section 8(5) provides that this section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.
23. In view of the appellant’s immigration history as set out at the beginning of the RFRL, the appellant’s behaviour plainly fell within the scope of section 8(5) of the 2004 Act.
24. Although the respondent did not formally raise section 8, the appellant was put on notice that, consistent with the provisions of section 8, “a deciding authority” was taking account, as damaging the appellant’s credibility, his behaviour in failing to make an asylum claim before being notified of an immigration decision, as well as the fact that he had made no mention of his sexuality from the time of his arrival in the UK in 2010 on a student visa until he had lodged further submissions in 2022.
25. As the Judge was a deciding authority when determining the appellant’s appeal, he was statutorily obliged to take account, as damaging the

appellant's credibility, of the behaviour of the appellant which came within the scope of section 8.

26. Accordingly, the Judge did not misdirect himself in applying section 8, although it had not been formally raised in the RFRL, and although the Presenting Officer, Ms Tariq, had not cross-examined the appellant on it.
27. There was no procedural unfairness for two reasons. The first was that the appellant had been placed on notice by the RFRL that a principal controversial issue in the appeal was the unexplained delay in him making a fresh asylum claim on the grounds of his sexual orientation; and that, if he wished to draw the sting of the adverse credibility finding which was thereby engendered, it was incumbent upon him either to challenge the accuracy of the account of his immigration history given in the RFRL or to explain why he had delayed for 12 years before raising and pursuing an asylum claim on the grounds of his sexual orientation.
28. Secondly, by the time Ms Barton made her closing submissions, Ms Tariq had raised as a factor which undermined the appellant's credibility his delay in raising and pursuing an asylum claim on the grounds of his sexual orientation.
29. I infer this from the fact that the Judge records Ms Barton as having addressed the appellant's immigration history in her closing submissions. It is apparent that Ms Barton sought to draw the sting of the adverse credibility point made against the appellant in paragraph 14 of the RFRL - which adverse credibility point was relied on by Ms Tariq in her closing submissions - by (a) arguing that it should not be held against the appellant that he did not mention his sexuality in his student visa application form; and (b) arguing that the appellant had sought to regularise his status in 2013, but that there was no information from the respondent about the asylum claim that he had lodged at that time. As to (b), I infer that Ms Barton's argument was that, as there was no information from the respondent as to the basis of the initial asylum claim, it could not be assumed that it did not relate to the appellant's sexuality.
30. I consider that the Judge adequately engaged with both arguments, and that there is no discernible flaw in his line of reasoning. It is not the case, as is alleged in the grounds, that the Judge assumed that the initial asylum claim did not relate to the appellant's sexuality. The Judge focused instead on the fact that, whatever it was about, the appellant had failed to attend an interview about it - and he had thereby not pursued it.
31. The detail about the appellant failing to attend an interview about his original asylum claim that was scheduled to take place in March 2015 - which was also the date when he is recorded as having absconded - did not feature in the RFRL. It is unclear whether Ms Tariq supplied this detail during her closing submissions or earlier. But either way it was open to Ms Barton to apply for a short adjournment to take instructions from the appellant on this matter, and, if so advised, to apply for permission to

recall the appellant to give evidence on this matter or about anything else in Ms Tariq's closing submissions on the topic of delay which the appellant wished to challenge.

32. It is argued in the grounds that the reason for the respondent treating the asylum claim as being withdrawn may have been because the appellant had failed to provide updated contact details, or because he had failed to complete an Asylum Questionnaire. It is also argued that the Judge should not have accepted Ms Tariq's claim that the appellant had failed to attend an interview to which he had been invited in March 2015.
33. I consider that these arguments amount to improperly treating the hearing in the First-tier Tribunal as a dress rehearsal. The appellant was legally represented at the hearing in the First-tier Tribunal, and Ms Barton did not submit that the information given by Ms Tariq was unreliable and therefore should be rejected. Rather than seeking an adjournment on the grounds of the appellant being taken by surprise, Ms Barton elected not to challenge the respondent's account of the appellant's immigration history, including the appellant's failure to attend an asylum interview in March 2015, and instead attempted to mitigate the adverse credibility finding that was inevitably going to attach to the appellant's undisputed immigration history by making the submissions that are recorded at paras [18] and [19] of the Decision.
34. Moreover, even in retrospect, the appellant has not made out a case of procedural unfairness. Firstly, as previously stated, it is not the case that the Judge assumed that the original asylum claim was not connected with the appellant's claimed sexuality. On the contrary, it is clear from his line of reasoning in para [19] that he accepted Ms Barton's premise that there was no information one way or the other as to the basis of the asylum claim made in January 2013, and he focused instead on the fact that the appellant had provided no evidence whatsoever as to (a) why he failed to attend his interview; (b) the basis for his initial claim for asylum; (c) why or whether he had absconded in March 2015; and (d) why he failed to make enquiries or seek to regularise his stay thereafter.
35. Secondly, the appellant has not sought to adduce evidence to show that his initial asylum claim did in fact relate to his claimed bisexual orientation or that the Judge was mistaken about any other detail of his immigration history that is canvassed in the Decision.

### **Notice of Decision**

**The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.**

Andrew Monson  
Deputy Judge of the Upper Tribunal



Immigration and Asylum Chamber  
7 February 2023