



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00596/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15 August 2018

Determination Promulgated
On 13 September 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MR M Z
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jones (Counsel)
For the Respondent: Mr Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born in 1979. He appeals against a decision of the respondent made on 28 December 2017 to refuse his application for asylum. The basis of his claim is contained in the following lines from the refusal letter:-

“B. You were married to your cousin [AZ] in 2003 in Pakistan. This was an arranged marriage which you did not object to despite your sexuality as you also liked women. You have two daughters [IZ], born 01 January 2004 and [SZ] born 25

October 2008, although you were not particularly happy about having children at the time. You have not been involved in any relationship with a male in Pakistan, and other than your marriage you have not been involved in a relationship with any other females in Pakistan (AIR 46-63, 87-88).

C. You are bisexual. You first had thoughts regarding your sexuality when you were aged 16 in Pakistan as you had more feelings towards men although you also liked women. You felt different because of this. You did not speak to anyone or express your thoughts or feelings during this period as you feared you would be killed due to societal attitudes. You came to terms with your sexuality 2-3 months after first having thoughts regarding your sexuality by masturbating (AIR 65-81).

D. Approximately 2-3 months after arriving in the UK you began living openly with your sexuality after being told by people living with you it was easy to get boys and you started attending nightclubs. You have had no interest in developing a relationship with any females during your time in the UK. Although you are open to having a relationship you have not yet had a relationship with a male during your time in the UK (AIR 120-132).

E. On 15 May 2017 you advised your wife and family in Pakistan of your sexuality as they were pressuring you to return home. After you advised them of your sexuality, your wife and family cut all ties with you (AIR 16,40).

Future Fear

12. You have claimed on return to Pakistan you fear you will be killed by your wife and family. This is because you revealed your sexuality to them and they cut all ties with you and threatened to kill you if you returned home. Additionally, you fear authorities and other non-state actors in Pakistan as being gay or bisexual is against religion and the law and you will be imprisoned or killed if you returned."

2. He appealed.

First tier hearing

3. Following a hearing at Taylor House on 8 February 2018 Judge of the First-tier Moore dismissed the appeal.
4. He heard oral evidence from the appellant and two witnesses.
5. His findings are at paragraphs 29 to 39. In summary, he did not believe the claim that the appellant is bisexual.

Error of law hearing

6. He sought permission to appeal which was granted on 29 March 2018.

7. At the error of law hearing on 13 June 2018 I concluded that the decision showed material error of law and set it aside to be remade.
8. As evidence was sought to be led it was not possible to do so on that day. The matter was set down for a resumed hearing before myself.
9. A notice setting out the errors of law was intimated to the parties as follows:-

“Reasons: Failing to give adequate reasons for findings at para [29];

- *Also, at [30] – for not accepting that appellant had no option but to enter arranged marriage despite his undeclared bisexuality; and for finding that because he had children by his wife he could not be bisexual;*
- *Also, at [31] – for finding against appellant that he did not have extramarital homosexual affairs. Such failed to take account of family, societal and legal constraints;*
- *Also, at [32] - for finding against appellant that he did not tell his wife he was bisexual;*
- *Also, at [34-36] – for finding that the evidence of witnesses Mr SH and Mr MH that they had seen appellant hugging and kissing men in gay clubs did not assist appellant’s claim to be bisexual.”*

Resumed hearing

10. At the hearing before me Mr Duffy stated that credibility is the issue. There was no issue with the background material which indicated that gays and bisexuals might be at risk in Pakistan.
11. I heard briefly from the appellant. He adopted his statement (dated 28 January 2018). In cross-examination he said that he had no homosexual experiences in Pakistan. Although he had feelings for men he could not act on them out of fear. He did not have sexual feelings for women. He had married because it had been the family’s decision. He could not stop it.
12. He said that since coming to the UK he had had sex with men but no serious relationships. For sex he went to gay clubs in London.
13. He said the two witnesses who had attended are friends not sexual partners. They had seen him with men at the clubs, in particular XXL Club. They had seen him go into rooms there which people used for sex. His witness Mr RH had seen him at XXL Club the previous Saturday.
14. I heard briefly from Mr HA. He adopted his letter (P78 of appellant’s bundle).

15. He said he is a host and drag queen at a LGBT club called Kali which caters mainly for Asians. He knows the appellant as both of them attend clubs including XXL. He has seen the appellant kissing and dancing with men. He has told the witness he is bisexual. He has seen him going into rooms at clubs for sex. He has never seen him with a woman.
16. I heard briefly from Mr RH who adopted his statement (dated 31 January 2018). He has refugee status based on his sexuality. He said he first met the appellant at Club Kali, a gay club primarily for Asians. He has seen the appellant kissing and hugging other men and going into rooms which are set aside for sexual intimacy.
17. In submissions Mr Duffy sought simply to rely on the refusal letter. He had nothing to add.
18. Ms Jones sought to rely on her skeleton argument. There was no reason to doubt the appellant's claim about his sexuality. He had satisfactorily addressed the issues of concern in that regard raised by the respondent.
19. Referring me to several extracts from the background material she submitted that it was clear that there is a hostile attitude to homosexuality in Pakistan, that there is no protection from the authorities and internal relocation is not an option.

Consideration

20. In considering this matter I look first at the background material. I can do so fairly briefly as Mr Duffy accepted that if the appellant was found to be credible his appeal must succeed.
21. The Country Information and Guidance (April 2016) states (at 2.2.1) "*LGBT persons in Pakistan form a particular social group within the meaning of the Refugee Convention because they share a common characteristic that cannot be changed and have a distinct identity which is perceived as being different by the surrounding society.*"
22. Under "*State treatment*": "*Same sex sexual acts are illegal in Pakistan. The Pakistan Penal Code does not explicitly refer to homosexuality. However, 'carnal intercourse against the order of nature' is punishable under Section 377 of the Penal Code 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 a conventional understanding of heterosexual sexual contact. In practice the authorities rarely prosecute cases, but police use the laws for harassment and extortion*" (2.3.3).
23. Under "*Societal treatment*" (at 2.3.4): "*LGB persons in Pakistan can be subject to societal discrimination as well as harassment and violence – most commonly within the family – and depending on the facts of the case, are unlikely to be able to seek effective protection from the authorities*".

24. Further, under “Protection”:

“2.4.1 Where the person’s fear is of ill treatment/persecution at the hands of the state, they will not be able to avail themselves of the protection of the authorities.

2.4.2 If the person’s fear is of ill treatment/persecution by non-state actors an LGBT person will not be able to avail themselves of the protection of the authorities. This is because same-sex sexual acts are prohibited in Pakistan, and it would be unreasonable to expect a person identifying as LGBT, who fears persecution or serious harm by non-state actors because of their sexuality, to seek protection from the authorities because they may in doing so be at risk of prosecution, persecution or serious harm.”

25. Finally, under “Internal relocation”:

“2.5.1 Where the person’s fear is of ill treatment/persecution at the hands of the state, they will not be able to relocate to escape that risk.

2.5.2 Decision makers must also take account that the Supreme Court in the case of HJ (Iran) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution.

2.5.3 With regard to those in fear of non-state actors, given that homophobic attitudes are prevalent throughout the country, there is unlikely to be any place in Pakistan to which an LGBT person who would be identified as such could safely relocate ...”.

26. In looking at the appellant’s claim I note the criticisms by the respondent. At [32] of the refusal letter it was considered that he had given an “insufficient” and, indeed, “incoherent” explanation to explain how he came to terms with and accepted his sexuality in Pakistan. His position at interview was that there was no specific event and that it was “just a feeling at the time” (Q69).

27. I do not agree with the respondent. The respondent’s scepticism about the appellant’s sexuality is premised upon the expectation that he should provide a detailed account of how he felt and thought when he realised he was bisexual, some 22 years ago. I see no good reason why gay or bisexual people should be any better at describing or understanding their sexuality than heterosexual people. The respondent’s assertions are founded upon an implicit expectation that he should be articulate, self aware and educated about the development of his sexual orientation in his childhood. I find such an approach to be unrealistic. I find the appellant’s response credible.

28. As for the claim that had he been bisexual he would not have had children by his wife [33, 34], I find his explanation in his statement that it was an arranged marriage, and that he was attracted to women as well as men, so having intercourse was not an issue and that he desired intimacy with his wife, to be wholly plausible.

29. The respondent (at [35] of the refusal letter) considered the appellant's responses regarding living openly as a bisexual in the UK to be insufficient and that he did not give a reasonable demonstration as to how his life had changed since living here. At interview he said that although he was open to it, he had not been in a relationship because so many people were around at the club that he could enjoy himself (Q125). I find his explanation, added to at the hearing that although he identified as bisexual he did not mention it to several men he was attracted to because he knew they would not reciprocate, to be entirely credible.
30. I may add that having had the opportunity to hear and observe the appellant and the two witnesses I found all three to come across as consistent in their evidence and patently truthful. The evidence of the witnesses as to the appellant's frequent attendance and activities at the gay clubs amply addressed the concerns of the respondent (at [36ff] of refusal letter) that such attendance was not determinative of his sexuality. As indicated, in his questioning and submissions, Mr Duffy did not challenge the evidence of the witnesses.
31. The appellant delayed in claiming asylum for several years and only well after being arrested under an immigration provision when he did not mention his sexuality. I take such against his credibility under section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. His explanation is that he did not mention it in 2014 as he was not asked and did not think to mention it at the time as it was not the purpose of the interview. I find such to be plausible. His explanation for not claiming asylum until 2017 is that he did not know until then that he could claim as an LGBT person. I find that less plausible. However, the section is not determinative. It is only one of the relevant factors in determining credibility.
32. To the lower standard looking at the evidence in the round I find the appellant's account to be credible and consistent with the background information of widespread and systematic state and societal discrimination, harassment and violence against LGBT persons in Pakistan. As indicated his account is supported by witnesses whose evidence I believed, evidence which went to the core of the issue in the appeal, namely the appellant's sexuality. He satisfies me that were he to return he fears his family and wider society including the authorities and that he would be at real risk. Also, his fear would be such that, as he said in his statement, he could not live openly as a bisexual man.
33. *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31 establishes that where a person would in future refrain from behaving in a way that would expose them to danger because of the risk of persecution that behaviour brings, that person is a refugee.
34. I find the appellant to be such a person. His claim succeeds.

Notice of Decision

The decision of the First-tier Tribunal showed material error of law. It is set aside and remade as follows:

The appeal is allowed on asylum grounds.

Anonymity

Order regarding anonymity - 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 their 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

Date 12 September 2018

Upper Tribunal Judge Conway