Upper Tribunal
(Immigration and Asylum Chamber)

MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 00353 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 July 2019	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

MR C.M.G. OCKELTON, VICE PRESIDENT

Between

MA

(ANONYMITY ORDER MADE MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Dr S. Chelvan, instructed by Farani Taylor Solicitors

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

(1) Where the decision of the Upper Tribunal to refuse permission to appeal against the decision of the First-tier Tribunal is quashed by the High Court, following the grant of permission in a "Cart" judicial review under CPR 54.7A, the Upper Tribunal's ability to grant permission to appeal without a hearing depends upon the Upper Tribunal being able to understand, from the High Court's grant of permission in the judicial review, what led the Court to conclude that the requirements of CPR 54.7A(7) were satisfied.

(2) If the Upper Tribunal lists an application for permission to appeal for an oral hearing, following the quashing of a refusal to grant such permission, the appellant will need to ensure that the Upper Tribunal and the respondent have all the relevant materials in connection with the "Cart" judicial review, which may bear on the issue of whether permission to appeal should now be granted.

(3) This will be particularly important where the case for the appellant has materially changed from what it was when the Upper Tribunal received the application for permission to appeal. In such a scenario, the Upper Tribunal will be unable to discern the potential point at issue merely by revisiting the original grounds of application for permission to appeal.

(4) The requirement in CPR 54.7A, that there must be shown to be something arguably legally wrong with the way in which the Upper Tribunal reached its decision in response to the grounds of application that were before it, is important. If it is not observed, there is a serious risk of a "Cart" judicial review being seen as a third opportunity for an appellant to perfect grounds of challenge to the First-tier Tribunal's decision, when Parliament has ordained that there should be no more than two.

DECISION AND REASONS

A. "CART" JUDICIAL REVIEW: CPR 54.7A

1.
This is the decision of the Upper Tribunal, to which both of us have contributed. It raises a number of issues regarding the nature and consequences of a challenge under CPR 54.7A by means of judicial review of a decision of the Upper Tribunal not to grant permission to appeal to that tribunal against a decision of the First-tier Tribunal.

2.
A decision of the Upper Tribunal to refuse to grant permission to appeal is an "excluded decision" for the purposes of section 11 of the Tribunals, Courts and Enforcement Act 2007. Accordingly, the only means of challenging such a decision is by way of judicial review. Following the decision of the Supreme Court in Cart v the Upper Tribunal [2011] UKSC 28, the Civil Procedure Rules 1998 were amended by the insertion of Rule 54.7A (Judicial review of decisions of the Upper Tribunal). Rule 54.7A provides a mechanism for challenging such decisions, which, in a number of respects, differs procedurally from the way in which other judicial reviews are brought under brought under Part 54.

3.
CPR 54.7A(7) provides as follows:

"(7) The court will give permission to proceed only if it considers –

(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and

(b) that either –

(i) the claim raises an important point of principle or practice; or

(ii) there is some other compelling reason to hear it."

4.
Although the Upper Tribunal is the defendant in such proceedings, in practice the Tribunal normally adopts what might be described as a neutral position. There is nothing unusual in this. The same approach is routinely taken by other judicial and quasi-judicial bodies, which are faced with judicial reviews of their decisions.

5.

A particular feature of CPR 54.7A is that, where permission to apply for judicial review is granted, unless the Upper Tribunal or an interested party requests there to be a hearing, within a prescribed period, the court "will make a final order quashing the refusal of permission without a further hearing" (54.7A(9)(b)). The power to make such an order may be exercised by a Master of the Administrative Court (54.7A(10)). In practice, a hearing is rarely requested, with the consequence that the grant of permission routinely leads to the quashing of the decision to refuse permission to appeal.

B. CONSEQUENCES OF A SUCCESSFUL "CART" JUDICIAL REVIEW

6.
That leaves the application for permission outstanding before the Upper Tribunal. If it appears from the High Court's grant of permission in the "Cart" judicial review that there is an arguable error of law in the decision of the First-tier Tribunal, then the Upper Tribunal will usually grant permission without a hearing and the resulting appeal in the Upper Tribunal will be dealt with in the normal way. The Upper Tribunal's ability to act in this manner, however, depends on its being able to understand, from the High Court's grant of permission, what led the Court to conclude the requirements of CPR 54.7A(7) were satisfied. As we shall see, that was not possible in the present case.

C. THE PROCEEDINGS IN THE FIRST-TIER TRIBUNAL

7.
The appellant, a citizen of Pakistan, appealed against the respondent's refusal of the appellant's protection claim. The appellant's case was that, if returned to Pakistan, he would face persecution or other serious ill-treatment, as a gay man.

8.
The appellant's appeal came before First-tier Tribunal Judge Aujla for hearing on 11 September 2018. The appellant did not give evidence. The judge was informed by the appellant's solicitor that the appellant's psychiatrist had said the appellant was not fit to give such evidence. The appellant's partner, however, gave oral evidence.

9.
In determining the appeal, Judge Aujla stated that he had considered the written and oral evidence "in particular the psychiatric report by … Dr Catherine King …". The judge then said that he had "taken into account the guidance [of] the Supreme Court in HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31.

10.
At paragraph 45, Judge Aujla stated that:-

"45. … the issue before me is whether or not the Appellant would choose to live as a homosexual openly after his returning to Pakistan. If I find that he would live openly, he would be at risk, and the appeal would be allowed. Equally, if I find that he would live discreetly as a homosexual and the reason for that was to avoid persecution and ill-treatment, the appeal would again be allowed. However, if I find that the Appellant would live discreetly because that was the way he was, and not to avoid persecution or ill-treatment, the appeal on asylum grounds would be dismissed."

11.
At paragraph 48 Judge Aujla said he had:-

"… no difficulty in finding that the Appellant kept his homosexuality [discreet] in Pakistan not to avoid persecution or ill-treatment but that was the way he was. Although he was a homosexual, he was happily living in a heterosexual environment with his wife and children … I therefore find that the Appellant would not live openly as a homosexual if he were returned to Pakistan."

12.
The judge went on to find that the appellant would keep his homosexuality discreet "as he had done previously for 25 years, not to avoid persecution or ill-treatment but that was the way he was". For this reason, Judge Aujla concluded, at paragraph 49, that the appellant had not shown he would be at real risk of persecution if returned to Pakistan.

13.
The judge then turned to the appellant's mental health issues. He stated at paragraph 51 that he had "very carefully considered and taken into account the enormous amount of medical evidence placed before me, most importantly the psychiatric report dated 23 May 2018 prepared by Dr Catherine King". The judge concluded that, although the appellant had been diagnosed with paranoid schizophrenia and was in receipt of appropriate medication for that condition, treatment (albeit not to the same level as in the United Kingdom) would be available for the appellant if returned to Pakistan. The appellant also had "a large circle of family members in Pakistan who should be able to provide him with help and support" (paragraph 53).

14.
Having made his findings, the judge dismissed the appellant's appeal on both asylum and human rights grounds.

D. SEEKING PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

15.
The appellant, through Duncan Lewis Solicitors, sought permission from the First-tier Tribunal to appeal to the Upper Tribunal against Judge Aujla's decision. The appellant's grounds, settled by Counsel (not Dr Chelvan), were, first, that there were "errors on risk on return; failure to consider the material evidence in caselaw on an appellant living discreetly as a homosexual". The grounds contended that, contrary to Judge Aujla's conclusion that there was no evidence to suggest the appellant lived discreetly in Pakistan to avoid persecution, there was a large amount of such evidence "contained in the appellant's interview records". Passages from the respondent's interview records with the appellant were then set out. Ground 1 made no reference at all to the appellant's paranoid schizophrenia, in connection with the question of whether the appellant had lived discreetly in Pakistan.

16.
Ground 2 was entitled "Fundamentally Flawed Approach to Risk on Return owing to Appellant's Mental Health". In this regard, it was submitted that Judge Aujla had been wrong to find that the appellant could seek support from his family, following return. It was also "simply incorrect" for the judge to have stated that there was no evidence as to the medical treatment available in Pakistan. On the contrary, a CPI on Medical and Health Care Issues dated August 2018 had been submitted, which, it was said, showed the paucity of facilities available for treatment of mental illness in Pakistan.

17.
Ground 3 submitted that there had been "incorrect approach to Article 8 ECHR". The ground did not, however, materially elaborate on that contention.

18.
Permission to appeal to the Upper Tribunal was refused by First-tier Tribunal Judge Lever on 18 December 2018. Judge Lever considered that Judge Aujla had "noted" the appellant's extensive immigration history in the United Kingdom and that "whilst the appellant was present at the hearing he chose not to give evidence". So far as HJ (Iran) was concerned, Judge Lever said that Judge Aujla had set out "succinctly … the questions that needed to be answered. The judge gave clear reasons why he found there was no real risk to the appellant. He was entitled to reach that decision".

19.
As regards ground 2, relating to the appellant's mental health, Judge Lever considered it "clear the judge had carefully considered the evidence. The fact that he dealt sparingly with reciting that evidence is not an error". Likewise, Judge Aujla had taken a "proper approach to A8 in this case and was entitled to conclude as he did".

20.
The grounds of appeal to the Upper Tribunal, settled by the same Counsel as had drafted those considered by Judge Lever and, again, filed by Duncan Lewis Solicitors, were, in all underlying respects, the same as those put to the First-tier Tribunal. Criticism was made of Judge Lever's alleged failure to engage with aspects of the grounds. It was also submitted that the reason the appellant did not give oral evidence was because he was adjudged unfit to do so.

21.
On 6 February 2019, Deputy Upper Tribunal Judge Warr refused permission to appeal. Judge Warr concluded that Judge Aujla had properly directed himself "when considering the issue of risk on return and his conclusion was reached on a full overview of the evidence and was properly reasoned". Judge Warr concluded that Judge Aujla's decision had been "a thoughtful one, guided by the relevant authorities such as HJ (Iran) v Secretary of State [2010] UKSC 31".

22.
So far as mental health was concerned, Judge Warr concluded that Judge Aujla "makes it clear that he had considered all the material before him including the medical evidence and in particular the availability of mental health facilities in Pakistan". At paragraph 51 of Judge Aujla's decision, he had confirmed that he had carefully considered "most importantly" Dr King's psychiatric report and that Judge Aujla was aware that the reason the appellant did not give evidence was "because he was unfit" to do so.

E. THE APPELLANT'S "CART" JUDICIAL REVIEW

23.
Duncan Lewis Solicitors applied under CPR 54.7A for permission to bring judicial review to challenge Judge Warr's refusal of permission to appeal. We have not seen those grounds. We were informed they were settled by the same Counsel who had produced the grounds accompanying the applications for permission to appeal against Judge Aujla's decision.

24.
We have also not seen any of the materials that accompanied Duncan Lewis's judicial review application. It appears, however, that amongst these materials was a report of Dr Catherine King, concerning the appellant, dated 30 August 2018. No reference to that report was contained in the applications for permission to appeal, although it pre-dated the hearing and, thus, both applications.

25.
From the materials with which we have now been supplied, we see that the judicial review application and accompanying materials went before Her Honour Judge Alice Robinson, sitting as a Deputy High Court Judge. In her order of 8 April 2019, the Deputy Judge noted that Dr King's report of 30 August 2018 was of significant relevance to the question of whether the appellant, if returned to Pakistan, would be likely to be discreet as to his sexuality, because the report suggested that, regardless of whether the appellant had been discreet in the past because (to use Judge Aujla's phrase) "that was the way he was", the appellant's paranoid schizophrenia would, in fact, prevent him from doing so. The report of 30 August 2018 was, therefore, troubling. It recorded Dr King's conclusion that the appellant "would be poor at being discreet about his homosexuality if returned because he is extremely fearful and convinced that there is a conspiracy to expose his sexuality. He becomes violent and aggressive when he is under perceived threat and is likely to struggle to control his responses".

26.
The Deputy Judge observed that Judge Aujla's decision suggested that "no account was taken of the psychiatric evidence, that by virtue of his mental illness, the claimant would not be able to be discreet about his homosexuality". She noted that it was not clear if the report of 30 August 2018 was before the First-tier Tribunal and that it would seem odd for Judge Aujla to have said that he had considered "all the medical evidence", in particular the report of Dr King of 23 May 2018, "when the 30 August report is more detailed and up-to-date".

27.
The Deputy Judge concluded that "this goes to the heart of the case, whether the claimant would live discreetly in Pakistan because, if not, it was uncontroversial his appeal should be allowed". She ordered the claimant to provide a copy of the asylum interview within 7 days and the defendant to serve summary grounds of defence, also within 7 days, which "should address this point, and any others the defendant wishes to deal with".

28.
When the Deputy Judge's order reached the appellant, Duncan Lewis were no longer acting for him. Instead, Farani Taylor Solicitors had been instructed. They, in turn, instructed Dr Chelvan who, on 10 April 2019, drafted a response on behalf of the appellant to the order of 8 April 2019.

29.
Dr Chelvan was able to confirm, by reference to the bundle that had been produced for the hearing in the First-tier Tribunal, that Dr King's reports of both 23 May and 30 August 2018 had been before the First-tier Tribunal Judge.

30.
The application for judicial review then came before His Honour Judge McKenna, sitting as a Deputy High Court judge, on 25 April 2019. He granted the claimant/appellant "permission to rely on supplementary grounds" before saying as follows:-

"Permission is hereby granted.

Observations: The Applicant has demonstrated a reasonable prospect of success in establishing that both the FTT and the UT made serious legal errors and the claim crossed the threshold on the basis of compelling reason."

F. PARTICULAR ISSUES

31.
Judge McKenna's decision tells the reader nothing useful about why permission was granted. The actual reasons why the stringent requirements of CPR 54.7A(7) were found to be met should have been contained in the order. The fact that they were not led to the Upper Tribunal finding itself unable to grant permission, following the subsequent quashing of Judge Warr's refusal of permission to appeal (see paragraph 5 above).

32.
As we have said, where it is apparent from the decision to grant permission on a "Cart" judicial review that an arguable error of law exists in the decision of the First-tier Tribunal, the Upper Tribunal's practice is to grant permission to appeal, without more ado. Here, however, since the decision was opaque, that course could not be taken.

33.
Where, as here, the Upper Tribunal does not grant permission, following the grant by a High Court of a "Cart" judicial review and subsequent quashing of the permission decision of the Upper Tribunal, the parties will be sent a notice of hearing which (again, as in the present case) makes it plain that the purpose of the hearing is to decide whether to grant permission to appeal. The appellant will need to ensure that the Tribunal and the respondent have all the relevant materials filed in connection with the "Cart" judicial review, which may bear upon the issue of whether permission to appeal should now be granted.

34.
This will be particularly important where, as in the present case, the case for the appellant has materially changed from what it was when the Upper Tribunal received the application for permission to appeal. In such a scenario, the Upper Tribunal will be unable to discern the potential point at issue merely by revisiting the original grounds of application for permission to appeal.

35.
In Shah ('Cart' judicial review: nature and consequences) [2018] UKUT 51, the Upper Tribunal pointed out that the process authorised by CPR 54.7A involves a challenge to the lawfulness of the Upper Tribunal's decision to refuse permission to appeal. Not only must there be shown to be an arguable error in the decision of the First-tier Tribunal; there must also be something arguably legally wrong with the way in which the Upper Tribunal reached its decision in response to the grounds of application that were before it.

36.
The second requirement is important. If it is not observed, there is a serious risk of a "Cart" judicial review being seen as a third opportunity for an appellant to perfect grounds of challenge to the First-tier Tribunal's decision, when Parliament has ordained in section 11 of the Tribunals, Courts and Enforcement Act 2007 that there should be no more than two.

37.
In the present case, the grounds of application to the First-tier Tribunal and the Upper Tribunal simply did not raise the issue that was identified by Judge Robinson, when she was provided with Dr King's report of 30 August 2018; namely, whether the appellant's paranoid schizophrenia would prevent him from being discreet as to his sexuality, even if his true desire was to be so, irrespective of any fear of persecution. Instead, the ground dealing with the appellant's mental health was concerned solely with critiquing Judge Aujla's findings regarding support from the appellant's family in Pakistan

and the availability of medical treatment in that country, which were the findings the Judge considered it necessary to make in relation to the psychiatric evidence.

38.
In those circumstances, the question arises how the High Court came to the decision to grant permission in the "Cart" judicial review proceedings. The answer, which emerges only after we were provided with some of the materials that had been placed before the High Court in those proceedings, including, importantly, Dr Chelvan's response of 10 April 2019 to Judge Robinson's order, is that her order identified a potential ground of challenge to the First-tier Tribunal's decision which, although not presented to the First-tier Tribunal or the Upper Tribunal, nevertheless would have a "strong prospect of success", if the report of 30 August had been before Judge Aujla: see AZ (error of law; jurisdiction; PTA practice) Iran [2018] UKUT 245, paragraphs 61-70.

39.
When it became apparent that this report had been before Judge Aujla, the appellant had a very strong likelihood of persuading the Upper Tribunal that Judge Aujla had overlooked or at least failed to give reasons for rejecting a crucial piece of evidence that bore directly on the appellant's claim to be at real risk of persecution, if returned to Pakistan. Furthermore, Deputy Upper Tribunal Judge Warr was in error in not identifying that point, since the bundle of documents placed before Judge Aujla, were, it seems, before Judge Warr when he reached his decision to refuse permission to appeal.

40.
It is necessary to make one final procedural point. If, as a result of "Cart" judicial review proceedings, the grounds for contending that the First-tier Tribunal Judge erred in law have changed, compared with those that were before the Upper Tribunal when it made its (now quashed) decision, the appellant will need to apply to the Upper Tribunal for permission to amend his or her grounds of permission, in order to be able to rely upon the grounds advanced in the "Cart" judicial review. The fact that such grounds have found favour in the High Court does not mean those grounds automatically become the grounds of challenge to the First-tier Tribunal's decision.

G. THE APPELLANT'S APPEAL IN THE UPPER TRIBUNAL

41.
Dr Chelvan, accordingly, was required by us to apply for permission to amend the grounds settled by his colleague, as considered by Deputy Upper Tribunal Judge Warr. In the circumstances, Mr Kotas did not oppose the application and we decided, in the circumstances, that it should be granted.

42.
The Upper Tribunal was then in a position to engage with the matter that lies at the heart of this case; namely, the effect of the appellant's mental illness upon his ability to be discreet, as a gay man in Pakistan.

43.
Having heard submissions on the amended grounds, we granted the appellant permission to appeal on them. We therefore turn to the substantive appeal which, with agreement of the parties, we went on to address at the hearing on 24 July.

(a) The appellant's history

44.

The appellant was born in January 1968. He made a number of visits from Pakistan to the United Kingdom in the period 2003-2006. After his entry in 2006, he did not leave at the end of his leave on 12 February 2007. He has remained in the United Kingdom without leave ever since.

45.
In 2010 he was arrested and in subsequent proceedings convicted of identity and false representation offences and sentences to 12 months' imprisonment. He then claimed asylum. His asylum claim was refused on 14 December 2010 and a deportation order made against him the same day.

46.
The appellant appealed against the refusal of his asylum claim. His appeal was dismissed by the First-tier Tribunal and by the Upper Tribunal, and permission to appeal to the Court of Appeal was refused. He then became appeal rights exhausted (and so removable) on 3 June 2012. He failed to report in accordance with the conditions of his bail and was recorded as an absconder from 15 May 2012 until his re-detention on 5 January 2016. He claimed asylum again on 20 April 2017. That claim was refused on 7 September 2017 and the appellant again appealed.

47.
Judge Aujla writes at paragraph 20 that "both representatives confirmed that the appeal [before him] was against the making of the deportation order made on 14 December 2010 [because] the previous appeal against the deportation order having been dismissed, the deportation order was still in force". The representatives were incorrect. The appeal before Judge Aujla was an appeal under section 82(1)(a) and (b) of the Nationality, Immigration and Asylum Act 2002 (as amended) against the refusals of the appellant's protection and human rights claims. The appeal against the deportation order, made when such an appeal was available, had failed. The present appeal carried potential consequences for the respondent's decision to refuse to revoke the deportation order, implicit in the refusals of the appellant's claims, but the appeal was limited by statute to that we have set out above. Nothing turns on this, however: the Judge was, and we are, concerned with the content of the appellant's claim.

(b) The appellant's claim and appeal

48.
The appellant's claim is based on his homosexuality, his mental health, and his private and family life. When the appellant first came to the United Kingdom he had a wife in Pakistan; he has had six children by her. But his evidence was that he had known from about the age of 13 or 14 that he "liked men", and since his arrival in the United Kingdom he had lived openly as a gay man. He had divorced his wife in 2008. He had met his partner (a national of Pakistan with indefinite leave to remain in the United Kingdom) in 2013 and entered a relationship with him: they were married on 11 July 2017. He feared persecution as a gay man in Pakistan, if he lived there as openly gay; if he concealed his sexual identity that would be solely because of the risk of persecution.

49.
The appellant's claim, and appeal, are also put under articles 3 and 8 of the European Convention on Human Rights and the associated paragraphs of the Statement of Changes in Immigration Rules, HC 395 (as amended). The appellant invokes the private life he has developed in the United Kingdom over many years, and the family life he has developed with his partner. Further, the evidence is that the appellant is severely mentally ill, which raises two further issues: the first is that it is said that he would not in Pakistan have access to sufficient arrangements for his care; the second is that separation from his partner would have considerable impact because the latter contributes greatly to his care. (This argument feeds to an extent into the asylum claim. It might be said that the partner

would obviously be able to accompany the appellant to Pakistan because of his own nationality. But that would mean their continuing their life together, so exposing them both to persecution for homosexuality).

50.
The respondent accepts that the appellant is gay and is in a homosexual relationship with his partner. He also accepts that the appellant would be at risk of persecution if he lived openly as a gay man in Pakistan. He notes, however, that when the appellant was previously in Pakistan he had gay relationships and was apparently in no danger: he confirmed, in connection with his visit visas, that he had no fear arising from living in Pakistan; and he had stated in interview that he would not be at risk because nobody would know he was gay. Taking these facts in conjunction with the appellant's immigration history, the respondent declined to believe that the true position now was that the appellant would live openly gay in Pakistan or that any motivation for discretion would be the fear of persecution.

51.
In relation to the human rights claims, the respondent noted that the appellant's relationship was entered into and developed when there was a deportation order in force. The appellant could not meet the requirements of the Rules and had not shown why he should be granted leave despite failing to meet the requirements of the rules. The appellant appeared not to be receiving, or in need of, any medical treatment that he could not receive in Pakistan.

52.
As we have earlier noted, Judge Aujla heard oral evidence from the appellant's partner. The appellant did not give oral evidence; a psychiatric report before the Tribunal indicated that he was unfit to do so.

53.
After considering the evidence, the authorities cited to him, and submissions, Judge Aujla decided as follows. First, and essentially agreeing with the respondent on this point, he found that given the appellant's history, including specifically his history in Pakistan, he had failed on the evidence to show that he would live as openly gay in Pakistan or that any discretion would be motivated by fear of persecution. Secondly, in relation to his mental health, the evidence simply did not show that the appellant would have any difficulty in receiving whatever treatment or help he needed in Pakistan. Thirdly, Judge Aujla did not regard article 8 as even engaged, given that the relationship was formed in the circumstances it was and "the Immigration Rules [are] a complete code in deportation cases". He, therefore, as we have said, dismissed the appeal.

(c) The law

54.
We have referred a number of times in the course of setting out the history of this appeal to the concepts of living openly as a gay man, discretion, and discretion motivated by fear of persecution. For completeness, although the principles are well-known, we should cite the authority for them. For present purposes we need go into no more detail that to set out the following from the judgment of Lord Rodger JSC (with whom Lord Walker, Lord Collins and Sir John Dyson (as he then was) agreed) in HJ (Iran) :

“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.”

(d) The appellant’s case to be in need of international protection

55.
In the light of the principles set out in HJ Iran at paragraph 82, and by frequent reference to them, Dr Chelvan addressed us at some length on his submission that the appellant’s discretion about his sexuality would be motivated solely by the fear he has of persecution. His diagnosis as a paranoid schizophrenic demonstrated, in Dr Chelvan’s view, that his actions would be motivated by fear.

56.
We should not be understood to accept those submissions, or to accept that such a diagnosis of itself assists in determining whether a person has the ‘well-founded fear’ that needs to be established at each stage of the determination of a refugee or human rights claim. The position as it appears to us (and as belatedly adopted by Dr Chelvan in his oral submissions) is in this case comparatively clear.

57.
The appellant is mentally very ill. Dr King, an experienced psychiatrist working for units in the London Boroughs of Camden and Islington, knows the appellant well, having had access to his notes and

having interviewed him on seven occasions in the period 2017-2019. She describes the appellant as “one of our most unwell and vulnerable patients”. She reports that the appellant has severe delusions, including fears of light fittings and other electrical components in his flat. He believes that there is a network of people observing him and who are ready to expose his life, including his sexuality, to public view. He is floridly psychotic. His psychotic symptoms distort his reality. He cannot be relied upon to act consistently. He would be “poor at being discreet about his homosexuality” because of his fear of the conspiracy to expose him, and because he becomes violent when he perceives he is under threat and would struggle to control his responses: he sees accidental or incidental occurrences as threats to which he needs to respond.

58.
All of this comes from the report of 30 August 2018 which, as we have established, was before Judge Aujla, but which he did not expressly mention in his decision, instead, referring expressly only to Dr King’s earlier and much less significant report of 23 May 2018 (paragraph 51 of the decision). Although there are passages in paragraph 52 of his decision which appear to indicate that Judge Aujla was there referring to what Dr King had said in her report of 30 August, concerning support networks, he did not engage with the important passage at paragraph 7.8 regarding the appellant’s ability (or otherwise) to be discreet.

59.
This failure cannot be laid at the door of Ms Head, the solicitor who represented the appellant at the hearing. On the contrary, at paragraph 39, Judge Aujla recorded Ms Head’s submissions, including the contention that “the psychiatrist had stated that the appellant did not have the capacity to be discreet”. As we have said, that contention was not engaged with in the Judge’s treatment of the report, where he confined himself to the psychiatric care and treatment the appellant needs now and would need on return to Pakistan.

60.
It is this feature of the report of 30 August, however, in our view accurately summarised by Ms Head, that is in our judgment crucial. There is, as Mr Kotas accepted before us, no reason to doubt it. The question of any reasons for the appellant’s discretion does not arise in this case. Nor, realistically, does any question about whether he would wish (or choose) to be discrete. The position is that he is a homosexual man who because of his quite exceptionally severe mental condition, well-attested by medical opinion not subject to any challenge, will be unable to maintain a life of discretion whatever his wishes would be.

61.
For these reasons, given that it is accepted that he would be at risk of persecution if openly gay in Pakistan, the appellant has established that he has a well-founded fear of persecution. That conclusion emerges from unchallenged evidence before the First-tier Tribunal. It appears to us that Judge Aujla erred in law by failure to take into account the relevant matter, that the psychiatrist, whose opinions he accepted, had indicated that the appellant would not be able to maintain discretion.

(e) Decision

62.
We set aside his decision and substitute a decision allowing the appeal on protection (Refugee Convention) grounds. In the circumstances we do not need to consider the other issues raised.

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 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

30 September 2019

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber