



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06721/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3rd June 2015

Decision and Reasons Promulgated
On: 1st July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Seelhoff of Seelhoff solicitors
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Albania. In the First-tier Tribunal it was felt appropriate to make an anonymity direction. Given that this relates to the personal life of the appellant and his partner and there being limited public interest in the disclosure of the identities of the parties, I make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Morgan promulgated on 20th November 2014. The judge dismissed the Appellant's appeal against the decision of the Respondent dated 22nd August 2014 to remove the appellant from the UK.
3. By decision made on the 13th April 2014 leave to appeal to the Upper Tribunal was granted. Thus this case appears before me to determine in the first instance whether or not there is an error of law in the original determination.
4. In granting permission Upper Tribunal Judge Perkins gave the following reasons:-

“3 I am particularly concerned that the First-tier Tribunal may not have given proper regard to the evidence of societal disapproval against gay people even in the context of an “Article 8” rather than an asylum claim.

4 I am also concerned that the possible difficulties facing the appellant returning from Albania as a gay partner have been overlooked. His previous immigration history might be an obstacle to his re-entry. How this impacts on his claim is not clear but it is at least arguable that the point needs to be considered more than it has been.”

Factual background

5. The appellant came to the UK in 2000. He claimed asylum claiming to be from Kosovo. He pursued his claim through to an appeal. His appeal was dismissed. It was found on the evidence that the appellant was not a Kosovan but that he was Serbian. His appeal was finally dismissed in 2002.
6. In December 2006 the appellant met a British National, who for the present is identified as PC. They developed a relationship and began to live together in January 2007.
7. In March 2010 the appellant seeking to regularise his status in the UK made fresh submissions to the respondent and an application for leave to remain in the UK based on his relationship with PC. By September 2012 the application had not been decided and the appellant issued judicial review proceedings.
8. The appellant's representative claims that he had to re-submit the application in March 2012 with supporting documents as the respondent had lost the papers. Whatever the cause of the delay, nearly 2 ½ years passed before a decision was finally made.
9. Finally the appellant was interviewed and a decision made to remove the appellant in February 2013.
10. In his application the appellant was admitting that he was an Albanian and a homosexual but those claims were not accepted and the respondent set removal directions for Serbia, in accord with the findings in the previous appeal.

11. In the application and appeal the appellant was relying upon his Article 8 family life with PC. There were appeal proceedings both in the First-tier Tribunal and Upper Tribunal but ultimately the immigration decision was withdrawn as the appellant produced his Albanian passport and an identity card. The respondent undertook to reconsider the application in light of the fact that the appellant was an Albanian national.
12. On the 24th August 2014 the respondent refused the appellant's application and made the present decision to remove the appellant to Albania. The appellant appealed against that decision.
13. The appeal appeared before Judge Morgan, who dismissed the appellant's appeal. The grounds of appeal were in part based upon asylum, humanitarian protection and Articles 2 and 3 of the ECHR.
14. On behalf of the appellant it was asserted that, whilst in paragraph 2 of the determination Judge Morgan correctly states that the appellant was no longer pursuing the asylum ground, the judge does not engage with the fact that that did not constitute a concession that homosexuals were not at risk in Albania. The reason given by the appellant's representative for not pursuing asylum was that the appellant would be able to live discretely in Albania and his homosexuality would not become known to the appellant's family and/or the general public. Thus the appellant himself would not be at risk. However it was still maintained that homosexuals were at risk in Albania.
15. The appellant's representative on behalf of the appellant asserts that the distinction has relevance as it would impact upon the appellant making an application to enter the UK as the partner of PC and the proportionality of making the appellant return to Albania to make that application. Reliance was placed on the fact that the appellant in order to make the application would have to disclose the identity of the person, who he was seeking to join in the UK. The application in Albania would have to be made through an agent. Documentation would disclose the nature of the appellant's relationship, the foundation for his application for entry. The appellant's family and others through the agency would or could become aware of the nature of the relationship. The appellant by reason of his relationship becoming known would be at risk of mistreatment.
16. In submissions the appellant's representative relied upon *Ganesabalan v SSHD* [2014] EWHC 2712 as providing guidance as to how the issues under Article 8 outside the rules should be approached. The most recent guidance on Article 8 has been given in the cases of *MM & others v SSHD* 2014 EWCA Civ 985 and *The SSHD v SS (Congo)* 2015 EWCA Civ 387. The emphasis being on assessing whether there are factors outside the criteria in the rules which are material in the proportionality exercise.
17. The appellant's representative seeks to assert that the risk to the appellant of his sexuality becoming known and his being at risk by reason thereof and that the

separation and delay caused by the removal of the appellant and his having to make an application are such factors.

18. As set out in paragraph 12 of the decision by Judge Morgan the evidence of the appellant and PC was not challenged as to their relationship. It was accepted that this was a genuine, substantial relationship that was to be acknowledged was akin to marriage and that if the appellant were allowed lawfully to remain in the UK the parties would enter into a civil partnership/marriage.
19. The first issue being whether in carrying out the assessment of article 8 and proportionality the judge had taken account of the potential risk to the appellant that in making the application his relationship with PC would become known and would expose the appellant to a risk of mistreatment.
20. That issue is dealt with in paragraphs 14, 15 and 16 of the decision. In submission before Judge Morgan it had been submitted that the *“there was insufficient evidence to justify the appellant’s concerns that entry clearance would cause a real risk of the appellant’s sexuality becoming known to his family”*.
21. In paragraph 16 the judge specifically considers whether the making of the application would result in the appellant’s relationship being disclosed to his family. The judge finds that it would not. That was a finding of fact that the judge was entitled to make on the evidence that was before him.
22. The judge also in paragraph 16 acknowledges that Albania is a conservative society where homophobic attitudes persist. It was clear that the judge did take account of the nature of society in Albania and was aware that homophobic attitudes were prevalent.
23. In paragraph 14 the judge takes account of the submissions made by the appellant’s representative. Those submissions included that it would be dangerous for the appellant to return to Albania to make an application for entry clearance and that there was no provisions for vulnerable clients to submit applications. The judge in that paragraph takes account of the submission that it would not be safe for the appellant to lodge an application.
24. The judge clearly took into account the risks to homosexuals in Albania and was aware that the submission by the appellant’s representative was that the appellant would be at risk by reason of the need to make an application. However the judge satisfied that it was proportionate for the appellant to return to Albania to make an application for entry. The judge was satisfied that the process of making the application would not expose the appellant to any risk as the judge in paragraph 16 specifically states that the fear of such was not objectively justified.
25. The second issue relates to the separation and delay pending consideration of the appellant’s application for entry. The judge has within paragraph 18 found that taking those factors into account that the decision was proportionately justified.

26. It was accepted that the appellant could not succeed at this point under the Immigration Rules, in part in respect of Appendix FM for the reason that the appellant had remained in the UK unlawfully for more than the prescribed period and because he did not have an English Language Certificate.
27. The circumstances justifying consideration of Article 8 are the potential risk to which returning and making an application the appellant would be exposed. The judge clearly has considered the submissions in respect thereof and has given valid reasons for finding that the appellant would not be at risk.
28. In the circumstances there is no error of law in the decision of the judge.

Decision

29. There is a no material error of law in the determination. I uphold the decision to dismiss this appeal on all grounds.

Signed

Date

Deputy Upper Tribunal Judge McClure

Direction regarding anonymity- rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2014

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed

dated

Deputy Upper Tribunal Judge McClure