



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01517/2014

THE IMMIGRATION ACTS

**Heard at Manchester Crown Court
On 19 August 2015**

**Decision & Reasons Promulgated
On 23 September 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

**OR
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Schwenk, Counsel instructed by WTB Solicitors

For the Respondent: Mr G. Harrison, Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. 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 his 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.

DECISION AND REASONS

Background

1. The appellant appealed against the respondent's decision to deport him from the UK. First-tier Tribunal Judge Devlin dismissed the appeal in a decision promulgated on 12 May 2015. The Upper Tribunal granted permission to appeal on 15 June 2015.
2. The appellant's grounds of appeal assert that the First-tier Tribunal Judge failed to adequately assess the law and evidence relating to the risk on return to the appellant's country of nationality as a gay/bisexual man. The grounds argue that the First-tier Tribunal Judge placed too much weight on the fact that, despite the fact that the law criminalises homosexual acts with a penalty of up to 10 years in prison, there was no evidence of prosecutions in the appellant's country of nationality in recent years. The grounds went on to argue that the evidence showed that the appellant lived discreetly because he feared for his safety and to avoid prosecution. The First-tier Tribunal Judge failed to properly assess whether the treatment he would face on return amounted to persecution.
3. The appeal now comes before the Upper Tribunal to decide whether the First-tier Tribunal decision involved the making of an error on a point of law.
4. The appellant was unable to attend the hearing. He is still a serving prisoner. The Upper Tribunal sent a production order to the relevant authorities on 25 June 2015. The appellant was not produced on the morning of the hearing. Further enquiries revealed that there was no plan to produce him and that it was unlikely that arrangement could be made for the appellant to be produced for the hearing that day. The situation was highly unsatisfactory. The appellant was entitled to attend the hearing if he wanted. However, Mr Schwenk accepted that it was not strictly necessary for the appellant to attend in order for him to put the case. The appeal would proceed by way of submissions and he did not need to take any instructions.
5. Before I decided whether to proceed with the hearing I asked whether it would be possible for the appellant's solicitor to contact the appellant to take instructions. I was told that she had been able to speak to the appellant and that he was content for the appeal to proceed in his absence. At the end of the hearing the Tribunal apologised to the appellant's representative once again for the failure to produce him for the hearing. After the hearing I asked for further enquiries to be made with DEPMU and HMP Manchester as to why the appellant had not been produced despite the fact that the Tribunal had made a production order.
6. I heard submissions from both parties and have taken a record of proceedings. The submissions will be incorporated into my findings where relevant.

Decision and reasons

7. After having considered the grounds of appeal and oral arguments I am not satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.
8. In a lengthy and detailed decision, the First-tier Tribunal Judge properly directed himself to the four stage test set out by the Supreme Court decision in *HJ (Iran) v SSHD* [2011] 1AC 596, which Lord Roger explained as follows:

“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.”

9. No challenge has been made to the First-tier Tribunal Judge’s findings of fact. The First-tier Tribunal Judge set out the evidence relating to the appellant’s sexuality in an enormous amount of detail [137-338]. Despite

the lengths he had gone to he found it difficult to reach a firm view on the evidence [339]. However, he went on to set out adequate reasons his finding that the appellant had failed to produce sufficiently reliable evidence to support certain aspects of his account [340-362]. After having considered all the evidence in the round the First-tier Tribunal Judge was prepared to accept that the appellant was bisexual although he was not satisfied that the evidence showed that he was “predominantly homosexual” [360]. The First-tier Tribunal Judge was not satisfied that there was sufficient evidence to show that the appellant had ever been in any long term gay relationships or that he had been as active in the gay community in the UK as he claimed [361]. In light of those findings he accepted that the appellant met the first requirement of the test set out in *HJ (Iran)*.

10. The First-tier Tribunal Judge went on to consider the second stage of the test i.e. whether gay people who live openly in the appellant’s country of nationality would be subject to treatment sufficiently serious to amount to persecution. He considered the background evidence relating to the treatment of gay or bisexual men in the appellant’s country of nationality in some detail [372-391]. Mr Schwenk accepted that the First-tier Tribunal Judge’s summary of the evidence was fair. In light of that evidence the First-tier Tribunal Judge concluded that there was legislation that criminalised homosexual activity between men, which provided for a punishment of a term of imprisonment of up to 10 years. However, he noted that there was evidence to show that there had been no reported instances of anyone being prosecuted under the legislation “in recent years”.
11. The First-tier Tribunal Judge concluded that, while there was evidence of “a level of societal disapproval” of homosexuality in the appellant’s country of nationality, there was little evidence of violent attacks against gay men although discrimination remained a problem. The evidence showed that there was an LGBT community in the appellant’s country of nationality and some LGBT organisations operated there albeit that societal disapproval of homosexuality sometimes impeded the operation of such organisations and the free association of gay men. He noted that the evidence showed that a number of gay men lived openly there and did not, in general, suffer serious harm amounting to persecution [392]. After having considered the background evidence in the round the First-tier Tribunal Judge concluded that the level of societal disapproval, violence, harassment and intimidation of gay men did not reach the degree of prevalence or seriousness required to show a real risk of persecution to openly gay men [393]. For these reasons he concluded that the evidence did not show that the second limb of the test set out in *HJ (Iran)* was satisfied. Although he did not go on to make detailed findings in relation to the other limbs of the test he made clear that it followed from his findings that if the appellant were to live openly as a gay man in his country of nationality he would not be at risk of sufficiently serious ill-treatment that would amount to a breach of Article 3. If he chose to live discreetly it

would not be because his fear of persecution was well-founded or that there was a real risk of treatment amounting to persecution [396].

12. Mr Schwenk's submissions turned on a narrow point; whether the mere fact that homosexual acts are criminalised in the appellant's country of nationality was sufficient to give rise to a real risk of persecution within the meaning of the Refugee Convention. He noted that the respondent relied on the Court of Justice decision in *X, Y and Z v Minister voor Immigratie en Asiel* [2014] 3 WLR 770. He argued that the decision showed that the burden shifted to the respondent in cases where it was accepted that a person is gay. He referred to paragraph 58 of the decision, which states:

"58. In those circumstances, where an applicant for asylum relies, as in each of the cases in the main proceedings, on the existence in his country of origin on legislation criminalising homosexual acts, it is for the national authorities to undertake, in the course of their assessment of the facts and circumstances under Article 4 of the Directive, an examination of all the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied, as provided for in Article 4(3)(a) of the Directive."

13. He referred me to an extract from *Asylum Law and Practice: Immigration and Nationality Law* (2nd ed.) by Symes and Jorro, which referred to the treatment of laws that had fallen into desuetude.

"3.39 The tenor of modern refugee law is in favour of granting protection only against fears of harm that will in reality eventuate. Whether this trend will operate to wholly exclude fears of the future invocation of laws on the statute book but at present in desuetude, is difficult to predict. The possibility that such a law may operate so as, at the very least, to contribute to the presence of a well-founded fear of persecution should not be lightly rejected given the undoubted subjective nature of 'persecution'. Schiemann LJ recognised the persecutory nature of such a sword a Damocles in *Jain* though the approach of the Court of Appeal in *Z, A and M* was to consider this factor as one element of the whole. On the other hand, if it appears that the law is on the statute book there may well be an evidential burden on the Secretary of State to show that it is inoperative."

14. Mr Schwenk also relied on a further judgment of Schiemann LJ in *Adam v SSHD* [2003] EWCA Civ 265, where he stated:

"12. Miss Plimmer submits that the approach of the IAT in paragraph 16 of their determination is not supportable. The Country Assessment states in paragraph 5.69 that "the penalty for refusing to perform military service is a fine and up to three years imprisonment...". This document was produced by the Home Office and placed before the adjudicator by their representative. In those circumstances to place a burden on the appellant to show that there is a real risk that this penalty would be imposed on him is unfair. I agree. It may well be that circumstances can arise when a law is shown to be never enforced in which case there would be no real risk to a citizen that he would be imprisoned pursuant to it. But, for my part, I do not consider that it was open to the IAT to conclude from the evidence before it that the present was such a case."

15. He relied on those sources to argue that it would only in circumstances where a law has fallen into desuetude to the extent that a decision maker can be sure that a person is not going to be persecuted that a person could be returned. He argued that the First-tier Tribunal Judge failed to appreciate that the burden was on the respondent to show that, even though homosexuality is criminalised in the appellant's country of nationality, the law would not be enforced.
16. Mr Schwenk developed his argument with reference to Article 9 of the Qualification Directive (2004/93/EC). Article 9(2)(b) states that acts of persecution can take the form of legal measures that are in themselves discriminatory or are implemented in a discriminatory manner. Article 9(2)(c) also states that acts of persecution could include prosecution or punishment, which is disproportionate or discriminatory.
17. The purpose of the Refugee Convention is to protect those who have a well-founded fear of persecution. It is trite law that a subjective fear of persecution is insufficient and that the person's fear must have some objective grounding in order for it to be "well-founded". The assessment of whether a person's fear of persecution is well-founded normally begins with consideration of his account. A decision maker will assess whether his statements are coherent and plausible and do not run counter to the available specific and general information relevant to his case. The decision maker will also consider whether the person has made a genuine effort to substantiate his claim or has provided a reasonable explanation for any lack of relevant material. The fact that a person has been subjected to persecution or serious harm in the past will be regarded as a serious indication of the person's well-founded fear of persecution unless there are good reasons to conclude that such serious harm would not be repeated. In most cases risk on return is also assessed by reference to background or expert evidence relating to the conditions prevailing in the person's country of nationality.
18. Because of the potentially serious nature of the consequences the standard of proof in an asylum claim is low. However, the person must still show that there are substantial grounds for believing that he would be at real risk of serious harm if returned to his country of nationality. In other words the person must show that there is at least a reasonable degree of likelihood of the feared harm occurring and that the feared harm is sufficiently serious to reach the required threshold to amount to persecution within the meaning of the Refugee Convention. A protection claim is not well-founded where the risk of serious harm is not reasonably likely to happen or where there is a real risk of harm that is not sufficiently serious in nature.
19. The arguments put forward by Mr Schwenk amount to little more than well-known principles relating to the evidential burden of proof. If a person who is seeking protection produces evidence to support his claim to be at real risk of serious harm, if the respondent does not accept the evidence, it is for her to give adequate reasons to explain why the evidence is not

accepted or she should produce further evidence in rebuttal. But the overall burden of proof, albeit a low one, remains on the person who claims that they would be at risk if returned to their country of nationality.

20. Mr Schwenk is correct to point out that Article 9(2) of the Qualification Directive states that acts of persecution can include discriminatory legal measures as well as prosecution or punishment, which is disproportionate or discriminatory. But Article 9(1) makes clear that acts of persecution must be sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, or that an accumulation of various measures must be sufficiently severe to affect the individual in a similar manner.
21. He was unable to refer me to any specific authority to support the argument that the mere existence of a law prohibiting homosexual acts is sufficient, without more, to reach the minimum level of severity required to found a protection claim. The decision in *X, Y and Z* is in fact quite clear on the point. The case concerned the proper interpretation of Article 9 of the Qualification Directive. The applicants came from countries where homosexual acts are criminalised. The court noted that the right to respect for private and family life under Article 8 of the European Convention of Human Rights was not a fundamental right from which no derogation is possible.
22. The court concluded that the mere fact that there is in existence legislation criminalising homosexual acts does not affect an applicant in a manner so significant that it reaches the minimum level of severity required to constitute persecution within the meaning of Article 9(1) [55]. But a term of imprisonment that accompanies a legislative provision would be capable of constituting an act of persecution “provided that it is actually applied in the country of origin” [56]. The court went on to state that, in considering whether a protection claim is well-founded, the national authorities should undertake an assessment of the relevant facts concerning the applicant’s country of nationality “including its laws and regulations and the manner in which they are applied” [58]. I do not consider that this equivalent to shifting the burden of proof as Mr Schwenk contends but it merely forms part of the anxious scrutiny required in every protection claim. The court found that, when undertaking that assessment, the authorities must determine whether the term of imprisonment provided for by the legislation is applied in practice in the applicant’s country of nationality and went on to conclude:

“61. Having regard to all of those considerations, the answer to the third question is that, in each of the cases in the main proceedings, Article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a

punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.”

23. The principles outlined above show that the question of whether a law criminalising homosexual acts is sufficient to amount to persecution for the purpose of the Refugee Convention will depend on the evidence and the facts of each case. The applicant must show that there is at least a reasonable degree of likelihood of the law being enforced. If the evidence shows that there is a real risk of prosecution then the claim is likely to succeed. If the evidence shows that the law is likely to have fallen into desuetude then the fact that it remains on the statute book is unlikely, without more, to found a protection claim. Mr Schwenk argued that the mere fact that a law remains on the statute book is still likely to give rise to a fear of prosecution and may lead the appellant to modify his behaviour as a result. But if the fear of prosecution is not well-founded then this is insufficient for the purpose of recognition under the Refugee Convention.
24. In light of the principles outlined above I turn to consider whether the First-tier Tribunal decision involved the making of an error on a point of law. The First-tier Tribunal Judge was ambivalent about the appellant’s claimed sexuality and the extent of his involvement in the gay community in the UK. Although he was satisfied on the low standard of proof that the appellant was likely to be bisexual he was not satisfied that he was “predominantly homosexual”. He considered the background evidence relating to the treatment of LGBT people in the appellant’s country of nationality in some detail. He considered the source and what weight to place on each piece of evidence. While the evidence showed that there is societal disapproval against LGBT people there was evidence to show that no known prosecutions have taken place in his country of nationality “in recent years”. The First-tier Tribunal Judge noted that there was some evidence to show that discrimination occurs but concluded that there was little evidence to show a pattern of violence against LGBT people.
25. I am satisfied that the First-tier Tribunal Judge conducted a fair appraisal of the evidence before him. It was open to him to conclude that the evidence did not show that there was a real risk of prosecution despite the fact that there is a law that criminalises homosexual acts. It was also open to him to conclude that while there was evidence of societal discrimination, and that there might be some isolated incidents of violence, taken as a whole, the evidence did not show that there was a real risk of serious harm that was sufficiently serious to amount to persecution for the purpose of the Refugee Convention. It is understandable that the appellant disagrees with the decision but the First-tier Tribunal Judge’s findings were within the range of reasonable responses and do not disclose any errors of law.
26. I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law and that the decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

The appeal to the Upper Tribunal is dismissed

Signed 

Date 22 September 2015

Upper Tribunal Judge Canavan