



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/00285/2012**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 11 May 2016**

**Decision Promulgated
On 20 May 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

**S D
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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.

Representation:

For the Appellant: Mr A. Gilbert, Counsel instructed by Rahman & Company
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant appealed against the respondent's decision to refuse to grant leave to remain on asylum and human rights grounds. First-tier Tribunal Judge Scott-Baker dismissed the appeal in a decision dated 20 April 2012. The Upper Tribunal found that the decision involved the making of a material error of law because the judge failed to give adequate reasons for rejecting the unchallenged evidence of a witness who gave evidence as to the appellant's sexual orientation. The First-tier Tribunal decision was set aside.
2. The appeal was listed for a further hearing and designated as a country guidance case. A panel of the Upper Tribunal considered the evidence of several expert witnesses as well as background evidence relating to Turkey. The panel outlined country guidance on the issue of military service and sexual identity. The Upper Tribunal also made findings in relation to the facts of this specific case but concluded that the appellant would not be at risk on return and dismissed the appeal.
3. The appellant applied for permission to appeal to the Court of Appeal against the Upper Tribunal's findings relating risk on return but did not seek to challenge the country guidance element of the decision. The parties agreed that the Upper Tribunal failed to give adequate reasons for concluding that the appellant would exercise restraint on return and failed to make adequate findings relating to risk of identification during military service. The appeal was remitted to the Upper Tribunal by consent in order for the decision to be remade.

Country guidance

4. The country guidance given in the earlier decision in this case was not subject to challenge. In *SD (military service - sexual identity) Turkey* CG [2013] UKUT 00612 the tribunal considered a number of pieces of expert evidence alongside relevant background evidence and came to the following conclusions:
 - (1) All Turkish males are required to undergo military service but exemption can be granted on the grounds of physical or mental disability which includes "sexual identity disorder".
 - (2) Homosexuality is regarded by the Turkish army as a sexual identity disorder but the perception of homosexuality in Turkey is not reduced to a person's sexual preference but is informed by an assessment of his whole personality including his outward appearance and behaviour. It is associated with the passive role which is seen as unmanly whereas taking the active role does not attract the same disapproval and is not considered to undermine the essence of manliness.

- (3) The exemption process for determining whether a recruit is entitled to exemption generally includes intrusive requirements which do not properly respect the human dignity of someone whose sexual identity would qualify him for exemption such that it can properly be categorised as degrading and involving a real risk of a breach of article 3.
- (4) If during his military service a recruit (whether he has not sought exemption or has been refused) is discovered or is perceived to be homosexual as understood in Turkey, there is a reasonable degree of likelihood of ill-treatment of sufficient severity to amount to persecution on the basis of his sexual identity and there is no sufficiency of protection. The risk of such discovery or perception arising during his service will require a fact sensitive analysis of an individual's particular circumstances including his appearance and mannerisms, the way in which he describes his sexual identity, the extent to which he fits the stereotype of a homosexual as understood within Turkish society and the extent to which he will conceal his sexual identity for reasons not arising from a fear of persecution.
- (5) Any such risk likely to arise during service is not negated by the fact that there is an exemption process as that process itself carries a real risk of a breach of article 3.
- (6) MS (Risk- Homosexual) Turkey CG [2002] UKIAT is no longer to be regarded as providing country guidance.

Issues to be determined

5. The decision in SD (Turkey) set out the factual background to the claim in some detail. During the course of proceedings a number of factual findings have been made, which it is agreed shall stand. The scope of the appeal now before the Upper Tribunal is narrowed considerably. At the beginning of the hearing both parties agreed the following:
 - (i) It is accepted that the appellant is bi-sexual.
 - (ii) The assessment of risk on return is confined solely to military service in light of the Upper Tribunal's earlier finding that the evidence relating to the general conditions in Turkey for gay men did not give rise to a real risk of serious harm [110].
 - (iii) It is accepted that the appellant is liable to do military service in Turkey.
 - (iv) It is accepted that the appellant should not be required to undergo a degrading application for exemption from military service on grounds of his sexual orientation, which the Upper Tribunal found would amount to a breach of Article 3 [111(iii)].
 - (v) The first question for determination by this tribunal is whether the appellant is likely to act discreetly during military service, and if so, why.
 - (vi) The second question is whether, even if he acted discreetly, his sexual identity is likely to be discovered. In such circumstances the Upper Tribunal concluded that a person would be at risk of serious harm [111(iv)].

Legal Framework

6. It is uncontroversial that the relevant legal framework was set out by Lord Hope in *HJ (Iran) v SSHD* [2011] UKSC 31:

“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, 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 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.”

Findings and reasons

7. The first two questions identified in *HJ (Iran)* are satisfied in this case. It is accepted that the appellant is bisexual. It is also accepted that if he carried out military service openly as a bisexual man that there is a real risk of serious harm.
8. The appellant’s evidence is that he would seek to hide his sexual identity during military service i.e. he would be discreet. The central question for determination in this appeal is why he would do so. If it were for reasons of military discipline or as a result of social conservatism his discretion would not engage the Refugee Convention. If he acted discreetly because he feared that he would suffer serious harm then he is entitled to the protection of the Refugee Convention.

9. A number of credibility issues were raised by the respondent in the original reasons for refusal letter including points relating to the appellant's immigration history, the delay in claiming asylum and doubts about his initial claim to have been tested as HIV positive, which turned out to be unfounded following a more recent test. Some of these initial concerns were used to reject the core aspects of his claim to be at risk on return. Mr Whitwell accepted that a number of factual findings have been made during the course of the appeal proceedings. He argued that the above issues were still relevant to the appellant's overall credibility and whether his claim that he would act discreetly for fear of persecution could be believed.
10. I have had the opportunity of hearing evidence from the appellant. He gave his evidence in an open and unhesitating way that was broadly consistent with his previous statements and other evidence that has been considered by the tribunal. The fact that he overstayed his student visa, knowingly remained in the UK for a number of years without leave, and only claimed asylum when he came to the attention of the authorities through a random incident, are all matters that are capable of casting doubt on his overall credibility.
11. However, in the context of the narrow issues that I am required to determine I find that the appellant's evidence is credible. His account of various relationships with men and women over the years has been relatively detailed and consistent. While he states that he exercises a level of discretion in discussing his sexual orientation nothing in the evidence suggests that he seeks to hide his sexuality as a result of social conservatism. It appears that he is open about socialising with friends in gay bars and clubs and that he also socialises in less overt ways with groups of friends. The appellant says that he would not disclose his sexuality to people he does not know very well but as friendships develop he does not seek to hide who he is either. He says that he is able to be open about his sexuality in the UK if he so chooses. His description of how he lives his life in the UK is entirely consistent with the way in which most people would approach new friends or relationships where greater levels of intimacy develop over a period of time.
12. In contrast the appellant says that he would feel forced to conceal his identity if he was required to carry out military service in Turkey. Given that he is able to live openly as a bisexual person in the UK there is no reason to conclude that his reasons for doing so would be solely for reasons of military discipline or social conservatism. The evidence relating to the treatment of men who are perceived to be gay during military service satisfied the Upper Tribunal that there is a real risk of persecution if a person's sexual identity becomes known. The appellant is fully aware of that evidence. Despite his poor immigration history I am satisfied on the low standard of proof that the reason why the appellant would feel forced to conceal his sexual identity would be because of a fear of persecution. The appeal succeeds on that point alone.

13. In the alternative, I have also considered whether, even if the appellant chose to live discreetly for other reasons, whether it is reasonably likely that his sexual orientation would become known during the course of military service thereby placing him at risk. The appellant has given an account of discrimination and verbal abuse while he was at university in Turkey. In a fairly closed environment his sexual orientation became known even though, at the time, he did not live openly as a bisexual man. I am satisfied that in the closed environment of a military unit, even for a limited period of service of a number of months, it is at least reasonably likely that the appellant's sexual identity would become known to other members of the military. It is unlikely that he could live so closely with a number of other people without more intimate bonds developing and some information about his background being discovered.
14. It is accepted that the appellant is liable for military service and would be unable to apply for exemption without having to undergo a degrading assessment. I am satisfied that the appellant is able to express his sexual identity in an open way in the UK and that he would be unable to be open about his sexual identity during military service without attracting a real risk of serious harm. I accept that the main reason why the appellant would feel forced to act discreetly would be because of a fear of persecution and not because of the normal course of military discipline or for reasons of social conservatism. I find that even if he acted discreetly there is a serious possibility that his sexual identity would be discovered over the course of a number of months service in a closed environment.
15. For the reasons given above I conclude that there is a reasonable degree of likelihood that the appellant would be at risk of persecution for reasons of his membership of a particular social group if returned to Turkey.

DECISION

I re-make the decision and ALLOW the appeal

Signed



Upper Tribunal Judge Canavan
17 May 2016

Date