



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/00052/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at	Centre	City	Tower,	Decision	&	Reasons
Birmingham				Promulgated		
On 21st July 2017				On 02nd August 2017		

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

S A C

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Nadeem of Duncan Lewis Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge I F Taylor of the First-tier Tribunal (the FTT) promulgated on 8th March 2017.
2. The Appellant is a male citizen of Bangladesh born 3rd January 1980. He arrived in the UK on 11th December 2007 with leave to remain as a visitor. He overstayed and made a claim for asylum on 8th June 2016.

3. The asylum claim was made on the basis of his sexual orientation, in that he claimed to be a member of a particular social group, namely gay and bisexual males in Bangladesh.
4. The asylum and human rights application was refused on 7th December 2016 and the appeal was heard by the FTT on 1st February 2017.
5. The FTT found the Appellant to be gay, but did not find that he would be at risk if returned to Bangladesh, and therefore he was not entitled to a grant of asylum or humanitarian protection, and his removal from the UK would not breach his protected human rights.
6. The Appellant had been represented before the FTT, but submitted an application for permission to appeal without legal representation. The application for permission was made on the basis that the FTT had applied the wrong standard of proof. The Appellant contended that the appropriate standard of proof is a reasonable degree of likelihood, and the FTT had applied a higher standard, and this amounted to a material error of law such that the decision should be set aside.
7. Permission to appeal was granted by Designated Judge Shaerf, although no error of law was found to be disclosed in the grounds seeking permission. Permission to appeal was granted in the following terms;

“The sole ground for appeal is that the judge has applied the incorrect standard of proof. The judge set out the correct standard and burden of proof at paragraph 2 of the decision and so the grounds disclose no arguable error of law.

I have considered not only the specific grounds for appeal but also the entirety of the decision to see if it readily discloses an arguable error of law.

Having found the Appellant to be gay, the treatment of the evidence at paragraph 23 of the decision discloses an arguable error of law in the application of the jurisprudence in HJ (Iran) v SSHD [2010] UKHL 31 which the judge incorrectly cited or relied on as [2009] EWCA Civ 172 and so permission to appeal is granted.”

8. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. It was contended that the FTT directed itself appropriately, and had found at paragraph 32 that the evidence did not disclose a real risk of persecution to homosexuals in general. That being the case, HJ (Iran) does not have any application.
9. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

10. Mr Nadeem submitted that the FTT had obtained objective evidence after the hearing, and had not considered the objective evidence relied upon by the Appellant at paragraphs 27 – 34 of his witness statement dated 1st February 2017. The objective evidence referred to in the witness statement is the Country of Origin Information Report on Bangladesh dated 31st August 2013.
11. Mr Nadeem submitted that at paragraph 32, the FTT had found that although there was discrimination, intimidation and harassment of gay and bisexual men, and there were isolated incidents of horrific violence, this did not reach the high level required to amount to a real risk of persecution. Mr Nadeem contended that the FTT had failed to supply adequate reasons for concluding that there was no real risk of persecution.
12. Mr Nadeem also relied upon the grant of permission, contending that the FTT had not adequately considered the guidance in HJ (Iran).
13. Mr Mills submitted that the FTT had followed the guidance in HJ (Iran) and had answered the questions posed in paragraph 82 of that decision, although the FTT had dealt with the questions in a different order.
14. Mr Mills' view differed from the rule 24 response, in that he accepted that HJ (Iran) has relevance, but the FTT after finding that the Appellant was gay, should then have considered whether there would be a risk if he lived openly, and having found that such a risk was not proved, need have gone no further.
15. Mr Mills pointed out that there was no background or objective evidence contained within the Appellant's bundle before the FTT, and the Appellant had been legally represented. The Presenting Officer before the FTT had not submitted the most up-to-date objective evidence, which the FTT had obtained following the hearing, and which was the Home Office Country Policy and Information note on Bangladesh, sexual orientation and gender identity dated December 2016. Mr Mills pointed out that this contained independent background evidence.
16. In this case the FTT had commented upon the evidence relied upon by the Appellant in his witness statement as there were references proving this at paragraphs 21, 28 and 29 of the FTT decision. The FTT had dealt with all the evidence produced, and could not be criticised, and permission to appeal was not granted upon the point that the FTT had considered the most up-to-date objective evidence after the hearing.
17. In response Mr Nadeem submitted that Mr Mills had not addressed the inadequacy of reasoning at paragraph 32, and although Mr Nadeem had not raised as an issue the fact that the FTT had obtained up-to-date objective evidence after the hearing, he now raised the point that the FTT had not given the parties the opportunity to comment upon that objective evidence. I was asked to find that the FTT had materially erred in law and the decision should be set aside, and Mr Nadeem suggested that it may be

appropriate to consider this case as a country guidance decision if the decision of the FTT was set aside and was to be remade.

My Conclusions and Reasons

18. Permission to appeal was not granted on the one challenge that was made by the Appellant which related to the standard of proof. It is clear that the FTT adopted the correct standard and burden of proof. The grant of permission refers to paragraph 2 of the FTT decision, and in addition at paragraph 20 the FTT makes specific reference to the low standard of proof that applies in this case, and specifically refers to a reasonable degree of likelihood.
19. There was no challenge to the FTT considering objective evidence which had not been before it. I appreciate that the Appellant was not legally represented when he made his application for permission to appeal, but this did not form part of the submissions made by Mr Nadeem, until he responded to the submissions made by Mr Mills. It was then contended that neither party had been given an opportunity to comment upon the objective evidence obtained by the FTT, which was the December 2016 country Policy and Information note on Bangladesh, in relation to sexual orientation and gender identity.
20. In my view the general rule is that a Tribunal should only consider evidence that has been placed before it, which means that both parties can comment upon that evidence. However, in this case I do not find that relying upon the most up-to-date Country of Origin Information amounts to an error of law. The FTT considered the evidence that had been submitted by both parties. The conclusion of the FTT was that the evidence relied upon by the Appellant did not disclose that a gay or bisexual male in Bangladesh would be subject to persecution. I find that sustainable reasons for that conclusion were given.
21. Mr Nadeem submitted that the FTT had not considered the background and objective evidence relied upon by the Appellant. That information is referred to in paragraph 27 of the Appellant's witness statement dated 1st February 2007 and is the Country of Origin Information Report on Bangladesh dated 31st August 2013. I do not accept that the FTT did not consider this evidence. There is specific reference to that evidence at paragraph 21.
22. I do not find that the FTT materially erred in considering HJ (Iran) which is the point upon which permission to appeal was granted. The FTT did make reference to an incorrect citation at paragraph 16 but that without more is not an error of law.
23. The Supreme Court at paragraph 82 of HJ (Iran) provided guidance on the approach to be followed by a Tribunal when an applicant applies for asylum on the ground of a well-founded fear of persecution because he or she is gay. Firstly, the Tribunal must decide whether the individual is gay

or would be treated as gay by potential persecutors in the country of nationality.

24. If satisfied that the individual is gay the Tribunal must ask itself whether it is satisfied that gay people who live openly would be liable to persecution in the country of nationality.
25. If that is the case the Tribunal must then go on to consider whether the individual would live openly if returned. If the Tribunal concludes that the individual would live discreetly and avoid persecution it must ask why.
26. If the Tribunal concludes that the individual would live discretely because that is how he wished to live, then he would not be entitled to asylum.
27. If however the individual decided to live discretely because of a fear of persecution, then he would be entitled to asylum.
28. At paragraph 20 the FTT makes a finding that the Appellant is gay or bisexual.
29. The FTT does not then ask whether the Appellant would be liable to persecution but considers whether he would live freely and openly. Therefore the FTT does not follow the order of questions posed in HJ (Iran).
30. The FTT finds that the Appellant would not live openly if returned to Bangladesh because he fears the consequences.
31. Having reached this finding, the FTT goes on to consider whether the background and objective evidence indicates that the Appellant would be liable to persecution. Therefore the FTT is dealing with the second question posed in HJ (Iran).
32. The FTT then extensively considers the background evidence at paragraph 26. The conclusion is that LGBT individuals in Bangladesh suffer from discrimination, intimidation and harassment, but the evidence does not show that there is a real risk of persecution. I find that there are sustainable and adequate reasons given by the FTT for reaching this conclusion at paragraphs 26 – 32. My conclusion is that although the FTT did not follow the sequence of questions posed in HJ (Iran) the general principles were considered, and the FTT reached conclusions open to it on the evidence and gave adequate reasons for those findings.

Notice of Decision

The decision of the FTT does not disclose a material error of law. I do not set aside the decision. The appeal is dismissed.

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 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. This direction is made because the Appellant has made a claim for international protection.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

28th July 2017

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

28th July 2017