



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

Appeal Number: PA/08770/2016

**THE IMMIGRATION ACTS**

**Heard at Liverpool**

**Decision & Reasons  
Promulgated**

**On the 5<sup>th</sup> December 2017**

**On the 17<sup>th</sup> January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

**MR ALISHAABAN ALI MOHAMED  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr V Jagadesham, Counsel instructed by the Bury Law Centre

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by Mr Alishaaban Ali Mohammed against the decision of First-tier Tribunal Judge Devlin to dismiss his appeal against refusal of his Protection Claim.
2. The appellant originates from the Palestinian territory of Gaza. He was born on the 28<sup>th</sup> November 1993. He entered the United Kingdom on the 30<sup>th</sup> March 2009, aged 15 years, and was granted discretionary leave to remain as a minor. That leave expired on the 28<sup>th</sup> May 2011. It was the

respondent's refusal to grant him further leave to remain, on international protection and private life grounds, that led to the present appeal.

3. The basis of the appellant's application for further discretionary leave to remain, as well the grounds upon which he appealed the respondent's decision to refuse it, was that he had a well-founded fear of persecution on return to Gaza due to his homosexuality. The respondent accepted from the outset that the appellant was homosexual.
4. Judge Devlin accepted that there would be very significant obstacles to the appellant's integration in Gaza were he to live there openly as a gay man. He did not however accept that those difficulties amounted to a real risk of persecution. He therefore dismissed the appeal against refusal of the appellant's claim that he was in need of international protection. He nevertheless allowed the appeal on the ground that the appellant had met the requirements of paragraph 276ADE of the Immigration Rules and that his return to Gaza would thus be a breach of his right to respect to private life as guaranteed by Article 8 of the European Convention of Human Rights and Fundamental Freedoms. The present appeal challenges the dismissal of the appeal on international protection grounds. It also purports to challenge the basis upon which the judge allowed the appeal on Article 8 grounds. There is no cross appeal by the respondent against the decision to allow the appeal on private life grounds.
5. The grounds, upon which Mr Jagadesham helpfully expanded during the hearing, may conveniently be summarised as follows:
  - (i) The finding that the appellant was not at risk of being persecuted in the Palestinian territory of Gaza by living an openly gay lifestyle was contrary to the evidence and to his own finding that this would present very significant obstacles to his integration for the purposes of paragraph 276ADE;
  - (ii) Although the judge allowed the appeal under Article 8 on the basis that the appellant would face very significant obstacles to his integration on return to Gaza, he should have done so on the basis that the appellant met the criteria for a grant of indefinite leave to remain under the respondent's policy relating to those who have resided in the UK with discretionary leave for a period of 6 years.

I will take the grounds in turn.

6. In relation to the first ground, Mr Jagadesham accepted that he would need to meet the very high threshold of 'irrationality' in order to succeed. In seeking to persuade me that this threshold was met, he drew my attention to paragraph 152 of the judge's decision in which he accepted that Gaza presented, "a very challenging environment for openly gay men and that the level of societal discrimination is such that many gay men choose to shut themselves off from society altogether". The central thrust of Mr Jagadesham's submission was that this limited characterisation of

the background country information concerning the difficulties faced by gay men in Gaza was perverse, and that the only rational conclusion to be drawn from the totality of the evidence was that openly gay men were subject to systematic persecution by state and non-state actors alike. In support of this submission, he drew my attention to the relevant 'Country of Origin Information Report' (COIR) which referred to instances of many homosexuals being left with "no choice" but to close themselves off from society (a fact that was, as previously noted, acknowledged by the judge) before concluding that "the incidence of ill-treatment [on the basis of sexuality] is not insignificant". The judge had failed to deal with the evidence that gay people are sometimes coerced into working for the Palestinian police and are suspected of being collaborators with the Israelis. Insofar as there was an absence of evidence of specific acts of persecution, the judge failed to have regard to the possibility that the climate of fear was such that gay people were too afraid to report them. For the judge to subject the expert report to his own critical analysis, in circumstances where the Presenting Officer had not done so, "verged on unfairness". The judge had been selective in his references to the background country information and the passages that he had quoted were incomplete and misleading. The judge should have treated the absence of a large, robust and accessible LGBTI activist and support network as indicative of a climate of persecution of gay men in Gaza.

7. Mr Bates submitted that given the absence of any personal experience by the appellant of persecution in Gaza, from which he has been absent since 2000, he would have to demonstrate that the background country information established that all openly gay men in Gaza were at risk of persecution. The judge was entitled to conclude that the evidence fell short of establishing that this was the case.
8. I agree with Mr Bates submission. I am satisfied that it was reasonably open to the judge to conclude, on the material before him, that it had not been established that there was a reasonable degree of likelihood that those who belong to the appellant's particular social group were at risk of persecution in Gaza. I begin by noting that the judge correctly directed himself by reference to the UNHCR handbook on Determining Refugee Status concerning the circumstances in which the cumulative effect of discrimination may amount to persecution [paragraphs 131 and 132]. He also undertook a careful and detailed analysis of the evidence in a decision that contains 164 paragraphs and extends to some 29 pages. I do not accept the suggestion that it was unfair of the judge to highlight the shortcomings in Dr Fateh's report simply because the Presenting Officer had not done so. The principle of fairness is (among other things) intended to ensure that points are not taken against an appellant without first giving him the opportunity to address them. A professional witness, on the other hand, is under a duty to the Tribunal to provide an impartial opinion. This involves not only drawing attention to the evidence that supports his or her opinion, but anticipating that which might be considered to tell against it. The judge was in my view entitled to conclude that the background country information did no more than establish that Gaza

provides a challenging environment for openly gay men such that the appellant would face very significant obstacles to his integration. Indeed, the judge's reference to a "challenging environment" was one that he adopted from one of the sources of information that was before him. I also reject the suggestion that the judge ought to have considered the possibility that the limited evidence of openly gay men being visited with acts of violence was due to them being too afraid to report it. On the contrary, the judge would doubtless have been accused of speculation by the respondent had he done so. Whilst it is true that the judge did not make specific reference to gay men being coerced into working for the Palestinian police and of being suspected of collaboration with the Israeli authorities, it is also true that the evidence did not suggest that they suffered specific acts of persecution as a result. The judge was not in any event bound to refer to each and every facet of the voluminous background country information that had been presented to him. This observation applies equally to the complaint that the judge made selective and incomplete references to that evidence. Whilst a strong LGBTI activist and support network may be said to militate against openly gay men being at risk of persecution in any given country, it was equally open to the judge to conclude that its absence was not indicative of the existence of such a risk when viewed within the context of the evidence as a whole. Thus, far from the judge's conclusion being irrational, I am satisfied that it was the result of a detailed and cogent analysis of the totality of the evidence. I therefore turn to consider the second ground.

9. I am not satisfied that it is open to the appellant to challenge the judge's decision to allow his appeal on Article 8 grounds simply because he arrived at that decision by a different route to that which had been urged upon him. As previously noted, the judge allowed the appeal on the basis that the appellant would face very significant difficulties to his integration on return to Gaza due to his wish to live as an openly gay man. I note that Mr Jagedesham did not seek to argue before me that this conclusion was perverse. Rather, he submitted that the judge ought instead to have allowed the appeal on the basis that it is the respondent's policy to grant indefinite leave to remain to those who have resided in the UK with discretionary leave to remain for a period of 6 years. It is easy to see why the appellant would have wished to succeed on this basis rather than under paragraph 276ADE of the immigration rules, given that the latter leads only to a grant of limited leave to remain for a period of 3 years as opposed to one of leave to remain indefinitely. Mr Jagedesham sought to persuade me that the relevance of the appellant meeting the terms of the policy (which, incidentally, Judge Devlin found that he did not) was that it meant that there was no public interest to set against the appellant's right to respect for private life when conducting the balancing exercise under Article 8. However, I am satisfied that this is simply an artificial attempt to resurrect the now-repealed provision of section 84 of the 2002 Act that formerly permitted an appeal against a decision by the Secretary of State that was contrary to her own policy to be allowed on the ground that it was "not in accordance with the law". In my view, the only appropriate

remedy in such circumstances is now one of judicial review. I am fortified in reaching this conclusion by the fact that the appellant's representatives have issued a pre-action protocol letter prior to pursuing precisely this remedy. I therefore conclude that the correctness or otherwise of Judge Devlin's conclusion that the appellant did not in any event meet the requirements for indefinite leave to remain under the policy was entirely immaterial to the outcome of the appeal.

**Notice of Decision**

10. The appeal is dismissed.

No anonymity direction is made.

Judge Kelly

Date: 13<sup>th</sup> January 2018

Deputy Judge of the Upper Tribunal