



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/45836/2013

THE IMMIGRATION ACTS

Heard at Field House
On 20 June 2014

Determination Promulgated
On 26 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

JULIAN DARIO CASTRILLON HOYOS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Fisher, Counsel instructed by M Reale Solicitors, London
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Colombia whose date of birth is recorded as 2 September 1986. He was granted a visa as a student on 3 September 2004 and thereafter his leave was renewed on several occasions until on 23 May 2013 he applied for a residence card as a person in a durable relationship having regard to the Immigration (European Economic Area) Regulations 2006.

2. On 22 September 2013 the Secretary of State decided to refuse the application and the Appellant appealed. The appeal was heard on 19 March 2014 by Judge A W Khan sitting as a First-tier Tribunal Judge at Richmond Magistrates Court.
3. When the matter came before Judge Khan, the basis of the Appellant's claim had changed. He was no longer in a durable relationship and so the Appellant sought to rely on his rights having regard to Article 8 of the European Convention on Human Rights.
4. The basis of the claim as advanced before Judge Khan was that the Appellant, having arrived in the United Kingdom in 2004 had been engaged in studies and then in August 2013 began a business, selling clothes. It was part of the Appellant's case that as a homosexual he would not have the freedom in Colombia which he was enjoying in the United Kingdom and would have to lead a "double life."
5. It was accepted that the Appellant could not succeed under paragraph 276ADE of the Immigration Rules and so he sought to rely on the wider considerations of Article 8.
6. Judge Khan did not accept that the Appellant was homosexual but went on to consider whether even if it were established that he was whether the Appellant should succeed under Article 8. Judge Khan came to the view that the Appellant's appeal should be dismissed.
7. Not content with the Determination and findings of Judge Khan, by Notice dated 11 April 2014 the Appellant made application for permission to appeal to the Upper Tribunal. A number of grounds were raised which are summarised at paragraph 4 of the grounds:
 - "i) The Judge failed to identify the standard of proof he was applying when making his finding;*
 - ii) The Judge failed to give proper consideration to the fifth consideration in the Razgar test (proportionality) and, in so doing, failed to give sufficient weight to material matters;*
 - iii) The Judge's finding that the Appellant is not "gay" is deficient for a lack of adequate reasoning, placing weight on immaterial matters and a failure to give sufficient weight to material matters."*
8. On 25 April 2014 Judge Simpson granted permission, though whilst not ruling out any of the grounds relied upon, did so, it would seem, because of the silence as to the burden and standard of proof in the Determination.
9. The Appellant was valiantly represented by Ms Fisher. She prepared a skeleton argument which runs to twelve paragraphs and I have had regard to it. At paragraph 7 it is submitted that the Judge, "Gave little consideration to the fact that

the Appellant has spent his entire adult life in the United Kingdom and has built up his private life whilst he has been lawfully here.”

10. By reference to the guidance in the case of *Ogundimu (Article 8 New Rules) Nigeria [2013] UK UT* and *MF (Nigeria) [2013] EWCA Civ 1192*, it was submitted that whilst the Immigration Rules are the starting point still a judge should go on to consider the wider aspect of Article 8 and at paragraph 11 of the skeleton argument Ms Fisher says in terms:

“It is therefore clear that the Court of Appeal accepted that there still had to be a two stage test.”

11. I deal firstly with the burden and standard of proof. In the strictest sense nowhere in the Judge’s determination does he say where the burden and standard of proof fell. However, the question that I have to determine is whether the judge in fact erred. I invited Ms Fisher to address me as to the various standards of proof which might have been applied. She agreed that there exists the criminal standard, the civil standard and the lower standard (applicable in asylum cases). Ms Fisher did not submit that the judge had applied any particular standard of proof but rather submitted that it was not possible to know from the determination what standard of proof had been applied. I do not agree. Mr Whitwell for the Secretary of State pointed to paragraph 6 of the Appellant’s own grounds which states:

“Whilst there is no need for trite law to be recited by Immigration Judges in their determinations on a routine basis, it is submitted that it is of fundamental importance that an Immigration Judge makes clear the standard to which he is measuring an Appellants and submissions.”

12. I find that reading the determination as a whole it is clear that the judge has applied the appropriate civil standard to the material findings which were to be made. As to the issue whether or not the Appellant was homosexual which the judge did not find established, that adverse finding is not material because at paragraph 19 of the determination the judge proceeded on the alternative basis that the Appellant had established that he was homosexual. What is more at paragraph 24 of the determination when pulling together the various strands following his findings, the judge uses both the words “proportionate” and “disproportionate.” It is clear reading the determination as a whole that the judge understood that there was a balancing exercise to be done.

13. Where the burden of proof lies clearly matters when the evidence is found to be evenly balanced or equivocal. But where the judge finds that it is not evenly balanced then it does not matter in any real sense where the burden of proof lies in a case such as this since whoever had the burden, the case would have resulted in the same finding. Further reading paragraph 24 of the determination in the context of the determination as a whole the following:

“...However, any interference in it [private life] would be in accordance with the law, in pursuit of the permissible aims set out under Article 8(2) namely the

economic wellbeing of the country, in this case immigration control and entirely proportionate to such permissible aim."

Gives further support to the finding that the judge knew where the burden of proof lay.

14. Though Ms Fisher relied on the cases of Ogundimu and MF Nigeria, there is other guidance which is material to this case. I refer to two cases in particular: Gulshan (Article 8 - New Rules - Correct Approach) [2013] UK UT640 and Patel and Others v Secretary of State for the Home Department [2013] UK SC72. As to Gulshan, the relevant point of law can be taken from the head note at (b) which reads:

"After applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

15. Whilst Gulshan is a decision of the Upper Tribunal, there is guidance to be found in the case of Patel. At paragraph 57 Lord Carnworth said that: *"It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules which may be unrelated to any protected human right. The merits for decision not to depart from the rules are not reviewable on appeal."*
16. It was also said at paragraph 54 that the starting point for consideration of Article 8 is the Immigration Rule itself, though of course the possibility of looking to the wider application of Article 8 is clearly not ruled out by the speech of Lord Carnworth.
17. Given the guidance including R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900; R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 and more recently Shahzad (Article 8 - Legitimate aim) [2014] UK UT00085 what emerges is that the immigration rules amount to a complete code. However, where there is a situation not adequately contemplated by the rules then the wider aspect of Article 8 should be examined, which is another way of saying that unless there is "some compelling reason" it is not necessary to go further.
18. In this case I invited Ms Fisher to list for me all of those factors which she said were material to the Appellant's case and why the appeal should have been allowed. She listed six matters:
- 1) That the Appellant had lawfully been in the United Kingdom for 9½ years and therefore just six months short of the requirement in Paragraph 276B of the Immigration Rules.
 - 2) The Appellant has spent all his adult life in the United Kingdom having arrived when he was 18.

- 3) He has studied in the United Kingdom.
- 4) He has worked in the United Kingdom.
- 5) He has a number of relatives in the United Kingdom.
- 6) He has friends "In the gay scene" and he has private life friendships.

19. The difficulty which I see for Ms Fisher and the Appellant is that the judge was clearly aware of all of those factors. At paragraph 17 he says:

"In deciding whether the Appellant has severed his ties to Colombia, I have looked at the whole of the evidence in the round. I accept that the Appellant has been living in the UK since 2004 when he was 18 years old and that he has obtained a number of educational qualifications and has been working in the UK. There is therefore clearly a private life but I am not satisfied that he has no ties in Colombia, including social, cultural or family ties. The Appellant speaks Spanish, the language of Colombia and he has kept in touch with his family there. It seems the real reason why the Appellant does not want to return to Colombia is because of his sexual orientation and he claims he would not be able to practice this freely."

20. As I have already said, the judge did not accept that the Appellant had established that he was homosexual but that is not material because as I have also said, from paragraph 19 onwards the judge examined the risks to the Appellant were he to return to Colombia. He used the case of HJ (Iran) [2010] UK SC31 which provides guidance in the case of those claiming refugee status but nevertheless that the judge considered how the Appellant might be affected as a homosexual in Iran cannot, in my judgment be criticised. Indeed he was right to do that. It goes to the Appellant's moral and physical integrity; something which Ms Fisher said the judge had had insufficient regard to. I do not agree. The judge has gone to some lengths to consider how the Appellant's life might be different in Colombia. Ms Fisher submitted that the judge had misapplied HJ (Iran) because whilst the Appellant lived openly as a homosexual in the United Kingdom it was his case that he would not be able so to do in Colombia. But the House of Lords set out the appropriate test at paragraph 35. The first question to determine was whether or not the applicant was indeed gay. The judge proceeded on that basis from paragraph 19. It is then necessary to look at the situation on return but it would not be sufficient to say that an applicant would not be able to do in the country of his nationality everything he can do openly in the country whose protection he seeks. Nevertheless if it were found that the applicant would conceal aspects of his sexual orientation it is necessary to see whether that is in response to social pressures or for cultural or religious reasons of his own choosing rather than fear of persecution. The judge addressed these questions at paragraphs 20 and 21. I accept that it was not necessary for the judge to go so far as to consider whether the Appellant would be persecuted in his consideration of the moral and physical integrity aspect of the claim but Ms Fisher agreed that applying the five stage test in Razgar, once the Appellant raised his sexual orientation it was not inappropriate for the judge to ask himself whether there was a risk of persecution because it would go to the third

question in Razgar namely whether the decision of the Secretary of State was in accordance with the law. It would not be in accordance with the law if the Appellant were indeed a refugee since it would be unlawful to remove him.

21. Ms Fisher however takes a different point. She submits that the issue of refugee status was not raised. The burden of the Appellant's submission was that the fact that he was homosexual went to his moral and physical integrity and it did not matter that he would not be persecuted but was a factor that in the round had to be considered in determining the fifth question in Razgar namely whether it was proportionate to require the Appellant to leave the United Kingdom. Contrary to the ground, it is clear to me that the judge did have in mind the five stage test in Razgar. Paragraph 24 clearly goes to that as does the use of the words "proportionate" and "disproportionate."
22. I do not find anything perverse or irrational in the approach taken by the judge. It is not for me to decide whether a different judge presented with the same facts would have come to a different view. I find that the findings made by the judge were open to him. Whether it is proportionate for someone to be required to leave the United Kingdom is ultimately a finding of fact. The judge did take into effect, in my judgment, the relevant factors and indeed all of those which were raised by Ms Fisher. He took as his starting point the Immigration Rule and indeed contrary to what is submitted, the judge in fact did go to the wider aspect of Article 8 because he did not simply stop at the Immigration Rule which the Appellant could not meet but rather considered the evidence that was before him.
23. In all the circumstances I find that there is no material error of law. It is established that there is no such concept as a "near miss." The fact that the Appellant has lawfully been in the United Kingdom for 9½ years only assists insofar as it goes to the issue of proportionality. As I have said the judge recognised the length of time that the Appellant had been in the United Kingdom but nevertheless made findings that were open to him.

Decision

The appeal is dismissed.

Signed

Date 25.06.2014

Designated First Tier Tribunal Judge
(Sitting as a Deputy Judge of the Upper Tribunal)