



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

Appeal Number: IA/16137/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 July 2015**

**Decision and Reasons Promulgated  
On 24 July 2015**

**Before**

**Upper Tribunal Judge Southern  
Upper Tribunal Finch**

**Between**

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

Appellant

**and**

**SO**

Respondent

**Representation:**

For the Appellant: Ms Brockleby-Weller, Senior Home Office Presenting Officer

For the Respondent: Ms P. Solanki, instructed by Kiteleys, solicitors

**DETERMINATION AND REASONS**

1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge Troup who, by a determination promulgated following a hearing on 11 July 2014, allowed SO's appeal. Although, therefore, SO is now the respondent before the Upper Tribunal, for convenience of expression we shall refer to him as "the claimant".
2. It may be helpful to summarise briefly the claimant's immigration history and the history of proceedings that now brings the appeal before the Upper Tribunal. The claimant, who was born on 25 July 1982, is a citizen of Turkey. He arrived in the

United Kingdom in June 2008 and was admitted as a visitor. He then secured further leave to remain, first as a student and then under the European Community Association Agreement for the purpose of establishing a business as a painter and decorator. While an application for further leave in that capacity was pending, the claimant was found to be working impermissibly in paid employment with the result that his application was refused.

3. The claimant appealed to the First-tier Tribunal. The judge rejected his claim so far as it related to the Association Agreement but the appeal was allowed on the basis that there would be an impermissible infringement of rights protected by Article 8 of the ECHR if he were not granted leave to remain. The Secretary of State successfully appealed to the Upper Tribunal with the result that the appeal was remitted to the First-tier Tribunal for the Article 8 claim to be determined afresh.
4. That brought the appeal before Judge Troup on 11 July 2014 before whom the claimant pursued an asylum claim on the basis that he would be at risk on return to Turkey as a gay man. The judge produced what is, in a number of ways, a problematic determination, not least because the judge has conflated his summary of submissions and his findings so that it is not always easy to see which are which. The Judge concluded, at paragraph 24 of his determination:

“I find from the evidence that the circumstances of this Appellant are such that he would not be able to live discretely in Turkey even if he wanted to do so. He has a civil partner, that is to say the Sponsor who, perforce, would return to Turkey with him. It is highly unlikely that they could live together discretely disguising their sexuality even if they wanted to do so.

I find from the evidence before me that the Appellant would be unable to exercise his right to live freely and openly as a gay man without fear of persecution in Turkey and I grant the asylum appeal accordingly.”

The judge went on to allow the appeal on Article 8 grounds also, finding that to be the inevitable consequence of having allowed the appeal on asylum grounds:

“I have found that the Appellant is at risk of persecution in the event of return to Turkey. It follows that his removal would be unjustifiably harsh and thus Article 8 is engaged.”

5. The grounds pursued by the Secretary of State in challenging the determination are to the effect that the judge erred in failing to apply relevant country guidance found in *SD (Military Service - sexual identity) Turkey* CG [2013] UKUT (IAC) and that the determination is wholly unreasoned and fails to explain what was the evidential basis upon which the conclusions were reached.
6. For the reasons that follow, we have no doubt at all that the determination discloses material legal error such that the decision to allow the appeal cannot stand.
7. Although it is not in doubt that the country guidance provided by *SD* was before the judge, he made no reference to it, at all, in the determination and there is nothing to indicate that he had regard to it. Ms Solanki, who said everything that could possibly be said properly in an attempt to defend the determination, submitted that it was permissible for the judge to have no regard to *SD* because the focus in that case was upon risks faced by gay men in the context of military service

obligations, so that observations made by the panel about the position of gay men in society generally were *obiter* and therefore not something that the judge had to take into account. She pointed out that the Tribunal in *SD* itself distinguished between the findings that were offered as country guidance, in the section of the determination that followed a heading at paragraph 111 of “Country Guidance” and observations set out prior to that which were not replicated in the head note. She submitted also that most of the expert and documentary evidence was concerned specifically with the issue of military service which was not relevant in this appeal.

8. We are not persuaded by those submissions. The panel in *SD* heard evidence over two days. The schedule of evidence considered runs to six pages. It is a carefully written judgment that extends to more than 100 pages. Having observed at paragraph 104 that:

“In the light of the evidence about how homosexuality is perceived in Turkey, it does not follow that all homosexual or bisexual men will face difficulties ...”

The panel said at paragraph 110:

“We are only concerned with the specific issue of military service. For the sake of completeness, on the evidence before us we find that the general conditions in Turkey for gay men do not give rise to a real risk of persecution or treatment contrary to Article 3. As identified in the background evidence there are a number of gay rights organisations and NGOs offering advice and assistance, and Kaos GL not only provides shelter for those suffering from ill-treatment but also provides lawyers to provide legal support for LGBT individuals and provides printed material and a magazine distributed in 24 cities. It has also noted a degree of openness in being gay or LGBT among more educated people and in urban areas, and there is evidence of a gay scene in Turkey particularly in urban areas, and some coastal areas.”

9. Addressing Ms Solanki’s submissions in this regard, we recognise that paragraph 110 of *SD* falls outside the distillation of country guidance assembled at paragraph 111. But even if we proceed upon the basis that paragraph 110 was not, specifically, offered as country guidance, it still represented a clear finding of fact contained in a reported decision of the Upper Tribunal on the basis of its consideration of extensive evidence presented in a country guidance case. That meant that, as those findings were put before the judge, he needed to explain why he took a different and irreconcilable view. This he simply failed to do.
10. In fact, the judge failed to make any attempt to engage with any of the evidence before him or to offer any reasoned findings of fact. He simply set out his conclusions upon risk or return and a reading of the determination provides no indication of why he reached those conclusions.
11. The absence of any reasoned discussion or analysis of the evidence constitutes an error of law. It is a material error because we simply cannot be sure that the judge would have reached the same conclusion had he engaged with the evidence before him.
12. The reasoning in respect of the Article 8 claim is equally unsatisfactory. The novel application of a test of “unjustifiable harshness” does not inspire confidence that the correct approach was taken to this assessment and, in any event, as it is plain

that the decision on human rights grounds was predicated upon the legally flawed decision in respect of the claimant's protection claim, it follows that the decision to allow the appeal on Article 8 grounds cannot stand either.

13. Having informed the parties of our decision we invited submissions as to the onward conduct of the appeal. Ms Solanki urged us to remit the appeal for determination afresh by the First-tier Tribunal. Ms Brockleby-Weller made no submission, being content to leave that for the Upper Tribunal to decide. In our view Ms Solanki is correct to say that the appeal should be remitted for re-determination by a different judge of the First-tier Tribunal. That is because the nature of the errors we have identified in this determination are such that there has, effectively, been no determination at all of the issues in dispute between the parties and the Tribunal must receive oral evidence from two witnesses.

Summary of decision

14. The Secretary of State's appeal to the Upper Tribunal is allowed.
15. The First-tier Tribunal made an error of law and the determination of Judge Troup, dated 21 July 2014, is set aside.
16. The appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge of the First-tier Tribunal.

Signed  
Judge of the Upper Tribunal



Date: 16 July 2015