



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

Appeal Number: AA/10272/2015

**THE IMMIGRATION ACTS**

**Heard at Centre City Tower, Decision & Reasons Promulgated  
Birmingham  
On 27<sup>th</sup> April 2017  
On 08 May 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**L S  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mrs K Obayelu of Goshen Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant appealed against the decision of Judge Green of the First-tier Tribunal (the FTT) promulgated on 12<sup>th</sup> February 2016.
2. The Appellant is a male Indian citizen born in 1992. He arrived in the United Kingdom on 13<sup>th</sup> January 2011 having been granted a visa as a Tier 4 Student. His leave was subsequently extended until 27<sup>th</sup> June 2015. However because the college at which he was a student had its Sponsor

licence revoked, the Appellant's leave to remain was curtailed so that his leave expired on 6<sup>th</sup> February 2015.

3. On 15<sup>th</sup> January 2015 the Appellant claimed asylum on the basis of his membership of a particular social group, that being his sexual orientation. The Appellant is gay.
4. The Respondent refused his asylum and human rights application on 14<sup>th</sup> July 2015. The Appellant's appeal was heard by the FTT on 8<sup>th</sup> February 2016.
5. The FTT found that the Appellant is gay, and that he could not return to his home in India, because of his fear of his father and brother. However, the FTT found that it would not be unduly harsh for the Appellant to relocate internally to a major city within India. The FTT found that the Appellant was not at risk because of the reasonable option of internal relocation, and he was not entitled to a grant of asylum or humanitarian protection, and his removal from the United Kingdom would not breach Articles 2 or 3 of the 1950 European Convention on Human Rights (the 1950 Convention).
6. The FTT considered the Appellant's family and private life pursuant to Article 8 and it was accepted that the Appellant had established family life in the United Kingdom with his partner who is a Pakistani Muslim and who has been granted refugee status in the United Kingdom. However the FTT considered that there were no insurmountable obstacles to that relationship continuing in India. The FTT found the Respondent's decision to be proportionate and the appeal was also dismissed with reference to Article 8.
7. The Appellant applied for permission to appeal to the Upper Tribunal. Judge Brunnen granted permission on one ground only, that being the consideration by the FTT of Article 8 and insurmountable obstacles. Judge Brunnen found it arguable that in finding no insurmountable obstacles the FTT had failed to take into account that the Appellant's partner is not only gay, but also a Pakistani Muslim, and that consideration of these additional characteristics might lead to a different conclusion. It was also arguable that the FTT had failed to give adequate reasons for finding that there were no insurmountable obstacles to family life continuing in India.

### **Error of Law**

8. On 27<sup>th</sup> January 2017 I heard submissions from both parties in relation to error of law and concluded that the FTT decision with reference to Article 8 must be set aside. Full details of the application for permission, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 3<sup>rd</sup> February 2017, promulgated on 14<sup>th</sup> February 2017. I set out below paragraphs 17 – 25 of that decision, which contain my conclusions and reasons for setting aside the Article 8 aspect of the FTT decision;

- “17. I indicated at the hearing that the FTT had materially erred in law in relation to consideration of insurmountable obstacles, and Article 8 outside the Immigration Rules. Therefore the FTT decision on those issues was set aside. Permission to appeal had not been granted on any other issue, and therefore the FTT findings in relation to risk on return were preserved.
18. My reasons for finding an error of law are as follows.
19. The FTT considered the Appellant’s family and private life at paragraph 31 finding that there were not insurmountable obstacles to family life continuing in India ‘for the reasons given above.’
20. At paragraphs 26 – 30 the FTT had considered whether the Appellant would be at risk on return to India because of his sexuality. The FTT found that the Appellant could not return to his home area because of his fear of his father and brother, but it would not be unduly harsh for him to relocate to a major city within India. Adequate reasons for these conclusions were given.
21. However, when considering internal relocation and whether this would be unjustly harsh, the FTT did not specifically consider the position of the Appellant’s partner. Consideration related to the Appellant only.
22. The Respondent’s guidance on insurmountable obstacles was before the FTT, and as conceded by Mr Mills contained two factors which needed to be specifically considered by the FTT. I do not accept that these factors were adequately considered. I refer in particular to page 26 (page 91 of the Appellant’s bundle) of the guidance and the consideration of whether the Appellant’s partner had the ability to lawfully enter and stay in India. The guidance indicates that decision makers should consider country policy and information, and in relation to India that shows that same sex marriages are not recognised.
23. At page 27 of the guidance decision makers were advised to consider the position of a same sex couple where the partner would face substantial social discrimination or where his or her rights and freedoms would be severely restricted. If this amounted to a barrier which either could not be overcome or would present a very serious hardship to the partner, then this could amount to an insurmountable obstacle.
24. Although the FTT considered internal relocation perfectly properly, the FTT did not consider all relevant factors in relation to insurmountable obstacles, and failed to give adequate reasons for finding that insurmountable obstacles to family life continuing in India did not exist.
25. Having set aside the decision of the FTT, it was not possible to proceed further and re-make the decision as I accepted that further evidence would be needed from the Appellant and his partner, and no interpreter was available. The hearing was therefore adjourned. There will be a further hearing, which will consider the issue of insurmountable obstacles, and Article 8 outside the Immigration Rules. The findings of the FTT on all other issues are preserved.”

## **Re-Making the Decision - Upper Tribunal Hearing 27<sup>th</sup> April 2017**

### **Preliminary Issues**

9. I ascertained that the Tribunal had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. The Tribunal had received the Respondent's bundle with Annexes A - E, the Appellant's bundle containing pages 1 - 23, and the Appellant's bundle which had been before the FTT. In addition Mrs Obayelu submitted a skeleton argument dated 26<sup>th</sup> April 2017.
10. Mrs Obayelu indicated that oral evidence would be given by the Appellant and his partner. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

### **Oral Evidence**

11. The Appellant indicated that he wished to give his evidence in English, although an interpreter in Punjabi was present, and assisted the Appellant with his evidence when required. The Appellant adopted his witness statement dated 28<sup>th</sup> January 2016.
12. The Appellant's partner J A gave evidence with the assistance of the interpreter in Punjabi. He adopted his witness statement dated 28<sup>th</sup> January 2016.
13. Both the Appellant and his partner were questioned by both representatives. I have recorded all questions and answers in my Record of Proceedings. It is not necessary to reiterate them here. If relevant I will refer to the oral evidence when I set out my conclusions and reasons.
14. In summary the Appellant and his partner stated that they have established family life together in this country. They met in this country. The Appellant's partner is gay and a cross dresser, and has been granted refugee status in this country on the basis of his sexuality. They wish to live together in the United Kingdom. They do not believe that they would be able to live together openly in India.
15. The Appellant pointed out that his father is a police officer in India, and he believed that he would be located by his father wherever he lived in India.
16. The Appellant stated that with reference to a visa for his partner, they had checked online, and he would not be given a visa. The Appellant's partner stated that he had not investigated whether he would be given a visa to enter India, as he stated that he did not wish to live in India and did not believe that he would be able to live openly with the Appellant as a gay couple in India.

### **The Respondent's Submissions**

17. Mr Mills pointed out that the FTT findings on risk and return had been preserved, and this included at paragraph 30 the finding that it was not credible or plausible that the Appellant's father and brother would look for him in India or even know if he returned to India. It was not accepted that

the Appellant's father posed any risk to the Appellant because of his connections with the police.

18. Mr Mills submitted that the main issue to be considered related to the nationality of the Appellant's partner, and his ability to obtain a visa to enter India. Mr Mills submitted that background evidence indicated that gay men could live openly in the larger cities in India.
19. Mr Mills submitted that no evidence had been provided to show that the Appellant's partner would not be granted a visa to enter India. The insurmountable obstacles test was a high threshold, and the Appellant had not provided evidence to discharge the burden of proof on this issue. Mr Mills submitted that evidence had not been submitted to show that there were any exceptional circumstances outside the rules which would warrant allowing the appeal with reference to Article 8.
20. Mr Mills referred to section 117B of the 2002 Act, and I was asked to note that the Appellant is not financially independent, and little weight should be given to the Appellant's private life because it had been established at a time when his immigration status was precarious. I was asked to find the Respondent's decision on Article 8 to be proportionate, and to dismiss the appeal.

### **The Appellant's Submissions**

21. Mrs Obayelu relied upon her skeleton argument which is comprehensive, comprising 25 paragraphs and 8 pages, and it is not necessary to set out that argument here. I was asked to note that the Respondent's guidance, updated on 16<sup>th</sup> May 2014, at page 57 of the Appellant's bundle, confirms there is no provision in Indian law for civil partnerships or the recognition of same sex marriages.
22. Therefore the Appellant's partner would not be granted a visa to enter India as his same sex partner. Reliance was also placed upon the Respondent's guidance which confirms that same sex sexual activity between males is regarded as a criminal offence. I was therefore asked to find that because the Appellant and his partner are gay and wish to live together, there are insurmountable obstacles to them living together in India. Therefore the appeal should be allowed with reference to EX.1 of Appendix FM, or alternatively with reference to Article 8 outside the Immigration Rules.
23. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

24. I have taken into account all the evidence, both oral and documentary, which has been placed before me, and taken into account the submissions made by both representatives.

25. Dealing firstly with risk on return, the FTT findings are preserved and therefore the Appellant is not entitled to a grant of asylum or humanitarian protection and his return would not breach Articles 2 and 3 of the 1950 Convention. The FTT also considered Article 12 of the 1950 Convention, which is the right to marry. Permission to appeal on this point was not granted, and the FTT finding at paragraph 32 that Article 12 does not confer the right to chose a particular country in which to marry, and there would be no breach of Article 12 if the Appellant and his partner returned to India is preserved. In making findings on risk on return, the FTT found that the Appellant could not return to his home area because of his fear of his father and brother, but he had a reasonable option of internal relocation to other parts of India, including the major cities.
26. It is accepted that the Appellant and his partner are gay, and that they are in a genuine relationship and have family life together. It is also accepted that the Appellant's partner has been granted refugee status in the United Kingdom, based upon his sexuality. It would therefore not be safe for him to return to Pakistan.
27. The issue to be decided is whether there are insurmountable obstacles to the Appellant and his partner continuing family life in India. EX.1.(a) is not applicable as this relates to a parental relationship with a child. I therefore set out below EX.1.(b) and EX.2;
- “EX.1.(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
- EX.2. For the purposes of paragraph EX.1.(b) ‘insurmountable obstacles’ means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.”
28. The Supreme Court considered insurmountable obstacles and Article 8 in Agyarko [2017] UKSC 11. It was found that the requirement of insurmountable obstacles is a stringent test to be met and this was not incompatible with Article 8. The requirement must be interpreted in a sensible and practical way and the definition in EX.2 was approved.
29. If the requirement within the Immigration Rules is not met, it was confirmed that leave pursuant to Article 8 outside the rules should only be granted in genuinely exceptional circumstances which would result in unjustifiably harsh consequences.
30. I have taken into account the guidance in MD India CG [2014] UKUT 00065 (IAC). The Indian penal code of 1860 criminalises same sex sexual activity, although prosecutions for consensual sexual acts between males

are, and always have been, extremely rare. Although same sex males may suffer ill-treatment, extortion, harassment and discrimination from the police and general public, the prevalence of such incidents is not such, even when taken cumulatively, that there can be said in general to be a real risk of an openly same sex male suffering treatment which is persecutory or which would breach Article 3.

31. In summary, the Upper Tribunal found in MD that it would not be unreasonable or unduly harsh for an openly same sex orientated male who is at risk in his home area because of his particular circumstances, to relocate internally to a major city within India. It was confirmed that India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities. The above is consistent with the Respondent's guidance relied upon by Mrs Obayelu. That guidance also confirms at 1.3.17 that in addition to the LGBTI support network mainly to be found in the large cities, gay people could often rely on NGOs or support groups to provide emotional and material support, which may include assistance in establishing contacts and obtaining employment and accommodation.
32. I therefore conclude that the country guidance, and background evidence, indicates that same sex males can live openly together in the large cities in India.
33. I must consider the two factors in the Respondent's guidance dated August 2015 at pages 91 and 92 of the Appellant's bundle. This relates to the ability to lawfully enter and stay in another country. The Appellant would have no difficulty as he is an Indian citizen. His partner is a citizen of Pakistan. While there is no provision in Indian law for same sex marriages, that does not mean, without more, that the partner would not be granted a visa to enter India. On this point, the burden of proof is on the Appellant. The hearing before the Upper Tribunal was adjourned to enable further evidence to be produced. The Appellant has not provided satisfactory evidence to indicate that his partner would not be granted a visa to enter India. Conflicting oral evidence was given on this point, the Appellant claiming that this had been checked online and that a visa would not be granted, whereas the partner stated that he had not investigated this as he did not wish to live in India. I find that no satisfactory independent evidence has been produced to show that the Appellant's partner would not be granted a visa to enter into and reside in India. The burden of proof has not been discharged on this point.
34. The other factor not considered by the FTT related to cultural barriers. It must be considered whether the partner would be so disadvantaged that they could not be expected to go and live in India either because as a same sex couple the Appellant and his partner would face substantial social discrimination, or the rights and freedoms of the partner would be severely restricted.

35. Again, the burden of proof is on the Appellant and it is has not been discharged. The evidence that has been submitted indicates that the couple could live together in a same sex relationship in one of the larger Indian cities. As was found in MD India, there is a large, robust and accessible LGBTI activist and support network in the large cities.
36. I fully accept that the Appellant and his partner wish to remain in the United Kingdom. That however is not the test that I must consider. It has not been proved the Appellant and his partner would face very significant difficulties living together in India, which could not be overcome, or which would entail very serious hardship.
37. I therefore conclude that there are no insurmountable obstacles to family life continuing in India.
38. I have considered Article 8 outside the Immigration Rules. I have taken into account the factors in section 117B of the 2002 Act. The Appellant is not financially independent. I accept that he can speak English, although this is a neutral factor. The enforcement of effective immigration control is in the public interest. The couple met and formed a relationship when the Appellant was in the United Kingdom lawfully, but only had limited leave to remain, and therefore his immigration status was precarious. I must place little weight upon the Appellant's private life formed when his immigration status was precarious.
39. I do not find the Appellant has demonstrated any compelling or exceptional circumstances that would justify allowing the appeal pursuant to Article 8 outside the Immigration Rules. Having taken into account the wishes of the couple to remain in the United Kingdom, I find that the weight that must be attached to the need to maintain effective immigration control is greater, and the Respondent's decision is proportionate and does not breach Article 8.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The appeal is dismissed on all grounds.

### **Anonymity**

The First-tier Tribunal made an anonymity direction. I continue that direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall directly or indirectly identify the Appellant or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date



Deputy Upper Tribunal Judge M A Hall

2<sup>nd</sup> May 2017

**TO THE RESPONDENT  
FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

2<sup>nd</sup> May 2017