



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/09516/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 29 September 2017**

**Decision & Reasons
Promulgated
On 13 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

**DEEPAK TAMRAKAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel instructed by Paul John & Co Solicitors

For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Wylie which was promulgated on 3 May 2017. The appellant is a national of Nepal, born on 28 September 1987 and his appeal arises from a decision of the respondent dated 31 March 2016 refusing him leave to remain in the United Kingdom.

Background

2. The basis of the appellant's case is that, as a homosexual now living in a civil partnership with Mr Alan Mercel-Santa, he would be rejected by his family in Nepal, and perhaps more generally, there and he would be compelled to enter a heterosexual marriage. It is contended that it would be impossible for him to live openly as a gay man and that he would be subject to vilification and worse. This, he says, would amount to a violation of his human rights.
3. When the matter was determined in the First-tier Tribunal, the appellant put forward Mr Mercel-Santa as his representative to argue the case on the appellant's behalf. He was given the alternative, had he wished, of representing himself and deploying Mr Mercel-Santa as a witness. Nonetheless, a degree of latitude was evidently afforded in that comments and representations made by Mr Mercel-Santa as the appellant's representative were taken into account by the judge notwithstanding they did not formally comprise part of the evidence nor had it been subject to cross-examination.
4. In short, the judge's findings were that the risk posed to the appellant was overstated and that it would not be disproportionate to compel his return to Nepal.

Permission to appeal

5. The grounds of appeal were lengthy and prolix: the judges who had had occasion to look at them for the purpose of considering whether to grant permission to appeal, struggled to find what the issues were being advanced as a distinct ground of appeal. The fact that the appellant does not agree with it is of course not a ground of appeal. What must be demonstrated to set aside a decision of the First-tier Tribunal is a material error of law.
6. Upper Tribunal Judge Kebede gave permission to appeal on 4 August 2017: it was made clear that permission was being granted on a very limited basis. The second paragraph of the reasons for granting permission reads as follows:

“The grounds are lengthy and in parts difficult to comprehend. On the face of it they appear to be nothing more than a vehement disagreement with the judge's decision. Contrary to the assertion in the grounds the late service of the respondent's appeal bundle, which in the event contained nothing outside the appellant's knowledge, and the presence of other persons in the hearing room do not arguably give rise to any procedural irregularity or unfairness in the proceedings. However there are various references in the grounds to documents which were put before the judge but not considered. I am unable to ascertain which documents these are, given the lack of clarity and focus in the grounds. In light of the fact that the appellant was previously granted entry clearance following a successful appeal to the Tribunal on what appears to be the same basis as the grounds relied upon in this appeal, I am just persuaded that this is a matter

which merits further discussion and consideration. Accordingly, on that limited basis, I am prepared to grant permission.”

7. When the hearing was called on at 10:00am this morning Mr Sharma, who appears for the appellant, indicated that he had construed the grant of permission to be such as to permit a wholesale challenge to the First-tier Tribunal’s decision on the ground that it was contrary to a previous one. I stated that on my reading, the grant was to be more narrowly construed and limited to considering those documents which it is alleged were not considered by the First-tier Tribunal.
8. Even at this stage, the particular documents relied upon in this appeal had still not been identified. I had been supplied with a partially paginated bundle. Mr Nath, who appeared for the Secretary of State, had not been supplied with a bundle at all. It was clear that the matter could not proceed until both bundles had uniform pagination and the appellant had identified those particular documents which it is said the First-tier Tribunal Judge did not consider. Accordingly I put the matter to the back of my list and dealt with three other appeals.

Application to rely on additional grounds of appeal

9. When the appeal was later called on for resumption, Mr Sharma was not in the building because he had apparently returned to his chambers. In fairness to the appellant, I adjourned the matter to await his arrival.
10. When Mr Sharma did re-appear, he produced a typed document headed ‘grounds of appeal’ and proceeded to make an application to extend the grant of permission to include two new grounds. The first was:

“the First-tier Tribunal failed to give due weight to the sufficient weight to the decision of First-tier Tribunal Judge Birrell of 7 July 2015. It is submitted that in that decision matters of direct relevance to the instant appeal were decided”

11. The second additional ground placed reliance on **Agyarko [2017] UKSC 11** and the oft-cited passage at paragraph 51 of the judgment of Lord Reed:

“Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in **Chikwamba v Secretary of State for the Home Department.**”

12. Having heard submissions, I took the view that permission to pursue these two so-called additional grounds ought not to be granted. First, they were raised far too late, notwithstanding that up until 22 September the appellant had been representing himself. More particularly, I did not consider that either of the two additional grounds revealed an arguable error of law in the decision of the First-tier Tribunal. In any event, since the decision of First-tier Tribunal Judge Birrell was one of the documents which it was to be alleged the judge had failed to take into consideration, this matter was fell within the territory of enquiry for which the limited grant of permission had already made provision. Thus there was no conceivable prejudice to the appellant occasioned by my refusal to grant permission for these additional grounds to be argued.

The substantive appeal

13. The substantive appeal then proceeded and Mr Sharma identified the four documents which were not considered by the First-tier Tribunal. In fairness to him, he put his oral submissions in a more measured way, stating that they were given insufficient weight or not afforded proper weight.
14. Although the bundle for the court and the bundle provided for the Secretary of State were not identically paginated Mr Sharma took the trouble to make sure that each of us was aware of the nature and content of the four documents upon which he relied. Since these documents, as now identified, lie at the crux of the appeal it is prudent to set them out individual below by name, location and description.

Email from Mr Mercel-Santa's mother

15. In the court's bundle at pages 62 and 63 is an email sent from Mrs Doris Ashton the mother of Mr Mercel-Santa, which addresses her personal circumstances living alone at some distance from the home shared by Mr Mercel-Santa and the appellant.

Decision of First-tier Tribunal Judge Birrell of 7 July 2015

16. At pages 137-148 of the court's bundle is the transcript of the decision and reasons of First-tier Tribunal Judge Birrell promulgated on 7 July 2015.

Letter from Dhan Bahadur Gurung dated 20 November 2015

17. The third document identified in the court's bundle at page 156 is from Dhan Bahadur Gurung, a close and trusted friend of the appellant, who deals with the nature of his friendship with the appellant and also the personal consequences for the appellant as a gay man living either with or without his partner in Nepal. Certain sections of that letter were highlighted by Mr Sharma.

Letter from Mr Conor Burns MP

18. The fourth document is dated March 2017 and it is a letter from Mr Conor Burns, Member of Parliament for Bournemouth West. The second substantive paragraph of that letter points to certain material in relation to the way in which the Lesbian, Gay, Trans and Bi-Sexual community is treated in Nepal. The letter concludes,

“I do not share the view of the Home Office that the situation in Nepal has changed in that time to the extent that the appellant and Mr Mercel-Smith could live safely as a couple in Nepali society”.

Discussion

19. It is clearly evident from the decision of the First-tier Tribunal precisely what documentation was before the court. At paragraph 8, express reference is made to the letter from Mr Burns MP and the email from Mrs Ashton. In paragraph 7 the judge says:

“I have taken account of all the documents provided, and everything that was said at the hearing, even when not specifically mentioned”

Thus Mr Sharma’s suggestion that the judge adopted a “blinkered” approach, not looking at particular documents, is not one that can properly be made.

20. As I observed during counsel’s submissions the probative value and weight of Mr Burns’ letter is extremely limited. Mr Sharma accepted that Mr Burns was not being put forward as an expert and the fact that a citizen, albeit a Member of Parliament, expresses a view is not, and cannot be, determinative of the court’s disposal of the matter.

21. Mr Sharma makes criticism that although Doris Ashton’s letter is referred to, the detailed content of it is not given fuller consideration. In paragraph 42 of the determination the judge says:

“The appellant and his partner have a family life together. They are in a civil partnership and have been in a committed relationship since 2013. Their extended family includes Mr Mercel-Santa’s mother who lives independently some distance from them”.

22. Mr Sharma submit that the judge should have gone further and should have included express reference to the entire content of Doris Ashton’s email and to her health and other matters. It is not the function of a fact-finding tribunal to recite each and every aspect of the documents placed before it. The judge need only identify and summarise the relevant material and record his or her findings accordingly. I regard this criticism of the First-tier Tribunal Judge as misplaced.

23. Equally, and for like reasons, I do not consider it to be anything approaching an error of law that the content of Dhan Bahadur Gurung’s letter was not referred to in any substantial detail within the course of the determination. It was clearly in the judge’s mind.

24. What has exercised me a little more has been the submissions in relation to the prior decision of First-tier Tribunal Judge Birrell which contained a similar examine the circumstances concerning this particular appellant. Mr Sharma rightly disavowed any suggestion of estoppel; nor did he advance

a positive case that the judge was obliged to come to the same factual conclusions as had Judge Birrell when he heard the matter in 2015.

25. There is a substantial commentary on Judge Birrell's decision in the course of the decision which the appellant seeks to impugn in the current appeal, paragraph 37 of which reads:

"The First-tier Tribunal Judge did not make mention of the legal status of same-sex relationships, nor the prohibition against discrimination set out in the constitution of Nepal. The full sentence of Sunil Pant, quoted in part by the First-tier Tribunal Judge, reads '*Nepal do not recognise same sex relationship and still remain a pretty homophobic country hence Mr Mercel-Santa cannot settle in Nepal to join [the appellant]*'. This is not in fact accurate."

26. In truth it is tolerably clear that the judge had fully in mind the earlier decision. Express reference is made to it: so the grounds overstate the position to suggest that it was ignored. It is not the function of First-tier Tribunal Judges to adopt uncritically prior decisions of other First-tier Tribunal Judges. Judges must come to their own conclusions based upon the evidence which they have heard, assessing the credibility of witnesses and assessing such expert evidence as may be put before them.
27. The decision of First-tier Tribunal Judge Wylie in this instance amounts to an impeccable assessment of the evidence, the conclusions are clearly and closely reasoned and not amenable to the criticism made of them by Mr Sharma. The judge undoubtedly took into account the decision of Judge Birrell, but went judge went on, in the proper exercise of the judicial function, to apply her mind to the material which was before the Tribunal in reaching conclusions as to the vulnerability of the appellant (whether alone or as part of the same sex couple) on returning to Nepal. The decision the judge came to is clear to understand, and the fact that its conclusion may differ from an earlier decision of the First-tier Tribunal is more than sufficiently reasoned. There is no discernible error of law.
28. Finally, and for completeness, whether or not the appellant would succeed in obtaining entry clearance as a civil partner is a matter which can only be determined by his return to Nepal and making an appropriate application. This is not the type of case where entry clearance can be guaranteed or deemed to be so likely that the **Agyarko** considerations would come into play. The judge dealt with this at paragraphs 47 and 48, and her balanced and frank assessment is something which cannot be criticised; hence my refusal, irrespective of the lateness of the application, to expand the scope of this appeal into matters which were not arguable.
29. It therefore follows that notwithstanding the skill and tenacity of Mr Sharma in taking every point possible on behalf of his client, this appeal must be dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed *Mark Hill*

Date

9 October 2017

Deputy Upper Tribunal Judge Hill QC