



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00009/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13th September 2017

Decision & Reasons Promulgated
On 22nd September 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SF

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, a Senior Home Office Presenting Officer
For the Respondent: Mr R Halim, Counsel instructed by Wilson Solicitors LLP

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

1. The Secretary of State appeals with permission against the decision of First-tier Judge Buckwell allowing the claimant's refugee status appeal on both homosexuality and ethnicity grounds. The respondent accepted at the hearing that the claimant is a Somali citizen of Bravanese ethnicity, and that he is homosexual. The claimant is a foreign criminal to whom sections 32 and 33 of the UK Borders Act 2007 apply.
2. In relation to ethnicity, the Secretary of State's case is that there is an internal flight option for the claimant within Somalia, and that he would have sufficient protection from clan violence in, say, Mogadishu.
3. In relation to homosexuality, the Secretary of State, notes that since coming to the United Kingdom, the claimant's conduct of his personal life has been so discreet that he has succeeded in keeping his family members unaware of his sexual orientation. The Secretary of State considers that the appellant could do the same in Somalia, and that therefore he would not be at risk on return to Somalia.

First-tier Tribunal decision

4. There is at present no binding country guidance on the position of homosexuals in Somalia, so the decision on risk on return for a homosexual there is entirely fact-specific. The undisputed evidence which the claimant gave on his reasons for discretion if returned to Somalia is recorded at [40] in the decision of the First-tier Tribunal:

"With respect to his sexuality the [claimant] was asked whether he feared that he would be killed if he was returned to Somalia. He so confirmed. Asked whether he could keep his sexuality secret if he returned to the country, the [claimant] stated that he would not be able to tell anyone about his orientation as he would be killed if he was to be revealed as a homosexual."

That evidence was accepted by the Secretary of State without cross-examination and I record for the purposes of completeness that paragraphs 1 and 2 in the Secretary of State's grounds of appeal are no longer relied upon.

5. The First-tier Tribunal decision says little about the risk to the claimant as a homosexual. At [35], the Tribunal mentioned and sought to apply the guidance of the Supreme Court in *HJ (Iran)*. At [83] of the judgment, the Tribunal identified that Somalia is a Muslim country, where there are strong views in relation to homosexuality. The decision continued:

"83. ... However, I am persuaded that the [claimant] would not be able to live his private life in Somalia on the basis of his sexual orientation and that such circumstances would be highly likely to affect the whole quality of his way of life and his private life if he had to return alone to Somalia and without the support of his immediate family. If he felt unable to be open about his sexuality it would be because he felt unable to live his private life as he would wish in that respect due to a real risk of persecution. On the same basis, I find that he would face a risk with respect to Article 3 ECHR."

The *HJ (Iran)* test

6. The correct approach to risk on return for homosexuals and other LGBTI persons was set out by Lord Rodger in *HJ (Iran) & Anor v Secretary of State for the Home Department* [2010] UKSC 31 at [35] thus:

“35. This brings me to the test that should be adopted by the fact-finding tribunals in this country. As Lord Walker points out in para 98, this involves what is essentially an individual and fact-specific inquiry. Lord Rodger has described the approach in para 82, but I would like to set it out in my own words. It is necessary to proceed in stages.

(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he

genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum.

36. It should always be remembered that the purpose of this exercise is to separate out those who are entitled to protection because their fear of persecution is well founded from those who are not. The causative condition is central to the inquiry. This makes it necessary to concentrate on what is actually likely to happen to the applicant. As Lord Walker says in para 88, the inquiry is directed to what will happen in the future if the applicant is returned to his own country. An approach which disregards what is in fact likely to occur there in the case of the particular applicant is wrong and should not be adopted."

The Secretary of State's policy

7. The Secretary of State's Asylum Policy instruction "Sexual orientation in asylum claims" published on 3rd August 2016, version 6, says this, at page 38 of 41:

"How the individual has acted until now in their country of origin or in the UK is immaterial. Caseworkers should not equate any historic absence on the part of the claimant in openly expressing their sexuality, for any reason, as evidence of voluntary discretion. The mere fact that someone may, in their past, have been discreet, even for non-protection reasons, does not mean that those reasons were either the sole reasons why they were discreet, *nor do they indicate how the claimant will continue to behave on return*" [Emphasis added]

Discussion

8. If the claimant's sexual orientation claim succeeds, then it matters not whether the First-tier Tribunal made any error of fact or law in assessing the risk to him as a Bravanese in his home area, or in the sufficiency of protection available to him in other parts of Somalia, because he will still be a refugee on the basis of his sexual orientation. Following the *HJ* sequence, the first question is whether the claimant is gay. The respondent accepts that he is. The next question is whether gays are persecuted in Somalia.

9. The evidence before the First-tier Tribunal indicates that there is legislation prohibiting homosexuality in Somalia. I remind myself, applying *JM* (homosexuality risk) Uganda CG [2008] UKAIT 00065, that in order to establish risk, the appellant must show not only that homosexuality is criminalised in law, but that there is a real risk of persecution, either from state or non-state actors. My attention has been drawn to the skeleton argument which was before the First-tier Tribunal, and which summarised the country evidence, with particular reference to the country expert evidence of Dr Hammond:

“The country situation in Somalia for LGBTI persons is addressed in Dr Hammond’s expert reports [A/150(i)] and [A1/21]. In summary:

- a. Sexual preference is a taboo subject in Somalia and cultural stigmatisation is widespread [A/150(xii)];
- b. Homosexuality is considered extremely aberrant, often seen as imported through corrupt foreign influences [ibid];
- c. Article 409 of the Penal Code (Decree No 5/1962) criminalises ‘carnal intercourse’ with the same sex, punishable – where the act does not constitute a more serious crime – with imprisonment from three months to three years [ibid];
- d. The punishment under Sharia law is more severe, including flogging or other forms of physical harm, and execution [A/150(xiii)] – [A/150(xiv)];
- e. Al Shabaab have carried out executions in Barawe of those accusing of homosexual acts [A1/22(iii)] – [A1/22(iv)].”

10. It is clear from that summary, which Mr Kotas did not challenge, and from the underlying evidence in the First-tier Tribunal bundle, which I have read and considered, that not only is homosexuality unlawful in the predominantly Muslim country of Somalia, but that there is a real risk of persecution to those who are, or are perceived to be, gay.
11. It is accepted by the Secretary of State that this claimant is a homosexual and it was not challenged at the hearing that the reason he would be discreet on his return to Somalia, as opposed to the reason for any discretion he has shown in the United Kingdom, was fear of persecution on the basis of being gay. Nor is it suggested by Mr Kotas that his fear is not genuine.
12. Given that the prohibition of homosexuality in Somalia is part of the country’s criminal legislation, internal flight does not arise in relation to his homosexuality and it is also clear that some executions have been carried out during the Al Shabaab period.
13. The claimant’s discretion while in the United Kingdom, such that his family are not aware of his orientation, is expressly not considered to be predictive of his actions on return. There was clear, unchallenged evidence that the claimant would change his behaviour on return, not out of social pressures, or for cultural reasons, as he has in the United Kingdom, but because in Somalia he fears physical harm or death if he is known to be gay.
14. The Upper Tribunal may only interfere with a finding of fact in the First-tier Tribunal in the limited circumstances set out in the opinion of Lord Justice Brooke in *R (Iran)* at [90]: that the finding of fact is perverse, unreasonable, in the teeth of the evidence or otherwise incomprehensible to the reviewing Judge. There was more than sufficient material before the First-tier Tribunal to support the robust finding at [83]

and any want of detailed reasoning is immaterial, on this factual matrix, to the outcome of the appeal. This particular finding is none of those and accordingly, I am satisfied that it was open to the First-tier Tribunal to find that the claimant was at risk of persecution in Somalia by reason of his accepted sexual orientation.

15. The Secretary of State's appeal is dismissed and I uphold the decision of the First-tier Tribunal.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson

Date: 14 September 2017