



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: AA/01790/2014

THE IMMIGRATION ACTS

Heard at Field House
On the 19th November 2018

Decision & Reasons Promulgated
On the 29th November 2018

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR M. M.

(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Yeo (Counsel)

For the Respondent: Ms Pal (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Rowlands promulgated on the 3rd January 2018, in which she accepted that the Appellant is gay, but found that he would not thereby be at risk upon return to Sri Lanka.

2. This case has a long history having previously been up to the Court of Appeal, who remitted the case back to the First-tier Tribunal for reconsideration and it is the reconsideration of First-tier Tribunal Judge Rowlands that forms the basis of this appeal.
3. Permission to appeal has been granted by Deputy Upper Tribunal Judge O’Ryan on the 26th September 2018 who found that it was an arguable material error of law that having accepted the Appellant was gay, in light of the arguments made by the Appellant that the country guidance case of LH and IP (Gay Men: Risk) (CG) [2015] UKUT 73 was of limited relevance and had been surpassed by more recent country information that it was arguable the Judge materially erred in failing to set out in any or sufficient detail the information relied upon by the Appellant in that regard. He also considered that given that the Judge refused to admit the unreported Upper Tribunal decision in the case of AA/07983/2015, on the basis that the objective evidence referred to it was going to be referred to in the present proceedings, it made it all the more important the Judge refer to that evidence in the decision and that this amounted to an arguable error of law.
4. At the appeal hearing, the Appellant was represented by Mr Yeo of Counsel and the Respondent was represented by Ms Pal, the Senior Home Office Presenting Officer.
5. Mr Yeo relied upon the Grounds of Appeal, which I have fully taken account of, and elaborated upon the same in his oral submissions. He submitted that the Judge’s failure to fully deal with the evidence of the Appellant regarding the situation of gay men in Sri Lanka and the fact that it was only dealt with in a generic way and the failure to refer specifically to any country information meant that the Judge had erred in law. He argued that the Judge had failed to properly take account of the evidence relied upon by the Appellant as detailed at paragraph 11 of the Appellant’s Skeleton Argument and that the Appellant had relied upon the unreported determination of the Upper Tribunal and the evidence dealt with therein and that although the Judge indicated that that evidence was to be relied upon by the Appellant and

therefore did not give permission specifically to rely upon the unreported decision itself, the Judge had failed to deal adequately with that evidence referred to in that decision. He argued that there was clear evidence in the Appellant's bundle, that 65% of gay men asked said that they had suffered violence at the hands of police in Sri Lanka and the Judge had simply failed to adequately deal with the evidence presented by the Appellant to indicate that the previous country guidance case should not be followed.

6. Mr Yeo further argued that the First-tier Tribunal Judge's analysis of HJ (Iran) was wrong and that although the Judge had said that the Appellant could live discreetly if he wanted to, the Judge had not indicated why he would want to live discreetly. He further argued that at paragraph 22 of the determination the Judge had erred in finding that there was nothing about the Appellant which would lead someone to identify him as being gay and it was not just a matter of the way that the Appellant looked but more subtle characteristics including his dress, speech, demeanour, etc. He submitted that the Judge had not dealt with the issue as to whether or not even if the Appellant tried to be discreet he would be identifiable as gay or perceived as being different or that he would be engaging in risky behaviour.
7. In her submissions on behalf of the Respondent, Ms Pal argued that the Judge had noted that the Appellant's representative had relied upon the Skeleton Argument and had clearly made reference to the country guidance case and that the Judge at paragraph 19 had said that he considered carefully all the evidence in the case and again at paragraph 26 he said that he had carefully considered the new evidence presented by the Appellant which showed that there had been a number of issues on a number of occasions when people had been persecuted because of their sexuality however the incidents had involved sex workers and transgenders in the main and that there is only some evidence of discrimination as far as gay men are concerned and it is not enough to amount to persecution. She argued that the Judge had adequately dealt with the new evidence at paragraphs 26 and 27 of the decision and had properly considered the case of HJ (Iran) and that there is nothing in terms of the Appellant's presentation which would lead him to be

identified as being gay and the Judge was entitled to make the findings that he made in that regard.

My Findings on Error of Law and Materiality

8. It is clear having considered the Skeleton Argument presented to the First-tier Tribunal Judge, that at paragraph 11, the Appellant had relied upon a substantial amount of new evidence contained within the Appellant's bundle including evidence at pages 211, 212, 213, 214, 216, 217, 218, 219, 222, 223, 226, 227, 234, 235, 236, 239, 243/244, 250, 254, 255, 266-267 and 280 together with updated case law in order to try to get the First-tier Tribunal Judge to depart from the country guidance case of LH & IP (Gay Men: Risk) [2015] UKUT 00073. However the Judge's consideration of the entirety of that evidence is limited to his finding at paragraph 26 that "*I have considered very carefully the objective evidence including the new evidence put before me and it clearly shows that there have been a number of issues on a number of occasions when people have been persecuted because of their sexuality. However, the incidents have involved sex workers and transgenders in the main and although that is not right there is only some evidence of discrimination as far as gay men are concerned and it is not enough to amount to persecution*". Although the Judge is not duty bound to go through and analyse each and every piece of evidence put forward by the parties to the case, there has to be sufficient consideration of the evidence presented in order to justify the findings of fact made. The Judge has not referred to any specific document that he has relied upon in the Appellant's bundle to say that in the main such incidents had involved sex workers and transgenders who had been persecuted; that there was some only evidence of discrimination as far as gay men were concerned and not enough to amount to persecution.
9. Indeed, in that regard, the Appellant had specifically relied upon the evidence considered in the unreported case of AA/07983/2015, which the Judge had indicated although permission had not been given to rely upon the decision itself, that the evidence contained therein could be relied upon, that at

paragraph 44 of that decision reference was made to the latest COIS report where at paragraph 4.1.3 it was stated that 65% of gay men surveyed had reported police violence based on their sexuality/gender identity and the US State Department Human Rights Report for Sri Lanka 2014 had made findings of arbitrary arrests, detention, blackmail, extortion, violence and coerced sexual acts. I am not satisfied that the analysis of the First-tier Tribunal Judge in this case was sufficiently thorough, in order to deal with the evidence presented fairly in order to examine whether or not that evidence did show persecution as opposed to simple discrimination. The Judge has not analysed the objective background evidence relied upon by the Appellant, nor adequately dealt with the large amount of information put forward by the Appellant between pages 211 and 280. The reasoning of the First-tier Tribunal Judge at paragraph 26, is insufficient to show why that evidence did not in fact show that there was a risk of persecution as opposed to simply discrimination. Insufficient reasons have been given to allow the losing party to understand fully why they have lost. Further, the Judge has not adequately explained why the evidence from the US State Department Human Rights report for Sri Lanka 2014 regarding the police conducting arbitrary arrests, detention, blackmail, extortion, violence and coerced sexual acts for example has not been dealt with.

10. I am therefore satisfied that the Judge's failure to deal adequately with the evidence presented by the Appellant does amount to a material error of law such that the decision of First-tier Tribunal Judge Rowlands should be set aside in its entirety and the matter remitted back for a further hearing before a differently constituted Tribunal. The re-hearing must not be before First-tier Tribunal Judge Rowlands nor before First-tier Tribunal Judge Froom who did the original hearing back in March 2014, which was the subject of the previous appeals.

11. Although Mr Yeo argued that the First-tier Tribunal Judge erred in his consideration of HJ (Iran) in stating that if the Appellant did live discreetly that will be simply because that would be how he would wish to live at paragraph 27, given the fact that the Judge found that the Appellant could in

fact live openly as a gay man in Sri Lanka, that the statement does not amount to a material error of law as the Judge indicated specifically he did not need to consider the question as to whether or not the Appellant could live discreetly. I further find that it was open to the Judge to make findings that there was nothing in the Appellant's presentation that would lead him to consider the Appellant was gay. I also find it open to him on the evidence and it was not I find simply based upon his appearance and I accept the Judge has taken into account all of the nuance factors indicated by Mr Yeo in reaching such a finding.

12. However, given that the Judge's decision does contain a material error of law in terms of how the fresh evidence was dealt with, the decision in its entirety has to be set aside.

Notice of Decision

The decision of First-tier Tribunal Judge Rowlands does contain a material error of law and it is set aside in its entirety. The matter is remitted back to the First-tier Tribunal for re-hearing de novo, before any First-tier Tribunal Judges other than First-tier Tribunal Judge Rowlands or First-tier Tribunal Judge Froom.

Given the nature of the appeal, the Appellant is entitled to anonymity. No record or note or transcript of these proceedings may in any way identify the Appellant or any members of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction can lead to contempt of court proceedings.

Signed



Deputy Upper Tribunal Judge McGinty

Dated 19th November 2018