



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13859/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2018

Decision & Reasons Promulgated
On 04 September 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

TJ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Reza (JKR Solicitors)

For the Respondent: Mr C Avery (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant is a citizen of Thailand born on 7 July 1978 who arrived in this country in December 2015 on a visit visa which expired on 13 April 2016. The appellant remained illegally after the expiry of leave, claiming asylum on 19 June 2017. The appellant claimed to be transgender – born male but seeing herself as a woman. The Secretary of State accepted that the appellant was transgender. The appellant feared returning to Thailand having no ties there and because she would be harmed by her family and discriminated against by society because she was transgender.

2. The respondent noted that the appellant had not applied for asylum on arrival claiming that she was not aware of the asylum procedure. The respondent did not accept this given that the appellant was an educated woman of 39 – “you have experience of the immigration system when you applied for your UK visa, and it is noted you have also travelled to South Korea”. Accordingly the respondent took the view that Section 8(2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 applied – the appellant’s behaviour was potentially damaging to her credibility. It was not accepted that the appellant would be at risk upon return to Thailand because she was transgender. She had not been persecuted in the past and had no genuine subjective fear on return to Thailand. The respondent contended that the appellant would have a sufficiency of protection in Thailand referring inter alia to a news article which stated that the Gender Equality Act which was designed to protect members of the LGBT community had been passed in March 2015. There was a sufficiency of protection to the standard set out in **Horvath v. Secretary of State [2000] UKHL 37**. Further, the internal relocation option was reasonably available to the appellant since she had related her fear of return only to certain areas within Thailand.
3. The appellant had previously worked in different areas in Thailand and had been educated to degree level and had started a business on her own and had also been able to support herself for two years in the UK despite not speaking the language. The appellant could not make a case out on humanitarian protection grounds or under Article 3 nor could she succeed under the Rules or Article 8.
4. The appellant’s appeal came before a First-tier Judge on 30 January 2018. The appellant was represented by Mr Reza as she is before me. The judge heard oral evidence from the appellant.
5. Having correctly addressed herself to the law the judge concluded her determination as follows:
 - “34. The appellant’s claim is that he cannot return to Thailand because he fears being harmed by his family and discriminated by society due to the fact that he is a transgender person. It must be noted that the appellant has provided no evidence that he has suffered any form of persecution in the past.
 35. In his Screening Interview, the appellant was asked at question 4.1 why he cannot return to his country and he said he cannot return ‘due to gender discrimination in my country’.
 36. In his statement dated 16 November 2017 where he sets out his claim and which was prepared before his asylum interview, he made no mention of being physically harmed by anyone due to his sexuality. He sets out his case mainly on the basis of discrimination, mainly to do with the fact that he found it difficult to get employment because of his transgender identity. He said his family members, specifically his father and brothers did not accept him and used to tell him off.

37. However in his asylum interview at question 115 he said contrary to what he said up to that point, that he feared his eldest brother and that this brother verbally and physically abused him. But at question 118 he said that his brothers 'hurl abuse at me'. I find that the appellant's account about being physically abused by his brother is inconsistent. I find that if the appellant had been physically abused by his brother at any point leading him to have a fear of his brother, he would have said so in his Screening Interview or in fact in his statement where he set out his claim without being under any pressure. I find the appellant has not proven to even to the low standard required that he was persecuted by his brother or other family members or by anyone in Thailand when he lived there.
 38. I find his fear of return is largely to do with discrimination. The objective evidence states that LGBT individuals face discrimination in health care settings, in dealings with persons of authority, in education and in the pursuit of employment but the objective evidence does not show that LGBT individual are not able to access health care, education or employment at all.
 39. I am not satisfied that the discriminatory difficulties LGBT individuals face in Thailand taken cumulatively, reaches the minimum level of severity for persecution or serious harm for a breach Article 3. I find the appellant's fear of return because of discrimination is not sufficient to be granted refugee status.
 40. I also find the fact the appellant did not claim asylum when he had the opportunity to do so earlier, undermines his claim for asylum. I find that if the appellant had a genuine asylum claim he would have made his claim when he first entered the United Kingdom".
6. Accordingly the judge dismissed the appellant's appeal on asylum, humanitarian protection and Article 3 grounds. In relation to her case under the Rules the judge found that the appellant could not meet the requirements of the Rules on the basis of family or private life. Outside the Rules she took into account the public interest and Section 117 of the Nationality, Immigration and Asylum Act 2002. The appellant had known full well that her status in the UK was precarious and her circumstances were not compelling. There was an application for permission to appeal. Permission was refused by the First-tier Tribunal. However, the application was renewed and permission was granted by the Upper Tribunal on 12 June 2018 on the basis that it was arguable that the judge had provided inadequate reasons for her decision.
 7. Mr Reza relied on the grounds and submitted that the judge had had ample objective evidence but had not given any reasons for finding that the discrimination suffered by the appellant did not reach the threshold required to demonstrate persecution. It was not necessary to demonstrate a threat to life – the judge appeared to require proof of actual bodily assault. A mere touch could amount to degrading treatment. The judge had not engaged with the objective evidence and had misdirected herself on the issue of persecution.
 8. Mr Avery submitted that the judge had directed herself correctly. The appellant's circumstances did not meet the test of persecution. The appellant had gained

employment and had suffered no significant hindrance. What she had experienced might have been unpleasant but did not amount to persecution. It was plain that the judge had gone through the appellant's account and the evidence and had concluded that the appellant's fear of return had been due to discrimination and she was clearly engaging with the appellant's case. There was nothing to indicate that the judge had not understood that discrimination could amount to persecution. Mr Avery referred to **HJ (Iran) v Secretary of State [2010] UKSC 31** about the test to be applied. The appellant had led a reasonable life.

9. In reply it was submitted that while the incidents on their own might not amount to persecution they should be looked at cumulatively. The appellant had not been living a life of dignity. There was a hierarchy of persecution and humiliating touching and so on might if prolonged amount to persecution.
10. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the decision of the First-tier Judge if it was flawed in law.
11. The judge correctly addressed herself on the legal issues. She states, and I have no reason to doubt, that she had carefully evaluated the appellant's evidence and given it the appropriate scrutiny. While the appellant had not provided any supporting documentation apart from the objective evidence, corroboration was not required in asylum cases. Further, each case had to be decided on its specific facts.
12. The judge rejected, and in my view was entitled to reject, aspects of the appellant's claim for the reasons she gives in paragraph 37 which I have set out above. What she says about physical abuse is criticised in the grounds but I do not find that she misdirected herself as claimed. She was entitled to draw a distinction between the claim as originally presented and how it had developed at interview. Furthermore, this was a case where the appellant's behaviour was of relevance given the terms of Section 8 of the 2004 Act.
13. The judge considered the appellant's claim in light of the objective evidence. She reminded herself to look at discriminatory difficulties on a cumulative basis in paragraph 39 of her decision, reflecting the guidance on discrimination at paragraphs 54-55 of the UNHCR Handbook.
14. Mr Avery referred to **HJ (Iran)**. As was stated by Lord Hope at para 15 of the judgment "It is not enough that that members of a particular social group are being discriminated against" and, at para 16:

"Thus international protection is available only to those members of the particular social group who can show that they have a well-founded fear of being persecuted for reasons of their membership of it who, owing to that fear, are unwilling to avail themselves of the protection of their home country..."

Lord Hope observed that persecution was recognised to be a strong word:

“12. The Convention does not define "persecution". But it has been recognised that it is a strong word: *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, para 7, per Lord Bingham. Referring to the dictionary definitions which accord with common usage, Lord Bingham said that it indicates the infliction of death, torture or penalties for adherence to a belief or opinion, with a view to the repression or extirpation of it. Article 9(1)(a) of the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees ("the Qualification Directive") states that acts of persecution must

"(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, para 40, McHugh and Kirby JJ said:

"Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

15. I do not find that the First-tier Judge misdirected herself in relation to her consideration of discrimination or left out of account material put before her as claimed in the grounds. Her determination is comparatively short but none the worse for that. She rejected, and was entitled to reject, aspects of the appellant's claim and to conclude that had she had a genuine asylum claim she would have made that claim at the appropriate time - when she first entered the UK.
16. I am not satisfied that the determination is flawed in law as contended and this appeal is dismissed.

Anonymity Order

The First-tier Judge made an anonymity direction which it is appropriate to continue in the circumstances of this case.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of

his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed

Date: 28 August 2018

G Warr, Judge of the Upper Tribunal