Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09402/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 10th August 2017	**On 21st September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

A T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hoshi (Counsel)
For the Respondent: Mr S Kotas (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Bowler, promulgated on 5th May 2017, following a hearing at Hatton Cross on 18th April 2017. In the determination, the judge allowed the appeal of the Appellant on human rights grounds, but refused it on asylum and humanitarian protection grounds. The Appellant, thereafter, applied for, and was granted, permission to appeal to the Upper Tribunal, on the grounds that the appeal should equally have been allowed on asylum and on humanitarian protection grounds as well.

The Appellant

2. The Appellant is a citizen of Nepal, is a male, and was born on 15th November 1990. He appealed against the decision of the Respondent Secretary of State dated 20th January 2017, refusing his asylum, human rights protection and human rights claims, on the grounds that he is at real risk of serious harm due to the fact that he is gay. The risks arose from threats made by his brother and previous harm suffered at his brother's hands as well as from the general attitude to gay people in Nepalese society.

The Judge's Findings

3. The judge held that the Appellant had faced societal attitudes in Nepal and discrimination against gay people. He had no family support. He was ostracised by his family. Although he had spent nearly nineteen years growing up in Nepal, and was familiar with the language and traditions and culture, those years were not lived as an openly gay person.

4. As a gay man, the judge found that the Appellant was a particularly effeminate man who was likely to be judged on his demeanor, and "the Appellant will face very significant obstacles in finding somewhere to live and finding a job. His capacity to participate in Nepalese society and to be accepted in Nepalese society would be limited by these very significant obstacles" (paragraph 51).

5. The judge went on to observe that the Appellant had always lived in the UK lawfully (paragraph 62) and had made a significant contribution to society through his voluntary work here (paragraph 62).

6. Having weighed up all the evidence, the judge concluded that the Respondent's decision was not proportionate as a response to maintain the integrity of immigration control (paragraph 64). The appeal was allowed on human rights grounds.

Grounds of Application

7. The grounds of application are twofold. The judge, it was said, had applied the wrong test with respect to internal relocation at paragraph 42 when she had held that, "he would face significant obstacles ... as a result of discrimination, but the discrimination is not state sponsored or condoned" (paragraph 42).

8. The correct legal test for internal relocation had been established in **Januzi [2006] UKHL 6** where Lord Bingham had said at paragraph 21 that the test was whether it was reasonable to expect the Claimant to relocate or whether it would be unduly harsh to expect him to do so.

9. In **AH (Sudan) [2007] UKHL 49** the House of Lords stressed that it would be an error of law to impose the standard of Article 3 ECHR for the

reasonableness threshold. The judge had applied a test where she was asking the question whether the Appellant would face persecution in Kathmandu. This was incorrect, she had to ask whether it was unreasonable or unduly harsh for the Appellant to relocate there.

10. Given that the judge had already stated (at paragraph 51) that the Appellant would be returning with no support network, unable to live a life free from judgment of others, facing significant obstacles with respect to accommodation, struggling in finding work, and having limited participation in societal life, the judge should have held that the Appellant succeeded in showing that there would be no internal relocation available to him in any reasonable sense, so that the appeal should have been allowed on asylum grounds as well.

11. Second, Mr Hoshi submitted that there was a further Ground of Appeal, namely, that the judge had failed to take relevant considerations into account in terms of sufficiency of protection given the expert report of Ms Welton-Mitchell, who had stated that, "in some instances, the authorities had been the ones perpetrating the violence.

12. Cases of sexual assault by authorities, including law enforcement, have been reported ..." (see pages 5 to 6).

13. She had gone on to say that, "ultimately authorities, including local police, cannot be trusted to protect the LGBT persons".

14. For all these reasons, the appeal should have been allowed on asylum grounds as well.

15. For his part, Mr Kotas submitted that the judge does fully address the expert report of Ms Welton-Mitchell (at paragraphs 36 to 37) of the determination. Therefore, it cannot be said that a relevant consideration has not been taken into account. Second, as far as internal relocation is concerned, at paragraph 47 of **Januzi**, the House of Lords had stated that,

> "The words 'unduly harsh' set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there." (Paragraph 47).

16. Mr Kotas submitted that this was exactly the position here. The Appellant could live a relatively normal life judged by the standards of that country. He would be able to move to a less hostile part without undue hardship. Therefore, the judge was perfectly entitled on this basis to conclude that the Appellant could not succeed in an asylum claim.

17. In reply, Mr Hoshi submitted that the judge had already found (at paragraph 51) that the Appellant would be ostracised by his family, would have no family support, was a particularly effeminate man whose life would be judged on his demeanor, and would, "face very significant

obstacles in finding somewhere to live and finding a job" (paragraph 51). This echoed the concerns as set out in the expert report of Ms Welton-Mitchell above.

Error of Law

18. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

19. First, I note that permission to appeal was granted in this matter on 1st June 2017 on the basis that it was arguable that the wrong test had been applied with respect to internal relocation by the judge when she had asked whether the Appellant could reasonably relocate to Kathmandu, without facing persecution, rather than whether it would be unreasonable or unduly harsh to expect him to relocate there.

20. That is indeed the reason why the decision of the judge below fell into error. The judge had already found (at paragraph 51) that the Appellant "will face very significant obstacles in finding somewhere to live and finding a job". She had found that the Appellant's "capacity to participate in Nepalese society" and also "to be accepted in Nepalese society" was such that it would be "limited by these very significant obstacles".

21. In the light of this, the conclusions that the judge reached at paragraphs 34 to 35 are unsustainable. She had concluded that "the Appellant could relocate to Kathmandu and could reasonably be expected to rely on the sufficiency of protection from the Nepalese state" (paragraph 35).

22. Second, I do not accept Mr Kotas' argument that **Januzi** is authority for the proposition that "if the Claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality" (see paragraph 47) then his relocation there would not be unduly harsh. This is because the judge has already found at paragraph 51 that the Appellant would face "very significant obstacles".

23. Given those findings, I conclude that the Appellant would find it unduly harsh to relocate to Kathmandu, especially as the evidence pointed that he was a depressed and mentally fragile homosexual man, who had been ostracised by his family, and was unlikely to be able to freely access the employment market and obtain accommodation. That would have sufficed, on the lower standard, for the purposes of a successful asylum and humanitarian protection claim.

Remaking the Decision

24. I remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

25. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows.

26. This appeal is allowed on asylum and humanitarian protection grounds, as well as it was on human rights grounds by the judge below.

27. An anonymity order is made.

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 their 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.

Signed Date

Deputy Upper Tribunal Judge Juss 15th September 2017