



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/06220/2017

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

Promulgated

On 9 February 2018

On 28 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**SR (BANGLADESH)
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Syed-Ali, Counsel instructed by Uzma Law Limited

For the Respondent: Mr Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge RG Walters sitting at Taylor House on 8 August 2017) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee on the grounds of his homosexual orientation. Although the First-tier Tribunal did not make an anonymity direction, I consider that it is appropriate that the appellant is afforded anonymity for these proceedings in the Upper Tribunal, given the nature of his claim.

The Reasons for the Grant of Permission to Appeal

2. On 20 November 2017 the First-tier Tribunal Judge Brunnen granted the appellant permission to appeal for the following reasons: *“Much of the grounds consists simply of disagreement with the Judge’s findings. However, it is arguable that he erred in law in that he did not analyse the appellant’s case in terms of HJ (Iran) [2010] UKSC 31.”*

Relevant Background

3. The appellant is a national of Bangladesh, whose date of birth is 1 July 1986. The appellant entered the United Kingdom as a student on 13 October 2009. He subsequently obtained leave to remain as a student until 30 September 2014. On 13 June 2014 the Home Office wrote to the appellant to inform him that his leave had been curtailed, as they had received information that he had ceased studying. His leave was curtailed to expire on 17 August 2014.
4. On 19 June 2014 the appellant was encountered by Immigration Officers at a restaurant in Sidcup. He was considered to be working in breach of the conditions of his student visa, and he was served with a notice requiring him to leave the country. His then representative asked the Home Office to review the decision not to give him an in-country right of appeal on the ground that he was not in breach of his student visa conditions, because he was enrolled on a supplementary course run by Brilliant Training Centre. However, on checking with Brilliant Training Centre, the Home Office established that they had no record of the appellant’s enrolment with them. The appellant applied for judicial review. His application was refused and certified as manifestly unfounded on 22 July 2015.
5. On 22 February 2016 the appellant claimed asylum on the grounds that he was gay. He said that he had had a relationship in Bangladesh with a boy, “TM”, when he was aged about 15 or 16. Since arriving in the UK, he had entered into a relationship with ‘PB’. Their relationship had begun on 20 January 2015.
6. On 18 August 2016 the respondent gave her reasons for refusing to recognise the appellant as a refugee. She did not accept that the appellant was gay. He did not qualify for leave to remain under the Partner route, as his claimed relationship with PB was only of 1 year and 7 months’ duration, and it appeared that they had not been living in a relationship akin to marriage for 2 or more years.
7. PB is a national of Bangladesh, and he has a similar profile to the appellant. He arrived in the UK on 27 October 2013 with valid entry clearance as a Tier 4 (student) migrant. As the result of the closure of his college, his leave was curtailed to expire on 23 June 2015. PB made three unsuccessful attempts for leave to remain on the basis of family/private life. Following the last rejection on 2 February 2016, PB contacted the Home Office to claim asylum, and he is recorded as making his asylum claim on 23 February 2016. PB said that he was in a gay relationship with the appellant.

The Decision of the First-tier Tribunal on the asylum appeal of the claimed Partner

8. PB's asylum claim was refused, and his appeal came before Judge Parker sitting at Taylor House on 11 May 2017. Both parties were legally represented. The Judge received oral evidence from PB, the appellant ("SR"), and two further witnesses.
9. In his decision promulgated on 24 May 2017, Judge Parker made the following findings:
 - (a) PB and his claimed partner, SR, were not living together – alternatively, they had only been living in the same household since October 2016;
 - (b) PB was gay, but he was not living openly as a gay man in the United Kingdom;
 - (c) PB had invented an account of informing his parents about his sexuality in an attempt to provide evidence of a risk on return at the hands of his family.
10. On the issue of risk on return, the Judge said that he had had regard to the decision in **HJ (Iran) & HD (Cameroon) -v- SSHD [2010] UKSC 31** in which the Court had held that a gay man "*cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal.*" He said that the Court further stated that if he feared persecution as a result, and that his fear was well-founded, he would be entitled to asylum, "*however unreasonable his refusal to resort to concealment may be.*" Judge Parker then cited the following passage: "*... The next stage, if it is found the appellant 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 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 would 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.*"
11. Judge Parker held, at paragraph [63] of his decision, that PB had concealed aspects of his sexual orientation in the UK, "*and there is no question of his doing this because of a fear of persecution.*" PB's evidence was that he did not like to discuss his private life and he was worried about the disapproval of his friends within the Bangladeshi community. He was worried that they would ignore him. This was not a fear of persecution. He had attended Gay Pride rallies but he did not view this as a public declaration of his sexuality.
12. At paragraph [65], the Judge held that there was no reason to believe that PB would behave differently in Bangladesh. While he might fear

persecution in Bangladesh, he already concealed his sexual orientation in the UK, and he would not be living discreetly because of any fear of persecution. He would be doing so because that was how he chose to live.

13. PB applied for permission to appeal to the Upper Tribunal. Permission to appeal was refused by the First-tier Tribunal on 3 October 2017, and on a renewed application for permission to appeal to the Upper Tribunal, permission was refused on 9 November 2017.

The Hearing Before, and the Decision of, the First-tier Tribunal in SR's Appeal

14. At the hearing before Judge Walters on 8 August 2017, both parties were legally represented. Mr Syed-Ali appeared on behalf of the appellant. At the outset of the hearing, Counsel for the Home Office drew the Judge's attention to the decision of Judge Parker in PB's appeal. In light of the findings made by Judge Parker, she conceded on behalf of the Home Office that the appellant was in a homosexual relationship with PB. Judge Walters received oral evidence from the appellant, PB, and 2 further witnesses.
15. In his subsequent decision, Judge Walters noted at paragraph [23] that Judge Parker had found that PB would not be at risk on return to Bangladesh because he lived discreetly as a gay man in the UK.
16. At paragraphs [25]-[29], the Judge gave his reasons for rejecting the appellant's account of being disowned by his father following the discovery in 2008 that he was in a gay relationship with TM. He found that if his father had been angry and upset about his son's homosexuality, then he would have expected him merely to send the appellant from his home and to tell the appellant to be reliant upon his own resources from now on, rather than providing him with a significant amount of funding for his studies in the UK.
17. At paragraphs [30]-[33], the Judge referred to the evidence given by the appellant as to the reasons why he had not told anyone in the UK that he was gay, or that he was in a relationship with PB.
18. At paragraph [45], the Judge said that he had asked Mr Syed-Ali what elements of his behaviour the appellant would have to modify if he were to return to Bangladesh in order to avoid persecution. Mr Syed-Ali replied that the appellant would not be able to attend gay clubs; he could not visit friends with PB as a couple; and he would not be able to participate in demonstrations such as "Gay Pride" as he would be subject to possible harassment and arrest by police. At paragraph [46], the Judge said: *"I do not accept that a couple living as quietly and modestly as the appellant and [PB] would in fact miss any of these things. They have shown no propensity to attend gay clubs in London. There is reference to attendance at a Gay Pride demonstration by them, but, as the Respondent points out, there was a "rainbow-themed march" participating in the main Bengali New Year celebration and causing little reaction from mainstream*

society. I also took into account the fact that it arouses little comment in Bengali society if men hold hands in public, live together and even share the same bed."

19. The Judge held, at paragraph [47], that there was nothing in the country material to show that a couple such as the appellant and PB - who lived quietly together - would suffer any adverse attention from the police or indeed general society in Bangladesh. He concluded, at paragraph [48], that there was no real risk that the appellant would be persecuted on return.

The Rule 24 Response

20. On 13 December 2013, Mr Kotas settled a Rule 24 response on behalf of the Secretary of State opposing the appeal. He submitted that there was little merit in the **HJ (Iran)** point in view of the findings of fact made by the Judge that the appellant chose to live discreetly in the UK as a gay person. Such findings of fact were rationally open to the Judge on the evidence. The grounds of appeal merely disagreed with the outcome of the appeal.

The Hearing in the Upper Tribunal

21. At the hearing before me to determine whether an error of law was made out, Mr Syed-Ali developed the arguments advanced in the grounds of appeal. He referred me to the Press Summary of the decision of the Supreme Court in **HJ (Iran)** and to the guidance given at paragraph [82] of **HJ (Iran)** by Lord Rodger as to the proper approach to be followed by tribunals.
22. The Press Summary said that the Court of Appeal in **HJ(Iran)** had held that it was permissible for a state party of the Convention to refuse asylum to a homosexual person who, if returned to their home country, would deny their identity and conceal their sexuality in order to avoid being persecuted, provided that the homosexual person's situation could be regarded as "*reasonably tolerable*". Mr Syed-Ali submitted that Judge Walters had wrongly followed the approach of the Court of Appeal, rather than following the correct approach set out by Lord Rodger.
23. Given the evidence of the appellant which was recorded at paragraphs [30]-[33] of the decision, the Judge ought to have held that a material reason for the appellant concealing his sexuality in Bangladesh would be a fear of persecution. This was the only finding that was reasonably open to the Judge on the evidence. Accordingly, I could, and should, remake the decision in the appellant's favour without hearing any further evidence.
24. On behalf of the respondent, Mr Kotas adhered to his Rule 24 response. He agreed with Mr Syed-Ali that, if an error of law was made out, I could remake the decision without hearing any further evidence. He submitted that, in the light of the findings made by Judge Parker - which had not

been successfully challenged by way of appeal to the Upper Tribunal - the appeal should be remade in favour of the respondent.

Discussion

25. In **HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31**, the Supreme Court gave the following guidance at paragraph [82]:

“When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the Tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he will be treated as gay by potential persecutors in his country of nationality. If so, that a Tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant’s country of nationality. If so, the Tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living ‘discreetly’. If, on the other hand, the Tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so ... If the Tribunal concluded that a material reason for the applicant living discreetly on his return would be a fear of persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution.”

26. The Judge gave adequate reasons for finding that the appellant would live discreetly as a gay person in Bangladesh, and would thereby not come to the adverse attention of potential persecutors.
27. The Judge did not overtly go on to ask himself whether a material reason for the appellant’s discretion in Bangladesh would be the fear of persecution that would result if he drew attention to his sexual orientation.
28. However, I do not consider that the Judge’s error in this regard is material. It was not the appellant’s case that he and BP were highly discreet about their relationship in the UK because of a fear of persecution. Accordingly, it is implicit in the Judge’s findings at paragraphs [45] and [46] that their continued discretion in Bangladesh would not be caused or contributed to by a fear of persecution, but would be entirely motivated, as it was in the UK, by a desire to avoid familial and societal disapproval.
29. Mr Syed-Ali submitted that the evidence given by the appellant, as rehearsed at paragraphs [30]-[33] of the decision, evinced a fear of persecution, and not merely a fear of societal disapproval. However, I consider it was open to the Judge to treat the appellant as expressing no more than a fear of social stigmatisation.
30. Mr Sayed-Ali also mounted a collateral attack on the decision of Judge Parker. He submitted that Judge Parker had wrongly failed to treat PB as

expressing a fear of persecution, and that this fundamental error had been replicated by Judge Walters. However, I consider that Judge Parker's rehearsal of the evidence given by PB at paragraph [53] of his decision only serves to reinforce (a) the sustainability of Judge Parker's findings and (b) the sustainability of the parallel conclusion reached by Judge Walters. PB initially said that he was scared to reveal his sexuality, but on appeal he clarified that what he meant was that he was "embarrassed". He stated that he had not disclosed his sexuality because his friends who formed part of the Bangladeshi community would ignore him if he did so. He was specifically asked why he was afraid "to come out", if he believed that the UK was safer and more accepting. PB replied that he was not scared, but he thought he would lose his friends.

31. In **South Bucks District Council v Porter (2) [2004] UKHL 33** Lord Brown said at [26]:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. *The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn* (My emphasis). The reasons need only refer to the main issues in the dispute, not to every material consideration."

32. The Judge made no reference to the "reasonable tolerability" test applied by the Court of Appeal in **HJ (Iran)** and there is nothing to indicate that he applied such a test. He made clear findings that the appellant and PB chose to live discreetly in the UK and that they would not have to modify their behaviour in Bangladesh in order to avoid being persecuted. He did not accept that the appellant had suffered any adverse consequences in Bangladesh from his father discovering that he was gay - still less any serious harm. Accordingly, his line of reasoning does not give rise to a substantial doubt that he accepted - rather than rejected - the proposition that a material reason for the appellant not living as an openly gay man in Bangladesh would be a fear of persecution.
33. Moreover, if the Judge had reached a different conclusion on this issue (the reason for discretion in the country of return) from that reached by Judge Parker, I consider that he would have said so.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

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 19 February 2018

Judge Monson
Deputy Upper Tribunal Judge