



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

Appeal Number: DA/00075/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2<sup>nd</sup> May 2014**

**On 27<sup>th</sup> May 2014**

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**ALEXEY VYLEGZHANIN**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Jeserum, counsel, instructed by Howe & Co solicitors  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant appeals a decision of the First-tier Tribunal which dismissed his appeal against a decision dated 7<sup>th</sup> January 2013 to refuse to revoke a deportation order made on 18<sup>th</sup> September 2012 in accordance with s32(5) UK Borders Act 2007.
2. I granted permission to appeal on the following grounds:

It is arguable that the First-tier Tribunal panel incorrectly undertook independent research of their own volition and failed to place such

considerations before the parties to enable submissions (see [55] determination]). Although there are disputes as to the weight to be placed upon the evidence given by the appellant it appears unlikely that these would, in the end make much difference to the outcome if the issue of persecution as a gay man returning to Russia were correctly and adequately addressed. There is no apparent dispute but that the appellant is gay and would, on return to Russia seek to live his life openly as a gay man. It seems of little relevance that the appellant is not credible in terms of his personal evidence as to his own history given the basic question at issue. It is arguable that prosecution and fines for public acts may amount to persecution; it is arguable that there is a lack of reasoning for such findings ([56]).

3. It was accepted by the respondent and the First-tier Tribunal that the appellant is a gay man but that his claimed experiences in Russia and whether he had been persecuted in Russia was challenged.
4. In paragraph 55 of the First-tier Tribunal determination the First-tier Tribunal judge states

“We consider that, viewed objectively, the situation in Russia is not a happy one for men and women who wish to live an openly gay lifestyle, but we would characterise this as (quoting the US State Department Report) “societal stigma and discrimination” rather than persecution. There is clearly some risk of attack from skinheads and others but we do not consider that the risk from the state can amount to persecution. We are not convinced that the evidence suggests (whatever Mr Chenciner’s view to the contrary) that the risk is such that it amounts to a well founded fear of persecution, either by the state or non state actors. However even if there is a risk of physical attack by non state actors, we consider that the evidence suggests that there would be adequate protection. Clearly there is a problem with police corruption but the background materials suggest that there is governmental will to address this, and there have been prosecutions of corrupt police. Furthermore there have been prosecutions of homophobic attacks. Although Mr Chenciner argues that it is hard to find evidence against attackers, we do not consider that this indicates a general lack of protection. We note that Mr Chenciner believes that the police do not provide sufficient protection, but his report relies on generalised corruption rather than (at 2.5.1 for example) explaining satisfactorily why there is a lack of sufficient protection. The addendum report (at item 3) argues that the law in the Russian Federation Criminal Code “only deals with victims after the event if they have been seriously injured or killed, which is too late”. I have read the code, and consider this analysis is simply wrong. It plainly does cover attacks which do not cause injury. We consider that the nature of any crime is that it cannot be prosecuted until it has been committed. There is nothing in the code, that I could find, about the need for independent witnesses: this appears to be no more than Mr Chenciner’s unexplained opinion, and the original report at 2.5.1 would not justify a conclusion that such crimes would not be prosecuted. We attach little weight to this assertion and accept that whatever the shortcomings of law enforcement in Russia there is sufficiency of protection.”

5. Mr Jeserum asserted that it was not open to a judge (or panel) to look at the source material relied upon by an expert without notifying the parties that he/they were intending to do this. I do not agree. If an expert relies upon particular sources for his opinion it is right and reasonable for a judge/panel to be able to access those reports himself and this would usually be through the source footnotes given by the expert in his/her report – as here. There was nothing wrong with the judge following the source and reading the original reports from that source, as here. A difficulty is that his view of the code appears to be at variance to that opined by the expert. It is not clear whether the judge is an expert in Russian criminal law – or indeed whether Mr Chenciner is. Interpretation of a statute, may call for more knowledge than mere reading of it. A further issue raised is that the judge refers to having read the Criminal Code; it is nowhere apparent that the non legal member also read the Code and yet the determination is a joint determination. This would be an error of law but the issue is whether and to what extent it is such as to require the setting aside of the determination to be remade.
6. Other matters were raised by Mr Jeserum in relation to the findings as to the appellant's past claims, in particular that the panel failed to approach the analysis of past events in the context of the expert report, a failure to identify whether they accept that the appellant's claims of past serious harm occurred or not and that although the relevant paragraphs of HJ (Iran) were set out in the determination, the panel failed to apply the principles properly.
7. The determination has to be read as a whole. It is clear in their setting out of the evidence before them and the analysis of the appellant's account that there were numerous matters which led to their conclusion that they did not accept that the claims made by the appellant were credible. There is reference throughout that analysis to Mr Chenciner's report. It is inconceivable that they did not bear fully in mind the overall views of Mr Chenciner when reaching their conclusions on claimed past events.
8. The assessment of the claim under the Refugee Convention considered those findings and specifically took account of Mr Chenciner's report. Although it is a mistake for only one member of the panel to view sourced material I am satisfied that this does not impact on the adequacy of the overall findings. Removal of the comments by the judge as to the Criminal Code does not detract from the criticisms of the report and its generality which stand irrespective of those comments. It is clear that this view of the code did not impact on the panel's approach to the report as a whole or its relevance to the evidence.
9. In so far as HJ (Iran) is concerned, the panel applied the correct principles. They accepted that the appellant was a gay man and made their findings, based upon the evidence before them. It is no contradiction to refer to the appellant's evidence that he had been able to live a reasonably openly gay lifestyle and yet to have dismissed the claim made by the appellant of assaults, given the evidence.
10. Accordingly I am satisfied that there is no error of law such as to merit the setting aside of the decision.

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

The decision of the First-tier Tribunal panel stands namely the appeal is dismissed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and no request for anonymity was made to me..

Date 23<sup>rd</sup> May 2014

Judge of the Upper Tribunal Coker