



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02811/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 20 July 2016

Decision & Reasons Promulgated
On 29 July 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SN

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Diwnycz (Home Office Presenting Officer)
For the Respondent: Ms S Khan (Counsel)

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department, hereinafter “the Secretary of State”. The respondent before the Upper Tribunal (his being the successful party before the First-tier Tribunal) is a person I shall simply refer to, throughout this

determination, as “the claimant”. I have decided to grant him anonymity because, as will be apparent from a reading of the rest of this determination, the case involves sensitive and personal issues of an uncommon nature. The appeal concerns the claimant’s entitlement or otherwise to international protection in the United Kingdom either on the basis that he is a refugee, a person entitled to humanitarian protection or a person entitled to the protection afforded by Article 3 of the European Convention on Human Rights (ECHR). The way in which this appeal has now come before the Upper Tribunal (for the second time) and the issues in the case are set out in some detail below.

How the appeal comes before me

2. The claimant is a national of India. He was born on [] 1969 and was therefore, as at the date of the hearing before me, aged 46 years. He is a national of India. It is recorded that his asylum claim was made on 29 February 2012 and that it was refused on 4 March 2013. The respondent also took a decision, on that date, to remove him from the UK. The claimant appealed to the First-tier Tribunal and there was a hearing which took place on 30 May 2013 before Judge Hindson at which both parties were represented. In a determination promulgated on 17 June 2013 Judge Hindson allowed the appeal, making several favourable findings which will be referred to specifically below, and deciding that he would be at risk of persecution and at risk of Article 3 ill-treatment if he were to be returned to India because he is what has been described as a trans-man (more about that below) and hence a member of a particular social group in India and would be persecuted on that account. Judge Hindson’s decision was not the end of the matter, though, because the Secretary of State obtained permission to appeal to the Upper Tribunal and, in due course, this led to a decision of the Upper Tribunal, promulgated on 22 November 2013, setting aside the decision of Judge Hindson. The claimant then appealed to the Court of Appeal, with the permission of that Court, and on 17 December 2015 and by consent, that Court quashed the decision of the Upper Tribunal referred to above and remitted the matter back to the Upper Tribunal for reconsideration. At a hearing of 11 March 2016 which had been intended to be the full hearing before the Upper Tribunal but for practical reasons affecting both parties could not be, directions were issued and it was decided that the matters to be considered by the Upper Tribunal would relate to risk upon return, the availability of an internal flight alternative and the relevance of the judgment in **HJ (Iran) v Secretary of State for the Home Department 2011 1AC 596**. It was also decided, by agreement, that certain of the factual findings of Judge Hindson would be preserved.

3. The rest of this determination is concerned with the law I have had to apply, the evidence which has been placed before me, the arguments I have heard and the way in which I have decided to deal with those arguments in the context of my remaking of the decision.

The law I must apply

4. In order to demonstrate entitlement to international protection the claimant must show that, upon return to his home country of India, he would be at real risk of:

- (a) being persecuted for one of the five reasons set out in the 1951 Refugee Convention;
- (b) being treated in such a way as to give rise to entitlement to a grant of humanitarian protection;
- (c) being treated in such a way as to bring about a breach of Article 3 of the ECHR.

5. I am to assess matters on the basis of how they stood as at the date of the hearing before me.

The claimant's case

6. The claimant was born in Warangal which is a city in India. He was born a female but has said that, from a young age, he had thought he had been born "in the wrong body". As a child he would wish to play with boys and he "could not stand" wearing female clothing and would try to wear what he has described as "gender ambiguous clothing" when he could. He says that he faced disapproval, discrimination and harassment. He changed his name, firstly from a female one to a more ambiguous one and then, in February 2012 by deed poll in the UK, to a male one. He has described himself as a trans-man (which I understand to be a term for a person who has been born female but whose gender identity is that of a man) though he suggests in a witness statement of 5 July 2016 that he is now coming to simply regard himself as being a man. He is currently in the process of undergoing hormone therapy and is awaiting surgery to forward his transition. The next step is to be chest reconstructive surgery.

7. According to the claimant he was not open about being a trans-man (in a witness statement of 20 May 2013 he uses the term 'trans-sexual') He says that in 2001 his parents pressurised him into entering into a marriage with a man, a marriage he did not want, and that very shortly afterwards they separated. There has subsequently been a divorce. He says his parents did not understand his objections to marrying and had laughed at him when he had raised them. He does say that he had a number of, as I understand it, quite brief and casual, relationships with females in India before entering into a much more serious relationship with an Indian female whom I shall simply refer to as R in 2000. He said that she treated him as if he were a man when they were alone together but that, in front of other people, they just presented as friends. That relationship continued for a number of years and was ongoing when the claimant came to the UK, for the purposes of study, in February 2009. The claimant returned to India on a number of occasions to spend time with R and he purchased a property in Hyderabad which the two of them shared. In October 2010, whilst he was spending time in India, he discovered that R was having a relationship with another and this led to disagreement and rows which, in turn, led to the relationship becoming known to their respective families and to its breaking down. The claimant says that on 17 November 2010 R's relatives physically attacked and beat him. Staff from an Indian TV station known as TV9 attended the incident and spoke to him and to R and subsequently aired the footage. This has also been placed on You Tube. The claimant suggests that the way in which the coverage was presented "made me look like an angry, vicious lesbian". He says that the police did not take his complaints about the incident seriously. He started drinking heavily. He went to the UK on 24 November 2010 but returned to India in January 2011 at the request of his parents who wanted him to undertake some health checks. However, whilst there, R's relatives beat him once again and made threats to kill him. He came back to the UK on 5 March 2011. He has not returned to India since. In September of that year he was attacked, in the UK, by his landlord who did not approve of his gender identity. He has subsequently developed a network of friends and professionals who have aided him in fully adapting to his chosen gender identity and in pursuing appropriate treatment and surgery as referred to above. He says that he now lives openly as a male person but would not be accepted as such if he had to return to India. If he lived openly as a male in India he would be attacked. His identity documents and educational qualifications show that he was born a female. To protect himself he would have to act as a female but he can no longer accept having to do that.

8. The account set out above is necessarily a summary but is based on what the claimant has indicated when seeking asylum, when pursuing the appeal before Judge Hindson and when pursuing

the appeal before me. It is contended, on his behalf, that given his history he would be at risk if he were to return to Hyderabad (which I think is regarded by his representatives as his home area in India) at the hands of R's family, that he cannot take advantage of an internal flight alternative because it would be unsafe and unduly harsh to expect him to do so given his current status and that he would, in any event, be a refugee on the basis that in order to avoid persecution in any part of India he would have to live in a way which would represent a denial of his identity (the HJ point).

The respondent's case

9. The respondent, in a reasons for refusal letter drafted as long ago as 4 March 2013, disbelieved much of the account which the claimant had presented when seeking asylum. Indeed, although the reasons for refusal letter seems somewhat inconsistent about this (see paragraphs 15, 17-20 and 38) it does seem the Secretary of State did not believe the claimant to be a trans-man at all. That, of course, if right would be utterly destructive of his claim. However, the respondent also took the view that even if the claimant is a trans-man he would have a sufficiency of protection available to him from the Indian authorities and that, even failing that, he would be able to relocate from his home area which the Secretary of State also seemed to regard as being Hyderabad (see paragraph 53). Mr Diwnycz's stance, before me, was and had to be somewhat different given the preserved findings of Judge Hindson and Mr Diwnycz's acceptance that they were to be preserved. It was his contention that, notwithstanding the favourable findings from the claimant's perspective, risk on return to India had not been "clearly evidenced". There would be some support available to him from organisations based in India. He had a viable relocation alternative in India and, indeed, has worked in various places in India in the past.

The matter of the appellant's credibility

10. Judge Hindson accepted that the claimant had been a credible witness before him (see paragraph 22 of the determination) and, on that basis, made some factual findings which all parties have agreed are to be preserved and which I now set out:

" 27. I make the following findings of fact:

- (i) I find that the appellant is a citizen of India and is a trans-man; neither of these are in issue.
- (ii) I find that, prior to leaving India, he lived, with difficulty, as a woman and suffered discrimination as a result of being perceived as 'different'.
- (iii) I find that he was in a secret relationship with [R] and that that relationship broke down in 2010.
- (iv) I find the appellant 'went public' about that relationship and about his own sexual alignment issues on television in what he now accepts was an ill-judged outburst in front of the camera. I accept he sought the assistance of the police to protect him from [R's] family on two occasions but did decline to take him seriously."

11. Those findings, then, are a starting point but of course the favourable credibility finding Judge Hindson made can only relate to the position as it was at the time he was considering the

case. However, I note that Mr Diwnycz has not invited me to make any adverse credibility findings with respect to what the claimant has subsequently had to say in oral evidence before me and in his more recent witness statement of 5 July 2016. Nor, for that matter, did he invite me to make any adverse credibility findings with respect to oral and written evidence I have received from Professor Whittle and the Reverend Randolph-Horn. I have, though, undertaken my own assessment as to credibility. In so doing I have considered all of the evidence as one composite whole. I have noted that some of the key claims made by the claimant have been found to be truthful. I have noted Mr Diwnycz did not challenge credibility whilst not specifically accepting it save for in respect of the preserved findings. I have not been able to detect any genuine inconsistencies in the evidence of the claimant as presented orally and in written statements. I have noted there is some corroboration for the claims he has made as to how he is now living life as a man in the UK from evidence provided by Professor Whittle and the Reverend Randolph-Horn. I have concluded that, to the lowest standard applicable in this sort of case, I am able to accept the claimant as being a credible witness and I accept (as distinct from opinions he has expressed) the truthfulness of facts contained within his evidence.

The other evidence before me

12. I do not simply have the claimant's evidence. I have already referred to Professor Whittle who has provided statements of 27 May 2013 and 11 July 2016 and who has given oral evidence before me. Professor Whittle is a man who has transitioned, having been born female, and is a Professor of Equalities Law at Manchester Metropolitan University and who holds other positions and other qualifications and who has other experience in relation to trans-sexual persons and transgender health. He has known the claimant personally for something in the region of six years. He has sought to make contact with various agencies which the Secretary of State had suggested might be able to provide support for the claimant in India and he has expressed views based upon his knowledge and experience as to what might await the claimant and what difficulties he will face if returned to India. The Reverend Randolph-Horn has provided a witness statement and oral evidence regarding his links with the claimant through their shared Christian faith and contacts he had made with the claimant's father in India. The credibility of neither of those witnesses was challenged in submissions by Mr Diwnycz, although he did diligently cross-examine each, and I have been able to accept the truth of what they have told me with respect to matters of fact.

13. I also note that there has been other documentary evidence before me all of which I have read and considered including statements of others who know the claimant and the life he leads in the UK, a report by a Consultant Psychiatrist Dr. S Lorimer and a report prepared by one M Suresh who is an advocate in India with some specialisation in legal issues concerning gender and sexuality.

My findings of fact

14. Making factual findings has not been difficult in this case bearing in mind that a number of key facts have already been found and preserved and bearing in mind the lack of specific challenge before me. However, it does seem to me to be appropriate to make a number of findings which will supplement those preserved ones and which will serve to update matters bearing in mind that I am basing my decision on the circumstances as at the date of the hearing before me. Accordingly, in addition to the preserved findings I also find as follows:

- (a) The claimant was physically assaulted and also subjected to death threats by members of R's family towards the latter end of 2010 and then in 2011.

- (b) The claimant has not subsequently returned to India.
- (c) The claimant has not subsequently been contacted by R's family and, indeed, he acknowledges that to be the case.
- (d) The claimant's home area in India is to be regarded as Hyderabad. That appears, by implication at least, to be the stance taken by both parties and I attach weight, in this context, to his having set up home with R, with whom on any view he had a long-term and serious relationship, in that city.
- (e) The claimant's family live in Warangal which is, as I understand it, something in the region of two hours drive from Hyderabad. I am not entirely sure of the distance but they are two different cities.
- (f) I find that whilst the claimant's parents have afforded him a degree of concern and have remained in contact with him as he indicates at paragraph 13 of his statement of 5 July 2016, they are not accepting of his gender identity and continue to regard him as a female person. In this context, I accept that they pressurised him, successfully, into entering into a marriage he did not want and that, in light of the evidence of the Reverend Randolph-Horn which was unchallenged and which I accept, his father remains unwilling to discuss the sexual identity issue. I also accept the claimant's indication that his elder sister and he no longer talk to each other because of her inability to accept him as he is. So, I find that the claimant will only be able to obtain tangible support from his close family members in the event of him renouncing his male identity and adopting a female identity.
- (g) I find that the claimant does live as a male in the UK and that he is in the process of progressing to a more complete transition (if that is the way to put it) through virtue of hormone treatment and forthcoming surgery. I also find, and this is what he says, that having progressed as far as he has it would be correspondingly more difficult to go back and adopt a more neutral or female persona.

My consideration of the appeal in light of my findings

15. Logically, the first point to consider is whether or not the claimant will be at real risk of persecution or serious ill-treatment if he returns to his home area of India which I have identified, for the reasons explained above, as being Hyderabad. There is no doubt, on the above findings including the preserved ones that he did suffer what amounts to persecution and serious harm in Hyderabad in the past. That is because he was attacked on two occasions by R's family members and received death threats. Further, having found him to be credible, I accept that whilst he did seek to make complaints to the authorities they did not afford him any real assistance. The mere fact that he has been persecuted in the past by these non-State agents (R's family) does not mean, of itself, that he will be so persecuted or ill-treated now. The first thing to consider, in this respect, is the passage of time. It is now over five years since the most recent incident occurred. When the incidents did occur the discovery of the claimant's long-term relationship with R would still have been fresh in the minds of her family. Emotions can cool over time. R's family have not, on the claimant's own account, sought to contact him in the UK but, of course, they may well not know that he is here. However, the claimant is in touch with his family (he says so himself) and there is nothing to suggest that they have contacted his family or sought him in Warangal. It is also

possible, I suppose, that they are no longer in Hyderabad themselves in which case they would not necessarily know about it if he did return and set up home there. On the other hand, the relationship with R was a long-term one and that is a matter which might aggravate the claimant's perceived offence in the mind of her family. It is not implausible to think that they will have remained in Hyderabad. The background country material provided to me does suggest that even absent a specific reason for them to be targeted (such as the relationship) what are described in some of the documents as LGBTI persons are at some risk of violence. Here I have in mind an extract from the US Department of State Country Reports on Human Rights Practices released in 2015 and which notes that some members of the Police Force committed crimes against such persons and that such persons faced widespread societal discrimination and violence. Further, of course, whilst not seeing a perceived enemy for some time might cool emotions such as anger, suddenly seeing them again unexpectedly might reignite them. At least it is not implausible that that might happen as a generality. I must, of course, apply the real risk test which is something less than a balance of probabilities. Putting all of that together I have concluded that the claimant will be at real risk of persecution at the hands of non-State agents (R's family) if he is to be returned to his home area. The next question that follows on from that, though, is whether there will be a sufficiency of protection from the authorities in that home area. The respondent, in the reasons for refusal letter, says that there will. Reference is made, in support of that proposition, to background country material which is quoted in the reasons for refusal letter. I do not have full copies of the various reports which the Secretary of State relies upon in this context because, whilst I had directed that they should be produced, they have not been. Nevertheless, it is clear that the Secretary of State takes the view that whilst there might be some imperfections there is, in general terms, a sufficiency of protection in place. However, it is a matter of fact that despite the existence of the law enforcement agencies in Hyderabad the claimant was, on two occasions, physically attacked and was also the recipient of death threats. I have also accepted that, as the claimant says, the police did not take his complaints sufficiently seriously to tangibly act upon them. I would conclude, whatever the generality regarding sufficiency of protection, there will not be a sufficiency of protection for this claimant, in all the circumstances of the case, if he is attacked by R's family in Hyderabad. Accordingly, therefore, I conclude, that he would be at real risk of persecution and at real risk of serious harm if he were to return to Hyderabad.

16. Logically, then, the next point to consider is whether or not the claimant will have available to him an internal flight alternative to any other part of India. That is, I think it is right to say, whilst there will be some overlap, a different question to that of whether he will be at risk of persecution throughout India on the basis of his status as a transgender person. In assessing the availability of internal flight I am required to consider whether it would be unreasonable or unduly harsh to expect the claimant to relocate to another part of India. I am not permitted to make the assessment by comparing the conditions in the area of internal relocation to international human rights law standards or the conditions in the country of refuge.

17. The Secretary of State, in the reasons for refusal letter, suggested New Delhi or Kolkata as possible places of relocation but did not appear to actually rule out other areas. The claimant's position is, of course, that it would be unduly harsh for him to relocate or for him to be expected to live in any part of India at all and that it would be unsafe for him to do so.

18. In looking at the safety issue, I remind myself of the background country material to which I have already made reference indicating that even the police, who might be expected to afford protection to transgender persons, have sometimes acted against them by threatening to arrest them in order to coerce them not to report incidents. A Human Rights Watch report refers to a transgender non-Governmental organisation which has indicated that in the State where it is based

there have been, on average, 10 physical attacks every month against transgender persons. The report has also referred to indications from LGBTI groups that their members face widespread societal discrimination and violence though that is said to be so, especially, in rural areas. I do not take that to mean, however, that there is no such problem in urban areas. Professor Whittle, for the most part, gave evidence about the difficulties faced by transgender persons which were of a general nature, rather than the sorts of problems which specifically arise for transgender persons in India and, indeed, in his oral evidence he acknowledged during cross-examination that he had never been to India. That said, he provided written and oral evidence which I was not urged to disbelieve in submissions, to the effect that the various organisations named by the Secretary of State in the reasons for refusal letter as being able to assist transgender persons either failed to respond to his approaches or indicated that they did not have experience of assisting or supporting persons who are transitioning from female to male. I conclude in light of that, that any support which the claimant would be able to access away from his home area in India would be limited.

19. Turning to matters relating to identity documentation, the report of M Suresh makes reference to identification cards issued in India. It is noted that individuals may register themselves as male, female or transgender but that a person who is born female and who is a trans-man would only be able to register himself as either being female or transgender but not male. Thus, it is said that this claimant “would not be able to legally identify himself as a man”. It is suggested that his choice would be registering himself as a female in order to gain access to such as education, employment, insurance and banking services, or registering himself as a transgender person which, as I understand it, would also mean he would have access to such services but would be denying his male identity and would mean exposing himself to discrimination on the basis that persons such as, for example, employers and landlords would become aware of his transgender status.

20. There would, then, be a range of difficulties which might be faced by the claimant upon his taking advantage of an internal flight alternative. He would, I conclude, feel obliged to cease living openly as a male because, even if what he would face would not amount to persecution, he would feel unsafe or would not wish to be discriminated against. This would, I accept, be particularly difficult for him bearing in mind the progress he has made in recent months towards greater transition to male status. He has documents which identify him as a female and which he would be required to produce when engaging with officialdom and the production of those would enable him to access such as an employment and various services but it would involve him in denying what he now very strongly feels is his male identity and emotional difficulties would result from that. Alternatively, if he registered as a transgender person, he would risk inviting unwelcome attention. He would, I find, lack significant support from any agencies in India my having accepted Professor Whittle’s evidence regarding the research he has conducted concerning those organisations. His evidence was to the effect that he did not know any friends in India who would now be able to help and support him and I accept what he says as to that.

21. Putting all of that together I would conclude that even if it is not the case that the claimant would be persecuted solely as a result of his being a trans-man, requiring him to relocate in India would be unduly harsh.

22. In light of all of the above I would accept that as a trans-man the claimant is a member of a particular social group. Indeed, the Secretary of State accepted (see paragraph 15 of the reasons for refusal letter that, if a trans man, he would be. I accept that he would face persecution in his home area for the reasons indicated and that requiring him to take advantage of an internal flight alternative would be unduly harsh. This means that he has succeeded in establishing refugee status.

It also means that he succeeds, on a similar basis, under Article 3 of the ECHR.

Decision

The claimant succeeds on asylum grounds and human rights ground (Article 3 of the ECHR).

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. I make an anonymity order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed:

Date: 29 July 2016

M R Hemingway

**TO THE RESPONDENT
FEE AWARD**

I make no fee award.

Signed:

Date: 29 July 2016

M R Hemingway