



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05912/2017

THE IMMIGRATION ACTS

Heard at Field House
On 23 January 2018

Decision & Reasons Promulgated
On 13 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SMR

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondent: Mr O Noor, Counsel, instructed by Law Dale Solicitors

DECISION AND REASONS

1. Although an anonymity direction was not made by the First-tier Tribunal (“FtT”), as this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, SMR is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his

family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant before me is the Secretary of State for the Home Department and the respondent to this appeal, is SMR. However, for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to SMR as the appellant, and the Secretary of State as the respondent.
3. This is an appeal against the decision and reasons of FfT Judge Swaney promulgated on 18th August 2017 in which the Judge allowed the appellant's appeal on human rights grounds only. At paragraph [4] of the decision, the Judge summarised the claim for asylum advanced by the appellant and at paragraphs [7] to [25], the Judge sets out the evidence received by the Tribunal from the appellant and the two witnesses called by the appellant. The Judge's findings are to be found at paragraphs [35] to [64] of the decision.
4. The appellant is a Bangladeshi national. The Judge found, at [38], that the appellant is a gay man and at [39], that the appellant has had two same relationships in the UK that he has conducted with a degree of openness albeit that he has not told his family about them. Having carefully considered the background material at paragraphs [43] to [53] of the decision, the Judge found:

"54. The evidence before me suggests that gay men are likely to face discrimination and harassment in Bangladesh but that violence and ill-treatment against gay men generally is not widespread. The evidence suggests that it is activists and members of the LGBT Community who had a public profile that are most likely to be targeted and face a risk of treatment amounting to persecution or serious harm. The appellant does not have such a profile. He was not involved in any LGBT organisations in Bangladesh before coming to the United Kingdom and although he has been open about his sexuality in this country, there is no evidence he has been involved in activism.

55. The appellant would only be at risk of persecution from his father if he were to return to Bangladesh and bring himself to his attention. He is an adult and would not have to do so. If the appellant did not tell his family that he was back in Bangladesh then it is not in my view reasonably likely that they will discover this fact themselves. Even if they did, Bangladesh is a populous country and the appellant has advanced no

reasons why it would be duly harsh for him to go and live in another part of the country and I find that it would not. He is an adult in good health, is educated and is of working age. He would enjoy the rights and entitlements of his Bangladeshi citizenship on return.

56. I find that the appellant could relocate within Bangladesh and that although it is likely he would face discrimination if perceived as a gay man, he has not demonstrated that he has particular characteristics that would place him at real risk of facing treatment amounting to persecution or serious harm. For these reasons I find that the appellant does not have a well-founded fear of persecution in Bangladesh and that there is not a real risk he would face a threat of serious harm or treatment contrary to articles 2 or 3 of the ECHR”

5. Having found that the appellant does not have a well-founded fear of persecution in Bangladesh and that there is not a real risk the appellant would face a threat of serious harm or treatment contrary to Articles 2 and 3 ECHR, the Judge went on to address the appellant’s Article 8 claim. The Judge states:

“57. I go on to consider whether or not the appellant satisfies paragraph 276ADE of the Immigration Rules. For the reasons that follow, I find that he does. The background evidence I have cited above shows that people who are openly gay or who are perceived as gay experience discrimination in Bangladesh. I accept the appellant wishes to continue living as an openly gay man and to be able to express his sexuality freely.

58. I find that this is likely to affect aspects of his life such as finding and maintaining employment, finding accommodation and leading a full life in civil society. The existence of laws criminalising sex acts between consenting homosexuals is an interference with the appellant’s right to respect for his private life even if those laws are enforced rarely, if at all.

59. I accept that the appellant would feel unable to freely express his sexuality in Bangladesh and that this would deny him the opportunity to establish a meaningful private life in that country. It would also deny him the opportunity to openly engage in a same sex relationship and would make it very difficult for him to establish a family life with a partner. I find that the appellant’s sexuality is a very significant obstacle to his integration in Bangladesh, and I find that he satisfies paragraph 276ADE(1)(vi) of the immigration rules. It is not open to me to allow the appeal under the immigration rules, which is a compelling reason for considering his case pursuant to article 8 outside.”

6. For the reasons set out at paragraphs [60] to [63], the Judge concluded that the respondent’s decision is unlawful and contrary to the appellant’s rights under

Article 8 of the ECHR. The appeal was dismissed on asylum and humanitarian protection grounds, but allowed on human rights grounds.

7. The respondent advances one ground of appeal. The Judge found that it would not be unduly harsh for the appellant to internally relocate, noting that Bangladesh is a populous country and the appellant has advanced no reasons why it would be unduly harsh for him to go and live in another part of the country. The Judge noted that the appellant is an adult in good health, is educated, and is of working age. Having concluded on the lower standard of proof applicable in asylum claims, taking account of the appellant's own circumstances and the laws in Bangladesh regarding sexuality, that the appellant can internally relocate, it was irrational for the Judge to conclude, on the balance of probabilities, that there would be significant obstacles to the appellant's reintegration in Bangladesh. The respondent claims that the Judge has failed to give sufficient reasons for his inconsistent conclusions. The respondent claims that the Judge has used to Article 8 as a general dispensing power in a way that is not permitted.
8. Permission to appeal was granted by FfT Judge Doyle on 2nd November 2017 noting that it is arguable that having founded that the appellant could internally relocate, the Judge could not make a finding that there are insurmountable obstacles within the meaning of paragraph 276ADE(1)(vi) of the rules. The matter comes before me to determine whether the decision of the FfT Judge should be set aside for legal error and, if so, to remake of the decision.

Application by the appellant for permission to appeal

9. The appellant had not filed any application for permission to appeal the decision of FfT Judge Swaney. However, at the outset of the hearing before me, Mr Noor made an application for permission to cross appeal the decision of the FfT to dismiss the appeal on asylum grounds, and in particular, the Judge's finding, that the appellant could relocate within Bangladesh. Mr Noor submitted that in reaching his decision, the FfT Judge improperly concluded that internal relocation was open to the

appellant, when an Upper Tribunal in a similar case, came to a contrary conclusion. The basis upon which Mr Noor makes the application for permission to appeal and introduce a ground of appeal out of time, is that Mr Noor became aware, only yesterday, of an unreported decision of Deputy Upper Tribunal Judge Saffer that was promulgated on 4 November 2015 in appeal number AA/02581/2015; MR v Secretary of State for the Home Department.

10. Mr Noor draws my attention to the Practice Direction Number 11 issued by the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal of 13 November 2014. He relies upon Part 11 of that Practice Direction relating to the citation of unreported determinations, and submits that paragraph 11.1 of the Practice Direction permits the Tribunal to give permission to the appellant to cite a determination of the Tribunal which has not been reported.
11. Mr Noor accepts, as he plainly must, that the application made on the morning of the hearing of the respondent's appeal some five months after the decision of the FtT Judge was promulgated, is significantly out of time, but he submits that the unreported decision that he seeks to rely upon only came to his attention yesterday and is capable of being persuasive. He submits that he did not know of the unreported decision previously, and it was not obvious that there was a decision that may be relevant. Mr Noor submits that it is in the interests of justice that I should grant the appellant permission to cross appeal. The FtT Judge has found the appellant to be gay, and in light of the unreported decision relied upon, it would appear that the FtT Judge erroneously concluded that internal relocation was open to the appellant.
12. The approach that I should take in relation to an application for permission to appeal out of time, is set out in the decision of the Vice President of the Upper Tribunal and Upper Tribunal Judge O'Connor in Onowu v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles) (IJR) [2016] UKUT 00185 (IAC). The head note to that decision confirms that in considering whether to exercise discretion to extend time for seeking permission to

appeal to the Upper Tribunal, both the First-tier Tribunal and the Upper Tribunal should apply the approach commended by the Court of Appeal in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 and Hysaj -v- SSHD [2014] EWCA Civ 1663. At paragraph [13] of the decision, the Tribunal referred to the decision of the Court of Appeal in SSHD -v- SS (Congo) & Others [2015] EWCA Civ 387, in which the court considered the learning from Mitchell, Denton and Hysaj. At paragraph [16] of its decision, the Upper Tribunal considered there to be no good reason why the approach in those cases should not equally be applied to the Tribunal's consideration of an application for an extension of time to apply for permission to appeal.

13. I consider first, the seriousness or significance in the failure to comply with the Rules. The decision that the appellant now seeks to appeal was promulgated on 18th August 2017 and Mr Noor, candidly acknowledges that the application was not made until the hearing of the appeal before me today, and is not supported by a Notice of Appeal. There is, in my judgment, as Mr Noor candidly acknowledges, a serious and significant delay or failure to comply with the Rules. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 requires a party seeking permission to appeal to the Upper Tribunal to make a written application to the FtT Tribunal for permission to appeal, so that it is received no later than 14 days after the date on which the party making the application, was provided with written reasons for the decision. No such application has been made to the FtT. Rule 21 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides that a person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if – (a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and (b) that application has been refused or has not been admitted or has been granted only on limited grounds. An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than 14 days after the date on which notice of the FtT's refusal of permission was sent to the appellant. As no application for permission to

appeal was made to the FfT, no application for permission can be made to the Upper Tribunal under the Rules.

14. In any event, Mr Noor submits that he only become aware of the decision of the unreported decision of the Upper Tribunal that he now seeks to rely upon, following his own research and enquiries in readiness for the hearing of the appeal listed before me. That, in my judgment, is not a good reason to excuse the failure of the appellant and his representatives to make an application for permission to appeal in accordance with the Tribunal procedure Rules. The decision of FfT Judge Swaney that is the subject of the appeal before me was promulgated on 18th August 2017. The unreported decision that the appellant now seeks to rely upon was promulgated on 9th November 2015 and there was no attempt by the appellant to rely upon that decision in the appeal before the FfT.
15. In reaching my decision I have evaluated all the circumstances so as to enable me to justly deal with the application made by Mr Noor. There is a serious and significant delay in making the application in circumstances where no prior application for permission has been made to, and considered by the FfT. There is a lack of any proper or reasonable explanation for that delay or the failure on the part of the appellant's representatives. As Mr Noor submits, it is not in issue that the FfT Judge has found the appellant is gay. Mr Noor says that in the unreported decision that he seeks to rely upon, having considered the objective evidence, the Upper Tribunal came to a contrary view of the objective evidence to that which was reached by the FfT in this appeal. Quite apart from the fact that the decision that the appellant seeks to rely upon is an unreported decision, in my judgement, I will not be materially assisted by the citation of the unreported decision. I have carefully read the unreported decision that is relied upon. At paragraphs [17] to [22] of the decision of Deputy Upper Tribunal Judge Saffer that the appellant seeks to rely upon, the Deputy Upper Tribunal Judge refers to the Country of Origin Information Report issued on 31 August 2013. He refers to background information

relating to events in December 2010, 2012, 2011 and comes to the overall conclusion at paragraph 22 of that decision.

16. That conclusion that was reached by the Deputy Upper Tribunal Judge on the basis of the dated objective evidence that was presented to him at that time. Here, FfT Swaney carefully considered, at paragraphs [43] to [54], to more recent objective evidence, such as the 'Country Policy and Information Note on Bangladesh: Sexual orientation and gender identity, CIPN, December 2016'. The Judge refers to the Amnesty International article at paragraph [46] of her decision that was as recent as 25th April 2017, and the Judge refers, at paragraph [45], to an incident that took place in April 2016. It is clear that FfT Judge Swaney was referring to much more recent evidence. In the end, I would not be materially assisted by the citation of the unreported decision that the appellant wishes to rely upon and so I would have declined the application for permission to cite the unreported decision. As it is the unreported decision that forms the foundation of the ground of appeal that the appellant seeks to rely upon, there is nothing to be gained by my granting permission to appeal in any event.
17. I was not persuaded that it is in the interests of justice that I should extend time for bringing a cross appeal on the ground that the appellant seeks to advance before me. I therefore refused Ms Noor's oral application to lodge an application for permission to cross appeal out of time.

The appeal before me

18. Mr. Avery adopted the respondent's grounds of appeal and submits that having concluded that internal relocation is available to the appellant, following a careful consideration of the facts and the objective material, the Judge erred in concluding that there are very significant obstacles to the appellant's integration in Bangladesh such that the removal of the appellant would be in breach of the appellant's Article 8 rights. He submits that it is inconsistent for the Judge to conclude, at paragraph [56], that it would not be unduly harsh for the appellant to live elsewhere in

Bangladesh, and to conclude at paragraph [59], that the appellant's sexuality is a very significant obstacle to his integration in Bangladesh such that the appellant removal is disproportionate to the legitimate aim.

19. In reply, Mr Noor submits that having found that the appellant is a gay man who wishes to continue living openly as a gay man and to express his sexuality freely, it was open to the Judge to conclude that although it would not be unduly harsh for the appellant to internally relocate, the removal of the appellant to Bangladesh will nevertheless, be disproportionate to the legitimate aim. Mr Noor submits that the conclusions reached by the Judge are not irreconcilable in the way submitted by the respondent. He refers to the decision of the ECtHR in Bensaid -v- UK (Application 44599/98), at paragraphs [47] to [48] to support the claim that treatment that does not reach the severity of that required for a breach of Article 3, may nevertheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on the physical and moral integrity of the individual. The ECtHR held that characteristics such as sexual orientation are important elements of the personal sphere protected by Article 8, that protects a right to identity, personal development and the right to establish and develop relationships with other human beings.
20. Mr Noor submits that here, it was open to the Judge to conclude that there would be sufficiently adverse effects upon the appellant's life, and his physical and moral integrity, so that the appeal could succeed on Article 8 grounds, notwithstanding the decision to refuse the appeal on asylum grounds and under Articles 2 and 3. Mr Noor submits that Article 8 has its own jurisprudence and the protection afforded by Article 8, should not be conflated with the protection afforded by the Refugee Convention or Articles 2 and 3. It was open to the Judge to conclude that the appellant would be unable to live openly in Bangladesh, and to form relationships, such that the removal of the appellant from the United Kingdom would be in breach of Article 8.

Discussion

21. I accept that it does not follow that the failure of a protection claim necessarily leads the failure of the claim on Article 8 grounds. As Mr Noor submits, Article 8 has its own jurisprudence and the protection afforded by Article 8, should not be conflated with the protection afforded by the Refugee Convention or Articles 2 and 3. Equally however, not every action that adversely affects the moral or physical integrity of an individual will interfere disproportionately with the right to respect to private life guaranteed by Article 8. Sexual orientation and the right to establish and develop relationships with other human beings is a crucial part of the effective enjoyment of the right to respect to private life; Bensaid v UK [2001] 33 EHRR 205.
22. The Judge found, at [60], that the appellant has established a private life in the United Kingdom and that the respondents' decision amounts to an interference with that private life. The Judge found that the consequences of the decision are sufficiently serious as to engage Article 8 of the ECHR and that the decision was in accordance with the law and taken in pursuance of a legitimate aim. The ultimate question for the Judge was whether the decision was proportionate to the legitimate aim.
23. The Judge found that the appellant is a gay man and that the appellant has had two same relationships in the UK that he has conducted with a degree of openness, albeit that he has not told his family about them. The Judge examined and reached a conclusion as to what his situation will be on return to Bangladesh. The Judge found that even if the appellant's family became aware that he was back in Bangladesh, Bangladesh is a populous country and it would not be unduly harsh for the appellant to go and live in another part of the country. He is an adult in good health, is educated and is of working age. He would enjoy the rights and entitlements of his Bangladeshi citizenship on return. There are no other aspect of the appellant's "private life" beyond the fact that the appellant is a gay man, the findings made by the Judge as to the relationships that he has had, and the passage of time that he has been in the UK.

24. Having found, following an individual and fact-specific inquiry, that it would not be unduly harsh for the appellant to go and live in another part of Bangladesh, in my judgement, the Judge did fall into error in the approach taken to the Article 8 claim in a manner that requires me to set aside that aspect of his decision, and remake it.
25. The Judge found that the appellant's sexuality is a very significant obstacle to his integration in Bangladesh and the appellant therefore satisfies paragraph 276ADE(1)(vi) of the Immigration Rules. The Judge approached the Article 8 claim on the basis that it was not open to him to allow the appeal under the immigration rules, but the fact that the appellant satisfied that the rules is a compelling reason for considering his case pursuant to article 8 outside the rules. At paragraph [63], the Judge found that the appellant satisfies the immigration rule that governs Article 8 private life cases, and in the absence of any countervailing factors, it is irrational to suggest the public interest would otherwise require his removal.
26. The Judge found that the appellant's sexuality is a very significant obstacle to his integration in Bangladesh. In reaching that finding, the Judge relied upon the background evidence that shows that people who are openly gay or who are perceived as gay, experience discrimination in Bangladesh. However, on that same evidence, the Judge found that the appellant could internally relocate within Bangladesh. In my judgement, having found that it would not be unduly harsh for the appellant to relocate within Bangladesh, the Judge irrationally concluded that the appellant could establish an entitlement to remain in the United Kingdom to escape the discrimination that he might face in Bangladesh. If it would not be unduly harsh for the appellant to live elsewhere in Bangladesh, notwithstanding the background material referred to, it cannot properly be said that absent some other factor, removal of the appellant would be disproportionate to the legitimate aim.
27. The Judge accepted that the appellant wishes to continue living as an openly gay man and to be able to express his sexuality freely. The Judge found that the appellant has conducted his relationships within the UK with a degree of openness

albeit that he has not told his family about them. The appellant's own account is that his family may have suspicions as to his sexuality and that he has acted with some circumspection, because he does not want them to find out. The Judge appears to have concluded that the appellant would conceal aspects of his sexual orientation if returned, simply in response to social pressures or for cultural or religious reasons of his own choosing.

28. It follows that in my judgement, the decision of the FfT that the appeal be allowed on Article 8 grounds is infected by a material error of law and should be set aside. No Rule 15(2A) application has been made identifying the nature of any further evidence to be adduced and explaining why it was not submitted to the First-tier Tribunal. No further witness statements or hearing bundle has been prepared by the appellant's representatives.
29. Having carefully considered the evidence before me and taking into account the unchallenged findings made by the Judge of the FfT, noting in particular that the Judge found that it would not be unduly harsh for the appellant to relocate within Bangladesh for all the reasons given, in my judgment the decision to remove the appellant is not disproportionate to the legitimate aim of immigration control. Accordingly, I am not satisfied that the decision to remove the appellant would not be in breach of Article 8 and the appeal is dismissed on Article 8 grounds too.

Notice of Decision

30. The decision of the FfT Judge involved the making of an error of law such that the decision of the Judge to allow the appeal on Article 8 grounds it is set aside. For the avoidance of any doubt the decision of the FfT Judge to dismiss the appeal on asylum and humanitarian protection grounds, stands and is not affected by this decision.
31. I re-make the decision and dismiss the appeal on Article 8 grounds.

32. An anonymity direction 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 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.

Signed

Date 23rd April 2018

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 23rd April 2018

Deputy Upper Tribunal Judge Mandalia