



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/14117/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 10 April 2018

**Decision & Reasons
Promulgated
On 27 April 2018**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**M J
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Jamaica, has permission to appeal against the decision of Judge Swaniker of the First-tier Tribunal (FtT) sent on 16 October 2017 dismissing his appeal against the decision made by the respondent on 12 December 2016 refusing his international protection claim.
2. The judge accepted (1) that the appellant was gay; and (2) that the background country materials indicated that there was widespread homophobia, hostility and violence directed against LGBT people in

Jamaica. However, she decided against the appellant's appeal because she considered him someone who was:

“naturally inclined to conduct his life in a private and discrete [sic] way and that he would reasonably likely wish to live a discrete gay life in Jamaica as his natural inclination and not because of the homophobic society and system there”.

3. The grounds of appeal contend that the judge has (1) misinterpreted **HJ (Iran) [2010] UKSC 31**; (2) not taken into account the appellant's evidence; (3) acted in a procedurally unfair way by allowing the respondent to pursue the “concealment for own reasons” point at the hearing; and (4) failed to take account of the appellant's submissions.
4. I received very succinct and targeted submissions from Mr Briddock and Miss Fijiwala.
5. It is convenient if I first of all address the third ground which contends that the judge fell into procedural error. It relies on the fact that the judge dismissed the appeal solely on what I shall call the ‘voluntary concealment’ point, whereas this point was not one on which the respondent relied in her reasons for refusal letter. The judge said at paragraph 27 that “the post-decision evidence irresistibly raised this as a live issue in the proceedings” and went on to state that there was no procedural unfairness involved since:

“the appellant was given the opportunity to address this matter in his evidence before me when asked related questions, as well as his Counsel having the opportunity to respond to the respondent's arguments in this regard in his closing arguments”.

I see no force in this submission. The respondent's refusal decision did not accept that the appellant was gay and as a result did not see it as necessary to go on to deal with the further questions set out by the SC in **HJ (Iran)**. The appellant and those instructing him were submitting to the judge that he was gay and that if he returned to Jamaica he would live discreetly. They cannot have been unaware of the fact that if that was accepted the appellant would also have to address the further questions set out in **HJ (Iran)** including “what the individual appellant would do if he were returned to [his country of origin] and the question:

“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”.

6. In light of the guidance set out in **HJ (Iran)** it would indeed have been remiss of the judge if he had not ensured that the appellant addressed how he would behave on return to Jamaica and what his reasons were.
7. Turning to the first ground (save in one respect, best dealt with when addressing grounds 2 and 4), I am not persuaded that the judge

“misinterpreted” **HJ (Iran)**. The two key questions set out in **HJ (Iran)** pertinent to the appellant’s case were set out by Lord Rodger at [82] as follows:

“If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the 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. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.”

8. I consider that the judge did indeed identify these as the pertinent questions. The judge’s statement at paragraph 27 that in her view the appellant “would reasonably likely wish to live a discrete gay life in Jamaica as his natural inclination ...” adopts wording very similar to that set out at [82] of **HJ (Iran)**.
9. However, I accept that the appellant’s second and fourth grounds do disclose a material error of law and (as already presaged) it is one that involves a misunderstanding (or misapplication) of **HJ (Iran)** in one respect.
10. Before identifying the judge’s error(s)), it is salient to note that the judge made a positive credibility finding in respect of the appellant in unqualified terms. At paragraph 21 the judge stated:

“I would state from the outset that I found the appellant an overall straightforward witness. I consider his evidence before me was simple and unhesitating. He presented before me as a quietly spoken man not given to exaggeration and/or hyperbole. The respondent raised a number of concerns about the appellant’s description of his discovery of his sexuality and his account of how and when he came

to realise his sexual orientation. I do not accept the respondent's assessment in this regard to be correct. I consider that the appellant was able to give a credible account of his background circumstances and his journey towards realising his homosexuality. It is unclear to me what else he was supposed to have said and/or how else he was supposed to have described his feelings other than as he described them. There is no template of the manner and/or terms by or under which an individual is expected to describe such matters, and I find that the appellant was able to give a plausible account regarding the realisation and development of his sexuality."

In this passage the judge found the appellant credible in the account he gave of "his background circumstances" and the "realisation and development of his sexuality".

11. The errors I identify are as follows. First of all, the judge nowhere appears to have taken account of the appellant's written evidence about the reasons why he would behave discreetly on return to Jamaica. In paragraph 37 of his screening interview he had stated that "I would have wanted to be open about my [gay] relationship with R but there is just no way for that in Jamaica. I knew there was no point putting my life on the line in order to change the situation". At paragraphs 57-64, under a section headed "My fear of return to Jamaica", the appellant stated, inter alia, that "couldn't however live openly in Jamaica and if I was returned there I would live in constant fear of being found out". At his second asylum interview he was asked at Q65 why he did not talk to people about his sexuality in Jamaica. He replied "Because like being gay is something that if you tell people, they would definitely reject me or beat me up". At Q108 he was asked why he feared family and community in Jamaica. He replied "If they ever find out about my sexuality it would be dangerous". In answer to Q110 ("What would happen?") he said "I would be beaten and killed". At paragraph 10 of his witness statement he stated that "In Jamaica I had to worry about losing my life for being gay".
12. Second, despite stating that the appellant was given an opportunity to address the matter of how he would behave in Jamaica and why, it is not clear from his own record of the cross-examination questions that the appellant was asked anything about why he would behave discreetly. Third, despite for the most part addressing the **HJ (Iran)** questions, there is no indication that the judge understood that they required him to ascertain whether the appellant would live discreetly in Jamaica "simply because" or "for reasons that have nothing to do with any fear of persecution" (to use Lord Rodger's phraseology). The judge's reasoning appears directed only to the question of whether fear of persecution was the material reason, rather than (as required) a material reason. The vital issue of causation was lost in her analysis of the hypothetical issue (not confined as it should have been to exploring how he would behave on return to Jamaica) of whether he would be open about his sexuality in Jamaica "if there were not problems for the LGBT [community] there".

13. Mr Briddock made a number of other submissions criticising the judge's reliance on the appellant's conduct in the UK as a litmus test of how the appellant behaves/would behave "naturally". I consider these have considerable force but I have already found the judge's decision vitiated by legal error for other reasons.
14. I turn to consider whether I am in a position to re-make the decision without further ado. Both parties agreed the case should be re-made in the Upper Tribunal, Mr Briddock urging me to decide it without a further hearing, Miss Fijiwala asking that I fix it for a further hearing.
15. I have decided there is no need for an adjournment or a further hearing. Miss Fijiwala agreed with me that it is very difficult to read paragraph 21 of the FtT judge's decision as anything other than unqualified positive credibility findings regarding the appellant's account of his experiences. She did not make any submissions against the appellant's credibility. Nor did she make any criticism of the judge's finding that persons who would be identified or perceived as gay in Jamaica would face persecutory harm for a Convention reason. In such circumstances, I consider that these two sets of factual findings are to be preserved. All that it is necessary for me to do, therefore, is consider how to evaluate those findings of fact.
16. Miss Fijiwala does not dispute that the appellant is entitled to succeed in his appeal if at least one of the material reasons for behaving discreetly on return to Jamaica would be fear of persecution.
17. In my judgement there are two aspects to my evaluation of this issue: the subjective and objective. As regards the subjective, it is entirely clear from the appellant's own evidence that whether or not his reasons for behaving discreetly on return to Jamaica included the fact that he was naturally a private person, one of his subjective reasons was his fear of persecution. That is evident from the passages I have quoted earlier from his screening and asylum interviews and his witness statement.
18. The only issue remaining is whether the appellant subjectively expressed fear of persecution upon return to Jamaica is objectively well-founded. I am satisfied that it is, for two principal reasons. Firstly, the appellant's own account of his past experiences bears out that one of the reasons why he grew up wanting to keep his sexual identity private was awareness that he lived in a deeply homophobic society and that if it became known he was gay he would suffer violence. (In his witness statement the appellant said he was forced to pretend to be interested in girls when he was a teenager and to make excuses including pretending to have a girlfriend (paragraph 25)). At paragraph 18 he stated that "I couldn't tell people in Jamaica that I was gay because I knew that I would be attacked or killed. The pressure and the way I have internalised the stigma about being gay is still with me today". Secondly, whilst the development of the appellant's sexual identity in the UK has not led him to "come out" or participate in LGBT activities, the evidence indicates that he has come to the position where he feels able to identify himself as gay to some persons other than his gay partners (J and K). From the evidence before the judge

he had revealed his sexuality to a friend, Brother V. In a recent witness statement the appellant said he had now also revealed his sexuality to his new flatmate. In light of the judge's positive credibility findings I am also prepared to accept as credible the appellant's own evidence that, absent any concerns about societal repercussions, he would like to reveal his sexuality at least within his own friendship network, a step which would mean his sexuality was no longer a private matter.

19. Viewed in the round I do not think that the appellant falls into the category of persons identified by Lord Rodger who would act discreetly on return to their country of origin purely because that was how "they would wish to live, or because of social pressures".

Notice of Decision

20. For the above reasons the decision I re-make is to allow the appellant's appeal.

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: 25 April 2018



Dr H H Storey
Judge of the Upper Tribunal