



In the Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/06405/2012
AA/07289/2012

THE IMMIGRATION ACTS

Heard at Bradford
On 22nd July 2013
Prepared 23rd July 2013

Date Sent
On 9th August 2013

Before

VICE PRESIDENT OF THE UPPER TRIBUNAL MISS E ARFON-JONES DL AND
DEPUTY UPPER TRIBUNAL JUDGE DEARDEN

Between

MR Q H AND
MR S H
(ANONYMITY DIRECTIONS MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Pickering
For the Respondent: Mr Diwnycz

DETERMINATION AND REASONS

1. This is the review of appeals against the Respondent's decisions made on 21st June 2012 and 25th July 2012 respectively to refuse each Appellant's application for leave to remain in the United Kingdom under the Asylum and Human Rights Conventions

and under the Humanitarian Protection Provisions. These matters have been dealt with as orders granting permission to appeal to the Upper Tribunal under the provisions contained in the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010.

The History of these Matters

2. These Appellants claim to be gay lovers. The Appellants made applications to the Secretary of State for leave to remain in the United Kingdom under the provisions referred to above. Each Appellant's application was refused by the Respondent on 21st June 2012 and 25th July 2012 respectively. Each Appellant elected to appeal the decision of the Secretary of State. Each Appellant appeared before First-tier Tribunal Judge Kelly sitting in Bradford on 13th August 2012 and 7th September 2012. In a determination subsequently promulgated on 12th September 2012 the appeals of each Appellant were dismissed.
3. The Appellants filed grounds seeking permission to appeal. Judge Vaudin d'Imecourt refused permission. The matter was then further appealed to Judge of the Upper Tribunal Chalkley who in a determination dated 12th March 2013 said,

"I believe that the first challenge may raise properly arguable grounds which suggest that the First-tier Tribunal Judge has erred in law although, having looked briefly through the file I have not been able to find any copy of the Operational Guidance Note which it is said was before the First-tier Tribunal Judge. Both challenges may be argued. Permission to appeal is granted".

The Representations

4. Ms Pickering relied on the Grounds of Appeal filed by her colleague on 18th September 2012 and 17th October 2012. Ms Pickering also relied on the skeleton argument which was handed to us shortly before the hearing commenced.
5. Ms Pickering maintained that there were two difficulties with the decision of the First-tier Tribunal Judge.
 - (1) The judge had not considered adequately or at all the Operational Guidance Note setting out the Respondent's position. Whilst acknowledging that the Operational Guidance Note did not have the force of law and was not determinative of the appeal of each Appellant, Ms Pickering maintained that it was of persuasive value and should have weight attached to it as a useful tool in assessing the dangers to gays in Pakistan.
 - (2) Ms Pickering maintained that the judge had failed to mention the authority of **HJ (Iran) [2010] UKSC 31**. It was maintained that the judge had not asked the right questions regarding the sexuality of each Appellant and in particular had not asked why it was that they had behaved with discretion in the United Kingdom.

We were invited to set aside the judge's decision and substitute a new decision allowing the appeals of each of the Appellants.

Has the Judge Erred in Law?

6. The issue for us at this stage of the review is whether the judge has made an error of law and in answering that question we approach the matters raised in the same order as Ms Pickering.

1. The Operational Guidance Note

7. Ms Pickering maintains that the judge had before him an Operational Guidance Note which has been issued by the Respondent and provides guidance to the Respondent's officials as to how to determine applications for asylum from Pakistan nationals.
8. We indicated to Ms Pickering that our files did not contain the Operational Guidance Note referred to. Whilst Ms Pickering acknowledged that the Operational Guidance Note had not been sent in the Appellant's bundle from Messrs Sovereign Solicitors of Bury in Lancashire, it was maintained by Ms Pickering, who appeared before First-tier Tribunal Judge Kelly on 13th August and 7th September 2012, that she had handed in the Operational Guidance Note before the first hearing commenced. However, interestingly, not only did we not have the Operational Guidance Note referred to but Mr Diwnycz for the Respondent also did not have the Operational Guidance Note. This suggested to us that Ms Pickering may be mistaken in her assertion that she handed in a copy of the same before the case commenced. The absence of the document on the Tribunal file and the file of the Respondent in fact persuades us that no such document was handed in and Ms Pickering's recollection is mistaken. The judge can hardly be said to have made an error of law sufficient to warrant the determination being set aside if he did not consider something which was never even before him at the relevant time.
9. In the alternative and without prejudice to the foregoing, if we accept that Ms Pickering did hand in the Operational Guidance Note referred to, we observe that this is but guidance to caseworkers employed by the Respondent, but does not amount to anything which has force of law or Parliamentary approved rules. We find that the Operational Guidance Note is literally that, that is guidance to caseworkers which can change on a regular basis, but reflects the type of thinking which the Respondent undergoes before making a decision on anyone's claim. We found that the Operational Guidance Note is not mandatory advice, can be departed to on a discretionary basis and should have limited weight attached to it.
10. Indeed the relevant Operational Guidance Note is quoted in the grounds which have been filed. We had a certain amount of difficulty in reconciling the contents of paragraph 3.10.6 and 3.10.8. The first of those paragraphs states "As gay men, lesbians and bisexuals in Pakistan may be considered to be members of a particular social group they should be granted asylum".

11. The latter paragraph says “However, if an individual chooses to live discreetly because he/she wants to avoid embarrassment or distress to her family and friends he/she will not be deemed to have a well-founded fear of persecution and will not qualify for asylum”. We did pose to Ms Pickering that it was perhaps too wide to say that gay men, lesbians and bisexuals in Pakistan should be granted asylum, especially when one bears in mind the rider to that position at 3.10.8.
12. We have overall concluded that if the OGN was before the judge, he was entitled to place limited weight upon it for the reasons disclosed.

2. HJ (Iran)

13. The grounds maintain that Judge Kelly made no proper assessment with regard to the HJ position and neither did the judge analyse what the motivation was for the Appellants behaving discreetly in the United Kingdom.
14. In fact on a fair reading of the determination the judge finds that the Appellants are gays and that,

“The main tenor of their evidence, however, was that although they do not make a secret of it, the Appellants’ relationship is an essentially private and exclusive one ... I am satisfied that the Appellants have conducted their relationship discreetly. I find that this has not been because they are fearful of the reaction of others ... but is because they are essentially private people who keep themselves to themselves”.

Indeed, at paragraph 20 the judge says, “I find that the Appellants are in a homosexual relationship and that they conduct their relationship with discretion because they are naturally private individuals”.

15. At paragraph 22 of the determination the judge says,

“There is of course much learning upon the subject of the exercise of discretion within the context of asylum law. However Ms Pickering agreed that the issue in this case can be reduced to the question of whether the manner in which the Appellants have hitherto conducted their relationship in the United Kingdom (where there is no risk of them being harmed on account of their homosexuality) would place them at risk of being harmed were they to continue it, in like manner, in Pakistan ... I have no real doubt that the hitherto discreet manner in which the Appellants have preferred to conduct their relationship in the United Kingdom would not be such as to place them at real risk of harm were they to continue it in Pakistan”.

16. We accepted that the judge had not specifically mentioned the case of HJ, but the sentences quoted above easily persuade us that the judge had the ratio of HJ uppermost in his mind at the time that he made the decision. Whilst it would have been helpful if the judge had briefly quoted HJ it is not appropriate to overturn the

judge for failing to so mention, especially when it is apparent that he was fully aware of the ratio of that authority.

17. Ms Pickering complains that the judge did not ask the right questions because he did not enquire why the Appellants behaved discreetly in the United Kingdom. In our conclusion this suggestion is in error. The judge analysed the way in which the Appellants had behaved in the United Kingdom and concluded that they are essentially private people who keep themselves to themselves. They have no particular desire to socialise with other gays. The judge was satisfied, for reasons open to him, that the Appellants have conducted their relationship discreetly not because they are fearful of the reaction of others, but because they are private people who wish to keep themselves to themselves and choose of their own volition to behave with discretion.
18. In our conclusion, contrary to the grounds, Judge Kelly asked all the relevant questions and clearly showed that he was aware of the legal position. The judge concluded for reasons which were open to him that if the Appellants had behaved discreetly in a free and open country like the United Kingdom out of their own choice, they would behave in a likewise manner in Pakistan. Whilst the judge concluded that the immediate families of the Appellants would be aware of their gay relationship he concluded, bearing in mind the way in which the Appellants chose to behave in the United Kingdom and would behave in Pakistan, that it was perfectly open to them to internally relocate well away from the homes of their parents in some new location where no-one would know that they were gay simply because they chose not to advertise that fact, being private individuals.
19. We have reviewed the determination as a whole and concluded that no error of law is disclosed. As a consequence the appeals of the Appellants are dismissed and the determination of First-tier Tribunal Judge Kelly dismissing each Appellant's appeal is upheld.
20. We make an anonymity direction on the same basis as that made by First-tier Tribunal Judge Kelly shown at paragraph 25 of his determination.

Signed

Date 8th August 2013

Judge Dearden

Deputy Upper Tribunal Judge Dearden