



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

Appeal Number: AA/02811/2013

THE IMMIGRATION ACTS

Heard at in Bradford

**Determination
Promulgated**

On 30th August 2013 and 8th November 2013

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SAMEER NEELAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Khan of Counsel instructed by Parker Rhodes
Hickmotts

For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This is the Secretary of State's appeal against the decision of Judge Hindson made following a hearing at Bradford on 30th May 2013.

Background

2. The claimant is a citizen of India. He was born a girl but describes himself as a transsexual or transman. In 1998 he changed his name from his original female name to a more ambiguous one and once in the UK changed to his current male name. He began a secret relationship with a girlfriend in 2000 and their relationship lasted until 2010. He was at the property which he had purchased with her, on 17th November 2010, when members of the family came to the home and attacked him. He locked himself into the bedroom and rang a friend whom he asked to contact the police. A TV crew arrived and he was interviewed and during the course of that interview he disclosed his relationship with his girlfriend, which she denied, and his own gender issue and the programme was subsequently broadcast. The police refused to take his allegation of assault seriously.
3. On 24th November 2009 he came to the UK with a student visa. He returned to India. In January 2011 at the behest of his relatives but was again attacked by relatives of his former girlfriend. The police refused to assist. He claimed asylum on 29th February 2012. In a brief determination the judge wrote as follows:

“I make the following findings of fact.

- (i) I find that the Appellant is a citizen of India and is a transman; 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 Radhika and that that relationship broke down in 2010.
 - (iv) I find that 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 a camera. I accept he sought the assistance of the police to protect him from Radkhika’s family on two occasions but they did decline to take him seriously.”
4. The judge said that if the Appellant was at risk from Radhika's family, which was largely speculative, he could avoid that risk by relocating elsewhere in India. He is well educated with experience in a number of jobs including law and social work and fluent in English.
 5. The judge was, however, satisfied that he would suffer persecution in India as a transman, being a member of a particular social group. He made that finding based on the evidence of the Appellant's experiences in India and on the background material to which he had been referred by Miss Khan. He could not return to living as a woman in India and would only do so in order to avoid persecution. The background material provides ample evidence of the way in which sexual minorities, specifically lesbian, gay, bisexual and transgender communities were treated by society and the unwillingness of the authorities to protect them. There were examples of individuals suffering assault, rape and murder as well as less physical

serious physical assaults. The police were unwilling to protect them and were often themselves perpetrators of the violence. On that basis he allowed the appeal on asylum grounds and on Article 2/3 grounds.

The Grounds of Application

6. The Secretary of State sought permission to appeal on the grounds that the judge had made no findings on whether internal relocation would be an option as a transman and a member of a particular social group. Neither had the judge sufficiently addressed the risk of persecution that the Appellant might face on return to India, having previously worked there, qualified as a lawyer, had a long term relationship and bought a house without being subjected to till-treatment.
7. Permission to appeal was granted by Judge Brunnen for the reasons stated in the grounds on 2nd July 2013.
8. Mrs Pettersen relied on her grounds and said that it was not at all clear why the Appellant could not relocate in India.
9. Miss Khan sought to defend the determination by stating that the judge had said that he had taken into account all of the evidence before reaching his conclusions and that the determination was an adequate consideration of the evidence before the judge.

Consideration of whether there is an Error of Law

10. The Appellant first came to the UK in February 2009 and returned to India six or seven times before he last entered the UK in February 2011. There was then a delay of a year before he claimed asylum. In the reasons for refusal letter, at paragraph 41, the Secretary of State outlined a considerable number of reports relating to the level of protection offered by the authorities in India. The letter also addressed the question of internal relocation in some detail.
11. The claimant also produced a number of more general reports and specifically a country expert report from Mayur Suresh dated May 2013 and a report from Professor Steven Whittal, also dated May 2013, who has extensive experience of providing support and legal advice services to the transgender and transsexual community. Professor Whittal also gave oral evidence before the judge.
12. None of this evidence is recorded in the determination. The standard paragraph which the judge inserted saying that he had considered all of the evidence in the round prior to reaching any of his conclusions does not absolve him from the responsibility of engaging with that evidence, both that in favour and that against the claimant.
13. The decision is set aside because the judge did not take into account relevant evidence when making his decision.
14. I proposed to remake the decision. Miss Khan objected to proceeding straightaway because she said that she wanted to call Professor Whittal, who had given evidence before the First-tier Tribunal but who was away on holiday. Accordingly I agreed that the appeal should be adjourned for a

resumed hearing on the next available date when Professor Whittal would be available.

Resumed Hearing

15. The basis of this hearing is the findings of fact made by Judge Hindson at paragraph 27 of the determination, namely that the Appellant is a citizen of India and a trans man and prior to leaving India he lived, with difficulty, as a woman and suffered discrimination as a result of being perceived as different. It was also accepted that the Appellant had been in a secret relationship, but if there was risk from the family of his former girlfriend, that risk was highly speculative, and he could avoid it by relocating within India. The issue which has to be decided today is whether the Appellant would suffer persecution as a trans man living in India..
16. I heard oral evidence from two witnesses, a friend of the Appellant, Ms Fishwick, a fellow member of his church who has offered him considerable support since he has been in the UK, and Professor Whittal. She regards him as being particularly vulnerable due to his alcohol dependency and vulnerability to exploitation and manipulation. He suffers from low mood and has had suicidal episodes. He finds his gender transition painful and without the support networks from which he has benefit in the UK, his vulnerabilities would lead to destructive consequences.
17. There is also confirmation of Ms Fishwick's concerns in a letter from the lifeline project which provided support to persons suffering from alcoholism.
18. Ms Fishwick accepted that she had no specialist knowledge of what the Appellant would face on a return to India, but she considered that he would not be accepted as living as a man and she did not think that the churches there would offer him support.

Professor Whittal's Evidence

19. Professor Steven Whittal is an acknowledged expert, having spent 35 years providing support and advice to the transgender and transsexual community. He is a female to male trans man, having transitioned 38 years ago, and lists a number of countries for which he has provided reports for Immigration Appeal Tribunals in the past, although India is not amongst them. He knows Mr Neelam personally, having met with him regularly since early 2012. He is no doubt that he is a female to male transsexual identified person.
20. Mrs Pettersen asked him to comment on the list of organisations set out in the reasons for refusal letter which the Respondent argues would be in a position to offer support to the Appellant upon a return to India. Professor Whittal said that he was familiar with the organisations but they would not be able to support the Appellant because in general they offered support for lesbian women or aid support for male to female trans people, commonly known in India as hijra. The only organisation which might have been able to help seems to have folded in that it did not respond to telephone calls or emails. Many were short-lived. Numerically people

transitioning from female to male were far fewer than those transitioning from male to female.

21. There was a decision of the Delhi High Court in July 2009 ruling that Section 377 of the Indian Penal Code can no longer be used to treat consensual homosexual conduct between adults as a criminal offence. Professor Whittal said that the decision was limited to Delhi but in any event had resulted in retrograde activity by police against gay men who had targeted gay activities. In his view India was very poor for transgender people. The hijras were a close-knit community who lived and worked together, often trading as prostitutes. So far as female to male transgender people were concerned, there was no support available. He agreed that it was possible to obtain surgery in India but the quality was appalling.
22. Professor Whittal said that the law did not give legal recognition to trans men. He accepted that it was now possible to register for voting as “transgender” but for the Appellant to obtain work or obtain a driving licence for example he would have to use his female birth name. The position was different in Uttar Pradesh where it was possible to obtain a driving licence as a transgender person and to register as an electoral candidate in the new gender. However, if he went to university the Appellant would have to register in his birth name and his work and tax records would all be as a female. It would not be possible for him to work without his employer knowing that he had been born female. The only way in which he could survive in his new gender would be if he set up his own business and if he had a supportive family.
23. Professor Whittal said that men felt that they had a right to assault people seen as vulnerable and the Appellant could only survive in India if he went back to living as a woman. New Delhi was no better than anywhere else and the churches would not offer any support.
24. It was put to him that the Appellant could wear gender neutral clothes and indeed had done so when he had worked as a social worker. Professor Whittal said that the Appellant would not wear female underwear and it would be difficult to get down the street without being assaulted. Even if he could walk down the street looking masculine, the minute he applied for a job or rented a flat it would have to be as a woman.
25. Professor Whittal emphasised the intensity of the feelings which a person in the Appellant’s position would have in being forced to acknowledge his previously female gender. It would not help him that he was able to register as a transgender because so far as he was concerned he wanted to spend his life as a man. Although he would be able to describe himself as transgender legally, that would be of no help to him. Transgender is an umbrella term meaning a third sex, neither sex, or both and so far as the Appellant is concerned he regards himself as male.

Submissions

26. Mrs Pettersen submitted that Ms Fishwick was not an expert in the field and was not in a position to give evidence about what would happen to the Appellant on return. She relied on the Reasons for Refusal Letter. The

Appellant came to the UK in 2009 as a student having worked in a number of professions in India and would be able to return. Professor Whittal had made a number of assumptions about how he would behave, but the Appellant had managed to go to work in neutral clothing before and there were legal provisions within India which would allow him to live as the person that he was. There was no objective evidence that this particular group were targeted. Professor Whittal had not been able to give any concrete examples of prosecutions and the Appellant himself had not been prosecuted in relation to his "marriage" to his former girlfriend. He could return to India and be self-employed and would not have to tell his co-workers of his history.

27. Ms Khan relied on the judge's previous findings of fact, in particular that the Appellant had found it difficult to live as a woman in India before. He had been born in the wrong body and he was no longer able to pretend. The Appellant had not sought medical intervention in the UK because he had not been able to access treatment since his immigration status did not allow him to do so. However, his intention was to complete his MBA and when he had done so to work and to pay for treatment here.
28. Although the asylum claim had not been made until June 2011, he had sought advice earlier and the medical report from the psychiatrist dated 27th June 2011 was prepared for the basis of seeking treatment rather than in relation to an asylum claim. The psychiatrist's opinion was that the Appellant met the diagnostic criteria for female to male transsexualism and that he required and would benefit from further treatment of his gender condition in terms of access to masculinising hormones and, as appropriate, surgery. He did not believe that Mr Neelam could live as a female in India and would be both eligible and appropriate for referral to the gender identity clinic at Charing Cross Hospital.
29. She asked me to accept Professor Whittal's evidence. He had a wealth of experience of transgender issues. She also relied on the country expert report of Mayur Suresh who concluded that the Appellant would be at significant risk on return and accepted that there had been an expansion of spaces for the gay male community but there were few spaces for transgender persons, especially female to male. If he was faced with physical violence he would not be protected by the police who would be likely to harass him or inflict further violence upon him. He would not be entitled to recognition as a male and, except for the purposes of voting and accessing limited services available, would be forced to register himself as female in order to gain employment, operate a bank account, register for further education etc. He could not live as Sameer Neelam if he revealed his gender history and his problems would persist irrespective of his place of residence.
30. Ms Khan submitted that it would not assist the Appellant to be regarded as transgender since so far as he was concerned he was male. His gender was fundamental to him and it was now essential for him to assert his male identity. She relied on the decision in HJ (Iran). It was not open to the Tribunal to find that the Appellant could avoid his problems by passing himself off as a woman.

Findings and Conclusions

31. The psychiatrist referred to there being no history of suicide risk either within the family and indeed said that Mr Neelam has no history of deliberate self-harm or overdose. The Appellant's case is however that he could not live as female and if forcibly returned would face serious risk of injury and perhaps even death.
32. The Appellant left India on 27th February 2009 to come to the UK to study. Ms Khan said that his intention was to get his MBA and then work and pay for private medical treatment. This is supported by the fact that he applied for further leave to remain as a student on 28th July 2010 and made no application for asylum. Indeed the Appellant returned to India six or seven times during the currency of his student visa.
33. It is not being argued on his behalf that he had a fear of persecution on arrival nor indeed on any of his voluntary returns to India when he was studying. It is said that he has changed whilst being in the UK such that he can no longer face his previous life of living as a woman or being regarded as transgender.
34. Professor Whittal gave powerful evidence of how it feels to be trapped in the wrong body. There is no doubt in my mind that, for Professor Whittal, his knowledge that he ought to have been born a man is absolutely fundamental to who he is.
35. There is no reason at all to doubt that the Appellant has had a strong sense of masculinity since childhood. However, in his case, I conclude, for the following reasons, that his sense of self is different to that of Professor Whittal.
36. When he originally wrote to the Home Office enquiring about the possibility of an asylum claim the Appellant stated:

"My name is Vijusha Neelam, I am a transgender, staying in Birmingham UK on a student visa. I learned that you would help people like me in trying for asylum seeking in UK. I would like to come for a meeting on May 5th 2011 at London. I am not choosing April month meeting because I have MBA final semester exams."

37. Additionally, there is a letter in the bundle papers which he produced from the CGS Witness Care Unit dated 24th October 2011 addressed to him as Ms Neelam at a women's hostel where he was then living. Ms Khan submitted that it is no answer to the Appellant's claim that he is able to use the term transgender in India because he does not see himself as transgender but as male. However over two years after the Appellant's arrival in the UK, he was describing himself in his female name.
38. This is not someone whose drive towards transitioning from female to male was so strong that he could not bear to live in his female body because he continued to use his female name and to describe himself as transgender some two years after his arrival in the UK.
39. There is a spectrum in all these matters, and some people on the spectrum feel the need for gender realignment as utterly core to who they are. Others would find themselves more comfortable without surgery

providing they were able to wear clothing with which they felt comfortable. Mr Neelam is a highly intelligent man with financial resources. He had the money to be able to pay for an MBA. One would have expected him to have used his resources to pay for surgery. His case that there has been such a significant shift in his feelings about who he is since he came to the UK is not borne out by the facts.

40. This is not a person who had a fear of persecution on arrival, nor at any time prior to making the application for asylum. He voluntarily returned to India on a number of occasions. Mr Suresh's report that the Appellant would be at risk of torture and abuse is undermined by the Appellant's return to India on seven occasions within the currency of his student visa.
41. For him it would not be unduly harsh to relocate to a city in India where there are other transgender individuals. Revealing that he was born female would not cause him unreasonable difficulty because he continued to refer to himself as female for two to three years after his arrival in the UK in his dealings with the authorities here. While for Professor Whittal it would be unbearable to reveal his birth gender for the purposes of employment, for the Appellant it would not. He could return to a region of India such as Delhi or Uttar Pradesh, if he did not want to go back to his home area. He clearly does not fear acts of violence by the population generally, and must have some kind of support network in order for him to have returned for numerous visits, either family or friends. I do not accept that there are no institutions which would be able to assist. Whilst it may well be that the numbers of people transitioning from female to male is small, nevertheless it is clear that there is a large measure of support for gays, lesbians, bisexuals and transsexuals more generally in India, particularly in the bigger cities. Some elements of the church would no doubt disapprove of the Appellant, but there will be others who are more supportive.
42. The Appellant has not identified anyone who would specifically wish to do him harm save possibly for his former girlfriend's family, but the evidence of their interest in him is slight and the appeal was not put on the basis that he would be at risk of persecution throughout India at their hands.
43. The Appellant is clearly very vulnerable, suffering as he does from alcohol addiction, and he has clearly made good and supportive friends particularly in the church here. This is not to minimise his distress and his clear wish to remain in the UK where he has been given kind and generous support from his local church. However, that is not a basis for a grant of status in the UK. He has to establish a real risk of serious harm, which he has not done.

Decision

The original judge's decision is set aside and is remade as follows. The claimant's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor