Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12176/2016**

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 20 June 2017	**On 05 July 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB
UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

B S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Ms M Bayoumi instructed by Qualified Legal Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent ("BS"). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Suffield-Thompson) which allowed the respondent's

appeal against the Secretary of State's decision dated 22 October 2016 to refuse the respondent's claim for asylum. Judge Suffield-Thompson found that the respondent, who is a citizen of India, would be at real risk of persecution if he returned to India because he is gay.

The Grounds of Appeal

3. The Secretary of State was granted permission to appeal against Judge Suffield-Thompson's decision by the First-tier Tribunal (Judge Kimnell) on 17 January 2017 on the basis that the judge had failed to take into account the Country Guidance case of MD (same-sex orientated males: risk) India CG [2014] UKUT 65 (IAC). Further, no reasons had been given by the judge for departing from MD. In addition, the grounds argue that the judge was wrong to place significant weight on the expert report of Dr C Osella.

Discussion

4. It was accepted before us that the judge had been referred to the CG case of MD which was set out and relied upon by the Secretary of State at, for example, paras 16, 17 and 21 of the refusal letter. It was also accepted that the judge had made no reference to MD in her decision.

5. Mr Kotas, on behalf of the Secretary of State submitted that it was a material error of law to fail to take into account the applicable CG case of MD. He submitted that it was not open to the respondent to argue, as was done in the rule 24 response, that there was sufficient material to depart from the CG decision when the Tribunal had made no reference to MD.

6. Ms Bayoumi, who represented the respondent, submitted that the judge had referred to material post-dating MD at paras 30 and 31 of her determination showing, inter alia, that the position of gay men in India did give rise to a well-founded claim of persecution. In addition, Ms Bayoumi referred us to a number of documents in the respondent's bundle before the First-tier Tribunal (at pages 38, 39, 41, 43 and 44) which dealt with the position in India post-MD.

7. It is clear from the case law in the Court of Appeal that a failure to apply a country guidance decision unless there is good reason constitutes an error of law. Hence, in R (Iran) v SSHD [2015] EWCA Civ 982 at [27] where it was accepted that:

> "Any failure to apply a CG decision unless there was good reason, explicitly stated, for not doing so would constitute an error of law in that a material consideration had been ignored or legally inadequate reasons for the decision had been given."

8. Further, in SG (Iraq) v SSHD [2012] EWCA Civ 940, the Court of Appeal noted that:

> "… Tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

9. The country guidance in MD is summarised in the head note as follows:

> "a. Section 377 of the Indian Penal Code 1860 criminalises same-sex sexual activity. On 2 July 2009 the Delhi High Court declared section 337 IPC to be in violation of the Indian Constitution insofar as it criminalises consensual sexual acts between adults in private. However, in a judgment of 11 December 2013, the Supreme Court held that section 337 IPC does not suffer from the vice of unconstitutionality and found that the declaration of the Delhi High Court to be legally unsustainable.
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> b. Prosecutions for consensual sexual acts between males under section 377 IPC are, and have always been, extremely rare.
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> c. Some persons who are, or are perceived to be, same-sex oriented males suffer ill treatment, extortion, harassment and discrimination from the police and the general populace; however, the prevalence of such incidents is not such, even when taken cumulatively, that there can be said in general to be a real risk of an openly same-sex oriented male suffering treatment which is persecutory or which would otherwise reach the threshold required for protection under the Refugee Convention, Article 15(b) of the Qualification Directive, or Article 3 ECHR.
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> d. Same-sex orientation is seen socially, and within the close familial context, as being unacceptable in India. Circumstances for same-sex oriented males are improving, but progress is slow.
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> e. It would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.
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> f. India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities."

10. As MD makes clear, prosecutions for consensual sexual acts between males are "extremely rare". The offence in s.377 of the Indian Penal Code 1860, criminalising consensual sexual acts between adults in private, was upheld as constitutional by the Indian Supreme Court on 11 December 2013. Internal relocation is, in general, a viable option.

11. First, in our judgment, Judge Suffield-Thompson was wrong not to begin her consideration of the respondent's claim to be at risk as a gay man in India by considering and following, unless there was good reason not to do so, the approach in MD which favoured the Secretary of State's position.

12. Second, we are not satisfied that even if she had done so the reason she offered at paras 29 *et seq* amounted to "good reasons". There she said this:

> "The penal code in India is clear. Section 377 of the Indian Penal Code 1860 criminalises (male) same sex activity. This was removed from the code in 2014 but in 2016 was reinstated which shows, I find, a shift in thinking. On this basis alone I find that the Appellant could be at risk if he were to be a gay man in India and the fact that there are over 25 Million gay men in India does not alter my finding."

13. Her first reason given in para 29 is difficult to follow. It is difficult to understand on the dates given what was the "shift in thinking" identified as important by the judge. The chronology concerning the constitutional challenge to s.377 of the Indian Penal Code 1860 was that it was declared unconstitutional by the Delhi High Court on 2 July 2009 but, in a judgment dated 11 December 2013, the Supreme Court reversed that decision. It is not immediately obvious to see what was "removed from the Code in 2014": nothing was and the decision that s.377 was unconstitutional was made in 2009. Nothing appears to have occurred in 2014 and reference to "in 2016 [it] was reinstated" is likewise not founded in the time frame of the constitutional challenge. What seems to have occurred in 2016 is that the Supreme Court on 2 February 2016 agreed to hear an appeal against its 2013 ruling which upheld the constitutionality of s.377.

14. The judge's second reason offered in para 29 - that the existence of s.377 meant that "[on] this basis alone I find that the appellant would be at risk if he were to be a gay man in India …" - flies in the face of the CJEU's decision in Minister Voor Immigratie En Asiel v X, Y and Z (Cases C-199/12 to C-201/12) [2014] Imm AR 1 at [55] that:

> "… the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it breaches the level of serious necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive."

15. The judge was, therefore, wrong to say that the mere criminalisation in s.377 of same-sex sexual activity was "alone" sufficient to find that the respondent was at risk of persecution as a gay man in India. What had to be assessed was the incidence of enforcement, punishment etc. The judge's statement does, in any event, run contrary to the guidance in MD which was given in the full knowledge of the existence of the offence in s.377 as is clear from para (a) of the head note.

16. As Ms Bayoumi pointed out to us the judge did, in fact, consider two pieces of background evidence at paras 30-31. There she said this:

> "30. The Respondent submits that in the last 150 years only 200 people have been arrested under this law. I do not accept that this is correct. I have before me (Appellant's bundle, pages 38-49) pieces of objective evidence to show that this submission is incorrect. In an article entitled 'Erasing 76 crimes, Nearly 1,500 arrested last year under India's anti-gay law', dated 17 October 2016, it states (Appellant's bundle pages 39-40):
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> > 'Almost 1,500 people were arrested last year under section 377, India's colonial-era anti-gay law, the Times of India and Equal Eye reported. It was unclear how many of those arrested, if any, were involved in consensual same-sex relations. The figure was more than double the figure in the earlier report on the number of arrests under section 377 during the previous year.'
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> 31. The Appellant gave oral evidence to say that his parents are totally against gay men and that they have beaten him and bullied him into marrying and that they will not support him in anyway if he lives as a gay man. This is supported by the independent evidence before me. In

an article, dated 21 October 2016, entitled 'Human Dignity Trust UK: 52% of gay men without peer support suffer violence' (Appellant's bundle, page 42) states:

> 'A recent survey conducted across five Indian states found that gay men who seek peer support were far safer than those living with their parents, most often without outing themselves. More than half of all men who face physical violence (52.4%), sexual abuse (55%) and emotional torture (46.5%) were still living with their parents and mostly in the closet according to the survey.'

17. There is, in our judgment, two difficulties with the judge's reasoning. First, the judge misunderstood the Secretary of State's position set out in the first sentence of para 30. In the decision letter, the respondent pointed out, based upon evidence in MD at [129] that "less than 200 persons" had been prosecuted under s.377 in the last 150 years. The evidence cited by the judge from "Erasing 76 crimes" related to arrests. That did not contradict the evidence in MD concerning "prosecutions". Second, the evidence relied on in paras 30 and 31 lacked in itself the necessary weight to amount to "cogent reasons" for departing from the CG decision in MD. That is, of course, apart from the fact that the judge did not explicitly reason from the starting point of MD and seek "cogent reasons" for departing from it.

18. Although Ms Bayoumi referred us to a number of other background documents in the First-tier Tribunal's bundle, the judge made no reference to them and they could not, therefore, form part of her reasons for actually or hypothetically departing from MD.

19. Finally, as regard the expert report of Dr Osella the judge dealt with this at paras 32-36 as follows:

> "32. I now turn to the report of Dr. C Osella (Appellant's bundle, pages 24-35). She is a Reader in Social Anthropology at the School of Oriental and African Studies (SOAS) and is part of the advisory editorial board for two journals 'Contributions to Indian Sociology' and 'Journal of South Asia Research' and she is the author of books and articles about India and its attitude to differing sexualities. For the purposes of this appeal I find her to be an expert.
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> 33. Her entire report, I find, is of enormous help to me in making my findings but I quote below just some of the report which has specific impact on this case. Her report states as follows:
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> > 'It is difficult to imagine how the appellant could in fact return to India at this point when he has acknowledged his sexual orientation and begun to live as a homosexual.' (para.7)
> >
> > 'Reinstatement of section 377 has been a clear signal to Indian homosexuals of no-tolerance and to non-homosexuals of support for the longstanding "sin/mental illness/perversion" paradigm.' (para 7c)
> >
> > 'It has often been recorded that when neighbourhood or vigilante killers execute hate crimes against non-conforming subjects-even to the level of murder- then the police do not prosecute or properly investigate the crime. On the other hand, there is evidence of both

> case cover-ups and even of police involvement in hate crimes, including murder.' (para.7f)

34. The Respondent submits that India is a huge country and that the Appellant will be safe if he internally relocates. The report of Dr. Osella states as follows:

> '**Regarding the internal flight option**: This is impracticable on several grounds.....It is difficult to imagine how the appellant could return to India at this point, or how internal flight would work. India is a society which has been characterised by sociologists and psychologist alike as being composed not of autonomous individuals but of people who are deeply embedded in ethnicity, community and family. It is in effect impossible to live unless one has and can demonstrate oneself to have a tight social networks around.' (para.8a)
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> 'The position of people who have had to run away from home because of family breakdown is more than precarious economically, socially and mentally with a high risk of suicides.' (para.8b)

35. This is an Appellant who has already made three suicide attempts when he was living in India due to his family trying to bully and beat him into marrying a woman.

36. Finally, and I find this most significant in this appeal. She states:

> 'The HO in its decision is failing to appreciate the degree to which Indian social, cultural and political life is quite different from that in the UK, and the degree to which public and state hostility, including violence-towards same sex desiring subjects exists and is legitimised in state and public discourse alike.' "

20. We see considerable merit in Mr Kotas's submission that Dr Osella's conclusions appear to be sweeping generalisations. Importantly, as set out by the judge, those conclusions are not set in the context of the CG decision in MD.

21. In the result, the judge failed to found her reasons for allowing the appeal in the context of the country guidance decision of MD by failing to have regard to it. Her reasons given at paras 29-36 do not seek to justify a departure from it and we are unable to say that those reasons would clearly amount to "cogent reasons" to depart from the CG decision of MD.

22. Consequently, for the reasons we have set out above, the judge materially erred in law in allowing the respondent's appeal on asylum grounds.

Decision

23. Thus, the decision of the First-tier Tribunal to allow the respondent's appeal on asylum grounds involved the making of a material error of law and we set it aside.

24. The appeal will be relisted in the Upper Tribunal to remake the decision, namely whether the respondent has established that he is at real risk of persecution as a gay man returning to India.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 4 July 2017