Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09791/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
On 23rd April 2015	**On 18th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR ABIBOU GUEYE
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A De Ruano, Legal Representative
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Senegal who was born on the 11th September 1989. He appeals, with permission, against the decision of Judge Robson who, on the 20th January 2015, dismissed his appeal against the respondent's refusal to grant him asylum and her consequent decision to remove him from the United Kingdom.

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2. An anonymity direction was not made by the First-tier Tribunal and little purpose would therefore be served by making one now.

The appellant’s case before the First-tier Tribunal

3. The appellant’s claim for asylum was based upon it being accepted that he was a gay man who had been forced to flee Senegal as the result of his homosexual relationship with a man called ‘Manguang’. That relationship was exposed when, in April 2011, Manguang kissed the appellant in the street. This was observed by three people, one of whom took a photograph of it. The appellant was stabbed near to his eye during the ensuing argument. This left a small scar. Manguang was stabbed to death. The appellant fled to the home another gay friend: Diallo. He did not contact the police because he believed that they would not investigate the matter if they knew that Manguang was gay. During the following four months, the appellant stayed with Diallo, occasionally leaving his house in order to play music in a band. On the 30th September 2011, he came to the United Kingdom with limited leave to remain for a period of 6 months for business purposes. He was detained by Immigration Officers on the 21st April 2013 as an overstayer. He claimed asylum on the 29th April 2013.

The decision of the First-tier Tribunal

4. Judge Robson did not find the appellant credible. His reasons are contained within paragraphs 60 to 75 of his determination, which are set out below:

> “60. The Appellant was asked in interview when it was that he first realised his sexuality. His initial reaction was “a long time ago” and he was unable to say in interview whether or not that was whilst he was at school. In his statement the Appellant stated categorically at paragraph 5 that he “realised he was a homosexual in school” which he went on to say was “indeed quite a long time ago”. In his oral evidence at a time when he chose to give his evidence in English rather than Wolof, he explained that initially he was “playing kissing/caressing but never slept with any man” until he met with Manguang. Returning to the interview he did say in fact in response to question 27 that the first time he had done anything sexual with a man was with Manguang. “I used to play with it but that was my first time.”
>
> 61. Whilst the Appellant had said that he met Manguang in 2009 that was also the year when he was apparently still at school. I do not find it credible that given what was a life changing experience, the Appellant was unable to initially state what was a considerable change in his lifestyle, namely when he first met Manguang.
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> 62. I was also concerned to note that in his interview he said that he had finished his BFEM and other courses around 2004 and 2005 which does not sit well with the claim that he was still at school in 2009.
>
> 63. The lack of detailed information in interview as to when he first realised he was gay adversely affects his credibility. I have noted the information contained in the refusal letter from the “international HIV and Aids charity ‘AVERT’” which describes the process of “coming to

terms with one's sexuality." None of the matters raised in that report were reflected in the claimed behaviour of the Appellant.

64. I turn to the relationship with Manguang. The explanation by the Appellant in relation to paragraph 30 of the refusal letter which addressed the lack of information regarding the description of how the Appellant experienced his feelings was as follows:

> "In relation to paragraph 30, my only difficulty was with other people's hostile views about homosexuality but I was inside perfectly comfortable with being gay."

65. That explanation does not explain why the Appellant did not give a detailed explanation that was understandably required by the Respondent to enable the Respondent to form a proper view about the Appellant's sexuality. Given this claimed fear of discovery, I do not find it credible that when asked about how the relationship with Manguang developed, his explanation was "it just came naturally". I also find it not credible that when asked whether or not the Appellant was scared that Manguang well might say that he was not gay the response of the Appellant was that in Thiossane, "there are generally more gay people". That is quite clearly inconsistent with the previous statement in interview that "everyone in Senegal would kill you because you are a homosexual".

66. The Appellant stated that he had been in a relationship with Manguang for two years. Of those two years the Appellant had first started cohabitation with Manguang on 22nd January 2010, a year before the claimed fatal attack on Manguang. I simply do not find it credible that the Appellant would not have known Manguang's date of birth or his occupation.

67. Although I have come to that conclusion, I must address the question of the attack in April 2011 which occurred a year after claimed cohabitation commenced.

68. If Manguang was killed as claimed in his interview, I do not find it credible that Manguang sought to kiss the Appellant in public and doing so when there were three people watching what was going on and taking photographs.

69. I do not accept the evidence that the Appellant's scar, if that was what it was, to his eye was caused by a stab wound and I do not find it credible having managed to make his escape on what turned out to be a fatal attack, Diallo should have gone back to learn of the death of Manguang.

70. The Appellant said that the police were not called because they would not attend. Whilst in the objective evidence it is clear that the police do arrest men who are perceived to be gay and charged with "unnatural acts" under the penal code of Senegal, I do not find it credible that a murder case should not be investigated. And further I do not accept the answer in the interview "if the police were there they might help with the killing". I also find it not credible that when asked what Manguang had died of that (question 44) the Appellant said he did not know. He did not see it but he was told by Diallo. In his witness statement the Appellant said that he believed that the attack was because of the kissing but as I have said before I do not find it credible

that given the claimed admission to homosexuality, the Appellant and Manguang would conduct themselves in public in the manner described.

71. The Appellant stated that he had remained in Senegal for four months during which time he stayed with Diallo. His explanation for the delay was that on the one hand he kept himself locked up during that time but on the other hand stated that he would go out and play in a band with Diallo. In his written statement his clarification at paragraph 13 was that "discreetly" he would go out and play with a band in their studio and there was no public performance. Whatever the position, if he was fearful for his life, I do not believe that he would have left hiding and gone to play in a band.

72. The Appellant applied for a visit visa as a Tier 5 TW (Creative and Sporting) Migrant on 27th June 2011. I noted the inconsistency about the length of time that the Appellant was at the address stated on the visa application when he said he had been at that address for over ten years and his claim to have moved in with Manguang in 2010.

73. If as was said by the Appellant in oral examination it was Diallo who filled in the form I did not find it credible that the Appellant would not have checked the form given the importance of his "escaping from Senegal" and furthermore there was no explanation as to how Diallo obtained the information to fill in the form other than obtaining it from the Appellant.

74. The Appellant undoubtedly arrived in the United Kingdom in 2011 but no claim for asylum was made until nearly two years later namely April 2013. This delay I find does adversely affect his credibility taking into account Section 8 of the Asylum and Immigration (Treatment of Claimant's, etc.) Act 2004. The claim for asylum was only made after the Appellant had been detained on 21st April 2014 by Immigration Officers on the grounds of being an overstayer. In his statement and in oral evidence the Appellant stated that he did not know he was expected to claim asylum on arrival, did not know what he should do about claiming asylum and it was the first time in a strange country. Furthermore he spoke only Wolof and French. He went on to say that after some months after coming to the United Kingdom he spoke to a person who did tell him about claiming asylum but said it was rather too late. The Appellant was then scared of claiming asylum since he might be arrested.

75. However, clearly the Appellant was familiar with the concept of asylum claims since he stated in oral examination that he knew that he could claim asylum in Belgium or France. He however did not know that he could claim asylum in the United Kingdom. There was no satisfactory explanation as to why the Appellant did not claim asylum in France if he was aware of the position there. If as he claimed in his oral evidence, he knew the United Kingdom was "safe for gays" then he must have investigated the position in the United Kingdom to some degree. I find that the only reason for the asylum claim was because of his detention."

The rival submissions

5. Mr de Rauno relied upon his grounds of appeal, which may be conveniently summarised as follows. There were no material discrepancies in the appellant's evidence. The judge simply found the appellant's account was implausible without making any reference to the detailed explanations that he had provided for his actions. In particular, the judge failed -

(1) to take account of the appellant's "clarification or correction" of his earlier statement that "everyone in Senegal would kill you because you are a homosexual";

(2) to take account of the appellant's explanation that they did not realise they were being observed when Manguang kissed him in the street;

(3) to explain why it was not credible that Diallo should have gone to the scene of the attack in order to discover what had happened to Manguang;

(4) to identify the background country information that supported its finding that the police arrest men who are perceived to be gay and charge them with "unnatural acts" under the penal code of Senegal;

(5) to explain why it was not credible that Diallo completed the appellant's visa application form without reference to the appellant for the necessary information;

(6) to take account of the appellant's explanation that the realisation of his sexual orientation had been a gradual process;

(7) to take account of the appellant's explanation that he had played with his band <u>in a private studio</u> whilst hiding in Senegal.

Additionally, the grounds draw attention to two claimed factual errors in the determination:

(i) the judge stated that the appellant had been detained in the UK in April 2014 whereas it was in fact 2013;

(ii) the judge also stated that the appellant had not mentioned having a boyfriend since he came to the UK whereas the respondent's refusal letter refers to the appellant having mentioned this during his asylum interview.

6. The respondent served a Notice under Rule 24 of the Upper Tribunal Procedure Rules, and this was elaborated upon by Mrs Pettersen. The respondent's arguments may conveniently be summarised as follows.

7. The judge's reasoning is not wholly reliant upon what he found to be the implausibility of the appellant's account. Amongst other things, he also took account of the explanations that the appellant had given for the anomalies in his account during cross-examination, for his delay in claiming asylum, the compatibility or otherwise of the appellant's account of his realisation that he was gay with the objective information, and the

appellant’s explanation that he only played “discreetly” in his band during the period that he was in hiding. Although the judge had at one stage inadvertently referred to the appellant being detained in April 2014, he had also correctly noted elsewhere that it was in April 2013.

Analysis

8. Mr de Ruano’s submissions were dependent largely upon the premise that the appellant had given an internally consistent account of his reasons for departing Senegal and that, therefore, the judge’s findings were entirely consequent upon his own subjective view of its plausibility [see also, paragraphs 11 to 14 of the grounds of appeal]. I reject that premise for the following reasons.

9. It is clear that the judge measured the appellant’s account of his realisation that he was gay against the objective evidence concerning the experience of coming to terms with one’s sexuality as described by the HIV and AIDS charity, ‘Avert’ [paragraph 63]. Moreover, the criticism that the judge failed to appreciate the gradual nature of this process is in my view ill-founded. The point that was reasonably being made by the judge was that the appellant had given conflicting accounts of the stage in his life at which he had <u>ultimately</u> realised that he was gay [paragraphs 60 and 61]. That was not a matter that could simply be glossed over by reference to the gradual nature of the process whereby he had reached that stage. Furthermore, this was an issue that was inseparable from other conflicts in the appellant’s chronology of events [paragraph 62].

10. Although the grounds criticise the judge for failing to identify the source of the background information that led him to conclude that gay people are arrested and charged with committing “unnatural acts” contrary to the penal code of Senegal, they do not suggest that this was a finding that was not open to him upon the evidence. It follows that the judge was entitled to view the appellant’s account through the prism of that particular finding. The judge was thus entitled, for example, to consider it implausible that Manguang would risk that which the evidence suggested would be the likely consequence of two men kissing in a public place in Senegal - namely, being arrested and charged with committing “unnatural acts” – regardless of whether they had appreciated that they were being observed doing so [last sentence of paragraph 70].

11. Upon a fair reading of paragraphs 72 and 73 of the decision, it seems to me to be implicit that the reason that the judge rejected the appellant’s explanation for the anomalies in his visa application (that Diallo had completed it without reference to the appellant) was that it contained information that only the appellant could have known.

12. The implausibility of Diallo going to the scene of the attack in order to discover what had occurred is not perhaps the strongest of the reasons that were given by the judge for rejecting the appellant’s account. Nevertheless, the point that is made in the grounds (that there was no

evidence to suggest that the people involved in the attack would have known that Diallo was connected to the appellant) is in reality an attempt to re-argue the merits of the appeal. Much would have depended upon the evidence concerning the particular circumstances, including how quickly Diallo came upon the scene following the attack, the nature of his enquiries, and the persons with whom he was said to have made them. These are all matters that were properly open for discussion at the submissions stage of the hearing before the First-tier Tribunal. They do not in my judgement fall to be considered by way of an appeal that is brought upon the ground that the Tribunal made an error of law in relation thereto.

13. There is in my judgement no basis for the complaint that the Tribunal misunderstood the appellant's account of playing in his band whilst he was at the same time supposedly hiding at the home of his friend, Diallo. The judge made it very plain that he had considered the appellant's account on the basis that he had supposedly been playing "discreetly" – more specifically, that he played in a studio and that there had been "no public performance" – but he nevertheless refused to believe, as he was entitled to do, that the appellant would have left the relative security of Diallo's house in order to play in a band [paragraph 71].

14. Mr de Ruano accepted, by way of reply to Mrs Pettersen's submissions, that nothing ultimately turned upon the judge's accidental slip concerning the year in which the appellant was detained following his arrival in the United Kingdom.

15. This brings me to the one possible error that <u>may</u> have been material to the judge's reasoning. This occurred at paragraph 78 of the decision:

> "I have considered the letter form Mr Diar but place no weight on the same. No satisfactory explanation has been given for his non-attendance. It was however of note that there was reference to a "boyfriend" but no such refe3rence was made by the Appellant, either orally or in writing".

However, as Mr de Ruano pointed out, when the appellant was asked in his asylum interview whether he had had any relationship with men in the UK, he had replied that he had been "getting with someone" but they had not "understand one another" due to the fact that this person's English "wasn't perfect" [question 69]. Whether that description accords with that of a "boyfriend" is perhaps debatable. In any event, it is clear that the principle reason that the judge gave for not attaching weight to the evidence of the appellant's witness was the absence of any satisfactory explanation for his non-attendance at the hearing, with the consequence that his testimony had not been subjected to the scrutiny of cross-examination. Within the context of the evidence as a whole, therefore, I do not consider this error (if such it was) was material to the judge's overall assessment of the evidence.

16. In conclusion, I am satisfied that the judge did not make any error of law in the determination of this appeal.

Notice of Decision

17. The appeal is dismissed.

Anonymity is not directed

Signed Date

Judge Kelly
Deputy Judge of the Upper Tribunal