



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

Appeal Number: PA/03906/2017

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice,
London
On 25 September 2017**

**Decision & Reasons
Promulgated
On 27 September 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

**DA
ANONYMITY DIRECTION MADE**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Jaquiss, Counsel

For the respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

1. I have anonymised the appellant's name because this decision refers to his asylum claim.

Summary of asylum claim

2. The appellant is a citizen of Kenya and claims that he is at risk of persecution for reasons relating to his activities on behalf of gay rights in the United Kingdom.

Procedural history

3. In a decision dated 7 June 2017 the First-tier Tribunal dismissed the appeal on protection and human rights grounds. In a decision dated 7 August 2017 Upper Tribunal Judge McGeachey granted permission to appeal observing that the First-tier Tribunal made no mention of the country expert report.
4. The respondent submitted a rule 24 notice dated 31 August 2017 in which it was submitted that the First-tier Tribunal's findings were open to it.

Hearing

5. Ms Jaquiss relied upon and amplified her grounds of appeal and Mr Melvin relied upon the rule 24 notice. At the end of the hearing I reserved my decision, which I now provide with reasons.

Error of law discussion

Country expert report

6. The First-tier Tribunal was clearly aware of the country expert report prepared by Professor Aguilar, having referred to it once at [24]. The reference is made in passing and simply comments that the homophobic laws in Kenya are being enforced by the courts and this is a subject "*about which Prof. Mario Aguilar speaks in his report*". There is no further mention of the report.
7. The First-tier Tribunal erred in law in failing to direct itself to the relevant parts of the country expert report which support the Applicant's claim that in Kenya he will be perceived as gay, by reason of his support for gay rights and those supportive of gay rights could be prosecuted under Kenyan law. This is a material error of law because the First-tier Tribunal appears to accept that "*undoubtedly*" the appellant engaged with the LGBT community, albeit this was not driven by his religious faith as claimed [27-9]. An appellant's account of his fears and the wellfoundedness of those fears must be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law - see AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 at [19b] and [21(e)].

Other findings

8. The First-tier Tribunal has also made factual errors that have caused unfairness.
9. First, the finding at [22] that there is “*nothing*” in the material independent of the appellant that speaks of named persons the appellant claims to have assisted is incorrect. One of the named persons, Andy Nsubuga, wrote a letter in support dated 15 April 2017, and this is contained at the end of the appellant’s bundle.
10. Second, the finding that the Peterborough LBBT Equality Council letter dated 10 March 2017 provides “*no detail*” of the work the appellant does at [23] is not supported by the letter itself, which sets out the appellant’s main roles with descriptions.
11. Third, contrary to the indication at [34] the appellant has not claimed to be homosexual. It follows that the First-tier Tribunal misdirected itself at [30] – the question was not whether the appellant is gay but rather whether (i) he has been an activist on behalf of the gay community in the UK; (ii) that information will become known to the Kenyan authorities or he will continue his activities in Kenya; (iii) the appellant’s behaviour in the UK and / or in Kenya would lead to a real risk of persecution in Kenya because the authorities will perceive him to be gay.

Conclusion

12. When the errors identified above are considered together I am satisfied that the First-tier Tribunal’s findings are inadequately reasoned, and the First-tier Tribunal has materially erred in law.

Disposal

13. I have had regard to para 7.2 of the relevant *Senior President’s Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal. This is because completely fresh findings of fact in relation to detailed evidence are necessary.

Decision

14. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.
15. The appeal shall be remade by the First-tier Tribunal de novo.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
26 September 2017