



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal No: PA/04172/2015
PA/05031/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 9 May 2018

Decision & Reasons Promulgated
On 16 May 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ANTHONY [T] & MARION [W]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Winter, Advocate, instructed by Maguire, Solicitors, for the first appellant, and by Katani & Co, Solicitors, for the second appellant

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. First-tier Tribunal Judge Porter dismissed the appellants' appeals by her decision promulgated on 26 April 2017.

2. The appellants have permission to appeal to the UT on grounds stated in their application dated 2 October 2017.
3. The grounds are headed:
 - (1) errors of law when finding that the first appellant is not homosexual;
 - (2) alleged actions by the first appellant's stepbrothers;
 - (3) error of law in criticising the appellants for not claiming asylum on arrival; and
 - (4) errors of law when assessing the second appellant's PTSD.
4. In course of submissions the following matters were agreed:
 - (i) Ground 1 is critical.
 - (ii) Grounds 2 and 4 depend upon ground 1.
 - (iii) Ground 3 could not succeed on its own.
 - (iv) The respondent's decision found that the case "taken at highest" failed on grounds of sufficiency of protection and internal relocation. Those issues were contested in the FtT, with submissions from both sides, which the judge did not resolve. There was, therefore, no alternative basis on which the outcome might stand.
 - (v) If ground 1 showed such error as to require the decision to be set aside, the appropriate outcome would be a remit to the FtT for a fresh hearing.
5. Having heard the submissions, I indicated that ground 1 was made out.
6. At paragraph 53 the judge correctly identifies the principal issue as whether the first appellant is gay. She gives three reasons for finding that not established: (1) his 14 year heterosexual marriage, with two children; (2) lack of corroboration of his sexual experiences and gay relationships in Kenya, and the accounts of the ending of those relationships being "extremely problematic and unpersuasive for the reasons outlined on behalf of the respondent"; and (3) very difficult to accept that the appellant could have been in a gay relationship between 2008 and 2013 without the second appellant being aware.
7. The grounds of challenge are based partly on failure to consider the cultural anti-homosexual context. That has some merit. Further, examples of gay men "coming out" after long heterosexual marriages, with children, whose wives were in ignorance, are known to occur even in countries where homosexuality is not highly stigmatised.
8. While it is not absurd to take a long marriage without a wife being aware her husband is gay as some indication that he may not be gay, the overlapping reasons (1) and (3) are not strong.
9. Ground 1 is based partly on error at (2) of overlooking that there is no obligation on an appellant to provide corroboration. However, an appellant is under a duty to

substantiate his claim, and a judge is entitled to take account of absence of material which might reasonably be expected; see e.g. ¶339L of the immigration rules.

10. The ground includes the stronger point that the appellant's account of his history as a gay man in Kenya is not one of which corroboration would obviously or readily be available. The judge does not specify the corroboration she expected to see.
11. It is not an error to give reasons partly (or even entirely) by adoption of one party's case, but it is not best practice. The reasons adopted at (2) are not specifically identified. They were tracked down at the hearing to paragraphs 25 – 50 of the refusal letter. It would have been useful to know which of them the judge took as showing the appellant's evidence to be "extremely problematic and unpersuasive", and what she thought of those matters herself, in light of the evidence. The reasons are not so obviously overpowering that no more needed to be said.
12. Mr Govan correctly argued that the decision was to be read as a whole, and not all its reasoning on the principal issue is at paragraph 53; but the paragraph set out to deal with that issue, and the grounds and submissions significantly undermine its reasoning.
13. Paragraph 54 finds other aspects of the account unpersuasive, but is phrased more as stating conclusions than as giving reasons.
14. The judge was entitled to find it difficult to accept that the appellant would pay blackmail over a false rumour of being a male prostitute, but that must be placed in a context of fear of disclosure of homosexuality, regardless of the lurid allegation attached. If the finding on homosexuality is unsafe, this reason loses much of its force.
15. The grounds criticise the treatment of a witness from an LGBT group at paragraph 55 as not adding anything to the appellant's evidence "in any independent way", because she simply confirmed what the appellant told her. Mr Winter accepted that this was not expert evidence, but he argued that it ranked above mere repetition.
16. I think that as the witness was a full-time worker for the group, experienced in sexual identity issues and support for those seeking asylum on such grounds, her observations were capable of adding something. The judge was, however, entitled to take it against the appellant that his participation in such groups dated only from the period after he was notified of refusal of his claim.
17. Ground 3 is not well founded. The judge was entitled to conclude at ¶57 that delay in the claim was adverse to (but not determinative of) credibility.
18. Although the judge obviously took considerable care over the case, setting out both sides at length and in detail, the decision is unfortunately long on the evidence and submissions but rather light on the reasons for resolving the issues.
19. While some reasons stand up to challenge, the grounds and submissions show that the principal passage justifying the judge's conclusion about the first appellant's sexual

orientation is not supported by adequate reasons. As a whole, the decision cannot safely stand.

20. The decision of the FtT is **set aside**. It stands only as a record of what was said at the hearing.
21. There is a presumption that the UT will proceed to remake decisions, of which parties are reminded in directions issued with the grant of permission. However, given the nature of this case, and as agreed by the parties, it is appropriate, once set aside, to remit to the FtT for an entirely fresh hearing.
22. The member(s) of the FtT chosen to consider the case are not to include Judge Porter.
23. No anonymity direction has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial "H".

10 May 2018
Upper Tribunal Judge Macleman