



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05028/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House
On 11 November 2020 by Video

Decision & Reasons Promulgated
On 16 February 2021

Before

UPPER TRIBUNAL JUDGE PITT

Between

COB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr S Chelvan, Counsel, instructed by Freemans Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. This decision is the remaking of the appellant's appeal brought on Article 3 ECHR grounds against the respondent's decision of 15 May 2019.
2. The remaking of the appeal is required following a decision of 3 February 2020 in which the Upper Tribunal found an error of law in the decision of the First-tier Tribunal issued on 18 September 2019 on the appellant's Article 3 ECHR claim. The Upper Tribunal decision upheld all other aspects of the First-tier Tribunal decision.

Background

3. The appellant is a national of Jamaica. He was born in 1974.
4. The appellant came to the UK on 4 May 2000 on a visit visa. He obtained further leave to remain as a student until 2001. He was arrested in 2002 and, whilst on remand, on 18 November 2002 he claimed asylum. That claim was refused on 28 November 2002. An appeal against the refusal was heard in his absence and dismissed on 27 July 2004.
5. On 12 January 2004 the appellant was convicted of possessing a class A controlled drug with intent to supply - heroin. On 9 February 2004 he was sentenced to three years and nine months' imprisonment and recommended for deportation. An appeal against deportation on asylum and human rights grounds was refused by the Asylum and Immigration Tribunal on 24 November 2006 and COB became appeal rights exhausted on 9 March 2007.
6. Of relevance to this appeal, in those proceedings the appellant was found to be gay. This finding was made in paragraphs 50 to 56 of the decision of 24 November 2006. It is common ground that this finding is extant. It is this aspect of his profile that forms the basis of the appellant's current Article 3 ECHR claim.
7. A deportation order was signed against the appellant on 9 August 2007 and served on him on 19 November 2007. The appellant applied to revoke the deportation order and when this application was refused, appealed on asylum and human rights grounds. In a decision dated 7 April 2008, an AIT panel reached the same conclusions as the earlier Tribunal. The decision of 7 April 2008 was successfully reviewed, however, and the appeal re-heard and again dismissed by an AIT panel in a decision dated 4 September 2009. The appellant became appeal rights exhausted on 23 September 2009. The appellant then absconded for an extended period of time.
8. On 6 January 2016 the appellant was convicted of possessing with intent to supply a controlled drug class A - crack cocaine, three counts of being concerned with supplying class A controlled drug - cocaine and two counts of being concerned in supplying class A controlled drug - heroin. On 3 February 2016 he was sentenced to six years' imprisonment.
9. The respondent then recommenced deportation action against the appellant. The appellant set out his protection claim in a Preliminary Information Questionnaire

dated 17 December 2018 and legal representatives made further submissions dated 25 February 2019.

10. In a decision dated 15 May 2019 the respondent applied Section 72 of the Nationality and Immigration Act 2002 (the 2002 Act), finding that the appellant had been convicted of a particularly serious crime and constituted a danger to the community of the UK with the consequence that he did not qualify for asylum or humanitarian protection. His Article 3 and 8 ECHR claims were also refused.
11. The appellant appealed against all aspects of the respondent's decision. His appeal was heard by First-tier Tribunal Judge Swinnerton on 16 September 2019. In a decision issued on 18 September 2019, the s.72 certificate was upheld and the appellant's Article 3 and Article 8 ECHR claims dismissed.
12. The appellant appealed against the decision of the First-tier Tribunal and on 1 October 2019 was granted permission to appeal to the Upper Tribunal.
13. As before, in a decision dated 3 February 2020, the Upper Tribunal found an error of law in the decision of the First-tier Tribunal only as regards the Article 3 ECHR claim based on the appellant's sexuality. The error of law decision specified in paragraph 23 that the decision of the First-tier Tribunal was set aside to be remade "only concerning the appellant's claim under Article 3 ECHR made on the basis that he is gay". Thus, the appeal now requires remaking on that important but limited basis.

Preliminary Issue – Additional Grounds

14. As set out in paragraphs 17 and 18 of the Upper Tribunal decision issued on 3 February 2020, at the error of law hearing the appellant applied to vary the grounds on which permission to appeal to the Upper Tribunal had been sought. The application to vary the grounds was contained in paragraphs 21 to 31 of the appellant's skeleton argument dated 17 November 2019.
15. The Upper Tribunal refused the application to vary the grounds:
 - "17. Mr Chelvan sought to argue at the hearing that the remaining grounds of challenge should be varied to include legal argument on whether s.72 was incompatible with the 2004 Minimum Standards Directive. As I understood it, his argument was that the primacy of EU law required that the Tribunal assess first whether the appellant was a refugee and only then assess whether a s.72 certificate should be applied to exclude him from the protection of the Refugee Convention.
 18. This was not an argument raised in the grounds of appeal to the First-tier Tribunal, at the hearing in front of the First-tier Tribunal or in the grounds of challenge to the Upper Tribunal. It was not brought to the attention of the Tribunal or the respondent until the day of the hearing, the amended grounds being submitted electronically on the weekend prior to the hearing. The application to amend the grounds stated that it should be granted as there was an important point of principle not yet determined by the Upper Tribunal or the

High Court. Dr Chelvan relied on paragraph 41 of MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 000353 (IAC) which shows that in the case of the Upper Tribunal granted him permission to vary his grounds where, the case having come back to the Upper Tribunal following a 'Cart' judicial review, there was no opposition from the respondent to that course of action. The procedural facts in MA (Pakistan) were notably different from this appeal. The position of the appellant in that appeal, after a 'Cart' judicial review, had 'materially changed from what it was when the Upper Tribunal received the application for permission to appeal'; see paragraph 34 of MA (Pakistan). There has been no 'Cart' judicial review here or material change of circumstances for this appellant since the original grounds were drafted or since permission was granted. The only thing that has changed is that Dr Chelvan was instructed after permission was granted. He was not able to provide any good reason for the point not being argued earlier. The respondent objects to the application to amend the grounds. In all the circumstances, I saw nothing in Rule 2 or 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 that indicated that the application to amend the grounds in these circumstances had merit. I refused to admit the amended grounds."

16. Notwithstanding that decision, at the hearing for the remaking of the appeal, Dr Chelvan again sought to persuade the Upper Tribunal to admit the same ground. This aspect of his submission was set out in paragraphs 30 to 45 of his skeleton argument dated 4 November 2020.
17. The core of this submission was the proposition that the application of s.72 of the 2002 Act to the appellant's asylum claim before considering whether he was a refugee was not compatible with EU law. The respondent and First-tier Tribunal had erred in deciding the s.72 question before deciding if the appellant was a refugee. In order to comply with EU law, therefore, when remaking the appeal the Upper Tribunal was required to decide whether the appellant was a refugee and only then proceed to decide if s.72 applied. In support of this proposition, Dr Chelvan relied on the joined cases of C-391/16, C-77/17 and C-78/17 M v Ministerstvo vnitra and X and X v Commissaire général aux réfugiés et aux apatrides (X & X), decided by the Court of Justice of the European Union (CJEU) on 14 May 2019.
18. Mr Clarke, for the respondent, maintained that the application to amend the grounds did not have any legal basis. What the appellant was really seeking to do was to find another route for going behind the findings of the First-tier Tribunal on the s.72 certificate and behind the decision of the Upper Tribunal not to vary the grounds of appeal challenging the First-tier Tribunal decision and, ultimately, reopening the question of refugee status. That was not permissible where those matters were settled.
19. I did not find that the application to widen the scope of the remaking of the appeal should be granted for a number of reasons. Firstly, the application had to fail where the case of X & X does not support the proposition that deciding the s.72 certificate before making a substantive decision on the asylum claim is incompatible with EU law. The question before the CJEU in X & X was whether Articles 14(4) to 14 (6) of Directive 2011/95 complied with the provisions of the Geneva Convention on

exclusion from refugee status or a refusal to grant refugee status; see, for example, paragraphs 1 and 58-59. The CJEU concluded that Directive 2011/95 did comply with the Geneva Convention as it provided protection from refoulement if refugee status was revoked or refused and, in that event, guaranteed the rights required by the Geneva Convention; see paragraph 110.

20. The case of X & X does not address provisions at the national level for revoking or refusing refugee status to the appellants in the cases under consideration, one of whom (Case C-77/17), like the appellant here, was refused asylum as a result of his criminal history. The case, therefore, does not say anything on the compatibility of the s.72 process with EU law (or the Geneva Convention). The appellant relied heavily on paragraph 110 of the decision in X & X in support of his argument but I do not read that paragraph as setting down a requirement for a positive finding on refugee status before revoking or refusing that status. If s.72 is applied an individual is refused asylum but is still be able to access protection from refoulement and a minimum level of rights. That is entirely in line with the ratio of X & X in paragraph 110 and with the rest of the decision. As the new ground did not have any arguable merit, that alone was sufficient to indicate that the scope of the remaking of the appeal should not be widened.
21. Secondly, it was argued for the appellant that if the ground was admitted there was a serious possibility that the outcome of the s.72 assessment would be different and that this added weight to the application to vary the grounds. I did not agree. Nothing was provided for the appellant capable of showing that the decision of the First-tier Tribunal on the s.72 certificate was in error or that the appellant could succeed on any basis in rebutting the presumption that he was a danger to the community. The new ground could not, therefore, lead to a different outcome. Dr Chelvan maintained that the respondent's conduct in a judicial review (CO/4600/2019) concerning the lawfulness of the appellant's detention indicated that she had resiled from her position on the question of the appellant being a danger to the community. The only document before the Upper Tribunal was a consent order dated 28 October 2020. The consent order said nothing on the respondent's view of whether the appellant was a danger. Nothing could be inferred from it or from the settlement of the judicial review by consent that had any materiality in this appeal.
22. Thirdly, the appellant also sought to argue that the new ground concerned asylum and that this showed it to be "compelling" or "exceptional". This was sufficient for the ground to be admitted even at this late stage in the proceedings and where the remaking expressly concerned only Article 3 ECHR. I did not accept those arguments had merit or that the extensive case law referred to by both sides took the arguments for admitting or excluding the new grounds beyond basic principles. As before, the point has not been shown to have any legal merit. Nothing in the materials indicates that even if applied there could be a different outcome for the appellant here. There was no suggestion that this ground could not have been argued before the First-tier Tribunal or included in the original grounds of appeal to the Upper Tribunal on which permission was granted. No reason, let alone a good reason, explained why

that was so. There was no suggestion that the new ground was Robinson obvious. It is therefore not the case that the new ground can be said to be “compelling” or “exceptional” such that it should be admitted now. It was not appropriate to admit the new ground and re-open matters lawfully decided by the First-tier Tribunal and the Upper Tribunal where that was so.

23. For all of these reasons, it was my conclusion that the appeal could be determined fairly and justly without admitting the new ground.

Article 3 ECHR claim

24. The appellant’s claim that he faces a risk on return to Jamaica on the basis of his sexuality must be assessed in line with the test set by the Supreme Court in HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31. The Supreme Court set out how the assessment that should be conducted in paragraph 82:

"The approach to be followed by tribunals

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

25. The respondent in this case concedes that the appellant is gay and that he would face a risk of mistreatment if he were to live openly as a gay man in Jamaica, answering

the first two questions of the HJ (Iran) test in the appellant's favour. The questions that remain to be answered are, therefore, what the appellant would do if he returns to Jamaica and, if he would act discretely, why he would do so. Assessing whether someone would act discretely and the mental state leading to that behaviour requires careful consideration, particularly in the context of what the respondent concedes are difficult circumstances for gay men in Jamaica. Although it has become a somewhat overused phrase, the potential for serious harm for a gay man in Jamaica shown in the country evidence calls for all aspects of the assessment to be conducted with anxious scrutiny.

26. I have also referred to the guidance in Devaseelan (Second Appeals, ECHR, Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 as there are previous Tribunal decisions which address the appellant's claim. Those decisions are the starting point for my assessment.
27. In the decision dated 18 October 2006, the Asylum and Immigration Tribunal found as follows in paragraph 55:

"55. I conclude from all the evidence available to me that the Appellant may have suffered some difficulties due to his sexuality but that this has not in any way amounted to ill-treatment to amount to persecution and I conclude from all the evidence that the Appellant has stated about his being able to travel around areas in Jamaica, albeit that it is a small country, he can do so as he has done so in the past, I therefore cannot conclude that there is a real risk that the Appellant would suffer ill-treatment to amount to persecution were he to be returned. I therefore cannot conclude that there is a real risk that the Appellant would suffer ill-treatment to amount to persecution were he to be returned. I set that against the background evidence to which I have been referred and the case of DW. Whilst the Appellant may attempt to assert that he would be readily identifiable as a gay man, clearly that was not the case as he was able to maintain employment, as referred to above, and move around the country although in the latter connection it is acknowledged that he states he was quantified as being gay whilst on one journey. The level of risk did not reach the relevant threshold for persecution, notwithstanding the objective evidence. Too, the Appellant left Jamaica to travel for a holiday to the USA, this is in 1999 and he stated that he hoped that sometime away from the situation might make things easier for him. At the end of the holiday he returned to Jamaica, he states that had he met some gay friends he might have tried to stay in the USA but he was staying in a hotel by himself and did not meet anyone. The Appellant is an intelligent man, he is studying an Open University degree in mathematics, by 1999, according to his own evidence he had been made very well aware of the situation in Jamaica, I do not accept that if he were as concerned about his situation in Jamaica as he claimed that he would have returned to Jamaica after his US holiday. I do not consider that his explanation that he had not met anyone was a reasonable one to explain his return to his stated difficulties."

28. The appellant's asylum claim was refused again in a decision of the AIT dated 4 September 2009. The panel made the following findings:

“15. The appellant’s evidence both from his statement and oral evidence given to the Tribunal in October 2006 was accepted to the extent that he is a homosexual man, and that at least on one occasion in 1996 he was deliberately cut across the face, as well as having been threatened on occasions. The appellant became a practising homosexual man in Jamaica. He was able to find employment in Jamaica, and kept the issue of his sexuality private at work, as did his partner Patrick. The appellant suffered some difficulties due to his sexuality in Jamaica, although he was able to travel within Jamaica, and the difficulties he did suffer were not considered to have amounted to persecution. The discrimination or harassment the appellant encountered in Jamaica did not develop into serious violence. The appellant gave brief evidence in March 2008. He said he had continued having homosexual relationships in the UK, and has also had sex for money. He said [sic] would not modify his sexual behaviour if he was returned to Jamaica, because he could not change. At that time he was not in a long term relationship, and he told the Tribunal he had previous sexual relationships in Jamaica. We accept that evidence on the whole, subject to our findings below as to whether the appellant would modify his behaviour on return to Jamaica, and the findings made by previous Tribunals in relation to the appellant’s evidence”.

29. The AIT went on to find in paragraphs 18 to 20:

“18. ... We find the appellant was not open about his sexuality in Jamaica, and met his friends in private. However when the appellant was a young man, before he left school, he was cut across the face by a bus conductor because the appellant was perceived to be gay, and the conductor did not want a gay man travelling on his bus. We were shown a photograph of the scar, and we accept this incident did take place. In 1998 the appellant was kicked and threatened, and in 1999 he was threatened with a gun together with his partner Patrick. The appellant was usually careful in meeting his friends in private and not disclosing his homosexuality, even at work. The appellant is an educated intelligent man. However, since he has been in the United Kingdom, albeit he has served a prison sentence, the appellant has become more open about his sexuality, and has engaged in short term casual sexual relationships, as well as having sex for money. The appellant has asserted he cannot change his behaviour, although we do not accept he would put himself at risk on return to Jamaica, particularly given he was so careful before he left in 2000. We are not concerned with the appellant’s demeanour, although we have been shown no evidence to suggest his behaviour is out of the ordinary or remarkable. The real issue in this appeal is whether the appellant would now be identified as being a homosexual man on return to Jamaica, and whether indeed he would behave as he has asserted. We bear in mind the appellant left Jamaica nine years ago.

19. The appellant has asserted he would not modify his behaviour on return to Jamaica. We do not accept that assertion; particularly given our concerns as to the appellant’s credibility on this crucial issue which we must take into account pursuant to Section 8 Asylum and Immigration (Treatment of Claimants) Act 2004. We take into account that the appellant did not make a claim for asylum when he came to the United Kingdom as a visitor; although we are quite clear he had no intention to return to Jamaica at that stage. The appellant only made an asylum claim after he had been arrested and was detained. In addition the appellant contested a serious allegation that he was in possession of heroin with

intent to supply for financial gain. The appellant was found guilty after a trial. The appellant's behaviour in contesting such a serious allegation and being found guilty was likely to mislead and was dishonest. We have noted that the Judge sentencing the appellant remarked that the appellant had been driving without a licence or insured, his speed has been about 90 miles an hour, and his driving had been erratic. We find that, contrary to his assertions, the appellant would be very careful to maintain a private and discreet life in relation to his homosexuality on return to Jamaica. We base our finding not only on the fact that we do not accept the appellant would continue to behave in the way he has done since he has been in the United Kingdom, but also given the appellant was very careful not to disclose his homosexuality when he lived in Jamaica prior to 2000 when he came to the United Kingdom."

30. The appellant submits that his accepted history and the country evidence shows that he will face inhuman and degrading treatment on return to Jamaica. It was common ground that three particular incidents of mistreatment had occurred whilst he was living in Jamaica, as found by the AIT panels in 2006 and 2009. In 1996 he was cut across his face by a bus conductor who identified him as a gay man. In December 1998 he was kicked when collecting water. In May 1999, he and his partner were threatened with a gun. There were other instances of verbal harassment and stone-throwing. The appellant maintains that he would be likely to face similar, if not worse, mistreatment on return. The country evidence continued to show that societal hostility towards gay men in Jamaica remained high, that the authorities did not offer sufficient protection and that government initiatives to change attitudes and increase protection had not been successful. The appellant did not want to have to be discrete and did not consider that it would be possible to be discrete so as to avoid harm as this had not proved possible in the past. Even if he did act discretely, this would be out of fear of serious harm. He therefore met the test set by HJ (Iran).
31. There are a number of reasons why I do not find the appellant's claim is made out. Firstly, the findings of both of the previous Tribunals were that when he lived in Jamaica he conformed sufficiently to social norms so as to avoid serious harm whilst still being able to have gay relationships and friends. His discretion was such that he was able to continue living with his family who knew he was gay and working even after choosing to tell one colleague about his sexuality. The panel in 2006 concluded that his claim to be "readily identifiable" as a gay man was not credible. The panel in 2009 was very clear that he would modify his behaviour on return as he had done in the past; see paragraph 19 of that decision, set out above. Considering those findings against the materials as a whole and in light of the matters set out below, in my judgment the evidence does not provide a basis for distinguishing those findings.
32. Secondly, and again as found by the earlier Tribunals, the appellant's decision to return after having had the opportunity to apply for asylum in the USA in 1999 does not indicate that he had a subjective fear of harm or of being unable to live a life he found tolerable in Jamaica or that he left Jamaica for the UK for reasons arising from his sexuality. The decision to claim asylum in the UK only after failing to obtain further leave and after being arrested and detained also supports the conclusion that he was able to live a discrete life which he found tolerable in the past and did not

leave Jamaica because he was gay and could not live the life he wanted or was afraid of serious harm. As before, his evidence before the AIT was that he had told members of his family about his sexuality and had been able to carry on living with them, that he had been able to relocate to live with an uncle in a more affluent area and that he had been able to work.

33. Thirdly, nothing in the appellant's evidence from 2009 onwards suggests that he has sought to live a gay life in the UK or expressed his sexuality in a way that might lead to him being identified as gay on return to Jamaica. It was not submitted on his behalf that anything prevented him from behaving as he wished in the UK. This added to his profile of someone who had behaved discretely in the past and could be expected to do so again in the future.
34. Fourthly, the appellant's case was seriously undermined where he has shown himself to be a profoundly untruthful witness concerning his history in Jamaica, his unwillingness to be discrete on return now and the he gave reasons for that. As set out above, in the appellant's evidence in the appeals in 2006 and 2009 he referred to having relationships, meeting up with gay friends, telling family members about his sexuality, continuing to live with relatives and being able to work. That account is very significantly at odds with his evidence in a witness statement dated 1 July 2019 prepared for the most recent proceedings before the First-tier Tribunal which gave a wholly different account of his time in Jamaica:

"10. When I lived in Jamaica before, I hated my life there completely. I was not free to express my sexuality. I could not form relationships nor associate myself with people of my same sex identity. I lived in constant fear of my life from the State and Jamaican people.

11. I could not turn to my close family and friends because they support violence against homosexuality. I hated to be around my family and friends because their hostility to homosexuality. I always felt demeaned at their views and comments about homosexuality. As a result, I could not talk to them or anyone about my sexuality. I lived my life in complete isolation and secrecy of my identity."

The witness statement set out similar statements in paragraphs 12 to 21 to the effect that the appellant had completely hidden his sexuality, had not had relationships and that his life in Jamaica had been intolerable as a result and that he had left the country because he could no longer tolerate living discretely.

35. The difference between this witness statement and the evidence in the earlier appeals before the AIT is stark. There was no explanation in the witness statement as to why the appellant's evidence before the AIT was entirely different. My conclusion is that the witness statement dated 1 July 2019 contains a deliberate and false attempt to come within the ratio of HJ (Iran) by asserting that because of a fear of harm the appellant was forced to live an entirely discrete life in Jamaica and had come to the UK to escape what he found to be an intolerable life in Jamaica. The appellant has thereby shown himself willing to lie in order to try to avoid deportation and to have

acted in a profoundly cynical manner in these proceedings. This significantly undermines his claim to be unwilling or unable to live discretely on return now

36. Fifthly, I am supported in the conclusion that the appellant is an untruthful and unreliable witness by other aspects of the witness statement dated 1 July 2019. In paragraphs 23 to 34 of the statement the appellant maintained, for the first time, that he was a victim of modern slavery in the UK, having been exploited and controlled by drug gangs and submitted that he was at risk of further harm on that basis in the UK and in Jamaica. Again, other than referring to having been able to “seek advice” by that time, there is no explanation as to why the appellant raised such a significant matter for the first time in this witness statement and made no mention of it even in the Preliminary Information Questionnaire dated 17 December 2018 and further submissions dated 25 February 2019, the latter drafted by legal representatives. The claim to have been a victim of drug gangs is wholly at odds with the appellant’s two convictions for serious drugs offences. The sentencing remarks from his conviction in 2004 are summarised in paragraph 30 of the decision of the AIT dated 18 October 2006. The appellant was found to be “close to the top of the chain of distribution”. The sentencing remarks from 2016 indicate he “played a leading role”. He has been found by the criminal courts to be the opposite of someone exploited and controlled by drug gangs. The National Referral Mechanism (NRM) found, unsurprisingly, in a decision dated 29 August 2019 that the appellant was not a victim of modern slavery. First-tier Tribunal Judge Swinnerton addressed this new claim in paragraph 19 of her decision dated 18 September 2019. She noted, correctly, that the appellant did not refer to being a victim of drug gangs at any time prior to July 2019. She concluded that the appellant’s evidence on this matter was not credible and represented “a last-ditch attempt to avoid deportation”. I agree with that conclusion and find that this aspect of the appellant’s evidence increases his profile as an untruthful and cynical witness.
37. My conclusion is, therefore, that the appellant has not shown that he will face inhuman and degrading treatment on return to Jamaica. His profile is that of someone who chose to live a discrete gay life in Jamaica previously and that he did so in a manner that he found tolerable. He was able to remain living with relatives, his evidence identifying the home of his uncle as somewhere more settled that he could go to if he wished. He has not shown that his decision to leave Jamaica was connected with his profile as a gay man. Nothing in the evidence indicates that his behaviour in the UK over the last ten years has been such that he would need to alter his behaviour on return in order to avoid identification as a gay man. His claim to be unable to act discretely or unwilling to do so out of a fear of harm rather than because, following HJ (Iran) “that was how he himself would wish to live” is not credible.
38. For completeness sake, I will deal with the submission made for the appellant that the respondent made a concession on page 7 of the refusal letter dated 15 May 2019 to the effect that it was accepted that the appellant would live as an openly gay man on return to Jamaica. It was not my view that this part of the refusal letter amounted to a concession, or that, even if it did, that the respondent was bound by it before me.

None of the appellant's accounts refer to him intending to live as an openly gay man on return to Jamaica. The statement on page 7 of the refusal letter appears, therefore, to be misconceived rather than a concession with legal force. In any event, the proceedings before the First-tier Tribunal, quite properly, clearly did not proceed on that basis and could not have done so given that the appellant's claim whether past or present was otherwise, his most recent claim being that in the witness statement of 1 July 2019.

39. For all of these reasons I did not find that the appellant showed that he would be at a real risk of serious harm on return to Jamaica on the basis of his sexuality.

Notice of Decision

The appeal on Article 3 ECHR grounds is refused.

Signed: *S Pitt*
Upper Tribunal Judge Pitt

Date: 9 February 2021