



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

Appeal Number: AA/09448/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31<sup>st</sup> October 2017**

**Decision and Reasons  
Promulgated  
On 02<sup>nd</sup> November 2017**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**Y A  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms V Easty, of Counsel, instructed by Duncan Lewis & Co  
Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of South Africa born in November 1952. He arrived in the UK in 2001. He applied for asylum in December 2014, and

was refused that status in a decision of the respondent dated 10<sup>th</sup> June 2015. His appeal against this decision was dismissed by First-tier Tribunal Judge Lingam in a determination promulgated on the 29<sup>th</sup> April 2016.

2. Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law on 24<sup>th</sup> May 2016. The matter came before the Upper Tribunal, and on 23<sup>rd</sup> November 2016 Upper Tribunal Judge Freeman and Deputy Upper Tribunal Judge Mandalia promulgated their decision that the First-tier Tribunal had erred in law, and set aside the decision of the First-tier Tribunal. The error of law decision is appended to my decision at Annex A.
3. The matter came before me pursuant to a transfer order to remake the appeal. The decision of Judges Freeman and Mandalia was that the findings of fact made by the First-tier Tribunal should stand, and that this hearing was purely to deal with an assessment of the objective evidence to determine whether the appellant was at real risk of serious harm if returned to South Africa.

#### *Submissions - Remaking*

4. I am not proposing to make reference to the country of origin materials and expert evidence referred to by the representatives for the appellant and respondent in this summary of submissions but simply to summarise their positions on risk on return. I will deal with the country of origin materials supporting these positions in my conclusions.
5. The position of the respondent, as set out in the reasons for refusal letter and in oral submissions is that: "the laws implemented in South Africa do not persecute LGBT individuals, and the environment for homosexual individuals in South Africa is not such that would amount to persecution." There are no persecutory laws, and there is an operational police service to protect the appellant against criminal elements, and no sustained and systemic failure of state protection. Further South Africa is a large country, and the appellant could relocate away from any particular groups he feared, such as PAGAD in Cape Town. There was evidence in public opinion surveys of positive and tolerant public attitudes in South Africa towards gay people as well as of prejudice and bigotry. There was clearly also a thriving gay scene in some of the larger towns.
6. The position of the appellant is that whilst there are proper and good laws which should protect the appellant in South Africa as a gay man in reality these do not provide sufficiency of protection and he is at risk from groups such as PAGAD who are a fanatical Muslim group based in Cape Town, and from similar groups throughout South Africa which remains as predominantly homophobic country in terms of social attitudes and a place in which there is widespread discrimination against LGBT people, and a place where a very significant proportion of

the community are prepared to countenance using violence against non-gender conforming people. It is contended that in practice gay men in South Africa are routinely subject to violence, and that homophobic attitudes are prevalent in the police service with reports of them further attacking gay people and failing to properly to investigate their complaints of abuse, leading to secondary victimisation. It is also argued that there is an underreporting of abuse, and particularly of corrective rape which is an issue for men as well as women and other hate crime. It is said that it is likely that a gay man in South Africa will be subject to violence, and there was no sufficiency of protection, and that this risk extends to the entire country with the appellant perhaps being more notable as a gay man on relocation as he is Asian, and so from a minority ethnic group. It is also argued that the situation has worsened over the past four years, with the more recently country of origin material from the respondent showing a more violent and serious picture than that from 2013.

7. At the end of the hearing I reserved my determination.

#### *Conclusions - Remaking*

8. The summary factual matrix of this case is that it is accepted that the appellant is gay man who intends to live openly in South Africa. He is 65 years old and has lived in the UK since 2001. He had an arranged marriage in South Africa with a woman which broke down and was from a wealthy background. He has been a film maker, with a British Film Institute profile, and has worked running a family business. It is accepted that the other trustees of a mosque in Cape Town, where he inherited a trusteeship from his father, opposed his involvement in the affairs of that mosque, probably because of his sexuality, but not that he was subject to attempts on his life and damage to his property as a result of this.
9. The question before me is whether the appellant is at real risk of serious harm on return to South Africa from non-state actors, and particularly vigilante homophobic elements and an organisation called PAGAD, and with no sufficiency of protection or possibility of finding safety by internal relocation away from the Asian community in Cape Town which is his home area.
10. Internal relocation would, I find, be a potentially reasonable thing to expect the appellant to do if this could reduce the risk he faces to one lower than a real risk of serious harm, as he is a well-educated man, who is multilingual and who has historically worked running a family business and as a film-maker, and would not seem to have any particular on-going links to Cape Town. However, there is no information before me which suggests that any area of South Africa has a significantly lower level of homophobic violence, and so ultimately I conclude that the question is simply whether there is sufficient state protection against this violence or not.

11. The law relating to sufficiency or effective protection where the risk is from non-state actors was considered by the House of Lords in the decision in Horvath v SSHD [2000] INLR 239 HL. The standard of protection which is applied in such a case is not one which would eliminate all risk but is a practical standard, which does not impose an impossible or disproportionate burden on the authorities. There must be: “a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected” and “more importantly...an ability and a readiness to operate that machinery”. There must therefore be criminal laws which can impose commensurate punishments for crimes committed and a reasonable willingness by law enforcement agencies including the police to detect prosecute and punish offenders. There must be cogent evidence that a state which is willing to afford protection is unable to do so particularly if it is a democracy. The Court of Appeal upheld these principles in the case of R (on the application of Bagdanavicius) v SSHD [2003] EWCA Civ 1605 and their application in the context of Article 3 ECHR. In the summary of principles there is included the fact that an effective system of protection will normally have a systemic ability to deter and or prevent the form of persecution of which there is risk. These principles have been relied upon by the Upper Tribunal in the decision in AW (sufficiency of protection) Pakistan [2011] UKUT 31.
12. Regulation 4(2) of the Refugee or Person in Need of International Protection (Qualification) Regulation 2006 provides that the state, as an actor of protection, has to take “reasonable steps” to prevent serious harm “by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and the applicant must have access to such protection.” This is the UK implementation of the obligation imposed by the Qualification Directive 2004/83/EC at Article 7(2), and this provision is considered by the Upper Tribunal in the reported case of NA and VA (protection: Article 7(2) Qualification Directive) India [2015] UKUT 432 providing the following additional guidance: “the operation of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and access to such system by the claimant may not, in a given case, amount to protection. Article 7(2) is non-prescriptive in nature. It prescribes neither minima nor maxima. The duty imposed on states to take “reasonable steps” imports the concepts of margin of appreciation and proportionality.” In resolution of the particular appeal before them a Presidential Panel of the Upper Tribunal found it was therefore necessary not only to establish the willingness of the authorities to take action against the perpetrators of serious harm via an analysis of the system of legislation prosecution and punishment but also the efficacy of the available measures; the protection this would provide to the appellants; and the nature of the individual threats to the appellants.

13. It is common ground that the government of South Africa has an extremely good and progressive constitution and domestic laws which prohibit discrimination and crimes against gay men and other members of the LGBT community. As set out in the respondent's Country Policy and Information Note South Africa: Sexual orientation and gender identity July 2017 (henceforth the July 2017 Country Policy Note) at paragraph 5.2.1. In its summary of the situation of South Africa, the NGO Outright Action International observed that: "The South African constitution provides one of the most comprehensive sets of protective measures of individual rights not only in southern Africa but in the world. A ban on discrimination on the basis of sexual orientation has been enshrined in the South African constitution for twenty years. This is particularly notable given that consensual adult same-sex sexual acts are subject to criminal penalties in many of the country's neighboring states. In addition, same sex marriage is a national right. As further evidence of its commitment to protecting LGBT rights, South Africa recently voted in favor of the Resolution on Human Rights, Sexual Orientation and Gender Identity adopted by the 27th Session of the Human Rights Council in September 2014, which has been hailed as a significant step forward in the fight against violence and discrimination based on sexual orientation and gender identity."
14. The South African government has also approved the publication for public comment of the Prevention and Combating of Hate Crimes and Hate Speech Bill in October 2016 although this has not become law to date. The UN Human Rights Council in April 2017 and the Human Rights Watch Report of 2016 recorded that the South African government had taken significant steps to improve coordination between government and civil society in combatting violence against LGBT people. I find that there is an excellent legal framework for protection of gay men such as the appellant from persecution, and that the South African government is working to improve this and to try to improve its effectiveness. There are also clearly appropriate prison sentences for the murder of gay people in which the perpetrators receive additional punishment for having acted out of hatred towards their victims as LGBT people, for instance see paragraph 6 of the July 2017 Country Policy Note. Further, there is evidence of police receiving training in dealing with gender/ LGBT violence, see paragraph 6.3.2 of the July 2017 Country Policy Note.
15. It is also the case that South Africa's major cities have a thriving nightlife and most have gay clubs and venues, with Cape Town and Johannesburg being the gay capitals, see 8.2.2 of the July 2017 Country Policy Note.
16. However, there are credible reports of pervasive official mistreatment which includes sexual and other assaults and discrimination of LGBT people, including gay men, by security forces and police, as recorded by the US State Department country report published in March 2017.

There are also credible reports from the UN Human Rights Council that there is a lack of due diligence by law enforcement officers reflected in a low conviction rate and a lack of proper data, see paragraphs 6.2.1 and 6.2.5 -6 and 6.3.3 and 7.5.6 of the July 2017 Country Policy Note. This is supported by evidence from Amnesty International in their 2016/2017 report, set out at paragraph 19 of the expert report of Professor Mario I Aguilar regarding problems of police involvement in crime and found at page 13 of the appellant's consolidated bundle.

17. The reason for this disparity between the legal framework and the reality of action implementing it to protect those in the LGBT community is said by both parties in this case to be a reflection of prevailing societal attitudes which are not universally accepting of gay and other LGBT rights. The surveys to which my attention was drawn paint, however, an inconsistent picture. Some would indicate in the region of three quarters of South Africans have tolerant views: for instance, 77% having no concerns if their neighbour was gay or 76% agreeing that human rights apply to everyone regardless of sexual orientation, see paragraphs 7.1.3 and 7.1.4 of the July 2017 Country Policy Note. Other opinion polls indicate however a less tolerant picture: for instance, 72% of South Africans viewing same sex activity as morally wrong, see 7.1.5 of the July 2017 Country Policy Note, which in turn is linked to conservative Christian religious views, and said to be more prevalent in poorer less educated black African communities, see paragraph 7.3.1 of the July 2017 Country Policy Note. The link to the views of Christian churches is also one made by the expert Professor Aguilar.
18. This leads to the question of how prevalent violence is towards gay men such as the appellant in South Africa. It is notable that the Policy Summary at 3.1.2 of the July 2017 Country Policy Note states: "LGBT persons are generally accepted or tolerated by South African society, although discrimination and violence is relatively widespread particularly in rural areas...While LGBT people are likely to face some form of discrimination, harassment and/or violence from societal actors, in general LGBT persons are not at risk of persecution or serious harm from non-state actors but each case will need to be considered on its facts." The respondent's position seems therefore to be that whilst it is likely that a gay man such as the appellant would face violence, harassment and discrimination in South Africa this would not be likely to amount to a real risk of serious harm. As Ms Easty has highlighted the position of the respondent does appear to be that the likelihood of violence to persons such as the appellant has worsened since the 2013 Operational Guidance Note on South Africa as in that report it was stated: "LGBT persons remain vulnerable to societal violence, discrimination and hostility". This would appear to be a statement that this behaviour was less likely that it is now perceived to have become.
19. Looking at the sources of information on this topic, OutRight International concluded from a 2016 survey that violence against

openly gay people was “rampant”, see paragraph 7.4.2 of the July 2017 Country Policy Note. The Other Foundation found that some three million south Africans felt that they might use violence against gender non-conforming people, see paragraph 7.4.6 of the July 2017 Country Policy Note. This is the context of their being approximately half a million people who identify themselves as gay, out of a general population of approximately 56 million people.

20. One 2003 study suggests that the prevalence of “corrective rape” against gay men could be similar to that against lesbians but there is a lack of data on this issue, see the “Men are also “corrective rape” victims” article by Bhekisisa dated April 2014 at page 68 to 70 of the appellant’s Consolidated Bundle. The Amnesty International 2016 report, also comments on the gross under reporting of attacks against gay people, see paragraph 11 of the expert report of Professor Mario I Aguilar. A study on the rape of men by Gcobani Qambela in the Graduate Journal of Social Science published in November 2016 starts observing that South Africa has one of the world’s highest rates of sexual and gender based violence and examines how the position that South Africa is a highly homophobic society feeds into the incidence of male rape and leads to low reporting rates due to further risk of victimisation during the reporting process.
21. There is evidence about the operation of PAGAD, in the appellant’s consolidated bundle at pages 260 to 330 in a 2001 study by the Institute of Criminology at the Department of Criminal Justice of the University of Cape Town. This is an organisation that the appellant has specifically identified as having posed a risk to him historically at his point of departure from South Africa in 2001, although these facts have not been believed. PAGAD began in Cape Town as a predominantly Muslim group which attempted to provide an umbrella for anti-crime groups attempting to address an upsurge in crime in the newly democratic South Africa. It then evolved into a violent vigilante organisation / urban terror group, associated in part with radical Islamic groups which led to it no longer being a popular mass movement, and to repression against it by the South African state. Amongst the targets for this organisation in 2001 were gay bars on the basis that they were a symbol of westernisation and were not in line with conservative social morality supported by radical Islam, see particularly page 322 of the appellant’s consolidated bundle at which examples of the bombings of gay bars in November 1999 and August 2000 are cited.
22. There is no evidence before me regarding any on-going operations by PAGAD, or to the current existence, targets or reach within South Africa of PAGAD, and as such I cannot conclude that there is evidence satisfying the lower standard of proof that this particular organisation poses a real risk of serious harm to the appellant. The appellant’s case must therefore be decided on the basis of whether the country of origin materials as a whole disclose a real risk of serious harm to an openly gay man in South Africa with his particular profile.

23. I do not find the expert report of Professor Mario Aguilar of assistance in resolving this issue. I accept that Professor Aguilar has some appropriate qualifications although he would not have seemingly studied the issue of gay rights in current day South Africa but instead focused his research on religion and politics, particularly in the apartheid era of South African history. He confirms his duty to the Court and his understanding of his duty as an expert but his conclusions are not ultimately particularly helpful to determining the key issue in this appeal. This is because his sources of information do not go beyond the human rights reports cited in the appellant's bundle and July 2017 Country Policy Note. His first conclusion is that: "While South Africa has advanced laws to protect the LGBT community from hate crimes, they have not gone far enough, and in practice they have failed to protect members of the LGBT community from violence, kidnapping and killings." This does not however assist in answering the primary question before this Tribunal of whether there is a real risk of serious harm to a gay man returned to South Africa. It is of course patently true that laws have not prevented all violence towards gay people in South Africa, but the report does not provide material which assists in the assessment of the likelihood of this violence taking place to men such as the appellant.
24. This is a very finely balanced decision. I start from the position of the respondent in the July 2017 Country Policy Note that the appellant as a gay man is likely to suffer some form of discrimination, harassment and/or violence from societal actors. Although it is not conceded that this will always, in the view of the respondent, amount to persecution or a real risk of serious harm a likelihood of facing violence on return is a matter that must weigh in the appellant's favour. The nature of this violence is of course further illustrated by the other country of origin reports I have summarised above, and does include failings by the police service to protect gay men and to rigorously uphold the law, evidence of violence to gay men by the police and a failure to keep proper statistics on this issue which would perhaps facilitate official action to increase protection in this area.
25. NA and VA makes it plain I must look at the position with respect to sufficiency of protection for this appellant and his individual position with respect to risk. I find that the risk of violence resulting in serious harm is higher with this appellant than others due to his state of ill health with HIV infection, and his being 65 years old. The medical evidence from Guy's and St Thomas' hospital dated March 2016 records that he has fractures of the hip, low bone mineral density and osteoporosis and high cardiovascular risk. Evidence from the same hospital from January 2015 indicates he has heart disease having had a recent heart attack, and also that he suffered from depression. I find that the appellant would also be less able to avoid danger of violence from societal actors than other gay South African men due to the fact he has not lived in South Africa for the past 16 years and so will be more out of touch with societal indicators of danger than those who



have lived there continuously, and also because he suffers from memory loss as a result of his various medical conditions. The appellant does not have extended family to return to in South Africa who could assist him with integration and current safety advice. I also find that at least initially the appellant would struggle to provide for himself financially although perhaps having access to a small pension, thus not having access, at least initially, to the protection that can sometimes be bought with money through for instance taking taxis rather than walking or living in more protected housing, as it is clear he has no savings and it is reasonable to surmise that finding work is likely to be a difficult process given his lack of recent work experience, age and ill-health.

26. I do not find that the material before me shows that all gay men would face an insufficiency of protection against homophobic societal violence in South Africa or that there was a real risk of serious harm as a result of that violence given the excellent legal framework and obvious efforts by the democratic government of South African government to advance in preventing hate crime as the material before me is not comprehensive enough for such a conclusion. However I am satisfied that this has been shown to the lower standard of proof to be the case for this appellant who intends to live as an openly gay man with his particular vulnerabilities in the context of the country of origin materials before me. I find that the appellant has a well founded fear of persecution for reason of his social group as a gay man, and for the same reasons his removal would also be a breach of Article 3 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The decision of the First-tier Tribunal was set aside the decision
3. I re-make the decision in the appeal by allowing it on asylum and human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley  
Upper Tribunal Judge Lindsley

∴ Date: 1<sup>st</sup> November 2017

## **ANNEX A: Error of Law Decision**

### **DECISION AND REASONS**

1. This decision, to which both members of the panel have contributed, determines the appeal by the appellant against a decision of First-tier Tribunal Judge Lingam promulgated on 29<sup>th</sup> April 2016, in which she dismissed the appellant's appeal against the decision of the respondent of 10<sup>th</sup> June 2015, to refuse to grant asylum under paragraph 336 of HC395 and to remove the appellant from the UK.
2. An anonymity direction was made by the First-tier Tribunal and is continued by us. 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.

### **Background**

3. The appellant is a South African national. He left South Africa in April 2001 with the benefit of a 6-month visa to enter the UK. On 7<sup>th</sup> November 2001, the appellant made an application for indefinite leave to remain in the UK. The application was refused with no right of appeal. On 27<sup>th</sup> August 2008, the appellant made an application for further leave to remain in the UK. That application was rejected because the relevant fee was not paid. The application was renewed on 23<sup>rd</sup> December 2008, but was refused with no right of appeal. The decision to refuse the renewed application was maintained on 12<sup>th</sup> July 2014.
4. On 9<sup>th</sup> December 2014 the appellant claimed asylum. A decision was made by the respondent to refuse to grant asylum and humanitarian protection on 10<sup>th</sup> June 2015 and that decision was the subject of the appeal before the First-tier Tribunal.
5. Broadly stated, the appellant's asylum claim is advanced on the basis of his sexuality. The appellant, a Muslim, realised that he was homosexual when he was about 10 years old. He was unhappy because of bullying, and the secrecy and lies that he had to live with. As he developed as a person, he realised that he was attracted to men. Although he never discussed his sexuality with his family, the appellant believes that they suspected him to be gay because he was effeminate. The appellant married in 1982. His wife was aware of, and accepted the appellant's sexual preference, but the marriage did not work out because of other issues between the two families. In 1991, the appellant inherited the position of a trustee of a Mosque, following his father's death. It was then that the appellant claims that he began to experience problems in South Africa. The other trustees of the mosque felt that someone of the

appellant's sexual orientation should not be a trustee of the Mosque. The appellant believes that two attempts were made on his life by way of damage caused to his property, that were directly linked to the position that he held as a trustee of the Mosque.

6. The appellant fears the PAGAD group, a Muslim group based in Cape Town that targets traffickers and homosexuals. He also fears those that targeted him there because of the position that he held as a trustee of the Mosque. The appellant claims that since arriving in the UK he has been able to openly express his sexuality.
7. In her decision of 10<sup>th</sup> June 2015, the respondent accepted the appellant's identity and nationality. She accepted that gay men are a particular social group, and that the reason given by the appellant for claiming a well-founded fear of persecution is one that engages the UK's obligations under the Refugee Convention. The respondent accepted the appellant's sexuality as a gay man and accepted as credible the appellant's account that the trustees of the Mosque opposed his involvement in the affairs of the mosque. The respondent concluded that the appellant's account that the two attempts made on his life were directly linked to the position that he held as a trustee of the Mosque, was not credible, wholly speculative and not well founded. The respondent noted the appellant's fear from the PAGAD.
8. The respondent assessed the appellant's ability to return to South Africa as a gay man, by reference to the decision of the Supreme Court in **HJ (Iran) [2010] UKSC 31**. The respondent referred in her decision to section 19 of the Country of Origin Information Report (COIR) for South Africa dated July 2010 and concluded:
  - a. It is evident that the laws implemented in South Africa do not persecute homosexual individuals, and the environment for them in South Africa is not such that it would amount to persecution.

- b. The appellant previously kept his sexuality hidden owing to the fear of disapproval from people around him, and not because of persecution. On return to South Africa, the appellant could move away from his family and community, and this should enable him to express his sexuality more freely, in an open manner.
- c. Since the appellant left South Africa in 2001, significant steps have been taken by the government, including the commitment of resources, which have resulted in clear improvements in the internal security situation in South Africa. The appellant would benefit from this upon his return. The appellant has failed to demonstrate that the authorities of South Africa would be unable or unwilling to offer protection if he sought it. There is evidence available that the authorities are able to offer protection in the circumstances described. There is a system of protection in place, and a reasonable willingness by the state to operate it. The appellant has failed to establish a sustained and systemic failure of state protection on the part of the authorities in South Africa.
- d. The appellant has not established that it would be unreasonable to expect him to live elsewhere in South Africa.

### **The decision of First-tier Tribunal Judge Lingam**

- 9. First-tier Tribunal Judge Lingam sets out her findings and conclusions as to the appellant's claim for international protection at paragraphs [22] to [63] of her decision. The Judge notes at paragraph [27] of her decision that she does not have to revisit the appellant's evidence on his sexuality as that aspect of his claim has been accepted as credible. The Judge goes on to consider those aspects of the claim advanced by the appellant that were not accepted by the respondent, and in particular the appellant's account that he was targeted by the Mosque trustees. The Judge rejected the appellant's account that the trustees of

the Mosque knew of his sexuality. She also found that the appellant's s sexuality was not of continuing interest to the trustees.

10. The Judge states in her decision:

*"48. The respondent identified the appellant as a gay man and was satisfied, on analysed objective material on the State that the law implemented by the South African government did not persecute LGBT individuals and the environment for a homosexual individual in South Africa is not such that would amount to persecution (para 47 RFRL).*

*49. Using the approach in HJ (Iran), the appellant has shown he is a gay man.*

*50. I have taken account of the various material relied on by the appellant including his own oral evidence. There is evidence of societal harassment, intimidation, violence and hate crimes against gay and the LGBT groups by the community but there is no evidence that the South African government condones such intimidation and harassment of the LGBT and gay groups. There are established LGBT groups in South Africa as well as HR Commission for Gay & Lesbian. There is an NGO named PFLAG, which provide a medium for communities and individuals to inform people of lesbian and gay rights. The organisation has a large following.*

*51. With reference to question 2 in HJ (Iran), the appellant stated that being an open gay man in the UK, he was likely to do the same in South Africa. I am satisfied that the appellant's only reason for keeping his sexuality a secret was because of community and societal judgement of his sexuality.... I am satisfied he has the backing of a Gay group named GMG as the founder member gave oral evidence in support of the appellant*

*as well as the group called NAZ Project London (provides support network for Black Asian communities with sexual health promotion and HIV).... I am satisfied that he has grown in confidence with his sexuality and being an active member of a gay group in the UK, he has the knowledge and experience to enforce his rights in South Africa; particularly given his status as a renowned film maker who is an ideal position to assist the gay and lesbian communities to entrench their rights. I find if he were to live discreetly, it is not to avoid persecution but social pressures which do not account to persecution and the Convention is not open for protection. As he fails to satisfy question 2 in HJ (Iran), I am satisfied on the guidance that I am not required to determine the remaining questions.*

11. At paragraphs [53] to [61] of her decision, the Judge considers whether there is a sufficiency of protection available to the appellant and whether it would be unduly harsh to require the appellant to live elsewhere in South Africa. Importantly, the Judge states:

*“55. There is evidence that since 2001, the government had introduced various legislations to protect its gay and lesbian communities including the establishment of HRC. Whilst, isolated incidents occur, the appellant has failed to show that there is a systematic failure or abuse by the government to protect its gay/lesbian communities or that the South African government is unable or unwilling to protect him against those who intend to hurt him; a claim that is rejected thus far. On those reasons, the appellant would find a sufficient level of protection in his birth country and therefore international protection is unwarranted in the appellant’s case.*

*57. The appellant’s circumstances are as follows: He lived mainly in South Africa for 45 years; studied six years in India and*

*remained the last 15 years in the UK. He had lived alone for five years in South Africa before coming to the UK (q38-39). He was a practising gay in South Africa and India and in 1982 he entered into an arranged marriage with a female who was from an equally wealthy Asian family in South Africa. His only movie production shot in South Africa was in 1983 (q 48) but primarily; he worked in the family food business (oral evidence) for 14 years. He gave initial evidence that he was relatively well off in South Africa. His sister bought over the family business and he profited from the sale. He gained also property interests from his late father's estate (q235-236); although at oral evidence he sought to deny such interests. The appellant's evidence is silent on the circumstances of his assets in South Africa.*

*58. I have already rejected his claim that the Mosque Trustees targeted or persecuted him. Given the appellant's low credibility level, I reject also his claim that his rather long stay in the UK was unplanned; just as I reject his claim that he is without any assets in South Africa or that he would genuinely sacrifice claiming asylum or securing protection merely on the premise of a chance to shoot a film in South Africa when in reality film sets and backgrounds can very easily be replicated or re-created anywhere in the world. I am satisfied that his actions are clearly not of a person who is truly in fear for his life.*

*59. Hence, I reject his claim he has no particular reason to return to South Africa or have no life there (q85) especially as he continues to share language and cultural ties in his birth country. The support letters from his previous doctor and long term friend confirm some ties in South Africa. I am satisfied that if the appellant wishes to avoid societal attention as an open gay man, he can live away from the Asian community.*



12. The Judge dismissed the appeal on asylum, humanitarian and ECHR grounds.

### **The appeal before us**

13. The appellant advanced three grounds of appeal. The first concerns whether the Judge was entitled to find that the trustees of the Mosque would know of his sexuality in circumstances where the respondent's reasons for refusal letter accepted that the trustees would not want him involved in their affairs for that reason. The second concerns the sufficiency of protection for homosexuals in South Africa against attacks by non-state agents. The third concerns the appellant's claim under Article 3 in relation to his medical condition.
14. Permission to appeal was granted on the second ground only, by Upper Tribunal Judge Smith on 29<sup>th</sup> June 2016. In granting permission to appeal, Upper Tribunal Judge Smith observed:

*"4. I grant permission however in relation to the second ground. The overall tenor of the background evidence is that the main problem arises for lesbians as part of a wider problem of violence against women and the examples given of attacks against gay men suggest that there is a sufficiency of protection. However, the Appellant included in his bundle the OGN dated 2013 (which has not apparently been updated) which does state at 3.10.13 that LGBT persons remain vulnerable to societal violence, discrimination and hostility which can in individual cases amount to persecution and that the authorities are unlikely to be able to provide effective protection in such cases. In circumstances where the Judge found that the Appellant would live openly on return to South Africa, it was incumbent on her to deal with that evidence. The Respondent may need to clarify her position as that paragraph of the OGN is unsourced and appears, at first blush, to be inconsistent with the other evidence.*

15. The matter comes before us to consider whether or not the decision of the First-tier Tribunal Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
16. Before us, Ms Easty submits that the background evidence referred to by the respondent in her decision letter is material taken from the Country of Origin Information Report (COIR) for South Africa, dated July 2010. However the Operational Guidance Note (v7: March 2013) that had been provided to the First-tier Tribunal Judge in the appellant's bundle, is in stark contrast to the matters relied upon by the respondent. Ms Easty submits that in reaching her decision, the respondent relied upon outdated information and that the Judge fell into the error of adopting the objective evidence referred to by the respondent, without having regard to the more recent material cited in the appellant's skeleton argument, and the more recent Operational Guidance Note. Ms Easty refers us in particular to the following extracts from the Operational Guidance Note:

“3.10.13 **Conclusion.** While South Africa's constitution outlawed discrimination based on sexual orientation, and same-sex marriages have been legalised, LGBT persons remain vulnerable to societal violence, discrimination and hostility. This can in individual cases amount to persecution and the South African authorities are unlikely to be able to provide gay men, lesbians, bisexuals and transgender persons or those perceived as such, with effective protection.

3.10.14 Where persons identifying as LGBT do encounter social hostility they may be able to avoid this by moving elsewhere in South Africa. There are however likely to be difficulties in finding safety through internal relocation given that homophobic attitudes are prevalent across the country. The Supreme Court in the case of HJ (Iran) made the point that internal relocation is not

the answer if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution,

17. Ms Easty submits that the Judge erred in failing to have regard to the more recent materials that were referred to in the further evidence put before the Judge on behalf of the appellant. She submits that had the Judge had regard to the objective evidence referred to, which includes evidence of numerous assaults against men and women, the Judge would not have concluded that the appellant would find a sufficient level of protection in South Africa, or that it would not be unduly harsh for him to relocate elsewhere. She submits that the objective evidence establishes a general risk. If, you are known to be a homosexual, as the appellant would be, on return, you are vulnerable to societal violence, discrimination and hostility and the South African authorities are unlikely to be able to provide effective protection.
18. In reply, Mr Kotas submits that there is no requirement upon a Judge to refer to all of the objective material before the Tribunal, in a decision. He submits that the Judge has adequately summarised the material in paragraph [55] of her decision and that the assessment as to whether there is an objectively well-founded fear of persecution, must be assessed by reference to the findings made by the Judge. He submits that the question is whether the appellant has established that he, as an individual, would be at risk upon return. Mr Kotas reminds us that beyond accepting the appellant's sexuality, the Judge rejected much of what was said by the appellant. He submits that the tenor of the objective evidence is that there is a sufficiency of protection and that the evidence does not establish that the appellant would be at risk in the future.
19. Both representatives confirm that there is no country guidance dealing with the risk upon return to South Africa's for members of the LGBT community.

## Discussion

20. We have carefully considered the extracts that are referred to in the respondent's decision of 10<sup>th</sup> June 2015 from the Country of Origin Information Report (COIR) for South Africa dated July 2010. The COIR refers to objective evidence set out in the *Gay Times* in 2010, the US State Department *2009 Human Rights Report; South Africa* released in March 2010, and the Human Rights Watch report of January 2010. It is right to say by reference to that material, as the respondent did at paragraph [47] of her decision, that there is evidence that the laws implemented in South Africa do not persecute homosexual persons, and the environment for them in South Africa, is not such that would amount to persecution.
21. At paragraph [48] of her decision, the Judge appears to adopt what is said by the respondent in paragraph [47] of the respondent's decision. However, there was in our judgement, a wealth of objective evidence before the Judge of what the appellant describes as a more "vigilante homophobic environment in South Africa, despite the legal liberalism which is in black and white". Much of the objective evidence relied upon by the appellant post-dates that COIR report of July 2012.
22. We have considered the content of the Operational Guidance Note (v7: March 2013) that was before the First-tier Tribunal. We have already set out above, the extracts from that report that were cited to us by Ms Easty. Section 3.10 of the note deals with "Lesbian, gay men, bisexual transgender (LGBT) persons. Insofar as is material to the appeal before us, we note that the note also states:

3.10.6 A 2011 Human Rights Watch report notes that while there have been significant legal advances in recognising the rights of the LGBT community, lesbians, gay men, and transgender people in South Africa continue to face hostility and violence. Social attitudes lag: recent social surveys demonstrate

a wide gap between the ideals of the constitution and public attitudes toward such individuals. Negative public attitudes towards homosexuality go hand in hand with a broader pattern of discrimination, violence, hatred, and extreme prejudice against people known or assumed to be lesbian, gay, and transgender, or those who violate gender and sexual norms in appearance or conduct (such as women playing soccer, dressing in a masculine manner, and refusing to date men). And constitutional protections are greatly weakened by the state's failure to adequately enforce them.

3.10.9 During the 17<sup>th</sup> UN Human Rights Council session, South Africa successfully pushed through the adoption of the first-ever UN resolution on sexual orientation and gender identity. This action affirmed South Africa's endorsement of the rights of lesbian, gay, bisexual and transgender "LGBT" people worldwide, but does not address the concerns of the LGBT community at home. A 2011 Human Rights Watch report found that, despite the country's progressive legislation, discrimination on the grounds of sexual orientation and gender identity is widespread in society and evident in the behaviour of government officials, including the police and teachers. Black lesbians and transgender men are especially vulnerable and live under constant threat of verbal, physical, and sexual violence from acquaintances and strangers. Civil society pressure following recent cases of rape, torture, and murder of black lesbians and transgender people has prompted the Department of Justice and Constitutional Development to form a multi-sectoral task team to formulate legal and judicial responses to violence against members of the LGBT community."

23. In our judgement, the conflict in the objective evidence between that which is referred to in the respondent's decision letter and that set out

in the Operation Guidance Note and other objective evidence contained in the appellant's bundle, was a matter that should have been addressed by the Judge in her assessment of the risk upon return. The Judge's failure to do so, amounts to a material error of law and the decision of the First-tier Tribunal is set aside, so far as the general risk to homosexual persons in South Africa is concerned.

24. We have carefully considered how we should proceed with remaking the decision. The factual matrix of this appeal has been determined and the findings made by the Judge stand, so far as this appellant's individual case is concerned, except for any general risk he may face on return as a homosexual person. There is no country guidance dealing with the risk upon return to South Africa's for such people, and in light of the potential conflicts within the objective evidence, in our judgement, this appeal may provide a suitable opportunity for the Upper Tribunal to provide guidance as to that general risk upon return.

### **Notice of Decision**

25. The decision of First-tier Tribunal Judge involves the making of a material error on a point of law and the decision is set aside.
26. The findings of fact made by the First-tier Tribunal shall stand.
27. The matter shall be listed for further hearing before the Upper Tribunal limited to an assessment of the objective evidence to determine the risk upon return to South Africa.

Signed

Date 01 November 2017

Deputy Upper Tribunal Judge Mandalia

### **FEE AWARD**

We have found there to be an error of law and have set aside the decision of the First-tier Tribunal. Whether there should be a fee award, is a matter that will be considered in due course once the decision is remade.

Signed

Date 1<sup>st</sup> November 2017

Deputy Upper Tribunal Judge Mandalia