



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/04412/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at North Shields

Decision & Reasons

On 26th May 2017

Promulgated

On 31st May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

**HM
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Miss C.Querton, Counsel, instructed by Lawrence Lupin, Solicitors (Olympic Way).

For the Respondent: Mr.Diwnycz, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. This is an appeal by the respondent against the decision of First-tier Immigration Judge Fox sitting at North Shields on 8 December 2016. For convenience, I will continue to refer to the parties as they were in the First-tier Tribunal.
2. The appellant claimed protection from the respondent on the basis that he is a national of Burundi and a homosexual who would be at

risk because of his sexuality if returned. Hereinafter, I will use the generally preferred nomenclature 'Gay'.

3. His claim is that he was from Buyenzi, Burundi. When he was 7 he went to live in Tanzania with his mother. She had left Burundi because of issues with her sexuality. His mother died shortly after childbirth and he sought shelter in a Mosque or Madrasa when he was 10. He remained there until he was 19. One of the teachers found him engaged in a sex act with another male. Following this, he and five others were held and beaten to the extent that some of them died. However, the appellant managed to escape and left the country.
4. The respondent did not accept the claim was true. The respondent did not accept he was from Burundi but felt he was most likely from Tanzania. It was not accepted he was gay. His account of how he escaped was not considered credible. It was felt he could safely return to either Tanzania or Burundi, either to his former home area or elsewhere.
5. The appellant produced no documentation to confirm his identity. It was not accepted he was from Burundi. He was asked about the country and could give no details. He spoke Swahili. He was able to give details about Tanzania.
6. Regarding his claimed sexuality the respondent referred to inconsistencies between screening and his substantive interview. At screening he said the Burundi and Tanzanian authorities were seeking him because he had abused children. In his substantive interview he referred to having relationships but was unable to explain his feelings.

The First tier Tribunal

7. Judge Fox found the appellant to be a national of Burundi and that he is gay. He also found that homosexuality would not be acceptable in either Burundi or and Tanzania. Judge Fox found that the appellant had led an active gay sexual life in Tanzania with different people and that if returned there would be able to live a similar lifestyle albeit an element of discretion would be needed. However, in Burundi he would have to alter his behaviour considerably and there would not be protection from the State. The judge found that the State would be the persecutor and consequently relocation was not an option. The judge allowed the appeal on the basis of the Refugee Convention and articles 2 and 3.
8. The respondent sought permission to appeal on the basis the conclusion by the judge that the appellant was gay was irrational given the judge's comment about his evidence: he was described as obstructive and reluctant to answer questions put directly. The judge said the appellant's account of his sexual orientation focused

upon the physical rather than emotional aspects and attributed this to his upbringing. However it was submitted this ignored the appellant's evidence that he had been in love .It was also contended the judge had failed to give adequate reasons for finding the appellant to be a national of Burundi.

The Upper Tribunal

9. Permission to appeal was granted on the basis it was arguable the judge had not applied the correct standard of proof and had failed to give adequate reasons for concluding the appellant was gay and a national of Burundi .
10. On behalf of the appellant I have received a rule 24 response. I also received an indexed bundle of six items which were before the First-tier Tribunal.
11. The rule 24 response sought to place the query in relation to the judge's approach to the standard of proof against the judge's self-direction by reference to case law such as Karanakaran [2000]3All ER 449. It was contended that First-tier Judge Fox had looked at matters in the round and had given adequate reasons for finding the appellant was gay and from Burundi. The judge had not found the appellant's evidence was unworthy of belief but had commented upon the manner with which he gave his evidence. It was also contended that whether the expression of sexual orientation was through the physical act or through motions was not an issue before the tribunal. Rather the judge had looked at matters in the round including a medical report which indicated scarring probably arose as a result of a beating. The judge had referred to section 8 and the assessment of credibility and had given reasons as to why his failure to claim in other countries did not detract from his account.
12. At the outset of the hearing both representatives suggested that if I found an error of law the appropriate course would be to remit the matter to the First-tier Tribunal. If this occurred, Miss Querton asked that the judge's findings in relation to how homosexuality was viewed in Burundi and Tanzania should be preserved. Mr.Diwnycz was in agreement with this. As a matter of practicality I would not have been in a position to remake the decision if evidence from the appellant was required because no interpreter had been arranged.
13. Mr.Diwnycz relied upon the grounds on which leave had been granted. He submitted that the judge failed to adequately explain why he accepted the appellant was from Burundi. Similarly, it was arguable that the judge did not adequately explain his reasons for finding the appellant was gay and there was apparent confusion as to the standard of proof applied.

14. In response, Miss Querton, who also appeared below, submitted the judge had given adequate reasons for his finding of the appellant's nationality. At paragraphs 17 and 18 the judge referred to the backdrop of the appellant's lack of education; that he had lived on the streets and that his mother only spoke to him in Swahili. Regarding the appellant's sexual orientation the judge had acknowledged the difficulty in reaching a finding and had noted the appellant focused upon the sexual act rather than any emotional aspect. The judge explained this as being attributable to his upbringing. At paragraph 27 the judge said analysing the appellant's physical or emotional viewpoint was not the issue but whether he in fact was gay. The judge acknowledged that he could not look inside the head of the appellant but concluded on the evidence produced to the low standard of proof applicable the appellant was gay. Miss Querton submitted that the respondent's challenge amounted to no more than a disagreement with the judge's conclusions.

Consideration

15. There are some references in the decision which give scope for arguing the judge did not apply the correct burden and standard of proof. For instance, at paragraph 19 the judge states: '... on the balance of probabilities and recognising that the appellant only has to satisfy me to the low level of proof....' In paragraph 32 the judge states: '... I am satisfied that the appellant has provided a credible basis for challenging the assertions, analysis and conclusions in the respondent's refusal letter...' However, I agree with Miss Querton in relation to these comments that the decision has to be looked at in the round rather than giving undue weight to the use of a phrase. I am satisfied when the decision is looked at in that context that the judge appreciated the low standard of proof applicable and that the burden of proof was upon the appellant.
16. It is exceedingly difficult to determine certain types of claims, such as sexual orientation. Deciding whether someone is genuinely gay should not be based upon stereotypical notions. Detailed questioning of sexual practices or use of sexually explicit evidence is inappropriate. The latter would not necessarily have probative value in any event. At the same time, simply because someone says they are gay does not mean this has to be accepted. However, it is a starting point. They must demonstrate to a reasonable degree of likelihood they are or are perceived to be gay. Inconsistencies at the various stages of their claim or improbabilities may go to the assessment of the truth of the claim. A history given of sexual awareness may be relevant in establishing credibility. A person's sexual orientation is not necessarily defined by their sexual behaviour. The role of the interpreter is particularly important: this is illustrated in the present case where the appellant was of the view that 'gay' meant the submissive partner.

17. The respondent did not accept the appellant was credible. Matters going to general credibility can be relevant in assessing the specific claim. Regarding the claim itself, the respondent at paragraph 29 of the reasons for refusal letter focuses upon an apparent inconsistency between the claim made at screening of being wanted for abusing children and in the substantive interview of homosexuality. No comment was made about this on behalf of the appellant until much later. The respondent referred to his inability to express emotion regarding homosexual relationships.
18. Judge Fox at paragraphs 24 and 25 referred to the appellant's evidence about how he felt about his sexual orientation. He formed the view that the focus was upon the sexual act rather than any emotional feelings. At paragraph 26 the judge considered the appellant's account of his upbringing may explain his difficulty expressing his emotions. At paragraph 27 the judge concluded in any event this was not the issue: the issue was whether the appellant was gay.
19. The judge acknowledges the difficulty deciding sexual orientation: referring to his inability to look inside the head of the appellant. Nevertheless, he concluded he had demonstrated he was gay. The judge refers generally to the evidence and the standard of proof but does not say what specific factors have led to this finding.
20. I appreciate entirely the difficult task the judge had in trying to determine the truth of the claimed sexual orientation. However, it is not sufficient to highlight the difficulties. This was a central part of the appellant's claim and it was something he had to establish. The judge had indicated he was not straightforward witness. I find the judge did not adequately explain why this claim was accepted.
21. Regarding the appellants nationality, at paragraph 16 the judge refers to the respondent's rejection of his claim that he is a national of Burundi. He could not identify any features about the country and could not give information about languages except that he spoke Swahili.
22. The judge said that Swahili is one of the languages spoken in Burundi. The judge seeks to put the appellant's evidence in context, given his claim that he was uneducated. At paragraph 19 the judge accepts that the appellant is a national of Burundi.
23. As with the question of sexual orientation, I find the judge has failed to adequately explain the basis for this finding on nationality.. The judge said he is likely to be a national of Burundi but does not say why. There is no consideration for instance, as to

the country information about the use of Swahili and whether or not the use of any other language is to be expected. The judge stated at paragraph 17 it was not disputed the appellant has spent the first seven years of his life in Burundi. I do not know if this was conceded at the hearing but this is at odds with the reasons for refusal as well as paragraph 15 of the decision which states it was not accepted he was born in Burundi.

24. The judge did deal with section 8 in relation to the appellant's credibility. The judge accepted the appellant did not have an opportunity to claim protection in any of the other countries he passed through. The judge refers in support of this to him only speaking Swahili and most likely not using his own passport and travelling with a friend. It is not my function to agree or disagree with this conclusion. However, it is only one part of the credibility assessment. At paragraph 23 the judge referred to the appellant's prevarication on other matters.

25. In conclusion, I find material errors in the decision of Judge Fox have been established. There has been a failure to adequately explain the findings by the judge that the appellant is gay and is from Burundi. These findings were central to the appeal and notwithstanding the difficulties faced by the judge a greater explanation was required.

26. At paragraph 28 the judge found that homosexuality is not tolerated either in Burundi or Tanzania. The judge commented the appellant would not be at risk in Tanzania if he lived as he had before but would in Burundi. The presenting officer, Mr. Diwnycz, was prepared to accept that homosexuals would face difficulties in either country. This finding by the judge can be retained. However, there may still be a need for evidence about country conditions to be led and the comment by the judge about the exercise of discretion will have to be read in light of the case law including HJ (Iran)

Decision.

The decision of First-tier Judge Fox allowing the appellant's appeal under the Refugee Convention and on articles 2 and 3 materially errs in law and cannot stand. The decision is remitted to the First-tier Tribunal for remaking de novo.

Deputy Upper Tribunal Judge Farrelly

26th May 2017