



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01326/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8 October 2018

Decision & Reasons Promulgated
On 17 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

[W B]
(~~ANONYMITY ORDER NOT MADE~~)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Azmi (for Bedfords Solicitors)

For the Respondent: Mr A Lindsay (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of [WB], a citizen of Ghana born 27 August 1985, against the decision of the First-tier tribunal of 25 July 2018 dismissing his appeal against the refusal of his asylum claim by the Respondent (of 16 January 2018).
2. The Appellant's claim is as follows. He was identified as gay having been caught *in flagrante* with another boy in 2003 and beaten by students,

following which the school banned him from further attendance. He had managed to intercept a letter to his parents of 14 May 2003 stating that his expulsion was because he was a practising gay; he had retained this letter over the years and put it in evidence before the Tribunal. He told his parents that he could no longer bear to stay at the boarding school, and they accepted this excuse.

3. In 2013 he was at a funeral at Osenase when he was again caught in a sexual act by community members who beat him, following which his gender preference became known locally, including to his parents. His father turned against him and left his mother. His mother raised funds for his exit from Ghana. He applied for a visa in October 2013, though that was refused. He then re-applied in December 2013, and a visa having then been granted, left the country on February 2014. He arrived in the UK with nowhere to stay, and having made his way to Luton which was recommended to him by a friendly taxi driver as somewhere that he might try and find accommodation, he ran into a fellow Ghanaian, Mr George Brobbey, who had indefinite leave to remain in the UK. Mr Brobbey was moved by his plight and offered to take him in; some time later they became aware of one another's sexuality and began a relationship.
4. The First-tier tribunal accepted the Appellant's account of being gay, based on two pieces of evidence that it considered particularly persuasive: a classified advert of 17 January 2011 giving his *nom de plume* as Hudgson, and the fact that all the available evidence, including that from Mr Brobbey himself who gave evidence in his support, showed them to be genuine partners.
5. However, some aspects of his claim were not accepted as credible. His partner Mr Brobbey referred to the Appellant having spoken regularly to his parents, which did not give the impression that they were truly separated. He had left Ghana in a planned and deliberate manner, and his visa application had contained significant untruths regarding his employment and the claim that he had been sponsored by the Agona West Municipal Assembly to study in the UK; it was not accepted that any agent had been involved in this process. His claim to have met Mr Brobbey by chance was not credible, and his asylum claim was made late, notwithstanding his being an educated man, only after three years spent working in a false identity, having quickly abandoned his studies here, and was apparently promoted only by his arrest for working illegally.
6. The First-tier tribunal summarised the relevant country evidence thus. The Home Office CIG report stated that LTBT persons faced intolerance and discrimination, though asylum would only be warranted if they faced a combination of measures which amounted to persecution; the dangers from non-state actors might be avoided by moving to another part of the country, particularly Accra, where it was not unreasonable to do so. Human Rights

Watch stated that there was an “anti-gay law” in force but there had been very few prosecutions. The Ghanaian permanent mission to the UN had reported that the national law prohibited persecution and violence against the LGBTi community.

7. Assessing his claim based on the accepted facts of his gender preference and the two incidents that had occurred to him, the First-tier Tribunal concluded that he had faced discrimination rather than persecution. He had been able to place classified advertisements with a view to arranging to meet other members of the LGBTi community. The incident at the funeral might have been motivated by a feeling that he had acted disrespectfully. No police action was taken against him following these incidents, which were a decade apart, and neither beating was serious. He had apparently been able to pursue a same-sex relationship for many years without suffering serious harm.
8. That left the *HJ (Iran)* question, ie whether he lived discreetly and the reasons for that decision. He had indeed practiced his homosexuality discreetly in Ghana, in the context of the conservative environment of which his family was part. Ghana was a religious society and a liberal democracy; there might be societal discrimination there leading to violence, but the police and government were supportive of the LGBTi community. There were no societal pressures in the UK driven by persecution yet he had lived here discreetly: Mr Broppey’s family had not been told of the nature of their relationship, to avoid causing offence.
9. As to the Appellant's claim on human rights grounds, he and Mr Broppey could legitimately live discreetly in Ghana; the latter’s 14-year old British citizen son did not live with him and could visit him in Ghana. There was no credible evidence suggesting Mr Broppey would face difficulties because of his kidney condition. There was no evidence to show that the Appellant would face very significant obstacles to integration in Ghana given his history of education and work there, and the skills and experience he had gained in the UK. Looking at the claim outside the Rules, his precarious residence, his inability to speak adequate English and his lack of financial independence showed that his departure would not represent a disproportionate interference with his private life.
10. Grounds of appeal argued that the First-tier tribunal had erred in law because
 - (a) Having apparently accepted that the Appellant had suffered physical violence on account of his sexuality it was untenable to proceed to find that level of mistreatment was not persecution – furthermore it was unclear, given the partial acceptance of the Appellant's credibility, as to whether these assaults were accepted;

- (b) Relevant country evidence was overlooked that showed a risk of persecution rather than discrimination;
 - (c) Evidence as to the closeness of Mr Broppey to his son who had recently stayed with him for three months was overlooked, which was relevant to the reasonableness of Mr Broppey's relocation to Ghana;
 - (d) It failed to take account of the fact that Mr Broppey would not be able to access NHS treatment in Ghana, whereas he was entitled to such treatment as a person with indefinite leave to remain in the UK;
 - (e) Failing to take account of the couple's LGBTi identity when assessing whether the Appellant would face very significant obstacles to integration in Ghana.
11. Permission to appeal was granted on all grounds by the First-tier tribunal on 21 August 2018, particular reference being made to the arguable lack of clarity as to the accepted events, the finding that violence amounted to discrimination rather than persecution, and the failure to consider the Appellant's sexuality when assessing the obstacles to integration.
 12. Mr Azmi for the Appellant made submissions in line with the grounds of appeal, pointing out the evidence before the First-tier Tribunal evidence which had been arguably overlooked. The country evidence had not been fairly summarised by the First-tier Tribunal: for example Human Rights Watch in their report of January 2018 had stated that LGBT people very frequently suffered physical violence and the May 2016 Solace Brothers Foundation publication *A shadow report* raised similar concerns.
 13. Mr Lindsay submitted that the two incidents said to demonstrate a real risk of persecution to the Appellant on a return to Ghana had been appropriately addressed: he had been beaten both at school and at a funeral following his behaviour being seen as socially inappropriate. Neither incident was due to the foreseeable consequences of everyday life in Ghana for the Appellant were he to return there as an adult. The judge's treatment of private and family life was lawful; there was nothing suggesting it would be unduly harsh or unreasonable to reintegrate into local society.

Findings and reasons

14. It seems to me that the grounds of appeal are made out in this appeal. As Carnwath LJ explained in *YH* [2010] EWCA Civ 116 that term "has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account."
15. Firstly, there is a concern as to the impression the First-tier Tribunal derived from the country evidence before it. It is important to set out the flavour of

the material said to have been overlooked. For example, Human Rights Watch stated that “LGBT people are very frequently victims of physical violence and psychological abuse, extortion and discrimination in many different aspects of daily life, because of their sexual orientation and gender identity.” The report *Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Ghana: A Shadow Report* (submitted for consideration at the 117th Session of the Human Rights Committee; Geneva, June-July 2016, by the Solace Brothers Foundation, The Initiative for Equal Rights, Center for International Human Rights of Northwestern Pritzker School of Law) set out the following:

“Amnesty International and the NGO Freedom House reported in 2013 that violence against the LGBT community was prevalent and that “the persecution of sexual minorities has escalated.

...

In December 2014, residents of Libya Quarters at Madina Zongo in Accra conducted a manhunt targeting a young man accused of being homosexual. Malam Shaibu, an Islamic cleric at Madina Zongo, said, “We shall burn [him] to death” because “Islam abhors homosexuality.” The leader of the manhunt, Shehu Munkaila Iddrisu, told the Daily Guide in an interview, “We shall burn or bury him alive to serve as a deterrent to others who may entertain any thoughts of engaging in homosexuality.” The mob severely beat members of the young man’s family, including his mother and father, and set fire to a motorbike that they believed belonged to the targeted man.

...

During a period of time in 2015, the LBGT community in the Nima area of Accra was terrorized by a homophobic vigilante gang called “Safety Empire,” whose stated aim is to “wage a crusade against homosexuality.” The leader of this group, who goes by various names including Sulley Fuseini and Doya Dundu, referred to himself on one of his Facebook pages as “The Gay Slayer.” According to reports, Fuseini and his gang would attack their victims after Fuseini had lured them on Facebook under the guise of asking them on a date. Upon a victim’s arrival, Fuseini and his gang would strip, beat, and humiliate the victim. Videos of these attacks were posted on social media, thus further humiliating the victim and causing fear in the LGBT community.

...

In January 2016, a mob of students at Opoku Ware Senior High School in Kumasi attempted to lynch three male students who were accused of having “engaged in homosexuality.” The attackers, who were prevented from carrying out the attack by some of the teachers at the

school, had been armed with clubs, machetes and stones. The school responded to this situation by expelling the three intended victims.”

16. These extracts from the country evidence clearly show that there is *some* risk of physical violence that reaches the level of persecution. The First-tier Tribunal nevertheless overlooked this material. This is relevant on the facts of this case, because the Appellant has twice suffered physical violence following the detection of his sexual preference. The country evidence tends to show that one could not rule out a risk of their repetition.
17. I do not accept, as Mr Lindsay argued, that the incidents in question can simply be discounted as the kind of violence which is to be expected in the averagely robust school or inevitably ensuing from social disapproval of behaviour at a funeral. The evidence comprised in letters and witness statements on file was that the Appellant was engaged in sexual relations in private on both occasions; these were not ostentatious displays that could reasonably have caused offence. The funeral incident did not take place at a ceremonial occasion but at the family home (according to the interview record) – nevertheless individuals broke into the room. Clearly they must have animus against the Appellant behaviour predicated on their view of his sexuality in order to act as they did. The country evidence depicts serious incidents of vigilante violence in not dissimilar contexts. Those suspicions might well have been motivated by persecutory intent. The Judge erred in law in failing to take account of this possibility.
18. Secondly, there is the question of how the Appellant would in future behave, assessed in the context of how he has behaved in Ghana and the UK in the past. *HJ (Iran)* [2010] UKSC 31 establishes §82 that where “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 ... then, other things being equal, his application should be accepted”. The Appellant's evidence included his answer at interview that he knew of negative attitudes towards gay people in Ghana from secondary school: “I knew you could not do it in public, you could not say this is your gay partner in public; I heard a story about a lesbian being beaten to death by people.” Asked at interview whether he was open about his relationship, he stated that “Not really apart from one or two gay and lesbian friends who knew us”. Additionally of course he advertised for a sexual partner in Ghana under a false name. None of this sits easily with the evidence identified by the First-tier Tribunal which apparently showed that he had been consistently able to live relatively openly in Ghana.
19. Given the case-specific and country-oriented evidence to which I have just referred, plus the fact that the Appellant was accepted as having previously suffered violence when his sexual identity came to light, I do not consider that the First-tier Tribunal could lawfully conclude that any future choice to live discreetly would be due to generalised social pressures rather than a

desire to avoid recurrences of such violence without a significantly closer engagement with the material than the exercise it carried out.

20. Thirdly, the First-tier Tribunal made clear findings, when determining the asylum ground of appeal, that the Appellant would face discrimination rather than persecution in his country of origin. Patently the existence of discrimination is relevant to the non-asylum ground in assessing whether he would face very significant obstacles to integration on a return there. These findings re discrimination were wholly overlooked when the private life claim was assessed. As stated in the Respondent's Guidance *Family Migration: Appendix FM Section 1.0b: Family Life (as a Partner or Parent) and Private Life: 10-Year Routes* (22 February 2018):

"The decision maker must consider the degree of difficulty that would be faced as a result of the applicant's faith, political or sexual orientation or sexual identity based on the situation in practice in the country of return and not necessarily solely what is provided for in law. The applicant's previous experience of life in that country and any difficulties the applicant claims to have experienced as a result of their faith, political or sexual orientation or sexual identity must also be considered."

21. For these reasons I consider that the grounds of appeal are made out. There were significant errors of law in the decision of the First-tier Tribunal requiring that the appeal be re-heard.
22. There is a further factor that should be taken into account by any Judge considering this appeal in the future. The Asylum Policy instruction *Sexual orientation in asylum claims* (Version 6.0) states:

"Feelings of shame, cultural implications, or painful memories, particularly those of a sexual nature, may have led some claimants to feel reluctant about speaking openly about such issues and may therefore not be uncommon."

23. That policy instruction also contains these further passages:

"Stigmatisation, shame and secrecy

Some LGB people may originate from countries in which they are made to feel ashamed, humiliated and stigmatised due to their sexual orientation. This may be through homophobic attitudes, instilled within children in early years that being gay is shameful and wrong. This can be compounded where the individual is made to feel different and separated from their peers, causing such negative messages to become internalised. Claimants may reference in their narratives, elements of strong disapproval from external sources, indicating that the claimant's sexual orientation and or conduct is seen to be unacceptable, immoral, sinful, and socially disgusting.

...

Responding to a claimant's narrative: issues around 'difference'

Most LGB asylum claimants live their lives in societies where being 'straight' is considered as the norm. From the perspective of the persecutor, the issue can be the fact that the individual is not conforming to common prevailing normative heterosexual stereotypes. In effect, the behaviour which may give rise to harm, harassment or persecution may not be LGB behaviour (or perceived LGB behaviour), but behaviour or lifestyles which are deemed not to be heterosexual enough."

24. The UNHCR have also recognised these themes, in their *Guidelines On International Protection No. 9*

"Ascertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices."

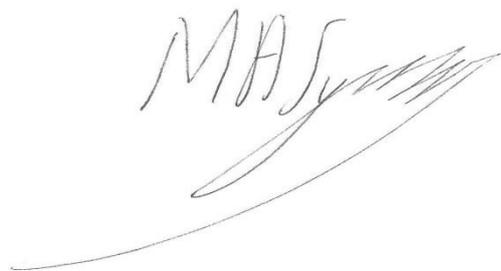
25. As the Judge noted below, this was *not* a case where the Appellant was living an openly gay lifestyle in the UK. So the relevance of these considerations will have to be considered when a Judge re-hearing this appeal assesses the concerns as to his claim's credibility based on the delay in claiming asylum.

Decision

The appeal is allowed, as there was a material error of law in the reasoning of the First-tier Tribunal. The appeal is remitted to the First-tier Tribunal for re-hearing afresh; no findings are preserved.

Signed

Date 8 October 2018



Deputy Upper Tribunal Judge Symes