



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

Appeal Number: PA/08097/2017

THE IMMIGRATION ACTS

Heard at Newport

On 2 October 2018

**Decision & Reasons
Promulgated**

On 6 November 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**A E H
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Fenney of NLS Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Morocco who was born on 21 September 1992. He left Morocco on 12 January 2016 and travelled to Amsterdam in the Netherlands. There, he claimed asylum on 16 January 2017. However, as the appellant continued to have a visa valid for entry into the United Kingdom, he was sent to the UK where he claimed asylum on 9 May 2017.
3. The basis of the appellant's claim is that he is gay and a member of a particular social group in Morocco and would be at real risk of persecution, including prosecution, as a result of his sexual orientation.
4. On 10 August 2017, the Secretary of State rejected the appellant's claims for asylum, humanitarian protection and under the ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. A number of matters were accepted before Judge Clemes who heard the appellant's appeal. It was accepted that the appellant is Moroccan. His immigration history was accepted as was his sexual orientation and that homosexuality is illegal in Morocco. It was also accepted that he had worked for an organisation known as "ALCS" in Morocco. That organisation provides advice and help to individuals in same-sex relationships, in particular in relation to AIDS.
6. Judge Clemes found, having examined the background evidence, that there was not a real risk of the appellant being prosecuted because of his sexual orientation. Judge Clemes accepted that the appellant had a boyfriend in Morocco who remained unharmed. He accepted that the appellant had been subject to a "low level [of] harassment" by, for example, neighbours. He did not accept, however, that either the appellant or his boyfriend had been subjected to any serious ill-treatment or persecution including, in the case of the appellant, whilst at work or because of his involvement with ALCS. In the result, Judge Clemes dismissed the appellant's appeal on the basis that he had failed to establish a real risk of persecution or serious ill-treatment as a result of his sexual orientation.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on, essentially, two grounds. First, the judge failed properly to consider the background evidence and the risk to the appellant of being prosecuted because of his sexual orientation. Secondly, the judge failed to consider all aspects of the appellant's claimed risk on return, in particular arising out of his employment.
8. Initially, the First-tier Tribunal (Judge Saffer) refused the appellant permission to appeal but, on 12 February 2018, the Upper Tribunal (UTJ Finch) granted the appellant permission to appeal.

9. In granting permission, UTJ Finch identified the following arguable errors of law:

“When considering the substantial amount of evidence relied upon by the Appellant about discrimination and persecution faced by gay men in Morocco men the First-tier Tribunal Judge failed to give any weight to material from sources such as Buzz-Feed or Erasing 76Crimes. He asserts the sources were not reliable but did not provide any reasons for such a finding.

It may be that greater weight should be given to reports by established international human rights organisations but this does not mean that no weight should be given to other sources.

He also did not stress the issue of whether in a country where homosexuality was illegal the appellant could rely on a sufficiency of protection from third party actors.”

The Judge’s Decision

10. In his determination, Judge Clemes set out the appellant’s claim (at para 2) and the respondent’s reasons, in summary, for refusing his asylum claim (para 3). Then at paras 4-10 of his determination, the judge set out the oral evidence from the appellant given at the hearing. At para 11, the judge set out the Presenting Officer’s submissions. At para 12, he set out the submissions of the appellant’s (then) Counsel as to why the appeal should be allowed. Then, having set out the relevant law at paras 13-16, the judge analysed the evidence and made his findings at paras 17-22 of his determination.

11. At para 17, the judge set out what was accepted and what was an issue in the appeal as follows:

“I find that the following facts are agreed and made out the nationality and age of the appellant; his immigration history; the appellant’s sexuality; homosexuality is illegal in Morocco; his employment history in Morocco. The threats made by his neighbour and the various accounts of encounters with the Police are contentious. The issue – according to the Skeleton Argument for the appellant – is whether there is a risk on return. Mr Dieu set out – helpfully – the points from the background evidence which he said pointed to prosecution of homosexual men in Morocco so much so that it amounts to persecution.”

12. Then at paras 18-19, the judge dealt with the background evidence contained in the appellant’s bundle of 114 pages. The judge said this:

“18. There is a volume of background evidence filed for the appellant, much of which is quite old. Some of it is of dubious relevance – for example the article on “Sex Tourism in Morocco”. The appellant’s bundle contains examples of cases where homosexual men have been prosecuted and these are listed in the Skeleton Argument at paragraph 2(c) onwards. The appellant had also shown some knowledge of the law against homosexuality in practice: being sexually active seemed to attract adverse

attention (the report at page 32 of the bundle is an example of public sexual activity). Many of the reports deal with defendants who are not only charged with being engaged in homosexual activity but also with aggravating other offences for example, inciting younger men to become involved in homosexual activity or drinking alcohol (see page 40). Some of the sources are not well-known and lack any reputation for independence and integrity an example is the blog at pages 42-43 which draws on some authoritative sources but also relies on others, such as Buzz-Feed. The Skeleton Argument claims that this source talks of eight men being arrested and jailed (in Morocco) whereas in fact it relates to two in Morocco and six in Egypt. Some of it recycles the information from the article at page 38 (the men sentenced in May 2013). Yet it is presented as an accumulating total – but it is not as simple as that, I am satisfied. It is right to note that at page 45 appears more evidence of the jailing of 3 more men but gain this was an arrest and conviction of men caught committing sexual acts in public. There are frequent references to “unreported” prosecutions but I am not satisfied that I can place any weight on such information: the sources are not made out or shown to be in any way authoritative or reliable.

19. A Human Rights Watch report (a reliable source) of July 2015 presents a more mixed picture with references to a mob attack on a suspected homosexual man but also arrests of the alleged perpetrators. It also goes on to call for the de-criminalisation of the law. Another report at page 52 relates other prosecutions but – in common with the earlier article, there is the recycling of older cases. Again, the Skeleton Argument does not make this clear. This feature is also evident on pages 54 and 55 (the same case is presented as two discrete ones). The website “76crimes” sets out that there is an average of 86 prosecutions per year under this anti-homosexuality law but – other than the Associated Press – its sources are less than impeccable and (in my judgment) possibly unreliable. Of more reliability is the report of the Danish Immigration Service at page 66 which sets out how LGBT groups can be exposed to violence. Against that, there is a more optimistic part of the report which describes the ways in which the LGBT community does manage to function and meet up. The same report goes on to detail that the Moroccan state does sometimes intervene to protect homosexual men and women from attacks from members of the public (page 68 of the bundle). The report sets out that this is a mixed picture: in other cases, there is little protection for an LGBT person who is the victim of a crime. The Danish Immigration report might be the best source for a clearer picture of how many prosecutions there actually are under the law: pages 68 onwards examine different sources and give some examples. The report itself has to grapple with the way in which information is presented to it: in paragraph 25 it has to report to setting out the different claims made (e.g. 4-5 cases at first instance in 2015-16). It lists some examples – these themselves include some of the ones from earlier reports in the bundle. The report also alludes to “trumped up” charges, i.e. based on false confessions or fabricated accounts. Despite this, in my judgement, the numbers of cases are a great deal smaller

than the Skeleton Argument represents at first reading. I am certain that there has been no attempt to mislead the Tribunal but there has not been the expected level of examination of the figures to prevent the same case of "prosecution" being duplicated and presented as a new one. I am not satisfied that the background evidence does support the claim that prosecutions are so numerous that they become persecution. Many of the cases are of men being caught in committing a sexual act as opposed to merely being homosexual and not hiding the fact. Committing sexual acts in public (as some of the examples entail) is often a criminal offence even in "Western" society. Other prosecutions involve other aggravating offences – for example promoting prostitution or the corrupting of younger people or the possession of alcohol. I – further – am not satisfied that the provenance of much of the information is wholly objective and therefore attracts less credibility and have approached it with some caution."

13. At para 20, the judge dealt with the appellant's evidence and, in a number of respects, did not accept his account:

"There is the appellant's own evidence. He could have sought evidence in support for it – most obviously from his boyfriend who remains in Morocco and is unharmed it seems. I remind myself that the appellant says that his boyfriend was far more "open" about his sexuality than the appellant had been and yet he (the boyfriend) has not suffered any ill-treatment which could be classed as persecution. I broadly accept the appellant's factual account – it fits with the descriptions of harassment of the homosexual community which are contained in much of the background evidence. I am not satisfied that the account of a female neighbour making threats against him is made out and certainly not satisfied that any such behaviour could amount to any form of behaviour for which he would need to seek the protection of the authorities. If there were such threats, then in any event they are a low level harassment by a non-state agent. I consider that the appellant has embellished the seriousness of this account to include the "maker" of them rounding up local youths against him. He – as I say above – had an easy source of possible support his boyfriend who could have sent in a statement (Morocco is not a closed state which would inhibit the sending of such evidence). Despite the picture that he now presents of a pattern of persecution against him, he chose to leave the UK and go back to Morocco in December 2106. This – I am satisfied – damages the credibility of his account: why would he return to the place where he was being persecuted when he had been able to stay in the UK and make an asylum claim? There is evidence on his visa application that he had also travelled abroad on other occasions to places where he might have been expected to make an asylum claim if his version of persecution carried any credibility. He says now that he wanted to see if his boyfriend was alright – but I am satisfied that this is not a true account. Nothing happened in that short time to materially alter the overall picture of their life together in Morocco."

14. At paras 21-22, the judge set out his conclusions that led him to dismiss the appeal as follows:

- “21. When the totality of the appellant’s account is considered these salient facts emerge he has not (certain latterly) made an attempt to hide his sexuality in Morocco; he has openly lived with a male who is also homosexual and was not afraid to show off that fact; he worked for an organisation which supported gay men quite publicly without – I find on the evidence – suffering the adverse attention of the Moroccan authorities. I did not find the dichotomy between the Ministries of the Interior and Health credible as suggested by the appellant; there is little to support it. I am satisfied that the appellant has probably been harassed at quite a low level by the authorities but that he has never been arrested or detained for any criminal process to be pursued. I do not accept the claim that he faced discrimination at work (a type of whispering campaign) – he was working for a tolerant organisation in terms of people’s sexuality and I find it unlikely that such an organisation would put up with such behaviour from its workforce.
22. In my judgment, the appellant’s own evidence supports the overall thrust of the background evidence: that prosecutions of gay men are sporadic at their worst - and in my judgment - show a pattern of court cases where there are aggravating features. The appellant has not been subjected to any such process. I am not satisfied that there is a pattern of prosecutions that - taken as a broad overview - can amount to persecution. At best the appellant might suffer the same sort of harassment that he has probably already had to put up with. That falls short of persecution, in my judgment. I am not satisfied that the appellant is someone who, owing to a well-founded fear of persecution for reasons of membership of a particular social group or political opinion, is unable or unwilling to avail himself of the protection of his country of origin Morocco.”

The Submissions

15. Ms Fenney, who represented the appellant submitted that the judge had failed properly to consider the background evidence. In particular, she submitted that he had “cherry-picked” from the Danish Immigration Service Report: “Morocco: situation of LGBT persons, 21/03/2017” which is at pages 62-86 of the appellant’s bundle. She submitted that the judge had been wrong to say that the background evidence established that only those with ‘aggravating factors’ were at risk of prosecution. That was not so. She relied on para 2.2 (“exposure to violence by sub-groups of LGBT persons”), para 2.3 (“LGBT communities and safe spaces in Moroccan society”), para 2.4 (“state protection available”) and para 2.5 (“examples of trials involving homosexuality”). She submitted that this painted the position in Morocco in much more of a negative light than the judge recognised in para 19 of his determination. She also submitted that the judge had failed to take into account whether the appellant’s work in an AIDS advice organisation would be a “aggravating factor”. She submitted that the evidence of harassment, if it went on long enough, would amount to persecution and in addition she submitted that the appellant had avoided prosecution by bribing police officers in order to be arrested and

had been subject to humiliation in order to avoid arrest and prosecution. Ms Fenney submitted that the judge had failed properly to assess the future risk of the appellant being attacked.

16. On behalf of the Secretary of State, Mr Howells submitted that the judge had properly considered the background evidence. He had, correctly, noted in para 18 that much of the evidence was quite old. The judge had been entitled to give less weight to sources on the internet such as blogs and Buzz-Feed. He was entitled, in para 19, to give greater weight to the Human Rights Watch Report and the Danish Report. In para 19, Mr Howells submitted that the judge had been entitled to find that the scale of prosecutions presented by the appellant's (then) Counsel in para 2 of his skeleton argument was not as great as claimed. Mr Howells relied upon the Home Office, Country Policy and Information Note, "Morocco: Sexual Orientation and Gender Identity" (July 2017) at pages 87-114 of the appellant's bundle where at para 3.1.2 and section 6 ("Law in practice") that "in practice" the law is "rarely used". Mr Howells submitted that it was wrong to say that the judge had found in paras 19 and 20 that arrests and prosecutions only occurred where there were "aggravating factors".
17. Further, Mr Howells submitted that the judge's rejection of some of the appellant's evidence at para 20 was not challenged; including his finding that the appellant was only subject to a low-level of harassment by non-state actors. Mr Howells submitted that the judge was entitled to find at para 21, that level of harassment did not reach that required to establish persecution.
18. Finally, as regards the appellant's work with ALCS, Mr Howells acknowledged that the judge accepted his work at paras 3 and 17 of his determination but had noted that he had not been arrested because of that. Mr Howells submitted that the judge was entitled to find that the appellant's work would not in itself, or as an aggravating factor, create a real risk of persecution on return to Morocco.

Discussion

19. I have set out the judge's reasoning and the respective parties' submissions at some length. In substance, I accept Mr Howells' submissions. The judge did not fall into error in reaching his findings and in dismissing the appeal.
20. First, I do not accept that the judge failed properly to consider the background evidence. He was entitled, at para 18, to give less weight to internet sources such as blogs including Buzz-Feed. The judge was entitled to give significant weight to both the Human Rights Watch report and the Danish Immigration Service report.
21. I am not persuaded that the judge misrepresented the weight of the evidence in the background material. Ms Fenney did not seek to "unpick" Judge Clemes' reasoning in paras 18 and 19 that the skeleton argument

relied on before him failed to identify that there was duplication and overlap between the claimed numbers of prosecution of individuals due to their sexual orientation. In my judgment, Judge Clemes' reasoning at paras 18 and 19 is properly sustainable in that regard.

22. Secondly, the judge did not conclude that the background evidence only showed prosecution of gay men where there was in addition an "aggravating factor". He merely said, at para 19, that "many" of the cases involve men who were "committing a sexual act" and not being prosecuted simply because they were gay; and "other" prosecutions involved "other aggravating offences", such as possession of alcohol, corrupting younger people and promoting prostitution. Judge Clemes accepted that there were instances of gay men being prosecuted, in a variety of circumstances, under the Moroccan law. However, the evidence before him was that these prosecutions were not numerous and the CPIN Report identified, on the basis of evidence, that prosecution was "rare". Judge Clemes had to decide whether there was a "real risk" of persecution based upon prosecution which was "more than fanciful". In my judgment, having properly considered the background evidence, it was not irrational for Judge Clemes to conclude that a "real risk" of prosecution (amounting to, as he put it, "persecution") had been established. In reaching that conclusion, I am wholly unpersuaded that he failed properly to consider the background material before him.
23. Thirdly, the judge made clear (and now unchallenged) findings that the appellant had been subject to a low level of harassment by non-state actors. Judge Clemes rejected the appellant's claim (again not now challenged) that he had faced discrimination at work, given that he was working for a "tolerant organisation in terms of people's sexuality". Those unchallenged findings were, in my judgment, findings which entitled Judge Clemes to find that the appellant had failed to establish a real risk of persecution by non-state actors. The issue of "sufficiency of protection" from the state did not "therefore" arise.
24. Fourthly, the fact that the appellant worked for an organisation such as ALCS was clearly well in the mind of the judge. He dealt with the appellant's evidence in that regard at some length at para 6. There was nothing in the evidence, before Judge Clemes, to suggest that the appellant had previously been at an enhanced risk of interest or ill-treatment by the authorities because of his job. He had never been arrested on that basis. In addition, Judge Clemes set out the appellant's evidence that he had avoided trouble with the police by paying bribes when threatened with arrest (see para 7). At para 22, Judge Clemes noted that: "the appellant might suffer the same sort of harassment that he has probably already had to put up with", nevertheless he concluded that that fell "short of persecution" for a Convention reason. Ms Fenney submitted that the judge had failed to consider all aspects of the appellant's claim to be harassed, not only by non-state actors but also by the police. As is clear from the citations I have given, Judge Clemes did consider all aspects of the appellant's claim to be harassed. I am unpersuaded that, on the

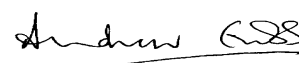
basis of his factual findings, the judge was not rationally entitled to conclude that that harassment did not reach the level of “persecution” both in its nature and intensity so as to engage the protection of the Refugee Convention.

25. Fifthly, I am in no doubt that Judge Clemes did consider the future risk to the appellant, albeit in the context of what the appellant claimed (and the judge accepted) had happened to him previously in Morocco. That included the fact that the appellant had returned to Morocco, having first come to the UK in 2016 and that there was no evidence from his boyfriend in Morocco either to support the appellant’s claim or which provided any evidence that the appellant’s boyfriend faced any problems in Morocco despite being, as the judge put it, “far more ‘open’ about his sexuality than the appellant” (at para 20).
26. Consequently, I am satisfied that the judge’s factual findings were properly based upon the background evidence and that in dismissing the appeal the judge did not err in law. For the reasons he gave, the judge rationally concluded that the appellant had failed to establish that on return to Morocco there was a real risk that he would be persecuted because of his sexual orientation.

Decision

27. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant’s appeal did not involve the making of an error of law. The decision stands.
28. Accordingly, the appellant’s appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

26 October 2018