



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/08867/2017

**THE IMMIGRATION ACTS**

Heard at Glasgow  
On 26 July 2018

Decision and Reasons Promulgated  
On 23 August 2018

Before

**DEPUTY UPPER TRIBUNAL JUDGE DEANS**

Between

**ELVIS [K]**  
(No anonymity direction made)

Appellant

and

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

Respondent

For the Appellant: Ms D Friel, McGlashan MacKay, Solicitors  
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision by Judge of the First-tier Tribunal Kempton dismissing an appeal on protection and human rights grounds.
2. The appellant is from Namibia, where he claims to be at risk because he is gay. The judge expressed some doubt about the appellant's sexual orientation but appears to have made a finding that he is bisexual. This finding seems to have been made on the basis that the appellant is now in

a same sex relationship but has three children in Namibia, each with a different mother.

3. According to the appellant, his relationship with his current partner began in Namibia. When the two men were attending a wedding there in November 2016 the appellant's partner was assaulted because he was gay. The assault was reported to the police but neither the appellant nor his partner told either the police or the medical services that they were gay, or that this was the reason for the assault.
4. The Judge of the First-tier heard evidence from a representative of the LGBT community in Glasgow who maintained that gays in Namibia were at risk from tribal leaders, who had the power to impose punishments. This witness was not, however, giving evidence as an expert on Namibia. She appears to have been doing no more than recounting what the appellant and his partner had told her about Namibia. The appellant's partner's evidence was that people in his village were punished by the chief for homosexuality. The appellant maintained that there was a warrant for his arrest, although this was not produced, and once arrested he would be handed over by the police to his local tribal leader to be persecuted.
5. The judge found that the appellant would not face persecution in Namibia by reason of his sexual orientation.

#### **Error of law**

6. Permission to appeal was granted by the Upper Tribunal on the grounds that the Judge of the First-tier Tribunal had arguably failed to address properly the background evidence relied upon by the appellant and had not applied the systematic approach set out in HJ (Iran) [2010] UKSC 31.
7. For the respondent Mr Govan submitted that the judge had not decided the appeal on the basis that the appellant could conceal his sexual identity, even though there was no mention of HJ (Iran). If the judge accepted that the appellant is bisexual then it appeared that the judge assessed the risk to him as if he was gay. The judge assessed the extent of discrimination and persecution against gays in Namibia. If there was no persecution of gays then the requirements of HJ (Iran) were satisfied.
8. In this appeal it would have assisted the judge to follow the systematic approach of HJ (Iran). Had she done so she might have avoided some difficulties over the findings and reasons in her decision. I am particularly concerned by the judge's approach to the assault on the appellant's partner when he and his partner were in Namibia. The judge found that the appellant's partner was given protection by the police. The judge noted, however, that neither the appellant nor his partner told the police they were

in a gay relationship. The judge neglected to consider the reason why the police were not told of this. Yet the answer to this question is crucial to the issues of whether the appellant concealed his sexual orientation and why he did so.

9. At paragraph 35 of HJ (Iran) Lord Hope set out 5 tests to be followed in cases of this nature. The first is “to consider whether the applicant is indeed gay.” In this appeal although the judge expressed some hesitation and misgivings she seems to have found that the appellant is bisexual. Mr Govan accepted that this effectively meant that the judge assessed the risk to the appellant as if he was gay. The first test is decided in favour of the appellant.
10. The second issue raised by Lord Hope is how the applicant will conduct himself on return to his country of origin and how others will react to what he does. A person must not be expected to conceal every aspect of his sexual orientation and if he does so because of a well-founded fear of persecution then he will be entitled to asylum.
11. Thirdly Lord Hope pointed out that the test to be applied was not whether the applicant would be able to do everything in his country of origin which he could do in the receiving country. There must be a focus on what would happen in the country of origin.
12. Fourthly, if it was found that the appellant would conceal aspects of his sexual orientation if returned, it must be considered why he would do so. If concealment would be because of social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution then the claim for asylum must be rejected.
13. The final question is whether the applicant has a well-founded fear that he will be persecuted.
14. Mr Govan’s position was that the judge had addressed the fifth and final test and found the appellant did not have a well-founded fear. His appeal could not therefore succeed, even if the judge did not properly consider the earlier tests.
15. In my view this will not suffice. The final test ought not to be considered in isolation from the earlier tests. It is important to ask how the appellant will behave on return and, if he will conceal aspects of his sexual orientation, it is important to ask why he will do so.
16. The judge had evidence before her that the appellant and his partner had in the past concealed their relationship from the police, following the assault on the appellant’s partner, precisely because they feared the police

either would not assist them or would inflict upon them further harm. The evidence before the judge was that if returned to Namibia the appellant would conceal his sexual orientation because he feared violence at the hands of the police and at the hands of his community, from whom the police would not protect him. It might be that these fears were not well-founded, but the judge should not have made a finding to this effect without considering why the appellant had concealed his sexual orientation in the past and if he would do so in the future because of a fear of persecution.

17. I am satisfied that the judge erred in law by failing to follow the systematic tests set out in HJ (Iran), and, in particular, by failing to consider whether in the past the appellant had concealed his sexual orientation because of a fear of persecution and whether he would do so in future were he returned to Namibia. Because of this error I set aside the decision.
18. I find in addition that the judge's reasoning in relation to the risk to gays in Namibia was less than adequate. Although, as Mr Govan pointed out, the judge referred at paragraph 4 to having regard to all the evidence, at paragraphs 37-39 when considering the situation in Namibia the judge did not address directly and in sufficient detail many of the concerns about the adequacy of protection in Namibia which were advanced on behalf of the appellant.

### **Re-making the decision**

19. So far as the appellant's own behaviour was concerned, the evidence before the judge, which appears to have been accepted, was that the appellant had concealed his sexual orientation when in Namibia because of a fear of harm. The appellant would conceal his sexual orientation on return for the same reason. The appellant's past conduct in this respect provides strong evidence of how he would behave on return. The question then becomes one of whether his fear is well-founded.
20. With a view to re-making the decision I asked the parties to address me on whether the fears expressed by the appellant and his partner were well-founded. In accordance with the fifth test in HJ (Iran) the answer to this question would determine whether the appeal would succeed.
21. Ms Friel began by referring to a report dated 2<sup>nd</sup> August 2012 on Namibia by the Immigration and Refugee Board of Canada (p 12, 2<sup>nd</sup> Appellant's Inventory). This referred to "many unwritten laws" in Namibia that restricted LGBTI people from living their lives freely. The police generally did not take complaints of violence against LGBT persons seriously. In 2011 a transgender woman was stoned in the town of Keetmanshoop. It appears she survived this attack but did not report the matter to the police

because they had failed to act on similar complaints she had made in the past. Two men caught engaging in a sexual act in a private bar were arrested and charged with sodomy, which is a crime in Namibia. The prosecutor withdrew the sodomy charges. Ms Friel pointed out that even if there were no prosecutions for sodomy before the courts, individuals might nevertheless be arrested and charged by the police. Up to March 2011 there had never been a court case in Namibia brought on the grounds of discrimination on the basis of sexual preference or orientation.

22. Ms Friel referred to a UNHCR Guidance Note of 21<sup>st</sup> November 2008 on refugee claims relating to sexual orientation and gender identity (p 89, 2<sup>nd</sup> Appellant's Inventory). This stated at paragraph 20 that an applicant may exceptionally be able to show a well-founded fear of persecution even if a law criminalising LGBT is no longer enforced, where the existence of the law creates "an intolerable predicament" for the appellant. Even where there was no conclusive country information showing that laws criminalising homosexual conduct are enforced, the state might disguise its penalisation of LGBT persons by prosecuting them for crimes such as rape, child molestation, or drug-related offences. A climate of homophobia may be an indication that LGBT persons are being persecuted.
23. Ms Friel then referred to a report of 10<sup>th</sup> November 2013 on the rights of LGBTI citizens in Namibia by the Kaleidoscope Trust (p 103, 2<sup>nd</sup> Appellant's Inventory). This report referred to an attack in 2012 on a young gay man by a group of men. Reports suggested that the local police refused to deal with the victim's complaints. In rural areas traditional courts often ignored constitutional procedures, although legislation was implemented in 2009 to better connect them to the formal judicial system. Although there were no recorded prosecutions under the colonial-era law that criminalised sodomy, LGBT individuals continued to face harassment and discrimination. There were reports of so-called "corrective rape" of lesbian women.
24. Ms Friel referred to a report dated 26<sup>th</sup> August 2018 on Namibia by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (p 153, 2<sup>nd</sup> Appellant's Inventory). Although there had been no prosecutions under the old anti-sodomy law there was no record of how many charges had been brought. A report of 20<sup>th</sup> October 2016 on LGBTI rights in Namibia by Advocates for Human Rights (USA) (p 164, 2<sup>nd</sup> Appellant's Inventory) stated that LGBTI Namibians continued to experience targeted discrimination and violence by state and non-state actors. This included arbitrary arrest and physical violence by the police. LGBTI persons who went to the police to report violence and ill-treatment by non-state actors experienced additional violations, including being ridiculed, treated in a degrading and insensitive manner, and asked inappropriate questions. A 2009 study found that 21% of men who have sex with men had been beaten

by a police officer or government agent and 21% had experienced blackmail or extortion. A 2008 study found that 40% of gay men had experienced human rights abuses related to their sexuality. In 2014 a man was beaten to death in Gobabis because he was suspected of being gay. Degrading treatment and ineffective investigation and prosecution contribute to under-reporting of abuses as survivors are afraid and have little faith in the criminal justice system.

25. A report dated 16<sup>th</sup> March 2016 by OutRight Action International (p172, 2<sup>nd</sup> Appellant's Inventory) stated that in the early 2000s the political tone in Namibia was vociferously anti-gay rights, and the then President attacked homosexual behaviour. Article 10 of the Constitution outlawed discrimination on grounds such as sex and race but did not include sexual orientation. In 2001 the Supreme Court held that same sex relationships were not recognised by law.
26. Ms Friel then turned to the respondent's additional bundle. Item A was a report of 10<sup>th</sup> December 2014 by the International Humanist and Ethical Union. This stated that although the offence of committing "an unnatural sex crime" was generally not enforced there was a persistent cultural sense of social prejudice reported by members of the LGBT community, resulting in some reports of street attacks. In 2012 an individual was attacked after winning the title of "Mr Gay Namibia". It was reported that the police were seemingly uninterested. After two months the police informed the victim that the case documents had been lost.
27. Ms Friel referred to the US State Department Report for 2015, at Item E of the respondent's additional bundle. This referred to the customary court system, in which there was uneven application of constitutional protections. In November 2014 the government denied asylum to a man from Uganda who claimed to be homosexual and deported him back to Uganda despite a High Court order prohibiting his deportation. UNHCR negotiated his return to Namibia and the man was eventually granted asylum in Canada. The report referred to corrupt practices among officials and the lack of a law providing for public access to government information, although media outlets generally found the government willing to provide information when requested.
28. Ms Friel submitted the appellant would not be able to live openly in Namibia as a gay man but would face persecution because of societal attitudes. He had lived "in the closet" until he and his partner were attacked. There was a lack of state protection. The government were unable or unwilling to protect gay men. The police were not told the appellant's partner was attacked because he was gay. This might be the reason the police responded seriously to the attack.

29. Mr Govan submitted that the evidence did not show that a gay or bisexual man in Namibia had a well-founded fear of persecution, having regard in particular to Items H, I, and J of the respondent's additional bundle. This was an issue which had polarised society in Namibia but many of the documents relied upon by the appellant were relatively old. It was a previous President who had threatened gays. Item I showed that in 2009 politicians had spoken for gay rights, even if some politicians used anti-gay rhetoric. There was access to information in Namibia for reporting bodies and if there was a high level of crime against gays this would be reported. There had been no prosecutions for sodomy in the last twenty years. The evidence relied upon by the appellant to show human rights abuses against gays was from 2009 and there was a lack of subsequent evidence. If there was a systematic problem some evidence-based examples would have been reported. Mr Govan suggested a comparison with Zimbabwe, in terms of the country guideline case of LZ, in which it was found that there were attempted extortions and police detentions but the evidence did not support a general risk to gay men.
30. It was pointed out that in relation to Zimbabwe the possibility was considered in LZ of relocation to Bulawayo. Mr Govan suggested that in Namibia there would be a similar possibility of relocation to Windhoek. Ms Friel referred in response to evidence that Windhoek was not safe for gays. I further noted that the question of internal relocation within Namibia had not previously been raised at any point in this appeal.

## Discussion

31. The comparison between the risk to gays in Namibia and in Zimbabwe, as set out in LZ, is an interesting one. In both countries there are homophobic attitudes and anti-gay rhetoric but, as pointed out in LZ, these countries are far from being the worst in the region so far as the mistreatment of gays is concerned. Mr Govan pointed out that some of the country information relied upon by the appellant was around 10 years old and he suggested that conditions had improved in Namibia since then. The decision in LZ was promulgated in 2011 and indicates that at that time the gay rights movement was significantly stronger in Zimbabwe than in Namibia. One example of this was the protection given in Zimbabwe by gay rights organisations against threats of blackmail. There was no evidence of any equivalent protection in Namibia, where blackmail remains a significant problem.
32. Most significantly, however, there was a finding in LZ that the police and other state agents do not provide protection for gays in Zimbabwe. The country information shows the position is the same in Namibia. The victims of homophobic crimes do not generally report these to the police either because the police will not take any effective action or because the

victim may be abused by the police. The assault on the appellant's partner in November 2016 was reported to the police but significantly the appellant and his partner were careful not to disclose the reason for the assault and concealed the fact they are a gay couple.

33. In LZ, even though state protection was found to be insufficient, the Tribunal went on to assess the risk to gays in Zimbabwe and the decision was reported as a country guideline decision. The Tribunal pointed out the need to have regard to individual circumstances. Indeed, in the appeal before me the focus is on the individual circumstances of the appellant and his partner, having regard to the country information, which provides a necessary element in establishing whether the appellant's fear is well-founded.
34. A particular feature of the legal system in Namibia is the customary courts. Efforts have been made to align the practices of these courts more fully with the conventional legal system but the evidence indicates that these efforts have not yet proved fully successful. The customary courts may well reflect and follow the homophobic attitudes of local communities with a resulting risk of mistreatment for LGBT persons in their communities. The appellant expressed a fear that the police would hand him over to a customary court. Although the judge did not make a finding directly on this point, the country information suggests this is a serious possibility. Mr Govan raised almost at the end of the hearing before me the possibility of internal relocation to avoid action by a customary court. As already pointed out, this was not an argument that had been raised earlier in the proceedings and the appellant had in fairness no proper opportunity to respond to it. In any event, the argument is not a good one in the factual context of this appeal, in which it is not a question of whether the appellant is at risk only in his home area. The risk must be assessed in Namibia as a whole.
35. The country information suggests that it is possible for LGBT persons to live safely in Namibia provided they are discreet and cautious. There is growing awareness of gay rights and there are gay organisations campaigning within the country. I was shown a newspaper article about a gay couple who had married in South Africa and were living in Namibia. There has been a Pride march in Windhoek although, as Ms Friel pointed out, the police were on duty to protect the marchers from bystanders. This appeared to be the only example of the police taking action to protect LGBT persons. The country information indicates though that even now Namibia is some way behind Zimbabwe, as it was in 2011, in the number of LGBT persons living openly and with respect for their rights. I do not think that press coverage of one gay couple and one reported Pride march is sufficient to establish that gays do not face a real risk of persecution in Namibia. Indeed, on the basis of the country information before me it is difficult to



be satisfied one way or the other whether in general gays face a real risk of persecution in Namibia.

36. Ms Friel suggested that the risk to gays in Namibia was greater than indicated by the country information because of difficulties in obtaining information and collating instances of mistreatment. I do not think this is a strong argument, although I accept that homophobic attacks may often go unreported. It is clear that NGOs and gay rights organisations have access to Namibia. The government is said generally to comply with media requests for information. I would recognise though that it may be more difficult to obtain information from communities in rural areas than from larger population centres.
37. Turning to the particular circumstances of this appellant, he and his partner attempted to live discreetly in Namibia but their attempt came to an end with the assault in November 2016. Although the police at the time were not aware of their relationship, others in their community were and it cannot realistically be supposed that this information would not be disseminated beyond those who were present when the assault took place. The appellant and his partner are therefore exposed to a serious possibility of further homophobic attacks, with a reasonable likelihood that the police will not act to protect them as it comes to their attention why an attack has taken place. There is also a serious possibility that the appellant will be arrested and detained, with the possibility of abuse in detention, even though no prosecution will result. The appellant and his partner do not have the protection of national or international publicity, as in some of the high profile instances reported in the country information. I am satisfied that as a partner in a gay relationship the appellant has a well-founded fear of persecution in Namibia.
38. Returning to the questions posed by Lord Hope in HJ (Iran), the appellant was found by the Judge of the First-tier Tribunal to be bisexual and the parties have accepted for the purpose of this appeal that the risk to him should be assessed on the basis he is gay. He would return to Namibia as a partner in a same sex relationship. Since the assault in November 2016 he and his partner are known as being gay by friends and, it is reasonably likely, by their wider community. The appellant fears persecution because he is gay. As a member of a same sex couple there would be significant restrictions on how he and his partner could live in Namibia and they would have to be highly conscious of the risks to their safety from every contact with the public or with the police. In the past the appellant and his partner sought to conceal their relationship in order to avoid persecution but their concealment was unsuccessful. Taking into account the appellant's particular circumstances, he has a well-founded fear of persecution in Namibia. His appeal will therefore succeed under the Refugee Convention.

## **Conclusions**

- 39. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
- 40. The decision is set aside.
- 41. I re-make the decision by allowing the appeal on protection grounds.

## **Anonymity**

An anonymity direction was made by the Judge of the First-tier Tribunal. I have not been asked to continue this direction and I see no reason of substance for doing so.

## **Fee award** (N.B. This is not part of the decision)

No fee has been paid or is payable and therefore no fee award is made.

M E Deans  
Deputy Upper Tribunal Judge

dated 13<sup>th</sup> August 2018