



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

Appeal Number: PA/00248/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 18 July 2019**

**Decision & Reasons Promulgated
On 26 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

C N K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Mukherjee, Counsel

For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant appeals with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal K R Moore dismissing her appeal against a decision of the respondent, dated 24 December 2018, refusing her protection claim.
2. The appellant is a Kenyan national. She arrived in the United Kingdom on 17 January 2018, entering as a visitor. She subsequently claimed asylum, revealing that she is a lesbian. The respondent accepted the appellant is a lesbian and also that she had a relationship in Kenya with a woman called Samantha. However, the respondent did not accept the

appellant's account of her problems in Kenya. It was considered the appellant could return safely to Kenya.

3. The appellant appealed. Her appeal was heard at Taylor House on 8 February 2019. In a lengthy and detailed decision, the judge gave reasons for coming to similar conclusions to the respondent about the appellant's claim (see paragraph [37]). He found that, on return to Kenya, the appellant would live discreetly and avoid persecution, as she had done previously, and that she would live discreetly due to social pressures and because she did not wish to upset her family (see [48]).
4. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Grubb because,

"It is arguable on the basis of the renewed grounds that the judge's finding that she would avoid persecution by acting discreetly due to social pressure and to avoid family distress may not reflect the evidence and, in any event, in itself may give rise to a well-founded fear of persecution following HJ (Iran). The point about the likelihood or otherwise of prosecution is also arguable."
5. The respondent has filed a rule 24 response opposing the appeal. It had been open to the judge to find the appellant would live discreetly due to social pressures.
6. I heard submissions from the representatives as to whether the judge made a material error of law in his decision. I shall provide a brief summary of the submissions.
7. Mr Mukherjee's first ground concerned whether the judge erred in finding that the appellant would act discreetly on return to Kenya and that she would do so due to societal and family pressure. He submitted that the appellant had made it clear that her motives were mixed and included a fear of persecution. The judge's finding to the contrary was perverse. Secondly, he argued that the judge erred in his assessment of the background evidence and expert report, which showed that openly gay people were at a real risk of persecution.
8. Ms Pal argued the decision showed the judge had considered the claim holistically and he was entitled to find that the appellant would live discreetly due to social pressures. His findings were sound and not perverse. The background evidence did not show openly gay people are at a real risk of persecution.
9. In reply, Mr Mukherjee argued that the judge had misconstrued HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31. Social pressures can still found a claim because they can amount to a form of persecution.
10. I reserved my decision on the question of whether the judge's decision contains a material error of law.

11. In HJ (Iran) and HT (Cameroon), Lord Rodger set out the approach to be followed by tribunals, as follows:

“82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that 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 as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.”

12. Lord Walker, Lord Collins and Sir John Dyson SCJ were content to adopt Lord Rodger’s wording of the test. Lord Hope used different wording, as follows,

“The test

35. This brings me to the test that should be adopted by the fact-finding tribunals in this country. As Lord Walker points out in para 98,

this involves what is essentially an individual and fact-specific inquiry. Lord Rodger has described the approach in para 82, but I would like to set it out in my own words. It is necessary to proceed in stages.

(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum."

13. It was common ground that the appellant was a lesbian. The next question to answer was whether a person who lived openly as a lesbian in Kenya would face a real risk of persecution.
14. The judge considered the background evidence in detail and noted some materials suggesting Kenya was a more tolerant place than, for example, neighbouring Uganda. However, he also noted that the US State Department report noted that violence and discrimination against LGBT individuals was widespread and that victims were extremely reluctant to report abuse due to fear of violence. Many LGBT victims believe the police were just as likely to persecute them as to protect them. A 2015 report stated there had been “few prosecutions ... in recent years”.
15. The judge also noted the contents of the expert report of Professor Mario Aguilar. He was critical of parts of it finding it “general in nature”, but he noted the overall opinion that the appellant would be at a real risk of persecution if she returned to Kenya.
16. At paragraph [39] the judge set out the test from HJ (Iran) but did not, as far as I can see, answer question (ii) definitively. He referred to the appellant's fear of the authorities as being speculative but I take that to be referring to the rejection of the claim that the appellant was at risk following exposure by her cousin, who had inadvertently witnessed the appellant and her partner, Samantha, engaging in intimate acts.
17. The judge went on to examine the detail of the evidence so as to determine whether the appellant would live openly or discreetly on return and, if the latter, why. He found the appellant had lived discreetly before coming to the United Kingdom and he made adverse credibility findings with respect to her claims to fear her family and the authorities. He found the appellant would live discreetly as she had before. He found the reason the appellant would live discreetly on return was through choice. In essence, she would not be forced to conceal her sexual orientation.
18. Mr Mukherjee’s principal challenge to the judge’s decision focused on the finding about why the appellant would live discreetly but he acknowledged that this argument could only lead to a material error if a woman who lived openly as a lesbian would face a real risk of persecution. As noted, on my reading of the decision, the judge did not make a definitive finding on that issue.
19. Mr Mukherjee argued the judge’s finding that the appellant would live discreetly due to social pressures did not reflect the evidence, a point which Upper Tribunal Judge Grubb found was arguable. Mr Mukherjee accepted this amounted to a perversity challenge in respect of the judge’s finding on the reason the appellant would be discreet.

20. I have read the interview record and I accept there are many references in it to the appellant stating she would live discreetly due to fear of being ill-treated. See, for example, questions 30, 49, 108 and 152. The judge appears to have acknowledged this in the first half of [42] of his decision, where he quotes from the appellant's answers to questions 151 and 152 of the interview. Mr Mukherjee also showed me parts of the appellant's witness statement dealing with this.
21. It is necessary to analyse the judge's decision in greater detail.
22. In the second half of [42] the judge considers the oral evidence given by the appellant on this point at the hearing. He noted the appellant said she would live in an open way, which he found contradicted what the appellant had said at her interview. Her representative put this contradiction to her and the appellant said she had been confused when the question was first put to her and she thought she was being asked about how she would live in the United Kingdom.
23. Leaving that point, the judge went on in [43] to state that the appellant had given inconsistent evidence about whether her family had been told that she was a lesbian and, in the second half of that paragraph, he concluded the appellant's account of her family disowning her because her cousin had informed them what she had seen was speculative. It was, he concluded, also speculation that the appellant's family would contact the police.
24. At the end of [44], he concluded as follows:
- “However, if the appellant was in genuine fear of her family, or indeed from the authorities, according to the appellant she continued working whilst at her friend's house, in that she was working remotely on her laptop. The fact that the appellant during this period continued working, and therefore would have been contactable by family or the authorities is not consistent with the appellant's claim that she would have been in danger from the authorities or family members, and due to such fear caused her to flee the country.”
25. The judge rejected the appellant's claim to have been in hiding at her friend's house before leaving Kenya. He drew matters together at [48] as follows:
- “I am not satisfied the appellant lived openly as a lesbian in Kenya before she came to the United Kingdom. I am satisfied that if this appellant was to return to Kenya she would live discreetly and avoid persecution, and in so finding I must ask myself, why she would do this. I am satisfied having considered all the evidence before me that she would choose to live discreetly, because that is what she had done before, and that was what she would continue to do due to society and social pressures, and due to the fact that she did not wish to anger or distress her family. In so finding such social pressures and reasons for wanting to live discreetly do not amount to persecution, and that this appellant does not have a well-founded fear of persecution in that, the appellant has chosen to adopt such a way of life,

and thereby is not in fact liable to be persecuted due to her sexuality, and due to her being a lesbian.”

26. The judge then referred again to the background evidence and expert report and, in relation to the latter, found the expert’s opinion that intimate acts between females was forbidden by Kenyan law to be unsupported by either the terms of the Penal Code or other documentary evidence. He saw no reason for the appellant’s activities in LGBT groups to create a risk for her on return. At [51] he reiterated his overall conclusion:

“Some of my negative credibility findings fundamentally undermine this appellant’s claim, though I accept that she is a lesbian and she had a lesbian relationship in Kenya prior to coming to the United Kingdom. However, I am satisfied that the appellant lived discreetly as a lesbian prior to coming to the United Kingdom, and that the problems and fear that she has from her family, and from the authorities, are speculative and not supported by credible and reliable evidence.”

27. As said, the principal challenge to the decision centred on the judge’s failure to have regard to parts of the evidence in which the appellant insisted she would live discreetly due to fear of persecution. However, it seems to me that, in order to show the decision is vitiated by legal error, Mr Mukherjee must show that the judge’s finding that the appellant was not credible about her past experiences and the inference he drew from that about why the appellant would behave discreetly on return was erroneous. It is not enough simply to show the judge overlooked parts of the evidence or that he failed to give adequate weight to some parts. He did not believe parts of the account.
28. If the claim were as straightforward as arguing that the judge could not rationally have arrived at the conclusion he reached regarding the appellant’s intentions on return, I think it would have strong prospects of success. As noted, there are numerous parts of the evidence in which the appellant said she feared her family and the authorities. The Supreme Court made it clear that cases like these are highly fact-specific. In discussing the position of an applicant who would behave discreetly to avoid persecution, Lord Rodger considered the mixed motives which such a person might have. At [62], he said,

“Having examined the relevant evidence, the Secretary of State or the tribunal may conclude, however, that the applicant would act discreetly partly to avoid upsetting his parents, partly to avoid trouble with his friends and colleagues, and partly due to a well-founded fear of being persecuted by the state authorities. In other words the need to avoid the threat of persecution would be a material reason, among a number of complementary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view it would not. A Jew would not lose the protection of the Convention because, in addition to suffering state persecution, he might also be subject to casual, social anti-semitism. Similarly, a gay man who was not only persecuted by

the state, but also made the butt of casual jokes at work, would not lose the protection of the Convention. It follows that the question can be further refined: is an applicant to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, in addition to any other reasons for behaving discreetly, he would have to behave discreetly in order to avoid persecution because of being gay?"

29. My analysis above shows that the judge did consider the appellant's claims but rejected them for the reasons he gave. I see no error in his account of or his understanding of the evidence. He considered the background evidence, including the evidence showing the risks to LGBT people, albeit he did not reach a definitive conclusion on Lord Rodger's second question. He considered the expert report and gave sustainable reasons for discounting the weight to be given to it. He did not resolve the question of whether the appellant's inconsistent answer in examination-in-chief was a matter contributing to his adverse credibility finding or not but I do not consider that is sufficient to show legal error.
30. In my judgement, the judge was entitled to make the findings he made on the evidence and it follows that he was entitled to draw an adverse inference and disbelieve the appellant's statements about why she would behave discreetly on return to Kenya. Other judges might have come to a different conclusion and believe that the appellant would behave discreetly out of a mix of motivations. However, that does not show this judge erred in coming to a different conclusion. He saw and heard the appellant give evidence.
31. Mr Mukherjee argued that the appellant's activities with LGBT groups in the United Kingdom should have been taken as an indicator of how the appellant would choose to conduct herself on return to Kenya. As a general proposition, I can see some force in that argument, although I also note that the judge was fully aware of those activities, which he described as "sur place activities" in [50]. However, I do not consider this gets Mr Mukherjee around the problem of the judge's adverse credibility finding. The judge believed the appellant would behave discreetly but he did not believe her about her motivation for that being connected to a fear of persecution.
32. Although I accept Mr Mukherjee was not putting the argument this way, I note that, in paragraph 35(c) of his judgment in HJ (Iran), Lord Hope set out the limits of the Convention's protection in this respect.
33. At [50] of his decision, the judge mentioned that he was aware that the Kenyan High Court was shortly to deliver its judgment in a case challenging the constitutionality of sections of the Kenyan Penal Code which are construed as criminalising same-sex acts. He noted the outcome of the Indian Supreme Court case, which challenged very similar legislation applicable in India. Mr Mukherjee informed me that,

unlike the Indian Supreme Court, the Kenyan High Court had upheld the provisions as legal.

34. There was clearly no error in the judge's reference to the case, which had not then been decided. He referred to it because he was provided with a press release about it. Mr Mukherjee suggested the judge's mention of the Indian case was an indicator that he thought the Kenyan case would go the same way, thereby reaffirming parts of the background evidence which suggested there was a movement towards greater acceptance of LGBT people in Kenya, which the appellant disputes. He told me that, should the case go further, he would advise his instructing solicitors to obtain evidence showing an escalation in violence towards the LGBT community.
35. I do not consider that it is a fair reading of [50] to say the judge took an unduly optimistic view of the Kenyan case. A press release is unlikely to have provided sufficient detail to show how, if at all, the case might affect the appellant's safety, particularly given the lack of clarity about whether the sections of the Penal Code in question apply to women at all (see [24] and [49]).
36. It follows from the fact that I cannot see any error of law in the judge's approach to the issue of the appellant's reasons for behaving discreetly on return to Kenya, there is no need to consider the second question concerning the judge's consideration of the risk of persecution arising from living openly.
37. There is no error in the judge's decision and therefore the appellant's appeal must be dismissed.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal shall stand.

The anonymity direction made by the First-tier Tribunal is continued.

Signed

Date 22 July 2019



Deputy Upper Tribunal Judge Froom