



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

Appeal Number: PA/04822/2018

THE IMMIGRATION ACTS

**Heard at Bradford
On 9 January 2019**

**Decision and Reasons
promulgated
On 21 January 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

OMM

(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Warren instructed by Duncan Lewis & Co Solicitors
(Harrow Office)

For the Respondent: Mr M Diwnycz - Senior Home Office Presenting Officer.

FINDINGS AND REASONS

1. By a decision promulgated on 1 November 2018 it was found a judge the First-Tier Tribunal had erred in law in dismissing the appeal. That decision was set aside. The matter returns for further consideration today to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

Discussion

2. There has been a dispute regarding the appellant's nationality in the appeal, whether he is a citizen of Burundi or Tanzania. The First-Tier Tribunal found in a decision promulgated on 4 January 2017 the appellant was more likely than not to be a national from Tanzania and not at risk of persecution for reason of his Hutu ethnicity or imputed political opinion within that country. The appellant subsequently claimed he has a well-founded fear of persecution in either Burundi or Tanzania for his membership of a Particular Social Group (PSG) as a gay man. The appellant has maintained he is a national of Burundi. The respondent refused his claim for international protection and on human rights grounds on 28 March 2018.
3. The issues in the case needs to be considered in light of the prevailing country information, evidence file by the appellant and his witness, and the decision of the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31*.

Sexual identity

4. As submitted on the appellant's behalf, he has provided a detailed account of how he came to realise his sexuality. That account has not been shown to be affected by material implausibility or inconsistency. It is plausible that the appellant was secretive regarding his sexual identity as a result of the negative institutional and societal attitudes to homosexuality in Tanzania.
5. Considering the country information, it is not arguably implausible that the appellant was approached by men on the street for sex in return for payment in a situation where he was in Tanzania, living on the street, clearly vulnerable, and in which it was more likely than not those who approached him will have assessed that he would agree to sex in return for money rather than reporting them to the authorities.
6. I accept, as submitted by Ms Warren, that the fact a person is not in a relationship does not mean their assertion regarding their sexual identity is untrue, many people remaining single for long periods of time within their lives.
7. It is also accepted that the appellant's account of his sexual identity is corroborated by the evidence from the founder and chair of the Huddersfield Gay Group, Mr James Martin. The appellant has been a member of this group since August 2017 and has spent time with Mr Martin socially outside group meetings. It was accepted that Mr Martin and the group have observed the appellant attending meetings and interacting with others which is said to form the basis of their view the appellant is a gay man.
8. It was accepted by both advocates, on the basis of the evidence in the round at the hearing, that the answer to the first question posed by the Supreme Court in *HJ (Iran)* is that the appellant is a gay man.

9. The issue becomes the answer to the second question which is whether the appellant has a credible well-founded fear of persecution on return to either Burundi or Tanzania and if he acts openly or, if he chose to act discreetly on return, whether this would be as a result of his choice to do so or out of fear of suffering persecution if he acted openly.
10. The appellant relies on a number of country sources in support of his claim to have a well-founded fear of persecution in Burundi, set out in Ms Warren skeleton argument, as follows:
 - a. Homosexual sexual activity is outlawed in Burundi in law from 2009 (ILGA, p083). After 2009 laws proposed, over 10,000 people gathered to show their support for the criminalisation of homosexuality. Testimonies collected by Human Rights Watch highlighted several beatings, evictions, dismissals from employment. The NGO MUCO said 'the preconceived idea that homosexuality is a phenomenal brought about by the white colonisers is still very much alive. Since 2009, another NGO MOLI as recorded and documented many cases of discrimination, arrests, abuses, threats and corruption, directed at the LGBT community (Contra Nocendi International, p K1).
 - b. In September 2014 a Vietnamese telecommunications worker was arrested on charges of homosexual practices (Erasing 76 Crimes, September 2014, p.J1)
 - c. in 2015 the Burundi delegation at its 2nd Universal Periodic Review (UPR) responded to recommendations about discrimination of same sex relations acknowledging the Criminal Code still punished homosexuality. That situation was in line with the country's customs and values, and the delegation asked for the international community's understanding while Burundian society prepared for a change in mentality. A Shadow Report to the Human Rights Committee describes the repressive conditions under which LGBT people live in Burundi and in November 2014 the committee recommended that Burundi should remove any de jure or de facto obstacles to or any restriction on the establishment of associations by homosexuals and take all necessary steps to provide effective protection from threats to their physical integrity and from discrimination of any kind. (International Lesbian Gay, Bisexual, Trans and Intersex Association (ILGA), May 2017, pp.L1- L2).
 - d. On 2 November 2016, the High Court of Chibitoke Province convicted of 15-year-old boy who admitted to the rape of a 7-year-old boy of homosexuality as well as rape (US State Department Report 2016, p. N21).
 - e. In 2017 there were no reports of prosecution the same sex sexual acts but there were cases of harassment, intimidation, arbitrary arrest and demands for bribes by police officers and

members of the Imbonerokure targeting LGBTI individuals (US State Department Report 2017, p.160).

- f. In October 2017, Burundi announced an 'official hunt' for LGBT people... Burundi was one of 13 to vote against the UN ban on using the death penalty for gay people... Police announced the 'hunt' homosexuals on 6th October, informing the media 'several' had been arrested. "The reason is just they are gay and the government says it is against Burundian culture," Bakari Ubena, a human rights journalist told Gay Star News. It is believed the UN motion had "some influence on the crackdown." Both gay and trans people face arrests. "Gay people must have a hidden life", Ubena added. "LGBT associations have been closed by police (Erasing 76 Crimes, p. M1).
11. I find the country evidence supports the appellant's contention that he faces a real risk of serious harm sufficient to amount to persecution as an openly gay man in Burundi. The only way the appellant would be able to have such relationships will be to do so discreetly. The need to act discreetly would be to avoid persecution and for no other reason. Accordingly the appellant is entitled to a grant of international protection in relation to any proposal to return him to Burundi.
 12. In relation to Tanzania, the appellant relies upon country information detailed in Ms Warren's skeleton argument establishing a well-founded fear of persecution sufficient to warrant a grant of international protection. It is noted there has been a major crackdown by the authorities in Tanzania since mid-2016. Specific information provided in support of the appellant's claim includes:
 - a. Homosexuality is outlawed in Tanzania (ILGA, p. O101).
 - b. Tanzania has some of the harshest anti-gay laws in the world (LGBT Voice, 21 June 2014 quoted in RFRL para 61).
 - c. Alongside official authorities, several community policing organisations and vigilante groups such as "polisi jamil" (community police in Kiswahili) operate in Tanzania and have committed human rights violations, according to Human Rights Watch. Gay men have been beaten by police officers but reports to the police have not been followed up; in one interviewee's case, the police extorted a Tsh 500 bribe to release him from custody (Rights in Exile, pp R11-R12).
 - d. In September 2009, 39 gay and lesbian activists were arbitrarily arrested and detained for 2 weeks in Dar es Salaam (Rights in Exile, p. R11).
 - e. LGBTI people and sex workers say they cannot form legally recognised membership groups and register with the government. In 2011, police arrested and beat one gay man in Dar es Salaam simply because he tried to organise a workshop for other men who have sex with men. (Human Rights Watch,

quoted in the International Business Times, 16 January 2014, quoted in RFRL para 61).

- f. In 2011, during the Gender Festival, participants who self-identified as LGBTI noted during interviews with Human Rights Watch [that they were] chased by media and forced to evacuate the premises, to be then violently attacked by members of the public who reportedly 'wanted to kill gays' (Rights in Exile, p.12).
- g. In July 2012 LGBTI activist Morris Njombul was murdered in Dar es Salaam (Rights in Exile, p. R12).
- h. According to a detailed 2013 report by Human Rights Watch, men in Dar es Salaam have been repeatedly beaten with belts stripped naked (Rights in Exile, p. R11). The same report said arrests of LGBTI person rarely led to prosecutions. They usually were a pretext for the police to collect bribes or coerce sex from vulnerable individuals (US State Department Report 2017, p. 190).
- i. The law does not prohibit discrimination based on sexual orientation and gender identity. LGBTI persons were target of the government sanctioning 'sungusungu' citizen patrols. There were often afraid to report violence and other crimes, including those committed by state agents due to fear of arrest. LGBTI persons faced societal discrimination that restricted their access to healthcare coming including access to information about HIV, housing and employment. There were no known government efforts to combat such discrimination (US State Department Report 2015, quoted in RFRL para 61).
- j. During 2016, government officials publicly stated opposition to improved safeguards for the rights of LGBTI persons, which are characterised as contrary to the law of the land and the cultural norms of society. Senior governmental officials made several anti-LGBTI statements. In August the Minister of Constitutional affairs and justice stated the ministry was investigating NGO's believed to support homosexuality and same-sex marriage and threatened drastic legal action against them, saying that the "dirt nonsense" of the Westerners should remain with them (US State Department Report 2016, p. Q13).
- k. In mid-2016 the government initiated an unprecedented crackdown on the rights of LGBT people and their advocates. In December 2016, Dar es Salaam raided a workshop on HIV prevention among key populations, and briefly detained 8 participants. In Zanzibar, police detained nine men for several days on suspicion of homosexual conduct and subjected them to forced anal examinations, a form of torture. In March, police arrested a man, 19 suspected of homosexuality based on his Instagram posts and subjected him to an anal exam. Several

activists were arrested for holding meetings (Human caps right Watch, p.204).

- l. In July 2016 the government banned the import and sales of sexual lubricants, which Health Minister Ummu Mwalimu said encouraged homosexuality which led to the spread of HIV and AIDS (The Herald, p. R1, see also the Daily Beast, p. 201).
- m. In October 2016, the Minister of Health announced that Tanzania will ban HIV/AIDS outreach projects aimed at gay men... About 30% of gay men in Tanzania are HIV - positive, now health workers say that figure could rise. Tanzania's actions appear to mark the first time that the country has suspended parts of the United States hugely successful foreign HIV/AIDS initiative in an attempt to crack down on the gay community... The ban comes after months of bitter speeches and threats from Tanzania officials aimed at the gay community and that organisations treating its HIV/AIDS patients. This year, police raided two US-funded HIV/Aids organisations and seized confidential patient information and supplies, officials said. In September, the deputy minister of health, Hamiel Kigwangalla, accused HIV treatment organisations of "promoting homosexuality". "Any attempt to commit unnatural offences is illegal and severely punished by law" Kigwangalla said... In an August speech, Paul Makonda, the regional Commissioner of Dar es Salaam, the capital, threatened to arrest people who were linked to gay men on social networking sites... "In this environment, it's not safe to be a known gay man in the open" [a gay man in Dar es Salaam] said (Washington Post, 23 November 2016, pp. R15-R17, re Makonda's threat see also p. R2).
- n. Tanzania on 18 February 2017 announced plans to publish a list of gay people allegedly selling sex online - just days after shutting dozens of AIDS clinics accused of promoting homosexuality... The country's deputy health minister Hamiel Kigwangalla said on Twitter... 'Those who think this campaign is a joke are wrong. The government has long arms and it will arrest all those involved quietly. Once arrested they will help us find others' (The Herald, p. R1)
- o. 28 June 2017, the Tanzanian President John Magufuli said that 'cows' disapprove of gay sex in a speech criticising those who campaigned for LGBT equality. Days after Magufuli's speech, Interior Minister Mwigula Nchemba threatened to arrest Tanzania LGBT campaigners, the register LGBT organisations in the country and deport foreign LGBT advocates... Those who are interested in homosexuality should go and live in countries that entertain such business" ... According to Neela Ghoshal gay men had been arrested on charges laid against them in recent months, although the outcome of their cases was not known (The Daily Beast, p. 190-192).

13. Ms Warren further submitted that persecution in detention for having same-sex relationships is persecution by itself, in addition to any matters that arise as a result of harsh prison conditions in Tanzania.
14. The country information does not establish that a sufficiency of protection or internal relocation option is applicable in either country as the State is an actor of persecution and it was not made out it is reasonable or possible for the appellant to find a safe place to which he could relocate in either country; as the matters set out in the country material are said to affect all parts of both Burundi and Tanzania.
15. I find the appellant faces a real risk as a gay man on return to Tanzania too. The only way he could continue any same-sex relationship would be if he undertook the same discreetly. The only reason he would have to act discreetly is to avoid persecution. He is, according, entitled to a grant of international protection.
16. I find that in both cases if the appellant was identified and arrested by the authorities as a result of his sexual orientation the treatment he would receive is sufficient to amount to persecution, and at the very least a breach of article 3 ECHR.
17. I accept the submission made by Ms Warren that the country information also supports a findings that very significant obstacles exist to the appellant re-establishing life within either Burundi or Tanzania, pursuant to paragraph 276 ADE (1) (vi) of the Immigration Rules.
18. Having considered the evidence with the required degree of anxious scrutiny I find the appellant has establish an entitlement to a grant of international protection within the United Kingdom and allow this appeal accordingly.

Decision

19. **I remake the decision as follows. This appeal is allowed.**

Anonymity.

20. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 10 January 2019

