



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/07763/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 15 April 2019

**Decision
Promulgated
On 8 May 2019**

& Reasons

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**MR M K
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Janjua, Counsel, instructed by Morden Solicitors
(London)

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant a national of Namibia, has permission to appeal the decision of Judge Grimmett of the First-tier Tribunal (FtT) dismissing his appeal against the decision made by the respondent dated 5 June 2018 refusing his protection claim. The judge, like the respondent, was prepared to accept that the appellant was a gay man but did not find credible his account of adverse experiences in Namibia.

2. The appellant's grounds of appeal amount to two grounds, the first contesting that the judge erred in her assessment of credibility and the second maintaining that the judge failed to consider or apply the principles set out in **HJ (Iran)** [2010] UKSC 31.
3. I heard submissions from both representatives for which I express my gratitude.
4. I consider that ground 1 is not made out. It alleges in fine that the judge's assessment of credibility disregarded the fact that the appellant's account was consistent with and strongly supported by the country background evidence. However, first of all the judge plainly did have regard to the background country evidence: so much is plain from paragraphs 12 and 13 for example. Second, that background country information did not establish that gay men in general were at risk of persecution or serious harm - Mr Janjua accepted as much during submissions. Third, whilst that background information did identify a number of difficulties and discriminatory circumstances facing gays in Namibia - including the illegality of same sex acts - the judge's findings (which were that the appellant faced discrimination but not persecution) were wholly consistent with that evidence. I would also observe that the grounds take no issue with the judge's identification of a number of internal inconsistencies in the appellant's account as well as a failure to provide sufficient evidence.
5. Mr Janjua sought to argue that the judge should have regarded the appellant as having established a well-founded fear of persecution by virtue of the fact that he could not conduct himself as a gay man without contravening Namibian law criminalising same sex acts. However, it is well-established that the mere fact that a state's law making certain acts illegal does not necessarily mean the state persecutes such acts, since what has to be shown is that they are applied in practice.
6. In C-71/11 and C-71/11 **Y and Z** the CJEU held at [55] that "the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution ..." and that in undertaking assessment of risk it is necessary to determine "whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice" ([59]). In the appellant's case there was no evidence that any term of imprisonment was applied in practice.
7. As regards the appellant's second ground, it only has traction if the appellant had established that he faced persecutory acts if he did not conceal his sexuality. The judge clearly found that he would not face persecutory acts.
8. Mr Janjua sought to rely on what the judge said at paragraph 14:

"I am not satisfied that the appellant came to the United Kingdom with the intention of claiming asylum as he failed to claim on arrival

but only claimed after he was stopped and refused entry. I am satisfied that he has been subject to some discrimination in his past while at school in view of that he said in interview. I am not satisfied he has shown he has had any difficulties with his family because of the inconsistencies in his account. I am satisfied that he has had gay relationships in Namibia and whilst he may have suffered some harassment has not suffered discrimination or persecution as a result. I am not satisfied, therefore, that he is at risk of persecution or article 3 ill treatment if returned to Namibia now."

9. However, whether or not the appellant would conceal his sexuality on return to Namibia, on the judge's findings, none of the reasons for such concealment could relate to fear of persecution. They could only relate to fear of discrimination. For the above reasons the judge did not materially err in law and her decision to dismiss the appellant's appeal must stand.

No anonymity direction is made.

Signed

Date: 3 May 2019

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'y'.

Dr H H Storey
Judge of the Upper Tribunal