IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001527
First-tier Tribunal No:
PA/01172/2021

THE IMMIGRATION ACTS

Heard at Manchester CJC
On the 25 October 2022

Decision & Reasons Promulgated
On the 15 February 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

N S W
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jagadesham,
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Jepson, promulgated on 24 February 2022, dismissing his appeal against a decision of the Secretary of State to refuse his asylum and human rights claim on 12 July 2021. The judge did, however, allow

the appellant's appeal on human rights grounds; it is against that decision which the Secretary of State appeals, again with permission.

The Appellant's Case

2. The appellant is a citizen of Kenya and is a gay man. He entered the United Kingdom in 2016 with a student visa, valid until 20 September 2020. The appellant realised he was attracted to boys of his own age around the age of 10 later becoming aware that he was gay. His family did not know and are still unaware of his sexuality.The appellant told two friends he was gay. One was later killed by the police in Kenya.

3. The appellant came to the United Kingdom on a scholarship in 2016 and has since completed a degree at Liverpool University. He was diagnosed with anxiety after a panic attack in Kenya in 2016 and also suffers from depression. He has had two relationships whilst in the United Kingdom, one ending after he had returned briefly to Kenya in 2017; the other due to the partner not wanting anything serious.

4. The appellant's case is that as well as homosexuality being gay is neither socially or culturally acceptable in Kenya where same sex acts are criminalised under the penal code and that there has been a hardening of societal attitudes towards gay men since he left. He fears that any attempt to live openly as a gay man would put him at least to a real risk of very severe discrimination, permeating through his life including access to have employment, housing, education and healthcare thus he is at risk of persecution on account of his sexuality.

5. It is also the appellant's case that his particular circumstances mean that he would not be able to integrate again into life in Kenya and thus he meets the requirements of paragraph 276ADE of the Immigration Rules.

The Respondent's Case

6. The Secretary of State accepts the appellant's account in broad terms but considers that the situation is not sufficient for the appellant to face persecution.

The Decision of the First-tier Tribunal

7. The Secretary of State was not represented at the hearing before the First-tier.

8. The judge noted that he was invited to depart from the country guidance in JMS (Homosexual – Behaviour - Prosecution) Kenya CG [2001] UKIAT 00007 not least in the light of HJ (Iran) [2010] UKSC 31. The judge noted [37] that JSM proceeded on the basis that an appellant might be expected to behave discreetly, contrary to HJ (Iran) which makes it plain there can be no such expectation. He noted also the appellant made it clear that he would not seek to conceal his sexuality thus the judge may depart from the country guidance.

9. Having considered carefully the most recent CPIN [38] to [39] the Home Office's asylum policy instruction with regard to sexual orientation [40] as well as the CPIN on actors of protection [42].

10. The judge posed questions [49]: would the appellant face persecution as an openly gay man in Kenya. He noted [50] those with support and or means are more able to openly express their sexuality, the appellant likely lacking both.

11. The judge noted [55] that the position was nuanced and, having set out the test in HJ (Iran) [56], concluded as follows:

> "57. Would the appellant face persecution as someone openly expressing his sexuality in Kenya? On balance, I find that he would not. In reaching that conclusion I remind myself of the low standard required to establish an asylum claim."

12. The judge accepted that the appellant would encounter some discrimination and would be disadvantaged and that there were certain portions of Kenyan society who would take a negative view towards him it being less clear whether the state is willing to intervene, country information tending to suggest general reluctance but not a refusal [61]. The judge concluded that the problems the appellant faced on return would not be of such level to constitute persecution [63].

13. The judge did, however, conclude that the appellant had established a private life in the United Kingdom [71] and if there was a distinction to be drawn between the risk of persecution and the obstacles of significance to reintegration and that the appellant would face significant barriers as an openly gay man in Kenya because:

> "… as an openly gay man the appellant would face substantial barriers in his day to day life. I have in mind employment, housing and the like. That would be coupled – though a less central factor - with the possibility of risk to his safety through hostility. His family are unlikely to provide any real support. Though some sections of Kenyan society appear more tolerant, on the evidence presented a lot there depends on one's standing and financial status. … Although the appellant's degree would assist in finding work, that would not I find overcome obstacles created as a result of his sexuality. Whilst not hostile to the extent that persecution is established, the state would seem to provide little by way of help to alleviate this."

14. The appellant sought permission to appeal on the grounds that the judge had erred:-

(1) in reaching findings in relation to state protection contrary to the evidence before him and contrary to his findings in relation to Article 8;

(2) in reaching findings in relation to societal views towards LGBTQI+ persons contrary to the evidence and contrary to his findings in relation to Article 8;

(3) in failing to address adequately or at all whether the appellant's individual circumstances, in particular his socioeconomic status and lack of family support would put him at risk.

15. On 3 May 2022 First-tier Tribunal Judge Oxlade granted permission.

16. The Secretary of State also sought permission to appeal against the decision, seeking to argue that the judge had erred in his assessment of Article 8 Judge Oxlade granting permission only in respect of ground 3 stating:-

> "5. However, as to ground 3, which complained that the judge failed to apply the CPIN that there would be likely to be discrimination instead concluded that there were obstacles to integration, having granted the appellant's application for permission to appeal against the asylum decision which also complains that the judge failed to correctly apply the background evidence of CPIN, it seems appropriate to unbind the hands of the Upper Tribunal Judge who will consider this."

The Hearing

17. I heard submissions from both representatives. Mr Diwnycz in effect conceded that the judge had reached contradictory findings that there would be a breach of Article 8 yet on the lower threshold, the appellant did not meet the test to demonstrate he had a well-founded fear of persecution

18. Mr Jagadesham submitted that the judge had erred in his approach to the background evidence, in particular failing to note that there was in fact no recourse to protection from assault, the cases cited by the judge as indicating protection related only to association. He submitted further that the judge had failed to accept that there were real problems and failed to properly factor into account the appellant's lack of financial status and family support as part of a cumulative assessment of risk.

19. Mr Jagadesham submitted further that the judge had erred in his assessment in failing to take proper account of the views of society in assessing asylum yet did so in his assessment of Article 8.

Decision

20. The Tribunal Judge directed himself properly in light of HJ (Iran) as identified in ground 1 and noted [58] that the risks need to be considered cumulatively.

21. At [59] the judge stated, "whilst any protections offered by the state seem relatively limited, the ability to seek recourse to the legal system does

appear to exist …". This is, however, contrary to the CPIN at paragraph 2.5.5 that

> "2.5.5 In general, the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of protection of the authorities …"

It is also noted that the police arrest people, usually under public order laws rather than same sex legislation though there have been reports of assaults by the police, harassment, intimidation and physical abuse in custody.

22. Where the judge erred was in his assessment of the level of protection offered by the state. While there was evidence of the courts intervening to allow LGBT people to organise, that is very different from the state protecting the victims of anti- LGBT violence and attacks. The judge appears to have thought that there was recourse to the legal system simply by reference to the fact that there was a court ruling preventing the state from refusing registration to LGBTI groups. That, with respect, is not protection of an individual against harm nor is it indicative that they can seek recourse from people who seek to harm them or that the state is willing to do so.

23. Further, as is submitted in the second ground of appeal, the judge found at [59] that the surveys of societal attitudes indicated that attitudes were variable and that neither shows overwhelming hostility. That is contrary to the evidence set out in the grounds at 11.1-2:

> As per the Amnesty International Report: "However a 2019 update on the Pew Research Centre study was conducted, which found that 86% of Kenyans do not believe that homosexuality should be accepted by society" 11.2. The United Nations Human Rights Committee stated as follows:
>
> The Committee is concerned about: (a) Sections 162 and 165 of the Penal Code criminalizing same-sex relations, and the High Court ruling in 2019 that declared those provisions to be constitutional; (b) The State party reporting that that prohibition is based upon same-sex relations being unacceptable to Kenyan culture and values but not providing information about any measures taken to address discriminatory attitudes and stigma among the general public;"

24. In addition, this appears to be at odds with the judge's findings at paragraph [67], [74] and [76] in respect of Article 8.

25. It is noted also that the judge found [76] the appellant's family was unlikely to provide any real support, and although some sections of Kenyan society appear more tolerant that depends on one's standing financial status. It is, I accept, contrary to the findings with respect to asylum. Further as is averred at ground 13:

> In addition (in relation to para 11.1 above), whilst the Judge stated in relation to the surveys relied on before him, "53…It is difficult to choose

between the two pieces of work, especially without better information about (for example) sample sizes. I cannot sensibly say which better reflects the current societal view in Kenyan", the Judge failed to recognise or address the fact that (a) the described study was actually an update of the study relied on by the Home Office (see refusal, para 14); and, (b) Amnesty International had raised specific concerns about the conclusions drawn by the Home Office from the other study relied on, stating (emphasis added), "In the context of the status quo being criminalisation, it does not seem to us to be accurate to suggest that the majority of Kenyans are actively opposed to criminalisation. We would also note that, viewed objectively, criminalisation is at an extreme end of a range of homophobic responses to LGBT people. The 'neighbour' question responses indicate that the majority of respondents would feel a level of 'uncomfortable' about a gay or lesbian neighbour, again a relatively strong homophobic response given that the neighbour's sexuality is all that is known about them in this hypothetical scenario" report pp.17 and 18 [AB/26-27] – highlighted in skeleton argument, para 10). The Judge did not address any of this – despite apparently relying on the Home Office study to make the findings summarised at 10.1-2 above.

26. I accept that submission.

27. I consider there is merit also in ground 3 in that the judge failed to assess the appellant's individual circumstances in particular observing [50] that those with support and or means are more able to openly express their sexuality and the appellant lacked both and failed properly to engage with the CPIN 2.4.14 that attacks on LBGTI persons occurred more often in low income or highly conservative areas and the Amnesty International information to the same effect. That finding by the judge needs to be seen in the context of his findings about the appellant's circumstances in his findings on paragraph 276 ADE of the Immigration Rules which are not challenged (although the evaluation of those is)

28. Accordingly, for these reasons, I am satisfied the decision of the First-tier Tribunal involved the making of an error of law insofar and I set it aside.

29. As discussed at the hearing, I am satisfied that it would be appropriate, a proposition to which both parties agreed, to proceed to determine the appeal on the basis of the evidence before me given not least the lack of any adverse credibility findings.

The Law

30. It is for the appellant to satisfy me that there is a real risk to him of persecution on return to Kenya. The correct approach to determining whether a gay person is at risk of persecution is set out in HJ (Iran) v SSHD [2010] UKSC 31.

31. It is accepted that the appellant is gay. I accept also that he would be inhibited from living as a gay man out of fear of the consequences, not for any social or other reasons, and what happened to him and his friends in the past (and as accepted by the Firs-tier Tribunal) is a reason for that.

32. The burden is upon the appellant to establish there is a real risk of persecution. In AA v SSHD [2006] UKAIT 00061, the AIT had to consider a risk said to arise not because of individual circumstances of the particular appellant but because of the belonging to or perception of belonging to a particular class of persons. The AIT held that in such circumstances, the appellant needs to show " only that there is a consistent pattern of such mistreatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does". That approach was upheld by the Court of Appeal in AA (Zimbabwe) v SSHD [2007] EWCA Civ 149.

33. Lord Hope summarised the test to be met in order for there to be persecution in HJ (Iran).

> "12. The Convention does not define "persecution". But it has been recognised that it is a strong word: Sepet and Bulbul v Secretary of State for the Home Department [2003] UKHL 15, [2003] 1 WLR 856, para 7, per Lord Bingham. Referring to the dictionary definitions which accord with common usage, Lord Bingham said that it indicates the infliction of death, torture or penalties for adherence to a belief or opinion, with a view to the repression or extirpation of it. Article 9(1)(a) of the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees ("the Qualification Directive") states that acts of persecution must
>
> > "(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."
>
> In Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473, para 40, McHugh and Kirby JJ said:
>
> > "Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

34. To constitute persecution, the harm feared must be state sponsored or state condoned; family or social disapproval in which the state has no part lies outside its protection. The Convention provides surrogate protection, which is activated only upon the failure of state protection. The failure of state protection is central to the whole system: Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 495. The question is whether the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals ..."

35. It is worth repeating Lord Hope's reminder in HJ (Iran) that the surrogate protection of the Refugee Convention is only activated upon the failure of state protection - see Horvath v Home Secretary [2001] 1 AC 489, bearing in mind that in DK v SSHD [2006] EWCA Civ 682 the Court of Appeal highlighted that the issue is not merely whether the authorities are willing to provide protection, but whether they are capable of providing the particular individual with adequate protection.

36. As prefigured above, I find that there is in Kenya in general no effective protection. That is because of the strong evidence that the authorities are unwilling to protect LGBT individuals from attack and do not investigate. Contrary to the First-tier Tribunal, I consider that there are difficulties with regards to societal attitudes and I note in particular the specific assessment by Amnesty International as to the appellant's position, at page 26:

> "It is because of this that it is our view that were [the appellant] to be returned to Kenya and attempt to live openly as a gay man he would be at least at real risk of very severe discrimination, which would permeate many of the main facets of a person's life, including access to employment, housing, education and healthcare. It would also affect his interactions with the authorities as he would be unable to seek legal redress for any discrimination he suffered and would not be able to rely on law enforcement to provide him with protection were he to face more severe forms of abuse and violence; circumstances which are a risk in themselves, albeit one that is difficult to quantify. He does not appear to be in the position of class, financial and familial security that some 'out' LGBT Kenyans benefit from. However it should be reiterated that even for these people the risk of violence, abuse and discrimination does not go away – their social and financial position merely helps balance these risks more favourably towards 'coming out'." I accept also that the appellant has neither the financial resources nor family support which would enable him to avoid some of the difficulties. I note also the points made above in respect of the studies of hostility. Taking all these matters in the round, I consider that the appellant would be in fear, a justified fear, of mistreatment if he were to live openly as a gay man and that needs to not to do so would be on account of his fear of showing his sexuality.

37. I bear in mind that this appellant would, on the findings reached, have little or no family support, and would face discrimination in obtaining employment and accommodation on account of his sexuality; although he has qualifications, he would face serious discrimination. In addition, I am satisfied that he would be at greater risk of violence, given his economic circumstances, and thus would differentially be at risk, given also the very negative attitude. That, in my view, is compounded by the lack of effective protection.

38. Accordingly, for these reasons, I find that on the particular facts of this case, given the appellant's particular circumstances, that he has a well-founded fear of persecution on return to Kenya on account of his sexuality and I therefore allow the appeal on asylum grounds.

39. The circumstances necessary for me to decide whether his return would be in breach of Article 8 giving rise to the Convention as I am satisfied that his return would be in breach of Article 3 given the finding he would be at risk of ill-treatment on return.I formally dismiss the appeal on humanitarian protection grounds on the basis that the appellant is entitled to recognition as a refugee.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I allow the appeal on asylum and human rights grounds.

(3) I dismiss the appeal on humanitarian protection grounds

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 8 December 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul