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Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/11481/2014

THE IMMIGRATION ACTS

At Field House
On: 3rd July 2015

Decision and Reasons Promulgated
On: 27th August 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR A.O.

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gilbert, Counsel, instructed by Turpin and Miller,
Solicitors.

For the Respondent: Ms Julie Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Introduction

1. The proceedings before the First tier Tribunal were anonymised. No application has been made to change this and so this should be maintained.
2. The appellant is 34 years of age and a national of Nigeria. He came to the United Kingdom as a student in 2004. He returned home for an arranged marriage in 2008 and returned with his bride. They have two young children.
3. He had various leaves up until 2009. He then made an unsuccessful claim to asylum. He remained in the United Kingdom and in 2011 made further representations in respect of his asylum claim but the refusal was maintained.
4. On 20 March 2013 he made further representations on a completely new basis, namely, that he was bisexual with a preference for males. The respondent accepted this amounted to a fresh claim which was duly considered. On 17 December 2014 that claim was refused.

The claim

5. He claimed that from an early age he realised he was attracted to males and had sexual relations. When he went to university he campaigned for homosexual rights but met with resistance.
6. Whilst in the United Kingdom he was leading a double life, keeping his homosexuality secret from his wife. He had various partners whom he met through Internet chat rooms; clubs; areas frequented by homosexuals; and through his church.
7. He was in a relationship with a Mr. T but he did not reveal his circumstances nor where he lived. Later on he revealed his address and Mr. T came to his home unannounced in December 2012. He did not realise the appellant was married and when he met his wife a row developed. His wife had suspicions about his sexuality and their relationship had been deteriorating. She had found details of homosexual activities on his mobile phone. Subsequently, his wife left the matrimonial home with the children. Mr. T also was annoyed because the appellant had not told him he was married.
8. The appellant continued to see his children at the weekend. He said his wife indicated she intends to divorce him. She has also spoken to members of the church about him. He claimed he has received threats from his relations in Nigeria following on this revelation. Since they separated he is open about his sexuality.
9. In refusing his claim the respondent did not accept the appellant was homosexual or bisexual. He had not mentioned issues about his sexuality in his earlier claims. The respondent concluded he was making this up in a

last bid to remain in the United Kingdom. His estrangement from his wife was also questioned

The First-tier Tribunal

10. His appeal was heard by First-tier Tribunal Judge Anthony. The judge heard from the appellant and had statements from the appellant's wife and Mr. T; Judge Anthony stated:

“25. I find the appellant has sought to bolster the account he gave ... I do not find that the appellant tried to put forward a campaign for gay rights to the committee at University whilst he was living in Nigeria ...

27. I have had regard to Mr. Swaby’s submission that little weight can be afforded to the appellant's own evidence regarding his sexual orientation because he posted Facebook pictures of himself and his wife in January, July and August 2013, after his relationship with his wife allegedly ended in December 2012. However, I find the appellant has provided a reasonable explanation for this and accept his explanation that he did so because it reminded him of the good moments a shared together.

30. My assessment of credibility is that whilst I have rejected parts of the appellant's account, including his claim regarding the campaign for gay rights in Nigeria, having had full regard to the evidence and arguments, I am satisfied on the lower standard of proof that the appellant is a bisexual man with a preference for same-sex relationships.”

11. The judge then went on to have regard to the objective material on Nigeria and concluded at paragraph 33:

“... I am satisfied that someone who is openly in a same-sex relationship in Nigeria would face persecution.”

12. Reference was made to paragraph 82 of Lord Rodger’s judgement in HJ (Iran) and HT (Cameroon) -v- SSHD [2010] UKSC 31 with Judge Anthony paraphrasing:

“... how will the appellant conducted himself on return? Would he live openly on return? If so, he qualifies as a refugee. If discrete, then; i) is it only because of family or social pressure? If it is, then he does not qualify as a refugee; or ii) is a material reason for being discreet the fear of persecution? If it is, then he qualifies as a refugee ...”

13. At paragraph 34 Judge Anthony said:

“The next question is how the appellant would conduct himself on return. At paragraph 54 of his witness statement, the appellant states that he would be forced to live in secret due to a fear of persecution on account of his sexuality. However, I have to consider his conduct whilst in the UK and whether he has lived as an openly bisexual man. In this regard, I find the appellant has not lived openly. Matters relating to his sexuality would still be a secret if not for the fact that (Mr. T) came to his house and told his wife he was the appellant's boyfriend. If that event had not taken place, the appellant would still be living discreetly. This is despite the fact that he would have no fear of persecution on account of his sexuality in the UK. I find that he would be discreet on return to Nigeria.

35. The next *HJ (Iran)* question requires me to ask why would the appellant be discreet on return to Nigeria. In this regard, I have considered why he has been discreet in the UK. .. I find that the only reason he has lived discreetly is because of family and social pressures. His reason for wanting to remain discreet has nothing to do with a fear of persecution ...

36. ... I find that on return to Nigeria, he would continue to behave discreetly because of family and social pressures ... There is no evidence to indicate that he would conduct any same-sex relationships openly. He certainly has not done so in the safety of the UK..."

The Upper Tribunal

14. Permission to appeal was granted on the basis Judge Anthony arguably materially erred in law in concluding the appellant did not have a well-founded fear of persecution. This was in light of her findings that he was bisexual with a preference for same-sex relationships and that someone who is openly in a same-sex relationship in Nigeria would face persecution. It was arguable the judge erred in concluding there was no evidence he would openly have a same-sex relationship because of how he behaved in the United Kingdom. He had given evidence that he attended gay bars and so forth in the United Kingdom. Consequently he had only concealed his sexual preferences when it affected his wife or church activities. It was argued that the appellant had hid his sexuality from his wife but away from her was expressing his sexuality openly. This point was argued further at hearing.

Error of law

15. It is my conclusion that there is a material error of law in the determination of Judge Anthony. The decision has been carefully prepared and is balanced and concise. However, it does not adequately explore the question posed by Lord Rogers in *HJ (Iran) and HT (Cameroon) -v- SSHD* [2010] UKSC 31 as to what the appellant would do if returned to his home country. It was over simplistic to conclude that he would not be at risk because he had concealed his activities from his wife. The appellant's case was that he had been leading a double life, hiding his sexuality from his wife and leaving an open, second life in situations where she would not be aware. Lord Roger at paragraph 62 stated:

"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 from 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 complimentary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view it would not..."

16. His claim is that he is now estranged from his wife following her discovery of his sexuality. He states that if returned he would express his sexual preference openly. The judge did not have regard to the appellant's claim that on return the constraints of his wife and family would no longer apply

as they are now estranged. The assessment must be in the context of the situation on return.

Disposal

17. The decision of Judge Anthony is set aside and the appeal remitted to the First-tier Tribunal. Ms Isherwood does not seek to challenge the judge's finding that the appellant is a bisexual man with a preference for same-sex relationships. The task of the new tribunal will be to make a finding as to what the appellant would do on return to his home country. I appreciate this is a very difficult fact-finding exercise, particularly as Judge Anthony found the appellant had sought to bolster his account and fabricated some aspects. Lord Hope at para.23 of HJ (Iran) and HT (Cameroon) -v- SSHD said 'Concealment due to a well-founded fear of persecution is one thing. Concealment in reaction to family or social pressures is another. So one must ask why the applicant will conduct himself in this way. A carefully nuanced approach is called for, to separate out those who are truly in need of surrogate protection from those who are not'.
18. It will be necessary for the next Tribunal to investigate the double life the appellant said he had been leading in the United Kingdom, including consideration of the up-to-date position. At the rehearing the appellant should be in a position to give evidence as to his domestic circumstances in the United Kingdom and whether he remains estranged from his wife. He should also be in a position to set out his family position in Nigeria.
19. An additional challenge to Judge Anthony's decision related to mental health problems and treatment available in Nigeria. In the Upper Tribunal Mr Gilbert did raise the question of the risk of suicide. Ms Isherwood referred me to paragraph 17 the decision which indicates the judge had regard to the medical report provided. The medical evidence was referred to obliquely in relation to assessing the appellant sexuality. At paragraph 55 the judge does give reasons as to why his mental health should not be at risk by returning to Nigeria. It is correct that the judge does not refer to what medical facilities are available in Nigeria. However, the thrust of the appellant's claim had been in relation to his sexuality. Given this approach I do not find the absence of a detailed analysis of health issues would have constituted a material error of law.

Decision

20. The decision of Judge Anthony contains a material error of law and is set aside. The appeal was referred back to the First-tier Tribunal for a rehearing, preserving the finding that the appellant is bisexual with a preference for same-sex relations.

Anonymity is maintained.

Signed

Deputy Upper Tribunal Judge Farrelly

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1. The proceedings before the First tier Tribunal were anonymised. No application has been made to change this and so this should be maintained.
2. The appeal is remitted to the First-tier tribunal for a rehearing. The finding that the appellant is bisexual with a preference for same-sex relations is maintained.
3. The focus in the rehearing should be upon what the appellant is likely to do if returned to Zimbabwe in line with the guidance given in HJ Iran -v- Secretary of State for the Home Department [2010] UKSC, para 82.
4. The appellant should be in a position to provide evidence as to how his same-sex preference was demonstrated whilst he was with his wife in the United Kingdom.
5. He should also be in a position to provide evidence as to the up-to-date position in terms of his domestic situation and connection with his wife and family. He should seek to demonstrate if he has had further same-sex relations in the interval.
6. He should also provide evidence as to the current position in relation to his family in Nigeria.
7. It remains open to the appellant to include in his claim any issues arising from his mental health. However, if this is not being pursued as a specific claim his representative should advise the respondent.
8. There is no need for an interpreter unless the appellant's representatives advise.

Signed

Deputy Upper Tribunal Judge Farrelly