



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/33207/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 9 October 2017

**Decision & Reasons
Promulgated**

On 17 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR A B

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Symes, Kesar and Co Solicitors

For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of the Ivory Coast (Cote D'Ivoire) born on 19 February 1997. He arrived clandestinely in the United Kingdom on 2 March 2013 and was detected by Kent Police and subsequently placed in the care of Kent Social Services as an unaccompanied minor. He made an asylum claim on 5 April 2013 on the basis that he was a Christian and would face persecution if returned to the Ivory Coast. This application was refused on 28 June 2013 but the Appellant was granted discretionary leave

to remain from that date until 19 August 2013. The Appellant made a subsequent application for further leave which was refused and his appeal against that decision was dismissed and he sought permission to appeal to the Upper Tribunal. His appeal in respect of the risk on return to Christians was dismissed but his appeal in respect of Article 8 was allowed and the Appellant was granted further discretionary leave to remain.

2. On 27 February 2015 the Appellant made a further application for leave which was refused in a decision dated 7 October 2015. The Appellant's appeal came before First-tier Tribunal Judge Khawar for hearing on 18 October 2016. At the outset of the hearing the Presenting Officer raised a preliminary issue, which was that the Appellant had not obtained the Secretary of State's consent to raise asylum as a ground of appeal by way of a section 120 notice being served on the Tribunal and the Respondent, albeit that the grounds of appeal filed in October 2015 plainly raised such issues. The judge ruled that it would be inappropriate to summarily dismiss an appeal given that the Respondent has effectively been on notice in relation to the Appellant's protection claim since the filing and serving of the grounds of appeal which addressed that issue.
3. The new basis of the Appellant's claim was centred around his sexual orientation. This is set out in his statement of 19 September 2016 where he stated that, whilst he had always known this and has never had a relationship with any girl he had attempted to kiss a boy in Morocco when he was 10 but was advised against this activity by his mother. In 2013 whilst travelling from France to the UK he had disclosed his sexual orientation to a number of individuals as a consequence of which he had been raped and as a consequence of that he had been tested positive for rectal chlamydia and had received treatment for three weeks in the United Kingdom. The Appellant also stated he suffers from depression and has symptoms of PTSD and that he would be at risk by virtue of his sexual orientation if returned to the Ivory Coast.
4. In a decision and reasons promulgated on 30 December 2016 the judge dismissed the appeal essentially because he did not find the Appellant credible in his claim to be gay holding at [27]:

"Indeed taking a global view of all of the evidence I am led to the inevitable conclusion that the evidence in this case amounts to little more than an assertion by the Appellant that he is gay; the evidence of various witnesses called to give oral evidence indicates in effect that the Appellant is known by them to be gay because he said so, and he appears to have commenced making such assertions in or about mid-2015."

The judge further held at [45]:

"However taken at its highest even if the Appellant is genuinely gay, there is no objective evidence to establish that if returned to the Ivory Coast he would suffer ill-treatment or persecution which crosses the Article 3 threshold. The reality is that while there is considerable

evidence and potential discrimination against gay individuals there is also considerable objective evidence to establish that homosexuality is not illegal in the Ivory Coast. Furthermore there is also objective evidence (examples being pages 348 and 349 of the Appellant's bundle and elsewhere) which clearly showed that in Abidjan Ivory Coast gay men have considerable freedom as part of the 'gay scene'."

5. The judge went on to find that at [47] that there were no exceptional circumstances to warrant a grant of leave outside the Immigration Rules. Permission to appeal was sought in time on the following grounds: firstly, that the judge erred in his assessment of credibility and in particular had failed to take account of relevant considerations in the following respects: (i) that the judge failed to consider the critical issue in the appeal, which is the corroborative support that the historic rape gives to the Appellant's claim to have been unable to put forward his asylum claim based on gender preference until a late stage in his stay in the United Kingdom. The judge does not reject the fact the Appellant had been sexually assaulted and the evidence that the Appellant had to be treated thereafter for rectal Chlamydia and (ii) the judge failed to take account of the core status of the determination principles under the Qualification Directive and as set out in the UNHCR guidelines on international protection No.9 "*Claims to refugee status based on sexual orientation and/or gender identity*" and the UNHCR document "*Beyond proof: credibility assessment in EU asylum systems.*"
6. The second ground of appeal was that, in the alternative to finding that there was no objective evidence to establish a risk of serious harm or persecution if returned to the Ivory Coast, the judge failed to take into consideration country evidence from the United States State Department Report which was expressly cited in the skeleton argument at [14] that "*gay men were subjected to beatings, imprisonment, verbal abuse, humiliation and extortion by police, gendarmes and members of the armed forces.*" It was essential that the judge determined whether this evidence constituted a real risk of persecution and whether if the Appellant acted discreetly to avoid the risk to him that this would be contrary to the judgment in *HJ (Iran)* [2010] UKSC 31 that a person cannot be expected to conceal an essential aspect of his identity in order to avoid persecution. However the judge entirely failed to conduct such an enquiry.
7. It was further argued in the alternative that, even if the risk did not reach the level of persecution, it nevertheless represented an issue which needed assessment as to whether it represented a very significant obstacle to the Appellant's ability to integrate in his country of origin pursuant to paragraph 276ADE(vi) and/or a flagrant interference with his Article 8 rights, which is clearly set out in the skeleton argument before the First-tier Tribunal.
8. Permission to appeal was granted by Upper Tribunal Judge Storey in a decision dated 15 August 2017 in the following terms

“The grounds, which contend that the judge’s approach to the Appellant’s late disclosure of his gay identity (postdating the previous unsuccessful asylum appeal) was contrary to established case law principles and that the judge also failed to undertake any proper enquiry of the background country evidence, disclose an arguable error of law. The judge’s cursory treatment of the Appellant’s claim to have been raped in Calais (see paragraph 41) and the apparent dismissal of its potential relevance to his late claim based on gay identity require further scrutiny.”

9. In a Rule 24 response dated 29 August 2017 the Respondent set out her position as follows.

“3. The determination shows that the judge conducted a very thorough analysis of the Appellant’s evidence as to his sexuality. Although there were witnesses their evidence was essentially based on what the Appellant had told them and the judge noted that ultimately it simply came down to the Appellant’s own assertion. His findings were fully reasoned and open to him on the evidence.”

Hearing

10. At the hearing before me, the Appellant was represented by Mr Symes, who sought to rely on his grounds of appeal. He submitted that the evidence before the judge required the judge to consider whether the Appellant’s late claim was consonant with that evidence, rather than him having invented a claim based on his sexual orientation, but the judge failed so to do.
11. In respect of the second ground of appeal, Mr Symes submitted that, in addition to his grounds of appeal, it was clear both from the evidence from the USSD and UNHCR that whilst it was not illegal to be gay in the Ivory Coast there were serious issues of discrimination and persecution. The judge in this case had simply taken the view that other aspects of the country evidence took precedence but that was not a rational approach and the weighty material from USSD and UNHCR clearly demanded consideration and adjudication. Mr Symes further submitted that the judge should have but failed to consider whether paragraph 276ADE(vi) applied and this did require adjudication given that it had been considered fully by the Respondent in the refusal letter and was fully pleaded in the skeleton argument before the First-tier Tribunal at [20] and [21].
12. Mr Kotas, on behalf of the Respondent, put up a robust defence of the judge’s decision. He submitted that the starting point was that the second and third grounds were only material if an error was to be found in respect of the first ground of appeal. He submitted that the judge’s conclusions as to the Appellant’s sexual orientation could not simply be reduced to the judge’s reliance on the delay in putting forward the claim. At [27] of the decision the judge also described inconsistencies, contradictions and highly improbable events. Mr Kotas took me through the judge’s findings

at [27] through to [42] of the decision and noted in particular that the Appellant had failed to disclose his sexual orientation to either his lawyers or Social Services. There was no evidence from the Social Services at the appeal hearing and that was a matter to which the judge was entitled to attach weight. Mr Kotas also sought to rely on the jurisdictional point raised by the Presenting Officer and recorded by the judge at [13] and [14] of the decision albeit he accepted that the Respondent had not cross-appealed on this basis. He submitted that the judge had no jurisdiction to consider this aspect of the appeal given the Secretary of State had not considered the asylum claim based on the Appellant's sexual orientation. Mr Kotas also relied on the fact that at [42] the judge noted that the Appellant stated he had not had any gay relations with anyone since coming to the United Kingdom in 2013.

13. In his response, Mr Symes focussed on the issue of jurisdiction. He pointed out that this had not been pleaded in a formal notice of appeal and it was too late to be raised. He submitted that the proper procedure at first instance would be to follow the policy guidance and the decision in Mandalia [2015] UKSC 59 which makes clear that if consent is refused in respect of jurisdiction at the same time it is incumbent upon the Respondent to do everything possible to ensure that a new claim or a new aspect of a claim is considered prior to a hearing. The Presenting Officer in this case failed to cite the Respondent's guidance as to how cases in such circumstances should be handled. This is the guidance set out in the document "*rights of appeal*" which relate to the rights of appeal post April 2015.

Decision

14. I find that First-tier Tribunal Judge Khawar made material errors of law in his decision for the reasons set out in the grounds of appeal and for the following reasons. Firstly, the judge found at [27] that the evidence by the Appellant amounted to little more than an assertion that he is gay. However, in so finding, in my considered view, the judge failed to give proper or sufficient weight to the cumulative evidence of a number of witnesses, including the project caseworker for ex-detainees, Mr Mark Connorton, the Department Manager at the Volunteer Centre in Folkestone; Mr Kevin Hobbs a highly specialised psychosexual therapist and the Reverend Stephen Bould who is a priest and who set out his knowledge of the Appellant in his letter of 13 October 2016, noting the Appellant had in 2013 and early 2014 regularly attended Mass. The judge quotes an extract from the Reverend's letter at [35] where he stated:

"I gain the impression not only from my own intuitions but the people that I saw him with that he had formed a new network of friends of his own age and upwards whose concerns were not those of the church. I venture the speculation that the options that are open or perceived to be open to a young lone francophone black man with only dubious residential qualifications without background experience of British society and moreover of an open and engaging manner must be few and narrow. I regret to say that it is no surprise to me

that-although I deprecate the outcome-that A has chosen to identify as a member of the homosexual community in Britain.”

15. I find that the judge erred in the manner in which he approached this evidence in that he appeared to take a view on the issue of the Appellant’s sexual orientation and then interpreted the supporting evidence of the witnesses to fit his view rather than the correct approach which would have been to consider all the evidence in the round and then reach a fully informed view as to the credibility of the Appellant’s claim to be gay, in light of the delay in putting forward that basis of claim. Moreover in respect of [42] the judge appears to place weight on the fact that the Appellant has not had any same sex relationships when the Appellant was, at the time the appeal came before the judge, only 19 years of age and in my considered view is unreasonable to expect him to have had relationships in light of his young age and in the context of the discrimination experienced by gay men in the Ivory Coast.

16. In light of my finding that the judge’s credibility findings are unsustainable, the points raised in ground 2 parts (i) and (ii) of the grounds of appeal i.e. the manner in which the judge assessed the background evidence as to the treatment of gay men in the Ivory Coast and the judge’s failure to engage with paragraph 276ADE(vi) and/or Article 8 outside the Immigration Rules also constitute material errors.

Notice of decision

17. I find that there are material errors of law in the decision of the FtTJ. I remit the appeal for a hearing *de novo* before a First-tier Tribunal Judge other than Judge Khawar.

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 Rebecca Chapman

Date 16 October 2017

Deputy Upper Tribunal Judge Chapman