Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13635/2016

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 16 October 2017	**On 1 November 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MRH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M McGarvey of McGarvey Immigration & Asylum Practitioners Limited
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the

appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of St Kitts & Nevis who was born on 17 February 1992.

3. He arrived in the United Kingdom on 22 May 2016 and claimed asylum. The basis of his claim was that he is gay and would be at risk of persecution on return to St Kitts.

4. On 18 November 2016, the Secretary of State refused the appellant's claims for asylum and humanitarian protection and on human rights grounds. The Secretary of State did not accept that the appellant was gay, that he had had gay relationships in St Kitts and had been the subject of a homophobic violent assault by a colleague in the workplace in 2010.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a determination sent on 23 January 2017, Judge L Murray dismissed the appellant's appeal on all grounds. The judge accepted that the appellant is gay. Further, she accepted that the appellant had been subject to a violent attack in 2010 but not that it had been motivated by homophobia. Finally, she concluded that she did not find that: "the treatment he has suffered or would be likely to suffer on return as a gay man would amount to persecution on the evidence before me".

6. As a consequence, the judge dismissed the appellant's international protection claim. She also rejected the appellant's claim under Art 8 of the ECHR. That latter decision has not been challenged and I need say no more about it.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal. Initially, permission was refused by the First-tier Tribunal but on 11 July 2017 the Upper Tribunal (UTJ McWilliam) granted permission to appeal.

The Appellant's Case

8. Mr McGarvey, who represented the appellant, relied upon the grounds of appeal. He raised, in essence, four points.

9. First, he submitted that the judge had failed properly to consider, and take into account, the background evidence concerning the position of LGBT persons in St Kitts & Nevis in finding that the appellant had not established a real risk of persecution on return.

10. Secondly, Mr McGarvey submitted that the judge had failed to make a finding on whether the appellant would live "discreetly" or as an openly gay man in St Kitts & Nevis and what risk, he would as a result, face on return.

11. Thirdly, Mr McGarvey submitted that the judge had been wrong to find that it was not established that the attack in 2010 was motivated by homophobia as she had done so, wrongly, on the basis that supporting documentation had not been provided. This, Mr McGarvey submitted, breached the 'rule against corroboration'.

12. Fourthly, Mr McGarvey submitted that the judge in reaching her finding that it was not established that the attack was motivated by homophobia had, in para 23, inconsistently also concluded that the police were aware that the assault was perpetrated due to homophobia and, as a result, had taken action against the perpetrator.

Discussion

13. It will be helpful to take Mr McGarvey's first and second points together.

14. The judge's consideration of the background evidence leading to her finding that the appellant would not be at risk on return to St Kitts & Nevis as a gay man can be found at paras 24–27 of her determination as follows:

> "24. I have considered the background evidence submitted by the Respondent and Appellant in relation to the treatment of LGBTs in St Kitts. According to the document at G1 of the Respondent's bundle from the Human Dignity Trust in 2015 the maximum penalties for homosexuality are 10 years imprisonment with or without hard labour for sodomy and 4 years imprisonment without hard labour for an attempt to commit an infamous crime. Despite the offences being on the books, there has been no known prosecution for sexual activity between consenting adults in recent years. LGBT sensitivity training took place in June 2015 for law enforcement officers. According to the US State Country Report in 2014 negative societal attitudes towards the LGBT community impeded the operation of LGBT organizations and the free association of LGBT persons. The government asserted it received no reports of violence or discrimination based on sexual orientation but unofficial reports indicated that violence and discrimination remained a problem and anecdotal evidence suggested that LGBT individuals were reluctant to report incidents of violence out of fear of retribution or reprisal.
>
> 25. The Appellant's supplemental bundle contains a number of reports in relation to the treatment of LGBT in St Kitts. P6 states that unofficial reports indicate that violence and discrimination remain a problem. A report entitled 'Can St Kitts protect its gay citizens?' by 'Daily Xtra' states that St Kitts and Nevis appears to be moving in the right direction when it comes to LGT rights but that the state does not enforce the laws. It repeats that there is anecdotal evidence of rampant homophobia and there is evidence from 2005 that authorities in Nevis barred a gay and nudist cruise from entering the island.

> 26. I conclude on the evidence before me that there is no evidence of state-sponsored persecution of LGBT individuals. Whilst there is evidence of discrimination the Appellant has not produced evidence to show that the authorities are unwilling or unable to prosecute perpetrators of violent attacks and on the Appellant's own evidence when he was attacked in 2010 a prosecution and conviction ensued. Whilst I accept that the Appellant may have been involved with other gay men and been the victim of homophobic taunts in St Kitts I do not find that the treatment he has suffered or would be likely to suffer on return as a gay man would amount to persecution on the evidence before me.
>
> 27. I find therefore the he would not have a well-founded fear of persecution on account of his sexuality".

15. The judge's finding in relation to the attack in 2010, and that it was not established it was motivated by homophobia, is found in para 23 of the determination which I will return to shortly.

16. In his oral submissions, Mr McGarvey referred me to the background material contained in the appellant's 'objective bundle' at pages 1–27 and in his 'Supplementary Bundle' also at pages 1–27. In particular, he referred me to a "Joint Submission from the United Nations Sub-Regional Team for Barbados and the OECS" (at pages 1–9 of the Supplementary Bundle) and an internet article "Can St Kitts protect its gay citizens?" dated 23 December 2015 (at pages 12–15 of the Supplementary Bundle). I also invited Mr McGarvey to take me to the "US State Department Report on Human Rights Practices for St Kitts & Nevis 2015" at pages 1–13 of the appellant's 'objective bundle' and, in particular, pages 10–11 under the heading "Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity".

17. On the basis of this material, Mr McGarvey submitted that discrimination and homophobic behaviour in St Kitts & Nevis was "rampant" and it was irrational for the judge to find that an openly gay man would not be exposed to a well-founded fear of persecution on return.

18. Dealing with Mr McGarvey's second point first, it is clear to me that the judge, when considering the background evidence in relation to the treatment of LGBT individuals at paras 24–27, was addressing the risk of persecution to an individual who openly expressed his sexuality in St Kitts & Nevis. Her conclusion was that such a gay man would not be exposed to a real risk of persecution or serious ill-treatment. If that finding is sustainable, it was wholly immaterial how the appellant would behave on return. Whether he would behave openly or 'discreetly', his claim could not succeed.

19. It is perfectly plain that the judge had well in mind the structured approach in cases where an applicant claims asylum on the basis of a well-founded fear of persecution as a gay man set out in the judgment of Lord Rodger in HJ (Iran) and another v SSHD [2010] UKSC 31 at [82]. She sets out the lengthy passage in Lord Rodger's judgment at para 18 of her determination. As Lord Rodger points out, the first question is whether the

particular individual has established on the evidence that he is gay or would be treated as gay by potential persecutors in his own country. Here, of course, the judge made a finding in favour of the appellant.

20. Then, Lord Rodger goes on to set out the next question which is whether the Tribunal:

> "is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality".

21. That is precisely the question which the judge considered in paras 24–27 of her decision and determined against the appellant.

22. The issues of how particular an individual would behave in his own country and if he would behave 'discreetly' whether that would be to avoid persecution, are, as Lord Rodger made plain at [83], only issues which arise *if* an openly gay person would be at risk of persecution in his own country. Given the judge's adverse finding on that latter issue at para 27 of her decision, the issues of how the appellant would behave on return, and if he would behave 'discreetly' why he would do so, did not arise.

23. That, then, raises Mr McGarvey's first point: was the judge entitled as a matter of law to find on the evidence that the appellant had failed to establish a real risk of persecution?

24. Mr McGarvey referred to the judge's finding in para 26 that there was "no evidence of state-sponsored persecution of LGBT individuals". That was, clearly, a finding open to the judge and I did not understand Mr McGarvey to dispute that finding. It is, of course, consistent with the judge's finding that despite the criminal law, no prosecutions for sexual activity between consenting adults has occurred in recent years. The focus, however, of the judge's assessment of the evidence and her ultimate finding was, correctly, upon the risk to the appellant (if any) from non-state actors and the attitude towards such individuals of the authorities.

25. At paras 24-25, the judge referred to the background material, in particular the US State Country Report and other documents, including that relied on by Mr McGarvey before me, referring to "rampant homophobia".

26. The US State Department Report [at page 11] states as follows:

> "The law criminalizes consensual same-sex activity between men, which carries a penalty up to 10 years in prison, but there were no reports of the law being enforced. The law does not prohibit sexual activity between women. No laws prohibit discrimination against a person on the basis of sexual orientation or gender identity.
>
> Negative societal attitudes towards the LGBTI community impeded the operation of LGBTI organizations and the free association of LGBTI persons. The government asserted it received no reports of violence or discrimination based on sexual orientation; however, unofficial reports indicated that violence and discrimination was a problem. Anecdotal evidence suggested

> that LGBTI persons were reluctant to report incidents of violence or abuse for fear of retribution or reprisal due to their sexual orientation or gender identity".

27. It is well established law that the criminalisation of homosexual acts does not *per se* constitute persecution (see Minister Voor Immigratie En Asiel v X and Y and Z (Joined Cases C-199/12 to C-201/12) [2014] Imm AR 440).

28. As the judge noted in para 24, the US State Department Report concludes that there were "no reports of the law being enforced". The judge went on to note that there were no official reports of violence or discrimination based upon sexual orientation but that, as Mr McGarvey submitted before me, the culture was antithetical to reporting such acts of violence or abuse.

29. There is, however, no doubt that the judge accepted that discrimination and homophobic behaviour occurred in St Kitts & Nevis. She also noted that no evidence had been produced to show that the authorities in the appellant's country were unable or unwilling to prosecute perpetrators of violent attacks. In fact, in para 23 she noted that (as regards the attack in 2010 upon the appellant which he claimed was motivated by homophobia) the police had taken action.

30. Mr McGarvey also placed some reliance upon the material that showed homophobic remarks by the Prime Minister (at pages 13–15 of the Supplementary Bundle).

31. There is no doubt that the background material demonstrates a level of discrimination and homophobic antagonism towards LGBT persons in St Kitts & Nevis. The word "persecution" has been judicially recognised as being a "strong word" (see Sepet v SSHD [2003] UKHL 15 at [7] *per* Lord Bingham). Discrimination, in itself, even if it were contrary to the standards of human rights in the UK, would not amount to persecution or serious harm (the latter relevant to establish humanitarian protection or an Art 3 claim). The level of violation, prospective or apprehended, must attain a "substantial level of seriousness" (see MI (Pakistan) and Another v SSHD [2014] EWCA Civ 826 at [63]).

32. In my judgment, the judge's finding in para 27 was not irrational in the light of the background evidence despite the level of discrimination and antagonism towards LGBT persons (which the judge fully recognised) in St Kitts & Nevis. It was properly open to the judge to find on the basis of the evidence that she summarised at paras 24–25 of her determination that any impact upon the appellant on return would not be "sufficiently severe or serious" to be characterised as persecution or serious harm contrary to Art 3 of the ECHR.

33. I now turn to consider Mr McGarvey's third and fourth points in relation to para 23 of the judge's determination in which she found that she was not satisfied that the attack in 2010 was motivated by homophobia. In relation to that finding, Mr McGarvey submitted that the judge had

required corroboration and, further, the judge's finding was inconsistent with her conclusion in para 23 that the police, knowing the assault was perpetrated due to homophobia, had taken action against the perpetrator.

34. At para 23, the judge said this:

> "Despite the fact that the matter was raised by the Respondent in the RFRL, the Appellant has provided no supporting evidence from his lawyers in respect of the court case and has not sought to obtain it since the RFRL was issued. The Appellant stated in oral evidence that he did not have the contact details of his lawyer but it is clear from the interview that he knew his name. The Appellant has, I find, provided no reasonable explanation why he could not obtain this information. In the light of this failure to obtain evidence which should have been available and failing to provide a reasonable explanation for not obtaining it I am not satisfied to the lower standard that the attack was motivated by homophobia. Nevertheless, it is clear that notwithstanding the fact that the police knew the assault was perpetrated due to homophobia they took action and secured a conviction".

35. It is axiomatic that an individual is not required to produce corroborative evidence in order to establish an international protection claim (see Kasolo (TH/13190)). However, a judge may properly have regard to the absence of supporting evidence in circumstances where it would be reasonable to expect that evidence to be produced (see TK (Burundi) v SSHD [2009] EWCA Civ 40 at [21]). In my judgment, the judge applied the approach in TK (Burundi) in assessing the evidence – and the absence of supporting evidence – in para 23 of her determination. The judge noted that the appellant had the contact details of his lawyer in St Kitts & Nevis and, therefore, had given no reasonable explanation why he could not obtain from his lawyer evidence relating to his claimed legal action against the person who attacked him in St Kitts & Nevis. The judge then went on to find, on the basis of the evidence, that the appellant had not established that the motivation behind the attack was as he claimed, namely homophobia.

36. As regards Mr McGarvey's fourth point in relation to para 23, it is clear that the final sentence is not inconsistent with the judge's finding that the appellant had not established a homophobic motive for the attack. All that the judge is stating in that final sentence is that if it were an attack motivated by homophobia, the police nevertheless took action and secured a conviction. That is the point which the judge considered, correctly, relevant as to whether the authorities in St Kitts & Nevis were (and would be) willing and able to provide protection against homophobic attacks by prosecuting offenders.

37. Consequently, I do not accept Mr McGarvey's submission that the judge erred in law in para 23 of her determination.

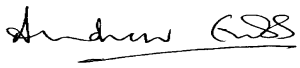
38. For these reasons, I am satisfied that the judge's decision was properly open to her on the evidence, for the reasons she gave. Her decision discloses no error of law.

Decision

39. The First-tier Tribunal's decision to dismiss the appellant's appeal on all grounds did not involve the making of an error of law. That decision stands.

40. The appellant's appeal to the Upper Tribunal is, accordingly, dismissed.

Signed



A Grubb
Judge of the Upper Tribunal
31 October 2017