



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03991/2017

THE IMMIGRATION ACT

Heard at Newport
On 15 August 2018

Decision and Reasons Promulgated
On 03 September 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

The Secretary of State for the Home Department

Appellant

and

M D

(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr D Mills, Home Office Presenting Officer.

For the Respondent: Mr I Meikel instructed by Rockland Law

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal that is Mr D as the appellant and the Secretary of State as the respondent.
2. In a determination dated 10 August 2017, Judge of the First-tier Tribunal Eames allowed the appellant's asylum, humanitarian protection and human rights protection claim on all grounds.

3. The appellant is a citizen of Senegal born on 10 November 1982 and entered the United Kingdom on a Tier 5 migrant Visa in 2011. He was encountered by the authorities in 2014 and served with a notice of liability to removal, and, in February 2015 applied for an EEA residence card as a spouse but this was refused in September 2015. He submitted an application on family and private life grounds on 29th of June 2016 and this too was refused. When detained in 2016 for removal he claimed asylum on 14 October 2016. The respondent refused the claim on 13 April 2017. The appellant stated that previously in August 2013 he met his wife to be, a Bulgarian national, and they married in January 2015, but the relationship was abusive. That appeared to be accepted by the respondent. It was during this period of difficulties with his wife, the appellant developed a relationship with someone called Mark and that he realised that he was bisexual. It was because he told his wife about his sexuality which prompted his divorce in January 2016. He feared that a return to Senegal he would be ill-treated because of his sexuality.
4. The First-tier Tribunal Judge set out the respondent's case which had rejected his claim on the basis of overall inconsistency, lack of credibility and the lack of supporting evidence with regard to relationships the appellant claimed to have had with men [27]. He came to the United Kingdom for a better life. He was not homosexual. He had been vague about when he first met his partner Mark and section 8, the delay in his claim, damaged his credibility. The Secretary of State did not accept that the realisation of his sexuality had caused domestic problems with his wife and he had produced no divorce papers
5. The first-tier Tribunal recorded the evidence including the oral evidence the appellant and his partner Mr Mark Phillips who adopted his statement 17 May 2017.
6. The submissions recorded by the judge and made on behalf the appellant at the First-tier Tribunal included that the judge should apply **HJ (Iran)** 2010 UKSC 31 and that the appellant had a UK partner openly bisexual [67]. The commencement of the relationship albeit an unusual and predominantly sexual one, coincided with the demise of his marriage. His relationship with Mark had lasted for approximately two years and continued. At [68] the judge recorded that the submissions stated that his bisexuality "would attract discrimination and prejudice and violence".
7. The judge made the following findings:
 - (i) his overall assessment of the appellant's credibility was "further" conditioned by the likelihood, in his view, that the appellant "is uneducated, and unfamiliar with knowing and organising the sort of information he may later be asked by officials and recording it in his memory, including dates"
 - (ii) the question was whether the appellant had had a sexual or intimate relationship with Mark and two other men and it was possible that notions of anniversaries, length of relationship other sexual relationships had been over stated by the respondent when assessing the relationship. The respondent had focussed on whether the relationship was subsisting and genuine which was more akin to the rules relating to marriage.

(iii) the lack of the divorce paperwork was raised for the first time in the oral submissions by the respondent and not in the reasons for refusal letter; this should not be held against the appellant

(iv) the dates the end of his marriage and the realisation of his bisexuality seemed 'to fit' and there was no need for greater precision on the dates. The lack of documentation concerning domestic abuse was merely possibly a reflection that the police had not taken the matter further. Realisation of when a person becomes bisexual is unlikely to generate a specific date. The inconsistencies raised in respect of birthdays, Mark's age, the pub where they met, and who talked first were tests relating to the subsistence of a relationship akin to marriage but did not illustrate anything about the appellant's sexuality

(v) there was enough consistency between the accounts of the appellant and his said partner and the judge added

"... they see one another from time to time, the appellant got Mark's birthday right, they met at a pub in Bristol, they have spent nights together, and as inference, they have sex to conclude that these are two men who like each other, have sex with each other, may have other partners and most likely would not regard this as any kind of marriage like permanent couple relationship. But if that set of facts is believable, then that is enough, in my estimation, to add very real credibility to the claim that he is bisexual. [84]

In my overall view it is indeed quite credible that their relationship reaches all those components that fairly low threshold. Any mismatches in things like Mark's mother, what they have done about birthdays, who talked to whom first, et cetera do not in my view undermine that the appellant has established he has some kind of sexual relationship with Mark. Because I find it credible, to the lower standard of proof, that the appellant is in a sexual relationship not necessarily akin to a marriage with Mark, that in my view establishes sufficiently his claim to be bisexual" [85].

(vi) the judge identified and considered the immigration history of the appellant and that he had made a previous unsuccessful EEA spouse application and that he raised claim for asylum in bisexuality after arrest. The judge considered section 8 and whether the timing of the claim of bisexuality was a convenient last-ditch invention however, the judge noted,

"... but there is also truth in the fact that people become alive to their true sexuality at given points in their life, when they need somebody who awakens it. The timing of that is totally unpredictable and without any pattern, across populations. The fact that the appellant was in a troubled and abusive marriage, coinciding with (perhaps even provoking) a fresh sensitising to the true nature of his sexuality, is perfectly consistent with the time sequence he has recounted. He has always thought he was heterosexual; things changed and then he realised he was not. That is what can happen. In my view it is equally plausible and equally credible interpretation of the timing that Mr Holt suggests is suspicious. His marriage to the EEA spouse was failing badly and it is no surprise he abandoned that basis of application. Combined with the overall credibility, to the lower standard of proof, of the appellant's account of his relationship with Mark, I find his credible evidence is enough to show that he is indeed bisexual, notwithstanding the immigration history point that Mr Holt [the Ftt Home Office presenting officer] validly makes".

(vi) at [88], the judge found the points raised by the respondent as to credibility did not materially damage the appellant's appeal or have a major bearing on the truthfulness of the core of his story which the judge accepted. The key finding of fact which eclipsed all others and was important was that the appellant was bisexual.

(vii) at [89] the judge made this finding "it is not expressly challenged by the respondent that in the event of his bisexuality claim being credible, he would be at risk of persecution, mis treatment, harm or death". The judge made a reference to the US State Department report on human rights practices with reference to Senegal "hundreds in jail for being gay (Senegal)".

Application for Permission to Appeal

8. The application for permission set out the following:

The judge had erred in failing to give reasons why this appellant was found to be illiterate when he arrived on a Tier 5 sponsor Visa which in essence required an educational background.

Just having sex on occasions with someone did not make someone bisexual

The judge had failed to apply the principles and **HJ (Iran)** and it was incumbent upon the judge to consider how this appellant would behave if returned to Senegal. A failure to consider this led to the judge making a material error law. The evidence was that this appellant was clearly willing to do anything to improve the United Kingdom.

9. The First-tier Tribunal granted permission in relation to the analysis of **HJ (Iran)** but rejected permission on the basis that the findings regarding bisexuality were irrational. On renewal to the Upper Tribunal permission was also granted in relation to the reasonableness of finding that the appellant was bisexual.

The Hearing

10. At the hearing before me Mr Mills accepted that the points made with respect to the Tier 5 Visa was not sustainable because the papers indicated the Visa was granted in relation to 'sporting prowess' and he conceded that this was not a good point and he was not pursuing it.

11. Mr Mills relied on the grounds and the key question was how was the appellant to behave in the future should he return to Senegal? He accepted that the reference to paragraph [89] did not flesh out a challenge on this ground.

12. Mr Meikle noted that the judge was taken to **HJ (Iran)** and recorded that the appellant had a partner and was openly bisexual. This was the man who had met his partner in a pub in Bristol and was, de facto, living openly with a gay relationship. It could not possibly be surmised that the appellant would return and live discreetly.

Conclusions

13. I have set out the findings of the judge above which on reading overall are extensive and detailed.
14. The judge clearly addressed the key criticisms made by the Secretary of State on the appellant's claim and regarding the assessment of the appellant bisexuality as can be seen from the extract taken from the decision and the findings by the judge. The judge was aware of the context of the appellant's immigration history and at paragraphs 86 and 87, explored the difficulties with the appellant's failure to claim asylum earlier and his EEA spouse application. Nonetheless at paragraph 84 which is crucial in his assessment of the claim, the judge made findings which were cogent and open to him, to the effect that the appellant and his partner/friend Mark did have a sexual relationship.
15. As the judge identified the appellant had realised his homosexuality during the course of his marriage to a woman. The judge recorded and reasoned that the respondent accepted there was abuse in that relationship and he found that the dates were consistent with his marriage difficulties in 2015, contributed to the realisation that he was bisexual and that his wife reacted violently or abusively. The judge found this feasible to the lower standard of proof which is important to apply. This the judge did. The judge specifically finds that it was significant the dates indicate that the relationship with Mark Phillips dated from around the same time.
16. The appellant's partner/friend Mr Mark Phillips submitted a witness statement and attended court to give oral evidence. Those are important features of this case and the judge clearly heard the evidence first hand and accepted that evidence. The judge was in position to have both the appellant and his partner give evidence before him and to critique both the documentary and the oral evidence and found to the lower standard of proof in the appellant's favour. On the reasoning he was entitled to do so. The finding may have been generous but does not indicate that the judge was irrational and unreasonable in his findings.
17. The respondent's criticism appeared to be that being bisexual in the past did not constitute being bisexual in the future but on the facts of this case and in the face of the judge accepting that the appellant and Mark had sex, for pleasure, that by definition means that the appellant is bisexual and a feature of his being. As the judge stated, the appeal was not in any way about whether the relationship was subsisting and that there was enough consistency between their accounts to be credible. Notwithstanding the judge accepted they had a casual relationship. That did not undermine his findings and adequate reasoning (as identified above) was given for the finding that the appellant was bisexual. It would appear that their relationship had persisted for over 2 years. Mr Phillips attended the hearing in the Upper Tribunal but that is not an issue before me.
18. Turning to the assessment of HJ (Iran), although there is no duty to deal with every argument presented it must, nevertheless, be an argument which is presented, and as the judge records at [89], there was no challenge by the respondent that in the event of his bisexuality claim being credible he would be at risk of persecution on return to

Senegal. It was not the respondent's case in the refusal letter or by the date of the hearing that the appellant would be discreet on his return. The refusal letter stated that the appellant was not bisexual.

19. The respondent did not put to the appellant that he would live discreetly in Senegal and therefore, it was not open to the respondent to rely on the absence of such a finding. However, that the judge did find the appellant had been having sex and spending nights with his partner and had met him in a pub clearly constitutes living openly as a homosexual/bisexual. The submission was made at paragraph 67 that the appellant had a UK partner, was openly bisexual that he feared he would be killed on return. That was supported by his witness statement and indeed the evidence given was that the appellant had met the partners family and indeed Mark had met the appellant's cousin.
20. Despite the failure of the respondent to specifically take this point as to how the appellant would live should he be returned to Senegal and even if the judge had not addressed this factor in error, it is quite clear from the witness statement of the appellant that he asserted he had been bisexual for some time and that he had been hiding his sexuality because of his religion as a Muslim and that he feared that he would be killed on return. In his statement of additional grounds dated 28 December 2016 the appellant said "[t]he way am so free to be who and what I am in this country, I can never be so free in my country (Senegal). People with a different sexuality other than heterosexual are given so much abused (sic) and sometimes killed". I find no material error in the judge's decision. The appellant wished to openly express his sexuality as he had done so in the United and would be prevented from doing so in Senegal by the nature of the regime.
21. For the reasons given above I find that there is no material error of law in the decision of the first-tier Tribunal, the grounds are first a disagreement with the decision and secondly do not disclose a material error of law. The decision will stand.

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 his 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

Helen Rymington

Date 15th August 2018

Upper Tribunal Judge Rymington