



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/05459/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 22 August 2018

Decision & Reasons Promulgated  
On 05 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

[K M]

~~(NO ANONYMITY ORDER MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Peterson (counsel for Duncan Lewis Solicitors)

For the Respondent: Mr S Walker (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of [KM], a citizen of Botswana born 20 June 1989, against the decision of the First-tier tribunal of 1 June 2018 dismissing his appeal against the decision of 18 April 2018 to refuse his asylum claim.
2. His asylum claim was based on his gender preference. He began to realise he was gay around July 2005 when his male dance partner [M] revealed his

feelings towards him. They began a relationship though did not publicly display any mutual affection. In August 2005 he mentioned his preference for men to a friend who spread this information amongst their circle of acquaintance; he was subsequently abused verbally by his friends. He did not keep touch with [M] thereafter.

3. He had a relationship with a male friend, [O], from November 2011 to August 2012, and another relationship with a man called [P], from June 2015 until 2016. During 2016 he and [P] were holding hands in a nightclub when a group of men set upon the Appellant, kicking him and stamping on his head. [P] escaped the scene whilst the Appellant was beaten.
4. [P] was politically active as the Student Representative Council President of Limko College, Gaborone. For this reason the Appellant did not want to reveal [P]'s identity to the police. They pressed him for this information, and took him to a nearby Dam where he was cuffed, put into a sack, and thrown repeatedly into the water. Eventually he was released, having sustained injuries to his cheekbone, ribs and jaw. He went back to his home town and stayed with his grandmother for four days, over which time he purchased tickets to come to the UK, arriving as a visitor on 29 November 2016.
5. In the UK he had had a relationship with Julio from March 2016 until February 2018 when the Appellant was arrested, who he had known in Botswana. He lived with him from November 2016. They fell out when the Appellant refused to take the blame for a crime for which Julio was sentenced. He claimed asylum having been encountered by the immigration service on 7 February 2018, well after his visa expired on 29 May 2017, after having been served with removal directions.
6. The Secretary of State refused that application on the basis that it was not accepted that the Appellant was gay.
7. The Appellant appealed. Before the First-tier tribunal his evidence was supported by Mr [L], a work colleague, who explained that he himself was straight. He had formed the impression that the Appellant was gay after an incident when the latter had touched him on the knee and looked at him intensely when they were alone at work one day. At the time, he had been uncertain as to whether he was joking, though subsequently realised this expressed the Appellant's true gender preference. He was confident that his present belief as to the Appellant being gay was accurate.
8. The First-tier tribunal rejected the Appellant's claim to be gay, noting that it had had the advantage of actually seeing, hearing and watching the way in which the live evidence unfolded. He was vague and his account was implausible and inconsistent. He had stated in evidence that nobody in authority in Botswana had directly or indirectly accused him of being gay.

There was no evidence of any gay friend or partner in Botswana to support his claim; the Rule 35 report which referenced scarring to his forehead consistent with having been stamped upon had not been supplemented by further evidence, and established no more than the possibility that he had been tortured.

9. His delay in claiming asylum counted against him; he was intelligent, spoke good English, and asylum was on the news constantly. Any suggestion of reticence due to his sensitivity about revealing his sexuality would be inconsistent with his "claimed openness in Botswana". He had obtained a visa to come to the UK but nevertheless remained unlawfully hidden from the Respondent's view, was inconsistent with any genuine fear of return to Botswana.
10. Mr [L] was an awkward and inconsistent witness whose evidence was hard to pin down; he had said the incident at work with the Appellant took place in October 2017, a month after the latter began work with him, but the Appellant's evidence was that he did not begin work at Premier Foods until December 2017.
11. In any event, even if the Appellant was gay, he would foreseeably continue to act discreetly on a return to Botswana, given his history and his evidence that he would keep his sexual identity private because of social and religious conventions, his respect for his very conservative family and other cultural factors.
12. Grounds of appeal argued that no reasons were given for the findings of vagueness, implausibility and inconsistency, and that a material error of fact had been committed by finding the Appellant had made an entry clearance application to come to the UK, when in reality citizens of Botswana were non-visa nationals.
13. Before me Ms Peterson developed those grounds. She pointed out evidence within the Appellant's bundle which had been overlooked in the decision below.
14. The Appellant's former partner [P] had written a letter of March 2018 stating they had developed a very strong bond from 2015. He could not further support the Appellant's case given his own career as a politician, but he provided his email and mobile phone. An article from *The Patriot on Sunday* of 20 October 2014 recorded [P]'s endorsement of his opponent in forthcoming general elections.
15. A friend of the Appellant, Paul Ritchie, had provided an email saying he had known the Appellant for over eight years since their university days, both in Botswana and in the UK. They had first met when he was running a business

in Gaborone, and Mr Ritchie had seen him take huge risks in pursuing relationships with other men in Botswana. Now he was aware that the Appellant lived much more freely and regularly frequented the Vauxhall Tavern in south London.

16. Mr Walker accepted that the flaws identified in the grounds of appeal were established, and that the evidence from [P] and Paul Ritchie had required attention in the making of credibility findings.

### **Findings and reasons**

17. Given the pragmatic stance of Mr Walker, I can be relatively brief in my decision. It is clear that material considerations were overlooked in the First-tier Tribunal's conclusions on credibility.
18. Notably one of the express reasons given by the First-tier Tribunal was the Appellant's presentation as a witness before it. In *SS (Sri Lanka)* [2018] EWCA Civ 1391 the Court of Appeal warned that it would be wrong to attach any significant weight to a Judge's impressions of a witness's demeanour. To do so would have no rational basis, because of the danger of thereby reflecting conscious or unconscious biases and prejudices. It was more appropriate to assess evidence by whether it was plausible, consistent with objectively verifiable information and consistent with what the appellant had said on other occasions.
19. However, it is not possible to discern from the decision why the Appellant's evidence was found wanting as to either plausibility or consistency. True it is that the Judge made it clear that he found the evidence from the Appellant's work colleague wanting, and that the lack of other corroborative evidence that was assumed to be available was unsatisfactory. However, the Appellant was entitled to succeed on his own oral and witness statement evidence, given there is no absolute requirement for corroboration in refugee law. The Rule 35 report might not have been as cogent as an expert report fully compliant with the Istanbul Protocol, but the Appellant had been detained throughout the evidence-collecting process and it represented *some* evidence in his favour. It must be recognised that the nature of asylum claims is such that corroborative evidence might not always be available, and evidence regarding one's sexuality is especially difficult to obtain.
20. Here the Appellant had put forward corroborative evidence which was not dealt with in the decision below. The letter from [P] and the evidence of Mr Ritchie were of particular relevance, but received no attention whatsoever. I accept that in the circumstances this represented a failure to take account of relevant considerations in forming a view as to the veracity of the historical facts which he advanced.

21. The Judge below also erred in presuming the Appellant had been party to a more sustained deception than was the reality, given the fact that he would not have needed to make an entry clearance application from Botswana, which is not a visa national country. This is a less important point, given the Appellant nevertheless entered the UK without making his true purpose for travelling clear to the authorities and then failing to seek to regularise his immigration status for a significant period, but it is nevertheless of some relevance, particularly in the light of the next point I raise.
22. I note that, whilst holding the delay in bringing a claim against the Appellant, there was no indication that the First-tier Tribunal was aware of the issues identified by the Home Office guidance as relevant to a delay in making such a claim had been given appropriate consideration. The Asylum Policy instruction *Sexual orientation in asylum claims* (Version 6.0) states:
- “Feelings of shame, cultural implications, or painful memories, particularly those of a sexual nature, may have led some claimants to feel reluctant about speaking openly about such issues and may therefore not be uncommon.”
23. That policy instruction also contains these further passages:
- “Stigmatisation, shame and secrecy**  
Some LGB people may originate from countries in which they are made to feel ashamed, humiliated and stigmatised due to their sexual orientation. This may be through homophobic attitudes, instilled within children in early years that being gay is shameful and wrong. This can be compounded where the individual is made to feel different and separated from their peers, causing such negative messages to become internalised. Claimants may reference in their narratives, elements of strong disapproval from external sources, indicating that the claimant’s sexual orientation and or conduct is seen to be unacceptable, immoral, sinful, and socially disgusting.
- ...
- Responding to a claimant’s narrative: issues around ‘difference’**  
Most LGB asylum claimants live their lives in societies where being ‘straight’ is considered as the norm. From the perspective of the persecutor, the issue can be the fact that the individual is not conforming to common prevailing normative heterosexual stereotypes. In effect, the behaviour which may give rise to harm, harassment or persecution may not be LGB behaviour (or perceived LGB behaviour), but behaviour or lifestyles which are deemed not to be heterosexual enough.”
24. The UNHCR have also recognised these themes, in their *Guidelines On International Protection No. 9*

“Ascertaining the applicant’s LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant’s sexual orientation or gender identity, rather than a focus on sexual practices.”

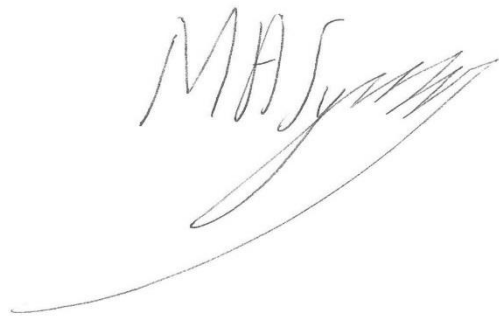
25. The failure to have regard to these significant considerations before finding that there was no reasonable explanation for the delay in claiming asylum is also a material error of law.
26. In the circumstances the appeal must be re-heard afresh.

Decision:

The appeal is remitted for hearing afresh in the First-tier tribunal.

Signed:

Date: 27 August 2018

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes