



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06231/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12th September 2018

Decision & Reasons Promulgated
On 17th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

PS
(ANONYMITY DIRECTION MAINTAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Spurling, Counsel, instructed by Barnes Harrild & Dyer
Solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Burns promulgated on 23rd June 2018 dismissing his appeal on the basis of his asylum and humanitarian protection claim and pursuant to his human rights. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Buchanan in the following terms:

- “2. The Grounds of Appeal contend that the FtTJ (1) had a flawed approach to the evidence, leading to unsafe adverse credibility findings; (2) failed to reach a reasoned conclusion on the risk faced by the Appellant in Cameroon.
3. Having regard to the comment of the FtTJ at [16] that it is ‘at least unusual in cases of this kind for a gay man to claim that he had no realisation of his own sexual inclinations before he was 23 years of age’; and to the comment at [19] that ‘on balance, I find that if the Appellant had genuinely lived as a gay in Spain it is likely that he would have ... used in interview some other less derogatory term’; and at [23] that

‘that does not explain why he has not had short-term relationships, which usually occur frequently in the gay community’ that it is arguable, as contended in grounds at [10], that the FtTJ has ‘based his plausibility assessment on his own preconceived view of the context rather than assessing it in light of the Appellant’s account’.
4. For these reasons, it is arguable by reference to the Grounds of Appeal that there may have been material errors of law in the Decision. I grant permission to appeal. In granting permission, I do not limit the grounds which may be argued at appeal.”

2. I was not provided with a Rule 24 response by the Respondent’s representative but was given the indication that the appeal was resisted.

Error of Law

3. In harmony with the view taken by Judge Buchanan in the grant of permission, in my own independent view, I find that there is sufficient in the grounds that demonstrates that there are material errors of law in the decision such that it should be set aside. My reasons for so finding are as follows.
4. In terms of Ground 1, the complaint aside from that already summarised by Judge Buchanan, is that the judge amongst other matters criticised the Appellant for his use of the term *maricón* when identifying himself as a gay person based upon his experiences in Spain. In terms of the use by the Appellant of this term to describe his sexuality and its derogative nature, Mr Spurling has pointed to objective material, albeit from Wikipedia, which suggests that the use of the term *maricón* is not entirely derogatory and may in fact be derived from a popular euphemism and popular culture such as mainstream cinema. The Grounds of Appeal aptly refer to the relevant authority of *Y v Secretary of State for the Home Department* [2006] EWCA Civ 1223 in the judgment of Lord Justice Keene concerning the difficulty in assessing the life experiences of a refugee claimant in a third country by a humble First-tier Tribunal Judge. In his judgment, Keene, LJ referred to a celebrated *dicta* of Sir Thomas Bingham,

as he then was, in *Kasolo v Secretary of State for the Home Department* 13190 at [25] wherein Sir Bingham stated as follows:

“An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships’ engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done.”

5. In the light of that judgment, in my view, the First-tier Tribunal Judge has taken his own views as to the likely motivations and day-to-day trivialities of the life of a gay person as the yardstick for measuring the experiences encountered by the Appellant in several different countries, not least including Spain. I further find that the judge has failed to take into account the fact that the Appellant’s realisation of his sexuality came about by virtue of his alleged life ‘on the streets’ and from being ‘street-homeless’. Therefore, it may be that the Appellant did not discover and explore his sexuality in the context of what one might call ‘polite society’ and it is possible that he may not have encountered polite Spanish terminology for his sexuality or may have acquired a less polite vernacular used on the streets of Spain or indeed at large in Spanish society. I put it no higher than that, but it is plainly a matter the judge has not considered in reaching his conclusion.
6. I am mindful of the fact that at paragraphs 23 to 28 of the decision the judge has noted his views about whether the Appellant was ‘street-homeless’ or not; however, the judge has not made any conclusive or reasoned finding as to whether the Appellant was in fact street-homeless or not, which, I find, also is vital to the outcome of the factual matrix underlining whether the Appellant is, or is not, a gay man. As such, the finding at paragraph 35 that the Appellant is not gay is one that was not reached in light of *all* the facts before the First-tier Judge, applying the threshold anxious scrutiny. I note paragraph 28, for example, where the judge criticised the Appellant’s account of being homeless and sleeping rough by virtue of whether or not he had any telephone contact with a person named John during his short-term relationship in 2013 in London.
7. That piece of evidence, in and of itself, of course would not be sufficient to defeat the Appellant’s claim to have been street-homeless, and if that were all, in my view, that would be a robust finding that was not open to the First-tier Tribunal, given the concurrent lack of reasoning in paragraphs 27 to 28 regarding the Appellant’s experience on the street and why that experience and evidence was rejected.
8. Thus, in light of my findings upon the decision concerning the Appellant’s sexual history (which are referenced in the Grounds of Appeal internally at paragraph 9 and

which in turn cite paragraphs 21, 22, 23 and 25 of the decision), and the First-tier Tribunal Judge's use of the term *maricón*, his findings upon the Appellant's sexual inclinations and his view of the Appellant's sexual experiences against his own preconceived yardstick of a gay man; I find that the adverse conclusion that the Appellant is not gay is unsafe.

9. Turning to Ground 2, I will deal with this matter very briefly. The complaint, in essence, is that the judge has not made clear findings as to whether fear of persecution on return played an active part in whether the Appellant would self-censor his sexuality upon return such that the finding made by the First-tier Judge at paragraph 37 that the Appellant's gay inclinations would either be "dormant or conducted in such a private and unnoticeable manner ... that he would not be at risk of persecution" were open to him to make, and represent a conclusive finding in light of *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31 at [54] to [55]. Having considered the matter for myself, I find that the judge has not made clear findings as to whether the Appellant was street-homeless or not at paragraphs 27 to 28 of the decision (as also discussed above), which was an important element in assessing whether the Appellant would also be likely to live in a private and unnoticeable manner on return to Cameroon to the lower standard of proof. Given the lack of a reasoned conclusion in respect of whether the Appellant's gay lifestyle did evolve in the manner he described, and if not, the lack of a reasoned conclusion as to why it did not, I find that the judge's conclusion in respect of the likelihood of the Appellant living in a dormant or self-censored manner on return to Cameroon is insufficiently reasoned and in any event crucially fails to go on and consider whether the Appellant's self-censoring or dormant lifestyle would emanate from a fear of persecution (or a desire to not live openly for other reasons) in accordance with [54] to [55] of *HJ (Iran)*.
10. In light of the above findings, I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

The appeal to the Upper Tribunal is allowed and the matter is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

Directions

- (1) The appeal is to be remitted to Taylor House.
- (2) A French interpreter is to be provided.
- (3) The Appellant is at the moment said to be the only witness that will give live evidence before the First-tier Tribunal.
- (4) The time estimate given is two hours.

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.

Deputy Upper Tribunal Judge Saini

Signed

Date 17th September 2018