



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/08348/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On Friday 20 April 2018

On Wednesday 25 April

2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

R F A

[ANONYMITY DIRECTION MADE]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss M Benitez, Counsel instructed by Wimbledon Solicitors

For the Respondent: Mrs Z Kiss, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to make that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Freer promulgated on 20 December 2017 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 15 August 2017 refusing his protection and human rights claims.
2. The Appellant is a national of Uganda. He came to the UK in October 2009 with leave as a student valid to 30 September 2010. Thereafter he overstayed. When he was encountered working illegally, he claimed asylum, initially based on his political opinion. That claim was refused on 20 July 2011 and he did not appeal.
3. The Appellant then made further submissions on 24 February 2017, raising for the first time his sexuality. He claims to be a homosexual.
4. The Appellant’s appeal against the Respondent’s refusal of that claim came before First-tier Tribunal Judge Freer on 6 December 2017. In the Decision, the Judge accepted the Appellant’s claim to be a homosexual but did not accept that this gave rise to a risk on return to Uganda because the Judge appeared to find that the Appellant would, by choice, live discreetly in his home country.
5. The Appellant appeals on three grounds. First, he argues that there is a fundamental inconsistency between the Judge’s finding about his profile in the UK and the finding that he would behave discreetly if returned, out of choice. Second, the Appellant argues that the findings about risk on return are flawed for failure to take account of background country evidence regarding the treatment of homosexuals in Uganda. Third, the Appellant submits that the Judge’s assessment of the Appellant’s ability to relocate within Uganda is affected by the Judge’s flawed finding that the Appellant would behave discreetly on return.
6. Permission to appeal was granted by First-tier Tribunal Judge McClure on 22 January 2018 in the following terms so far as relevant:-
 “...
 [2] The Judge found that the appellant was a gay man from Uganda (see paragraph 38) and that the evidence here of sexual proclivity was unusually strong (see paragraph 39). The judge also describes vociferous support by other gay activists for the appellant’s claims and evidence of years of weekly activity. However the judge then goes on to find that the appellant would act discreetly if returned to Uganda and could live in Uganda as a widower. It is arguable in the light of the case of HJ Iran that the judge has failed to consider whether the appellant is expected to alter his conduct for fear that he will be persecuted. The expectation that the appellant should amend his behaviour may give rise to the issues specifically considered in HJ Iran 2010 UKSC 31. The grounds may be argued.”
7. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier

Tribunal for re-hearing. At the conclusion of the hearing, I indicated that I found an error of law in the Decision and would issue a decision setting out my reasons for so finding which I now turn to do.

Discussion and conclusions

8. At [38] and [39] of the Decision, the Judge made a finding that the Appellant is genuinely a gay man. He did so in the following terms:-

“[38]The Appellant has satisfied me by abundant evidence from various sources that he is genuinely a gay man. I am not inclined to find that his past and tragic marriage shows otherwise. He may be bisexual as he fathered children but his gay side is the predominant one. He has had gay feelings ever since puberty and they have not stopped.

[39] The evidence here of sexual proclivity is unusually strong. It is rare to have a committed gay activist who is supported vociferously by other gay activists in this jurisdiction and shows evidence of years of weekly activity. It is very hard for me to imagine a heterosexual man doing that and even more so being believed by other activists.”

9. The Judge went on to discount one of the reasons the Respondent had rejected the claim because she did not accept that the Appellant was in a relationship as claimed. In support of that conclusion, she pointed out that the couple had been in the relationship for some time but did not cohabit when, on the facts, they could have chosen to do so. The Judge found at [44] of the Decision that the true nature of that relationship was casual and not serious and that they did not cohabit by choice for that reason. The Judge also accepted that the Appellant took some time to come to terms with his sexuality after arrival in the UK and only after therapy.
10. However, having reached those findings, the Judge went on at [46] to consider whether the Appellant would be at risk on return on account of his sexuality as follows:-

“[46]The Appellant is a discreet gay man now. He was very discreet in Uganda. That was due to his inquisitive wife. It was not due to fear of the authorities as such; he would not have wanted to lose contact with his children and that required he keep a secret from his wife.

[47] There is no evidence before me that shows he can rely on **HR (Iran)** [sic] for protection. He does not meet the first test in it. The agents of persecution will not be aware. It is possible to live openly as a widower in Uganda and have a life that is discreet in terms of sexuality, which is what he wants.”

11. It may be possible to read [39] compatibly with [46] and [47] of the Decision if what is meant by the Judge is that the Appellant is open and outgoing about his support for gay rights but prefers to behave discreetly when it comes to his own relationships. However, even if that is a possible reading of those paragraphs, the Judge does not consider what would be

the impact of the Appellant returning to Uganda and continuing in that support.

12. Furthermore, there are internal inconsistencies in other respects. At [45] of the Decision, for example, the Judge finds that the Appellant was unable to come to terms with his sexuality whilst in Uganda and only came to terms with it in the UK following therapy. That is not taken into account when considering whether the Appellant would behave discreetly on return to Uganda even if he did so previously.
13. Second, the Judge's finding that the Appellant behaved discreetly when in Uganda previously because he was married at the time and did not wish to upset his wife and lose contact with his children also includes an implicit finding that, if his wife had discovered his relationship and disclosed it, that would not have been seen as acceptable in Uganda.
14. Third, the Judge accepted that the Appellant is in a relationship in the UK with a man which is described as casual but which has nonetheless been ongoing for some time and which the Appellant has been prepared to disclose. Again, that is potentially incompatible with a finding that the Appellant has behaved discreetly also in the UK.
15. Fourth, Ms Benitez pointed out that the Appellant's claim is that he would only behave discreetly on return to Uganda because he feared recrimination due to his sexuality. If the Judge rejected that claim as it appears he did at [47] of the Decision, he needed to say why he rejected that element of the claim.
16. Whilst the Judge might be entitled to find as he did at [48] of the Decision, that the Ugandan authorities do not prosecute frequently for offences, as the Appellant points out in his ground two, such a finding does not take into account the background evidence cited at [2.3.20] and [2.4.1] and [2.4.2] of the same report that if a person is open about their sexual orientation, they are likely to face harassment and discrimination from the State and societal discrimination including harassment and violence. Those factors taken together are likely to be sufficiently serious to amount to persecution and serious harm. The question whether the Appellant will behave discreetly is therefore central to the claimed risk on return.
17. The Appellant's ground three concerning the Judge's findings on internal relocation is made out also for similar reasons.
18. For those reasons, the grounds disclose an error of law in the Decision and I agree that the Decision should be set aside.
19. Ms Benitez initially submitted that, if I accepted that the Decision contains an error of law, I could simply re-make the Decision without hearing further evidence because of the Judge's finding at [36] and [37] that the Appellant is gay and behaves in such a way that he would not behave discreetly on return. The difficulty with that submission, as I pointed out, is that on one view what the Judge is there finding is that the Appellant is a committed activist not that he would not behave discreetly with regard to

his relationships. The Judge has in fact found, apparently based on the Appellant's evidence, that the Appellant would behave discreetly in Uganda in relation to his own sexuality as he had in the past and out of choice not because of feared persecution.

20. Ms Benitez thereafter accepted that there were insufficient findings made by the Judge concerning the way in which the Appellant would choose to live his life in Uganda, based on the evidence of how he conducted himself in the past and now and what had potentially changed in that regard. She accepted based on the lack of findings on that crucial aspect that, in fairness to the Appellant, the appeal ought to be remitted. She asked though that I preserve the findings that the Appellant is a gay man and the finding about his behaviour in the UK at [39] of the Decision.
21. Ms Kiss accepted that the Respondent has not challenged the findings that the Appellant is genuinely gay nor what is said at [39] of the Decision about his behaviour. In fairness to the Respondent, I note that there is no provision in the Tribunal's procedure rules for a respondent's notice as exists in the Court of Appeal. Nonetheless, no issue is taken with those findings in the Rule 24 statement.
22. Both representatives were agreed in the circumstances that the appeal should be remitted to the First-tier Tribunal.
23. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:-

“[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”
24. Accordingly, and in the interests of a fair and just disposal of the Appellant's protection claim, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Freer. I consider that it is appropriate to preserve the findings made by the Judge at [38] to [45] of the Decision since the Respondent has not taken issue with those findings. The finding at [38] that the Appellant is genuinely gay therefore stands and what is said at [39] to [45] provides reasoned support for that finding.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Freer promulgated on 20 December 2017 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Freer.

Signed

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Upper Tribunal Judge Smith
2018

Dated: 23 April