IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005742

First-tier Tribunal No: PA/50453/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

E P M
(AMONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Johnrose, instructed by Broudie Jackson Canter
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 21 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant and/or any member of his family, likely to lead members of the public to identify the appellant and/or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

© CROWN COPYRIGHT 2023

1. The appellant is a citizen of Namibia born in 1987. He appeals against the decision of First-tier Tribunal Judge Alis ('the judge') dated 9 August 2022 dismissing his appeal against the refusal of his protection claim on asylum, humanitarian protection and human rights grounds.

2. Permission was granted by Upper Tribunal Judge Norton-Taylor on 31 January 2023 on the grounds it was arguable the judge failed to properly consider internal relocation in the context of country information, the appellant's particular circumstances and the HJ (Iran) principle. Secondly, the judge's consideration of Article 8 was very brief and it was for the appellant to demonstrate whether any inadequacy was material. The appellant was directed to serve a skeleton argument no later than 10 days before the hearing.

3. The appellant's skeleton argument was drafted by Mrs Johnrose and is dated 19 February 2023. For reasons unknown, it was served on the Tribunal on 20 July 2023.

4. The issues in this appeal are relatively narrow. The respondent accepted the appellant was a credible witness. He is a gay man from Windhoek in Namibia and he is unable to return to his home area because of a well-founded fear of persecution from his family and ex-partner. The respondent accepted the appellant was a member of a particular social group and the authorities were unwilling to protect him.

5. It is the respondent's case that the appellant can internally relocate to Swakopmund where he would not be at risk from his family or his ex-partner George and where there is an LGBTI community. The appellant could live openly as a gay man and would not be at risk of persecution, serious harm or treatment in breach of Article 3.

6. The judge rejected the appellant's evidence on appeal that his aunts lived in Swakopmund on the basis that the appellant had failed to mention this in his asylum interview or statement. The judge rejected the appellant's explanation that this was because of a lack of understanding of English. The judge concluded the appellant gave a detailed account in English and any inconsistencies were not a result of language issues.

7. The judge found that the country evidence suggested there were some arbitrary arrests, detentions, harassment and discrimination towards LGBTI persons, but this had to be balanced against other evidence of the authorities responded to LGBTI hate crime. The judge found the country evidence did not support the appellant's claim that he could not live in Swakopmund and concluded it would not be unduly harsh for the appellant to relocate there.

<u>Submissions</u>

8. Mrs Johnrose relied on the grounds and her skeleton argument. She submitted that there was evidence before the judge which demonstrated that the LGBTI community were targeted by the authorities contrary to paragraph 2.4.11 of the CPIN which stated:

> "In general, the available information does not establish that openly LGBTI persons face a risk of persecution or serious harm from the state. Trans persons may be more likely to face harassment or discrimination from the police, than other members of the LGBI community. Each case must, however, be considered on its facts and the onus is on the person to demonstrate why, in their particular circumstances, they would be at real risk of persecution or serious harm."

9. Mrs Johnrose submitted the onus was on the judge to make an assessment in light of the appellant’s profile. In this case the judge had failed to consider HJ (Iran) v SSHD [2010] UKSC 31 and the particular facts of the appellant's case. The judge’s finding that the appellant could live openly as a gay man was based on the fact that gay pride events had taken place in Swakopmund. The judge had failed to consider the wider issues. It would not be difficult for the appellant’s family to locate him in Swakopmund given the presence of the LGBTI community and the gay pride events. Mrs Johnrose accepted this was not argued before the First-tier Tribunal or in the grounds of appeal. She applied to amend the grounds. The application was opposed by Mrs Nolan who submitted this point was not Robinson obvious.

10. Mrs Johnrose submitted the judge concluded the appellant could live openly as a gay man without having considered why the appellant had not lived openly as a gay man before he left Namibia in 2019. The appellant had never lived openly as a gay man in Namibia irrespective of the circumstances. There was no indication in the decision that the judge had considered these material facts. The appellant’s family were still targeting him in the UK. The judge had taken a very general approach and had not undertaken an assessment of the appellant’s personal circumstances and considered why he would not live openly as a gay man in Namibia, notwithstanding the respondent’s position that he could do so. The judge should have considered the appellant’s reasons for not living openly as a gay man in assessing whether it would be unduly harsh for the appellant to internally relocate.

11. Mrs Johnrose submitted the existence of gay pride events did not reach the threshold that there was no risk to the appellant living openly as a gay man. She relied on her skeleton argument in relation to Article 8.

12. Mrs Nolan submitted the judge found the appellant could not be traced to Swakopmund by his family and/or George. There was no evidence they were connected to the authorities. There was no restriction on freedom of movement nor was there a requirement to register on relocation. The judge did not accept the appellant had family in Swakopmund and gave adequate reasons for rejecting the appellant’s evidence on this issue. The was a clear finding the appellant would not be at risk from non-state agents in Swakopmund.

13. The existence of gay pride events was not the only evidence relied on by the judge. He accepted there was harassment and discrimination. The existence of an LGBTI community in Swakopmund supported the respondent’s submission that the appellant would not be at risk from the authorities. The background evidence demonstrated that the appellant did not have a well-founded fear of persecution. The judge need not go on to consider whether the appellant would conceal his sexuality because of a well-founded fear of persecution.

14. Mrs Nolan submitted the judge’s assessment of Article 8 was sufficient given the status of the appellant’s relationship with his partner in the UK and the lack of compelling circumstances outside the immigration rules. Article 8 was not engaged. Any failure to refer to the personal characteristics of the appellant was not material and the judge gave adequate reasons for finding that it would not be unduly harsh for the appellant to internally relocate.

15. In response, Mrs Johnrose submitted the judge considered the country evidence in relation to sufficiency of protection not internal relocation. The judge referred to general evidence and failed to consider why the appellant would not live openly as a gay man in Namibia. The judge had failed to consider the appellant’s

personal circumstances. The judge had failed to conduct a thorough assessment. This was not a case where the appellant would choose to live discreetly. By living openly, the appellant would attract attention from those who had persecuted him in the past. The judge had failed to consider these circumstances when applying the country information. In relation to Article 8, there were exceptional circumstances.

Conclusions and reasons

16. At [42] of the judge's decision the appellant, by his representative Mrs Johnrose, accepted that the issue was whether the appellant would be able to safely relocate to Swakopmund and live openly as a gay man. The judge noted that, although the respondent accepted the appellant's account of events was credible, the respondent disputed his claim that he could not internally relocate.

17. The judge then set out the three issues associated with internal relocation: whether the appellant could be traced by his family or his ex-partner George; whether it would be unduly harsh; and whether the appellant could live openly as a gay man.

18. The judge found the appellant could not be traced by his family or George because they had no connection with the authorities, there was a large population; there was freedom of movement; and there was no mandatory registration requirement. The judge rejected the appellant's claim that his aunts lived in Swakopmund. There was no challenge to either of these findings in the grounds of appeal.

19. In her submissions, Mrs Johnrose applied to amend the grounds of appeal on the basis the appellant could be traced by his family because of the presence of the LBGTI community and gay pride events in Swakopmund. She accepted this argument was not made before the judge in the First-tier Tribunal.

20. I rely on Lata (FtT; principle controversial issues) [2023] UKUT 000163 (IAC): "A party that fails to identify an issue before the First-tier Tribunal is unlikely to have a good ground of appeal before the Upper Tribunal." I refuse the very late application to amend the grounds because the delay was significant and serious and there was no good reason for it. In any event, the judge's findings and reasons adequately demonstrate that the appellant would not be at risk from his family or George in Swakopmund.

21. Mrs Johnrose submitted that the appellant has never lived as a openly gay man in Namibia and the judge erred in law in failing to consider this and the appellant's reasons for so doing contrary to HJ (Iran).

22. I accept that the judge did not specifically refer to HJ (Iran) but his findings are consistent with the approach to be followed by Tribunals at [82]:

> "When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.
>
> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

23. It is accepted the appellant is gay and therefore the judge went on to consider whether he would be persecuted living openly as a gay man. The judge found, on the totality of the evidence, that the appellant could live openly as a gay man in Swakopmund. Following HJ (Iran) there is no requirement to consider what the appellant would do on return. The appellant would not be liable to persecution if he relocated to Swakopmund.

24. In any event, had the judge considered the appellant's reasons for not living openly as a gay man in Namibia, he would have come to the same conclusion because he made sustainable findings that the appellant would not be at risk from his family in Swakopmund and he would not be at risk of persecution from the state.

25. Mrs Johnrose accepted the appellant had no particular personal characteristics, over and above his sexual orientation, which were capable of establishing that relocation to Swakopmund would be unduly harsh. The judge's finding that the appellant would not be at risk of persecution in Swakopmund was open to him on the evidence before.

26. The judge's findings on Article 8 were brief but disclose no material error of law. The appellant could not satisfy the immigration rules. There were no circumstances capable of engaging Article 8 outside the immigration rules.

27. Accordingly, I find there was no material error of law in the decision dated 9 August 2022 and I dismiss the appellant's appeal.

Notice of Decision

The appeal is dismissed

J Frances
Judge of the Upper Tribunal
Immigration and Asylum Chamber
25 July 2023