IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002558
UI-2023-004403

First-tier Tribunal No:
PA/03306/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31 July 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GW
(Anonymity order made)

Respondent/Cross-Appellant

Representation:
For GW: Mr F. Magennis, counsel instructed by Duncan Lewis, solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 8 May 2024

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, GW is granted anonymity, given that this is an asylum appeal and involves sensitive issues of sexuality.

DECISION AND REASONS

1. Before us are the appeals of the Secretary of State against the decision of 15 June 2023 of the First-tier Tribunal allowing the appeal of GW, a citizen of Jamaica born 10 June 1978, and what is effectively the cross-appeal of GW

against one element of that same decision upon which he was unsuccessful below.

2. GW has a criminal record. In March 2018 he was sentenced to 20 months in prison for conviction on five counts arising from a violent incident against his partner in the presence of her young son, including common assault, assault causing actual bodily harm, destroying/damaging property to the value of £5,000 or less, threats to kill and failing to comply with a community order. He was convicted of battery on 23 March 2023 at Bedfordshire Magistrates Court. Thus he is a foreign national criminal for the purposes of the deportation legislation.

3. GW's case as put to the First-tier Tribunal is as follows. Aged 12 he had witnessed a gangland triple murder committed by his neighbour Singh, who was GW's brother's best friend. Singh's younger brother subsequently threatened GW that he would kill him because he had witnessed the murder. A week later Singh assaulted him and knocked out his teeth with a gun butt; he subsequently suffered repeated serious violence, being hit by a baseball bat, attacked by a gang member who lived nearby, abducted, tied to a chair, beaten, hit with a stone and with a machete; and on one occasion was threatened with further violence if spoke of what he had witnessed, the reality of the threat being reinforced by being cut on the arm with a machete. He was too fearful to go to the police. Everyone knew one another in Jamaica and so he would easily be recognised by the gang on a return there. His difficult home life led to him being homeless, which was how he was living when his birth mother encountered him on a visit to Jamaica; she brought him to the UK in 1996 or 1997.

4. In the UK he had had relationships with men and women. He had had a 19-year relationship a woman with whom he had had a son, Kevin, and had at times referred to relationships with women called Monica and Sharon. He had had a good relationship with Kevin at one time though presently had no contact with him; his relationship with Kevin's mother ended after the violent assault that GW perpetrated on her. He aspired to have a stable relationship with Kevin again via social services. He had had a long-term relationship with a man called Ross (presumably the person referred to as Russ in the record of cross examination), which was not presently extant as GW wished to work on his own mental health; he had had sexual relations in Luton with a man he knew only as Gym Guy for a year. In the UK GW had worked for a cleaning company and a security company and had qualifications in painting and decorating, a field in which he planned to work in the future. At times he had lived with his mother, who herself sometimes made lengthy visits to Jamaica, and asserted that he helped her with her serious mental health problems.

5. GW's supporting evidence included a medical report from Dr Burman-Roy, a consultant psychiatrist, from October 2018, in which he set out GW's account of witnessing domestic violence at home, suffering physical and serious sexual assault including rape by his father, abandonment aged six by his birth mother, exploitation by his stepmother, sexual abuse from his siblings and step-siblings, leading him to frequently run away from home and sleep on the streets. He had attempted suicide in 1990, 2016 and 2017, seemingly in response to challenging social situations and a cumulative sense of hopelessness; he had a history of drug and alcohol abuse. He had been on anti-depressant medicine since his imprisonment at Chelmsford HMP though had been too ashamed to disclose his childhood sexual abuse. She diagnosed him with PTSD and depression, concluding that his ongoing social and immigration status

uncertainty contributed to his difficulty in engaging with psychological interventions. In her view GW was genuinely fearful of return to Jamaica. Forced removal there would cause further deterioration to his mental health putting him at risk of suicidal acts and potentially acting violently towards others. A report from Dr Sahota came to similar conclusions, on the basis that his PTSD and depression would increase from moderate to severe; his index offence followed his release from the psychiatric unit in Rockford.

6. A report from Dr Davies concluded that GW showed insight into his offending and related risk factors, and had completed rehabilitative courses in prison including alcohol, drugs and victim awareness, and anger management; he presented a low risk of future violent re-offending and did not evince a negative attitude to authority; he was fully compliant with his probation arrangements. GW himself acknowledged that he still has a problem with alcohol.

7. Before the First-tier Tribunal GW relied on a number of claims arising from these facts:

   (a) He faced serious harm at the hands of Singh and his gang as a surviving witness to the murder long ago (a viable Article 3 ECHR claim).

   (b) He faced serious harm because of his bisexuality (a possible Refugee Convention claim).

   (c) He had resided in the UK for 20 years and cared for his mother Ms Clarke, and he had significant mental health issues raising a suicide risk on return to Jamaica (giving rise to a possible claim under the Immigration Rules ("the Rules") on private life grounds or directly by reference to ECHR Art 8).

8. Thus it can be seen that a number of grounds of appeal were before the First-tier Tribunal, doubtless giving rise to potential confusion as the matter has progressed. (c) is relevant to GW's private and family life, whereas (a) and (b) are asylum-focussed.

9. The First-tier Tribunal considered the evidence and concluded that:

   (a) GW faced a real risk of serious harm in Jamaica due to witnessing a gangland killing: his scarring was consistent with his attribution of it according to a report from Dr Monroe, his antagonists were neighbours and thus knew him well, and his history of violence at the hands of the gangs indicated continued interest in him. He was still recognisable and remembered many years later, as shown by one of Singh's friends encountering him by chance at the Notting Hill Carnival 2021, calling out to GW and requesting his contact details. Applying the guidance from AB (Protection –criminal gangs-internal relocation) Jamaica CG [2007] UKAIT 000 there was no evidence that GW would be able to access a witness protection programme given his poor mental health and he would thus lack effective protection in his home area. The Open Arms drop-in centre, the existence of which was central to the Secretary of State's case as to the arrangements for his welfare on return, and which provided support to deportees and ex-offenders under the Jamaica Reducing Re-offending Action Plan (part funded by the UK authorities), was not a realistic safe haven. His presence there would be a matter of which the gang would be likely to become aware.

(b) GW faced no real risks from being bisexual: noting that Jamaica was one of the least accepting countries for the LGBTi community and that physical intimacy in public or private was punishable by two years imprisonment, the Judge at para 67 stated "I find that the appellant is bisexual" and would not modify his behaviour on return to Jamaica, but at para 72 stated he had "fabricated his claim that he is a bisexual", on account of his inability to name one sexual partner with whom he had had a sustained relationship for a year or so, the lack of supporting evidence from any man with whom he had had a relationship, and because his evidence of a Facebook posting on his account of himself wearing a dress was self-serving.

(c) Having regard to the statutory exceptions under s117C of the Nationality Immigration and Asylum Act 2002 ("NIAA 2002"), GW had not shown that his removal would involve unduly harsh consequences for his family life, as he presently had no relationship with Kevin's mother or with Kevin. But he had a strong private life claim. He had established lawful residence in the UK, where his mother lived, for most of his life having been brought here as a teenager and was now aged 45, he was socially and culturally integrated here given his education and working history, and could not be seen as a persistent offender having regard to the circumstances surrounding his convictions; he had shown very significant obstacles to integration in Jamaica in the light of the expert evidence. Whilst he may have downplayed the relatives and friends his mother may have visited on her trips there, the reality was that some of his relatives had abused him in his youth. His PTSD would prevent him from meaningfully participating in a society which did not take mental illness seriously and his knowledge of life in Jamaica was limited; his mental health problems would limit his ability to access medication and healthcare given that that would require sustained engagement with the health service having obtained a National Health Fund (NHF) card, a Taxation Registration number (TRN), and a fixed address. Dr Burman-Roy's opinion was that he be likely to engage in suicidal acts and might pose a risk of violence to others if he felt his attempts at self-harm were being thwarted.

(d) Addressing ECHR Art 8 more broadly beyond the defined statutory exceptions, GW had shown very compelling circumstances contraindicating a return to Jamaica. It was appropriate to recognise the significant weight which should be given to public protection and to the public interest in discouraging foreign non-nationals admitted to the UK from believing they can escape deportation notwithstanding having committed serious crimes, and to the need to express revulsion in relation to serious drugs offences. However, the remorse he showed and the low reoffending risk, the fact that his offending was linked to his mental health problems, the complex family history of abuse including the violence he had suffered from his father, his depth of integration into UK society, his relationship with his mother, and his desire to be involved in Kevin's life, collectively established very compelling circumstances over and above those identified by the statutory exceptions.

10. The Secretary of State appealed on the grounds that the First-tier Tribunal

(a) Failed to explain how GW would remain at risk of harm from the criminal gang so many years after the event, failed to consider the possibility of other attributions for his scarring than harm at the hands of the gang,

and failed to consider the possibility of state protection or internal relocation.

(b) Failed to have regard to GW's long offending history, in concluding that he was not a persistent offender, and in attributing little weight to his admission of still drinking and drug-taking.

(c) Failed to properly consider available support on return such as the Open Arms facility, GW's keenness on living alone, the availability of a health care system and state protection, and his propensity to reoffend.

11. Those grounds of appeal led to the grant of permission to appeal by Judge Frances on 10 August 2023 on the basis of there having been an arguable misdirection in law and a failure to give adequate reasons.

12. GW also appealed, having failed to establish the bisexuality limb of his asylum claim, because the First-tier Tribunal had

(a) Made inconsistent findings vis-á-vis his gender preference and overlooked messages from his Facebook account, and wrongly made assumptions as to the full spectrum of potential sexual relationships in finding that a relationship was implausible absent knowing one's partner's name.

(b) Failed to recognise that this limb of claim involved a viable Refugee Convention reason, in that one's past actions and associations, including refusing to associate with a criminal gang, could constitute an irreversible and immutable characteristic by way of a shared past experience.

(c) Failed to observe the ground rules agreed as appropriate between the parties and the judge at the hearing, given GW's vulnerability as a witness, by permitting examination relating to traumatic events in his childhood, and thus creating a risk of re-traumatisation and failing to properly recognise his vulnerability. By the time of the hearing before us, GW had procured a psychiatric report into the impact of this questioning on his mental health.

13. GW's grounds of appeal to the Upper Tribunal also raise some other issues, which are more in substance a matter of Respondent's 'rule 24' reply than cross-appeal: the suicide risks had not been evaluated as a distinct issue and the reference to serious drugs offences was inappropriate as GW had no convictions of that kind. Those contentions will only come alive on this appeal should it become necessary to re-determine the ECHR Art 8 dimension of this appeal, a matter to which we will duly come.

14. Judge Pickup granted permission to appeal to GW because there was a clear inconsistency in the findings as to his sexuality and, recognising that on that basis the question of his gender preference would retain relevance, the existence of a Convention reason as to that element of his claim had arguably not been properly addressed. Whilst the other grounds were seen as having less force, there was no restriction on the permission granted.

15. Before us Mr Tufan accepted that there was a material error of law relating to the First-tier Tribunal's approach to GW's asserted bisexuality and that it would be necessary to set aside the decision on the Refugee Convention aspect of his claim. He maintained that the Secretary of State's own grounds were made out: as to the ECHR Art 3 claim given the lack of any recent mistreatment at the

hands of his criminal antagonists, and as to the ECHR Art 8 claim, based on the grounds of appeal as drafted.

16. Mr Magennis made submissions consistent with his grounds of appeal. He argued that it would be open to us to allow the Refugee Convention gender preference claim outright on the basis of those findings which were clearly in GW's favour; in the alternative, it should be re-determined by the Upper Tribunal.

17. We reserved our decision at the hearing and indicated that, aside from the acceptance of an error of law in relation to the findings as to gender preference, all matters would potentially form part of our consideration process, including the means by which the appeal would be finally determined, bearing in mind the potential procedural unfairness that had taken place before the First-tier Tribunal regarding GW's treatment as a vulnerable witness.

Decision and reasons

Error of Law aspect of hearing

Error of law: Inhuman and degrading treatment at the hands of criminals

18. The First-tier Tribunal found that GW faced a real risk of inhuman and degrading treatment by way of violence or worse at the hands of the criminal gang and their associates having witnessed multiple incidents of murder. The Secretary of State essentially contends that in so doing it came to an untenable conclusion, given GW's difficulties arose from an incident when he was aged twelve, some years before he left Jamaica. There was no reason to think that he would remain in danger thirty years later, and even if he did face any risks of harm, these could be abated by seeking state protection or availing himself of internal relocation.

19. When assessing this challenge, we must have in mind the appellate principles most recently summarised by Green LJ in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 §26 (here cited minus the supporting precedents cited therein):

> "(i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently …
> (ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account …
> (iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out …
> (iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference …
> (vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law".

20. Some might think the First-tier Tribunal's decision a generous one on its acceptance of ongoing risks to GW so long after the event. But that finding was made in the context of him plainly being a witness to very serious criminal acts

that it is reasonable to presume would remain the subject of police interest were an enquiry into them to reawaken at any time in the future. And the true question is not whether there is a real risk of any such enquiry, but whether criminal elements prone to extreme violence would be concerned as to its potential eventuality. GW had suffered the most serious and extended mistreatment on a number of occasions in 1990 and had been recognised and interest in him shown in London as recently as 2021 by one of Singh's associates. It was not unreasonable for the First-tier Tribunal, having regard to the considerations identified in Ullah, to conclude from this evidence that he remained at real risk of serious harm.

21. The other elements of the Secretary of State's ground of appeal on this issue have much less force. The Tribunal assessed the expert medical evidence as to the causation of GW's scarring in the context of its own appraisal of his oral evidence and the supporting evidence as to his mental state. It is unsurprising that it found he could not avail himself of state protection, having regard to the country guidance in AB (Jamaica) which showed that such protection was in theory something the authorities would want to offer albeit in practice it might be limited to participation in a witness protection programme, given his fragile mental health which renders any sustained engagement with authority improbable. And the notion that he could reside in safety at the Open Arms Centre, an establishment where numerous Jamaicans convicted of serious crimes abroad reside, seems rather fanciful given the nature of GW's antagonists. It is not difficult to imagine that in that relatively small community, composed largely of convicted criminals, word of the identity of any particular returnee would quickly spread. It was perfectly reasonable for the First-tier Tribunal to rule that out (at para 61) as a potential safe haven and that the abuse he had suffered from various family members in Jamaica made support from relatives unlikely. Mr Tufan suggested in his submissions that the psychiatric experts had not adequately referenced GW's GP records: but the reports repeatedly refer to his full NHS records (eg Dr Sahota specifically mentions these as one of the "documents studied").

22. This ground of appeal fails. We should note that the success of this head of GW's appeal potentially entitles him to Humanitarian Protection, not simply a finding of a risk of an ECHR Art 3 violation. The Secretary of State's refusal letter considered that he would be excluded from this form of international protection due to the severity of the assault he committed against his ex-partner. The First-tier Tribunal failed to consider whether or not the relevant level of severity was reached. Given our finding on the Refugee Convention ground of appeal below, nothing turns on this oversight.

Error of law: Gender preference claim

23. We have already acknowledged Mr Tufan's pragmatic decision to recognise the fundamental inconsistencies in the passages of the decision below that address GW's gender preference. We agree that this represents a material error of law in the disposition of this aspect of his case. In those circumstances it might be thought unnecessary to consider whether there are any other flaws in the treatment of his evidence below. However because of its relevance to our final disposal of this appeal, we will determine the matter.

24. We consider it appropriate to admit the post-hearing psychiatric evidence as to the potential impact of the First-tier Tribunal's treatment of GW's claim on his mental health. The report emphasises the fragility of GW's mental health and

states that “questions need to be asked of [GW] sensitively, agreed in advance, he being given time to answer the questions, the questions explained to him if he has not understood properly and to allow for breaks if he is upset or traumatized in any way. There is a risk of him perceiving this experience to be stressful, thus perceiving it as a psychosocial stressor, to which he is more vulnerable, not only due to the vulnerabilities in his personality but also the experience being re-traumatizing.” There was in fact material to similar effect before the First-tier Tribunal. However, because of the unusual circumstances prevailing here, we believe that this evidence is relevant to demonstrate the potential consequences of a failure to adhere to the agreed ground rules, and thus passes the test for admission under The Tribunal Procedure (Upper Tribunal) Rules 2008 at Rule 15(2A). In so concluding we have regard to those Rules’ overriding objective of achieving a fair and just result. The production of the evidence only at this stage of the proceedings is understandable given that it was not reasonably to be expected as necessary before proceedings misfired below and there has been no subsequent unreasonable delay in producing it.

25. The transcript of proceedings below records that GW was agreed to be a vulnerable witness who would be given breaks when appropriate. This was in line with the opinion evidence of Dr Burman-Roy who opined that every effort should be made to avoid asking unnecessary questions which might retraumatise him and that questioning should be carried out in a supportive way, giving him enough time to respond. The parties discussed the relevant ground rules to give effect to this, Mr Magennis stating that “I would ask my learned friend to avoid asking any questions that, having regard to the witness evidence, carry a risk of re-traumatisation.” The Judge addressed the Presenting Officer and stated “I do not believe for a moment that her cross-examination - and you can confirm this, Ms Ciampi - would relate to the childhood trauma - I think that is what you are alluding to - which is mentioned in all the reports”; Ms Ciampi confirmed she had no intention to pursue questions in that regard.

26. However, as Ms Ciampi’s cross examination proceeded she did begin to question GW about the abuse in his youth, specifically an incident when he was tied to a chair. Mr Magennis objected on the basis that “this is precisely the traumatic incidents that are likely to retraumatise this witness”. The Judge replied that “I have heard what you have said. If it proceeds to a point where I think he may be re-traumatised I will stop it”, and then, in answer to Mr Magennis’s rather impertinently expressed objection that “Is that how it works: we wait until he is re-traumatised and then stop it?”, replied that “I do need to know the line of questioning” before determining whether there was any such risk.

27. Simon Brown LJ in Kingdom Of Belgium, R (on the application of) v Secretary Of State For Home Department [2000] EWHC Admin 293 approved De Smith, Woolf and Jowell’s proposition that the components of fairness are to be assessed by the courts as a matter of law, and should not be treated simply as matters arising within the discretion of the original decision-maker: Wednesbury reserve had no place when assessing procedural propriety. Citing this precedent Moses LJ in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284 at §13-14 found that the principle extended to appellate assessment of the First-tier Tribunal’s approach to fairness: the question was simply “what does fairness demand?” rather than evaluating if the proceedings below had been pursued in a manner reasonably open to the relevant Judge.

28. In AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 the Senior President of Tribunals observed §27 that in immigration appeals "the tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the tribunal can utilise to deal with a case fairly and justly." At §30 he summarised the effect of the joint Presidential Guidance Note No 2 of 2010 as including proposition "c": "where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing".

29. Having regard to the Presidential Guidance and AM (Afghanistan), and determining for ourselves what a fair procedure below required, we cannot accept that the First-tier Tribunal conducted the hearing fairly. Its approach at the hearing's outset was exemplary, facilitating the agreement of appropriate ground rules consistent with the expert witness's advice and ensuring that the Secretary of State's Presenting Officer expressly understood the parameters of reasonable cross examination. However once questions threatened to veer into the territory of GW's childhood abuse, it was essential for the Tribunal to step in to ensure that the ground rules were respected. It was not appropriate to suggest that it was necessary to hear the line of questioning before ruling on any likelihood of re-traumatisation, not least because the vulnerable witness had been expressly told there would be no such questions. We note Mr Tufan's submission that this material had been covered to some extent in the witness statement, but giving evidence in public proceedings in response to cross examination is a very different matter to preparing one's case with a supportive team of lawyers and medical practitioners. The Tribunal's approach unfortunately posed the very risk that the ground rules were intended to avoid. This too represents a material error of law in the determination of the Refugee Convention ground of appeal in terms of gender preference.

30. Given that we have identified material errors of law in the First-tier Tribunal's treatment of this aspect of the appeal, we set aside its decision, and in due course will need to address how to finally resolve the issue. As will be seen below, our conclusion is that the interests of justice require us to remake the decision ourselves without any further hearing.

Error of law: Private life claim

31. The Secretary of State's challenge to the ECHR Art 8 dimension of the appeal is misconceived. The First-tier Tribunal gave detailed reasons for finding that the private life exception under the NIAA 2002 s117C criteria was met in its decision at §73-86; it then went on to determine whether, in the alternative, there were very compelling circumstances contraindicating deportation §95-112. The Secretary of State's grounds of appeal are three in number; we have addressed the first ground, relating to ECHR Art 3, above. The others take aim only at the *second* element of the Tribunal's reasoning on private and family life: thus the ground headed "Public Interest Consideration" raises the persistency of GW's offending citing passages of the decision §98-110, and the ground headed "Very Compelling Circumstances" cites passages at §94-112. So there is simply no clearly pleaded challenge to the private life finding under the statutory exceptions whatsoever.

32. Underhill LJ explained the relationship between the statutory exceptions and the residual “very compelling circumstances” proviso in Yalcin v Secretary of State for the Home Department [2024] EWCA Civ 74 at §53:

> “The starting-point is to identify the basic structure of the law in this area. At para. 47 of his judgment in HA (Iraq) Lord Hamblen approved the summary which I gave at para. 29 of my judgment in this Court:
> "(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does not outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.
> (B) In cases where the two Exceptions do not apply – that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements – a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C (6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'."

33. So in this appeal the First-tier Tribunal accepted, having regard to Parliament’s pre-determination that where a relevant exception is established the public interest in the deportation of medium offenders does not outweigh the article 8 interests of the foreign criminal or his family, that GW met the private life statutory exception. Thus the “short cut” was established and there was no need to have regard to broader issues of the public interest. The private life exception does not require assessment of whether return abroad is ”unduly harsh”, and so even construing the grounds of appeal in the most generous way possible, it is very difficult to see how they could possibly impact on the First-tier Tribunal’s reasoning. Of course, given our findings on Refugee Convention issues, ECHR Art 8 issues might reasonably be seen as academic.

Re-determining the gender preference claim

34. In the normal course of events we would have relisted this appeal for a continuation hearing limited to the question of GW’s sexual orientation. However, on the unusual facts of this case we consider it appropriate to determine the issue based on the written materials. This is because the Secretary of State has already had a full opportunity to cross-examine the witness. Unfortunate that opportunity was abused, and the ground rules to protect a vulnerable witness’s mental health were not adhered to. We do not believe that in those circumstances he should be required to face cross examination again. We have the advantage of an exceptionally wide range of expert opinions as well as the transcript of his answers below: in reality that transcript represents a more accurate record of his oral evidence than would the notes of any but the most diligent judge hearing evidence in any event.

35. GW addresses his sexuality at various points as his account has developed throughout his case’s progression:

(a) In his original witness statement he describes a series of secretive sexual encounters with men, arising in the context where recourse to pornography had made him appreciate his bisexual predisposition. In the UK he had first had a same-sex experience around ten years before his asylum claim following a drunken encounter at a night club; thereafter he began going to clubs to meet other men. He sustained an extended relationship with a man, Sean, who was also married with children, and they would disappear off together when possible in the course of evenings out with friends; there was also another man, Russ. Once one of his straight friends, Michael, saw him kissing Sean and for a time he feared he would be indiscreet about what he had witnessed, though in fact he only encouraged GW to be candid about his sexuality. He lost Sean's details after his mobile phone was stolen. He was frightened about the risks faced by gay people in Jamaica: he had seen the bodies of two men who he was told were killed because of their sexuality. On one occasion he posted a photograph of himself wearing a dress online, leading to hateful messages from people he had previously believed to be his friends, who questioned whether he was mentally well; his brother attributed his conduct to his experiences in prison. He could not cope with the ensuing negativity and abuse particularly from his own brother. These reactions prevented him from telling people he knew about his sexuality, because it would put his social support system at risk; he had not even told his mother, knowing that she would not be able to accept this news.

(b) In his final asylum witness statement he said that he had not raised it at his screening interview as he felt unable to speak openly about things in the way he could with his trusted solicitor.

(c) In cross-examination he was asked about meeting a man who he knew only as Gym Guy with whom he had an occasional sexual relationship for over a year and whose true name he had never discovered. It was put to him that there was a discrepancy between his statements regarding a friend, Russ, who he had variously said was a sexual partner who he believed was transitioning to be a woman, or a confidante who he had barely met; during these questions GW referred to how he was presently working on his mental health, and the judge offered him a five-minute break, which he took.

(d) There is evidence of GW discussing his sexuality via Facebook messaging with one Kyla-Rose. A message from him states "i didn't want people to know that i'm bi sexual", and she replies "So u like both why not just be honest with yourself"; she says "So ur going to be open about being bi now then?" and he replies with a message referring to his sexual activity with another man.

36. The Secretary of State disbelieved GW's account of his sexuality because he had not raised it at his screening interview and due to perceived discrepancies as to how he first became aware of it. Those discrepancies are referenced in relation to how it was that he had first realised his true gender preference, which was when viewing gay and transgender pornography. It is rather difficult to work out precisely where any such discrepancy arises, however, as the refusal letter contrasts his asylum interview with his written representations, both of which, even in the refusal letter's summary, refer to pornography as a significant means by which he became aware of his true sexuality.

37. Of the expert witnesses, forensic psychologist Lisa Davies recounts his evidence as to how he first had sexual experiences with other males during childhood, how stressful he felt it when living what amounted to a double life as an adult, his wish to be able to live openly, and his fears about how difficult it would be to return to Jamaica if he was unable to be open regarding his bisexuality. Dr Burman-Roy refers to his difficulties with coming to terms with his relationships with men and women and the significant guilt he felt in consequence.

38. GW has maintained his account of his bisexuality for a prolonged period. It is unsurprising that there are discrepancies within his account of a series of sexual relationships conducted in secret over varying periods of time, particularly given the extensive evidence of the fragility of his mental health. It is unsurprising he did not raise the issue during his screening interview, which represents a brief initial encounter with the authorities where one is unlikely to have any real trust in one's interlocutor. It is plausible that protagonists of a secret sex life might not reveal their true names to one another. The Facebook messages touching on GW's sexuality are on the one hand rather slight; but on the other, they represent contemporaneous records of sentiments being expressed amongst intimate confidants, and to our mind, taken with GW's witness statement and oral evidence given to the First-tier Tribunal, have the ring of truth. Having reviewed all the available evidence, we conclude that his account is credible on the appropriate lower standard of proof for assessing asylum claims. As the country guidance establishes, and as was agreed between the parties, members of the LGBT community in general face a risk of persecution in Jamaica.

39. There is no dispute between the parties as to Convention reason. The Secretary of State's refusal letter cited the Home Office's own guidance that "LGBT persons in Jamaica form a particular social group (PSG) within the meaning of the Refugee Convention. This is because they share a common characteristic that cannot be changed and have a distinct identity which is perceived as being different by the surrounding society." Accordingly GW's well-founded fear of persecution arises in relation to his membership of a particular social group and he is entitled to the protection of the Refugee Convention. He is not excluded from the Convention's protection: as noted by the First-tier Tribunal below at §38, section 72 of the Nationality Immigration and Asylum Act 2002 was not relied upon by the Secretary of State in the refusal letter or at the hearing, and was not raised before us by Mr Tufan, but the judge found that section 72 did not apply in any event.

Decision:

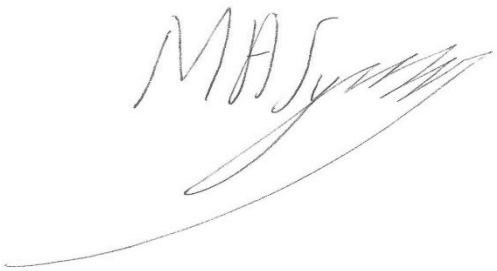
The decision of the First-tier Tribunal

(a) Contains no material error of law regarding ECHR Art 3 and dangers from criminals.

(b) Contains no material error of law regarding ECHR Art 8 and the statutory exceptions. and the issue of very compelling circumstances beyond those exceptions.

(c) Contains a material error of law regarding the Refugee Convention gender preference ground of appeal. We have set aside the First-tier Tribunal's decision on that issue and remade the decision for ourselves, allowing the appeal on Refugee Convention grounds

The Secretary of State’s appeal is dismissed.
GW’s appeal on Refugee Convention grounds is allowed.



Deputy Upper Tribunal Judge Symes
Immigration and Asylum Chamber

24 July 2024