



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09217/2015

THE IMMIGRATION ACTS

Heard at Glasgow
On 26 February 2018

Decision & Reasons Promulgated
On 23 March 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

E K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aslam, McGlashan MacKay Solicitors

For the Respondent: Mr Mullen, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge R Handley, promulgated on 22 November 2016, dismissing his appeal against the decision of the respondent made on 4 June 2015 to refuse him asylum and to remove him from the United Kingdom.
2. The appellant is a citizen of Malawi born in 1986. He was, however, first diagnosed with schizophrenia towards the end of 2009 and left university. Subsequent to that there were a number of incidents in which he believed attempts were made to harm

or to kill him. These include an attempt being made to poison him whilst he was living and teaching in Blantyre and then an incident in Lilongwe when he was involved in a car crash. He was at that point travelling in a police van as he had been stopped by police who had forced him into the van. In another incident his car was attacked and after that he stated his father admitted that he was trying to have him killed.

3. The appellant then tried to leave Malawi to go to Zambia but was attacked and returned home. He then attempted to go to Tanzania and again was prevented from doing so and finally came to the United Kingdom where he enrolled at Swansea University having obtained entry clearance as a student.
4. The appellant has two sisters and an aunt who live in the United Kingdom as well as various cousins.
5. The appellant claimed asylum in June 2011 but that was refused. He appealed against that decision stating that he is gay.
6. The appeal did not proceed as the appellant had been admitted to hospital owing to a deterioration in his mental health. In light of the information supplied the respondent withdrew her decision. Attempts to obtain additional interviews prove to be problematic given the appellant's continuing ill health.
7. The appellant's case has subsequently changed. He stated that the father who he said had tried to kill him was in fact his stepfather, his own biological father having died when he was aged 5. The relationship between his mother and stepfather had broken down; as his stepfather believed in black magic and thought that by sacrificing his life he would obtain wealth and also wanted to kill him because he is gay and is frightened that other people will find out about his sexuality.
8. The appellant stated that he had a boyfriend in Malawi named HP with whom he lost contact after coming to United Kingdom and that there had been an incident in which he had been caught with Harris by the stepfather who beat him.
9. The appellant has subsequently had a relationship with Mr Alexander Grey in the United Kingdom but that has now ceased. He continues to be involved in various LGBT support groups centred in the college he attends.
10. The respondent refused the appellant's claim considering the accounts of incidents he had described as taking place in Malawi were grossly inconsistent and lacking in credibility even accounting for the appellant's mental health problems. It was also noted that the person the appellant had described as being his female partner, Lubona, showed that she was a student in the United Kingdom as he had said, but she was female, not male, and that therefore his explanation that he had not been able to describe his sexuality and to describe his partner as her not him was inconsistent and not plausible. The respondent considered also that the appellant's account of how he was first able to visit a gay club in Malawi was inconsistent and did not make sense.

Procedural History

11. The appeal first came before the First-tier Tribunal sitting in Glasgow on 23 March 2016. On a decision promulgated on 5 May 2016, First-tier Tribunal Judge Kempton allowed the appeal concluding that the appellant was gay and would face persecution for that reason on return to Malawi. The respondent appealed that decision to the Upper Tribunal and in a decision promulgated on 6 July 2016, Upper Tribunal Judge Macleman concluded that the decision of the First-tier Tribunal had involved the making of an error of law, set it aside, and remitted it to the First-tier Tribunal for a fresh decision on all issues.
12. When the matter came before Judge Handley on 18 October 2016 he concluded that the appellant is not a reliable witness and that his credibility had been damaged. The judge concluded that:-
 - (a) it was wholly implausible that the appellant had failed to make mention of any difficulties he had due to his sexuality during his asylum interview on 15 May 2012 [32]; and, had failed to mention in his asylum interview that his father wanted to kill him because he had discovered that he was gay, finding it implausible that he had not mentioned this in his interview [33];
 - (b) the appellant's credibility was further damaged by stating in his asylum interview that he had a partner who was female then stating that he had lied to the interviewer when he had referred to his partner as being female; that it was not plausible he was too embarrassed to discuss his sexuality [34];
 - (c) the appellant's account of the attacks which had happened to him in Malawi were implausible [35] to [37];
 - (d) the appellant's evidence at his second interview with regard to his sexuality was vague, unclear and lacking in plausibility;
 - (e) it was implausible the appellant was unable to know the surname of "Ben" with whom he had had a relationship, noting that he had been unable to provide evidence of this;
 - (f) there were inconsistencies in the evidence given by the appellant and by AG with who it is said they are in a relationship [40], specifically the evidence as to when the relationship started, this casting further doubt on the reliability of the appellant's evidence [40];
 - (g) the appellant suffers from mental health issues [45], noting the report of Dr Byres who had produced a report and also supplementary report following a meeting with the appellant on 13 October 2015, in which he confirmed that there was no evidence of a relapse psychiatric illness and no symptoms suggestive of psychosis [43], albeit that there would be a risk of relapse or psychosis were he to change his current antipsychotic medication;
 - (h) although the level of and standard of treatment available in Malawi would be of a lower standard than that from the United Kingdom, he was not satisfied that Article 3 was engaged.

13. The appellant sought permission to appeal on the grounds that the judge had erred;
 - (a) in failing to factor into account the appellant's mental health problems in assessing credibility;
 - (b) in failing to provide any or adequate reasons for rejecting the evidence of AG that he had an intimate sexual relationship with the appellant.
14. For the reasons set out in the annexed decision promulgated on 16 August 2017, I set aside that decision, preserving none of the findings of fact. The appeal then came before me on 26 February 2018 having been adjourned twice before that.

The Hearing on 26 February 2018

15. I heard evidence from the appellant as well as submissions from both representatives. He was allowed to take time when requested but no other special adjustments were requested nor did the most recent medical report identify any that would be necessary.
16. Having adopted his witness statements, the appellant was cross-examined. He said that on return to Malawi he faced being imprisoned for fourteen years or possibly also killed and if they knew he was gay he would be tortured. Asked who knows he is gay he said that his mother did.
17. The appellant confirmed that he had read the most recent psychiatric report from Dr Burrows and he accepted that he has schizophrenia and that his thoughts were sometimes illogical.
18. The appellant said that the church he now attends is a Pentecostal church but he was unaware of their attitude towards gay people and they did not discuss sexuality.
19. The appellant said that he does discuss sexuality with friends at college and that he attends a gay club there. The club had not provided him with a letter of support.
20. The appellant said that he was no longer in a relationship with Alexander Grey who had gone abroad and they were no longer in contact. He said that prior to Mr Grey he had been in a relationship with Ben Kalekwala.
21. The appellant accepted he had not always been compliant with his medication in the past but that he is now. He said that he is afraid that his illness would return.
22. In response to my questions the appellant said that he had not socialised with people that he met in the club at college and that they did have a WhatsApp group and said it was difficult for him to socialise with people.
23. He was unable to assist in explaining what Dr Burrows had meant by "sexual disinhibition" in his report.
24. I then heard submissions from both representatives.

The Law

25. It is for the appellant to demonstrate that he has a well-founded fear of persecution in Malawi. He must do so to the lower standard of proof applicable to asylum claims. In assessing his evidence I have considered all the material produced to me as a whole, even if I have not referred to it expressly.
26. The starting point for any analysis of the appellant's evidence must be the psychiatric reports from Dr Burrows the most recent of which is dated 17 October 2017 in response to the directions issued in this case.
27. It is not suggested that there is any material difference between the now three reports from Dr Burrows, the first dated 8 September 2014 followed by a supplement of 16 November 2015. They do however indicate progress in the appellant's condition.
28. The appellant was first referred to psychiatric services in December 2011. On assessment, it was believed that he was suffering from a paranoid psychotic illness which had likely been present for some years. It appeared also that he had been treated for a psychotic illness in Malawi where, from what the appellant relates, he had suffered acute dystonia, a recognised side effect of anti-psychotic medication. The psychiatrist notes "it is difficult to get hold of a clear narrative and timeline of events during this period (during his late teens and early 20s in Malawi) of the appellant's life and his account is often fragmented". It is stated as follows:-

"[The appellant's] first presentation in the UK consisted of a constellation of difficulties characteristic of schizoaffective disorder. This is a severe and enduring mental illness which presents with both psychotic symptoms and symptoms of either elevated or depressed mood. [The appellant's] particular presentation was that of marked suspiciousness and paranoia particularly in relation to being poisoned in some way by food. He had marked thought disorder with difficulty communicating clearly and it was felt that he was experiencing auditory hallucinations. Unfortunately his suspicions and paranoia became extreme to the point where he believed people were tampering with food and drink in his flat and he had packed bags to flee from his delusional belief of being poisoned. At this point his vulnerability and illness was deemed severe enough that he was admitted to the psychiatric unit at the Southern General Hospital on 22 December 2011".
29. The appellant later absconded but was re-detained. The first drug of treatment, Risperidone, provoked an acute dystonic reaction and the drug was then changed to Olanzapine. After discharge in April 2012 the appellant received support on compulsory treatment although he appeared not to be taking it properly resulting in a further breakdown in July 2012, reports from his family indicating his illness had relapsed. There had been problems with the police. It was the impression of the treating team that these incidents were likely due to him misidentifying people and misinterpreting their actions as part of his deteriorating mental health.

30. Further readmission was authorised and a compulsory treatment order made. There were difficulties in identifying the correct medication and dosage and eventually the side effects from anti-psychotic depot medication had resolved.
31. It is also of note that he was assessed by a psychologist for neuropsychological testing and it was identified that there were significant impairments particularly in concentration which were consistent with a diagnosis of schizoaffective disorder.
32. The appellant's health deteriorated again in March 2014 resulting in further readmission, the doctor recording that "common things to his presentation were that of paranoid ideas, people following him and general fearfulness of others. There are also reports of sexual disinhibition".
33. He was discharged on 27 March 2017 but readmitted four days later suffering again from ongoing delusions of being poisoned. He again absconded but he was later detained again with a gradual improvement to his mental state and change of medication.
34. When describing the current mental state, the doctor notes that the appellant is not currently in a relationship but identifies as gay.
35. In his summary and opinion, Dr Burrows states:

"As described earlier in my report, [the appellant] has likely experienced mental illness for many years prior to coming to the UK and that accounts of his late teens and 20s are often fragmented and difficult to follow. The likely reasons for this are active illness impairing his memory and recall.

It is difficult to ascertain with any certainty which elements of [the appellant's] experiences are true and which are delusional. There are certain examples more bizarre ideas which would be deemed delusional and which [the appellant] now holds no longer to be true. There are however other examples which [he] maintains are true to this day.

It can often be the case that despite resolution of active psychotic symptoms, full insight into previously held delusional ideas is never entirely regained and delusional memories may be held too with certainty in the absence of current symptoms. Again however I would stress that without any corroborating history from this period of his life, we are unable to ascertain with certainty the veracity of his account. On balance however I do feel that he had a long duration of untreated illness during this period of his life in Malawi which would impact significantly on his memory of this time.

I do not feel [the applicant] will need any special measures other than additional time and sensitivity to his mental health difficulties".
36. In the light of the above it is difficult to consider the appellant to be a reliable witness of events which occurred in Malawi. That does not mean that he has put forward what he knows to be untrue. But there are indicators in Dr Burrows' report and

certainly in regard to encounters with the police in Wales that he misunderstood and misinterpreted what was happening.

37. It is in this context useful to have regard to the evidence of the appellant's sister set out in her witness statement, SL, who lives in Wales. She explains that she had not been in Malawi at the time of the incidents complained of by the appellant and whether she had heard about it from family and others who had told her that the appellant had become paranoid and sick, had tried to run away and had thought people were going to kill him. She does confirm attempts to leave the country and that it is now easier to talk to him as he received treatment.
38. SL's evidence does not confirm that the family had any animosity to the appellant although she does confirm that there are poor attitudes towards people with mental health in Malawi which is in turn confirmed by the background evidence. It is, however, I consider important to note that there is no indication from the evidence the family had sought to disown him, rather that they understandably had found it extremely difficult to cope with his behaviour.
39. The evidence of the appellant's sexual orientation is more complex and is, to an extent, confused.
40. The appellant did not disclose his sexual orientation when first interviewed. He did, however, volunteer information when asked if he had anything to add in his interview on 13 May 2012 that he had found a significant partner. He was then asked about the partner (Q178 to 191) giving her name as "LI" and that they were still in communication.
41. In his witness statement of 15 October 2012 he explains at paragraph [38] that:
 - "38. I would like to stress my partner is male. I did not bring this up before because I was embarrassed. I phone my Lubona every day and we constantly send each other emails. The relationship that I have with Lubona is very strong and we are hoping to get married in the future. I would like to apologise for causing any inconvenience. I was scared to reveal my sexuality. People in Malawi do not accept homosexuality. It can be said that homosexuality is forbidden in Malawi ...
 39. ... all of my family here in the United Kingdom are aware of my sexuality and my health problem and support me as much as they can.
 40. My stepfather wanted to kill me because he discovered that I was gay, my stepfather was afraid that other people might find out about my sexuality, and I would therefore bring shame on the family. Another reason why my stepfather wanted to kill me was because my stepfather believes in black magic and thinks that by sacrificing my life he will obtain wealth".
42. That witness statement was prepared in support of a hearing due to take place on 22 October 2012 against a decision to refuse the applicant's asylum claim. That had been refused on 13 July 2012.

43. In the subsequent refusal letter dated 30 June 2014, the respondent having agreed to reconsider the asylum claim, it is recorded that the Secretary of State was aware from 13 August 2012 that the appellant had been admitted to hospital over concerns about his mental health and the respondent was informed by his then representatives the appellant intended to make a statement and advised by the solicitors that he intended to obtain a statement from the claimed partner who was male rather than female and this would be sent. It was never received.
44. The respondent attempted to fix an additional asylum interview but the appellant was too unwell to attend. A further interview was scheduled on 23 April 2014 but did not proceed as the appellant had again been hospitalised. The same situation occurred on 14 May 2014.
45. The respondent drew inferences adverse to the appellant from the failure to provide a statement from his partner [55]. She wrote that a check of Home Office records [57] showed only one person recorded with the name of LI who was a Zambian national who lived in Swansea and had been given indefinite leave to remain but that she is female. The respondent did not accept the explanations of the appellant having taken into account his mental health and did not accept that he is gay.
46. Subsequent to this refusal the appellant was interviewed again on 18 March 2015 and was questioned about his sexuality. He was asked "Going back to your sexuality, I understand that you are not comfortable to talk about it but I need you to tell me if you have any fear on return to Malawi because of your sexuality". The appellant replied "no". He did, however, describe himself as gay and that it would put him at risk in Malawi [Q 22] saying that he had not said that before because he was not comfortable [Q. 23].
47. The appellant then did describe that he had realised he was gay at about the age of 18, had not had feelings for girls but had feelings for men, which meant he was not comfortable at disclosing it in public because in Malawi when you were gay they put you in prison and his family had told him that gay people were outcasts. He said he believed he would be always hiding his sexual orientation and not going public about it. His stepfather had found out when he was about 18 and beat him up as he had been caught with his boyfriend. He said that he had met this person, HJ, in a gay club. Asked if this was a gay club he confirmed it was. Asked if there were special meeting places that gay people could go to socialise he said it was an underground club I should say in the city centre. Asked how he found out about the underground gay club he said "I was just strolling along to the place one day and I just went in. It is not like a big club, it is just a small small club". Asked how he had heard about it he said "I was just strolling along the place and I just walked in" and that he knew it was a gay club because there were no men inside. He said that he met Harris Jones, that they became friends and afterwards lovers and that they were together for about four years although they met only once a month. He confirmed that after the incident which his father had caught him he had maintained a relationship with Harris for four years.

48. Asked [Q. 70] about the teaching of his religion in relation to sexual orientation he said that he was a Presbyterian when he was back in Malawi and so no gays were allowed but currently he is a member of the Church of Jesus Christ of Latter Day Saints but he has not told them of his orientation. He said that there is a conflict with his religious beliefs that is neutral on this point.
49. Asked if he had met other gay people in the United Kingdom [Q. 79] he said "I had a boyfriend in the UK".
50. The appellant confirmed this person's name was LI. It was put to him that he had referred in his first interview to this person as either she or her fifteen times. He said he was not comfortable saying he was gay and he was not comfortable and had not raised his sexual orientation in interview. He said that he was with LI for about a year, that he is originally from Zambia, they had started as friends meeting in church and then became lovers. He said that his younger sister knows about his sexual orientation [Q. 95] but his relationship with LI had ended when he came to Scotland.
51. The appellant said that he had now met a man called Ben in a pub in Glasgow and that they have been in a relationship for about a year having met in a pub on Jamaica Street in Glasgow.
52. In the subsequent, third, refusal letter dated 4 June 2015 the respondent considered that the appellant's reluctance to admit his sexuality was not an unreasonable explanation [47] but drew inferences from the failure to provide a statement from LI [49]. It was also noted that during his second interview he had said that he did not wish to proceed with the claim on the basis of sexuality and that he was not comfortable about talking about it. Only later did he agree to discuss his sexuality stating first that he did not have a fear to return on that basis, the Secretary of State considering it unclear as to why he would change his mind about a risk as a result of his sexuality [55]. That is a fair point.
53. The respondent did not accept the appellant's explanation as to how he had first heard about the gay club [56] it being unclear why he would choose to walk into a gay club one day particularly when he had not known it existed before, and that it was unclear how he could not recall HJ's age given they had spent a significant period together as a couple [58]. The respondent concluded that "with all reasonable allowance having been made for the difficulties you may have had in providing your account - it is considered that the credibility of your claim has been damaged to the point where it cannot reasonably be accepted".
54. The matter then proceeded to appeal and the appellant provided a further witness statement dated 12 November 2015. Addressing the points raised about his sexual orientation the appellant stated that he did not like revealing his sexuality to the Home Office because he was uncomfortable by which he meant that he was ashamed of himself because of the way he was brought up in Malawi. He did, however, confirm that LI is a man but could not recall exactly when their relationship came to an end and that a statement had not been provided as they were no longer in contact.

He said “in terms of the person who the Home Office are talking about, this is not the same LI that I was in a relationship with. I am not sure why my partner is not in the Home Office’s records”. He added also that he still did not feel comfortable about talking about his sexuality and at the time when he went into the club he did not know it was a gay club and did not know why he went in, that he was suffering his illness at the time. It was not usual in his culture to ask people their age.

55. In his supplementary statement dated 18 March 2016 the appellant said that “LI is a girl”, was someone he had met in a church in Swansea, that he never had any form of relationship with her and that he had told the Home Office that he was with a girl called LI because he felt uncomfortable in telling them he was gay, having been branded as gay in Malawi as he had never had a relationship with a girl. He said he had always struggled to cope with sexuality and he was worried in case he would be branded as a bad person when he was being interviewed by the Home Office and did then tell the Home Office that Lubona was a boy and not a girl, the reason for changing his story being that he was worried that the Home Office would think that he is not gay.
56. The appellant then gave Ben’s surname confirming that they meet about once a week but that Ben is not one to get involved with his case.
57. In his witness statement of 17 October 2016 the appellant adopted his previous statement adding that he had been in a relationship with AG. He said:

“I have been friends with AG for four years now. I met him at the African church in Govan. AG is bisexual. It was about four months ago that we became intimate with each other. It has not been easy to get into a relationship, especially given my mental health and that I have had this case hanging over me for years”.
58. There is then a witness statement from AG confirming that they had been friends for about four years and that some four months ago he had arranged to meet the appellant who was in some financial difficulties and that having helped him buy some groceries and go for a meal he went back to the flat. He said they had been intimate about three times during the last four months and that they see each other a number of times a week.
59. Finally, in his witness statement of 12 February 2018 the appellant said that he is gay and fears return to Malawi as he would not be able to socialise as a gay person. He says that he had previously told the court that he had lied about seeing a woman before and that he had been casually seeing AG but it had not worked out as he had gone to Spain and they had not kept in touch.
60. I take note of the differences in the evidence between the appellant and AG that arose in the hearing before Judge Handley. I do not, however, consider that much weight can be attached to these differences. They are comparatively minor and relate to primarily the sequencing of the events which took place on the day on which their relationship became intimate. Whilst I accept that AG did not give evidence before

me, nonetheless he did give evidence on a previous occasion and I consider that some weight can be attached to his testimony.

61. I can accept the appellant's reason for not disclosing his sexual orientation at his screening interview or in his initial interview. The relevant guidance indicates that many people, particularly those who arriving from a country or culture in which being gay results in discrimination or worse, may be reluctant to disclose this. I bear in mind also the appellant's mental ill-health.
62. It is, however, more difficult to assess the appellant's admitted lie about LI. As a starting point the appellant first volunteered that he was in a relationship with Lubona and that she was a woman. He then said that LI was in fact a man, a non-truth in which he persisted, and then said LI was in fact a woman and she was simply somebody that he had known in Swansea.
63. It does not appear to be contested by either party that LI exists. The Home Office's own enquiries revealed that she does exist and that, as is evident from some of the descriptions of her given by the appellant, that she is Zambian. She appears also to have lived in Swansea. That is consistent with the appellant's description of her and the details he has given. It thus appeared that she does exist and it appears also given the amount of detail the appellant was able to give about her which has been confirmed by the Home Office, that he knew her.
64. The explanation for the change in testimony is first, the appellant believed he ought to volunteer this information as he might be thought to be gay, and second, changing her gender, on the basis that he felt he needed to prove he is gay. This suggests at best significant confusion and illogical behaviour but that must be seen through the prism of Dr Burrows' diagnosis and observations as set out above. It is also necessary to consider the proximity of the interviews to the appellant's periods of compulsory treatment and detention in hospital. Whilst it might be difficult to accept the explanations given by somebody who was behaving rationally, that is not the standard by which this appellant could be judged. The thought processes behind what the appellant says he did and why are further indicative of his disordered and illogical thought processes, again consistent with the medical reports. It does also, I consider, cast further doubt on the reliability of the appellant as a narrator.
65. Similarly, whilst I can accept that the appellant might meet an older man with whom he began a relationship in Malawi, the explanation for how and when they met makes little sense. There is no proper explanation as to how he discovered the club or why he went in and it appears somewhat odd that the appellant was able to continue living at the family home after the age of 18 when he says he was discovered by his stepfather. In light of the difficulties in assessing what happened to the appellant in Malawi when it appears on Dr Burrows' diagnosis that the appellant was seriously ill, it is difficult to believe that this account is reliable or capable of bearing much weight. I do not, however, given the medical evidence, consider that it detracts from credibility.

66. It is difficult to attach weight to the account of the appellant's relationship with Ben. Although some details are given about him and where they met this appears to have been a casual relationship, nothing more is said about him. Whilst it does not detract from the appellant's credibility, I note that there has been no production of, for example, casual photographs of them taken.
67. Equally, in terms of the appellant's socialising with other gay people I accept that given his mental health he finds socialising difficult. He is on constant medication and has some insight into his illness and in any event, the degree to which he socialises with other gay people or has relationships is incidental to his orientation.
68. While I note that Dr Burrows records that the appellant identifies himself as gay, he says nothing more. That is perfectly proper.
69. Given the unreliability of the appellant as a narrator, it is important to consider other external evidence as to the core issue of his case, that is his sexual orientation. No submissions were made by the Home Office regarding the evidence of the sister or, for that matter, that of AG. On one issue they are consistent, that is, that the appellant is a gay man. I bear in mind that neither of them attended to give evidence before me but equally they had shown willingness to do so in the past in the case of AG. I bear in mind that they may wish to have helped the appellant particularly in the case of the sister who clearly feels that she has to support her brother. What I do note about her statement is that she does not confirm all the appellant's account in that she makes a distinction between what is clearly delusions in the appellant's account about what his family were seeking to do to him and his sexuality. It is also noticeable that she does display some degree of reticence and difficulty in writing about it, which in the context is understandable. In the circumstances I consider that weight can be given to her evidence.
70. I note that there is no evidence confirming the appellant's attendance at, for example, any gay society at his college. I do not know why that is so but equally it is unclear to me just how formal the discussions he attends are. I was asked to take on board his explanation that he does not socialise again for understandable reasons and I do so.
71. Finally, I have considered section 8 of the 2004 Act, but I am not satisfied that in all the circumstances of this case, given the appellant's health, that any material damage is caused to his credibility of the appellant.
72. Taking all of these factors into account and viewing the evidence as a whole, despite my concerns about the reliability of the appellant's evidence, and bearing in mind all the matters raised in the refusal letters, I am satisfied to the relevant standard that he is a gay man. I am satisfied also that he identifies as such. I do not, however, accept his account of how he was ill-treated in Malawi, not because, I do not accept that attempts were made to stop him leaving the country or that he may have been involved in a car crash or that he became ill, but because I do not accept his view of how and why these occurred. I do not accept that attempts were made to poison him

and it is perfectly understandable that family and others concerned for him would wish to stop him from running away given he was clearly mentally ill.

73. Having made these findings I must consider three steps as set out in **HJ (Iran)** [2010] UKSC 31 at [35]:

“(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

...

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

...”

74. The test is framed in terms of sexual orientation, and in whether the person in question is a gay man
75. I accept on the basis of Dr Burrows’ evidence and I note that he is also an honorary senior lecturer in psychiatry in Malawi, that it is unlikely that the appellant would be able to get the same level of support and to get the appropriate drug treatment as he obtains in the United Kingdom. That is not to say that this would engage Article 3 but it is I consider important to note the very real concern that the appellant is likely to become unwell again and that there have been significant difficulties in the past

with his medication and in controlling his schizophrenia. I note also that in the past his behaviour has involved sexual disinhibition.

76. I accept that in theory homosexuality and homosexual behaviour in Malawi is punishable at law. The maximum sentence appears to be fourteen years but there is no indication that sentences of that length are passed contrary to what the appellant appears to believe would happen to him. Whilst there was in some four to five years ago an indication of a change in attitudes, as can be seen from the Home Office COI of 31 October 2012 at paragraph 20.12, this did not result in the laws being repealed. Also of note is that a predecessor President Mutharika had in 2011 sharply objected to rights activists' calls to respect the rights of gays and lesbians, adopting former Zimbabwean President Robert Mugabe's stance against homosexuals saying that they are worse than dogs. The more recent report from March 2016 notes at paragraph 2.2.9 that despite statements made by the government that LGBT persons would not be prosecuted this did occur in May 2014 noting that there was a moratorium on arrests (2.2.10). That moratorium does, however, appear to have continued although it appears to have been lifted as can be seen from the Nyasa Times article dated 10 February 2016.
77. It is also apparent from paragraph 2.2.13 that there are societal stigma and discrimination with incidents ranging from physical assault, harassment in the own person's home and in accessing healthcare for gay people, it is also recorded there is no evidence of widespread harassment or violence against persons known or perceived to be LGBT [2.2.15]. It is, however, noticeable at paragraph 5.1.12 that gay rights movements have to be secretive. It is also noticeable from the US State Department Report for 2014 quoted at 6.1.6 that documented abuses included mob violence and police harassment directed towards gay or allegedly gay men. It also recorded at 6.1.8 that the Centre for Human Rights and Rehabilitation noted in its annual report that human rights defenders for LGBT rights were also a constant subject of ridicule and hate speech, also recording that apparent changes are minimal.
78. The articles from 76 Crimes records (and this is sourced) that Malawi News reported that a gay man Eric Sambisa was detained by police after being quoted in an article in the Malawi Times entitled "kill us or give us our rights". It is also recorded that the reporter was also detained and Mr Sambisa received death threats. Further articles from the source indicate the hostility and violence that people who are open about their sexuality receive. It is instructive also that the attitude of the police was to arrest the reporters and the gay men who spoke out.
79. In the circumstances, I am satisfied, contrary to the respondent's submissions and policy as set out in the country guidance notes, that those who are openly gay in Malawi are at risk of ill-treatment of sufficient severity to amount to persecution. Further, I am satisfied that the appellant would find it difficult given his mental health difficulties to be discreet that would put him at an enhanced risk. I am also satisfied that in any event, that the discretion he attempts is motivated out of fear. That is certainly the evidence of his sister and it is consistent with the background

information. I am also satisfied by the material that gay men are seen as a particular social group in Malawi.

80. Accordingly, for these reasons, I find that the applicant has demonstrated that he has a well-founded fear of persecution on return to Malawi on account of his membership of a particular social group, that is, gay men. I find consequently that his removal to Malawi would be in breach of the United Kingdom's obligations pursuant to the Refugee Convention and for the same reasons, Article 3 of the Human Rights Convention.
81. In the circumstances, it is unnecessary for me to consider whether his removal to Malawi would be in breach of the appellant's rights under the Article 3 of the Human Rights Convention on health grounds; or, under Article 8

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal on asylum grounds and on human rights grounds.

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 their 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.

Signed

Date 21 March 2018



Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09217/2015

THE IMMIGRATION ACTS

Heard at Glasgow
On 14 August 2017

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

E K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aslam, Solicitor

For the Respondent: Mr Matthews, Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge R Handley, promulgated on 22 November 2016, dismissing his appeal against the decision of the respondent made on 4 June 2015 to refuse him asylum and to remove him from the United Kingdom.

2. The appellant is a citizen of Malawi. His case is that he is a gay man and faces persecution on that account, both from his family and more generally on return to Malawi. He has also been diagnosed as having a schizoaffective disorder and, since his arrival in the United Kingdom in 2010 he has been hospitalised, and detained compulsorily under the Mental Health (Scotland) Act. It is also the appellant's case that he would not receive the appropriate treatment both in terms of medication and the support he currently receives from a community psychiatric nurse and other medical professionals if returned to Malawi.
3. The respondent's case is set out in the refusal letter. In summary, she did not accept the appellant's account of attempts and attacks on him in Malawi nor did she accept that he had suffered attacks from his family. She did not accept either that he is gay or that he would be at risk on return on that basis. She was not satisfied either that, despite his mental ill-health, as there would be adequate treatment available for him there albeit that it was not up to the standard available in the United Kingdom, it thus did not constitute a breach of his rights pursuant to Articles 3 of 8 of the Human Rights Convention.

Procedural History

4. The appeal first came before the First-tier Tribunal sitting in Glasgow on 23 March 2016. On a decision promulgated on 5 May 2016, First-tier Tribunal Judge Kempton allowed the appeal concluding that the appellant was gay and would face persecution for that reason on return to Malawi. The respondent appealed that decision to the Upper Tribunal and in a decision promulgated on 6 July 2016, Upper Tribunal Judge Macleman concluded that the decision of the First-tier Tribunal had involved the making of an error of law, set it aside, and remitted it to the First-tier Tribunal for a fresh decision on all issues.
5. When the matter came before Judge Handley on 18 October 2016 he concluded that the appellant is not a reliable witness and that his credibility had been damaged. The judge concluded that:-
 - (a) it was wholly implausible that the appellant had failed to make mention of any difficulties he had due to his sexuality during his asylum interview on 15 May 2012 [32]; and, had failed to mention in his asylum interview that his father wanted to kill him because he had discovered that he was gay, finding it implausible that he had not mentioned this in his interview [33];
 - (b) the appellant's credibility was further damaged by stating in his asylum interview that he had a partner who was female then stating that he had lied to the interviewer when he had referred to his partner as being female; that it was not plausible he was too embarrassed to discuss his sexuality [34];
 - (c) the appellant's account of the attacks which had happened to him in Malawi were implausible [35] to [37];
 - (d) the appellant's evidence at his second interview with regard to his sexuality was vague, unclear and lacking in plausibility;

- (e) it was implausible the appellant was unable to know the surname of “Ben” with whom he had had a relationship, noting that he had been unable to provide evidence of this;
 - (f) there were inconsistencies in the evidence given by the appellant and by AG with who it is said they are in a relationship [40], specifically the evidence as to when the relationship started, this casting further doubt on the reliability of the appellant’s evidence [40];
 - (g) the appellant suffers from mental health issues [45], noting the report of Dr Byres who had produced a report and also supplementary report following a meeting with the appellant on 13 October 2015, in which he confirmed that there was no evidence of a relapse psychiatric illness and no symptoms suggestive of psychosis [43], albeit that there would be a risk of relapse or psychosis were he to change his current antipsychotic medication;
 - (h) although the level of and standard of treatment available in Malawi would be of a lower standard than that from the United Kingdom, he was not satisfied that Article 3 was engaged.
6. The appellant sought permission to appeal on the grounds that the judge had erred;
- (a) in failing to factor into account the appellant’s mental health problems in assessing credibility;
 - (b) in failing to provide any or adequate reasons for rejecting the evidence of AG that he had an intimate sexual relationship with the appellant.

The hearing

7. I heard submissions from Mr Aslam on behalf of the appellant and Mr Matthews on behalf of the respondent.
8. Mr Aslam submitted that the judge’s findings with respect to the relationship between AG and the appellant focused on when the relationship had come into being, but failed to consider whether there had been intimacy between them, a material issue in assessing whether the appellant is gay. He submitted further that the judge’s conclusions at [38] were inadequate.
9. Mr Aslam submitted further that the judge had failed properly to engage with the medical evidence, it being important to the appellant’s case that he may have difficulty as a result of statements he might make about his sexuality if suffered a psychotic relapse. He asked me to note also Dr Byres’ indication of the risk of relapse.
10. Mr Matthews submitted that there was nothing in the medical evidence to suggest that the appellant had, at the time of the appeal, difficulties in recall or in cognition. He accepted that the dismissal of the appellant’s sexuality was at [38] short but that this was adequate.
11. Turning to the evidence of AG he submitted that it was clear from what the judge had recorded at [27] to [29] that there were clear inconsistencies in the evidence.

12. Mr Matthews submitted that there was nothing in the medical evidence to suggest the appellant was incapable of recall or that his recall of events had happened in Malawi was impaired. He stated that the medical evidence regarding the appellant's condition was such that it came nowhere near the high threshold to engage Article 3 or Article 8 on medical grounds.
13. In response, Mr Aslam submitted the judge should properly have addressed the nature of the appellant's condition although he did accept to an extent in response to my questions that Dr Byres' report did not expressly address the difficulties the appellant might have in giving evidence.
14. I deal with the grounds in turn.

The Evidence of AG

15. There are differences in the evidence relating first as to the circumstances in which, after meeting at Asda, that relations became intimate and second, as to when AG had learned of the appellant's immigration status. The appellant had [27] been unable to answer when he had last met AG prior to meeting him at Asda. He also said that they had gone from Asda to AG's house and the relationship had become a sexual one at that point. In contrast, AG at [30] said that it was about three days later when their relationship became intimate. There are also differences in the evidence regarding when AG had known of the appellant's immigration status but there is no apparent drawing of any inferences from that issue.
16. That said, whilst the judge does comment on the "appellant's evidence" he makes no direct comment on that of AG. Nor, for that matter, does he make any findings as to whether there was in fact any relationship, sexual or otherwise between AG and the appellant. Whilst I note Mr Matthews' submission that the "appellant's evidence" could be taken to refer to the appellant's evidence in its entirety, I find no support for that in the determination. Viewing the determination as a whole and the way it is constructed in the references to the appellant's credibility [34], I consider that the natural and proper inference is that the reference is to the oral and written evidence of the appellant, rather than the evidence put forward by him as a whole.
17. It therefore follows that there appears to be no consideration as to whether her rejected AG's evidence. That in turn goes to the question of whether is in fact an intimate or sexual relationship between AG and the appellant which is relevant as to the question of the appellant's sexual orientation.

The Medical Evidence

18. There is a difficulty with the medical evidence in that Dr Byres reports whilst providing a very detailed and helpful history of the appellant's condition, the difficulty there has been in getting the correct dosage and the appropriate drug to treat him, little is said about his current state, or the difficulties he may have in giving evidence. Whilst there are indicators that the appellant has some insight into his condition, equally it is not clear from the medical reports whether he considers or accepts that some of the things which he says may have occurred in Malawi were in fact delusions. Dr Byres appears to believe that the allegations particularly of being

poisoned are unlikely to be true given that there is a thread of the appellant believing that he is being poisoned when this is not the case. The appellant does, however, assert in his witness statement the truth of the events which occurred in Malawi.

19. There appears to be no indication in the medical report that the appellant has difficulty in recalling what occurred, other than the implicit suggestion that because the delusions from which he has suffered in the past, he believes things to have happened to him which did not in fact happen.
20. There are I consider difficulties with the appellant's account of what occurred in Malawi. Although he accepts in his witness statement that he has mental health conditions, nonetheless he maintains that the events did occur. While the judge did not accept that this events did not occur, he did not find them to be incredible. It is and it was open to him to conclude that the events was not plausible.
21. What the judge does not, however, appear to have considered is that the appellant may be a vulnerable individual. Whilst it is not a point raised in the submissions before me, I note that in AM (Afghanistan) v SSHD [2017] EWCA Civil 1123, that the Court of Appeal emphasised the importance of adhering to the guidance set out in the Practice Direction "First-tier and Upper Tribunal child, vulnerable adult and sensitive witnesses", issued by the Senior President on 30 October 2008 and the Joint Presidential Guidance Note Number 2 of 2010. These do not appear to have been addressed by the judge.
22. AM (Afghanistan) is relevant as to the need for the judge to have considered the medical report in assessing credibility, a point made by the appellant. While it is not suggested that the appellant lacks capacity, nonetheless there are strong indications in the medical evidence given that he has been sectioned on at least two occasions, that care should be taken in assessing his evidence, see AM in particular at [34].
23. Taking these factors into account, cumulatively I consider that the judge's assessment of the appellant's credibility was flawed, in that it failed to have proper regard to the appellant's mental ill-health. Taken together with failure to explain whether or not he accepted AG's evidence, I consider that the core findings of fact in this case are impugned and are unsafe. I therefore set the decision aside on the basis that the decision of the First-tier Tribunal did involve the making of an error of law.
24. Given the history of this case, I do not consider it appropriate that it should be remitted to the First-tier Tribunal.
25. Accordingly, I make the following Directions [omitted]

Signed

Date: 16 August 2017



Upper Tribunal Judge Rintoul