



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05528/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On: 22 May 2018

Decision Promulgated
On: 27 June 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

CA
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chaudhry, Broudie Jackson Canter Solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Benin born 1989. He appeals with permission the decision of the First-tier Tribunal (Judge Durance) to dismiss his appeal on protection grounds.

Anonymity Order

2. This appeal concerns a claim for international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the

Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

3. The basis of the Appellant’s claim for asylum was that he faces persecution in Benin for reasons of his membership of a particular social group. He asserted that he is homosexual, and that he faces societal discrimination and persecution for that reason, from which the state is unable or unwilling to protect him.
4. The Respondent refused asylum in a decision dated the 26th May 2017. Although it was accepted that gay men do constitute a ‘particular social group’ within the meaning of the 1951 Refugee Convention, it was not accepted that the Appellant faced a real risk of serious harm for the claimed reason. The Respondent found the Appellant’s account to be characterised by inconsistency and implausibility and accordingly rejected his claim to be gay, or to have suffered harm for that reason in the past. In the alternative the Respondent asserted that the government in Benin would be willing and able to provide the Appellant with a ‘sufficiency of protection’ such that the UK’s international obligations under the Refugee Convention were not engaged.
5. When the matter came before the First-tier Tribunal the Appellant gave evidence himself and called a number of witnesses to testify that to the best of their knowledge, the Appellant identified as a gay man, and that he lived an ‘openly’ gay lifestyle in this country. The Tribunal accepted, applying the lower standard of proof to the totality of this evidence, that the Appellant was in fact gay. The Tribunal was not however satisfied as to the other elements of the account, in particular the claim that the Appellant had been ‘outed’ on a number of occasions whilst living in Benin, and that he faced a danger from his father or anyone else there. Although the Tribunal was satisfied that the Appellant would face a degree of societal discrimination as a gay man, it found that he had managed to live openly in Benin in the past and that he would be able to do so again without fear of serious harm. Homosexuality is not illegal in Benin and there is an active LGBT community in Cotonou, the largest city. The Tribunal found that the absence of any “reported cases” the Appellant has not demonstrated there to be an objective risk. The appeal was accordingly dismissed.

6. The Appellant now appeals on the ground that the First-tier Tribunal erred in failing to take all of the relevant evidence into account. In particular it is alleged that:
- i) The citation of country background evidence in the determination is selective. The determination finds there to be no evidence of harm caused to gay men but there were reports of persecution in the bundles before the Tribunal;
 - ii) Similarly, in respect of state protection the Tribunal found this to be present on the basis of the Appellant's evidence that he had reported an assault to the police, without taking into account the further evidence that the police had done nothing to help him and had refused to lodge the complaint;
 - iii) In reaching its finding that the Appellant had previously lived an openly gay life in Benin the Tribunal had focused on the Appellant's answer at his asylum interview that his outing before his father had been a 'positive experience'. It is submitted that read in context the totality of the evidence was that it had been a negative experience, with people throwing stones and shouting at him, and that he was forced to spend long periods not leaving the house;
 - iv) The Tribunal misconstrued the evidence to find that the Appellant was living an 'out' life in Benin. On a contextual reading it is clear that he was not. For instance, when he was having sex on the beach it was late at night when nobody was around.
7. For the Respondent Mr Bates opposed the appeal on all grounds.

Discussion and Findings

8. The First-tier Tribunal begins its deliberations by assessing a series of incidents narrated by the Appellant. It first rejects the claim that he was expelled from school because he had kissed a boy, it being found to be inherently incredible that *inter alia* he would be expelled, and then enrol at a new school, without his parents knowing about it [§39]. Next it rejects the claim that he was discovered by his aunt to be having sex with a male cousin. The evidence was that this aunt had told the Appellant's father, who then told everyone about it. The First-tier Tribunal thought it unlikely that the Appellant's father would do this, given the stigma attached to same-sex relationships in West African society [§42]. Finally the Appellant's claim to have been assaulted by five men at his home address is rejected as making "no sense". The account was that the assailants had been sent there by a boyfriend's father. They punched the Appellant, ripped up his passport and told him that they would be back in a month. The Tribunal could not understand why they would do this: if they wanted to do him harm, they

could have done so there and then. Furthermore the police report, allegedly made by the Appellant after the incident, makes no mention of the five men, but simply makes a complaint about the boyfriend's father.

9. These three events were all incidents in which the Appellant is said to have been 'outed', and to have suffered discrimination or physical harm as a result. None of the Tribunal's adverse findings about these incidents are expressly challenged in the grounds. They form the backdrop to the Tribunal's conclusions on how the Appellant lived his life in Benin. The crux of the findings are however at paragraph 56. The Tribunal finds, having had regard to the country background material, that same-sex relationships are not illegal in Benin. The US State Department reports that there is a "degree of openness in the gay community" and that as of 2013 there were at least 9 LGBT organisations in the country. In the Appellant's hometown there is a weekly LGBT meeting, and there are "known bars, clubs and beaches where gay men can meet". By his own evidence the Appellant had engaged in online activity (ie gay dating sites) in a public cybercafé and had had sex on a local beach. He also claimed to have sought help from the police. Having noted all of these factors the Tribunal then says this:

"Ultimately, however, it is the appellant's own evidence which counters his assertion that to be gay in Benin places one at risk. At interview he made it clear that in 2004 he was outed by his father and that this was a positive experience for him as he did not need to "hide anymore". I find that comment in conjunction with the analysis of the country material leads me to conclude that (i) the appellant lived openly as a gay man in Benin and that ii) he has not suffered persecution and iii) there is no real likelihood or risk of ill treatment in the future so that iv) the appellant is not at risk applying Lord Rodger's analysis in HJ (Iran)"

10. The grounds take issue with that reasoning on two fronts.
11. First, it is submitted that the Tribunal did not take all of the Appellant's evidence into account. The Appellant did not say that being outed was a "positive experience". Although he did say, in response to Q116 of the asylum interview "I didn't mind anymore because I said to myself at least they know I don't have to hide anymore", he also said that his father refused to touch objects that he had touched, refused to pay for his college fees any longer, and that people in the community ostracised him and threw shoes at him.
12. Second, it is submitted that in reaching its findings the Tribunal fundamentally misinterpreted the country background material, omitting to weigh in the balance evidence that indicated that homosexuals face persecution, and prosecution, in Benin.
13. At paragraph 56 the Tribunal characterises the Appellant's evidence as being that when he was outed to his father it was a "positive experience". That was perhaps

an unfortunate turn of phrase. What the Appellant actually said that is that his father refused to speak with him any longer. People in the community would talk about him, and would not speak to him when he passed; sometimes they would throw shoes at him and he would spend a week or so in the house without going out. That evidence, and the Tribunal's findings, must however be viewed in context. The Appellant also said that after this 'outing' he spent a further 12 years in Benin, and managed to have a number of homosexual partners. He describes the treatment that he was subjected to as a teenager as "discrimination".

14. The grounds assert that the risk assessment was made on the basis of a 'selective' reading of the country reports and that in fact there was evidence of gay men suffering serious harm. There was evidence which indicated that homosexuality is unlawful in Benin. In support of this ground Mr Chaudhry took me to several pages in the country background material that was before the First-tier Tribunal.
15. Most of these references dealt with the question of legality. Unusually, it appears that there was some confusion as to whether homosexuality is in fact illegal. There were documents before the Tribunal, from a variety of sources, which gave conflicting information on the point. A 2006 report by the US State Department had indicated that it was unlawful under the 1996 Penal Code; Amnesty International had reported the same. Then in 2009 ILGA clarified that this information was wrong, and had emerged from a mistranslation of a book published by the University of Benin: it was the Togolese Penal Code that had been under discussion therein, not that of Benin. The US State Department now maintain that there are no laws criminalizing consensual homosexual sex, but the US Peace Corps continue to advise their staff that there are. A screenshot in the bundle from the website www.equaldex.com simultaneously indicates that homosexuality is illegal, and that the age of consent is equal with that for heterosexual intercourse. Mr Chaudhry is therefore correct to submit that the evidence did not all point one way. What is however also apparent is that the First-tier Tribunal understood that to be the case. At paragraphs 33-35 the determination summarises some of the evidence I have just touched upon, and at 56 squarely addresses the conflict. It concludes that in the absence of documented cases of prosecutions, it cannot be satisfied that homosexuality is illegal, or that gay men face legal sanction. It notes that the evidence of illegality arose from the mistranslation of the academic text. I am satisfied that it was entitled to find, given the evidence, that the Appellant had not discharged the burden of proof on this matter.
16. As to the objective material on risk of harm, Mr Chaudhry took me to two articles. The first was an article entitled "six members of Benin City gay gang arrested". As Mr Bates pointed out, this article was of no relevance to this appeal since it related to Benin City in Nigeria [at page 57, bundle 2]. The second was an extract from a report by the Immigration and Refugee Board of Canada, dated the 28th July 2015. Mr Chaudhry pointed to a passage which read that the president of the Hironnelle Club, LGBT organisation that meets every Monday in Cotonou, had written an online column in which he stated that he had met individuals who

had been subject to assault and who had been driven out of their homes. In extreme situations he had known individuals to take their own lives over their sexuality [at page 41, bundle 2]. Again, I am unable to conclude that the Tribunal ignored that evidence. It is apparent from the determination that the Tribunal expressly had regard to that passage: see paragraph 56. What the Tribunal did not do was set out the passage in its entirety, to include the reference to assault and suicide.

17. The question is therefore whether the Tribunal's decision could have been different, had it taken into account the Appellant's own evidence about the discrimination he suffered, and the column written by the (unnamed) President of the Hironnelle Club. Looking at the decision, and the evidence, as a whole, I am not satisfied that this is the case. The Tribunal had rejected, with cogent reasoning, the three centrepiece incidents of the Appellant's account. It did not accept that the Appellant had been expelled from school for homosexual activity, that his aunt had discovered him having sex with his cousin, or that five men had been sent to threaten and assault him by a partner's father. What the Tribunal was left with was its finding that the Appellant is a gay man who on his own evidence spent at least 12 years living in his home country after he realised that he was gay, 12 years in which he managed to conduct online and real-world relationships. The Tribunal set that evidence in the context provided by the country background material. That material indicated that whilst gay men do experience discrimination, and in some instances violence, there is a growing LGBT community, one that is active in the Appellant's home city, there are opportunities for gay men to socialise in known venues. The Appellant felt confident enough (by his own account) to approach the police and ask for help. On the basis of that evidence, the Tribunal was entitled to reach the conclusions that it did. I cannot be satisfied that the HJ test could have been made out had it weighed in the balance the evidence identified in the grounds, and omitted from the reasoning.

Decisions

18. The protection decision of the First-tier Tribunal contains no error of law and it is upheld.
19. There is an order for anonymity.



Upper Tribunal Judge Bruce
24th June 2018