



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number:  
AA/04056/2014

**THE IMMIGRATION ACTS**

**Heard at: Manchester**

**Determination  
Promulgated**

**On: 4<sup>th</sup> November 2014**

**On: 6<sup>th</sup> November 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**NCC**

**(anonymity direction made)**

Respondent

**For the Appellant: Mr Harrison, Senior Home Office Presenting Officer**

**For the Respondent: Mr Hussain, Counsel instructed by Duncan Lewis Solicitors**

**DETERMINATION AND REASONS**

1. The Respondent is a national of Trinidad and Tobago date of birth 29<sup>th</sup> December 1988. On the 17<sup>th</sup> July 2014 the First-tier Tribunal (Judge Lloyd-Smith) allowed his appeal against the Secretary of State's decision to remove him from the UK pursuant to s10 of the Immigration and Asylum Act 1999. The appeal was allowed on human rights and humanitarian protection grounds. The Secretary of State now has permission to appeal against that decision.
2. The Respondent's claim to international protection was that he is a gay man. He submitted that he had already suffered very serious harm in Trinidad and Tobago as a result of his membership of a

particular social group and that the state had failed to protect him. He further submitted that return would result in a breach of Article 3 ECHR and Article 8 because he is now HIV+ and would not be able to access the necessary medication.

3. The Secretary of State accepted that the Respondent is gay and that he is from Trinidad and Tobago. It was accepted that he is HIV+. It was further accepted that he had suffered serious harm including being carjacked and raped, being assaulted with a bottle, having his house broken into and homophobic graffiti sprayed on the wall. It was accepted that societal discrimination and harassment is an on-going problem. The Secretary of State was not however satisfied that all, or any, of these incidents could be attributed to the fact that the Appellant was gay. A further claim, that the Respondent had been in attendance at a New Years Eve party which was attacked by homophobic thugs, was rejected because of perceived inconsistencies in the evidence. Overall the Respondent was not satisfied that the level of discrimination and harassment suffered by homosexuals in Trinidad and Tobago was "such that it reached the level of persecution"; it was further found that the state would offer a sufficiency of protection.
4. The First-tier Tribunal begins its consideration by noting that much of what the Respondent says was accepted. In light of that acceptance, and the country background material, the Tribunal finds as fact that the carjacking and gang-rape of the Respondent in 2008 were because he is a gay man. It is further accepted that his house was broken into, vandalised and homophobic graffiti sprayed in 2009. Judge Lloyd-Smith notes that the Respondent's evidence is supported in large measure by the country background which notes that homosexuality is illegal and that society at large considers it to be "immoral and unnatural". She refers to the country guidance case of MB (inability to provide protection -JAM) Trinidad and Tobago CG [2010] UKUT 448 (IAC) and the concerns set out therein about the crisis in policing on the islands. In the context of this claim that evidence accords with the evidence of the Respondent himself that he received no support from law enforcement officials and the country background material that gay men are reluctant to report crimes because of a fear of harassment by the police and court officials. At paragraph 20 of the decision these findings are distilled into the following findings:

"there are substantial grounds for believing that harm would come to him on return to Trinidad. It seems apparent that the police are unable or unwilling to offer the required protection. The appellant would be forced to live a secret life living covertly and concealing his sexuality...it follows therefore that on return the appellant would face a real risk of suffering serious harm and consequently he is entitled to

humanitarian protection”

Having made those findings the appeal was allowed on human rights and humanitarian protection grounds.

5. In respect of asylum the determination says this at 19:

“Despite the above findings the objective material does not conclude that homosexuals in Trinidad will suffer from persecution. Therefore I cannot find that this appellant is a refugee...”

The appeal is dismissed on asylum grounds.

6. The Secretary of State now appeals on the grounds that the decision of the First-tier Tribunal was perverse. It is submitted that it cannot be correct to allow the appeal on humanitarian protection grounds if it could not be allowed on asylum grounds. The reasons given fall within the refugee convention.
7. In a bizarre twist the Rule 24 response prepared on behalf of the Respondent by his representatives actually asks me to uphold the decision on the grounds that “it was open to the Judge to find that the Appellant may not be at risk of persecution but would be at risk of serious harm (and) significant harm”

### **Error of Law**

8. The matters in issue before the First-tier Tribunal were narrow. Much of what the Respondent had said had already been accepted. The reasoning of the refusal letter was that there was no reason to think that the atrocious persecution already endured by the Respondent was in any way connected to his sexuality. That was frankly nonsensical in light of the accepted fact that people had broken into his house and sprayed homophobic messages on the wall and that when he was being raped the Respondent was being called “pretty boy”. Whilst some gay men may be able to live in Trinidad and Tobago and suffer no more than discrimination, harassment and the disapproval of society, it was clear from the facts that this was not the case for *this* gay man. The only matters in issue were whether the persecution was for a Convention Reason, and whether there would be a sufficiency of protection.
9. This is, for the most part, a perfectly lucid and clear determination. The First-tier Tribunal accepts that the persecution already endured was for reasons of the Respondent’s membership of a particular social group. There had been no sufficiency of protection for him in the past,

and there was no reason to conclude, on the evidence before the First-tier Tribunal, that this had changed. These findings are all well made and were open to the Judge on the evidence before her.

10. Paragraph 19 is something of an aberration from the rest of the reasoning. It may be that the First-tier Tribunal was referred to evidence showing that not all homosexuals in the country do face persecution, but that was not a basis upon which to dismiss this appeal on asylum grounds. Nor was it a basis upon which to allow it under the head of humanitarian protection.
11. I find that paragraph 19 contains an error of law. The fact that the country background material did not conclude that all homosexuals in Trinidad face persecution did not mean that the Tribunal was precluded from allowing the appeal on refugee grounds. That was because the Tribunal had already made clear findings of fact that *this* homosexual man had suffered Convention persecution in the recent past, and there had not been a sufficiency of protection *for him*. There was on the evidence no reason to suppose that such a sufficiency of protection would be forthcoming now or in the future. On the facts as found by the First-tier Tribunal he is a refugee. If he is a refugee, he is not entitled to humanitarian protection.
12. In respect of the decision to allow the appeal on human rights grounds, this has not been challenged by the Secretary of State. That decision is upheld.

## **Decisions**

13. The decision of the First-tier Tribunal contains an error of law such that it must be set aside.
14. I re-make the decision in the following terms:  
  
“The appeal is allowed on asylum grounds.  
  
The Appellant is not entitled to humanitarian protection because he is a refugee.  
  
The appeal is allowed on human rights grounds”.
15. In view of the sensitive nature of the evidence in this case, in particular that the Appellant is a survivor of sexual violence, I make a direction for anonymity 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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”.

Deputy Upper Tribunal Judge Bruce  
4<sup>th</sup> November

2014