



IAC-FH-AR-V2

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

Appeal Number: AA/04411/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 October 2015**

**Decision & Reasons Promulgated
On 14 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

M M

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Radford, Counsel instructed by Wilson Solicitors LLP

For the Respondent: Mr S Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Mauritius, date of birth 6 November 1989, appealed against the Respondent's decision dated 16 June 2014 to make removal directions following the refusal of an asylum/human rights claim. A form IS151A had been served on 22 August 2011.
2. The appeal against that decision [D] came before First-tier Tribunal Judge Davda who on 16 June 2015 dismissed the appeal on Refugee Convention, Humanitarian Protection and human rights grounds. Permission to appeal

that decision was given by FtTJ Pooler on 10 July 2015. The Respondent provided a Rule 24 response on 21 July 2015.

3. The submissions made to the judge covered a wide range of issues and amounted to some 29 typed pages. The judge therefore could have been left in no doubt what the Appellant's representative was arguing on the various grounds. The grounds to the First-tier Tribunal set out the basis of the Appellant's claim and the grounds on which it was said he was at risk on return and/or the effects of removal both in terms of paragraph 276ADE of the Immigration Rules and Article 8 outside of the Rules. Further submissions were made concerning the Appellant's mental health and the impact of removal upon him.
4. The judge had the opportunity to hear the Appellant's evidence and that of his brother. The Appellant and his brother claimed to be homosexuals and at risk on return to Mauritius because of their sexuality.
5. The Appellant gave a longish history, repeated to others, concerning the abuse and ill-treatment he received from society in general, his father and cousin when he was a child. In addition the Appellant claimed that he was the object of derision from people generally and cited a number of examples of difficulties that he had faced. Those included his general private life, his early adult life and the difficulties he had faced at work through his sexuality. In essence the Appellant asserted that he could not live openly as he could in the United Kingdom but were he to do so he could not manage that in Mauritius because of societal prejudice against him and an absence of domestic protection.
6. The Appellant in setting out his asylum claim said that societal discrimination was so great that he could not live a reasonable life and would be in effect forced into hiding but more importantly he could not live a reasonable life there as a homosexual. In addition it was said that Mauritius being a relatively small island was not big enough for him internally to relocate.
7. It was said that the judge made adverse credibility findings concerning the Appellant's evidence. For example [D61] the judge said,

“... I take into account all the circumstances in which the Appellant has provided his various accounts. While his core account of being a homosexual has been accepted, however taken together I have found the account at times selective, enhanced and inconsistent. I note: ...”
8. It could be that [D62] was intended to follow [D61] as to what the judge “notes” but if so it is not easy to see what was noted by way of examples of selective presentation of evidence embroidering or enhancing evidence or giving inconsistent evidence. Paragraph [D 62] does not in any obvious sense clarify the criticism made of the Appellant's evidence nor, it is fair to say do successive paragraphs [D 63, 64, 65, 66 and 67]. Whilst at [D 62] the Judge described the Appellant's evidence was at odds with his brother's evidence: It may be an unclear aspect but its materiality needed to be set in context of the evidence provided as a whole.

9. At [D 65] of the decision the judge was entitled to reach a view on the late claim for protection insofar as it was pertinent to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The relevance of [D 66] to the decision and the Appellant failing to mention he had a sister was really of little assistance in assessing credibility.
10. It would seem, and it was not contradicted, that aspects of the judge's concerns were not raised by the Respondent's representatives nor had they been raised in the Reasons for Refusal Letter nor were they raised by the judge with the Appellant and/or the Appellant's brother, nor were they raised with parties at the point of making closing submissions. The grounds generally attack these criticisms in the judge's decision: I was still in the dark as to what response might be made by the Appellant to such points. Thus it was difficult to accurately assess the weight such criticisms have in terms of the point being taken as a procedural error of law. However having considered the matter it seemed to me that the judge's decision made it difficult to tell what was accepted of the Appellant's account of life in Mauritius and growing up there for him and his brother.
11. When the judge found that an account given was not entirely truthful it also fell to the Judge to explain whether that aspect or aspects which are untruthful undermined the centre piece of the claim. The judge stated:-
[D65]
 "... I find there are matters which, even after making allowances for trauma, distress, call into question the Appellant's account in that the events and people he has sought to describe during his life before coming to the UK is entirely truthful. It is also clear the appellant the appellant when he sought to come to the UK for his studies 'ever intended to leave the UK'."
12. The relevance of such doubts or what these matters were in terms of the assessment of risk on return was even more difficult to assess in the light of the decision read as a whole.
13. I find that the judge's decision perhaps should have considered not only whether or not, when sodomy was an illegal act or the Appellant was at risk of criminal proceedings but also more particularly on societal discrimination and the claims of risk from family and people in general, the real risk of being ill-treated, whether internal relocation was a reasonable option let alone the extent to which there was recourse to domestic protection.
14. I find the Original Tribunal's decision cannot stand and the matter of assessment of risk on return needs to be further addressed. There can be no confidence that the judge's assessment of risk reflects the evidence as to the actual difficulties the Appellant faced let alone how that sat in the context of the background evidence.
15. It is further arguable that the assessment of events on return tainted the judge's conclusions in relation to that paragraphs D 62-76 that might have been made, had the judge done so, in assessing the issue of return.

16. The grounds illustrate that there could be a different result that might have arisen on the issue of safety of return and the ability of a gay man to live his life without concealment through fear of persecution and societal ill-treatment.
17. Similarly the judge's exercise of considering proportionality with reference to Sections 117A to D of the 2002 Nationality, Immigration and Asylum Act failed to weigh up a number of factors. First, the Appellant spoke English. Second, the Appellant was financially independent. Third, the Appellant had worked in the UK when allowed to do so. Fourth, the Appellant whilst having offers to work had been unable to do so because of his immigration status. Fifth the Appellant was integrated into British society. Sixth, the Appellant was not a burden on the taxpayer and had through his substantial voluntary work been a benefit to this society. Seventh, the Appellant had not developed his relationship after he was in the UK illegally. Eighth the Appellant had never been in the United Kingdom illegally and his status was not precarious save insofar as the Respondent took some three years to determine the Appellant's claim. Thus the passage of time and length of uncertainty as to his final status was not a direct fault of the Appellant's. Similarly the judge had failed to consider or at least set out in his consideration the voluntary work that the Appellant had been carrying out both in terms of work to promote LGBT rights to help the blind and he was in need of help with signing language as well as working for a leading HIV community based charity.
18. It should not be thought that these matters and such others as are raised demonstrate the appeal was likely to succeed but it seemed to me when there was a lack of clear reasons for doubting the Appellant's credibility, his sexuality should not be held against him in terms of assessing the worth of his actions whilst in the United Kingdom or the implications for his mental/physical health on return.
19. I generally doubt whether the Appellant gets close to establishing a claim not to be removed on medical grounds. In the light of the above I am satisfied the Original Tribunal made a number of errors of law. The Original Tribunal's decision cannot stand and the matter will have to be remade in the First-tier Tribunal.

Directions

- (1) Re-list for hearing three hours. Not before F-t T J Davda
- (2) No interpreter required.
- (3) Any further evidence relating to the Article 8 claim should be served not less than seven working days before any further hearing.
- (4) No findings of fact to stand save that the Appellant is accepted as being homosexual.

No anonymity direction is made.

Signed

Date 2 December 2015

Deputy Upper Tribunal Judge Davey.

P.S. I regret promulgation has been delayed because the case file was mis-located.