



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03631/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On the 7th April 2016

Decision & Reasons Promulgated
On the 15th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

[A.G.]
(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bandegani (Counsel)

For the Respondent: Miss Fijiwala (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Sweeney promulgated on the 10th August 2015 in which he refused the Appellant's claim for protection on asylum grounds.
2. Within the decision of First-tier Tribunal Judge Sweeney it was recorded how the Appellant is a national of Algeria who was born on the [] 1979. His mother, father, five sisters and one brother all live in Algeria and he has one sister who lives in France. The Appellant's case is that he is gay

and he would be killed/persecuted by his own family by reason of his sexuality and persecuted by the Algerian state and society as a result of his homosexuality.

3. Within the decision of First-tier Tribunal Judge Sweeney he summarised the Appellant's case at [19] of his decision. He recorded how the Appellant's father was a strict disciplinarian who beat his children, including the Appellant and expressed shame at the Appellant's manner of speaking and effeminate manner. The Appellant says that whilst at school at the age of just 11, a 35 year old man named Samir from the same neighbourhood pretended to be the Appellant's cousin and provided excuses to the school as to why the Appellant did not attend at school and that Samir sexually assaulted the Appellant several times including having sexual intercourse with him. The Appellant says at the age of 15 he discovered he was attracted to men and did not like women, but that he kept his sexuality secret until aged 19 or 20 and that two people in his home area had been murdered for having same sex relationships. He said that he was frightened that his family would kill him if they found out he was gay. The Appellant worked at the local bakery from 2000 until 2010. Within his summary of the Appellant's case, Judge Sweeney says that the Appellant's case is that the head chef at the bakery was having a sexual relationship with a fellow chef called Saleh and that on the day he started at the bakery the Appellant revealed to Saleh that he was gay and that a sexual relationship subsequently developed between the Appellant and Saleh and that the Appellant and Saleh had sexual intercourse in the bakery, when the head chef would make videos of them.
4. Judge Sweeney stated that the Appellant's claim was that Saleh had ceased his sexual relationship with the head chef, which resulted in the head chef becoming jealous of the Appellant's relationship with Saleh and that in October 2010 the head chef told the bakery boss of the Appellant's relationship with Saleh and the Appellant was suspended from work and the Appellant was afraid that his father would find out

the reason why he had been suspended as his father knew the bakery boss. It was said that the head chef had distributed videos that he had taken of the Appellant and Saleh throughout the neighbourhood, as a result of which the Appellant was beaten by his cousin, stabbed in the leg by his brother and stoned by neighbours, such that the Appellant fled Algeria.

5. There was no presenting officer at the appeal before First-tier Tribunal Judge Sweeney, but Judge Sweeney went on within his decision to summarise how the Appellant came to the UK, the contents of the refusal letter dated the 20th February 2015, and the submissions made by Ms Davies on behalf of the Appellant and the skeleton argument that had been produced on his behalf before then going on to give his conclusions and reasoning between paragraph [39] and [90] of his decision.
6. Judge Sweeney rejected the Appellant's account of being gay and did not accept the Appellant had been attacked by his brother, his cousin and his neighbours as claimed. Judge Sweeney did not accept that the Appellant would have revealed his sexuality to Saleh in circumstances where the Appellant barely knew Saleh and in circumstances where he had little opportunity to assess Saleh's trustworthiness, given the risks to the Appellant if Saleh were to betray the Appellant's confidence. Although the Judge noted that the letter from Dr Pickard dated the 9th February 2015 in respect of the 3 centimetre laceration on the Appellant's upper right thigh was consistent with him having been attacked with a knife in Algeria, that report was not Istanbul Protocol compliant and that whilst consistent with his account of having been attacked by his brother, it was also consistent with other possible explanations.
7. The Judge went on to weigh, in balancing and assessing the Appellant's credibility, the evidence given by the Appellant regarding his journey to the UK. He did not find that the evidence in that regard was consistent

and gave full reasons for his finding in respect of inconsistency regarding the account given by the Appellant as to how he came to the UK between [64] and [71] and how, for instance, the Appellant's account of living in Dublin was inconsistent with his present evidence and further, how in the screening interview the Appellant had said that he had left Algeria at the end of November 2010 and came by boat to Ireland where he hid in the back of a lorry and got off the boat in Dublin, the Judge found was inconsistent with the evidence of the Appellant at paragraph 51 of his witness statement, where he spoke of having travelled through Turkey and Greece before flying from Greece to Belgium and then travelling from Belgium to France, before then going back to Belgium, before flying to Dublin, before then taking a bus to Belfast and ultimately a ferry to Scotland.

8. First-tier Tribunal Judge Sweeney went on in any event, to find that even on the basis that he was wrong and the Appellant was gay, in light of the case of OO (gay men: risk) Algeria [2013] UKUT 00063, that it was possible for gay men to live openly in Algeria and that living openly did not attract a risk of serious harm, such that he found that the Appellant would be able to safely internally relocate within Algeria. The Appellant's appeal was therefore dismissed on asylum grounds, on humanitarian protection grounds and on Human Rights grounds.
9. The Appellant has sought to appeal that decision to the Upper Tribunal.
10. Within the Grounds of Appeal it is argued that the Judge has incorrectly decided that the Appellant was not a homosexual and as such made an error of law.
11. Permission to appeal was granted by First-tier Tribunal Judge Simpson on the 22nd November 2015, on the grounds that it was arguable that the Judge in not accepting the Appellant's assertion that he was gay, had failed to give any adequate reasons for that assessment and the fact that the Appellant had not participated in any homosexual activity in the past four and a half years since his arrival in the United Kingdom

did not lead to the inevitable conclusion that he was not homosexual or that he would not be perceived as one in his country of origin.

12. Within the Rule 24 reply from the Respondent dated the 8th December 2015 it was argued that the Judge had properly directed himself and had given several reasons as to why he did not accept the Appellant's account that he was gay and that those reasons were cogent and that no material error is disclosed.
13. It was on that basis that the appeal came before me in the Upper Tribunal. Mr Bandegani on behalf of the Appellant argued that the error made by First-tier Tribunal Judge Sweeney was apparent from the face of the determination. He argued that the Judge had proceeded on a mistaken basis of fact when finding that the Appellant had disclosed to Saleh that he was gay on the first day that he met him and that that was not an accurate recording of the evidence given by the Appellant in his statement and that nowhere within his interview or in the screening interview was that said. Mr Bandegani argued that there was a lack of clarity regarding the facts as to when the Appellant had revealed he was gay to Saleh.
14. Mr Bandegani secondly argued that at paragraph 25 of the Appellant's witness statement, the Appellant had given evidence regarding how it was Saleh who had asked if the Appellant was gay and that Saleh had a tattoo of a butterfly which would be taboo in Algeria and that he spoke softly and that the Appellant had said that when Mukhtar went to sleep Saleh had started flirting with him with his hands and stroking the Appellant's private parts and pressed the Appellant to say if he was gay and it was only then that he had confessed that he was gay. Saleh had made him feel at ease. He argued that the Judge had not considered the evidence of the Appellant as to why he had revealed his sexuality and that there was inadequate reasoning in this regard. He argued that if the material evidence had not been considered, there was a material error of law.

15. In respect of the alternative finding made by First-tier Tribunal Judge Sweeney, regarding the ability of the Appellant to safely internally relocate within Algeria, he argued that the Judge only dealt with the risk from the state and had not dealt with the evidence regarding the risk that the Appellant would face from his own immediate family and extended family, and as to the reasonableness of him internally relocating within Algeria.
16. Mr Fijiwala on behalf of the Respondent argued that there were no material errors in the decision. She argued that the grant of permission to appeal was misconceived given the fact that the Appellant had not been involved in a homosexual relationship was only one strand of the decision. She argued that the Judge was entitled to find that the Appellant had revealed his sexuality to Saleh on the first very day that he was working given the evidence contained within the Appellant's statement and that the Judge was entitled to find that the Appellant would not have revealed his sexuality to Saleh so quickly. However, she argued that this was not the only factor that was considered by the Judge in considering the Appellant's credibility, in that he had also considered the credibility of the Appellant's account as to how he came to the UK and the expert evidence and that taking all of the evidence into consideration in the round, the Judge had properly found that the Appellant was not homosexual and that was a finding open to him on the evidence. She further argued that the Judge had considered whether or not the Appellant would be at risk from the State, if he were to relocate within Algeria and had made findings that the Appellant would be able to safely relocate within Algeria.
17. In his submissions in reply Mr Bandegani argued that the Judge had not dealt with the question regarding whether or not the Appellant would be at risk from his family if internally relocating and as to the reasonableness of such internal relocation. He argued that the Judge's finding that the Appellant would not have disclosed his sexuality so quickly and that that was inherently implausible was wrong in law and

that the evidence should be considered holistically and that the finding of the Judge that the Appellant's account of having disclosed his sexuality was entirely implausible was an extraordinary finding. He argued that the Judge had not given adequate reasons and had not dealt with the evidence with specificity.

My Findings on Error of Law and Materiality

18. Within his decision First-tier Tribunal Judge Sweeney at [39] stated that he had given very careful consideration to all of the evidence put before him, and he again bore in mind that he had to be careful when considering the inherent probability of the Appellant's actions given that he came from a country which had traditions, customs and practices which are very different from those in the UK at [40]. The Judge further bore in mind the difficulty in reaching a decision on someone's sexual identity and fully took account of the low standard of proof applicable in asylum claims.
19. Although it is argued on behalf of the Appellant by Mr Bandegani that the Judge was wrong to find that the Appellant's evidence was that he had disclosed his sexuality to Saleh on the very first day that he started to work at the bakery and that the Appellant's evidence was unclear in this regard, I do not accept that submission. At paragraph 23 of the Appellant's statement, he stated how on his first day he had been introduced to the owner of the bakery and the head chef and the sous chef Saleh. At paragraph 25 of his statement the Appellant stated:

"Saleh and I got on well from the beginning. He started asking me if I was gay and I was shy and afraid so at first I didn't respond. I noticed that Saleh had a tattoo on his lower back of a butterfly which was considered taboo in Islam and he was softly spoken like me. That night when Mukhtar went to sleep Saleh started talking to me and he was flirting with his hands, he told me to tell the truth and asked me whether I was gay or not. He stroked my private parts because he was sure that I was gay and I confessed. He did everything he could to make me feel at ease and it was in the middle of the night, just us two in the bakery. He was so handsome and so confident in his sexuality, I was completely in awe of him and attracted to him from the moment we met. He was the first to smile at me and he started to talk to me as though we had been friends for years. Up until this moment I had never dreamed that I would be able to talk about my sexuality so openly in Algeria. He made me

forget about all of my troubles and all of the nights that I would cry myself to sleep. The feeling of relief that I experienced in coming out was comparable to finding water in the desert. Saleh understood that it was not easy being gay and he knew the risks of being gay in Algerian society. He swore that what we talked about that night would not be disclosed to anybody, I believed him because he was gay too, it would have harmed him as well as me to have told anybody. I felt so liberated after that first night.”

20. Given the evidence of the Appellant in this regard in his statement and how at paragraph 23 he referred to “on the first day” being introduced to the owner of the bakery, the head chef and Saleh, and how at 25 he referred to “that night” as being the night when he confessed to being gay, I do find that that was a finding open to the First-tier Tribunal Judge on the evidence presented. His finding in this regard is neither irrational nor perverse, and I do bear in mind that Mr Bandegani was not saying that the Judge had got the evidence wrong in that regard, he was simply asserting that the evidence was unclear. The reference to “that night” at paragraph 25 of the Appellant’s statement appears to lead on from the initial meeting at paragraph 23 and is referring to the same day/night. I do not find that the evidence was unclear and the finding of the Judge that the Appellant had disclosed his sexuality on the first night was perfectly open to him.
21. Further, in respect of the argument from Mr Bandegani that the Judge has not taken account of the evidence of the Appellant at paragraph 25 of his statement, as to the reasons why he felt able to disclose his sexuality to Saleh so quickly, it is not a necessity for an Immigration Judge to recite every single piece of evidence that he has taken into account, or to fully set out the contents of the Appellant’s witness statement. The Judge has indicated within his decision that he has taken account of the contents of the Appellant’s witness statement, and the Judge has clearly taken account of the Appellant’s evidence given that at [52] of the decision, the Judge recorded that the Appellant suggests in his witness statement that he felt able to confide in Saleh as

Saleh was forthcoming and comfortable with his sexuality. The Appellant believed that Saleh would keep details of the Appellant's sexuality confidential, as Saleh would also have been in danger had he disclosed details of their conversation. The Judge properly noted how the Appellant's own evidence was that he had previously concealed his sexuality due to fears that he would be killed by his own family were his sexuality to become known and that other people in the area had been murdered having engaged in same sex relationships at [51].

22. The Judge went on having considered the Appellant's account to reject that account and to find that the Appellant would not have disclosed his sexuality to a man that he did not know on the very first day that he met them.
23. Although it is argued by Mr Bandegani that it was Saleh who took the lead in the relationship, the Judge has clearly considered the evidence in this regard and not accepted, given the risks were it to become known that the Appellant was gay, that the Appellant would have revealed his sexuality on that night. Again, I find that was a finding that was perfectly open to the Judge on the evidence before him. It is clear from reading the decision that the Judge has taken account of the Appellant's witness statement in this regard, but it is simply that he did not believe the Appellant's account. The Judge has also given reasons which are adequate and sufficient for rejecting the Appellant's account in this regard, given the risks that the Appellant would face were his sexuality to become known and the fact that he did not know Saleh and had not had time to build up trust in him. The arguments raised by Mr Bandegani in this regard simply amount to disagreement with the decision. The weight to be attached to the evidence, I note and remind myself is a matter for the First-tier Tribunal Judge, unless it can be said that the findings were either irrational or perverse. The Judge's findings in this regard were not irrational, nor perverse.

24. Again, when assessing credibility, as correctly stated by Miss Fijiwala, the Judge has not simply relied upon the fact that the Appellant disclosed his sexuality to Saleh on the first day they met, but also took account of the fact that the evidence from Dr Pickard was not Istanbul Protocol compliant and significantly, in assessing the Appellant's credibility, the Judge took into consideration the Appellant's account of his journey to the UK and the discrepancies in that account between [64] and [71] and has therefore considered the evidence in the round, before making his findings regarding sexuality. I find that Judge Sweeney has properly considered all of the evidence in that regard. These findings were perfectly open to the Judge. In my judgment, there was no material error in this regard.
25. Although it is argued by Mr Bandegani that the Judge has failed to deal with the specificity of the Appellant's account, the Judge has taken account of the evidence of the Appellant in this regard, and has given reasons for rejecting that evidence. The Judge does not need to specify exactly everything stated by the Appellant in his witness statement, if his reasons for rejecting the Appellant's account are open to him, which these were.
26. It has been stated in the latest Country Guidance case of OO (gay men) Algeria CG [2016] UKUT 00065 (IAC) at paragraph 6 of the headnote that:
- “For these reasons, a gay man from Algeria would be entitled to be recognised as a refugee only if he shows that, due to his personal circumstances, it would be unreasonable and unduly harsh to expect him to relocate within Algeria to avoid persecution from family members, or because he has a particular characteristic that might, unusually and contrary to what is generally to be expected, give rise to a risk of attracting disapproval at the highest level of the possible range of adverse responses from those seeking to express their disapproval of the fact of his sexual orientation.”.

27. This Country Guidance case post-dated the decision of First-tier Tribunal Judge Sweeney. Judge Sweeney properly took account of the then Country Guidance case that was applicable at the time of OO (gay men: risk) Algeria CG [2013] UKUT 00063, in which it was established that the evidence at that time did not suggest that as a general matter, societal and familial disapproval of male gay identity in Algeria reached levels that were persecutory within the meaning of Article 9 of the Qualification Directive or which otherwise reached the threshold required for protection under Article 15(b) of that Directive or Article 3 of the ECHR and that the admittedly small number of gay men who live openly in Algeria do not, in general, suffer serious harm amounting to persecution and that if someone was able to establish that their behaviour was shaped by more than disapproval amounting to serious harm, they may be able to establish a need for protection.
28. Although I find that First-tier Tribunal Judge Sweeney did err in not considering whether it would be either unreasonable or unduly harsh to expect the Appellant to internally relocate within Algeria to avoid persecution from his family members, and has simply considered that he would not be at risk from the state and therefore able to internally relocate, given that Judge Sweeney did not accept that the Appellant was gay, the question of internal relocation is not relevant in any event. The findings on internal relocation were only in the event that Judge Sweeney was wrong in his findings regarding the Appellant not being gay. For the reasons given above, in my judgment the findings of First-tier Tribunal Judge Sweeney in respect of the issue as to whether the Appellant was gay were open to him, and that therefore any error that he made in respect of how he dealt with the question of internal relocation does not amount to a material error, given that the Appellant will not need to internally relocate given the finding that he is not gay, which finding was sustainable on the evidence.
29. In such circumstances the decision of First-tier Tribunal Judge Sweeney does not contain a material error of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Sweeney does not contain a material error of law and is maintained.

Signed

Rob McGinty

Deputy Judge of the Upper Tribunal McGinty

Dated 8th April 2016