



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00608/2016

THE IMMIGRATION ACTS

Heard at Birmingham.
On 26th July 2018

Decision & Reasons Promulgated
On 9th August 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

KD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bradshaw, Counsel instructed on behalf of the Appellant
For the Respondent: Ms H. Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the Gambia.
2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 28th September 2017, dismissed his claim for asylum and humanitarian protection and on human rights grounds.
3. The Appellant's immigration history and factual background is set out within the determination at paragraphs 7-8, and in the papers before the Tribunal, namely, that the Appellant arrived in the United Kingdom on 5 June 2015 and after his use of a false passport was uncovered he claimed asylum on the basis of his membership of a particular social group on the basis of his perceived sexual orientation.

4. The judge summarised his factual claim at paragraph 8. The Appellant had a female partner and two children and when earning money through "Bomsin", showing tourists around, he was paid by a man called C to engage in homosexual acts which continued for a number of years meeting at a hotel where the man had stayed. In 2015 people in the locality found out about C's sexuality and warned the Appellant to be careful. However the meetings continued and in May 2015 the Appellant's wife told him that the police were looking for him with the help of a friend who worked for the government the Appellant left the country using a Swedish passport with a Spanish residence permit which he used to travel to the UK through Spain. The Appellant claimed that the authorities were looking for him and that he had been circulated as a wanted person for his activity.
5. The Respondent in a decision taken on 12 January 2016 refused his protection claim. The full reasons are given in the decision letter. The Appellant's identity and nationality were accepted but it was not accepted that he was gay or would be perceived as such by the authorities in Gambia. His account was that he had engaged in homosexual activity to earn money and that this would put him at risk of harm from the authorities on return.
6. Her appeal came before the FTT on the 13th September 2017 and in a decision promulgated on the 28th September 2017 his appeal was dismissed.
7. The judge set out his findings and conclusions at paragraphs 17 – 27. It is plain from reading the findings of fact and assessment of the evidence that the judge did not accept his factual claim as credible. Importantly, the judge did state at [17] that if it was accepted to the lower standard that his account was reliable then the Appellant would be perceived as being homosexual and therefore would be at risk on return and succeed in his claim.
8. The findings of fact made can be summarised as follows:
 - (1) the judge accepted that they may be the sale of sexual services to foreigners in Gambia by those engaged in Bomsin. However the judge took into account the Appellant's attitude and religious background and his reluctance to engage with C, but found that it was "surprising that on his own account the Appellant overcame his inhibitions as quickly as he did and he then engage regularly over a number of years in an activity which he says he did not like and which carried significant risks in terms of the likely reaction of others and the authorities" [18].
 - (2) The judge observing that the report at page 28, "an individual who is homosexual is likely to suffer serious consequences at the hands of traditional authorities and fellow members of society" was not consistent with the Appellant's account that he was instead warned to be careful and given the opportunity to desist. The judge found "it is difficult to reconcile the warning that he had with the background evidence relating to attitudes towards homosexuals in Gambia and the likely reaction to such activities being suspected." [19].

- (3) The judge found that as the Appellant met C at a hotel and the staff would be aware of the nature of Bomsin and that they too would share the same prejudices towards homosexuality set out in the report, that it was “difficult to believe that the repeated meeting of the men in the hotel would have gone unnoticed without comment in the context of a hostile attitude set out in the evidence.” The judge therefore rejected his account that the meetings would have continued as claimed without challenge from the hotel staff [20].
 - (4) The judge considered the wanted poster of 15 July 2015 and the original produced at the hearing. The judge observed at [22] that the expert’s opinion that it was genuine as it was sufficiently similar to other wanted posters he had encountered in his work and that there was no specific format for such items. However at [23 – 24) the judge set out his concerns about the documents produced; the heading on the first two posters are different from that of 15 July poster; on that document was not clear why in the date of birth the year should appear in bold type in contrast the day and month; the expert had referred to the use of templates from Interpol and the Swiss security firm and the judge concluded that he would have expected there to be more consistency between the documents. The judge noted that the Appellant’s first name spelt differently on each document and the format was wrong. Consequently the judge did not accept that the wanted posters were “reliable documents” and this undermined his credibility [24].
 - (5) There was no supporting evidence from his lawyer, his wife or friend [25]
 - (6) At paragraph 27 the judge set out a summary of his conclusions and rejected his account as implausible.
9. Thus the judge concluded that he was not satisfied that it had been established to the low standard that he would face a real risk of persecution or serious harm in the Gambia and dismissed his appeal.
 10. The Appellant sought permission to appeal that decision and permission was originally refused by FTTJ Dineen but on renewal was granted by Upper Tribunal Judge Lindsley on the 12th March 2018.
 11. Thus the appeal came before the Upper Tribunal. Mr Bradshaw, who had appeared before the FTTJ again appeared on behalf of the Appellant. He relied upon the written grounds and went through those grounds in his oral submissions as set out in the record of proceedings.
 12. Miss Aboni on behalf of the Respondent relied upon the Rule 24 response in which it was submitted that the judge directed himself appropriately and was entitled for the reasons given, to find that the account lacked credibility. In her oral submissions she accepted that the decision was relatively brief but that the judge made adequate findings of fact to reach the overall conclusion that his account was lacking in plausibility. As to the wanted posters, whilst the expert was of the opinion that they were genuine it was on the basis that they were sufficiently similar. However she

submitted that it was open to the judge to consider the format of the documents on the basis of Tanveer Ahmed and that the judge gave adequate consideration that they were not reliable or supportive of the Appellant's case. She submitted those findings were open to him and gave sufficient reason to reject the claim made. She further submitted that much of the expert report was generalised information and did not establish the Appellant's circumstances. She submitted that it was open to the judge depart from the experts opinion and that the assessment of the documents was adequate.

13. I have considered with care the submissions made by each of the advocates. There appears to be no dispute that if the Appellant was perceived to be gay that he would be at risk on return in light of the country materials pertaining to the Gambia. That was recognised by the judge at [17] who identified that the real issue was whether in fact the Appellant had given a credible factual account as to the circumstances in Gambia which had led to him leaving that country.
14. The thrust of the submissions made on behalf of the Appellant relates to the credibility findings made by the judge and in essence, he submits that the findings made were "speculative" and did not take account of the context in which the evidence was given.
15. By way of reply Ms Aboni did not seek to engage with the specific findings made but had general submission was at the findings of the made by the judge open to him on the evidence and that he had read the written documentation and heard the oral evidence and was entitled to reach the conclusion that the account given was not credible.
16. Mr Bradshaw identified some examples in the decision to support his grounds. In particular the finding made at paragraph 18. Here the judge premises his finding on the basis that he accepted that there may be the sale of sexual services to foreigners in Gambia by those engaging in "Bomsin." Whether the Appellant was in fact engaged in "Bomsin" or could properly be described as a "Bumster" or "sex worker" in accordance with the evidence from the author of the country report is a debatable given the descriptions provided. However the judge found that the Appellant's attitude and his religious background (as a Muslim) and his reluctance to engage with C "it is surprising that on his own account of the Appellant overcame his inhibitions as quickly as he did and that he then engaged regularly in over a number of years in an activity which is has he did not like and which carries significant risks in terms of the likely reaction of others and the authorities." What Mr Bradshaw submits his missing from that finding is the context in which the Appellant had stated he had become involved with C. His account was set out in the evidence and recorded at paragraph 12 - 13 that he had been led to becoming involved out of financial reasons and due to living in poverty and that he did not have sufficient monies to support his family. The witness statement provided on behalf the Appellant set out that background. Thus I accept the submission made; the judges "surprise" is not set out against that evidential background and does not seek to analyse or take account of the reasons given by the Appellant for being involved with C.
17. The evidence as to his motivation for engaging in that activity was referred to in the country materials relied upon by the Appellant (paragraphs 12 - 37 of the expert

report). As I have said whilst it is arguable as to whether he fell within the categories identified as a “sex worker” or “Bumster” but the judge did not take into account all the available evidence in reaching his finding.

18. The second finding relied upon relates to paragraph 19. The judge did take into account the context of the report at page 28 relating to the serious consequences for those who are gay or perceived to be so from the traditional authorities and fellow members of society. The judge sought to contrast this with the warning that the Appellant was given. Furthermore at [20] the judge also contrasted the evidence of general discrimination and prejudice against MSM with the attitude of the hotel staff.
19. It is plain that what the judge sought to address was the ease in which it was said the Appellant was able to meet with C against the background evidence that related to the general population and how they viewed the issue of same-sex relationships.
20. There is no doubt from the evidence that same-sex relationships had been criminalised (see paragraph 41 - 44) and the Gambia law prohibited sex tourism (paragraph 45). The evidence referred to political and cultural practices against same-sex relationships which were “highly stigmatised” (see [21]). However the difficulty with those two findings are that they do not take into account other evidence available and proceed on the assumption that all members of the population are likely to behave in the same way. In respect of the warning that he was given, the evidence is set out at page 21; paragraph 9. The people who had seen him and warned him were also those involved in “Bomsin” and that this may or may not have provided the reason as to why he had been warned in this way. Furthermore, the judge imputed general societal attitudes to a smaller number of individuals namely the hotel staff. The judge did not set out what the staff would have been aware of, and also makes the presumption that their “traits and prejudices” would have been those ascribed to the general population. The judge does not set out in the findings in the context of the Appellant’s evidence as to the amount of meetings, where they took place to put such a finding in context. Reasonable inferences are entirely permissible by a fact finder however if there is other evidence of relevance, it needs to be taken into account when reaching an overall finding and thus giving the factual account the “anxious scrutiny” that is required in protection claims.
21. Thus the reasons given for rejecting the account are those based on the general plausibility of the account which do not take into account other evidence given by the Appellant. It is not known whether the country reports obtained on behalf of the Appellant were accepted or whether there was any critique offered as to their general contents.
22. As to the documentary evidence, I do not accept the submission made by Mr Bradshaw that the judge was seeking to take on the mantle of a documentary expert when he made reference to the format of the wanted posters. That is precisely what the decision in Tanveer Ahmed sets out and how a judge should consider aspects of the reliability of the documents in question. That said, I am satisfied that the findings do not engage with the reasons given in the country reports as to why the author considered they were in fact genuine documents. The reports provided specifically for this purpose

make reference to the format as not being uniform which provided reasoning as to why the formats were in fact different. Furthermore as Mr Bradshaw points out, the judge wrongly referred to the use of templates by Interpol and the security forces and concluded that in view of that he would have expected that there would have been more consistency between the documents. However this was incorrect because at paragraph 62 (page 86 of the bundle) the evidence was that although originally designed in this way, the local needs by way of police officers or clerks was to redesign those formats. Therefore there was an issue as to consistency. It is open to a judge to reject expert evidence provided adequate and sustainable reasons are given for taking such a course and by reference to the evidence but to do so on an erroneous basis cannot be correct.

23. Consequently for those reasons, I am satisfied that the decision demonstrates the making of an error on point of law and will be set aside.
24. As to the remaking of the decision, I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal which at (b) states that "the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."
25. There did not appear to be any disagreement that the matter should be remitted to the First-tier Tribunal for the appeal to be reheard so that an analysis of the evidence can be made and findings of fact reached, including an examination of the reports provided and in the light of the documentary evidence as none of the findings can be preserved. Therefore I am satisfied that is the correct course to adopt. Accordingly, and in the interests of a fair and just disposal of the Appellant's claim, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge xxx.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the decision is set aside; the appeal is remitted to the First-tier Tribunal for a rehearing.

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. 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: 30 July 2018

Upper Tribunal Judge Reeds