



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10051/2017

THE IMMIGRATION ACTS

Heard at Field House
On 31 May and 16 August 2018

Decision & Reasons Promulgated
On 6 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

FL
(FORMERLY SDI)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, counsel.

For the Respondent: Mr L Tarlow, Home Office Presenting Officer (31 May 2018).

Mr D Clarke, Home Office Presenting Officer (16 August 2018).

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 14 September 2017 refusing his application for international protection.

Background.

2. The appellant is a citizen of Kenya born on 18 May 1981. He first arrived in the UK on 9 January 2014 as a visitor, remaining after the expiry of his leave. He claimed asylum on 20 March 2017. In his application he claimed that he would have a well-founded fear of persecution in Kenya on the basis of his membership of a particular social group as transgender/lesbian and by reason of gender-based discrimination due to the risk of forced marriage. The respondent was not satisfied that he was transgender/lesbian or that he had faced problems as a result in Kenya. His concerns about the prospect of a forced marriage were also rejected. The respondent considered the appellant's evidence about how he expressed his sexuality in the UK but, looking at the matter in the round and on the basis of the information provided, found that he had been attempting to provide support for his claim.

The Hearing before the First-tier Tribunal.

3. The judge considered firstly whether the appellant had satisfied her that he was transgender. She noted that there was a material inconsistency in his account, describing himself initially as a lesbian but then as transgender, but she did not find these different descriptors of his sexual identity or gender to be of any particular importance [13]. She found that his view of his gender was corroborated by others as summarised in [15]. She said, based on the whole of the evidence before her, that she was satisfied that the appellant's gender was one that was rightly described as transgender and he had begun the process of transition, changing his name and referring to himself as a male, but no medical treatment had yet been undertaken [17].
4. The judge then went on to consider at [18]-[25] whether those who were transgender living openly in Kenya would be liable to persecution. She referred to the Country Policy and Information Note, Kenya: Sexual orientation and gender identity, March 2017 ("CPIN") and, in particular, to the conclusion that, in general, the evidence available did not establish that LGBT persons were likely to be subject to persecution or serious harm by the state and, as for non-state actors, LGBT people had been victims of individual acts of violence but, in general, the level of discrimination and abuse faced from non-state actors was not such that it would reach the level of being persecutory or otherwise inhuman or degrading treatment. She also noted two Kenyan High Court judgments, described as landmark rulings, on the rights of transgender people.
5. The judge referred to the fact that the appellant had produced a number of articles to support his claim that Kenya persecuted those who were transgender [20]. She did not find these articles to be of much assistance for a number of reasons including the fact that they were of some age and published in 2009, 2010, 2012 and 2014 [20a]. She said that, having considered all the information, she relied on the more recent country guidance from as recently as March 2017, which was more in line with today's society in Kenya. It appeared that, although discrimination still existed, transgender persons were not likely to be persecuted, neither were they at risk of serious harm from the

state [21]. Furthermore, so far as non-state actors were concerned, the guidance likewise was that it was not at a level of being persecutory [22].

6. The judge then said at [23]-[24]:

“23. At no stage, has this appellant stated that [he] is likely to be persecuted or at serious harm from [his] family and friends but more so, that [he] will be disowned by his family and that [he] is unlikely to be accepted by [his] family and friends. I bear in mind that the appellant states that [he] is not likely to contact [his] mother on return and would cut off all contact. This is unfortunate. However, as I find the appellant credible, there is little that undermines this assertion. In this instance, I find that the appellant would therefore be returning as an independent adult, one that identifies as being transgender or is transitioning, who has professional qualifications, has had the benefit of having the life experiences in the United Kingdom and can take the benefit of those life experiences back to Kenya. I am not persuaded [he] is required to relocate but that is a choice for the appellant, if [he] prefers not to return to [his] mother's home.

24. I am therefore not persuaded return will be unduly harsh or that [he] faces a real risk of destitution should he choose not to contact his family and friends.”

7. She said, bearing in mind the country guidance and applying HJ (Iran) [2010] UKSC 31, that she was of the view that transgender persons who lived openly in Kenya would not be at risk of persecution as such and she did not feel that she needed to go any further in terms of addressing how the appellant would behave if returned there [25]. She accepted that he might have a subjective fear of persecution, but that fear was not borne out by the objective country guidance [27]. She went on to consider the claim made on human rights grounds but was not satisfied that the appellant's private life was such as to engage article 8 but, if it did, the respondent's decision was proportionate to a legitimate aim.

The Grounds and Submissions.

8. The grounds raise three issues. Ground 1 argues that the judge failed to take into account, when assessing risk, the totality of the country material and specifically the evidence documenting the risks to transgender men or to women perceived to be masculine lesbians and also failed to take into account crucial evidence, setting out the unique risks which faced a transgender man or a lesbian woman perceived to be masculine. Ground 2 argues that the judge used the incorrect standard of proof evidenced by the use of the phrase "likely" rather than "real risk" or "reasonably likely", which would indicate the correct standard of proof. Ground 3 argues that the judge did not make adequate findings on internal relocation as her findings at [23] and [24] appeared to conflate the issues of well-founded fear of persecution and internal relocation.

9. Permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that the judge had erred by not considering evidence specific to the risk which the appellant claimed to face on return to Kenya. Permission was also given to argue ground 3 but, when granting permission, UTJ Allen saw no arguable merit in ground 2.

10. Mr Briddock did not seek to add anything in relation to ground 2 save to comment that, although UTJ Allen had seen no arguable merit in that ground, he had not refused permission to appeal. In respect of ground 1, he submitted that it was clear from the decision that a number of articles submitted on behalf of the appellant had either not been considered by the judge or no explanation had been given for rejecting their contents. She had commented that the appellant's articles were of some age being published in the years before 2014 but this ignored the fact that A186 was dated April 2015, A257 January 2015 and A291 May 2017 (Mr Briddock accepted that A190, referred to in this ground had been included in error as it was about Mongolia).
11. These articles, so he argued, contained evidence to support the appellant's contention that he would be at real risk on return and in particular the Sida report of January 2015 at A257 and the evidence at A291 which, whilst relating to Ugandan LGBTI refugees in Kenya, indicated the risks which would also be experienced generally by transgender people in Kenya. In respect of ground 3, he submitted that the judge's treatment of internal relocation at [24] was clearly inadequate. Various issues had been conflated and the judge had failed to consider properly whether the appellant, as a transgender man, would be able to relocate.
12. Mr Tarlow submitted that there was no error of law capable of affecting the outcome of the appeal. Although it was not entirely clear what issue [24] referred to, a thread could clearly be drawn from the findings that there was no real risk of persecution in Kenya for the appellant. The judge had been entitled to rely on the CPIN report, which was extensively referenced whereas it was unclear how independent the reports relied on by the appellant were. The judge's conclusions based on the CPIN report were properly open to her.

Assessment of the whether there is an Error of Law.

13. I must assess whether the judge erred in law such that the decision should be set aside. I am satisfied that there is no substance in ground 2. The fact that the judge used the word "likely" does not, without more, even arguably indicate that she did not apply the lower standard. There is no reason to believe that the judge was not fully aware of the relevant standard of proof or that she failed to apply it.
14. I am satisfied that ground 1 is made out. It argues that relevant material was not taken into account by the judge when assessing whether the appellant would be at real risk on return to Kenya. The background evidence relied on by the appellant is set out at A145-301. Whilst the judge cannot reasonably be expected to refer to all the background evidence, it must all be taken into account and looked at as a whole. At [20a] the judge, when commenting on the appellant's evidence, said that the articles were of some age and published in 2009, 2010, 2012 and 2014. As set out in the grounds, a number of these articles were published later and in particular A257 (January 2015) and A291 (May 2017), both of which contain material capable of affecting the assessment of the risk on return.
15. By way of example, A257 at A259 says:

"...Violence against LGBTI people is often based on non-conforming gender identity or sexuality. Lesbian women with a masculine gender expression and transgender people of all genders are at risk of being raped, while other people with non-conforming gender expressions risk violence due to their gender presentation. Many individuals risk coming under the scrutiny of healthcare workers who are both ignorant of, and biased against, sexuality or gender identity."

In A291 there is report of the Kenyan authorities arresting LGBTI refugees from Uganda and ill-treating them, the report adding that

"...Unlike heterosexual refugees who are guaranteed safe harbour by host countries and UNHCR, it is apparent that it is almost impossible to provide LGBT refugees any protection, least of all, equal protection."

16. I am, therefore, satisfied that the judge erred in law by failing to take a number of items of relevant evidence into account which were at least capable of affecting the assessment of risk on return. Alternatively, no reasons have been given for regarding these articles as unreliable or less persuasive than the CPIN.
17. For the sake of completion, I am not satisfied that ground 3 in itself discloses any error of law capable of affecting the outcome of the appeal. The judge found that the appellant would not be at real risk of persecution on return to Kenya and that she would be able to live openly there as a transgender man. The comment that she was not persuaded that return would be unduly harsh or that he would face a real risk of destitution was made in the context that it would be his choice if he preferred not to return to his mother's home and not to contact his family and friends but to live elsewhere in Kenya. In the light of the judge's findings, the issue of internal relocation did not arise and her remarks in [24] cannot be categorised as an erroneous self-direction on internal relocation.
18. Both representatives accepted that the appeal should remain in the Upper Tribunal for the decision to be re-made. As Mr Tarlow has not had a proper opportunity of considering all the background evidence relating to the risk on return, I am satisfied that the right course is for the appeal to be adjourned to a resumed hearing. At that hearing the appellant produced a further bundle (2A), indexed and paginated 1-37, to supplement the bundles before the First-tier Tribunal, the original bundle (A), indexed and paginated 1-301 and the previous supplementary bundle (SA), indexed and paginated 1-48.

Further evidence.

19. The appellant adopted his supplemental witness statement of 14 August 2018 (2A 1-2). In this he confirms that he changed his name by deed poll on 19 June 2018. As he was experiencing mood swings and what he felt was a deterioration in his mental state, he decided to start taking testosterone, a hormone replacement drug, after he self-referred to an online gender GP, who approved the prescription. He decided to take this drastic step because he called the Gender Clinic in July to check how much longer he would have to wait for an assessment and was told that he could expect a period of

18 to 24 months before he could start. He had started attending counselling sessions in the last three weeks.

20. In further oral evidence he said that if returned to Kenya, he would not be able to express his true identity gender. In every Kenyan document he was registered as female. He would not have the freedom to behave as a man and there would be a backlash from his family. He believed that he would be harassed by the police and would be at risk of being sent to jail. There were no resources for gender procedures in Kenya and he would have to hide his gender identity.
21. In cross-examination, when asked why he thought he would face a backlash from his family, he said that they did not know the current situation, although he had been in contact with them. His mother had said on one occasion that these people (transgender people) had a genetic disorder. He was in fear of being disowned but he accepted that he was breaking contact with his family as, if he transitioned to a man, he knew they would reject him.

Submissions.

22. Mr Clarke submitted that when considering whether the appellant would be at risk of persecution on return, the fact that he was returning as an independent adult and had additional experience to take back to Kenya should be taken into account. There was no factual matrix of previous persecution and his fears of rejection by his family were speculative as he had made no attempt to inform them of his position. There was, therefore, no evidence of their likely reaction.
23. He submitted that the background evidence relied on was not sufficient to identify a risk per se. He referred to and relied on the approach taken by the Upper Tribunal in LH and IP (gay men: risk) Sri Lanka CG [2015] UKUT 73 at para 110 where, although there was a legal potential of sanctions underlying instances of the police arresting homosexual men and subjecting them to violence and abuse, the level of abuse generally fell short of persecution. Similarly, so he argued, the risk for transgender men in Kenya did not reach the level of persecution or serious harm. He referred to the CPIN report at A194, in particular to the positive High Court rulings in Kenya on two cases involving transgender issues (at 4.3.1) and the fact that a survey showed that 53% of the population did not agree that being gay should be a crime (at 2.3.10).
24. Whilst same-sex relations were criminalised in Kenya, the law was rarely applied. There was evidence that in Nairobi there was a greater acceptance of the LGBT community (6.1.8). In general, Kenyan society disapproved of LGBT issues, but there was evidence indicative of a changing attitude (6.1.6). The position was nuanced. He accepted that there was evidence of police brutality but that tended to be specific to groups such as sex workers (5.2.1). The evidence about the treatment of refugees from Uganda at A291 had no real bearing on the risk to the appellant as their situation was significantly different from his.
25. He submitted that the position in Kenya was far better than in Uganda. The evidence relied on by the appellant did not, so he argued, show a risk per se, even when taken

at its highest. When the evidence was looked at as a whole, it could not be shown that the appellant would be at real risk from his family or anyone else and, in any event, he would be able to relocate to places where there were LGBT communities.

26. Mr Briddock submitted that the background evidence had to be considered in the context of the intersection of gender and sexual identity and how they were perceived in Kenya. The appellant's individual circumstances had to be considered. The fact that the situation in Kenya might not be as bad as in Uganda did not in itself show that there was no well-founded fear of persecution and the fact that there may be some signs of improvement did not mean that the underlying factors likely to give rise to a risk of persecution were not still there. He argued that the extent of the discrimination the appellant was likely to suffer was so great that it would amount to persecution.
27. The appellant had the right to live openly and he would not be able to do so in Kenya. The fact that there had been no actual persecution the past was because he had concealed his identity and had not lived openly because of a fear of the harm that would follow if he had done so. The risk to him was enhanced by the fact that he would be perceived as a lesbian: a person in his situation who was masculine-presenting, would be regarded as a lesbian and at risk. If his gender was seen as non-conforming, there was a risk of being arrested and strip-searched.
28. The appellant's fear of rejection by his parents could not be rejected as speculative. The reliance on successful cases in the Kenyan High Court had to be seen in the light of the evidence that one of the successful appellants was still unable to lead a normal life because of problems over documentation. He submitted that the appellant, as a transgender man seeking gender-affirming medical treatment, would be at real risk on return. He would want to continue this treatment but would be unable to do so. He would wish to continue to dress in a traditional male way and hide his female physical form but as such, he would be openly transgender, and the reality of the position was that he would be unable to do so in Kenya without fear of harm or, at least, discrimination amounting to persecution. In the alternative, he submitted that if the risk of persecution was not substantiated, there would be a breach of article 8 as there was no legal right to change gender in Kenya, to amend gender markings on identity documents and very limited access, if any, to gender affirming medical treatment.

Assessment of the issues.

29. The background evidence is set out at A145-301. Mr Clarke placed particular reliance on the CPIN report of March 2017. At 2.3.5 it is reported that in Kenya same-sex sexual activity between men is criminalised with a penalty of up to 21 years in prison but was not clear if there have been any recent convictions and sources suggest that the law on "unnatural offences" was rarely applied and there had only been two recent reported cases, one of which was dismissed and the other was still ongoing at the time of publication. It is further recorded at 2.3.8 that the police do not generally target and prosecute LGBT people and there have been few, if any, convictions for same sex sexual activity. Police have arrested some LGBT people, but this is usually followed

by their release shortly afterwards. However, the police have reportedly harassed LGBT persons, or those believed to be so, and they have been subjected to blackmail and rape.

30. The report confirms that societal treatment and attitudes are generally intolerant of LGBT people, although one recent survey reported that 53% of Kenyans did not agree that homosexuality should be considered a crime and 46% had no concerns about their neighbours being gay or lesbian. It is also reported that LGBT NGOs are generally able to function relatively freely and that with the vibrant social movement in some parts of Kenya, societal attitudes are gradually starting to change (2.3.12).
31. Set against this is the fact that religious leaders generally express homophobic views and the media is taking increasing interest in LGBT issues sometimes reporting objectively, although some media publish anti-LGBT opinion pieces (2.3.11). There were also attempts by some politicians in 2014 to propose anti-gay bills (2.3.5) and in June 2015, the Kenyan Deputy President was reported as saying that "we would stand with the religious leaders to defend our faith and our beliefs. We would not allow homosexuality in our nation, as it violates our religious and cultural beliefs." This view was said to reflect the view of a large percentage of the population (5.1.1). In a Human Rights Watch Report in September 2015, it is said that the Kenyan government has adopted a nuanced position on LGBT rights, and successive Parliaments have declined to follow in the footsteps of neighbouring countries of enacting new legislation, harsher than the colonial-era legal codes (5.1.5).
32. I take into account that there have been two successful High Court cases in which gender issues have been maintained (4.3.1) but also note that one of the successful appellants has been unable to find work: see the article at A188, Lifestyle, Kenya's transgender warrior; from suicide bid to celebrity, 8 April 2015, setting out that she has been unable to find work, has been subjected to nasty comments at job interviews including a threat to take her academic certificates to the police, accusing her of fraud (A188). In this article transgender people are described as some of the most invisible people in Africa where rigid gender stereotyping continues to stifle freedoms and many are forced to hide their identity and live on the margins of their communities or risk being vilified as immoral and unchristian by the conservative majority (A187).
33. I also take account of the likely reaction of the appellant's family. I accept that his concerns that he will be rejected by his family are reasonably likely to be true in the light of the evidence of society's attitudes towards sexual issues in Kenya, his mother's comment about such people having a genetic disorder and the evidence in his first witness statement dated 3 October 2017 (A, 2-19) about why he moved from his brother's home.
34. The appellant wishes to live openly as a transgender man. This is supported by the psychiatric report of Mr Barrett, (SA, 4-21) referred to at [15b] of the First-tier decision, and the evidence in the most recent statement of seeking counselling, obtaining a hormone replacement treatment and changing his name by deed poll. I draw no

adverse inference from the fact that he has not been subject to persecution in Kenya as at that stage he was coming to terms with and concealing his sexual identity.

35. I accept there is evidence that someone in the appellant's position as a transgender man is likely to be perceived in Kenya as a lesbian as he would be seen as a masculine acting woman with the risk of a violent reaction as set out in the Sida report, *The Rights of LGBTI People in Kenya*, January 2015, already referred to at [15] above.
36. The background evidence shows that the situation in Kenya relating to LGBTI issues is nuanced and I accept Mr Clarke's submission to the extent that the background evidence does not establish a risk of persecution per se for claims based on transgender and sexual identity issues. The decision in LH & IP (Sri Lanka) does not really take matters much further save to emphasise the need to show persecution and not just discrimination. The issue, therefore, for me to assess is whether this particular appellant in his particular circumstances would be at real risk of persecution on return to Kenya.
37. In HJ (Iran) at [62], Lord Roger said:

"... The Tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality... and if the Tribunal concluded that the applicant would choose to live discreetly simply because that was how he himself would wish to live or because of social pressures... then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them... If, on the other hand the Tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the grounds that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution."

Whilst Lord Roger was referring to gay men, the same approach must apply to applications in all cases involving sexual orientation and gender identity.

38. Looking at the appellant's circumstances in the light of the background evidence and following the approach in HJ (Iran), I am satisfied that there is a reasonable degree of likelihood that he, in his particular circumstances, would be at real risk of persecution on return. In the light of the attitude to transgender people and particularly transgender men, there is a real risk of violence if he lived openly. The fact that he would dress as and behave as a man would give rise to a perception of a non-conforming gender identity which would put him at enhanced risk as part of a particularly vulnerable group taking account of the evidence that transgender men and lesbian women with a masculine gender expression are at such risk.
39. I am satisfied that he would not be able to look to the authorities for effective protection and he would have to face the problems arising from official documents in

Kenya identifying him as female. He could not look to his family for protection or shelter unless he concealed his sexual identity. He is not able to relocate as he would only be able to live in safety by not living openly as a transgender man.

40. In summary, I am satisfied that the appellant's subjective fear of persecution, accepted by the First-tier Tribunal, is in his particular circumstances well-founded in the light of the background evidence. In the light of my findings, I need not consider the position under article 8.

Decision.

41. The decision of the First-tier Tribunal erred in law and has been set aside. I substitute a decision allowing the appeal on asylum grounds.

Signed: H J E Latter

Dated: 24 August 2018

Deputy Upper Tribunal Judge Latter