



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

Appeal Number: PA/05656/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 21st January 2020**

**Decision & Reasons Promulgated
On 31st January 2020**

Before

UPPER TRIBUNAL JUDGE COKER

Between

KS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Markus, instructed by Turpin Miller LLP (Oxford)

For the Respondent: Mr S Singh, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as KS. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. On 8th April 2019, for the reasons given below, I set aside the decision of the First-tier Tribunal judge:

1. By a decision promulgated on 18th July 2018, First-tier Tribunal Judge Alty dismissed KS' appeal against the respondent's decision to refuse his human rights claim and his protection claim.
2. KS, a citizen of the DRC, arrived in the UK in December 2003 as a minor. Asylum claims made after his arrival in the UK listing him as a dependant first on his mother and then on his father were refused and appeals in each case were dismissed. Neither the appellant, nor his parents or siblings left the UK. They were eventually granted indefinite leave to remain in August 2008.
3. In July 2016, KS was sentenced to a total of 15 months' imprisonment for a number of offences on various dates: taking a motor vehicle without consent, failing to surrender to custody, possession of cannabis, possession of an offensive weapon, racially aggravated harassment, breach of a criminal order and exposure. He fell within the automatic deportation provisions and a deportation order was made on 2nd March 2017. He claimed asylum. His claim was refused for reasons set out in a decision by the respondent dated 17th April 2018.

Error of law

4. The First-tier Tribunal judge found, inter alia,
 - (i) the appellant is bi-sexual;
 - (ii) on 7th July 2016 he was recorded on CCTV as having sex with a man in a public place;
 - (iii) although same sex relations are not illegal in the DRC, there are cases of arrest for public displays of same-sex sexual relations;
 - (iv) it was unlikely that an on-line search would reveal the appellant's bi-sexuality, not least because of periodic restrictions in internet access;
 - (v) the level of arrests under public decency laws are not such as to give rise to a real risk of persecution;
 - (vi) although clear that there is societal discrimination it has not been demonstrated that it is at a level that amounts to persecution;
 - (vii) irrespective of the risk of persecution, he would not live openly as a bisexual man; he would choose to live discretely;
 - (viii) he is not at risk of persecution because of his sexuality if returned to the DRC;
 - (ix) he does not fall within paragraph 399 Immigration Rules/s117C(5) NIAA 2002;
 - (x) he has been lawfully resident in the UK for most of his life;
 - (xi) he is socially and culturally integrated into the UK;
 - (xii) there would not be very significant obstacles to his re-integration into DRC.
 - (xiii) There are not very compelling reasons such as to outweigh the public interest in deportation.
5. The appellant sought and was granted permission to appeal on the following grounds:
 - (i) The judge failed to give adequate reasons for finding that there were periodic restrictions on internet access which would result in a search of the appellant's bi-sexuality not being disclosed and in any event such a conclusion was perverse;
 - (ii) The judge failed to apply the correct test and failed to give adequate reasons in considering why the appellant would live discretely in the DRC;
 - (iii) The judge failed to address not only societal taboos but the extent of the arrests and potential extortion that flowed from the stopping (not necessarily the arrest and charge) of a bisexual man whose identity as a bisexual man would be known; failed to have regard to relevant evidence that was before the judge; failed to have regard to the violent actions of non-state agents against a known bi-sexual man;

(iv) In reaching his conclusions as to very significant obstacles, the judge failed to consider the discrimination, societal taboo, lack of support and overall lack of ability to find accommodation and employment.

6. Mr Bates said that he was inclined to accept that the judge had failed to give adequate reasons for his finding that there would not be very significant obstacles. Mr Bates acknowledged that periodic restrictions on the internet would not necessarily prevent a search bringing up the appellant's name; the judge had failed to provide adequate reasons for reaching the finding he did, given the paucity of the evidence before him to support such a finding.

7. Nevertheless, Mr Bates submitted that even though the possibility of it becoming known that the appellant was bisexual did not result, without more, in a finding that he would be at risk of being persecuted. Ms Wilkins stressed that grounds 1 and 2 specifically highlighted that an individual assessment had to be made; the risk to the appellant flowed not only from the risk of arrest and extortion because he was identified as bisexual but from his personal circumstances and the evidence before the judge which had not been considered and assessed in the context of the appellant's personal circumstances. She noted in passing that there was an apparent contradiction in the judge's findings whether he was now free from alcoholism.

8. Ground 3, she submitted, refers to evidence that was before the judge that he did not consider in the context of the appeal as a whole.

9. Mr Bates submitted that the respondent did not accept that anyone who was bisexual would be at risk, but he acknowledged that the findings in relation to persecution flowed from the finding by the judge that he would not be identified or identifiable as bisexual.

Discussion

10. The findings by the First-tier Tribunal judge have as a baseline an unreasoned finding that the appellant would not be identifiable from an internet search. To reach such a fundamental finding, the judge ought to have set out his reasoning on the basis of the evidence before him. It was not possible to identify evidence in the file that could have led to that conclusion. The findings as to risk of being persecuted flow from that baseline – the evidence material to arrests, violence from non-state actors, detention are all matters that, if held adverse to the appellant, need to be reasoned and in the context of the evidence that was before the judge. That was not done.

11. I am satisfied the First-tier Tribunal judge failed to provide adequate reasons for his findings with regard to very significant obstacles and the risk of being persecuted. The judge erred in law such that I set aside the decision to be remade.

12. The finding that the appellant is bi-sexual has not been challenged and stands. It is the applicability of the appellant's personal circumstances in the context of the DRC both in terms of risk of being persecuted and whether there are very significant obstacles to reintegration that have to be examined.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be re-made.

Consequential Directions

1. Both parties have leave to file and serve such further evidence as they seek to rely upon by 7th June 2019 (such evidence to be sent direct to Mr Bates)
 2. Thereafter written submissions by both parties to be filed and served by 22nd July 2019.
 3. If either party wishes an oral hearing for submission only, no oral evidence, they are to notify the Tribunal by 22nd July and in that case the hearing will be listed for 27th August. Failing such notification the appeal will be determined on the papers.
2. Both parties indicated they wished a further hearing and thus the resumed hearing eventually came before me on 21st January 2020. There had been earlier dates of hearing set, but these had been adjourned because the respondent was in the process of preparing an updated Country Policy and Information Note (CPIN) which was eventually produced dated January 2020.
 3. In addition to the CPIN I also had before me a skeleton argument on behalf of the respondent dated 17th October 2019 and a skeleton argument on behalf of the appellant dated 16th January 2020 (one correction to which was the appellant's date of grant of indefinite leave to remain being 12th September 2007 and not 2008).
 4. Mr Singh had not been able to update the skeleton argument because he had only had an opportunity to consider the CPIN the previous day; nevertheless, he was content to proceed.
 5. Mr Singh did not seek to expand upon the skeleton submitted on behalf of the respondent. He did not seek to challenge or disagree with the submissions in the skeleton argument filed on behalf of the appellant. He acknowledged the applicant's criminal conviction could be ascertained from a simple internet search. This could, the evidence supported, in turn lead to the appellant's arrest/detention or so as to exhort money from him.
 6. The evidence supports a finding, which was not disputed by Mr Singh, that the appellant's conviction together with his mental health difficulties would more than likely lead to an inability on the part of the appellant to live discretely, even if he wanted to which the evidence indicated he would not.
 7. There is little doubt but that the appellant would, as a result of this, be at real risk of being persecuted because of his sexual orientation. Although not conceding the issue, Mr Singh did not dispute this. I am satisfied that to remove the appellant to the DRC would be a breach of the Refugee Convention.
 8. In so far as Article 8 is concerned and the exceptions to deportation, Mr Singh did not challenge the summary of the evidence provided on behalf of the appellant.
 9. The appellant has not been lawfully resident in the UK for half his life although he has been resident in the UK for more than half his life. When he

did not have leave to remain, he was a child and dependent upon his parents for applications made to regularise his stay. Given his length of residence and spending his formative years in the UK, it can safely be concluded, particularly in the absence of any significant countervailing features that he is culturally and socially integrated in the UK despite his criminal conviction. The circumstances of the appellant's offence arose in part from his mental ill-health – he suffers from Bipolar Affective Disorder and the presence of his family in the UK constitute a powerful protective factor against relapse. The appellant has no family in DRC.

10. The appellant is at real risk of being persecuted for a Convention reason.
11. I am satisfied, in all the circumstances, that the appellant presents very compelling circumstances such that his deportation from the UK in accordance with the deportation regime would be a breach of Article 8.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

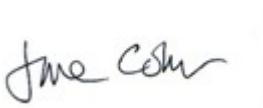
I re-make the decision in the appeal by allowing it on international protection and human rights grounds.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

I make that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 29th January 2020



Upper Tribunal Judge Coker