



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
PA/11317/2019

THE IMMIGRATION ACTS

Heard on: 14th January 2021
At: Manchester Civil Justice Centre
(remote hearing)

Decision & Reasons Promulgated
On: 26th February 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

UT
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Wood, IAS (Manchester)
For the Respondent: Ms Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Namibia born in 1996. He seeks international protection on the grounds that as a gay man he has a well-founded fear of persecution there for reasons of his membership of that particular group. His appeal was dismissed by the First-tier Tribunal (Judge Mark Davies) on the 18th

March 2020. Permission to appeal to this Tribunal was granted on the 30th July 2020.

Background and Matters in Issue

2. By her decision of the 6th November 2019 the Secretary of State accepted the following factual claims as made out:
 - a) That the Appellant is gay;
 - b) That he left Namibia in order to escape an arranged marriage to a female cousin and/or the problems he would face if he refused the union.

The background to (b), set out by the Secretary of State and implicitly accepted, was that the Appellant's father had already in the past subjected him to beatings and threats because he believed him to be gay. The only matter placed in issue by the refusal letter was whether gay men *per se* face a real, that is to say objective, risk of serious harm in Namibia.

3. By its decision of the 18th March 2020 the First-tier Tribunal was not satisfied that there was before it evidence capable of demonstrating a real risk of harm to gay men in Namibia. The Tribunal commented that in particular there was no evidence to show that those who refused to enter into arranged marriages were subject to what is known in other contexts as 'honour' based violence. If the Appellant's family were looking for him it had not been shown that this was in order to do him harm. If he wished to avoid marriage to his cousin it was open to him to move elsewhere in Namibia, where attitudes to homosexuality were becoming ever more liberal: in this regard the Judge concluded that the Appellant could live "without difficulty" in Windhoek. He would not face prosecution for "sodomy"¹. In fact, if he wished to live in the capital he would receive support from the LGBT community living there. On these grounds the appeal was dismissed.
4. This appeal is firstly brought on the ground that the First-tier Tribunal failed to apply the *Demirkaya* principle set out at paragraph 339K of the Immigration Rules. The Respondent had already accepted that the Appellant had been mistreated by his family in Namibia, including being beaten and threatened with further harm. Although on one reading the Tribunal had assumed that this would place him at risk in his home area of Ojtinene - why else would it proceed to considering internal flight to Windhoek? - the Tribunal's findings on this past persecution were not in fact clear.

¹ It is unclear on the face of the decision whether the Tribunal is here reflecting the terminology in Namibian law or employing this term itself. Either way it is an unfortunate anachronism, found offensive by many.

5. The second ground is that in concurring with the Respondent's analysis that gay men do not face a real risk of harm in Namibia the Tribunal has failed to have regard to relevant background information. This including research cited in the CPIN that 14% of MSM Namibians had been raped, 21% blackmailed and 22% beaten by the police or other government representatives.

Error of Law: Discussion and Findings

Demirkaya

6. Paragraph 339K of the Immigration Rules gives effect to the judgment of the Court of Appeal in Demirkaya v Secretary of State for the Home Department [1999] EWCA Civ 1654:

339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

7. It was the Appellant's case that when his family discovered him to be gay his father "almost killed" him [AIR 47]: he beat him and whipped him with electric wires [AIR 81]. The Appellant was subsequently threatened with more violence, should he fail to marry his female cousin as his family had arranged. On appeal the Appellant submitted that this violence, and the threats of further violence, amounted to persecution for a Convention reason. This should have been the Tribunal's starting point.
8. The grounds as advanced before me are that these matters were implicitly accepted in the Respondent's refusal letter, wherein the writer has conducted a careful *Karanakaran* analysis of what matters are accepted, what is left in the balance, and what is rejected. Nowhere are the beatings or threats rejected as non credible, and forming as they do the backdrop to the acceptance that the Appellant is gay, it appears that the Respondent takes no issue with them. Before me Ms Pettersen accepted that proposition, but in reality it matters not whether the Respondent accepted this history or not. It was the evidence of the Appellant, and it was incumbent on the Tribunal to make findings on it. No such findings are made. That was of course an error. There can be no doubt that being beaten with electrical wires because you are gay amounts to persecution. Whether the error is material, however, depends largely on whether the conclusions on the objective risk to gay men were sustainable.

HJ (Iran): Objective Risk

9. In *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 the Supreme Court gave guidance on how claims based on sexual orientation should be assessed. At paragraph 82 Lord Rodger offers this structure for enquiry:

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, 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.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, 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. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. 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 ground 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. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

10. The first question was answered in the affirmative. It is accepted that the Appellant is gay.
11. The second question, answered negatively by both Respondent and First-tier Tribunal, was whether a gay man who live openly in Namibia would be liable to persecution.
12. The First-tier Tribunal addresses this question at its §35-37. The Tribunal finds that those engaging in gay sex are not prosecuted. It finds that gay men do face

discrimination generally. Neither of those findings are challenged. The Appellant's complaint is that the Tribunal goes from there to a conclusion that gay men do not face persecution, without any consideration of the extensive country background evidence, found primarily in the Respondent's CPIN, which indicates that gay men do encounter high levels of violence and hostility from society in general.

13. Before me Ms Pettersen accepted that none of this evidence is addressed in the decision. She further suggested that the real error lies in the Tribunal's answer to the Lord Rodger's third and fourth questions in HJ (Iran). At its §38 the Tribunal states that the Appellant "has not indicated in his evidence that he would behave in manner if returned to Namibia that would make it abundantly clear that he was a gay man", and at §39 the risk assessment is concluded with this: "I fail to understand on the basis of the Appellant's evidence how he would or could be identified as a homosexual man". Ms Pettersen rightly conceded that the first statement is wholly contrary to the Appellant's evidence, which states that he wishes to live openly as a gay man; he does so in this country, and it is accepted that to the extent that he felt able, did so when he lived in Namibia. I agree that the Tribunal here misapprehended, or overlooked, the Appellant's evidence on this key point. I am further troubled by the use of the term "abundantly" - I am unsure what this gloss on the term "openly" might mean. All the Tribunal had to ask itself was whether gay men suffer persecution in Namibia, whether the Appellant would seek, to one extent or another, to hide his identity in that environment, and if so why. The decision of the First-tier Tribunal is flawed for its failure to address the country background evidence to which it was referred, in its misapprehension of the Appellant's evidence and in its failure to adopt the structured approach endorsed by the Court of Appeal in HJ.
14. It follows that both grounds are made out and the decision is set aside.

The Re-Made Decision

15. The parties before me agreed that since the central facts are accepted, there is no point in any further evidence being called. It was agreed that I would proceed to remake the decision in the appeal on the evidence before me.
16. I begin by setting out the accepted facts. The Appellant is from Okakarara, a small town in north central Namibia, about 300km from Windhoek. The Appellant himself describes realising that he was gay in early puberty, but states that in retrospect his peers recognised it before he did. He used to prefer to play with girls rather than do "boy things" and his brothers used to taunt him and tell him to play football instead. They would call him "moffy", a slang term for gay. The Appellant's first homosexual experience was when he was about 13/14. His family found out that he had been with this other boy and his

father beat him, almost killed him. He hung him upside down and beat him with electrical wires. He shouted that he was going to make the Appellant “like girls”. The Appellant’s mother stopped the assault. Afterwards the Appellant assured his mother that he was not gay – he said that him and the boy had just been playing. His family were observant Christians who believed in the “holy fire”. As he grew older the Appellant began to understand what his feelings meant. When people called him names he realised that there was nothing he could do about it because having homosexual relationships is not legal in Namibia. He began to feel scared. He did not feel safe around his family. By his late teens he was “trying to act like a man” in order to hide his sexuality. He started playing football and other more ‘male’ activities. He describes trying to “walk like a straight man”.

17. The Appellant accepts that he did have male partners in Namibia. He describes having short flings or one night stands – “they just want intercourse and then they don’t want to know. Some elderly men just do that”. He describes being in bars and making eye contact – you could follow each other into the toilet and exchange numbers and then arrange to meet somewhere. It would be somewhere dark, somewhere no one would find out. The Appellant would lie to his family when he was going to such a rendezvous – he would say that he had a job interview, or an extra class. One time he met a man in a bar in Windhoek called the Car Wash – it was known for being a gay bar.
18. The Appellant states that he only had one real relationship in Namibia. It was when he went to vocational school away from home, when he was about 20. He was staying with his aunty in Kakaraya and attending college during the day. He met a man, Dave, there. They met in the library and hit it off. They didn’t need to discuss sexuality – it was understood. The Appellant really liked him and just took a risk: “you just close your eyes and step into the fire”. They were together for about 2 years. No one knew, except for the Appellant’s sister, who saw a picture of Dave on the Appellant’s phone and questioned him about it. She kept it secret. They would not go anywhere together in the ‘open’, except they would study together in the library. They would meet together at Dave’s place, and on occasion the Appellant would rent a room where they could secretly meet.
19. The problems that caused the Appellant to leave Namibia started in late 2018. Once you get past 21, and have done everything you are supposed to do, the tribe, your family, expect you to marry. Sometime in the autumn one of the Appellant’s uncles died. There is a tradition in his tribe then when an elder dies, some younger people must marry. All the elders had gathered for the funeral, and were in the ‘big house’ with the body of the dead man. They called the Appellant in – they were all sitting there. They told him “tonight, you will marry”. His bride was to be a cousin, who was one year younger than the Appellant. The Appellant left the big house, and “vanished”. He knew that he could not marry his cousin: he walked out of the compound, got a lift to the

nearest town, and then took another. The Appellant returned to Kakaraya, where he had been studying. He had one more test to take so he stayed there for a month or two to complete his course. Kakaraya is about 70km from the village. The Appellant was contacted by his brother and sister they told him that everyone is angry and the girl's family are asking "where is the boy". The Appellant told his brother that he just wanted to finish his course and then he would marry.

20. He did not however return to the village as promised. After he had finished his course the Appellant went to Windhoek to stay with friends. He would not stay long in one place. His sister would message him to warn him that he had been located - that the family had heard he was staying with so-and-so and so he would move on. He survived doing odd electrical jobs and staying with friends. After some months his sister told him that he should try and leave the country - she said that the family would "hound him like an animal". He applied for a Schengen visa and left in approximately May 2019.
21. At his interview the Appellant said that he did not want to remain in hiding in Namibia: "I wouldn't want to live a life of travelling from town to town new life, sleep fearing, wake up fearing....Namibia is not such a big country, if someone is looking for you, they will find you". Asked directly whether he would hide his sexuality if returned to Namibia the Appellant said that he would. He is still afraid of his family, of people his age: "I am just fearing the whole country".
22. In this country the Appellant is entirely open about his sexuality. He experiments with wearing make up, or high heels, in public. There is no pressure here - no one cares. At the date of the interview the Appellant had made contact with a LGBT group in Liverpool - Many Hands One Heart. He wanted to find a partner, to live a normal life. To marry another man. Asked if it was important to him to be able to express his sexuality the Appellant replied

"Yes it is. It means like when I am around guys or ladies I should be able to tell them I should be able to do that and not be afraid of anything. People should know what I am"
23. I now apply these facts to the framework set out in HJ (Iran) [at my §9 above].
24. The Appellant is a gay man.
25. As to whether gay men who live openly in Namibia face a real risk of persecution, I have been referred to the Respondent's CPIN entitled *Namibia: Sexual orientation and gender identity and expression* (Version 1.0: November 2018) and other country background material in the Appellant's bundle, the relevant passages of which have been helpfully highlighted. Insofar as that additional

material is consistent with the CPIN, I have not summarised it in any detail here.

26. The Respondent points to positive features in the evidence about life for gay men in Namibia. Although gay sex is illegal, there are no reported prosecutions and the gay community, particularly in Windhoek, appear to be tolerated by the state, which in recent years has permitted 'Pride' parades to take place and permitted LGBT civil society organisations to operate. The US State Department reported that apart from isolated shouting of insults and "head shaking" by passing drivers, the parades have passed off without incident. Although homosexuality has traditionally been considered taboo, a recent survey found that 55% of Namibians would "accept a gay neighbour" and there is a growing tolerance for sexual minorities. Young people in particular believe old attitudes to be waning. The government of Namibia does not generally commit "egregious human rights violations" against the population and there is in general a good level of control over the police and security forces. Unlike in some other African states, politicians do not universally incite hatred against the gay community: "vocal disapproval from prominent politicians, parliamentarians and some community members sits alongside attitudes ranging from tolerance to acceptance in some communities" [CPIN 5.2.2]. It was this picture of relative tolerance which led the Respondent to refuse the claim.
27. Against this, are the following matters.
28. LGBTI people continue to report being subjected to discrimination and harassment when trying to access services, in interactions with the authorities, and by society in general. Gay youth are more likely to be unemployed, to abuse drugs and alcohol, and to be vulnerable to discrimination. There are reports of LGBTI people being subjected to verbal, physical and sexual abuse. The CPIN cites [at 2.4.12] a 2016 academic study² which found that 52% of men who have sex with men (MSM) have experienced a human rights abuse, defined as rape, police beatings, blackmail, or the discriminatory denial of healthcare or housing. I note that a 2009 study conducted by the UN Human Rights Committee made similar findings, as did a University of Namibia study in 2008. Mr Wood understandably placed considerable emphasis on these figures. It is therefore necessary to look at this evidence in more detail.
29. It is clear that some harassment and violence stems from that proportion of the Namibian population who are not tolerant towards the LGBTI community. This much is confirmed in the CPIN [2.4.12]. At one end of the scale examples are given of the discriminatory denial of medical care and housing, at the other extreme violence. The global figure of 52% in the 2016 study is broken down as follows: "14% of the MSM Namibians surveyed had been raped, 21% had been

² Zahn et al *Human Rights Violations among Men Who Have Sex With Men in Southern Africa: Comparisons between Legal Contexts* (2016).

blackmailed, and 22% had been beaten by the police or government official” [CPIN 5.3.10]. These findings accord with the research conducted by The Other Foundation in 2017 which found:

5.3.11 The Other Foundation report 2017 noted:

‘Violence against LGBTI people is pervasive and there are “high levels of sexual and other violence targeting people because of their sexual orientation and gender identity [which] are endemic in some areas of our country.” (ORN Human Rights Report on LGBTI People in Namibia, 2013).

‘Upwards of 40% of MSM [men who have sex with men] experience human rights abuses including rape and violence, and this violence is reported as one of their main health challenges. Hatred, extreme violence and rejection from family and communities, including lack of financial support, is a significant challenge’

30. What is clear from the material in the CPIN is that much of this violence is perpetrated by the police themselves. In 2016 the UN ICCPR Human Rights Committee expressed concern about the reported cases of violence and harassment against lesbian, gay, bisexual and transgender persons by the police [CPIN 4.2.3]. The following year the UN Committee Against Torture expressed concerns about the abuse and ill-treatment of LGBTI persons in detention and found that “police officers *routinely* violate the human rights of LGBTI individuals by arbitrarily arresting them or subjecting them to physical violence” [4.2.6] (my emphasis). The Other Foundation made similar findings in 2017, referencing a number of sources who conclude [at 4.2.4]:

“The significant experiences and needs of LGBTI people relate to the prevalence of physical and sexual violence, including general violence, police violence, rape and rape by the police.

Harassment and brutality at the hands of the police is a reality and police create methods to humiliate trans people, including forcing them to strip in public”

31. Crucially, where hostility does occur, the Respondent recognises that a distinction must be drawn between the population at large, who in general terms enjoy a sufficiency of protection from the state, and the LGBTI community: “in general, the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of the protection of the authorities” [CPIN 2.5.5]. This conclusion was, in light of the material from various UN committees cited in the CPIN, perhaps inescapable. UNCAT concluded that the state had failed to take sufficient action to prevent, investigate and protect LGBTI individuals from torture, cruel, inhuman or

degrading punishment [see for instance 4.2.6] and found that this was, at least in part, because homosexuality continues to be forbidden by law. The US State Department has in recent years consistently cited the same complaint made by human rights organisations. An example is given in the CPIN [5.1.1] of what that means in practice, even in the context of relatively tolerant Windhoek:

“That civilised and passive attitude doesn’t always prevail, as one of my friends found out a few weeks ago when he was beaten up in a gay friendly local establishment in a homophobic attack. The establishment did nothing to try to protect him, which earned it an online petition, but little else.

The police wont help, either. In fact, they reportedly refused to pursue the above case and are often the cause of violence against the LGBTI community. The biggest problem is the silence that breeds the ignorance that breeds the violence”.

32. That failure of state protection must be seen in the context of the continued existence of laws prohibiting homosexual intercourse. A 2013 report *Baseline Study Report on Human Rights in Namibia* to this effect is cited in the CPIN:

5.3.2 The same report noted: ‘Even though the laws on sodomy and unnatural sexual offences are seldom enforced, their existence has a negative impact on the LGBT community. These laws perpetuate stigma and discrimination, create an environment of fear, encourage secrecy which undermines public health initiatives and damage the dignity of LGBT individuals’.

33. The conclusion I draw from this material is as follows. The Respondent is correct to find that Namibia is a significantly better place to be gay than some other countries in Africa. That the authorities, and society in general, has given space to, and tolerated ‘Pride’ marches, is a very positive sign. Although homosexual intercourse remains a crime, there appears to be no appetite for prosecutions. Gay bars exist, particularly in Windhoek. The situation is improving all the time, as the views of the younger population become ever more tolerant, and LGBTI representation in civil society increases in strength. The author of the refusal letter has however fallen into the trap – much like the First-tier Tribunal – of concluding that a LBGT presence in civil society, and a lack of prosecutions, must mean that there is not in general terms a real risk of serious harm for those who choose to live ‘openly’. I am not satisfied that the enquiry can properly begin and end there. The fact that a particular social group exists cannot logically negate its claim to face persecution; the fact that such a group is permitted to organise or campaign collectively *may* be a relevant factor in determining whether its members are at risk, but it cannot be the only consideration.

34. Here, unfortunately, the evidence on the other side is currently outweighing those positive advances in human rights in Namibia. The bald statistics which appear in the CPIN have not been challenged and are not contradicted by any other material before me. They are broadly consistent with studies over the preceding decade conducted by the UN CRC and other academics. The 2016 research found that 14% of gay men in Namibia have been raped, and 22% have experienced violence at the hands of the police. 21% report being subject to blackmail. Those are not insignificant figures, nor insignificant harms that can be dismissed as 'discrimination'. They must be read in light of the conclusions that violence towards the LGBTI community generally is "pervasive" and at "high levels" (The Other Foundation 2017). Violent assault by the police is "routine" (UN CAT). I do not think it impermissible speculation to find that those who are subject to these most serious of human rights violations are likely to those who are *identified* by the perpetrators as being LGBTI. It follows that they are likely to be, to one extent or another, 'open' in their sexuality. That being the case, I must find that for those brave enough to be 'out' in Namibia, life in this relatively tolerant, "laid back" country nevertheless carries with it the constant risk of serious harm. The fact that there are gay bars is little consolation if daily life carries a 1 in 5 chance of being assaulted by the police, raped or blackmailed.
35. It is clear from the Appellant's own evidence that he - and the community at large - apprehended that to be the case. His description of his own illicit encounters with men in toilets, and how he and his partner Dave managed to maintain a relationship over two years entirely in secret is consistent with this country background material. Whilst the direct threat to the Appellant came from his family, he indicates in his evidence that he "feared the whole country". That the Appellant himself did not experience at direct assault by for instance the police is, on a statistical analysis, his good fortune. I note in this regard that he was only in Windhoek a matter of months before he left the country.
36. I am satisfied that whilst is clearly a mixed picture for the LGBT community in Namibia, it remains the case that such individuals face a real risk of persecution if they choose to live openly.
37. I return to the HJ analysis. Given the unchallenged evidence of the Appellant, on this I can be brief. It is his clear evidence that whilst in Namibia he hid his sexuality not just from his family, but from society at large. To the extent that he was able to have sex with other men he did so in secret, and at significant personal risk. He "slept fearing, woke fearing". In this country, absent the risk of serious physical harm the Appellant is able to openly express his LGBTI identity. He has experimented by wearing make-up and high heels in public; he speaks of his hope of finding a partner, and maybe one day getting married. He is able to live this life not just because he is free of the constraints of societal expectation, but because he is free of a risk of actual harm. I accept his evidence

that if returned to Namibia he would feel compelled to go back into hiding, and he would do so out of fear of persecution.

38. It follows that the Appellant is a refugee.

Anonymity Order

39. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decision and Directions

40. The decision of the First-tier Tribunal is flawed for material error of law and it is set aside.

41. The decision in the appeal is remade as follows: the appeal is allowed on protection grounds.

42. There is an order for anonymity.

Upper Tribunal Judge Bruce
15th February 2021