



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004274
FTT: PA/51447/2023
LP/00801/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 December 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

IK (Namibia)
(anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes, Counsel instructed by Lawmans Solicitors
For the Respondent: Mr Diwnyecz, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 29 November 2023

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify him or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a national of Namibia born in 1994. He appeals with permission against the decision of the First-tier Tribunal (Judge Forster) to dismiss his appeal, on human rights and protection grounds, against a decision to refuse him leave to remain in the United Kingdom.

2. The Appellant's claim for protection, made on his arrival in the UK on the 7th July 2019, is on the basis that as a gay man he has a well-founded fear of persecution for reasons of his membership of a particular social group in Namibia. He asserts that he was attacked in the street in 2018 by a group of men who hurled a derogatory epithet at him, that he has been disowned by members of his family and that as a footballer he suffered homophobic abuse from fans. He fears serious violence that the state will be unable, or unwilling, to protect him from.
3. The appeal was dismissed by Judge Forster on the 11th August 2023.
4. I am satisfied that the decision of the First-tier Tribunal contains errors of law such that it must be set aside, and the decision remade. Those errors are as follows.

Error 1: Procedural Unfairness

5. The account given by the Appellant was accepted by the Respondent. As a result the Appellant did not give evidence, because he and his representatives believed that the only dispute between the parties was the extent to which his fear was objectively well-founded, a matter to be determined by reference to the country background evidence. In particular the refusal letter expressly accepts that the Appellant was attacked in 2018, and takes no issue with his interpretation of that event, which was that it was a homophobic assault. The Appellant believes this to be the case because the men called him 'Mofi' which is a word used in Namibia as a homophobic slur. The First-tier Tribunal rejected this interpretation, preferring its own translation of what the word 'Mofi' means:

The Appellant himself initially believed it was simply a robbery but because he was called "mofi" he came to think that it must have been due to his sexuality. However, in his asylum statement, the Appellant states that his uncle was sometimes called "mofi" because he was "kind and not tough". It is clear that "mofi" is used as general term of abuse. The fact that the Appellant was called "mofi" by his assailants does not establish that it was reasonably likely that they attacked him because he is gay.

6. It is a fundamental principle of fairness that a party must have an opportunity to address points taken against him. This assault, and the reasons for it, had not been placed in issue by the Respondent. It was accordingly unfair for the Tribunal to go behind that agreed position without giving the Appellant a chance to speak to it, or if necessary to produce independent evidence confirming what is understood by the word 'Mofi' in Namibia.

Error 2: Reversing the Burden

7. Staying with the assault, there is a discrete error in the Tribunal's approach to it. At its paragraph 26 the Tribunal uses the following formulation:

"I find that it is reasonably *unlikely* that the men who attacked the Appellant because he is gay".

(emphasis added). This was an inversion of the standard/burden of proof and an error of law. The question, in this pre-NABA 2022 appeal, was whether it was reasonably *likely* that the men who attacked the Appellant while calling him 'Mofi' did so because they perceived him to be homosexual.

Error 3: Misdirection

8. The guidance in HJ (Iran) (FC) v Secretary of State for the Home Department [2010] UKSC 31 required the Tribunal to ask itself a series of questions. The first was whether the Appellant is in fact gay. That question has been answered by the Respondent, who accepts that he is, so all the Tribunal had to do was adopt that agreed finding. The second question is whether gay people who live openly in Namibia face persecution. That was the primary matter in issue in the appeal, and it is a question that is not answered by the First-tier Tribunal's decision. What the decision instead does is consider other possible reasons for why this appellant has suffered harm in the past. That is an error of law. The proper approach was to examine the country background material about gay men generally and to ask itself whether someone living *openly* as a homosexual would face a real risk of persecution, before going on to ask the final *HJ* question of whether the Appellant would conceal his sexuality and if he did, why.

Decisions

9. The decision of the First-tier Tribunal is flawed for error of law and is set aside in its entirety. The decision in the appeal must be remade. Before me the parties agreed that given the nature of the errors, in particular that the decision is flawed for unfairness, the interests of justice require that this be undertaken in the First-tier Tribunal by a judge other than Judge Forster.
10. There is an order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
29th November 2023