Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06972/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 31 May 2017	**on 2 June 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HUSSEIN AHMAT ATTIE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr G Dewar, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent decided to deport the appellant for reasons explained in her decision dated 1 February 2016.

2. Designated FtT Judge Murray dismissed the appellant's appeal for reasons explained in her decision promulgated on 8 February 2017.

3. The appellant has permission to appeal to the UT on grounds which (lightly edited) run as follows:

Failure to take relevant evidence into account.

At paragraph 56 the judge concludes that the appellant is not gay because, inter alia, "The only evidence I have of him being homosexual is his own evidence".

Apart from the appellant's own witness evidence there was evidence that he has been convicted of a number of sexual assaults against other men (and none against women). There is also a social work report which stated that the appellant "undoubtedly would have experienced 'sexual thoughts' prior to the offences being committed". The author of the report is presumably objective and appears to benefit from some degree of expertise in the assessment of sexual offenders.

By failing to consider this evidence and to assess the appellant's evidence in the round with it, the judge materially erred in law.

Error by imposing requirement of corroboration.

Further and in any event by dismissing this aspect of the claim due to an (alleged) absence of corroboration the judge made a further error in law by requiring corroboration in a jurisdiction were this not required.

Application of incorrect (higher) standard of proof.

The judge in effect applied a standard of proof higher than "reasonable degree of likelihood" on this point. The Home Office decision accepted that the appellant "may well be gay". The Home Office made clear that this was not intended as a concession and it is accepted that it is does not go as far as an explicit concession that the appellant *is* gay. However, if any fact "may well" be correct then there must be a "reasonable degree of likelihood" that it is correct. To conclude otherwise is illogical. It is impossible to see how the judge could have concluded otherwise without imposing a higher standard of proof.

Making a finding that is unreasonable and irrational.

At paragraph 56 the judge concludes that the appellant did not commit sexual offences against men because he is gay but because "he could be bisexual or could be seeking revenge against men for some reason ". Neither of these eventualities (based upon speculation in any event) would absolve him of risk on return to Chad. If driven to seek sexual gratification with men (for whatever reason) he could be at risk of persecution in Chad. By apparently concluding that he would not be at risk if bisexual or "seeking revenge against men" the judge proceeded in a manner that is unreasonable and irrational.

Further failure to take relevant evidence into account and failure to reach conclusion on core aspect of claim.

At paragraph 64 the judge says "I see no reason why he would not be able to get through the airport [on removal to Chad]. I do not believe he would be at risk of detention"… she has failed to take into account a relevant and material factor…

In his supplementary witness statement at paragraph 4 the appellant said, "I believe the authorities of Chad would ask me about [my criminal record] at the point of return".

> It was the appellant's case that if asked about this he would be exposing himself to a risk of persecution because his criminal record indicates that he is (a) a sex offender and (b) gay. If this creates a risk of persecution, he cannot be expected to lie to avoid it … This is not something the judge appears to have taken into account when reaching her conclusion that she sees "no reason" why he would face problems at the airport.
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> In relation to the same point … the appellant's assertion that he would be asked about such matters by the authorities in charge seems entirely credible. By analogy, immigration officers in the UK would be expected to ask such questions of any returnee to the UK. This went to the core of the claim and the judge was obliged to consider the point and reach a conclusion on it. Failure to do so is a further error of law.
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> The appeal should be reheard *de novo* by a differently constituted First-tier Tribunal.

4. The submissions for the appellant were along the lines of the grounds. The main further points which I noted were as follows. It was accepted that although the grounds are set out under 5 headings, they overlap significantly. The evidence that the appellant is homosexual was not only his own. The social enquiry report provided to the High Court on the appellant is at page Q1 of the respondent's bundle. At page Q6 there is the passage quoted in the grounds. As the author of the report observed, the commission of the offences required motivation. This was evidence to support the proposition that the appellant is gay. That was the inference which ought to have been drawn. It was not clear what the judge meant at paragraph 56. There was also an inference to be drawn from the appellant's criminal conduct. The authorities in Chad would in any event draw the inference that he was gay, which was sufficient to give rise to a need for protection. It was accepted that is not an error that the judge did not include a self-direction on the standard of proof. The question was the standard of proof which she applied, which was pitched too high in effect at paragraph 56. The Home Office did not concede that the appellant is gay, but went so far as to say that he "may be homosexual". That could only logically be taken as substantial grounds for believing that he might be, and as sufficient to meet the lower standard of proof, at least a serious possibility that the appellant is gay. The judge's findings regarding what might happen at the airport in Chad failed to take account of the probability that the appellant would be questioned on return. It was accepted that the appellant was the only source of evidence about that, but it was an obvious likelihood, and although the appellant might have been not generally credible, it did not follow that he might not be correct about that.

5. The presenting officer submitted along these lines. The appellant said that the sentencing report disclosed a high probability that he is homosexual, but it only says that he must have experienced "sexual thoughts", not that these were necessarily of a homosexual nature. The judge had been well aware of the issue between the parties on this point, which she set out carefully at paragraph 6. It was not shown that the appellant's sexual offending necessarily related to his sexual orientation. His attitude towards his offending was highly inconsistent and unclear. There was no other evidence about his orientation. He gave no comprehensible account of either his motivation or his sexuality. There was no concession made and no presumption arose. The judge did not find the appellant a reliable witness, noted that he had not been living in the UK "as an openly gay man", and at paragraph 59 expressly

declined to find that he is homosexual. As to return to the airport, there was no reliable evidence of what the authorities of Chad might do. It was far from obvious that the appellant would be asked questions. There was no evidence that returnees under similar circumstances to the UK would be questioned by immigration officers. The little evidence there was on the point came from someone who is well established to be a liar.

6. Mr Dewar in reply said that the key point for the appellant went to the standard of proof. The decision did not demonstrate that the correct standard had in effect been applied. There had been material before the FtT more than adequate for the appellant to succeed in proving his sexual orientation. Applying the correct standard to the evidence, the judge could logically have drawn only one conclusion.

7. I reserved my decision.

8. The respondent said that the appellant might be gay, but expressly stopped short of a concession, to the lower standard. The respondent's letter written in course of proceedings (27 September 2016) took the position that although convicted of a number of violent sexual assaults against men, a distinction was to be drawn between those matters and his sexual orientation.

9. The respondent's point was made in a particular context, both in the original decision and in the further correspondence: "While it is accepted you may well be homosexual, it is not considered there is a significant risk that you would come to harm because of this on your return to Chad". That aspect has rather been lost sight of; the evaluation was in the alternative that the appellant might be gay. For completeness, that was a necessary part of the respondent's decision-making.

10. In any jurisdiction, particular facts in contention may be shown to varying degrees, from the faintest of possibilities to virtual certainty. What the tribunal had to do was to apply the correct standard to the overall decisive issue.

11. The respondent's position did not require the judge to find that the appellant had established his homosexual orientation to the lower standard of proof. It was for her to gauge the degree of possibility.

12. The nature of the offending was not conceded to speak for itself as to the appellant's sexual orientation. I do not think it has been contended that the offending obliged the judge to find in his favour on the issue. In any event, her decision explains why she did not find that point conclusive.

13. The social enquiry report is not a separate source of evidence that the appellant is gay, but at best a commentary upon the evidence. It was there to be considered, but its terms offer no real additional support to the proposition that the appellant is gay. The author does not purport to say that the perpetrator of such offences must be so.

14. There may have been evidence by which the judge could have found one way or the other on the appellant's orientation, but it was not evidence by which she was bound

to come to only one conclusion, and there was no error in coming down on the side she did.

15. In any event, the appellant's sexual orientation was not decisive of his case.

16. The judge found no evidence that in Chad the appellant would behave openly as a gay man, or that anyone would know about or be interested in his sexuality. At the date of the hearing, homosexuality was not illegal in Chad. No error has been shown in those conclusions.

17. The evidence that the appellant might be questioned at the airport on return to Chad (leading him to disclose his convictions) was as skimpy as it could be, no more than his own (convenient) guess.

18. Even if there had been some realistic evidence that the authorities in Chad question citizens whose return is enforced, it is far from clear that the appellant would be entitled to have his case considered on that basis. The appellant did not develop this aspect of his case either in the FtT or in the UT, but refusal to return voluntarily, where that course is available, does not qualify for protection, as a matter of general principle.

19. (On that point, see e.g. *Macdonald's Immigration Law and Practice*, 9th ed., ¶12.24, citing *AA v SSHD, LK v SSHD* [2006] EWCA Civ 401, [2006] NLJR 681, [2007] 1 WLR 3134. Put another way, "A person cannot rely on their own failings (as where they do not co-operate in securing valid travel documentation) to obtain international protection": *Macdonald's Immigration Law and Practice*, 9th ed., ¶12.28, citing *HF v SSHD* (Iraq) [2013] EWCA Civ 1276.)

20. There is no reason to think that the appellant might not, if he chose, return to Chad in his true identity on regularly obtained documentation.

21. In short, the judge was not bound to find that the appellant is gay; made no error in declining so to find; and in any event, even if he had established that he is gay, the appellant failed to make the case that his orientation placed him at risk on return to Chad, arising from questioning at the airport, or otherwise.

22. The determination of the First-tier Tribunal shall stand.

23. No anonymity direction has been requested or made.

Hugh Macleman

1 June 2017
Upper Tribunal Judge Macleman