IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001049

First-tier Tribunal No: PA/01147/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23rd October 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A A
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr R. Spurling, instructed by Duncan Lewis Solicitors

Heard at Field House on 07 May 2024

Order Regarding Anonymity

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 the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Upper Tribunal has been conscious of, and apologises for, the delay in promulgating this decision. The delay was in part caused by an unavoidable and fairly lengthy period of fitness absence of one of the panel members, which was followed by a phased return to work.

2. For the sake of continuity, we will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

3. The original appellant (AA) appealed the respondent's (SSHD) decision dated 28 June 2021 to refuse a protection and human rights claim in the context of deportation proceedings. Because the appellant had been convicted of a serious criminal offence, the respondent certified that there was a presumption that the appellant constituted a danger to the community for the purpose of section 72 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002').

First-tier Tribunal appeal

4. First-tier Tribunal Judge Mulready ('the judge') allowed the appeal in a decision sent on 29 December 2023. The judge summarised the appellant's account of his childhood history in Jamaica. When he was 13-14 years old the appellant considered that he was in a relationship with an older man. He did not consider it to be sexual abuse. It was not disputed that the man was murdered or that the appellant was 'repeatedly violently attacked in Jamaica, leading to multiple scars on his head and body including from a metal bar, a machete, and attacks by dogs.' The appellant was brought to the UK by a relative in 2001, when he was 18 years old [3].

5. The judge noted the serious nature of the appellant's conviction for rape in 2018, for which he received a sentence of 7 years' imprisonment [4]. The judge also summarised the basis of the appellant's protection claim. He feared that he would be at risk on return to Jamaica as a bisexual man [5].

6. The judge took a clear and structured approach to her decision. She summarised the relevant issues that needed to be determined before deciding each issue in turn [6].

7. The judge began by considering whether the appellant had rebutted the presumption that he was a danger to the community. She reminded herself of the guidance given in *Danso v SSHD* [2015] EWCA Civ 596, that rehabilitation courses taken in prison were unlikely to bear material weight [13].

8. It was not disputed that the appellant had been convicted of a serious offence. The judge set out the details of that offence [14] before going on to consider the evidence that was produced by the appellant to rebut the presumption that he constituted a danger to the community [15]-[33].

9. The judge was critical of the appellant's claim that, at the time he committed the offence, he did not know that forcing himself on a sleeping woman who had been drinking was wrong, albeit he was at pains to say that he now knew it was wrong. The judge noted that the appellant had been drinking and smoking cannabis at the party on the night of the offence. The appellant said that he was ashamed of what he had done, had written to apologise to the victim, and had attended a victim awareness course. The judge considered the evidence of Dr David Rigby, who had prepared independent psychiatric reports.

10. The judge also considered the evidence given by Kate Adams, a Caseworker and Prison Co-ordinator from Kent Refugee Help, who had been working with the appellant. Ms Adams made clear in her statement that she had been a social

worker in London for 10 years. She also had some training in counselling. Ms Adams had been in her current job at Kent Refugee Help since 2014. Ms Adams had known the appellant since 2021.

11. The judge made clear that Ms Adams had given her evidence in a careful way. Ms Adams made clear that she could only comment on what she had seen and experienced of him and his behaviour towards women. Ms Adams was not qualified to conduct a risk assessment, but during the course of her work experience she had worked with many people who had committed sexual offences. Ms Adams gave an example of her own observations of the appellant's behaviour at a Christmas party in 2022, where she did not observe the appellant demonstrate any behaviour that might cause concern, despite the fact that there were women there and alcohol was available. Ms Adams was also able to give her observations about his demeanour with an older Jamaican lady he was friends with and could say that he had a good relationship with the police who manage the sex offenders register [20]-[21].

12. When coming to her conclusions on this issue, the judge acknowledged the very serious nature of the offence and the impact that it was likely to have had on the victim. Although it was a serious offence, she noted that it was the appellant's only conviction. The offence took place over 6 years before. The judge was careful to note that Ms Adams was not a probation officer, nor did she have any formal qualifications to assess the risk of reoffending. However, the judge accepted that as a social worker she was likely to have had relevant experience dealing with offenders who had committed sexual offences. The judge also noted that Ms Adams herself was very careful to make clear the limits of her role when she gave evidence [28].

13. The judge considered the appellant's evidence on this issue, which she did not find entirely credible. She did not accept that he did not know that what he did was wrong when he committed the offence. She accepted that the appellant had learned from attending the victim awareness course and now had a greater understanding of issues surrounding consent and vulnerability. He also understood the life changing nature of the offence he committed for the victim [29]. Although he expressed a great deal of remorse for the offence, most of his regret appeared to be for the fact that it had led to him being imprisoned. Even if the appellant did not have complete insight into the offence, the judge was satisfied that he was 'incentivised not to reoffend by the threat of return to prison' [30].

14. The judge went on to consider the respondent's concerns about the appellant's continued use of drugs and alcohol, given the role that they played in the offence. She accepted that there was some evidence to show that, on at least one occasion, he had attended a party without drinking. She accepted the appellant's evidence that he now only smokes cannabis and drinks wine occasionally rather than habitually. He was aware of the 'risks of overindulging'. The judge also noted that the appellant had social support and positive influences in his life now, which he did not have at the time he committed the offence.

15. Having considered the evidence relating to this issue as a whole, the judge considered it to be a 'finely balanced' decision. However, she was satisfied that there was 'significant evidence of positive rehabilitation' and for this reason she concluded that the appellant had rebutted the presumption that he constituted a danger to the community [33].

16. The judge then went on to consider whether the evidence showed that the appellant had a well-founded fear of persecution for reasons of his membership of a particular social group, identified to be 'bisexual men' [34]-[50]. The judge accepted on the low standard of proof that the appellant was likely to be bisexual. She took into account the respondent's submission that there was only evidence to show that he had been in relationships with women since he came to the UK. The judge was satisfied that the appellant had been in what he considered to be a relationship with an older man when he was around 12-13 years old, which she found to be sexual abuse of a child. She accepted his evidence of past events because it was 'sufficiently detailed and consistent across multiple accounts, and plausible in the circumstances of his childhood…' [38]. The appellant had also been consistent about his sexual orientation with various professionals, across interviews, statements, and in oral evidence. In oral evidence he had described a brief relationship with a man in the UK. The judge accepted that there was no documentary evidence of that relationship, but she accepted that it might be difficult to do given that the relationship ended some time ago and in the circumstances he described [39]-[40].

17. Although the respondent relied on the late application for asylum as a matter that was generally damaging to the appellant's credibility, the judge noted that the respondent did not raise any specific challenge to the appellant's account of 'what took place during the individual attacks, of the severe injuries he suffered, of his being subjected to verbal abuse using homophobic slurs, nor did the Respondent challenge the Appellant's evidence that the man he considered himself to be in a relationship with, was murdered.' [43]. Her own assessment was that the appellant's account of the violence he suffered in Jamaica had been detailed and internally consistent across the many accounts he had given to various people. She noted that Dr Rigby had given him a probably diagnosis of enduring personality change after a catastrophic experience i.e. complex post-traumatic stress disorder [44]. She also noted that his account of how he obtained the injuries from members of the One Order Gang was consistent with the medical evidence, which found that his injuries were consistent or highly consistent with the explanations he gave for them. His description of the police response (or lack thereof) was also consistent with the unchallenged evidence of the country expert [45]. For these reasons, she concluded that the appellant had suffered past persecution in Jamaica because he was perceived to be gay [46].

18. The judge went on to consider the country guidance in *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica* CG [2005] UKAIT 00168. She quoted the headnote in full:

> 'Men who are perceived to be homosexual and have for this reason suffered persecution in Jamaica are likely to be at risk of persecution on return. Men who are perceived to be homosexual and have not suffered past persecution may be at risk depending on their particular circumstances. The Secretary of State conceded that, as a general rule, the authorities do not provide homosexual men with a sufficiency of protection. There are likely to be difficulties in finding safety through internal relocation but in this respect no general guidance is given.'

19. In light of this guidance the judge found that, as a person who has suffered past persecution because he was perceived to be gay, it was likely that he would still be at risk if returned. She then quoted the following sections of the expert country report of Dr Damion Blake:

> ‘2. It is more likely than not that [the appellant] will encounter homophobic attitudes and practices if he is deported to Jamaica. Further, there is an entrenched culture and practice of anti-gay violence against men and trans-women in the LGBTQ+ community in Jamaica. …’
>
> …..
>
> ‘4. It is my opinion that [the appellant] will be at risk for, stigmatization, isolation, physical attacks, torture, and/or deadly violence because of his sexual orientation as a bisexual male. This fact is compounded by the reality that he was previously attacked by members of the One Order Gang and is likely to be targeted again if he is deported to Jamaica. At the very least, he has a high risk of experiencing physical abuse and serious bodily harm from members of the One Order Gang. …’
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> 5. [The appellant], in my opinion, has several interlocking risk factors working against him. Namely: (i) he is a bi-sexual male who was previously identified, labelled as a gay man (batty bwoy), attacked, and injured in Jamaica because of his sexuality. As a result, he has a high risk of being attacked again in Jamaica because of his LGBTQ+ identity. (ii) A targeted ‘hit’ is likely to be activated against him if he returns to Jamaica by members of the notorious One Order Gang because of his bisexual orientation. …’
>
> …..
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> ’124. Compounding this reality is the fact that deportees as I note above, have a stigma and label in Jamaica, when they are returned to the island, their whereabouts are accessible. In fact, when a deportee enters or is returned to his/her community, residents know that they have been returned.’

20. In light of the country guidance and the up to date expert evidence, the judge concluded that the appellant had a well-founded fear of persecution in Jamaica, that there would not be sufficiency of protection wherever he lived in Jamaica [50]. In the alternative, she made clear that even if she had not found for the appellant in relation to the section 72 issue, she would have allowed the appeal on human rights grounds because there was a real risk of a breach of Article 3 ill-treatment if he were returned to Jamaica [51].

Upper Tribunal appeal

21. The respondent applied for permission to appeal to the Upper Tribunal on the following grounds:

(i) The First-tier Tribunal failed to give adequate reasons for finding that the appellant had rebutted the presumption that he constituted a danger to the community for the purpose of section 72 NIAA 2002. The judge erred in placing weight on the evidence given by Ms Adams, a former social worker and current caseworker at Kent Refugee Help, as to the risk that the appellant might pose.

(ii) The First-tier Tribunal failed to give adequate reasons for finding that the appellant was a bisexual man and was therefore a member of a particular social group.

22. We have considered the First-tier Tribunal decision, the documentation that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but we will refer to any relevant arguments in our decision.

23. The Supreme Court in *HA (Iraq) v SSHD* [2022] UKSC 22 reiterated that judicial caution and restraint is required when considering whether to set aside a decision of a specialist tribunal. In particular, judges of the specialist tribunal are best placed to make factual findings. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v SSHD* [2007] UKHL 49 and *KM v SSHD* [2021] EWCA Civ 693. Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account: see *MA (Somalia) v SSHD* [2020] UKSC 49. When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out: see *R (Jones) v FTT (SEC)* [2013] UKSC 19. We have kept these considerations in mind when coming to our decision.

Decision and reasons

24. Having considered the arguments made by the parties and the evidence before the Upper Tribunal, we conclude that neither of the grounds disclose a material error of law in the First-tier Tribunal decision that would justify setting the decision aside.

25. Mr Lindsay accepted that the judge was entitled to take into account the evidence given by Ms Adams in assessing whether the appellant had rebutted the presumption that he constituted a danger to the community. However, he submitted that the judge appeared to give substantial weight to her evidence when she did not have the qualifications to assess what risk he might pose.

26. The first ground, as drafted, made a series of submissions on the evidence, but amounts to no more than a disagreement with the judge's findings. We have set out the judge's findings in some detail above. It is clear from that summary that the judge gave careful consideration to all of the evidence that was relevant to the assessment of whether the appellant constituted a danger to the community. The respondent has not referred to any formal risk assessment made by a relevant probation officer, such as an OASys assessment, which might show a positive risk of reoffending. The respondent's bundle does not appear to include any evidence of that kind.

27. The judge assessed what evidence was before her, which included the appellant's oral evidence, the fact that this is his only recorded conviction (albeit a serious one), the period of time that had elapsed since the offence, the appellant's evidence about the rehabilitation he had completed while in prison, and the evidence of Ms Adams and Dr Rigby. In our assessment, the judge conducted a balanced review of this evidence. She did not accept that the appellant did not know what he did was wrong at the date of the offence. She was sceptical as to whether he regretted the offence because he had true insight given that his main concern was the impact that it had on him rather than the victim. Nevertheless, it was open to her to find that his desire not to return to prison was still likely to be a motivating factor to not reoffend. None of those findings are challenged.

28. The judge gave careful consideration to the evidence given by Ms Adams, who attended to give oral evidence. It was open to the judge to assess what weight she placed on that evidence have been in the best position to assess the witness.

It is clear from the decision that both the judge and Ms Adams were both careful to point out the limitations of the evidence she could give in relation to the risk of reoffending when she was not qualified to do a risk assessment. It was open to the judge to note that Ms Adams' experience as a social worker might have brought her into contact with people who might have had convictions for sexual offences, but there is nothing to suggest that she placed undue weight on this factor, it merely formed part of her background and experience as a witness. Nevertheless, it was open to the judge to take into account the observations that Ms Adams could provide, having worked with the appellant since 2021 and seen him in several different situations, including a social situation where alcohol was available. There is nothing to suggest that the judge placed undue weight on her evidence, it formed one part of the overall assessment. Having considered the evidence as a whole the judge considered it to be a finely balanced decision. We can see nothing in the decision to suggest that her findings were outside a range of reasonable response to the evidence such that they might disclose an error of law.

29. The second ground, as originally pleaded, argued that the judge failed to give adequate reasons for finding that the appellant was bisexual and was therefore a member of a particular social group. The grounds submitted that, even if the appellant had a relationship with a man in 2015 in the UK, there was no evidence to show that he would be identified as bisexual if returned to Jamaica given his 'preponderance for relationships with women'. The second ground went on to argue that the judge had failed to consider the fact that the appellant did not claim asylum until 19 years after he arrived in the UK, which indicated that the appellant did not have a genuine fear of persecution.

30. At the hearing, Mr Lindsay sought to argue that the judge failed to conduct an assessment of risk on return with reference to the principles outlined in *HJ (Iran) v SSHD* [2010] UKSC 31. This was not an argument particularised in the grounds, nor was it the subject of an application to amend. However, in so far as the decision letter did refer to that decision, we accept that it was an issue that was broadly before the judge.

31. Nevertheless, even applying the test in *HJ (Iran)*, the issue still turned on the findings of fact made by the judge and the background evidence relating to Jamaica. We are satisfied that the judge considered the submissions made by the respondent about the appellant's preponderance of relationships with women, with whom he has had several children, and the lack of evidence about the relationship he said that he had with a man in 2015. However, there has been no challenge to the judge's findings about his past history of sexual abuse by an older man in Jamaica and the severe ill-treatment that the appellant received as a result of being perceived as gay man.

32. Although the second ground disagrees with the judge's acceptance of the appellant's evidence surrounding the brief relationship he had with a man in 2015, it fails to particularise how or why her findings might disclose an error of approach. The judge heard evidence from the appellant and was in the best position to assess him as a witness. Clearly she was satisfied that he had given an internally consistent account throughout his evidence in interview, in his statements, and to various professionals who have interviewed him. She was satisfied on the low standard of proof that there was some evidence of a relationship with a man in the UK.

33. In any event, it was open to the judge to find that the appellant would nevertheless be perceived as a gay man if he returned to Jamaica. In doing so, she took into account his history of past persecution due the perception that he was gay. Paragraph 339K of the immigration rules makes clear that the fact that a person has already been subject to persecution or serious harm will be a serious indication of the person's well-founded fear of persecution, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

34. The respondent's case in the decision letter was that the appellant had not 'chosen to live as a gay man' in the UK. The judge pointed out that this was not the appellant's case. His case was that he is a bisexual man. The fact that he might have had a series of relationship with women in the UK was not inconsistent with that claim. There was no evidence to suggest that the appellant had sought to be discreet or to otherwise hide his sexual identity since he has been in the UK. In our assessment the factual findings made by the judge about the appellant's sexual identity were adequately reasoned and those findings were open to her to make on the evidence before her.

35. Having found that the appellant was likely to be bisexual, the judge considered his past history, relevant country guidance and country expert evidence to assess whether he was likely to be at risk on return. There is nothing to suggest that she did not take into account the passage of time since the appellant left Jamaica. The evidence relating to Jamaica showed that there continues to be an entrenched culture of 'anti-gay' violence and discrimination. The evidence did not show any improvement in the situation since the country guidance decision in *DW (Jamaica)*, which found that men who were perceived to be gay were likely to be at risk of persecution and that sufficiency of protection was unlikely to be available. In Dr Blake's opinion, the passage of time did not change the embedded culture of revenge and reprisal by gangs, who would be likely to become aware of is return [paras 11& 50].

36. In light of the strong evidence relating to the embedded nature of anti-gay and LGBTQI+ attitudes in Jamaica, and the evidence contained in the expert country report, we find that it was not necessary for the judge to specifically refer to the principles in *HJ (Iran)* when the evidence showed that it was sufficient to be perceived as gay, whether you were or not. It was open to her to take into account the fact that the appellant had suffered past persecution on this basis, and that as a bisexual man, it was reasonably likely that he would face similar treatment if returned [48]. The second ground does not dispute that gay or bisexual men might form a particular social group, only the findings relating to the appellant's sexual identity and risk on return, which we have found to be sustainable.

37. For the reasons given above, we conclude that the First-tier Tribunal decision did not involve the making of an error of law.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law.

M.Canavan
Judge of the Upper Tribunal

Immigration and Asylum Chamber

21 October 2024