



Neutral Citation Number: [2012] EWCA Civ 1930

Case No: C5/2012/1967

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
[APPEAL No: AA/01354/2011]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 17 December 2012

Before:

LORD JUSTICE LAWS

Between:

GN (SOUTH AFRICA)

Appellant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

(DAR Transcript of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr S Chelvan (instructed by Messrs MKM) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

Judgment
(As Approved by the Court)
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Lord Justice Laws:

1. This is a renewed application for permission to appeal and an extension of time in which to bring the application against a decision of the Upper Tribunal of 20 February 2012, by which the earlier decision of Immigration Judge Robson was set aside. However, the applicant's appeal against the refusal of the Secretary of State to grant him asylum remained dismissed by the Upper Tribunal on all grounds. Sir Richard Buxton refused permission to appeal to this court on consideration of the papers on 4 October 2012. Such an appeal would be a second appeal, which I should only allow to proceed if it would raise an important point of principle or practice or that there is some other compelling reason why this court should hear the appeal.
2. The applicant is a citizen of South Africa, born on 8 October 1959. He is gay. The Upper Tribunal has summarised the background as follows:

“2. [...] He entered the UK in 2008 and was given six months' leave to enter on arrival. He then stayed on in the UK to assist his partner in a criminal trial which ended in 2009 and claimed asylum on 17th December 2010.

3. [...] He had a long term relationship between 1993 and 2001. During the course of that time his house was burgled on seventeen times occasions and, whilst he called the police each time, and they initially attempted to help, their attitude changed when they realised he was a gay man. He subsequently moved to the Western Cape coast where he was threatened and badly attacked and hospitalised for about a week.

4. The Claimant left South Africa in June 2004 and travelled to the UK returning to South Africa in November 2005. He came back to the UK again almost immediately, having broken up with his former partner, and in 2006 he met his second partner here.

5. He returned to South Africa in December 2006 for Christmas. In January 2007 the Claimant and his new partner were held up after going to a gay bar for New Year's Eve. He did not report the incident to the police. There was a further incident in Easter 2008 and the Claimant's partner returned to the UK. He was arrested and the Claimant came back to the UK to assist him in his trial. The couple split up in December 2010.”

3. The immigration judge who found the applicant entirely credible upheld his asylum claim. The Secretary of State appealed with leave to the Upper Tribunal. Upper Tribunal Judge Taylor held as follows:

“22. The Claimant is a freelance writer who mainly works from his home and who has set out his life history in a compelling account which draws the reader into his world. The homophobia which he has endured for most of his life is plainly and graphically described. He has suffered serious assaults, in particular in 2003 and he has lost the sight of an eye. No one would seek to minimise his troubles.

23. On return there is no evidence that he would do anything other than seek to live his life as an openly gay man in South Africa and his appeal must be considered on that basis.

24. It is not disputed that there is in place the apparatus of state protection in South Africa. The argument put forward by the Claimant is that the authorities are unable or unwilling to offer him the protection which is theoretically available. He cites his past experience as evidence that he would be at risk in the future and he relies on his extensive bundle of articles and letters which he says shows that the authorities are not in practice able or willing to protect him.

25. Whilst not seeking to minimise in any way the severity of the Claimant's experiences, he did come to the United Kingdom on a number of occasions, most recently in 2004, 2005 and 2006 and on each occasion he returned to his home area. The most serious assault which he had suffered took place before each of these visits and subsequent returns to South Africa. His behaviour is not consistent with his claim to have a subjective fear of persecutory ill treatment.

26. Moreover [GN] attributes the fact that he has been the victim of a number of crimes, including a large number of burglaries, to his sexual orientation. It is not entirely clear whether this is correct. South Africa has a notoriously high crime rate. Indeed, he himself accepts that at least some of the burglaries have nothing to do with his sexuality. Significantly he did go to the police on many occasions and some kind of investigation took place. That is neither evidence of the state being unwilling to assist the Claimant nor evidence that he did not believe they would be unable or unwilling to do so.

27. It is not asserted here that there is any one individual or group of individuals which the Claimant fears on return. His is a general complaint about the safety of South Africa for the gay community generally. However in his statement he acknowledges that there is a gay scene in Cape Town. He has been able to enjoy two long term relationships which he conducted in South Africa over many years since 1993.

28. South Africa has a clear system of protection in place for its gay community and whilst there is considerable evidence of homophobic attitudes not only in the general population but also within the police, the evidence shows, including the evidence adduced by the Claimant, that crimes on the gay community are investigated and the perpetrators brought to trial.

29. Taking the evidence as a whole, [GN] has not established that he would be at individual risk of persecutory ill treatment on account of homophobia in South Africa as a whole or indeed, if he did have problems in any one area, that it would be unreasonable to expect him to relocate to an area where he would be safe. The authorities are not required to guarantee protection, but to show that there is a system in place and a reasonable willingness to operate it. None of the evidence adduced by the Claimant establishes that this is not the case in South Africa.”

4. The applicant seeks to challenge the finding that he would not be at risk of persecution if returned to South Africa. Other grounds of appeal have been abandoned. If his case was simply a disagreement with the Upper Tribunal’s approach to the facts there would of course be no basis for an appeal, let alone a second appeal. But the applicant submits that in a document dated 6 February 2012, 14 days before the Upper Tribunal decision was signed, the Secretary of State changed her stance as regards the likely persecution of gays returned to South Africa. The document, entitled "Operational Guidance Note on South Africa", was not disclosed to the Upper Tribunal. It is to be noted that the hearing had taken place on 25 January 2012 before the OGN came into existence, but it certainly came into existence before the decision was finalised.
5. Mr Chelvan for the applicant draws attention to the following paragraphs of the OGN:

“3.7.2 Treatment. The constitution and law prohibit discrimination on the grounds of race, disability, ethnic or social origin, colour, age, culture, language, sex, pregnancy, sexual orientation or marital status. However, entrenched attitudes and practices often resulted in the denial of these rights in practice. The post-apartheid constitution outlawed discrimination based on sexual orientation and in 2006 the country legalised same-sex marriages. There were no reports of official mistreatment or discrimination. However, in its annual Social Attitudes Survey released in 2008, the Human Sciences Research Council found widespread public intolerance of homosexual activity. While South Africa's constitution outlawed discrimination based on sexual orientation and same-sex marriages had been legalised, gay and lesbian people remained vulnerable to violence. The

South African Human Rights Commission and other NGOs have suggested that the criminal justice system needs to take determined action to deal with hate crimes in the country, something that the government has yet to do.

3.7.3 A report published by the International Lesbian and Gay Association entitled *State Sponsored Homophobia*, published in May 2010, noted that all sections of the country's LGBT community faced homophobic abuse. South Africa was ranked the 4th country in the world with the highest rate of crimes and every year, there were numerous cases of hate crimes towards LGBT people. The report went on to note that the abuse was escalating."

6. It is of importance to note that the issue for the Upper Tribunal is articulated by Upper Tribunal Judge Taylor as follows, paragraph 16:

"The question which the Immigration Judge should have engaged with was whether, having regard to the Claimant's past experiences, if he were to return to South Africa as an openly gay man, the authorities there would be able to offer him a sufficiency of protection. The issue is not whether homophobic attacks occur in South Africa, which they undoubtedly do, but whether the state offers legally adequate protection, i.e. a reasonable willingness to use the system which is in place. The State is not required to guarantee absolute protection for its citizens."

7. Mr Chelvan's essential case (and I should say he referred to the Supreme Court guidance in HJ (Iran) [2011] 1 AC 596 per Lord Rodger of Earlsferry at paragraph 82) is that once one sees the contents of the OGN in the passages I have read, the Upper Tribunal's critical conclusion at paragraph 28 is at the very least undermined -- he would say fatally undermined -- as a proper answer to the question which the Upper Tribunal judge had formulated at paragraph 16. In the ordinary way, even if this argument were good on the facts, it might well not be enough to pass the second appeals test, I have to consider whether, even if Mr Chelvan is right to submit that the OGN might perhaps promote a different answer to the case than was arrived at, nevertheless permission should be refused because the point is not fit for a second appeal.
8. However it seems to me, with some misgiving, that the fact that Mr Chelvan is seeking to rely on a document of some importance, which it may be contended was the Secretary of State's duty to put before the Tribunal notwithstanding that the argument had been completed when the document came into existence, that this is enough to bring the case properly within the ambit of a second appeal. It seems to me that Mr Chelvan may be right in submitting that the OGN might promote a different result from that arrived at by the Upper Tribunal and in the circumstances I have concluded, as I have indicated to Mr Chelvan, that permission to appeal should be granted.
9. I grant an extension of time and permission accordingly.

Order: Application granted