



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number:  
AA/04139/2014

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**On: 17<sup>th</sup> October 2014**

**Determination  
Promulgated**

**On 13<sup>th</sup> November 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**AAH**

**(anonymity direction made)**

Respondent

**For the Appellant:  
Officer**

**Mr Tarlow, Senior Home Office Presenting**

**For the Respondent: Mr Chirico, Counsel instructed by Coram  
Children's Rights Centre**

**DETERMINATION AND REASONS**

1. The Respondent is a national of Trinidad and Tobago. On the 30<sup>th</sup> July 2014 the First-tier Tribunal (Judge Traynor) allowed his appeal against the Secretary of State's decision to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Secretary of State

now has permission to appeal that decision<sup>1</sup>.

2. The basis of the Respondent's claim was that he faced a well-founded fear of persecution in Trinidad and Tobago for reasons of his membership of a particular social group. He is a gay man, and he claimed to have suffered persecution because of this.
3. The Secretary of State accepts that the Respondent is gay, and that he has had relationships with other men in both Trinidad and the UK. It is further accepted that he suffered physical and mental abuse from his own parents when they discovered the truth about his sexuality whilst he was still a young teenager. The Secretary of State did not however believe that the Respondent faced a currently well-founded fear of persecution in Trinidad. It was not accepted that the police had refused to protect him. Although homosexuality is unlawful there the country background material indicates that there have not been any prosecutions for many years. It is accepted that there is not widespread societal tolerance of homosexuality, but the Secretary of State considers there to be a sufficiency of protection such that the discrimination that is faced by gay men does not constitute persecution. Asylum was therefore refused.
4. The Respondent appealed this decision to the First-tier Tribunal. The Tribunal heard oral evidence from the Respondent, and took into account a large bundle of country background evidence submitted on his behalf. This included an expert report by Dr Keith McNeal, an anthropologist based at Houston University who has recently published a book on homosexual identity in Trinidad and Tobago. Dr McNeal found all of the Respondent's evidence to be in keeping with his own understanding of the difficulties faced by homosexual men there who wish to live 'openly'. The First-tier Tribunal further had the benefit of a medical report prepared by Professor Katona, a Consultant Psychiatrist, who concluded that the Respondent was suffering from complex PTSD as a result of his experiences in Trinidad.
5. The Tribunal found as fact that the Respondent had faced persecution in the past. There was only one material credibility issue to resolve, and that was about the attempt by the Respondent to access protection from the police. He had claimed that after being assaulted by his parents he had gone to the police who had "laughed in his face". The Tribunal weighed in the balance the Respondent's own consistent evidence about this incident, the fact that he had been found to be credible by the Secretary of State about the core of his claim, the "very objective and balanced" report of Mr McNeal about the likelihood of him getting sufficient protection and the medical evidence of Professor Katona. Against this the Tribunal considered the country background material relied upon by the Secretary of State, in

---

<sup>1</sup> Permission granted on the 28<sup>th</sup> August 2014 by First-tier Tribunal Judge Simpson

particular the material set out in the refusal letter. Having done so he concluded that the Respondent had discharged the burden of proof. The police in Trinidad had refused to help him in the past. This led the Tribunal to conclude that the Respondent would not receive sufficient protection in the future. As to the Respondent's ability to live "discreetly" and so avoid further problems the Tribunal attached considerable weight to the report of Professor Katona, to the effect that it would be "impossible" for this young man to conceal his identity. He found that the Respondent was suffering from PTSD and there would be a significant likelihood of him being re-traumatised should he return to Trinidad. He was a vulnerable young man experiencing episodes of suicidal ideation and he required urgent and intensive therapeutic support. Having regard to those particular features of the Respondent's personality, the First-tier Tribunal found that he would be at risk in Trinidad today. The appeal was allowed on asylum and human rights grounds. In respect of the latter, the Tribunal had regard to Professor Katona's "entirely reliable" evidence about the Respondent's mental health and suicidal ideation. Having done so it found his removal to be a disproportionate interference with his private life.

6. The grounds of appeal are that the First-tier Tribunal erred in the following respects:

- i) Failure to take into account of and/or resolve conflicts in the evidence.

The particulars of this complaint are that the Secretary of State had relied on country background material which indicated that gay people in Trinidad and Tobago suffered discrimination, but not persecution.

- ii) Making a material misdirection in law.

The grounds allege that the determination refers in three places to "discrimination" when that is not the relevant test under the Refugee Convention.

- iii) Failing to apply the test in Gulshan (Article 8 -new rules-correct approach) [2013] UKUT 640 to the findings of Article 8, in particular failing to identify the "compelling circumstances".

### **Error of Law**

7. There is no error of law in this decision.

#### *Ground 1*

8. The first ground submits that the Tribunal failed to pay any or

adequate regard to the country background evidence which showed that gay men in Trinidad suffer discrimination. As I understand it, it is suggested that this was relevant to the risk assessment because it showed that gay men are not persecuted in Trinidad, suffering “only” discrimination. As a preliminary observation I would note that none of the evidence cited in the refusal letter was actually made available to the First-tier Tribunal. It is therefore somewhat surprising that the Judge is now being criticised for failing to consider evidence that was not in fact before him. In his Rule 24 response Mr Chirico highlights the potential problem in expecting the Tribunal to treat refusal letters as evidence: paragraph 71 of that letter sets out an article from ‘Gaytimes.com’ which, I am told, does not in fact exist. No source reference is provided for this article and it cannot be located by an online search.

9. All of that said I am not satisfied that the Tribunal did overlook the material set out in the reasons for refusal letter, since much of it is reproduced in full at paragraphs 28-32 of the determination, and referenced elsewhere. Moreover this argument overlooks two basic tenets of asylum law. The first is that there is no need for a claimant to establish that everyone in his social group faces a real risk of harm. There may well have been country background evidence out there showing that not all gay men are persecuted. The situation would for instance, be very different for a rich tourist than for a poor local. It is enough to show that the claimant himself, for whatever reason, is at risk. That leads to the second problem. That is the clear findings of fact that this claimant had already suffered persecution for reasons of his sexual identity, persecution from which the state was unable or unwilling to protect him. Paragraph 339K of the immigration rules states that this must be taken as a serious indication that such harm would be repeated, unless there were good reasons to believe that the situation had changed. There were no such reasons. The Tribunal took care in distinguishing the position of *this* claimant as opposed to the generality of gay men in Trinidad. Particular emphasis was placed on his mental state, and the great importance to his identity of not living in the closet. The Tribunal was entitled to reach the conclusions it did, notwithstanding the Secretary of State’s recitation of the country background material in the refusal letter.

### *Ground 2*

10. This ground is entirely without merit. I asked Mr Tarlow to identify where in the determination the term “discrimination” was used in isolation. He could not. The Tribunal refers to “discrimination and persecution” “discrimination or direct violence”, “discrimination, abuse and ill-treatment”. It nowhere suggests that discrimination of itself could constitute persecution.

### *Ground 3*

11. This ground is also entirely without merit. Apart from the fact that the Gulshan “test” has now been disapproved by the Court of Appeal in R (MM) v SSHD [2014] EWCA Civ 985 it is self-evident that there were compelling circumstances in this case, those being that the Respondent is gay man facing return to a country where he had faced persecution and rejection by those closest to him, where he would face overwhelming societal discrimination should he chose to leave the closet and whose fragile mental health would deteriorate further faced with the constant fear of violence and abuse. I am not aware that the Rules provide for consideration of such a factual matrix: this being one of the cases where they are not a ‘complete code’ the Judge was obliged to conduct his own *Huang/Razgar* assessment of proportionality. He did this, and there is no fault in his reasoning.

### **Decisions**

12. The determination of the First-tier Tribunal contains no error of law and it is upheld.
13. I make a direction for anonymity 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:

“Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”.

Deputy Upper Tribunal Judge Bruce  
8<sup>th</sup> November 2014