

IMMIGRATION APPEAL TRIBUNAL

Jonathan Mane Sankale (Homosexual - Behaviour - Prosecution) Kenya CG [2001]
UKIAT 00007

Appeal No: 01TH02549
HX-14649-2001

Date heard: 09/10/2001
Date notified: 03/12/2001

Before:
Mr H J E Latter (Chair)
Mrs A J F Cross De Chavannes

Jonathan Mane Sankale
Appellant

The Secretary of State for the Home Department
Respondents

Determination and Reasons

Representations; For the appellant: Mrs G Oliso of the Refugee Legal Centre. For the respondent: Mr M Blundell, Home Office Presenting Officer

1. This is an appeal by Jonathan Mane Sankale, a citizen of Kenya, against the determination of an Adjudicator (Ms P S Wellesley-Cole) issued on 7th June 2001 dismissing his appeal against the respondent's decision giving directions for his removal following a decision that he was not entitled to asylum.
2. The appellant arrived in the United Kingdom on 8th March 2001 and claimed asylum on 15th March 2001. He said that he feared persecution because he was homosexual and he was at risk from both Masai warriors and his villagers (Q2). The fact that he was gay came to light when he made advances to a school friend, a Mr Tipis, in a hotel room. The friend objected and the appellant was beaten up. The police were called by the hotel management and both the appellant and the people who were attacking him were arrested and taken to Rumurut police station where statements were taken from them.
3. The appellant said he was detained from 23rd December 2000 until 1st January 2001. He was ill treated and assaulted in the police station. He said in his interview that he left the country because of this torture (Q32). He got away from the police station when Masai warriors came and got him out but the police kept his ID card. The warriors took him back home and said they tried to treat him because they thought he was bewitched (Q41). He was locked up in a room where he was kept for twelve days. He was then taken to his father's house where he was able to make contact with another friend, a Mr Smith, with whom he had a relationship and this

friend sent two people who said they were police officers from Rumurut police station and the appellant was allowed to leave with them. He went to Nairobi and was able to leave for the United Kingdom.

4. The Secretary of State's decision is set out in his letter dated 21st March 2001. It was his view that it was unlikely that legal action would be taken against a homosexual male in Kenya unless some other offence was involved. He was aware there was strong social pressure against individual instances of homosexuality from family members but it was not much of an issue in the public domain. It was his view that discreet homosexuals were unlikely to face harassment from the Kenyan populace that would amount to persecution. He did not accept the credibility of the account the appellant had given, in particular as to how Mr Smith had been able to obtain his release from his father's house. Accordingly, he refused the application.

5. The appellant appealed by a notice dated 23rd March 2001. His appeal was heard by the Adjudicator on 14th May 2001. She heard oral evidence from the appellant and had before her documentary evidence produced both by the appellant and the respondent. Her conclusions are set out at paragraphs 18-21 of her determination. She accepted that the appellant was a homosexual and that he had had a discreet relationship with Mr Smith from 1998. No one had known about it and it was conducted in hotels. He had also been interested in Mr Tipis and it was his attempt to force his attentions on him in December 2000 that led to a fracas in the hotel and the appellant being detained by the police.

6. The Adjudicator said that the maltreatment that he went through whilst in police custody could not be condoned but there was nothing to suggest that it was state sanctioned. She regarded this as the action of rogue officers who should be prosecuted or disciplined. She accepted that the appellant was released into the custody of Masai warriors, but noted that he was never charged or taken to court. She did not accept that the appellant had been released from his father's home in the circumstances which he had described. She did not accept that the Masai were now looking for him in the way described. Homosexual behaviour was a criminal offence in Kenya but after looking at the objective material she concluded that homosexuals were not persecuted. Prosecution was only instigated where some other offence was involved and there was no evidence that any sentences were disproportionate. In these circumstances she dismissed both the appeals on asylum and Human Rights grounds.

6. The appellant applied for leave to appeal. The Grounds of Appeal are set out in the letter from the Refugee Legal Centre dated 20th June 2001. It is asserted that the Adjudicator had made errors of facts as to whether it would now be open to the appellant to act as discreetly in future as he was known to be homosexual and as to whether he could receive protection from the authorities against ill treatment by Masai warriors. It is asserted that she erred in law by failing to consider whether the warriors were agents of persecution and by failing to consider whether by returning the appellant to a country where homosexuality was a crime, the United Kingdom would be in breach of Article 8.

7. At the hearing before the Tribunal, Mrs Oliso submitted that the appellant would be at risk from both the police and the Masai. The appellant was now known as a homosexual as he had been outed in the circumstances set out in the evidence. He had

been detained and ill treated by the police. He would face consequences because of his homosexuality. She referred to the medical evidence now available. This is a report from the Medical Officer at the Oakington Reception Centre at pages 15-18 of the appellant's bundle. This confirms that the appellant does have scars on his feet, genitals and bottom, has a tooth missing and has scars on his left index finger. In summary the Adjudicator was wrong to dismiss the appeal in the light of the treatment which he had suffered in the past and the fact that if he returned there would be no recourse to state protection. There would be a breach of Article 8 as the appellant would now not be able to have discreet relationships because of what had happened in the past.

8. Mr Blundell submitted that there was no risk of a breach of Article 8 as the appellant had been able to conduct a discreet affair since 1998. He could continue to do so. He had been taken to the police station because of the disturbance in the hotel. Homosexuality was illegal in Kenya but it was unlikely that any action would be taken against homosexual male unless some other offence was involved: paragraph 5.25 of the CIPU report. The appellant had not been charged and had nothing to fear from the police. Even if he was at risk from his family and the Masai Warriors, he could live elsewhere in Kenya.

9. There is no dispute that the appellant is a homosexual and the Adjudicator has accepted that he had a discreet relationship with a Mr Smith. He was also interested in starting a relationship with a former school friend Mr Tipis. He tried to pursue this relationship in a hotel on 23rd December 2000 but Mr Tipis objected and this led to a fight. As the Adjudicator records, this fracas attracted the attention of other guests and the hotel management called the police. It is hardly surprising in these circumstances that the appellant was taken to the local police station.

10. The Adjudicator appears to have accepted that there was a reasonable amount of likelihood that the appellant was detained and ill-treated. There is no justification at all for the appellant being treated in the way he has described in his interview and in his oral evidence before the Adjudicator. The Adjudicator describes these as the actions of rogue officers who should be prosecuted or disciplined. The Secretary of State in his decision letter refers to the fact that there has been a vociferous human rights debate in Kenya and there are human rights organisations that are extremely active. The appellant may well have been a victim of homophobic behaviour by the Kenyan police, but the fact remains that he was released without charge. There is no reason to believe that were he now to return to Kenya, that he would be of any interest to the authorities.

11. We agree with the Adjudicator that the evidence shows that discreet homosexuals are unlikely to face prosecution still less persecution in Kenya. The Tribunal accepts as set out in paragraph 5.25 of the CIPU Report that although there is strong social pressure against individual instances of homosexuality such as from family members, it is not an issue in the public domain. There is no strong antagonistic feeling towards homosexuals, but equally neither is there an active gay community to provoke it. Discreet homosexuals are unlikely to face prosecution or persecution. It is unlikely that criminal proceedings will be taken against a homosexual male unless some other offence is involved.

12. The appellant also asserts that he would be at risk from his family and fellow Masai were he to return. Assuming that the account the appellant has given is true of the way he was treated by his family and fellow tribesmen, he has been the victim of the kind of antagonistic feeling referred to in the CIPU Report. On the appellant's own account at the interview, he said that his family and tribe regarded him as bewitched. Ill-treatment and rejection by his family as described by the appellant is a hard burden for anyone to bear, but the issue is whether the appellant would be at risk of persecution on return to Kenya. The Adjudicator did not accept that the Masai were looking for him in the way he had described. The Tribunal agrees. In our view there are no reasonable grounds for believing that the appellant continues to be at risk from his family nor from the Masai who in effect have rejected him. In our view were he now to return to Kenya he would now be able to lead his own life without interference from his family or tribesmen.

13. In our judgement the Adjudicator has not erred in law as asserted in the Grounds of Appeal. She has considered the possibility of further persecution from the Masai warriors. There is no basis for a successful claim under Article 8 in the light of her finding that the appellant is able to have homosexual relationships provided he acts discreetly. There is no reason to believe that the appellant would be targeted as a known homosexual and be at risk on that basis.

14. In the Tribunal's view, the Adjudicator has reached conclusions that she was entitled to reach on the evidence before her. She has reviewed the evidence and looking at it as a whole has considered whether there is a reasonable degree of likelihood that the appellant would be persecuted for a convention reason on return. The Tribunal agrees with her findings and conclusions that there is no serious possibility of such a risk.

15. In these circumstances the appeal is dismissed.

H J E Latter (Vice President)

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Decision: dismissed