Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01462/2014**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
On 6 January 2016	**On 12 January 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

LB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Rutherford (Counsel)
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND DIRECTIONS

1. This is the appellant's appeal to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Parkes and Mr G Getlevog), hereinafter "the panel", promulgated on 10 June 2015, dismissing her appeal against the respondent's decision of 9 July 2014 to make a deportation order in respect of her. The respondent had also decided that the appellant was not entitled to asylum and her assertion that she was so entitled was also considered by the panel.

2. By way of background, the appellant was born on 16 February 1970 and is a national of Jamaica. She says that, as a minor, she was sexually abused by family members. She also says that she is a lesbian and that, whilst in Jamaica, she had a lesbian relationship with a girl she attended school with and whom I shall refer to as "A". She

has, though, had relationships with men and, indeed, has previously been married. She has two daughters. She has described, in some detail, the relationships she had with men in Jamaica and the nature of those relationships in a witness statement of 21 November 2014.

3. On 28 April 1999 the appellant came to the UK as a visitor. She was granted leave to enter for a period of six months on that basis. As I understand it, she returned to Jamaica within the currency of her leave to enter but subsequently came to the UK once again, in 2000, and obtained two successive periods of leave as a student. However, her last period of leave expired on 31 May 2002 and she remained in the UK, thereafter, as an overstayer.

4. The appellant says that, in 2006 or 2007, she met a person I shall refer to as "LH". She claims that the two of them had a lesbian relationship, which they conducted discreetly, but that the relationship is now at an end. On 4 January 2010 the appellant was convicted at Lewes Crown Court of an offence of "possess false/improperly obtained/another's identity document" and received a sentence of 12 months imprisonment. She did not appeal against either the sentence or the conviction. That sentence has now been served. The offence related to her obtaining a false passport. In consequence of her conviction the respondent notified her that she was liable to deportation and, in due course, went on to reject her claim for asylum and to make a deportation order.

5. The appellant appealed to the First-tier Tribunal. There was an oral hearing before the panel which took place on 20 May 2015. Both parties were represented. The appellant gave oral evidence as did LH and a number of members of the appellant's family. The First-tier Tribunal dismissed her appeal concluding that she had failed to show that she was a lesbian and seemingly having concluding, in the alternative, that even if she was, she would not be at risk upon return to Jamaica on that basis because she would not be perceived to be a lesbian as a result of her having had previous heterosexual relationships, having had children and being discreet. It set out its reasoning in this way:

> " 13. In this appeal it is for the appellant to show on a balance of probabilities that he (sic) should not be deported. As an in-country appeal the relevant date for the consideration of the facts is the date of the hearing. The evidence and submissions are set out in the Record of Proceedings and referred to where relevant below.
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> 14. The appellant's claim is set out in full in the appellant's and respondent's bundles provided in the Tribunal papers. Initially the appellant's asylum claim was based on events in Jamaica in her childhood which involved family members and her now ex-husband, these can be accurately described as repeated, deeply unpleasant and harrowing. These are not pursued as it is accepted that she no longer has a fear of the ex-husband and so we do not see the need to repeat those parts of the appellant's case here. The claim is now put on the basis of the appellant's sexuality, that a lesbian she is a member of a particular social group (PSG) and that she would be at risk in Jamaica and could not be expected to live discreetly there.
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> 15. The appellant is a citizen of Jamaica. She came to the UK in 1999 as a visitor and since 31 May 2002 she has remained in the UK without leave. On 4 January 2010 at Lewes

Crown Court the appellant was convicted of possessing a false identity document and was sentenced to 12 months imprisonment. It was this conviction that led to the Secretary of State to making the deportation order.

16. Part of the background is that the appellant has been married her daughter attended the hearing of the appellant's appeal. That is not determinative of the appellant's sexuality many gay individuals have married members of the opposite sex for various reasons. Equally a homosexual experience or having very close friends of the same sex is not determinative of whether a person is gay.

17. We bear in mind in considering this aspect of the appellant's case that issues of sexual orientation are not necessarily straightforward and that there may be a number of factors that affect an individual's appreciation of their own position including personal issues such as upbringing and family values as well as cultural mores.

18. The appellant made a witness statement on 21 November 2014 which is in her bundle at pages 1 to 29. Much of that statement refers to matters which are no longer relevant to this appeal but at paragraphs 28 and 29 the appellant briefly described her relationship with a girl at school called [A]. Although not currently in a relationship the appellant relies on a relationship with [LH] in the UK. She attended the hearing and gave evidence in support of the appellant but it is clear, as observed below, that they are not in a relationship and that there have been strains between them.

19. The appellant's description of her time with [A] and the freedom and feelings she experienced took place in the context of her very troubled home life with the attendant abuse and lack of protection from her mother. In the appellant's witness statement she does not describe any other such relationships in Jamaica but there followed a series of relationships with men, none of which appear to have brought the appellant much if any happiness or much of protection (sic) that she says she was seeking.

20. The appellant has only referred to one relationship in the UK and that is with LH. In her evidence at the hearing the appellant and LH said that they had been discreet and did not tend to go to openly gay venues preferring to be together in a more low key fashion. They did not live together but lived, at one stage, in adjacent properties and spent a lot of time together. Also in evidence the appellant indicated that they had only been intimate once.

21. Other witnesses, including the appellant's cousin who worked in the music business, indicated that they were aware of the appellant's being a lesbian and that her coming out had not been a surprise to them. It was also a feature of their evidence that the appellant was not averting her behaviour and he did not know that the appellant and LH had lived in separation accommodation.

22. While the appellant said that she appreciated the toleration in the UK it was still the case that the Jamaican community, in which she lives, remains deeply homophobic and that includes the church that she and LH attend. They chose to live discreetly within that community.

23. The situation is complicated by the letter written by LH in December 2012 in which she withdrew her support for the appellant. We note that the letter makes no reference to the appellant's sexuality, or that of LH, and does not suggest that past claims were made up or otherwise unreliable. In any event LH and the appellant appear to have

re-established a friendship and the letter appears to have been motivated by a disagreement unrelated to this case.

24. We attach no weight to the letter from Aston Law Practice of the 18th December 2012. While the letter refers to the letter from LH and states that they were professionally embarrassed it was wrong to suggest that the appellant's claim was not genuine, such a claim could not properly be based on the letter from LH and in the absence of other disclosable information it should not have been made to the Home Office.

25. Although both the appellant and LH spoke of the dangers to those who are gay or thought to be gay in Jamaica LH is a regular visitor to Jamaica to see family members. This voluntary regular return was not said to be accompanied by any particular danger to LH and it was not suggested that there have been any problems for her when visiting even though she would have the added disadvantage of not having been born there.

26. The appellant's conviction related to her obtaining a false passport and it is her case that this was to enable her to travel to Jamaica. In evidence she said she hoped to visit her father and build a relationship she had never had. However in her letter of 3 July 2013 she said that it was only 'to visit my family, most of whom I had not seen for nearly a decade' and to offer moral support to the family of a gay friend who had been murdered.

27. The willingness of the appellant to travel back to Jamaica to visit people there does serve to undermine her claim to be in fear of a return there. The intention to travel there is consistent with the willingness of LH to visit regularly and calls into question the reality of any danger that they might face.

28. The evidence is not consistent but that is not surprising, this is a complex issue and involves personal matters that the individual may themselves find perplexing. Taking the evidence overall, and the bearing in mind the lower standard of proof, we do not believe that the appellant has shown that she is a lesbian. More importantly we do not believe that the appellant would be regarded as a lesbian in Jamaica.

29. At best the appellant has had a close friendship with LH as an adult and described a brief friendship as a school girl. That has to be set against the heterosexual relationships she described as having in Jamaica. We do not see that if returned to Jamaica the appellant would be living her life in a way that would be significantly different from the way she chooses to live in the UK and would do so for similar reasons and not out of necessity to avoid societal violence but because that is the manner in which she prefers to live.

30. We have to assess whether that would place the appellant at risk in Jamaica and whether she would be perceived to be lesbian. The appellant has a past of heterosexual relationships and has children which would be regarded as positive factors. She could live in one of the larger urban areas and her view of the relative safety of doing so is underlined by her willingness to try to travel to Jamaica on false documents and supported by the willingness of LH to travel there on an almost yearly basis. We find that the appellant would not be at risk of treatment contrary to Articles 2 or 3 of the ECHR."

6. The rest of the determination relates to considerations relevant to Article 8 of the European Convention on Human Rights (ECHR) and the findings made, in that context, have not been the subject of any challenge before the Upper Tribunal.

7. The appellant, through her representatives, though, did seek to challenge the findings in relation to her claim to be entitled to international protection and did seek permission to appeal to the Upper Tribunal. In summary, the grounds assert that the First-tier Tribunal erred in law in applying an incorrect standard of proof with respect to the asylum aspect in that it applied a balance of probabilities test as opposed to a real risk test (see paragraph 13 of the determination); it erred in failing to address the content of a psychiatric report prepared by one Professor Katona which, it is said, "addresses the appellant's sexuality"; in failing to consider the content of a letter written by LH of 19 January 2011; in failing to adequately explain why it found that the relationship with LH was a "close friendship" as opposed to a genuine lesbian relationship; in irrationally concluding that a willingness to visit Jamaica undermined the appellant's claims regarding her sexuality; in failing to consider that her past sexual and physical abuse was "inextricably linked to her sexuality"; in failing to adequately assess the evidence before it including the oral evidence of various witnesses; in failing to adequately consider the question of how she lived discreetly in the UK and how she might have to live more discreetly in Jamaica to avoid risk and in failing to consider what is said in the country guidance case of **SW (Lesbians –HJ and HT applied) Jamaica CG 2011 UKUT 251 (IAC).**

8. On 3 July 2015 a judge of the First-tier Tribunal granted permission to appeal. The salient part of that grant reads as follows:

> " 3. Paragraph 8 of the decision does not assist in identifying the appropriate standard of proof. The tribunal did say, at paragraph 13 of the decision that it was for the appellant to show, on the balance of probabilities, that she should not be deported. Whilst reference was made, in paragraph 28, to the lower standard of proof, the decision does not set out that lower standard and it is arguable, in those circumstances, that the lower standard was, in fact, the balance of probabilities. Clearly, that would be an error of law when considering asylum issues.
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> 4. It is arguable, therefore, that the panel has erred in law, and so I grant permission to appeal. All grounds are arguable."

9. There was a hearing before the Upper Tribunal (before me) for the purpose of a consideration as to whether or not the First-tier Tribunal had erred in law such that its decision ought to be set aside.

10. At that hearing Ms Rutherford, for the appellant, successfully applied to me for an anonymity direction. As to the grounds, she contended that the panel had applied the wrong standard of proof, as was apparent from what it had said at paragraph 13 of its determination, notwithstanding the later reference to "the lower standard of proof" at paragraph 28. It was, at least, she argued, sufficiently unclear as to what standard had been applied for the determination to be rendered unsafe. The report of Professor Katona had not been referred to at all and some of its content was relevant to the question of the appellant's sexuality. Whilst it is not necessary for reference to be made in a determination to each and every item of evidence, the letter from LH referred to in the grounds was a significant piece of evidence and there ought to have been some comment upon it. It was not clear whether the panel had, in fact, been making an alternative finding to the effect that even if the appellant was a lesbian she would not be perceived as one but,

if it was intending to make such an alternative finding, it had not adequately explained it and had not adequately gone into the issue of her being able to live discreetly as a lesbian in Jamaica bearing in mind what she had said about such matters, in particular, in the detailed witness statement referred to above. There was an overlap with respect to the rest of the grounds but, as to those, in summary, it was right to say that the panel had failed to adequately reason its decision.

11. Mrs Pettersen, for the respondent, submitted, in particular, that the panel had, on a full reading of the determination, applied the correct standard of proof with respect to the asylum aspect. She acknowledged that she was in some difficulty in seeking to persuade me that the reasoning, overall, was sufficiently adequate, but pointed out that the panel had said why it thought she would not be perceived as a lesbian and why she would choose to live discreetly in Jamaica.

12. I have decided, as I indicated to the parties at the hearing, that although not all the grounds are made out, the First-tier Tribunal did err in law in a material way such that its decision falls to be set aside. I set out my reasoning below.

13. I do not accept that the panel erred in law by applying an incorrect standard of proof. I agree that it referred to "a balance of probabilities" at paragraph 13 of its determination. However, prior to going on to state its key findings with respect to the asylum arguments, those findings being that the appellant is not a lesbian and in any event would not be regarded as one in Jamaica, it made reference to "the lower standard of proof". Whilst I note what was said in the grant of permission, it seems to me that, taken in context, that could only have been a reference to what is known as the "real risk test" and which applies when arguments relevant to asylum are to be considered. Further, the fact that a "real risk" test is to be applied in the context of international protection claims is a cardinal and absolutely fundamental principle and it does not seem to me that, without something more clear than has been offered by way of argument, I should conclude that the panel lost sight of it. Further, as to the point about Professor Katona's report, I do not think it is right to say, as is suggested in the grounds, that it "addresses the appellant's sexuality". It seems clear to me, from a reading of the report, that Professor Katona's expertise is in the field of mental health and that her conclusions went to the nature and extent of the mental health problems from which the appellant suffered. I do not read the report as containing anything which amounts to an expert opinion that the appellant's sexuality is what she claims it to be. I agree it would have been better if the panel had borne the content of the report in mind and made some reference to it, particularly bearing in mind that it does contain detailed information provided by the appellant as to aspects of her sexuality which might, when looked at in a particular way, be taken to have lent support to the contention that she has given a credible or at least consistent account, but I do not think that that, of itself, means that the failure to have regard to it amounts to material legal error. I would also add that I do not think that the failure to refer to the letter written by LH, of 19 January 2011, when taken in isolation, establishes legal error either bearing in mind that it is not necessary to refer to each and every aspect of the evidence. For completeness, with respect to dealing with the parts of the grounds I do not find persuasive, and although there was no discussion about this at the hearing, it seems to me to go too far to contend, as was done at ground (f) that the

appellant's history of abuse is "inextricably linked to her sexuality" such that the panel erred by failing to take that into account. Certainly, I do not think it can be said that the very unfortunate history of abuse which she describes is necessarily relevant to the question of her sexuality and it does not seem to me that there was any expert or other evidence before the panel which suggested, in terms, that it was. Of course, it may or may not be the case that any new evidence can now be obtained and produced at some point in the future.

14. I have, though, as indicated, and despite my views as to the parts of the grounds addressed above, set the decision aside. In this context, the panel heard oral evidence from the appellant and from a number of witnesses, including LH, which touched upon the question of her sexuality. It is clear from the determination that LH had something to say about that as did a cousin of the appellant. As well as the appellant's oral evidence it had detailed written evidence from her which, in part, dealt with her sexuality and her relationship history. In looking carefully at the determination the panel seems to have concluded that she is not a lesbian on the basis of her willingness and it seems the willingness of LH, to visit Jamaica. Ordinarily, of course, one would not expect a person who fears persecution or serious ill-treatment in a particular country to be at all interested in visiting that country. However, on the face of it, if a person is not already known by the general populace to be lesbian, it seems to me that the risk would not arise immediately but, rather, would arise over a passage of time if, for example, there was a failure to maintain a heterosexual narrative. Viewed in that context, the willingness to visit or contemplate visiting Jamaica might not, of itself, be an indication that a person would not be at risk if they were to relocate to that country on a permanent basis. So, whilst I do not go as far as do the grounds in suggesting that the finding that the appellant's desire to visit Jamaica and LH's history of having done so undermined their claims regarding their sexuality was irrational, I do think it was incumbent upon the panel to explain, against the above background, why it did think that it undermined the claims. The panel has failed to do that and, in consequence, in my judgment, has failed to provide an adequate explanation as to why it concluded that the appellant is not a lesbian and why it concluded that she and LH had only a friendship as opposed to a lesbian relationship. Since there is really nothing else in the determination which points to a justification for those adverse conclusions (from the appellant's point of view) it does seem to me that the First-tier Tribunal has erred in law and I so decide.

15. There is, though, the question of whether the panel made a sufficiently sound alternative finding. At paragraphs 29 and 30 it said, in effect, on my reading, that it thought the appellant had, if a lesbian, lived discreetly as such in the UK as a matter of preference, that she would do the same in Jamaica as a matter of preference and that, bearing that in mind, and given that she has had previous heterosexual relationships and has children, she would be safe. Ms Rutherford submitted that it was not clear that, in fact, the panel was making such an alternative finding. However, I really cannot see that those paragraphs can viably be read in any other way. That is important because the error of law I have identified above will not be a material one if the alternative finding should stand. I have concluded, however, that it should not.

16. In this context, it does not seem to me that the appellant was saying that she lived discreetly out of choice as a lesbian in the UK. Certain comments she makes in her witness statement (the one referred to above) are more to the effect that she is not the sort of person who would enjoy gay nightclubs and an overtly high profile lesbian lifestyle but, apart from that, would wish to live as a lesbian without feeling she has to hide the fact and that her predominant reason for doing so is a fear of the reaction or possible reaction from the Jamaican community living in the UK. Perhaps the appellant is telling the truth about all of that and perhaps not. The point is, though, the panel did not, in my judgment, properly evaluate all of that in light of her evidence such that its apparent conclusion that she simply prefers to live discreetly as a lesbian by way of unfettered preference is not sufficiently reasoned. I would also conclude that the question of whether she would be able to maintain a heterosexual narrative, even bearing in mind positive factors in this connection which the panel identified at paragraph 30 of its determination, has also been inadequately considered. This ties in with the reference in the grounds to the country guidance decision in **SW** cited above. Bearing in mind what is said in that decision, it seems to me that the panel did not sufficiently consider the difficulties the appellant may have in retaining a heterosexual narrative over the passage of time, if returned, such that whilst she may not be at immediate risk she might come to be at risk given the expectation that women should be sexually active "into their sixties" unless there is an obvious reason why they do not have a partner such as, for example, recent widowhood, which is something the appellant would not appear to be able to show.

17. I conclude, then, that the decision should be set aside and that is what I do.

18. There was a discussion at the hearing as to whether or not the appeal should be retained within the Upper Tribunal or whether I should remit to the First-tier Tribunal. Ms Rutherford sought the latter course of action pointing out that the bases upon which I had decided that the panel had erred in law meant that the negative credibility assessment could not stand and meant that little or nothing could be viably preserved from the findings. She was also I am sure, conscious of the possible advantage to be had in protecting the appellant's ongoing appeal rights if remittal could be secured. Mrs Pettersen expressed an essentially neutral stance but did not say anything to oppose the idea of remittal. I was also assured by both representatives that remittal does now follow much more frequently than was once the case in the event of a decision being set aside without much or any of the factual findings being preserved. Taking into account the views of the representatives as noted, and taking into account the fact that I am unable to preserve anything of real significance from the determination of the panel despite it being apparent that it set about its task with diligence, and bearing in mind the basis for my setting its decision aside, I have concluded that remittal is the appropriate course of action with directions which follow below.

19. Finally, I have decided, as indicated above, to make an anonymity direction. That is because it seems to me that there are aspects of the factual background to this case which are sensitive, most notably, the past history of abuse and because it may be that the appellant will not be assisted by any publicity if it transpires that she is a lesbian as claimed but that, nevertheless, it is decided that she is to be returned to Jamaica.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision. The case is remitted to the First-tier Tribunal in accordance with the directions set out below and on the basis that it be heard by another judge of the First-tier Tribunal.

I make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Therefore, the claimant and members of her family are granted anonymity throughout these proceedings. No report of these proceedings in whatever form shall directly or indirectly identify the claimant or any member of her family. Failure to comply with this order could lead to a contempt of court.

Signed Dated

Directions for the rehearing before the First-tier Tribunal

1. The case is remitted to the First-tier Tribunal to be heard by a panel which shall not include Judge Parkes or Mr G Getlevog.

2. The new hearing shall take place at a hearing centre convenient for the appellant and the time estimate for the new hearing shall be three hours. There are no interpreter requirements.

3. If either party is to rely upon further documentary evidence not already filed then that evidence should be produced in the form of a paginated and indexed bundle and sent to the First-tier Tribunal and the other party so that it is received at least five working days prior to the date of hearing.

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Upper Tribunal Judge Hemingway