



IAC-FH-AR-V1

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

Appeal Number: DA/01830/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 14 March 2016  
Oral judgment**

**Decision &  
Promulgated  
On 14 April 2016**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**[A C]**

**~~(ANONYMITY DIRECTION NOT MADE)~~**

**and**

Appellant

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss V Laughton, Counsel, instructed by Duncan Lewis & Co

For the Respondent: Miss N Willocks Briscoe, Home Office Presenting Officer.

**DECISION AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Fisher promulgated on 10 February 2015, following a hearing at North Shields on 15 January 2015, in which the judge dismissed the appellant's appeal on all grounds against the refusal of his claim for asylum or leave to remain in the United Kingdom on any other basis.
2. Judge Fisher did not accept that the appellant's account was credible, in particular, relating to the issue of the applicants sexual identity as a gay man and any risk that he may face on return to Nigeria as a result.

3. There are within the bundles available to the judge, in addition to a report from Janet Owen concerning the sexual identity issue, reports from psychologists and psychiatrists relating to the appellant's mental health and reference to suicidal ideation. It was noted in paragraph 32 of the determination that Miss Rasoul, Counsel, who represented the appellant before the First-tier Tribunal did not advance the appellant's case on the basis that Article 3 would be breached following the decision in **J [2005] EWCA Civ 629**. This case has to now be read in light of other case law such as **N v UK** and more recently **GS and EO (Article 3 - health cases) India [2012] UKUT 00397(IAC)** in which medical issues were looked at in some detail by the Court of Appeal.
4. Article 8 was raised in relation to family and private life, in which the medical evidence appears to have been referred to, but in **GS (India)** the required structure of an Article 8 case based upon medical evidence is set out by the court. Such a claim in proper form was not made out on the basis of the documents before the Tribunal hearing the matter in North Shields. What I will say at this stage, although no specific material error is identified, is that if there are issues that arise as a result of mental health issues and the appellant's position as a vulnerable individual which should have been considered it is arguable Miss Laughton should have the opportunity to raise them at the next hearing provided she sets out in clear terms in her skeleton argument the exact nature of such a claim and the evidence being relied upon.
5. I also mention the vulnerable witness issue, as one ground of challenge is that the judge did not treat the appellant as a vulnerable witness when assessing his evidence. It does not appear that a submission was made to the Tribunal that the appellant should be viewed as such by Miss Rasoul although, for the reasons set out in the grounds seeking permission to appeal, it is arguable this is a matter in which such a submission should be made at the start of the next hearing where the judge who hears the appeal can consider whether it has been established that the appellant is a person who should be properly viewed as a vulnerable witness and treated accordingly.
6. Judge Fisher's starting point was the previous determination. Judge Fisher cannot be criticised for taking that as his starting point in accordance with the **Devaseelan** principles. At paragraph 23 of his determination Judge Fisher sets out the conclusions of the previous Tribunal and notes halfway down that paragraph:

“The Tribunal concluded that the appellant's claim to fear persecution as a result of his sexual activities was false and that his injuries were more likely to have been caused during the war in Liberia than as a result of an attack on him and his partner.”

7. At paragraph 56 of the earlier determination the panel observed that the appellant had been engaged on a path of providing misleading and untruthful information to the UK authorities and that he sought to use a false passport to travel to France. At that time the Tribunal was of the belief that the appellant has spent time in Liberia. His case was found to be “yet another lie”.
8. At paragraph 24 of his determination Judge Fisher records that he has grave concerns about the appellant's credibility and reliability as a witness based upon his previous conduct in relation to misleading the UK authorities and previous claims for international protection.
9. At paragraph 25 the Judge does not find the appellant has been candid with either him or Miss Owen, found the claim he had been disowned by his mother due to rumours of his sexuality not to be true, and found that was part of the very core of the applicants case before the Judge.
10. At paragraph 26 the Judge again refers to mistreatment statements and lies told by the appellant before concluding in paragraph 26: “I do not find that I can attach any real weight to his evidence, written or oral.” I find that to be a clear finding by the Judge in relation to the weight given to the appellant's evidence.
11. At paragraph 27, the first three words of which are “In those circumstances”, Judge Fisher goes on to consider the weight to be attached to the evidence of a witness who gave oral evidence on behalf of the appellant and also the evidence of a Mrs Janet Owen who is described as an impressive witness who describes herself as a community support worker with a group specialising in those with sexual orientation and gender identity issues in the north east and her relationship and connection with a group known as the Rainbow Group.
12. The Judge had to take that evidence into account but what Judge Fisher was required to do is to consider that evidence as part of the credibility assessment, not come to the conclusion that the appellant could not be believed and then taking that finding regarding lack of credibility as determinative, effectively placing little or no weight upon the evidence that is set out in paragraphs 27 and 28. Two relevant cases I have in mind in relation to this are the case of **HE [2004] UKIAT 321** in which the Tribunal said that where the report is specifically relied upon as a factor relevant to credibility, the adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add on which does not undermine the conclusions to which he would otherwise come. However the Tribunal also said that where the report simply recounts a history which the adjudicator is minded to reject and contains nothing which does not depend on truthfulness of the appellant the part which it can play in the assessment of credibility is negligible.

13. I refer to the second part of the finding in **HE** because Miss Owen in her report makes specific reference to an element of the appellant's account which she herself is able to confirm accords with other evidence she is aware of although, as a result of a duty of confidentiality, she is unable to provide further detail in relation to the identity of the person concerned or the reason why she is able to make such a statement.
14. That observation relates to a specific comment on a matter that arose during a sexual act being undertaken by the appellant with another male within the United Kingdom. Whilst accepting that sexual conduct is not necessarily determinative of sexual identity, in the context of this report, it was a very powerful observation made by Miss Owen.
15. The second case is that of **SS v Secretary of State [2006] EWCA Civ 1153** in which the Court of Appeal said that an error of law only arose in this type of situation where there was artificial separation amounting to a structural failing, not where there was a mere error of appreciation of the medical evidence. The Court of Appeal distinguished **Mibanga**, so I will say nothing further in relation to the **Mibanga** case.
16. The judge on the face of the determination appears to have fallen into the type of error identified by the Court of Appeal, namely the artificial separation point. It was for that reason I made the observation during submissions on behalf of the Secretary of State that perhaps the judge's findings on credibility should more appropriately have been included in paragraph 29. The rider being that the evidence in [27] and [28] properly supported them. What we have is an adverse finding as to the credibility of the appellant in relation to anything he says and the use of that to reject the evidence that follows. I do find this a material error of law relating to the core element in relation to which risk on return is claimed. It amounts to a material failing, making the further assessments by the judge in relation to that element arguably unsafe.
17. In paragraph 29 of Judge Fisher's determination, the conclusion the appellant is not a genuinely gay man and that the judge did not accept the appellant is reasonably likely to be gay is arguably infected by the structural failure referred to above.
18. In relation to the rejection of Janet Owen's evidence, for the reasons stated above, the judge has given inadequate reasons for rejecting the account given by Janet Owen especially in light of the other statement by Janet Owen in the report that even if the appellant has lied about his past events and past history, her conclusion in relation to his sexual identity still stands. The judge in paragraph 28 states he was somewhat surprised that Miss Owen said if it was the case that the appellant had lied about his background it would not affect her conclusion about his sexual orientation. That is a comment of some concern because whether one's mother or grandmother did whatever they are said to have done or whether a person lied or made a false claim in relation to false identity in the past, that may

not necessarily be determinative of the issue of sexual identity especially where it is accepted that an individual may hesitate in terms of revealing their true sexual preferences.

19. The judge did observe that a lot of the information Miss Owen referred to about sexual conduct and sexual practises is available in the public domain but that ignores Miss Owen's comment that the nature of the detail the appellant gave to her was clearly indicative of a person who had been involved in such sexual practices and, as stated earlier, there is the observation in relation to something of which she had notice, of which only the appellant and other person involved could have known which gave weight to her observations.
20. The submission made on behalf of the Secretary of State that the issue of credibility was a matter for the Judge of the First-tier Tribunal, which was the best submission Miss Willocks Briscoe could make, I accept is an accurate statement of law. The problem in this case is not a misunderstanding of the legal principles, it is the legal error in the structure by which the judge arrived at the conclusions he did. Weight is a matter for the Judge provided it is shown he has considered the evidence with the required degree of anxious scrutiny and has given sufficient reasons for the decision made. In this case neither requirement is arguably satisfied.
21. For the above reasons I find material error of law. The determination must be set aside.
22. As the process applied by the judge was not a lawful process the appellant has been denied the opportunity to have his case properly considered by the First-tier Tribunal.

### **Notice of Decision**

23. I consider that it is appropriate in all the circumstances for the matter to be remitted to North Shields to be heard by Designated Judge Zucker or another experienced First-tier Judge nominated by him, but excluding Judge Fisher and Judge Holmes who heard the appeal of the appellants partner and whose decision dismissing the same is also under challenge, on a day to be fixed before the end of July 2016 (if possible) on a date convenient to Miss Laughton who will have to travel from London to North Shields for the purposes of the hearing.

No anonymity direction is made.

Signed

Date: 8 April 2016

Upper Tribunal Judge Hanson