



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

Appeal Number: PA/07018/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27<sup>th</sup> February 2018**

**Decision & Reasons  
Promulgated  
On 1<sup>st</sup> March 2018**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**PCN  
(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Briddock, of Counsel, instructed by Wimbledon Solicitors

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of Uganda born in 1976. She arrived in the UK in 2000 as a Tier 4 student migrant. Her leave expired in 2004 and she overstayed. In 2015 she made an unsuccessful application to remain on private life grounds. On 10<sup>th</sup> January 2017 she claimed asylum on the

basis that she was at real risk of serious harm if returned to Uganda because of her sexuality. Her application was refused on 11<sup>th</sup> July 2017. Her appeal against the decision was dismissed by First-tier Tribunal Judge Widdup on all grounds in a determination promulgated on the 31<sup>st</sup> August 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Kebede on 2<sup>nd</sup> January 2018 on the basis that it was arguable that the First-tier judge had erred in law in the approach adopted to HJ (Iran) v SSHD (Rev 1) [2010] UKSC 3 with respect to living discreetly.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law. After submissions on error of law I found that the First-tier Tribunal had erred in law and set aside the decision dismissing the appeal. We then proceeded to remake the appeal with further submissions, and I informed the parties that I would allow that appeal. Mr Briddock requested that the matter be expedited, in terms of receiving the decision of the Upper Tribunal and the respondent issuing refugee status papers, as the appellant was due to become street homeless tomorrow. Mr Lindsay and I agreed to do our best in expediting the paper work.

#### *Submissions – Error of Law*

4. In her grounds of appeal the appellant argues as follows. It is accepted by the First-tier Tribunal that she is a lesbian and Ugandan. She is found to be a generally credible witness. It is accepted that she has had a same-sex relationship in the UK; it is also accepted that she has attended LGBT meetings; and chosen not to be an out lesbian amongst members of the Ugandan community for fear of losing her accommodation.
5. The First-tier Tribunal finds that she would be discreet if returned to Uganda and as a result would not be subjected to persecution, see paragraphs 60 and 63 of the decision. This is the first finding which is said to be legally flawed. The First-tier Tribunal failed to consider the totality of the appellant's lesbian behaviour in the UK where she has had a same sex relationship and attended LGBT meetings; and consider whether she could find and have a relationship with a partner, live with that person and attend LGBT meetings in Uganda; and whether this was accurately described as discreet behaviour in the UK.
6. Further the First-tier Tribunal failed to consider whether the motivation of the appellant if she would not do these things in Uganda was in any part due to avoiding persecution rather than for her own reasons relating to her character. As it is accepted that she conceals her sexuality from the Ugandan community out of fear of being forced to leave the area, see paragraph 53 of the decision, this is not evidence of this being solely a personal decision to be discreet.

7. HJ Iran directs how the First-tier Tribunal should have assessed how the appellant would behave on return to her home country. There should have been an assessment of how she would want to behave absent any persecutory factors and then a decision if she would have behaved differently if she would not be at risk of being persecuted. The First-tier Tribunal err by failing to frame this question correctly. At paragraph 61 this is put as an either or question: the applicant would be discreet because she is private and reserved or because she fears persecution, whereas HJ Iran directs that the First-tier Tribunal should have looked to see if her discreet behaviour would in any part be due to persecution. The First-tier Tribunal ought to have found the appellant to be a refugee if any part of the concealment of her sexuality was due to persecution. The appellant clearly recorded fear as a factor in influencing her lifestyle if returned to Uganda, see her evidence recorded at paragraph 46 of the decision. This fear also runs through answers to questions given at interview, see explicitly her answers to questions 229 and 233.
8. The respondent accepts LGBT persons are at risk of persecution in Uganda and it is clear someone who behaved as the appellant has in the UK, except when in the Ugandan community, would be persecuted. It was not correct to require the appellant to change her behaviour, and the appellant has indicated she would behave in this modified discreet way at least in part due to fear of persecution if she returned to Uganda. The appellant was therefore entitled to refugee status.
9. In a Rule 24 notice the respondent argues that the First-tier Tribunal directed itself properly with respect to HJ (Iran) at paragraphs 40-43, 48 and 61 of the decision. The First-tier Tribunal found that the appellant lived discreetly because of her personality and reserved nature and not a fear of persecution, with a fear of prejudice not being sufficient at paragraphs 49 to 63 of the decision, and that if the appellant had a relationship on return to Uganda she would continue to be discreet due to her private character, see paragraph 63 of the decision. Mr Lindsay added in oral submissions that there was no evidence that appellant would not have conducted herself discreetly on return in Uganda for personal reasons, and that the burden was on her so there was no material error of law. It would be possible to go to meetings of LGBT groups discreetly, and also to have a relationship discreetly in Uganda for personal reasons even if the appellant had not lived this way in the UK.

### *Conclusions – Error of Law*

10. The respondent and the First-tier Tribunal accept both that the appellant is a lesbian, and also that people who are open about their lesbian sexuality are persecuted in Uganda.
11. The appellant correctly identifies that the First-tier Tribunal has not directed itself lawfully at paragraphs 40 and 61 of the decision with respect to the issue of whether the appellant would live discreetly and

the motivation for living discreetly. The proper question is whether a decision to live discreetly would only be motivated by social pressures or a reserved nature or whether a material reason would be fear of persecution. The First-tier Tribunal puts the question as an either or one, not allowing for what the Supreme Court in HJ (Iran) recognised as likely to be a more complicated picture of mixed motives, and not recognising that an appellant was entitled to recognition as a refugee if the decision to be discreet about her sexuality was materially motivated by fear even if other factors also played a part.

12. It is accepted that the appellant has had a lesbian relationship in Uganda and one in the UK between 2003 and 2004; and that she has joined an LGBT group, Rainbows without Borders, in the UK, see paragraph 51 and 52 of the decision. Her relationship with her girlfriend was conducted openly in the UK, and involved holding hands and kissing in public, and going on dates. In this context the finding at paragraph 60 that she has lived a very private and discreet life in the UK is either insufficiently reasoned or irrational.
13. The First-tier Tribunal recognised that fear did and would impact on the appellant's lifestyle with respect to her sexuality when she was in Uganda and when she is amongst the Ugandan community in the UK, see paragraphs 46 -48 and 53 of the decision.
14. In these circumstances I find that the error of law with respect to the misdirection on living discreetly to be material. I therefore set aside the decision of the First-tier Tribunal dismissing the appeal on asylum grounds.

#### *Submissions - Remaking*

15. Mr Lindsay did not concede but did not challenge the credibility of the appellant. He submitted that the test was whether the appellant would modify her behaviour and conceal her lesbian identity if she returned to Uganda out of fear of persecution. It was unclear that this had been shown to be the case, and thus the appellant had now shown that she was entitled to refugee status.
16. Mr Briddock accepted that Mr Lindsay had formulated the correct test. He submitted however that it need not be "clearly" shown but rather the appellant had to show it to be reasonably likely that fear of persecution would be a material factor in the appellant modifying her behaviour if returned to Uganda. Mr Briddock argued that the responses set out in the appellant's asylum interview shows that repeatedly she associated her being discreet in Uganda to fear of homophobia and violence in that country. Likewise, in her appeal statement she explains that unlike in the UK she cannot be open with her sexuality because she would face persecution. In these circumstances the appellant was entitled to refugee status.

### *Conclusions - Remaking*

17. I remake the decision allowing the appeal on asylum grounds for the following reasons.
18. I find that the appellant has put forward a consistent position in both her asylum interview and in her appeal statement that she was and would be afraid to reveal that she was a lesbian and live an openly gay life in Uganda because of fear of physical violence from a homophobic society.
19. This is stated explicitly by the appellant at her interview, for instance in response to question 233 of her interview where she says she fears being “harmed or stoned” because of admitting to being gay; and in response to question 80 where she states that “there is homophobia throughout the country” which would cause her to hide away if she went back there; and in response to question 299 where she talks about “the fear” being there if she returned to Uganda. In her appeal statement the appellant states that she is open about her sexuality in the UK, bar with those from Ugandan community who provide her with accommodation and food as this would then be withdrawn if she told them, but that if she were like this in Uganda she would “face persecution”, see paragraph 36B, and in contrast to the UK she would not be safe and would fear that people would come after her, see paragraph 40.
20. Applying HJ (Iran) I find that the appellant has shown to the lower civil standard of proof that she would be discreet with respect to her lesbian identity if she were returned to Uganda but that a material reason in this decision to live discreetly would be a fear of persecution if she were to live openly as a lesbian woman.

### Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by allowing it on asylum and human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of her protection claim.

Signed: Fiona Lindsley

Date: 27<sup>th</sup> February 2018