



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/11110/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14<sup>th</sup> August 2018

Determination Promulgated  
On 23<sup>rd</sup> August 2018

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

M S  
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr K Mukherjee, of Counsel, instructed by Jerry Clore Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of Uganda born in July 1978. She first arrived in the UK in 2005 as a visitor, she says that she came to the UK and returned to Uganda in that year, and then returned and overstayed. In April 2009 she claimed asylum on the basis that she had been trafficked to the UK for prostitution. This claim was refused, and her appeal dismissed with adverse credibility findings. The

appellant was removed to Uganda, but returned again in 2012 with the help of an agent. She applied for leave to remain outside of the Immigration Rules, which was refused, and then made further submissions which were rejected in 2016.

2. In February 2017 the appellant made a fresh asylum claim on the basis of her homosexuality, which was refused in October 2017. Her appeal against this last decision was dismissed by First-tier Tribunal Judge Griffith in a determination promulgated on the 20<sup>th</sup> December 2017. Permission to appeal was granted by Upper Tribunal Judge Canavan in a decision dated 12<sup>th</sup> March 2018, and for the reasons set out in my decision at Annex A I found that the First-tier Tribunal had materially erred in law. The remaking hearing was adjourned.
3. The matter now comes back before me to remake the appeal. The appeal is remade on the basis that the First-tier Tribunal findings with respect to the witness evidence of the appellant and Mr K are preserved. The remaking hearing consisted of consideration of the witness evidence of the appellant, Mr K and Mr S, and then legal submissions on the totality of the documentary evidence, the preserved findings from the First-tier Tribunal and the evidence of the witnesses before the Upper Tribunal.

#### *Evidence and Submissions - Remaking*

4. The appellant was called to give evidence to put the written evidence of LC and other evidence about her relationship with LC in context, despite the preserved negative findings with respect to her credibility. She confirmed her name and address and adopted her three statements and interview record. In summary she gave the following oral evidence. She dealt with issues as to the different dates which feature in her history of her relationship with LC this relationship in these documents, and the fact that it was not mentioned in the second statement. She explained that they had met via Facebook in 2015, and they had used this method of communication until October 2016 when they switched to Whatsapp, which explains why the Whatsapp records before the Upper Tribunal begin at this point in time. The omitted images referred to in the Whatsapp records were intimate or naked pictures of herself and LC. She explained that a first they were just chatting and friends, then from June 2016 they were going out in the sense of going to the cinema and other places together, then in about October or November 2016 they started to have a more serious sexual relationship. The relationship ended in November 2017 when LC refused to support her appeal by coming to the Tribunal as she was upset about this, but they have remained friends and still talk. LC would not come to the First-tier Tribunal as she is a very private person and feels she cannot discuss her relationship, and she also suffers from depression and a personality disorder so her health means she cannot do this. LC is currently having suicidal thoughts.
5. In summary in her written statement LC says that she is studying for a Master's degree in public health with the University of East London. She is a British citizen born in the UK. She is a bisexual, and a very private person. She also suffers from

Borderline Personality Disorder, also known as Emotionally Unstable Personality Disorder, and depression. She takes medications and sees a psychiatrist. She has unstable relationships with others and an unstable sense to self. She is unwilling to disclose medical information about herself to the Tribunal as it is highly personal, and contains information that the appellant is not aware of. She made contact with the appellant via Facebook in late 2015; they met up in person around June 2016; and started an intimate relationship which continued until just before the appellant's appeal in November 2017. The split was brought on by the fact that she did not feel able to come to the Tribunal to support the appellant. During their relationship they went out together and the appellant stayed over with her when her flat mate was not there. They could not stay at the appellant's place due to her host being homophobic. LC met the appellant's friends, and went to the African LGBT organisation "Out and Proud" in Dean Street to socialise. LC cannot attend the Upper Tribunal hearing as she has had a severe emotional breakdown, wanted to kill herself at the end of July 2018, and remains suicidal. She is still in contact with the appellant as a friend.

6. In summary Mr K says the following in his witness letter and oral evidence. He is a Ugandan human rights advocate and executive director of Out & Proud African LGBTI (OPAL). He has qualifications in development, human rights and social work. He has known the appellant socially since 2013, and heard rumours she was a lesbian. In January 2016 the appellant joined his organisation. Initially she appeared anxious and confused, but he spoke to her and informed her about nights out at G-A-Y. She started to open up and talk about her same sex feelings, and to participate in workshops, seminars and social events. The appellant has talked to him about having feelings for women since she was about 14 years old, but feeling at that time that these were not acceptable feelings and would bring shame on her and her family. His opinion is that the appellant is clearly a lesbian given the credible narrative of feelings and experiences growing up as a Muslim woman in Uganda and his observations of her in the UK. He believes that she would be at risk of persecution on return to Uganda. He did not mention the appellant's relationship with LC in his letter as he forgot to put this in, but he did talk about it when he gave evidence to the First-tier Tribunal. He had seen them together on three or four occasions at social events at the G.A.Y club and at London Pride in June 2016, and they were holding hands and openly expressing affection.
7. In summary Mr S sets out the follows in his witness statement and oral evidence. He was born and brought up in Uganda, but came to the UK in 2007 and obtained leave to remain and British citizenship on the basis of his marriage to a British citizen woman whom he had met whilst working in Japan. He has known the appellant since she was a young child as they were brought up in the same area of Uganda, and attended the same school, although she is three years younger than him she was in the same class as his late younger sister. He remembers that the appellant always dressed like a boy, which made her stand out. His sister hinted to him clearly that the appellant was a lesbian (although that word was not used) and said that it was strange that she was not interested in boys. The

rumours got back to her family who were upset, but these died down when the appellant was about 19 years old and was persuaded to marry one of his sister's male friends. Mr S met the appellant again in 2013 in central London, and the appellant was quite emotional to meet someone from their old village. Over the next year they became friendly, and she told him she was a lesbian and it was a relief not to have to hide it from everyone. She told him that she had been seeing an English woman called K, but that they were no longer together and she was looking for someone else.

8. In 2016 the appellant came into the shop where he works in Soho just before London Pride with her friend LC, and told him that they had just started a relationship and were very happy. Over the following year the appellant spoke about LC when they had telephone conversations and said that they were in love. In 2017 the relationship cooled, and the appellant was quite down about this. She told him that her relationship with LC had broken down before the appeal hearing. He had not mentioned this relationship in his original letter written in November 2017 because he had had no guidance from the appellant's original solicitors as to what was relevant to include and had just responded to a request from the appellant herself, but he had talked about the relationship with LC in his evidence before the First-tier Tribunal.
9. Mr Tarlow relied upon the reasons for refusal letter but made no further submissions. He clarified that he did not pursue any argument that if the appellant was a lesbian she would not be at risk as she would be discreet: the appeal therefore turned on whether the appellant was a lesbian as she claimed, as per paragraph 26 of the refusal letter the respondent accepted that the LGBT community are at risk of persecution in Uganda.
10. In the refusal letter, in relation to the asylum claim, in short summary it is found that the appellant is not a credible asylum seeker as she was found not to be credible in her previously appeal in 2010 by the First-tier Tribunal, where the judge found that she had fabricated a claim to have been trafficked to the UK and imprisoned in a brothel. Her credibility was also reduced by the fact that she had not previously mentioned her claim based on her sexuality despite being aware she was gay since she was a young girl and despite having claimed to have an intimate relationship in Uganda aged 16 or 17 years at interview and despite having many immigration opportunities to make such a claim. The appellant had also failed to provide any evidence of relationships with SK in Uganda and two women in the UK, K and LC. Further the appellant had only become involved with LGBT organisations in 2015, shortly before she made her asylum claim on the basis of her sexuality. When considered as a whole it was not therefore accepted that the appellant was a lesbian or that she was at risk of persecution on return to Uganda for that reason.
11. Mr Mukherjee submits via a skeleton argument and oral submission, in summary, that the evidence of the relationship of the appellant with LC is the central plank which shows the appellant is a lesbian. He submits that the

relationship with LC should be accepted as when looked at in detail the appellant is consistent about the development and duration of her relationship with LC in her various statements and asylum interview; the statement of LC is consistent with the appellant's history; the evidence of Mr S and Mr K is consistent with the history of the relationship - both men having seen the appellant and LC together at Pride in June 2016 and Mr K having seen them together on a couple of additional occasions; the Whatsapp evidence supports the genuineness and development over time of a lesbian relationship, that the appellant is afraid of being persecuted in Uganda because of her sexuality and that LC has mental health issues thus explaining her non-attendance before the Upper Tribunal. Mr Mukherjee relies upon the Asylum Policy Instruction "Sexual Orientation in Asylum Claims" dated 3<sup>rd</sup> August 2016 in relation to the issue of "Painful self-disclosure", which can result in delay in asylum seekers making such claims and in a lack of additional supporting evidence.

12. In the context of all of the evidence in this case Mr Mukherjee submits that the appellant should be seen as meeting the lower standard of proof to show that she is a lesbian, and thus that she has a well founded fear of persecution.

#### *Conclusions - Remaking*

13. It is accepted by the respondent that if the appellant is a genuine lesbian she is entitled to refugee status. As stated at paragraph 26 of the reasons for refusal letter the respondent accepts, on the basis of the country of origin materials, that LGBT people are at risk of persecution in Uganda, and Mr Tarlow clarified that he did not pursue an argument that if the appellant was found to be a lesbian that she was not at risk because she would be discreet on return to Uganda for reasons other than a fear of persecution. Whether the appellant is a lesbian, as she has claimed, is therefore the only issue to be decided in this appeal.
14. The First-tier Tribunal in their decision of 20<sup>th</sup> December 2017 found that the evidence of the appellant about her relationships in Uganda was not consistent as she had said at interview that she did have a relationship with a girl in Uganda where as in her oral evidence to that Tribunal she said she fancied women but had no relationship. It was not accepted that she had a relationship with SK in Uganda, nor that she was denied treatment for HIV because of homophobia. It was found that her credibility was seriously undermined, and that there was no reason to depart from the finding of the previous First-tier Tribunal, which had dismissed her appeal based on a claim to have been a victim of trafficking, that she was not a credible witness particularly given the delay in bringing this asylum claim. I preserved this finding, and therefore do not place any significant weight on the evidence of the appellant herself in coming to my conclusions in this appeal.
15. I accept however, in accordance with the respondent's own guidance in the API, Sexual Orientation in Asylum Claims, that given the appellant comes from a culture in rural Muslim Uganda where same sex feelings were stigmatised so that

it would be likely for it to be difficult for her to talk freely and openly about the development of a lesbian identity or sexual orientation, that it will be challenging to assess her evidence, and that in addition a lack of early association with the LGBTI groups may also be consistent with a credible claim.

16. The First-tier Tribunal in their decision of 20<sup>th</sup> December 2017 found at paragraph 50 that Mr K had a sincere belief that the appellant is a lesbian. Mr K is the director of Out and Proud Africa, and is a Ugandan human rights advocate. He has refugee status. He confirms that the appellant has been a member of his organisation since January 2016, that he knew her in Uganda and had heard rumours that she was a lesbian there. He had seen her on Pride marches and at social events; seen her with her partner LC; and due to over two years discussing her history and observing her did not dispute her sexuality. He knew that the appellant had been married in Uganda, and been removed to Uganda from the UK but had returned. It was found by the First-tier Tribunal that this evidence was not determinative of the appellant's sexuality, but I find that this is strong credible evidence that must be weighed in the balance in the appellant's favour.
17. I find, for the reasons set out in Mr Mukherjee's submissions that the totality of the evidence before me shows that the appellant is a lesbian, because the evidence of Mr K is now joined with other significant evidence that shows that the appellant has had a serious long-term sexual lesbian relationship with LC.
18. I find that the appellant has herself given a broadly consistent history of that relationship in two of her statements and at interview: starting with Facebook contact in 2015, then with a period of going out from June 2016 to October 2016 and then a sexual partner relationship albeit with limitations due to their accommodation arrangements between October 2016 and November 2017. The Whatsapp messages given a detailed insight into the relationship for a period of a year between October 2016 and October 2017 with many messages for all months in that period covering mundane matters and arrangements as well as feelings of love and sexual attraction, attending Pride 2017 and issues with LC's mental health including the taking of medications for depression and counselling. I accept that the messages and the appellant's statement are consistent with that of LC, and that there is sufficient evidence of serious mental health problems to find that LC's written evidence should be given weight despite her non-attendance at the Upper Tribunal. In addition there is the evidence of Mr S which was omitted from consideration by the First-tier Tribunal, which I find to be credible, and is again supportive of the appellant being a lesbian and having a serious relationship with LC, with Mr S's opinion relying not just on what the appellant told him but also on talk within the community about her sexual orientation in Uganda and his own meeting with the appellant and LC on the way to Pride 2016. In addition, there is evidence of the appellant and LC having their pictures on pro-LGBT websites, and pictures of the appellant attending pro-LGBT demonstrations and meetings in the appellant's bundle at B31 to B49.

19. I conclude on the totality of evidence before me that the appellant has shown to the lower standard of proof that she is a lesbian who is open about her sexuality and would be open but for fear of persecution if returned to Uganda, and as a result would face a well founded fear of persecution if returned to Uganda and is therefore entitled to be recognised as a refugee.

**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 remake the appeal by allowing the appeal 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: 15<sup>th</sup> August 2018

Upper Tribunal Judge Lindsley

## **Annex A : Error of Law Decision**

### **DECISION AND REASONS**

#### *Introduction*

1. The appellant is a citizen of Uganda born in July 1978. She first arrived in the UK in 2005 as a visitor, she says that she came and returned to Uganda in that year, and then arrived again and overstayed. In April 2009 she claimed asylum on the basis that she had been trafficked to the UK for prostitution. This claim was refused, and her appeal dismissed with adverse credibility findings. The appellant was removed to Uganda, but say that she returned again in 2012 with the help of an agent. She applied for leave to remain outside of the Immigration Rules, which was refused, and then made further submissions which were rejected in 2016.
2. In February 2017 the appellant made a fresh asylum claim based on the basis of her homosexuality, which was rejected in October 2017. Her appeal against this last decision was dismissed by First-tier Tribunal Judge Griffith in a determination promulgated on the 20<sup>th</sup> December 2017.
3. Permission to appeal was granted by Upper Tribunal Judge Canavan in a decision dated 12<sup>th</sup> March 2018 which firstly extended time for the lodging of the appeal and then found it was arguable that the First-tier judge had erred in law in failing to give adequate reasons for rejecting the supporting evidence in the appeal, and in particular that of a witness who gave oral evidence.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

#### *Submissions & Conclusions – Error of Law*

5. In the grounds of appeal and in oral submissions from Mr Mukherjee the appellant argues that firstly there was an error of law in failing to give reasons for rejecting the evidence of the witness Mr S as all that is said, see paragraph 50 of the decision, is that this evidence: “did not add anything of significance”. Mr S’s evidence is set out at paragraphs 29 – 31 of the decision and is, in summary, that he had suspected that the appellant was gay when they grew up together in a village in Uganda due to rumours; and that they had re-met in London in 2013 and become friends again and the appellant had told him she was gay. He had also known about the appellant’s relationship with LC. He had met LC on a gay pride march two years ago and had known the appellant was in a relationship with her prior to this. Ms Everett accepted that there was an error of law for failure to consider this material evidence or to give valid reasons for rejecting it.
6. I found that the First-tier Tribunal had erred in law for the reasons set out above, and set aside the decision as I found that the error was potentially material as the



evidence of the witness Mr K from Out and Proud Africa, that he had observed the appellant for two years and believed she was a lesbian, had been found to be sincere, and if weight were given to the evidence of Mr S it was possible that the outcome of the appeal could be different.

7. I did not find that the treatment of the evidence of LC was unlawful. It was lawful to give less weight to this evidence given her unexplained lack of attendance before the First-tier Tribunal. The finding at paragraph 45 of the decision that the discrepancy about the school girl relationship was a factor which negatively affected the appellant's credibility was open to the First-tier Tribunal. Likewise, the findings with respect to the negative impact of delay in claiming asylum were open to the First-tier Tribunal. The negative findings about the relationship between the appellant and SK and the issue of health discrimination are essentially ones based on issues of plausibility but are not, I find, irrational. The First-tier Tribunal correctly directs itself with respect to the decision in Devaseelan at the start of the decision at paragraphs 42 to 43, and was correct to start from a position that the appellant had been found to be someone who had not been judged to be a credible witness in other proceedings before the First-tier Tribunal even if the factual context of the appeal was different.
8. The appellant's solicitors had applied in a timely way under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit new evidence with a fully reasoned notice and witness statement from the appellant explaining why that evidence had not been previously presented and its relevance. Ms Everett did not object to the new evidence being admitted and I found that it was appropriate to allow that evidence to be considered in the remaking of the appeal as it was clearly relevant to deciding the only issue in the appeal: whether the appellant is gay. However, Ms Everett had not received the bundle (which was over 100 pages long) with her file and so was not ready to proceed with the remaking hearing immediately. Likewise, the appellant was not ready to proceed as the two relevant witnesses, Mr S and LC (who was said to have delicate mental health but who might now be prepared to attend the Tribunal) were not present.
9. In these circumstances I agreed that the remaking should be adjourned to the first available date before me. The matter will be remade on the basis of the First-tier Tribunal findings with respect to the witness evidence of the appellant and Mr K. The remaking hearing will consist of oral evidence from LC if she is able to attend and Mr S, and then legal submissions on the totality of the documentary evidence, the preserved findings from the First-tier Tribunal and the evidence of the witnesses before the Upper Tribunal.

### **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 adjourned the re-make of the decision.

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: 1<sup>st</sup> May 2018

Upper Tribunal Judge Lindsley