



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

Appeal Number: PA/14010/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 15 October 2018**

**Decision & Reasons
promulgated
On 22 October 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**SN
(anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Brown instructed by Sutovic & Hartigan Solicitors
For the Respondent: Mr T Lindsay Senior Home Office Presenting Officer.

DECISION AND REASONS

1. Following a hearing at Manchester on 13 February 2018 the Upper Tribunal found the First-Tier Tribunal had erred in law in a manner material to the decision to dismiss the appeal. The matter comes before the Upper Tribunal today for the purposes of a hearing after which that Tribunal shall substituted decision to either allow or dismiss the appeal.

Background

2. The appellant is a Ugandan national born on 22 February 1992 who arrived in the United Kingdom on 16 October 2005, claiming asylum on 8 June 2016 on the basis of her fear of persecution for reason of her sexuality. The protection application was refused in a decision dated 7 December 2016 against which the appellant appealed.
3. The only preserved findings from the First-tier Tribunal decision are in respect of the appellant's immigration history.
4. The respondent accepts the appellant's nationality and identity are as claimed and that a person who is homosexual is capable of being member of a particular social group for the purposes of the Refugee Convention.
5. The key issue in the appeal is, and always has been, whether the appellant's claim to be a lesbian is credible.

The law

6. In *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31 (07 July 2010) Lord Rodgers said "When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the

ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him”. Lord Hope said "It is necessary to proceed in stages. (i) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case. (ii) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry. (iii) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin. (iv) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will

resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded. (v) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum.

Discussion

7. The standard of proof applicable in a protection case is often referred to as the lower standard which requires assessment of whether there is a reasonable degree of likelihood that what an appellant is saying is true.
8. In *A, B and C v Staatssecretaris van Veiligheid en Justitie* (Cases C-148/13, C-149/13 and C-150/13) it was held that the inability of an applicant to answer questions based on stereotyped notions could not constitute grounds for concluding that the applicant lacked credibility. It could not be concluded that an applicant lacked credibility simply because he did not declare his homosexuality at the outset due to his reticence in revealing intimate aspects of his life.
9. This principle is applicable not only to the time period between entering the United Kingdom and claiming asylum, for which the appellant provides an explanation, but also the line of questioning adopted by Mr Lindsey which was suggestive of the appellant not being credible as she had not declared her sexual orientation on her Facebook account.
10. The obligation upon any Tribunal is to consider all the available evidence both for and against the appellant's claim. Although it was submitted that an aspect of the appellants evidence that undermined her credibility was that she could not provide a date when in November she and her partner celebrated their first anniversary, this line of questioning was not put to the partner despite the partner attending and giving oral evidence. There was therefore nothing to contradict the appellant's claim that they had not discussed the question of an anniversary or to show the same is not credible or undermined the appellants claim in relation to her sexual orientation.
11. In addition to the appellant's own evidence, which I do not find was undermined to a material degree during the course of questions put to her, the appellant has provided a substantial number of documents corroborating her claim. The first of this is from the appellant's partner Ms ER who I found to be a credible witness and who gave clear evidence in relation to the nature of the relationship. Further evidence from a close friend of the appellant, FM, who intended to attend the hearing but was unable to do so, corroborated the claim. Evidence from a Mr Ssali a Refugee Project Coordinator of the Say It Loud Club gave detailed written evidence and attended to give oral evidence in which he confirmed his belief that the appellant's sexuality is as she claims. Although Mr Lindsay pursued a line of questioning indicating

the fact this individual had not ejected many from Say It Loud, this did not undermine the evidence of the witness that those who he did not believe were genuinely seeking assistance or support from the group or who did not genuinely hold the sexual orientation claimed, would not be tolerated and his evidence regarding his personal belief of the appellant and the fact she had not been ejected from the group.

12. There is also evidence from four named female friends who are themselves lesbians who believe the appellant to be a lesbian and evidence from a Volunteer and Service Development Coordinator of London Friend, a support group for LGBT people who is in no doubt that the appellant is a lesbian. Love letters from the appellant's former partner, her first serious partner in Uganda, have been provided together with photographs of the appellant at Birmingham Pride and screenshots from the Say It Loud Facebook page showing the appellant in attendance.
13. It is part of the appellant's case that whilst in Uganda, after she was found kissing another woman, she was beaten and abused by her father, raped on two occasions by men brought to the home by her father and threatened with death. The appellant's account of such ill-treatment is supported by the objective medical evidence of Dr Juliet Cohen whose report concludes that (a) eight of the lesions on the Appellant's body are typical of burns caused by hot oil, (b) one of the lesions is highly consistent with the appellant's account of having been beaten with a cane and (c) two of the lesions are consistent with the appellant's account of having been beaten with a blunt object. Dr Cohen also reports that the appellant is suffering from Post-Dramatic Stress Disorder attributed to the appellant's experience of sexual violence. In relation to this matter Dr Cohen writes:

".. From her account, it appears that she was able to maintain a good level of function while at university and while working as a dancer, but since she has been unable to work her mental health has deteriorated. The symptoms have persisted since the time of the rapes described but have been causing significant impairment only since she has been unable to keep active and distract herself by being fully occupied, so while she might not have reached the diagnostic criteria in previous years, in my opinion she does now. I make this diagnosis not based solely on the history related but on my observations throughout the examination, the responses made to specific clinical questions and my objective findings on examination of her mental state.

The later increase in severity of symptoms is not an unusual finding in the context of mental health conditions, where a person is able to employ coping strategies for a considerable period of time but when these are no longer available or further stressors impinge on them, then they can no longer cope and experience a significant increase in severity and frequency of symptoms."

14. I find sufficient evidence has been provided by the appellant upon which appropriate weight may be placed demonstrating the positive and negative experiences of the realisation of her sexuality and experience of the same in reality. Relevant evidence was provided just prior to and just after the asylum interview indicating this is not a

matter that has arisen or been developed by the appellant since the refusal letter, as suggested by Mr Lindsay.

15. It is of course difficult to see inside an individual's head or heart in terms of knowing what they truly feel or think. It is for this reason that an assessment has to be made based upon the available evidence. Having considered such evidence I make a finding of fact that the appellant has discharged the burden of proof upon her to prove that what she says about her sexual identity and experiences with her female partners, including her current partner in the United Kingdom, is credible.
16. It is not disputed that gay people in Uganda who live openly are liable to prosecution or persecution. If the appellant returns to Uganda but is unable to live openly as a lesbian this will clearly, on the basis of her evidence, be to avoid being the victim of acts of persecutory violence. It was not disputed before the Upper Tribunal that a gay person who lives openly, or who cannot live openly as a result of a fear of harm, is entitled to international protection in light of the situation that currently prevails in Uganda.
17. Internal flight and sufficiency of protection were not issues the Upper Tribunal was asked to consider. The country information supports a contention there is no sufficiency of protection for the appellant if she was returned to Uganda or place within that country where she could safely relocate.
18. The weight of the evidence supports a finding this appeal must be allowed.

Decision

19. **I remake the decision as follows. This appeal is allowed.**

Anonymity.

20. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 18 October 2018

