Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03262/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2018	**On 8 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ANNET NAKIWALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Ferguson instructed by Ratna & Co.
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Burns promulgated on 23 April 2018 dismissing the appeal against the decision of the Respondent dated 19 February 2018 refusing asylum in the United Kingdom.

2. The Appellant is a citizen of Uganda born on 15 May 1979. She arrived in the United Kingdom on 10 December 2002; an application for asylum is recorded as having been made on 11 December 2002, and a screening interview was conducted on the same date. The Appellant failed to attend a scheduled substantive asylum interview, and in due course the application was refused on grounds of non-compliance. An appeal was made to the IAC which was dismissed on 22 July 2003 (ref HX/14912/2003) – documents in relation to these previous proceedings were before the

First-tier Tribunal herein, e.g. see paragraph 3 of the Decision of Judge Burns.

3. On 13 February 2014 the Appellant was refused leave to remain under the so-called 'legacy' scheme: see Respondent's bundle before the First-tier Tribunal at Annex F.

4. Thereafter the Appellant made further submissions to the Respondent in April 2014, which included raising protection issues in respect of sexuality. In due course an asylum interview was conducted on 9 February 2018.

5. The Appellant's application for protection was refused by the Respondent for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 19 February 2018.

6. A more detail rehearsal of the Appellant's immigration history, including helpful summaries of the basis of her various claims, is set out at paragraphs 5-21 of the decision of the First-tier Tribunal.

7. The Appellant appealed to the IAC.

8. The appeal was dismissed by the First-tier Tribunal for the reasons set out in the Decision of First-tier Tribunal Judge Burns promulgated on 23 April 2018.

9. The Appellant applied for permission to appeal to the Upper Tribunal, which was granted by First-tier Tribunal Judge Grimmett on 8 November 2018.

10. The application for permission to appeal set out five Grounds. Judge Grimmett made observations that were dismissive in respect of four of the grounds, but accepted that "*It is arguable the Judge may have erred in the reference to lesbian activities in the decision*". Ms Ferguson acknowledged that in substance permission to appeal had only been granted in respect of Ground 3 which was headed "*Inappropriate assessment of sexual identity*".

11. The Grounds of challenge criticised aspects of the Judge's choice of language which, it was submitted, betrayed "*stereotypical notions*" of homosexuality. In particular:

(i) The Judge was criticised for using the word 'inclinations' in "*sexual inclinations*", e.g. see paragraphs 16 and 19 of the Grounds. It was submitted that the use of the word inclination was "*a clear erosion of the well-established principle that homosexual identity is an immutable characteristic… central to a person's identity*". In substance this was to argue that the word 'inclination' erroneously suggested sexuality was a matter of choice or preference.

(ii) The Judge's observation at paragraph 46 of the Decision – "*if the Appellant had any material lesbian inclinations, it is likely there would now be some visible and outward signs of them*" – was further criticised on the basis that it was unclear what the Judge meant by "*visible*" and/or "*outward*" signs.

(iii) It was also submitted that the Judge had "*used entirely inadequate language*", citing "*lesbian story*" (paragraph 44), "*lesbian inclinations*" (paragraph 46), and "*lesbian activities*" (as part of the sub-heading between paragraphs 21 and 22 – "*Claimed lesbian activities in the UK*").

12. I accept that there is some substance to aspects of these criticisms in the abstract. However I am not remotely persuaded that the choice of language is in any way indicative of an erroneous approach to the core factual issues in the appeal. Further, for the avoidance of any doubt, I do not understand it to be alleged that the use of language betrays a biased or prejudicial approach on the part of the Judge, and in any event I can detect no evidence that might support such a contention.

13. The substance and the nature of the challenge must be viewed in the overall context of the appeal.

14. When the Appellant first claimed asylum in 2002 she did so on the ground that she had fled a risk of persecution because of association with an opposition political party of which her father was a campaigning manager. She claimed that she had been detained and accused of treason, and that her father was still then detained. These claims were made in a self-completion 'statement of evidence' form prepared with the assistance of a representative and signed by the Appellant on 18 December 2002 (Respondent's bundle B3-B21). No aspect of this original claim is maintained or preserved in the present pursuit of protection. No reference was made in the original claim to any issue in respect of sexuality - notwithstanding that the Appellant's current claim includes a narrative account of having had a relationship with another woman in Uganda between 1996 and 2002, and an assertion that she had left Uganda solely because of her sexuality (e.g. see paragraph 9 of asylum interview record, Respondent's bundle E7).

15. Unsurprisingly this fundamental discrepancy was raised by the Respondent in the RFRL: see paragraph 12. Necessarily, in turn it was the subject of consideration and scrutiny before the First-tier Tribunal.

16. In my judgement the First-tier Tribunal Judge gave very careful and full consideration to this discrepancy and the Appellant's attempts to address it: see paragraphs 32-41. The Judge's consequent conclusions, set out at paragraph 42, are entirely sustainable - and indeed I do not understand them to be impugned in the 'live' ground before the Upper Tribunal:

> "*I find that:*
>
> *(i) the Appellant knowingly put forward through her then solicitors a false claim (about her father's alleged political activities) in December 2002;*
>
> *(ii) if the latest account (about fleeing from persecution because of lesbian activities in Uganda,) was true it would have been the natural and proper thing for her to have put it forward then, and*
>
> *(iii) she had ample opportunity late 2002 and early 2003 (for example in the Statement of Evidence and by attending an asylum interview) to do so.*"

17. As the Judge went on to note, it was not until 2014 – "*some 12 years after her arrival in the UK*" - that the claim based on sexual orientation first appeared. Inevitably, there is nothing in the criticisms of choice of language that remotely addresses any of these aspects of the Judge's reasoning, or the Judges finding that "*No credible explanation has been put forward for the delay*" (paragraph 44).

18. The Judge noted the Appellant's claim to have had one lesbian relationship in the UK between 2004 and 2006 (paragraph 22). The Judge also noted that there was not a "*scrap of documentary evidence of this shared life*", including an absence of any photographs (paragraph 23). The Judge took into account the testimony of two witnesses to this relationship, including live evidence at the hearing from one of the witnesses (paragraph 24). The Judge explained why she did not consider the supporting testimony to be credible in establishing the Appellant's case (paragraph 24).

19. The Judge also noted the Appellant's explanation as to why she had not had any further lesbian relationship since 2006 – "*that it was difficult to strike up such a relationship because people tend to think she was trying to use them for immigration purposes*" (paragraph 25). The Judge rejected this explanation at paragraph 45, observing "*if she was genuine in her relations, others would recognise this*". It seems to me that that was an entirely permissible observation, and the Judge was entitled to reject the

Appellant's proffered explanation in itself; in any event the Judge was reinforced in so doing by the significant damage to the Appellant's credibility in consequence of having initially advanced a false claim for asylum, and having thereafter substantially delayed without any explanation before advancing the present claim.

20. 'In the round' the Judge's conclusion – "*It appears to me obvious that the Appellant has invented the story about fleeing Uganda because she was gay, having forgotten that she previously put forward a different story*" (paragraph 47) – is entirely sustainable, and adequately reasoned.

21. In my judgement the criticisms of aspects of the language are entirely peripheral to the substance of the Judge's evaluation of the evidence in the appeal.

22. As a general observation, it would appear that the science and understanding of gender and sexuality, and the concomitant issues in respect of language in the field of gender and sexual politics has developed significantly over the past few years - and not without significant controversy. I accept that the notion of sexual preference – e.g. "I choose to be gay" rather than "I am gay" – is problematic. The phrase 'sexual inclinations' might readily be understood to be consistent with the notion of preference, and to that extent I acknowledge that it has a 'clumsiness'. However, it seems to me that 'inclination' could also be read as broadly consistent with the more neutral and acceptable term 'orientation', and so I do not accept that there is anything fundamentally offensive in its use. More particularly, I do not accept that there is any basis for suggesting that the Judge's use of inclinations has in any way impacted upon his approach to the issues in the appeal.

23. In respect of 'visible' and/or 'outward' signs, in context it seems to me that the Judge meant no more than that the Appellant would have been able to provide something more concrete by way of supporting evidence. In so far as it may be implicit in the ground of challenge that it is suggested the Judge was expecting some sort of physical manifestation in the Appellant's appearance, I reject that in context the words can bear such a meaning. I do accept, however, that the phrasing is awkward and unfortunate.

24. In referring to 'lesbian activities' it seems to me that the Judge had in mind relationships, whether sustained or casual, and/or sexual activity. I acknowledge that sexual activity is not a *sina qua non* of sexuality or sexual orientation, nor does it define sexuality. Nonetheless, a consideration of relationship history and/or sexual activity is not irrelevant to an overall evaluation of sexuality. This was not a case where the Appellant claimed to have refrained from relationships or sexual activity out of choice or for any other reason (such as religion); the Appellant's

claim not to have had a relationship with another woman since 2006 was inevitably an aspect of her explanation for a dearth of supporting evidence of her sexuality, which needed to be addressed by the Judge.

25. I am not particularly troubled by the phrase "*lesbian story*" at paragraph 44, which seems to me to be no more than shorthand for "*the account of being a lesbian*". If the phrase appears dismissive, this is because of the word 'story', and I find there to be no particular significance in the adjective that might suggest inadequacy of language or stereotyping.

26. In all the circumstances I find that there is nothing in any of the criticisms of the language used by the Judge that begins to undermine the adequacy and thoroughness of the reasons given for concluding that the Appellant was not credible in her claim to be a lesbian. There is no error of law on the part of the First-tier Tribunal.

27. For completeness I note that the Appellant filed further evidence with the Upper Tribunal. The substance of this evidence was that the Appellant had informed representatives of her sexual orientation in 2008, although this had not then been subsequently communicated to the Respondent at that time. Ms Ferguson acknowledged that these further materials were not relevant to the issue of error of law. In the circumstances I have not given detailed consideration to them, or heard submissions, albeit they were the subject of brief discussion at the commencement of the hearing. In this context I merely note that it seems to me that the documents essentially seek to support a re-argument of the issues in the appeal, and are likely to be similarly vulnerable to the First-tier Tribunal Judge's assessment in respect of a false claim originally being made in 2002, and there being significant delay before raising the issue of sexual orientation, save that the period of delay might now be suggested to be from 2002 until 2008, rather than from 2002 until 2014. It is difficult to see that this would make any substantive difference.

28. Finally, I note that the Decision of the First-tier Tribunal was completely silent on the issue of anonymity – but was drafted in such a way that no anonymity order was apparent on its face. I invited the observations of the representatives. Both indicated that they had no strong views on the matter. In the circumstances there was no specific application to make an anonymity order. I am unable to identify any reason that warrants the making of such an order.

Notice of Decision

29. The decision of the First-tier Tribunal contained no errors of law and stands.

30. The Appellant's appeal remains dismissed.

31. No order for anonymity is sought or made

Signed: Date: 6 March 2019

Deputy Upper Tribunal Judge I A Lewis