Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06065/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th October 2019	**On 23 October 2019**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

E M M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Jafar, Counsel
For the Respondent: Mr Walker, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction was made by the First-tier Tribunal ("F*t*T"), and as this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, EMM is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies amongst others to all

parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a national of Kenya. She arrived in the UK on 12th February 2019 having been granted a Tier 5 TW (Charity) migrant visa valid until 4th March 2020. She claimed asylum on 1st March 2019 and her claim was refused by the respondent for the reasons set out in a decision dated 19th June 2019.

3. The decision of 19th June 2019 gave rise to an appeal that was heard by F*t*T Judge Burns ("the judge") on 25th July 2019. The appeal was dismissed for the reasons set out in a decision promulgated on 7th August 2019. It is that decision that is the subject of the appeal before me. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 2nd September 2019.

4. The factual background to the claim is not in issue. It is set out at paragraphs [13] to [15] of the judge's decision.

> "13. The appellant is a single woman aged nearly 28 years. The appellant's family home is in a rural area namely Kiungani village near Kitale in the far west of Kenya. She attended school in the Kitale area and after school obtained a Diploma in Business Administration from the Technical Institute in Kakamega, and she can speak and write English well. She worked in Kenya selling clothes and working for a charity.
>
> 14. She had several lesbian relationships in Kenya, from a fairly young age. She conducted these in secret or discreetly because she feared reprisals from her family and members of the public if she was discovered.
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> 15. When her father discovered her involvement in a gay relationship in February 2018 he assaulted her with a *"block with a nail in it".* She suffered injuries and reported the assault to the police, who did nothing about it. After that she went to live with an aunt. She was given an opportunity to visit the UK to work for a charity and entered the UK on 12/2/2019 on her own passport on a charity worker visa."

5. The judge went on to consider the material relied upon by the appellant to establish that she is at risk upon return. The judge found that the report of Mr Murugi, was not helpful in deciding the issues in the appeal. The judge

also considered the judgement of the High Court in Kenya dated 24th May 2019 in petition 150 of 2016, noting that the court had dismissed petitions which sought to obtain declarations that the provisions of the Kenyan criminal code that criminalised gay sex, were unconstitutional. The judge referred to an unreported decision of Judge Norton-Taylor in another appeal, that the appellant relied upon. Having considered all the background material before him, at paragraph [36], the judge noted that the information as a whole, paints a mixed picture with different sources pointing different ways. He said:

> "... I do not find it a helpful or sensible approach to focus on particular sources either positive or negative, to the exclusion of other sources pointing the other way, but rather to read the material as a whole. Having done that I regard the policy summary which I have set out in paragraphs 22 above, as balanced, fair and correct."

6. At paragraph [37], the judge stated:

> "I conclude on the basis of the COI as a whole and in summary that
>
> - The situation for LGBT people in Kenya is discriminatory and still unsatisfactory but a liberalisation process is underway and has been for some time, although law reform is still required.
> - Violence and abuse against some LGBT persons does occur occasionally, and in some of those instances, but not always, the police are unco-operative.
> - In Nairobi in particular there is an expanding space and opportunity for LGBT persons to live open lives in reasonable safety.
> - In general, the problems faced by LGBT persons in Kenya, and certainly in Nairobi do not meet the threshold of seriousness which amounts to persecution of those persons or their being at a real risk of serious harm."

7. The judge then addressed the possibility of internal relocation and stated at paragraphs [38] and [39] as follows:

> "38. The appellant is a well-educated and healthy young woman who has already lived away from home (when studying at Kakamega, and more recently in the UK). She has worked in various employments before and is capable of earning her own living and living independently.

> 39. I see no reason why she could not successfully re-locate to Nairobi where I find that although she may encounter some discrimination, she would be able to enjoy an open lesbian life without suffering persecution or running a real risk of serious harm. It is obvious that many other gay Kenyans are already doing so."

The appeal before me

8. Mr Jafar adopted the grounds of appeal dated 15th August 2018. He submits the issue in the appeal was whether it would be unduly harsh for the appellant to internally relocate to Nairobi. He submits the judge erred in law by equating the infernal flight alternative test with a breach of Article 3 or persecution. He submits the judge failed to consider the effect of being stigmatised because homosexual activity is illegal, in light of background material that members of the LGBT community are prevented access to social services, healthcare, and employment.

9. He submits the judge failed to ask himself whether in all the circumstances, internal relocation was reasonable, and would allow the appellant to live a relatively normal life. He refers to the decision of the House of Lords in AH (Sudan) -v- SSHD [2006] UKHL 49, and submits that although the judge recognised that the situation for LGBT people in Kenya is discriminatory, the judge failed to consider whether that discrimination is an obstacle to living a normal life without discrimination. He refers to extracts from the Country Policy and Information Note Kenya: Sexual orientation and gender identity (March 2017) ("COI Report") and submits the background material confirms that although same-sex conduct between women is not interpreted as prohibited under the penal code, lesbians - like gay men - face considerable prejudice and discrimination, in part because of stigma associated with the criminalisation of same-sex relationships. He submits the background material demonstrates that the LGBTI community experience discrimination in accessing healthcare, education and employment, with the continued existence of the laws being a key causal factor.

10. Mr Jafar submits the overall effect of the discrimination directed against the LGBT community is such that where they live in open, they are forced to live in unconscionable conditions. He refers to an extract set out in paragraph 6.1.10 of the COI Report *(source: Huffington Post, Lesbian, Bisexual and Queer Women Speak Out in Kenya, 20 February 2016)* that states one impact of rights abuses among LBQ women is high levels of "stress-related problems, such as depression, insomnia and anxiety.". It is said that as a result of accumulated stress and depression, "a large part of 'lesbian culture' in the larger cities in Kenya consists of heavy drinking and drug abuse.". The report states that mental health and substance abuse services are scarce and difficult to access for all Kenyans, and LBQ women face the additional burden of identifying the rare providers who will help them without judging their sexuality or gender identity. Mr Jafar accepts that there is no evidence that the appellant has any predisposition to heavy drinking or drug abuse, or that she turned to drink and drugs previously, when living in Kenya.

11. Mr Jafar submits the judge failed to consider whether the cumulative effect of the conditions for the LGBT community in Kenya amounted to persecution, and whether it is unduly harsh for the appellant to relocate to Nairobi. He submits the idea that a young female can live openly as a homosexual, even in Nairobi, is irrational. He refers to the background material and submits there is evidence of mob violence and evidence that the Police never prosecute for violence against homosexuals. They sometimes step in to protect by the individual, but they never prosecute the perpetrator. Mr Jafar submits the lack of redress against the discrimination is such that although homosexuality exists, it exists in a culture where homosexuality is not in fact accepted. Mr Jafar submits the extract from paragraph 6.1.10 of the COI Report at paragraph [34] of the decision demonstrates that women living in the lower middle class and lower class neighbourhoods where people interact more intensively with each other than in high-class areas, are more at risk of violence and public abuse that tends to be tied to social policing of rigid gender norms. He submits the appellant does not come from a “high class family”, and she

would therefore find herself living in a lower-middle-class and lower-class neighbourhood. He submits that at paragraphs [38] and [39] of the decision, there was no attempt by the judge to assess the appellant's background and to establish whether it would be be unduly harsh for the appellant to internally relocate to Nairobi. Mr Jafar accepts that at [37], the judge refers to Nairobi as having an expanding space and opportunity for LGBT persons to live open normal lives in reasonable safety, but submits that would only apply if the appellant could live in a high class area.

12. In reply, Mr Walker referred to paragraph [37] of the decision where the judge provides an overview of his assessment of the background material noting that there is improvement in Kenya. He referred to paragraph 2.4.3 of the COI Report in which it is said that *"The attorney general has said that it is not government policy to discriminate against persons based on their sexual orientation and gender identity, and that Kenya would pass legislation to protect LGBT people from discrimination. However, at the time of publication, such laws have not been enacted."* . He also referred to paragraph 2.5.3 of the COI Report that states; *"Internal relocation is not viable if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution".*

13. He agrees with Mr Jafar that the issue before the First-tier Tribunal Judge was one of internal relocation and at one point, Mr Walker appeared to suggest that there is an error of law in the decision of the judge. When I pressed him, as to the respondent's position, and if the respondent's position is that there is an error of law, what that error is, he was unable to identify an error and submitted that having considered the background material, it was open to the Judge to conclude that the appellant can successfully relocate to Nairobi.

Discussion

14. The appellant claims she would be at risk from societal attitudes and intolerance (including violence) directed against the LGBT community and that in light of the background material, the conclusion of the First-tier Tribunal Judge that the appellant can successfully relocate to Nairobi, is irrational.

15. There can be no doubt that the Kenyan Penal Code prohibits and criminalises consensual same-sex conduct between adults, but, as appears to be acknowledged by Mr Jafar, the mere existence of legislation criminalising homosexual acts could not in itself amount to persecution. *(see the CJEU's decision in Minister voor Immigratie en Asiel v X and Y; Z v Minister voor Immigratie en Asiel (Cases C-199/12 to C-201/12) [2014] Imm AR 440 at [55] and [56]*). At paragraphs [20] to [35] of the decision, the First-tier Tribunal judge dealt with the background evidence not only in relation to criminalisation and prosecution for consensual same-sex conduct but also in relation to societal attitudes towards the LGBT community. In the overall assessment of the background material set out at paragraph [37], the judge concluded "*The situation for LGBT people in Kenyan is discriminatory and still unsatisfactory but a liberalisation process is underway and has been for some time, although law reform is still required.".*

16. Mr Jafar in essence submits the judge failed to consider the background evidence concerning the intolerance, societal attitude and violence directed against the LGBT community in Kenya, and the background material that the police condone or actually contribute to it.

17. The material to which Mr Jafar drew my attention, in truth, adds nothing of a significantly different flavour to the evidence to which the judge expressly referred in his determination. The judge accepted in his summary at paragraph [37] of the decision that the evidence shows that LGBT people in Kenya may be subjected to discrimination and that violence and abuse against some LGBT persons does occur occasionally, and in some of those instances, but not always, the police are

uncooperative. That is entirely consistent with the background material that Mr Jafar drew my attention to. The judge carefully considered all of the background material at paragraphs [22] to [34] of the decision, and at paragraph [36], the judge noted that the information as a whole, paints a mixed picture with different sources pointing different ways. It is clear that the judge had well in mind the material to which he was referred.

18. Discrimination against members of a particular social group in the country of origin is not enough, even though such discrimination might be contrary to the standards of human rights prevailing in the state in which asylum is sought. In my judgement, although the background evidence undoubtedly established a level of intolerance, discrimination and sometimes actual hostility towards the LGBT community in Kenya, it was not irrational for the judge to find that exposure to that society would not create a real risk of serious harm, particularly in Nairobi.

19. The judge noted at [37], that although the situation for LGBT people in Kenya is discriminatory and unsatisfactory, a liberalisation process is underway and has been for some time. He also noted that in Nairobi in particular, there is an expanding space and opportunity for LGBT persons to live open normal lives in reasonable safety. The judge found that in general, the problems faced by LGBT persons in Kenya, and certainly in Nairobi, does not meet the threshold of seriousness which amounts to persecution of those persons, or their being at a real risk of serious harm.

20. The judge did not find it a helpful or sensible approach to focus on particular sources either positive or negative, to the exclusion of other sources pointing the other way, but rather to read the material as a whole. The judge referred to the background evidence concerning the "wider" situation in Kenya. His approach was neither irrational nor unreasonable. In my judgement, the appellant is unable to establish that the judge failed to have regard or proper regard to the background material.

21. The internal relocation alternative is an assertion that although the appellant may risk persecution or breach of fundamental rights in her home area, she could find safety somewhere else in Kenya. I accept that the internal relocation alternative must not be used so as to require the appellant to live in a way that replicates the persecution that she was fleeing. The basis of comparison in assessing internal protection is between the proposed location (i.e. Nairobi) and the appellant's home area.

22. Here, the question of internal relocation remained a two-part question. First, are there risks of serious harm or persecution in Nairobi. Second, if not, is it unduly harsh expect the appellant to relocate to Nairobi.

23. Having carefully considered the background material and set out his conclusions at paragraph [37], it was open to the judge to conclude that there is no reason why the appellant cannot successfully relocate to Nairobi. The judge recognised that the appellant may encounter some discrimination in Nairobi but found that she would be able to enjoy an open lesbian life without suffering persecution or running a real risk of serious harm. A summary of the relevant facts was set out at paragraphs [13] to [15] of the decision. Following her father having discovered her relationship in February 2018, and until her departure from Kenya in February 2019, the appellant was able to live with an aunt. Having concluded that there is no reason why the appellant cannot successfully relocate to Nairobi, the judge noted that on the facts here, the appellant is a well-educated and healthy young woman who has already lived away from home. She has worked in various employments and is capable of earning her own living and living independently.

24. Adopting what is said in the COI Report at 5.2.2, while societal intolerance is prevalent throughout the country, relocation may be relevant and reasonable where the threat from a non-state actor is localised. What is required is a consideration of the person's individual circumstances, and that is what in my judgment, the judge did here. The judge's reasons,

which are detailed between paragraphs [18] and [39] must be read fairly and as a whole. It is plain in doing so, in my judgment, that the judge found that it is not unduly harsh for the appellant to relocate to Nairobi where she would be able to enjoy an open lesbian life.

25. In my judgement, the conclusion reached by the judge was neither irrational nor unreasonable in the Wednesbury sense, or a conclusion that was wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really cannot understand the original judge's thought process when he or she was making material findings. In my judgement, the judge identified and resolved key conflicts in the evidence and gave a brief explanation of the conclusions he reached on the background material and whether the appellant can internally relocate to Nairobi. The conclusions reached by the judge were conclusions that were properly open to the judge on the evidence before him. The conclusions cannot be said to be perverse, irrational or conclusions that were not supported by the evidence. The appeal was dismissed after the Judge had carefully considered the facts and circumstances of the claim and all the evidence before him.

26. In my judgment, the appellant is unable to establish that there was a material error of law in the decision of the FtT, and it follows that the appeal is dismissed.

Notice of Decision

27. The appeal against the decision of F*t*T Judge Burns is dismissed.

Signed Date 21st October 2019

Upper Tribunal Judge Mandalia

FEE AWARD

I have dismissed the appeal and there can be no fee award

Signed Date 21st October 2019

Upper Tribunal Judge Mandalia