Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07832/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th January 2019	**On 7th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

MORIS [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Benfield of Counsel instructed by Wimbledon Solicitors
For the Respondent: Mr S Whitwell of the Specialist Appeals Team

ERROR OF LAW DECISION AND REASONS

The Appellant

1. The Appellant is a Ugandan born on 9 October 1969. On 2 May 2010 he arrived as a business visitor and on each of 28 November 2013 and 15 October 2014 he applied for discretionary leave to remain but failed to pay the requisite fee. In January 2017 he sought subsidiary protection because on return to Uganda he feared persecution on account of his sexual orientation. He had a partner in Uganda by whom he has two children born in 2001 and 2004 who remain in Uganda.

The Respondent's Original Decision

2. On 1 August 2017 the Respondent refused his application and proposed to remove him to Uganda. The Respondent considered the Appellant had:

> "… failed to give a sufficient level of detail in (his) responses. It is considered that a person having gone through a life changing event will be able to give a consistent and highly detailed account of their thoughts and feelings … in summary your account of your sexuality is considered internally inconsistent, fake and evasive, implausible and lacking in detail."

On that basis the Respondent did not accept the Appellant's claimed sexual orientation: see paragraphs 29 and 33 of the reasons for refusal.

3. On 16 August 2017 the Appellant lodged notice of appeal of which there is no copy in the Tribunal file.

Proceedings in the First-tier Tribunal

4. By a decision promulgated on 30 July 2018 Judge of the First-tier Tribunal Lucas did not accept the Appellant's claimed sexual orientation and dismissed the appeal on all grounds.

5. The Appellant sought permission to appeal. The grounds were first that the Judge in rejecting the Appellant's claimed sexual orientation had placed inappropriate weight upon the fact that Appellant had been married and by that marriage had two children in Uganda. The Appellant had disclosed details of his children when screened by an Immigration officer on 5 February 2017. In placing inappropriate weight, the judge had not taken account of the Respondent's Asylum Policy Instructions or assessed the evidence how he presently identified himself which was relevant, following the judgment in *NR (Jamaica) v SSHD [2009] EWCA Civ.856*.

6. The second ground is that the Judge had erred in placing reduced weight on the evidence of two witnesses from the LGBT community to whom the Appellant was personally known. His reason for rejecting their evidence was that they did not know the Appellant had been married and had children in Uganda.

7. The third ground argued the Judge had erred in focusing on the Appellant's family in Uganda and the perceived delay disclosure of it and not giving adequate consideration to the rest of the evidence was insufficient to support his adverse credibility finding.

8. On 20 August 2018 permission to appeal was refused by a Judge in the First-tier Tribunal.

Proceedings in the Upper Tribunal

9. The Appellant renewed the application to appeal on similar grounds and on 19 November 2018 Upper Tribunal Judge Canavan granted permission on all grounds.

The Hearing in the Upper Tribunal

10. The Appellant attended supported by the two friends who had given testimony before the First-tier Tribunal. Other than to confirm his new address, neither he nor his friends took an active part in the proceedings. Indeed, it was evident when I attempted to explain the purpose of the hearing and the procedure to be adopted that the Appellant had limited English which Ms Benfield confirmed. The Respondent had not filed any response pursuant to Procedure Rule 24.

Submissions for the Appellant

11. Ms Benfield submitted that at paragraph 49 of his decision the Judge had found that the Appellant had failed to disclose his family in Uganda and the this was the primary reason to reject his claimed sexual orientation and to reject the evidence of his two friends. However, the Appellant had identified his two children and their dates of birth at screening and so it could not be argued that he had withheld information about his family in Uganda. Rather, he had disclosed it at the earliest opportunity.

12. The Judge had failed to take account of the Respondent's Asylum Policy Instruction: Sexual orientation in asylum claims, 3 August 2016 in the Appellant's bundle (AB) at pages B27ff. (the API). This was incorrectly referred to at the hearing as the Country Policy and Information Note on Uganda: Sexual Orientation and Gender Identity January 2017 at AB p.1ff. (the CPIN). She had set out the relevant extract at paragraph 13 of renewed grounds for appeal to be found also at AB pp.38-39.

13. Similarly, he had failed to take account of the requirement to assess the Appellant's present sexual identity as posited in *NR (Jamaica)*. Giving all the evidence careful and holistic consideration, the Judge had insufficient reasons his conclusions both in respect of the Appellant's claimed sexual orientation and also the credibility of his two friends. That the two friends did not know about his family in Uganda did not constitute sufficient reason alone, and there was no other reason given, to make adverse credibility findings against the friends and also against the Appellant. Ms Benfield who had appeared before the Judge added that the existence of the Appellant's two children in Uganda had been mentioned in oral testimony by one of his friends.

14. The issue before the Judge was the Appellant's present sexual identity, not activity. The Judge had not considered how this present identity was reflected in the evidence of his two friends. He had not taken account of the social and cultural pressures in Uganda on men, and particularly young men, who did not find themselves happy with identifying as heterosexual.

15. The Judge at paragraph 52 had noted that the Appellant had been an effective witness but had not explained in his adverse credibility findings why any impact this may have had did not weigh in his favour.

16. The Judge had not given anxious scrutiny to what the Appellant had said when screened, the evidence of his two friends and the Appellant's own evidence. The decision was unsafe and should be set aside.

Submissions for the Respondent

17. Ms Cunha referred to the instructions about conducting and asylum interview in the API at AB p.37ff. Evidence of existing or former opposite-sex relationships or parenthood may be considered relevant to a credibility assessment and a claimant's self-identification cannot be accepted as an established fact on the basis solely of the declarations of the claimant. The Judge at paragraph 47 had acknowledged that being previously married and a parent was not necessarily inconsistent with a present non-heterosexual identification. He had identified the Appellant's very considerable delay in making the present claim and the explanation that he did not know asylum could be claimed on the basis of sexual orientation: see paragraph 18.

18. Additionally, the Appellant had claimed to have formed sexual relationship with a Ghanaian man in 2011 mentioned at paragraph 15 of his decision. Further, the Appellant knew from one of his two friends who had given evidence and whom he had met in 2014 that this friend had claimed and in 2016 been granted asylum on the basis of his sexual orientation.

19. At paragraphs 44-46 the Judge had noted the Appellant had not mentioned his marriage or children at interview or in his witness statement and at paragraph 53 that he had not provided any photographs, correspondence or other evidence of his relationships in the United Kingdom. At paragraph 55, the Judge had noted that all the evidence of the Appellant's involvement with LGBT groups in the United Kingdom dated from subsequent to his asylum application.

20. The Judge had reached sustainable conclusions on the evidence before him. The decision should stand.

Response for the Appellant

21. Ms Benfield re-iterated that the Appellant had given details of his children when screened and stated at the main interview he had not been pressed on his family in Uganda. In that light there was no reason for the Appellant to address his Ugandan family in his statement.

22. The Judge had not taken into account either at paragraph 47 of his decision or elsewhere the social and cultural pressures of Ugandan society on those who are not fully heterosexual. He had given inadequate reasons for not accepting the evidence of the Appellant's two friends or taken express account of the Appellant's present sexual identification.

23. The Appellant's delay in claiming asylum was not sufficient reason to reject his claim in the light of the evidence presented. The decision should be set aside.

Consideration and decision

24. The Judge's finding the Appellant had "quite deliberately left out this important detail" of his family in Uganda does not fairly reflect that the Appellant mentioned his children when screened and that no questions were put to him at the main interview about any family in Uganda. Indeed, he was not even asked whether his parents were aware of his attraction to boys or if they were aware, what they had said to him on the matter. The interview record shows considerable sensibility and awareness of the approved approach to ascertaining information about a person's sexual orientation and identification in the CPIN at AB pp.B37ff. The Appellant comments on what he considers to be the inappropriateness of the gender of the interviewer in his statement at ABp.10. The Judge has made no comment about these aspects of the interview record. He also made no reference in his reasoning to the acknowledged social and cultural pressures in Uganda on those who are not seen as fully heterosexual although this issue was raised by the Appellant in his evidence as noted at paragraphs 10-14 of the Judge's decision setting out the Appellant's evidence. Similarly, there is no reference to the CPIN.

25. I accept that the Appellant may need to have some explanation for the substantial delay in claiming asylum on the grounds of his sexual orientation but any delay alone is without reference to background information on LGBT issues in Uganda insufficient to support the Judge's conclusion. He took cognizance of the API at paragraph 47 but made no reference to CPIN and on balance, I conclude the Judge has materially erred in law and that the decision should be set aside in its entirety with no findings of fact preserved.

26. Having regard to my view that no findings of fact from the First-tier Tribunal's decision can be preserved, and to Practice Statement 7.2(b) I consider the appeal should be remitted to the First-tier Tribunal for hearing afresh.

Anonymity

27. There was no request for an anonymity direction and I see no reason to make one.

SUMMARY OF DECISION

The First-tier Tribunal decision involved the making of an error of law and is set aside.

The appeal is to be heard afresh in the First-tier Tribunal with no findings of fact preserved.

Signed/Official Crest Date 25. i. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal