



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

Appeal Number: PA/07980/2017

THE IMMIGRATION ACTS

**Heard at Liverpool Civil and Family Court
On 29th January 2019**

**Decision & Reasons
Promulgated
On 18th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**RA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Holmes of Counsel instructed by Greater Manchester Immigration Aid Unit

For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant is a female Nigerian citizen born 1st January 1980. She appealed against a decision of Judge McCall (the judge) of the First-tier Tribunal (the FtT) promulgated on 21st March 2018.

2. The Appellant made a claim for international protection which was refused by the Respondent on 4th August 2017. The Appellant has two sons born in April 2010 and February 2012 respectively who are dependants in her appeal. Her husband (PO) died in September 2012 in Nigeria and she fears his family because the family held her responsible for his death. In addition, the Appellant claimed that she was raped in the UK in August 2016 by a man known as EZ, who also originates from Nigeria. This was reported to the police in January 2017 but EZ was not prosecuted. She has a fear of EZ and his acquaintances if returned to Nigeria because she reported the rape to the police. The third reason for claiming international protection relates to her sexuality in that she is a lesbian.
3. Following refusal of her application for international protection the Appellant's appeal was heard by the FtT on 7th March 2018. The judge heard evidence from the Appellant and from SW who is a volunteer with the Lesbian Immigration Support Group (LISG) in Manchester. SW and another volunteer, KS, who could not attend the hearing because of work commitments, had prepared a statement on behalf of the Appellant dated 28th January 2018.
4. The judge dismissed the appeal on all grounds. The judge did not accept the Appellant's claim that she was blamed for her husband's death and did not accept that she had previously been ill-treated by his family. The judge found that account to be a fabrication.
5. The judge did not accept that the Appellant had been raped by EZ and therefore did not accept that she had a well-founded fear of EZ or his family and acquaintances either in the UK or in Nigeria.
6. The judge did not accept the Appellant's claim to be a lesbian and therefore did not accept that she would be at risk on that basis if returned to Nigeria.
7. The Appellant applied for permission to appeal to the Upper Tribunal. Permission to appeal was granted by Upper Tribunal Judge Reeds who found it arguable that the judge had failed to properly assess the evidence in relation to the issue of the Appellant's sexual orientation.

Error of Law

8. On 3rd September 2018 I heard submissions from both parties in relation to error of law and concluded that the judge's decision must be set aside. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties and my conclusions and reasons are set out in my error of law decision dated 3rd September 2018 promulgated on 12th September 2018. I summarise below my reasons for setting aside the decision of the FtT.
9. I found the FtT decision to have been prepared with great care. There was no error of law disclosed regarding the judge's conclusion that the

Appellant would not be at risk from her former husband's family or from EZ. Those findings were preserved and are contained in paragraphs 20-29 of the FtT decision.

10. I was persuaded that the judge had erred in law in considering the Appellant's sexuality. I found the judge had not provided adequate reasons for rejecting the considerable amount of evidence in relation to the Appellant's sexuality. I found the judge erred in law at paragraph 49 by giving the impression that because he did not believe the Appellant had been raped, this suggested that she may not have been truthful about her sexual orientation. It is trite law that in cases such as this the evidence must be considered in the round, and the impression is given that having decided that the Appellant was not raped, the judge did not believe the remainder of her claim in relation to her sexuality.

Re-making the Decision

11. At the resumed hearing the Appellant attended and Mr Holmes advised that the Appellant would be giving oral evidence and there would be three witnesses.
12. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed.
13. I had received the Respondent's bundle that had been before the FtT with Annexes A-J, and the Appellant's bundle that had been before the FtT comprising 82 pages. In addition, I had received a supplementary bundle on behalf of the Appellant comprising 48 pages. Mr Holmes submitted case law, TF and MA [2018] CSIH 58 and NK v SSHD (IJR) [2015] UKUT 00431 (IAC). There was no skeleton argument.
14. The Appellant gave oral evidence, adopting her witness statement dated 24th January 2019.
15. SW gave oral evidence, adopting as her evidence her letter dated 22nd September 2018.
16. KS gave oral evidence, adopting as her evidence her letter dated 30th September 2018.
17. WJ gave oral evidence, adopting his witness statement dated 28th February 2018.
18. The Appellant and witnesses were questioned by the representatives. I have recorded all questions and answers in my Record of Proceedings and will not reiterate them here. If relevant I will refer to the oral evidence when I set out my conclusions and reasons.
19. I then heard oral submissions. Mr Tan submitted that the Appellant had not given a credible account in relation to her sexuality. He described the

three witnesses, who had stated that the Appellant is a lesbian, as well intentioned but mistaken. Mr Tan pointed out that these witnesses had stated that they believed the Appellant's account in its entirety, despite a judge having found that she had fabricated her account and those findings had been preserved.

20. Mr Tan confirmed that if the Appellant was a lesbian, the Respondent accepted that she would be at risk in Nigeria, but the Respondent's case was that the Appellant had fabricated her claim to be a lesbian.
21. Mr Holmes submitted that the sole issue to be decided at the hearing related to the Appellant's sexuality. The Appellant claimed that she was entitled to asylum on the basis of her membership of a particular social group. Mr Holmes confirmed that no human rights claim was being pursued in this appeal.
22. I was asked to find the Appellant and witnesses credible. Mr Holmes submitted that evidence from SW and KS, who are founding members of the LISG, could be regarded as expert evidence in line with the findings made in paragraph 54 of TF and MA in relation to church members. I was asked to note that in NK there was specific reference at paragraph 8 to the LISG and weight was attached to evidence from members of that group, based on their own experiences and their own sexuality.
23. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

24. I have taken into account all the evidence, both oral and documentary that has been supplied, and have considered that evidence in the round. In relation to risk on return the burden of proof is on the Appellant, to the lower standard, that being a reasonable degree of likelihood.
25. The issue before me related only to the Appellant's sexuality. The findings by the FtT that the Appellant would not be at risk from her late husband's family or from EZ or his associates and family were preserved.
26. As the Respondent accepted that the Appellant would be at risk in Nigeria if she is a lesbian, I had to decide whether she had proved to a reasonable degree of likelihood that she is a lesbian.
27. The Appellant claimed that she had a lesbian relationship with an individual whom I shall refer to as GN while in Nigeria. A letter from that individual had been provided to the Respondent. The Appellant also claimed that she had a lesbian relationship with TM in the UK which lasted between September and December 2017, the couple having met in Liverpool. No evidence had been provided from TM.
28. The Appellant was found to have fabricated elements of her account by the FtT. That does not mean that she has fabricated her account in relation to her sexuality.

29. A letter dated 20th January 2018 from LISG is contained in the Appellant's bundle at pages 22-26 and is written by SW and KS. This confirms that the Appellant contacted LISG in October 2017, when there was an initial assessment. Only women who are believed to be lesbian or bisexual are admitted to the group. If there are doubts the individual would not be invited to join the group after the initial meetings. The letter confirms that the group have no doubt that the Appellant is a lesbian. The letter confirms that the Appellant disclosed to the group her lesbian relationship with GN in Nigeria.
30. SW in giving oral evidence relied upon her letter dated 22nd September 2018. SW is one of the founding members of LISG and confirmed that she has known the Appellant for approximately fourteen months. SW described coming out as a lesbian when she was married with three children. She was 32 years of age at that time, and is now 68 years of age. SW confirmed that she had no doubts at all that the Appellant is a lesbian.
31. KS then gave oral evidence. She adopted her letter dated 30th September 2018. This is contained at pages 7-10 of the Appellant's supplementary bundle. She is also a founding member of the LISG. She came out as a lesbian in 1984. She gave very similar evidence to SW, in describing the Appellant's attendance at meetings and interaction with other women. She reiterated that LISG would not offer support to an individual over whom there were any doubts as to her sexuality. KS confirmed that she has no doubts that the Appellant is a lesbian.
32. The third witness was WJ who adopted his witness statement dated 28th February 2018 contained at pages 23-24 of the Appellant's supplementary bundle. WJ is a gay man. He was a teacher for seventeen years and is now an IT professional. He is a church elder, has spent six years as a civilian instructor with the RAF Cadets, and twelve years as a magistrate, and chairs both adult and youth courts. WJ in his statement explained that he had known the Appellant for approximately seven months prior to the statement date when she started attending the church where he serves as an elder. The Appellant attended a support group for LGBT people seeking asylum. WJ confirmed that he had no doubt whatsoever that the Appellant is a lesbian. He had observed her interacting with other LGBT people and he has no doubts about her sexuality. I found the witnesses to be entirely credible and genuine. They have no doubt that the Appellant is a lesbian.
33. My task is to decide what weight I should attach to their evidence, and to consider the Respondent's view that they are genuine witnesses but have been misled by the Appellant.
34. I attach very considerable weight to the evidence given by the witnesses. They have a considerable amount of experience in meeting with LGBT persons. They have known the Appellant for approximately eighteen months. They have met with her on a frequent basis.

35. I do have to take into account that the Appellant has been found to have fabricated other elements of her account, and that it is for the Appellant to prove her sexuality to a reasonable degree of likelihood. My conclusion is that the Appellant has discharged the burden of proof. I reach this conclusion because of the weight that I attach to the evidence given by the three witnesses. I do not find that the Appellant has been able to mislead all three witnesses over a considerable period of time. I am satisfied because of the evidence given by those witnesses that the Appellant is a lesbian. It therefore follows, and is accepted by the Respondent, that she would be at risk if returned to Nigeria.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. I substitute a fresh decision.

The appeal is allowed on asylum grounds.

An anonymity direction is made.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
2019

Date 11th February

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

I make no fee award. The appeal has been allowed because of evidence presented to the Tribunal that was not before the initial decision maker.

Signed
2019

Date 11th February

Deputy Upper Tribunal Judge M A Hall