Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: LP/00058/2020**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On Wednesday 17 November 2021	**On Thursday 25 November 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

S A
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. This is an appeal on protection grounds. It is therefore appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Ms U Dirie, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Keane promulgated on 6 November 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 19 February 2020 refusing her protection and human rights claims. This is the Appellant's second appeal. The earlier appeal was rejected on the basis that the Appellant would not be at risk on return to Pakistan.

2. The Appellant came to the UK as a student in 2009. She had leave in that capacity to July 2011. Her leave was extended on a discretionary basis to April 2012. She then made two human rights claim which were refused in May 2012 and July 2013. She made her first claim for protection only in 2014. That was refused on 12 December 2014 and her appeal was dismissed on 24 April 2015. Onward appeals failed and she became appeal rights exhausted on 6 August 2015.

3. The Appellant's first asylum claim was based on a fear of being forced into marriage by her family against her will or being killed by them. That claim was found not to be credible. She made further submissions nearly three years after exhausting her appeal rights, this time claiming to be a lesbian. The Respondent rejected that claim as not credible but accepted that it was significantly different from the claim made previously and therefore accorded the Appellant a second right of appeal. The Respondent accepts that, if the Appellant is indeed a lesbian, she is at risk on return to Pakistan. The essential question for the Judge to determine was therefore whether the claim was credible. The central reason for the Respondent disbelieving the claim was the timing of it and failure by the Appellant to mention her sexuality at an earlier stage. That was therefore understandably the focus of the Judge's reasoning.

4. Having heard evidence from the Appellant, and her friend, [R], the Judge did not accept the claim as credible. He set out his reasons over four extremely lengthy paragraphs.

5. The Appellant also suffers from endometriosis. Her human rights claim based on that condition was rejected on the basis that it could be treated in Pakistan. There is no challenge to that finding. There is however a challenge to the Judge's reasoning in relation to the medical evidence concerning the Appellant's mental health (ground 3). There is no challenge to the Judge's rejection of the Article 8 claim per se, although obviously that would be impacted by any error made in relation to the protection claim.

6. The Appellant appeals on three grounds as follows. The first is that the Judge erred when considering the Appellant's ability to discuss her sexuality. It is said that the Judge's reasoning is not borne out by the evidence which he cites. As part of this

first ground, it is submitted that the Judge failed to have in mind the Respondent's Asylum Policy Instructions ("API") regarding the reasons why an individual might disclose their sexuality at a late stage. It is said that the Judge speculated when finding that it would have been "reasonable" or "natural" for the Appellant to have disclosed her sexuality when discussing the reasons why she did not wish to marry a man.

7. The second ground centres on the evidence of [R]. It is submitted that the Judge failed to provide reasons for finding her evidence not to be credible. The Judge described her evidence as a "joint claim" but it is pointed out that [R] is a British citizen and it is submitted that she had nothing to gain from giving her evidence.

8. The third ground concerns the Appellant's mental health. That was the subject of a report by Dr O Olowookere. The Judge accepted some of her diagnosis but not that the Appellant would be at risk of suicide or self-harm on return. The Appellant submits that the Judge fell into a Mibanga type error by determining the Appellant's credibility first and then applying those findings to the medical evidence rather than considering the evidence in the context of those findings.

9. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on 8 December 2020 for the following reasons so far as relevant:

> "... 3. Whilst acknowledging that issues as to credibility are usually for the assessment of the judge, I am satisfied that it is arguable that the judge, in rejecting the evidence of the Appellant's witness, failed to analyse her evidence properly or at all and failed to provide any or sufficient reasons for doing so. I am also satisfied that it is arguable that the judge wrongly concluded that the answers given by the Appellant to various questions asked in cross examination showed that she was not reticent about her sexuality rather than the contrary being the case. Given the importance of this issue to the case as a whole, I am satisfied that it is arguable that the judge did make a material error.
> 4. Permission to appeal is therefore granted. In the circumstances all grounds may be argued."

10. The Respondent filed a Rule 24 Reply on 29 September 2021 seeking to uphold the Decision. Although it was accepted that the Judge's findings in relation to the evidence of [R] were not "as extensive" as those relating to the Appellant herself, it is said that this made no difference as there were many other reasons why the appeal failed. The Judge was entitled to reach the view that the credibility of [R]'s evidence stood or fell with that of the Appellant's credibility.

11. The matter comes before me to determine whether the Decision contains an error of law. If I conclude that it does, I may set aside the Decision and, if I do so, I may either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

12. I have before me a core bundle of documents relating to the appeal including the Respondent's bundle and the Appellant's bundle including a skeleton argument

which was before the First-tier Tribunal (referred to hereafter as [AB/xx]). Given the nature of the challenge, I do not need to set out much of the evidence, but I have taken it all into account.

DISCUSSION AND CONCLUSIONS

13. I deal with each of the Appellant's grounds in turn.

Ground 1

14. The Judge's reasons for rejecting the protection claim are set out at [8] to [11] of the Decision. I do not need to set those out in detail. They are lengthy but largely focus on the Appellant's failure to make her claim based on sexuality at an earlier stage. This reason for rejecting the claim is challenged by the Appellant's first ground.

15. The Judge found at [8] of the Decision that the Appellant had been able to discuss in her earlier appeal what were emotional issues concerning her family's threats and coercion. He concluded that she "might have mentioned her sexual orientation with similar ease". The Appellant's evidence was that, as a result of the diagnosis of endometriosis, in 2012, she "realised that [she] needed to embrace her feelings". The Judge concluded that this showed that she was "developing a degree of confidence" at that stage in relation to her sexuality. That was prior to the first claim. She had a relationship with another woman in 2014 (again prior to the earlier claim) and met [R] in February 2015 prior to the earlier appeal hearing. The Judge concluded that paragraph as follows:

> "The above-mentioned facets of the evidence satisfy me that by the date of the hearing before the judge the appellant had developed a very clear preference for relationships with women, she had been prepared to demonstrate publicly her affection for [A] and it would have been reasonable and indeed natural for her to have mentioned her sexual orientation as a reason for not wishing to return to Pakistan. She could quite simply have said that she did not wish to marry [As] because she was a lesbian. She had every opportunity to say that but did not. "

16. I do not consider the use there of the words "reasonable" or "natural" to be speculative. As is made clear by the sentence which followed, the Judge was simply there making the point that the Appellant's sexuality bore relevance to the earlier claim and an assertion that she did not like men and for that reason did not want to marry one would naturally flow from the claim being made at that time.

17. The Judge went on at [9] of the Decision to set out verbatim a passage from the Appellant's oral evidence concerning her reasons for not mentioning her sexuality at an earlier stage. Ms Dirie confirmed that the Appellant did not take issue with the accuracy of what is there set out. I do not need to set out the entire passage. Ms Dirie took me to one exchange as supporting her assertion that the evidence showed that the Appellant was indeed reticent about mentioning her sexuality as follows:

> "(Page 4 of the note)
> Q. You were asked (at the hearing before the judge) quite a lot about the proposed marriage to [As]. My next question. I ask you why you didn't mention in the previous appeal that you were a lesbian. That would have been extremely relevant to your claim wouldn't it?
> A. So what. I was really afraid and worried about forced marriage and I didn't want to say about my sexuality. Even now I don't want to talk about it but my doctor told me to talk about it and that the Home Office would keep it confidential and nobody would find about it."
> [my emphasis]

18. As Ms Dirie submitted, that last part does indicate that the Appellant said that she remained reticent even now about discussing her sexuality. The relevant question was in any event whether she might have been genuinely reticent over five years previously. That passage does not therefore wholly support the Judge's reasoning. On the other hand, this was only one in a combination of reasons. Moreover, the Judge was not obliged to simply accept the Appellant's assertion.

19. The Judge went on at [10] of the Decision to describe the manner in which the Appellant gave her evidence about her sexuality. Ms Dirie did not criticise that passage directly. I do though take into account her submission that what mattered was not how readily the Appellant could discuss her sexuality now but how willing she was to mention it at the first appeal hearing in 2015.

20. I do not place any weight on the challenge based on the API. As Mr Whitwell pointed out, there is no reference to the API in the Appellant's skeleton argument before the First-tier Tribunal nor recorded in the submissions in the Decision. Ms Dirie accepted that it was not before the Judge. She submitted however that it reflects the law about how the Tribunal should consider the issue of late disclosure. The API is directed at the Respondent's caseworkers and not the Tribunal. As Mr Whitwell also pointed out, the extract from the API on which the Appellant places reliance has no relevance to the issue. It cautions caseworkers against relying on a failure to mention sexuality in the screening interview but subsequently raised in the substantive asylum interview. Here, as Mr Whitwell rightly submitted, the Judge was obliged to follow the Devaseelan guidelines. Those remained relevant in the sense that a second Judge is advised to exercise circumspection about a claim not raised previously. That is, said Mr Whitwell, what the Judge was doing here. The Judge considered the Appellant's claimed reticence and considered that with the evidence in the round. Mr Whitwell submitted that the Judge had therefore properly evaluated the evidence in this regard.

21. Although I am unpersuaded by the Appellant's reliance on the API and, as I have already made clear, I do not consider the Judge to have erred in the use of the words "reasonable" or "natural" when looking at whether the Appellant should have raised this claim earlier, I am just persuaded that the Appellant's first ground is made out. That is on the basis of the Judge's failure to place in context the

Appellant's demeanour now when looking at what she could have been expected to mention at the first appeal hearing in 2015. Mr Whitwell sought to persuade me that this was not pleaded, and I should not allow it to be raised. Although it is not expressly mentioned, I accept that the submission is part and parcel of the general criticism of the Judge's approach to the question whether the Appellant was not to be believed because of her failure to raise this issue at the earliest opportunity.

Ground 2

22. I would in any event have found an error on the second of the Appellant's grounds concerning the Judge's treatment of the evidence of [R].

23. [R] is someone with whom the Appellant claims to have had a relationship. [R] is a British citizen and, as such, stands to gain nothing personally from a finding that she has had a relationship with the Appellant.

24. [R]'s evidence is recorded at [5] of the Decision. The Judge summarised her statements and set out her answers in oral evidence.

25. Having stated at [8] of the Decision that he did not find the Appellant to be credible, he went on to say that "[s]imilarly and equally sadly, [he found] that [R] was not a credible witness and did not give a credible account as to the appellant's sexual orientation". The only reason there given is that "[t]heir claim to have had an intimate relationship fell into the category of a joint claim which stood or fell together".

26. I do not understand what the Judge says about "joint claim" to be in the nature of a finding that [R] had something to gain from a finding that the relationship was genuine. In my view all the Judge meant was that [R]'s and the Appellant's evidence had to be taken together and was either credible or not when taken as a whole. However, it is not said that [R]'s evidence was inconsistent with that of the Appellant. It is not said that [R] did not stand up well to cross-examination, was vague or evasive. Whilst the evidence of [R] and the Appellant about their relationship was two sides of the same coin, the Judge still had to consider whether the evidence of [R] was capable of corroborating the Appellant's evidence when looked at in the round. If he was going to discount it, he needed to say why. He did not do so.

27. Mr Whitwell drew my attention to what the Judge said at [12] of the Decision concerning the close mutual friendship between the Appellant and [R]. He said that might be reason why [R] would provide the Appellant with supporting evidence. That may be so. However, that was not a reason given by the Judge for not accepting [R]'s evidence as credible.

28. For those reasons, I am satisfied that the Appellant's second ground is made out.

Ground 3

29. The Appellant's third ground concerns the medical evidence of Dr Olowookere. The Judge refers in summary to the content of Dr Olowookere's report at [6] of the Decision when recording the submissions made by the Appellant's Counsel. In summary, Dr Olowookere "had diagnosed that the appellant was suffering from depression and was at a risk of perpetrating self-harm and of taking her own life if she believed that she would be removed from the United Kingdom."

30. Dr Olowookere's report is at [AB/12-29]. There is reference to a previous overdose whilst in the UK and the Appellant referred to at least one earlier episode in Pakistan. The doctor accepted that the Appellant was suffering from depression and was not feigning her symptoms. She recommended psychotherapy. The doctor accepted at [15.5] of the report that "[h]er inability to freely practice [sic] her sexuality, difficulties experienced and ongoing debilitating condition of endometriosis" could all "contribute to increase in severity of depression increases [sic], the likelihood of experiencing suicidal thoughts and possibly acting upon them". The doctor could not however know what the cause of the mental illness was or even the cause of the previous suicide attempts. The overdose in the UK is said to have been triggered by the earlier adverse appeal decision. The doctor herself recorded that the "immigration issues" and threat of removal lay at the heart of the Appellant's problems.

31. Reliance is placed in the grounds on JL (medical reports – credibility) China [2013] UKUT 145 (IAC) ("JL (China)") the headnote to which reads as follows:

> "(1) Those writing medical reports for use in immigration and asylum appeals should ensure where possible that, before forming their opinions, they study any assessments that have already been made of the appellant's credibility by the immigration authorities and/or a tribunal judge (SS (Sri Lanka) [2012] EWCA Civ 155 [30]; BN (psychiatric evidence discrepancies) Albania [2010] UKUT 279 (IAC) at [49], [53])). When the materials to which they should have regard include previous determinations by a judge, they should not conduct a running commentary on the reasoning of the judge who has made such findings, but should concentrate on describing and evaluating the medical evidence (IY (Turkey) [2012] EWCA Civ 1560 [37].
> (2) They should also bear in mind that when an advocate wishes to rely on their medical report to support the credibility of an appellant's account, they will be expected to identify what about it affords support to what the appellant has said and which is not dependent on what the appellant has said to the doctor (HE (DRC, credibility and psychiatric reports) Democratic Republic of Congo [2004] UKAIT 000321). The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23]).
> (3) The authors of such medical reports also need to understand that what is expected of them is a critical and objective analysis of the injuries and/or symptoms displayed. They need to be vigilant that ultimately whether an appellant's account of the underlying events is or is not credible and plausible is a question of legal

> appraisal and a matter for the tribunal judge, not the expert doctors (IY [47]; see also HH (Ethiopia) [2007] EWCA Civ 306 [17]-[18]).
> (4) For their part, judges should be aware that, whilst the overall assessment of credibility is for them, medical reports may well involve assessments of the compatibility of the appellant's account with physical marks or symptoms, or mental condition: (SA (Somalia) [2006] EWCA Civ 1302). If the position were otherwise, the central tenets of the Istanbul Protocol would be misconceived, whenever there was a dispute about claimed causation of scars, and judges could not apply its guidance, contrary to what they are enjoined to do by SA (Somalia). Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them."

32. That headnote is directed not simply at Tribunal Judges but also those writing medical reports. As such, Dr Olowookere should have been made aware of the previous appeal and adverse credibility findings ([1] of headnote in JL (China)). Although she appears to have been sent the previous decision (see [6.1.3] of the report albeit the determination is there wrongly dated), she makes no reference to it and continues to accept apparently at face value what the Appellant says about her past (including the claim which was not accepted that she would be at risk of being forced to marry – [15.10]). There is no reason given for accepting that the Appellant's sexuality is (one of) the root causes of her mental state beyond that being what the Appellant herself told the doctor. That the Appellant's mental state is genuine does not advance matters. The Appellant's mental health problems are said in the report to be long-standing and pre-date the Appellant coming to the UK. The doctor does not say why the Appellant's account of the trigger for her mental state is her sexuality or why the risk arising from that on return is accepted as being a cause let alone the cause of her problems. That was particularly important if this report was to corroborate the Appellant's claim because the doctor herself recognises that there are other reasons for the mental health issues.

33. The core of the Appellant's criticism of the Decision in this regard is the Judge's refusal to accept that the Appellant is at risk of self-harm or suicide on return. Having looked at the report itself, therefore, I turn to how the Judge dealt with this evidence at [11] of the Decision. He set out the Appellant's own evidence about the risk of self-harm and suicide. He noted the "scant reference" to this. The Judge also took into account a letter from the Appellant's GP but that was dated January 2019. I note incidentally that neither this letter (at [AB/32-33]) nor the letter at [AB/34-35] nor the medical records make any reference to an overdose in October 2017 as is referred to in Dr Olowookere's report at [14.6].

34. That then was the context against which the Judge made his assessment of what was said by Dr Olowookere as follows:

> "Dr Olowookere at paragraph 15.8 of his report (page 24 of the appellant's bundle) stated 'in my opinion, she presents with a moderate risk of self-harm and suicide due to what she has experienced…'. Of course, Dr Olowookere's opinion was

> expressed having read the appellant's and indeed [R]'s first witness statements, having had medical letters and records presented to him and having interviewed the appellant who confirmed (paragraph 15.7 of the report) that the appellant had told him, 'I have nowhere to go if removed from the United Kingdom, my 5-year 'relationship' with [R] has given me stability and she is the only support I have'. Dr Olowookere's opinion at paragraph 15.8 was predicated upon an acceptance of the appellant's (and indeed to the extent that he had then in mind given that he did not meet her, [R]'s) statements. In the light of my findings of fact the factual basis for Dr Olowookere's findings as to the risk of self-harm and as to the risk of the appellant taking her own life entirely dissipated. In passing I should also remark upon the fears which the appellant actually expressed to Dr Olowookere. The appellant did not express to him (their meeting taking place at a time when the appellant had become open about her sexual orientation) a fear of being harmed on account of that sexual orientation in Pakistan. However, her distress was on account of having nowhere to go if removed to Pakistan and being deprived of the stability which her relationship with [R] had given her. It would have been reasonable for the appellant having mentioned to her general practitioner in 2017 that she was a lesbian to mention that fact to Dr Olowookere. I am certainly prepared to acquiesce in Dr Olowookere's finding that the appellant is suffering from depression. She has serious conditions of her health of which her endometriosis is but one. I should take judicial notice that a struggle to remain in the United Kingdom by engaging with the respondent and the First-tier Tribunal may cause stress and upset. I am certainly not satisfied that the appellant's depression has come about as a result of her fear as to what would happen to her upon a return to Pakistan given her claim as to her sexual orientation. I am very satisfied indeed for the very many reasons mentioned above and the facets of the evidence as to which I have remarked that the appellant was not and is not a lesbian by sexual orientation."

35. As I have myself observed, Dr Olowookere's report could not assist in corroboration of the Appellant's account to be a lesbian. The Judge accepted the diagnosis of depression. The position as to self-harm and suicide was however of a different nature. The doctor appears to have accepted the Appellant's account of previous attempts. So far as I can see, there is no evidence of the attempt said to have been made in 2017. Neither Dr Olowookere nor the Appellant's GP provided any supporting evidence for their assessment of that risk. They do not explain why they find the risk to exist. It was open to the Judge not to accept that part of the doctor's report.

36. Nor has the Appellant made out her criticism of a Mibanga error. The Judge considered the content of the medical evidence at [11] of the Decision. He evaluated that in the context of the other evidence (which in this case was simply that of the Appellant and [R]). He did not reach a conclusion about the Appellant's credibility before first considering the medical evidence. That he started his findings with a statement as to credibility does not suggest that he formed that view without the consideration of the evidence that followed.

37. For those reasons, the Appellant's third ground is not made out. However, in light of my conclusion regarding the first two grounds, the medical evidence will need to be reassessed as part of the reconsidered credibility findings.

38. In conclusion therefore, I find that there is an error of law disclosed by the Appellant's first two grounds but not the third. However, since the errors relate to the consideration of the Appellant's credibility and that of her witness, it is not appropriate to preserve any part of the Decision. I therefore set the Decision aside. Both parties confirmed that, if I found an error, I should remit the appeal to the First-tier Tribunal for redetermination as the Appellant's credibility is at the core of this appeal and the appeal will have to be redetermined entirely afresh.

CONCLUSION

39. The Appellant's first and second grounds disclose errors of law in the Decision. I therefore set the Decision aside in its entirety. The credibility of the Appellant's claim will need to be considered afresh. The appeal is remitted for a de novo hearing before the First-tier Tribunal.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Keane promulgated on 6 November 2020 is set aside in its entirety. No findings are preserved. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Keane.

Signed *L K Smith* Dated: 25 November 2021
Upper Tribunal Judge Smith