Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12261/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Working Remotely by Skype for Business	**Decision & Reasons Promulgated**
On 11 February 2021	**On 3 March 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

A A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr V Onipede instructed by Aminu Aminu Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Nigeria who was born on 28 April 1976.

3. The appellant arrived in the United Kingdom on 17 June 2019. On 23 September 2019 she attended the Asylum Intake Unit in Croydon. On 1 October 2019, the appellant claimed asylum.

4. The basis of the appellant's claim was that she would be at risk on return to Nigeria because she is bisexual. She claimed that she had been caught in a compromising situation with another woman by that woman's husband on 15 or 16 May 2018. The incident was reported to the appellant's husband and on 17 May 2018 she was questioned at a police station about her sexuality. She was warned by the police not to carry out similar activities in the future. Subsequently, on 12 December 2018 whilst she was on her way home, she was shouted at by some people in her local area and when she went to the police station to lodge a complaint she was harassed and they were hostile to her. She was subsequently warned by her husband that if she returned to Nigeria, after she had come to the UK, for a holiday, he would report her to the authorities. On 25 July 2019, her sister called her and told her that some people had confronted her husband about her sexuality. The appellant claimed that on return she feared that her husband, her girlfriend's husband and her neighbour would report her to the Nigerian authorities who would ill-treat her.

5. On 29 November 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR. Principally, the Secretary of State did not accept that she was bisexual or that her account of events in Nigeria was credible.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. In a determination sent on 16 March 2020, Judge A J Blake dismissed the appellant's appeal. He made an adverse credibility finding and did not accept that the appellant was bisexual or that her account of events in Nigeria was true.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds. Permission was initially refused by the First-tier Tribunal (Judge Adio) on 18 May 2020. On renewal of that application to the Upper Tribunal, on 21 July 2020 the Upper Tribunal (UTJ Blundell) granted the appellant permission to appeal.

8. Following the grant of permission, on 16 September 2020 the Secretary of State filed a rule 24 response seeking to uphold the decision.

9. Following an initial adjournment of a remote hearing on 3 November 2020, the appeal was listed at the Cardiff Civil Justice Centre for a remote hearing by Skype for Business. The court was working remotely and Mr Onipede, who represented the

appellant, and Mr C Howells, who represented the Secretary of State, also joined the hearing by Skype for Business.

The Grant of Permission

10. In granting permission to appeal, UTJ Blundell limited the grant to two specific points relating to paras 81 and 85 of the judge's determination.

11. In para 81 Judge Blake, in finding the appellant not to be credible, said this:

> "I also note that the appellant has not made any mention of being harassed by the police at the time of her initial screening interview. I noted this formed a major part of her claim. I found that it had undermined her credibility that she had failed to mention it at the early stage."

12. In granting permission to appeal, UTJ Blundell said this:

> "It is arguable that Judge Blake erred when he concluded at [81], that the appellant had not made any mention of being harassed by the police at the time of her initial screening interview. Although there is no mention of police harassment in the interview itself, the conduct described in the witness statement which was adduced at that interview might aptly be described as harassment."

13. Then, at para 85 of his determination Judge Blake considered the evidence, given orally, by the appellant's cousin, Mr Aminu. His evidence was supportive of the appellant's account and claim to be bisexual. The judge said this:

> "I considered the evidence of the appellant's cousin, Mr Aminu. I found his evidence also lacked credibility. I noted in his witness statement of 11 January 2020 he had made no mention of a number of important issues. I noted in evidence he had stated that his wife had discovered the appellant's sexual orientation and demanded that she leave their home. I noted this was not mentioned in his witness statement. I further noted that he claimed in his witness statement that the appellant had originally stayed with him in his home until his wife had found out about her sexuality and that he had then let her live in his offices. I noted that this had not been mentioned in the witness statement. I further noted that on one account he stated that both he and his wife paid the rent for the appellant of £550 per month. I noted he had stated that the accommodation the appellant was in was a three-bedroomed house that was rented by him. In contrast, I noted that the appellant had stated in evidence that he was living in a bedsit."

14. In granting permission to appeal, UTJ Blundell said this in relation to the second half of that paragraph:

> "It is also arguable that the judge misunderstood the evidence when he made the findings he did at [85], concerning the evidence of a witness. I cannot read the Record of Proceedings. The complaint does not prove itself and, if it is to be maintained, there must be proper evidence to show that the judge fell into the error claimed. A witness statement from the appellant's advocate, together with his contemporaneous record of the evidence may suffice. The advocate must obviously not appear at the hearing of the Upper Tribunal."

15. In response to that grant of permission, the appellant filed a statement from Mr Edward Akoheni dated 2 October 2020 who represented the appellant before the judge. At paras 4 and 5 of his witness statement he says this:

> "(4) Unfortunately I have a practise of disposing of my Record of Proceeding once a determination is promulgated in case I have been instructed. However my recollection of the evidence from Mr Aminu is that his oral evidence was that the appellant was staying in his matrimonial home prior to his wife discovering the appellant's sexuality.
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> (5) Mr Aminu then stated in evidence that he was forced to accommodate the appellant in his office for a short period because he secured a tenancy for the appellant. Finally Mr Aminu made two clear statements in his oral evidence. Firstly he stated that he alone paid for the monthly rent of £550.00 for the bedsit that the appellant was living in. Secondly, Mr Aminu stated that both he and his wife paid jointly for their three- bedroom property rent. He did not mention an amount for the three-bedroom property in oral evidence."

16. Mr Howells was content that this evidence, not in evidence before the First-tier Tribunal, should be admitted under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

The Submissions

17. On behalf of the appellant, Mr Onipede submitted that the judge had materially erred in law in both paras 81 and 85 of his determination.

18. As regards para 81, Mr Onipede submitted that the appellant had referred to the police harassing her prior to the Screening Interview in her statement dated 1 October 2019. He relied upon para 8 where she said this:

> "Around December 2018 I was confronted on the road by some neighbours who were aware of the incident of 16 May 2018, attacked and embarrassed me on the street for being bisexual. I went to the police to report but the police were very aggressive to me and abused me for whom I am. Immediately I saw their response to me I quickly left the station as they have started threatening to detain me. At the police station the officers recognised me and started abusing me for being a lesbian even before I could report the attack I suffered. I had to run out of the station without lodging my complaint."

19. In his opening submissions, Mr Onipede submitted that it was plain, therefore, that the judge had been wrong to take into account in assessing the appellant's credibility that she had not referred to harassment by the police prior to her screening interview on 21 October 2019. He referred me to the respondent's decision letter at page 75 of the Home Office bundle which referred to the appellant's witness statement dated 1 October 2019. He also referred to page 26 of the bundle which referred to the appellant submitting her witness statement at the asylum interview (although he did not at this point recognise it was not her Screening Interview),. He submitted, therefore, that the appellant had at the time of the Screening Interview mentioned that she had been harassed by the police and the judge had made a material error in para 81 when he had counted against her in assessing credible that she had not done so.

20. In response, Mr Howells submitted that the judge had not made any factual error. Although the statement of the appellant was dated 1 October 2019, he submitted that it had not been provided to the Home Office prior to the Screening Interview. He pointed out that the reference, to which Mr Onipede referred me, to the appellant submitting her witness statement (at page 26 of the bundle) was on the occasion of her asylum interview which had taken place on 31 October 2019 after the Screening Interview. He pointed out that at para 6.2 of the appellant's Screening Interview (page 17 of the bundle) the appellant when asked whether she had documents said "I will bring to the asylum interview". Although apparently written before the Screening Interview, Mr Howells submitted the witness statement had not been provided to the Home Office and the judge had, therefore, not fallen into error in taking into account that the appellant had not raised the issue of police harassment prior to the Screening Interview. In addition, Mr Howells submitted that the judge had given a number of reasons for not accepting the appellant's credibility and any error would not be material.

21. In response, Mr Onipede submitted, on instructions, that the witness statement had been provided at the time of the Screening Interview. He relied on the fact that it was dated before the Screening Interview on 21 October 2019 and it appeared in the respondent's bundle, apparently in chronological order, prior to the Screening Interview. As regards materiality, Mr Onipede submitted that the judge had, himself, referred to her claim to have been harassed by the police as something which "formed a major part of her claim" and was, he submitted, therefore material to the judge's adverse credibility finding.

22. As regards para 85 of the judge's determination, Mr Howells accepted the evidence of Mr Akoheni particularly given that it was supported by a tenancy agreement (at pages 20–25 of the bundle) which was for a single room as Mr Aminu had claimed in his evidence that he rented for the appellant and also the implausibility point made by the judge that the witness had said the appellant was being accommodated in a rented three-bedroom house as an asylum seeker. Nevertheless, Mr Howells again submitted that this error was not material to the decision given the judge's multiple reasons for not accepting the credibility of the appellant.

23. Mr Onipede submitted that this (now accepted) error was also material to the decision and he invited me to set the decision aside.

Discussion

24. I deal first with para 81 of the determination.

25. There is no doubt that there is in existence a witness statement dated 1 October 2019 – and therefore dated before the appellant's Screening Interview – which, if taken at face value, contradicts the judge's premise in para 81 that the appellant's credibility on "a major part of her claim" is undermined by the fact that she had not mentioned being harassed by the police prior to her Screening Interview. There is no clear evidence as to when this document was submitted to the Home Office. The Screening Interview, itself, refers to the appellant wishing to provide documents at

her "asylum interview" which, of course, was later. Likewise, at that interview it is recorded (at page 26) that the appellant wished to submit three documents one of which is a "witness statement". Mr Onipede relied on that latter document as supporting his submissions but, as became plain following Mr Howells' submissions, it does not provide that support because it concerns the submission of a witness statement at the *asylum* interview which, of course, was later than the Screening Interview. There is no suggestion that the appellant has submitted more than one witness statement in support of her asylum claim. Mr Onipede told me, on instructions, that the witness statement had been submitted for the Screening Interview. Further, Mr Akoheni's statement dated 2 October 2020 also states that he:

> "received clear instruction from the appellant that the witness statement dated 01 October 2019 was presented to the Immigration Officer prior to the screening interview on the 21 October 2019."

26. It is also the case, for what it is worth, that the appellant's witness statement appears in an apparently chronological bundle produced by the Home Office prior to the Screening Interview and not the asylum interview.

27. As I have said, the evidence is somewhat ambiguous and equivocal. The judge, however, seems to have treated it as a given fact that the appellant's witness statement dated 1 October 2019, which was in evidence before him, was not made available to the Home Office before the Screening Interview. That was not self-evidently the case on the basis of the material that was before the judge. The statement itself predated the Screening Interview by twenty days and reflected the date upon which the appellant had, in fact, claimed asylum. In an apparently chronological bundle produced by the Home Office it appeared before the Screening Interview rather than after it and before the asylum interview. Of course, there was also the potentially conflicting material in para 6.2 of the Screening Interview and at page 26 of the bundle which pointed to the witness statement being produced at the time of the asylum interview.

28. Given the equivocal evidence and material before the judge, it is difficult to assess whether the judge made an actual mistake in concluding that the witness statement had not been provided prior to the Screening Interview so as to provide evidence of the appellant's claim to have been harassed by the police. It does not appear to have been an issue which was explored at the hearing. It was not suggested before me that the issue had arisen at the hearing although it was a point raised in the decision letter at para 37 (referred to as part of the respondent's case at para 50 of the determination). Nevertheless, the judge does not grapple with the apparently conflicting evidence about when the witness statement was provided to the Home Office. He simply finds, as if uncontroversial, that it was not made available at the time of the Screening Interview. His failure to engage with the evidence and to give reasons for preferring one understanding of that evidence over another was, in itself, an error of law.

29. Given the prominence of this point, as the judge made clear in para 81 of his determination, and given the ambiguity in the evidence and material before the

judge, prior to reaching a firm finding against the appellant it was, in my judgment, also incumbent upon the judge to raise this issue so that the appellant had a fair opportunity to deal with the contention that she had not raised the issue of police harassment, in particular through her statement dated 1 October 2019, prior to the Screening Interview. That also amounted to an error of law.

30. As regards para 85 of the determination, Mr Howells accepts that the judge made a mistake of fact, amounting to an error of law, in misstating the evidence of Mr Aminu concerning his (and his wife's) arrangements for providing accommodation to the appellant in the UK. That error was relevant to the judge's assessment of whether the evidence of Mr Aminu, supportive in other respects of the appellant's claim was credible or reliable.

31. Whilst it cannot be gainsaid that the judge gave a number of reasons for rejecting the evidence of the appellant and the evidence of Mr Aminu, overall I accept the submissions of Mr Onipede that these errors were material to the judge's adverse credibility findings.

32. As regards para 81, any finding in relation to whether the appellant had raised prior to the Screening Interview, what the judge describes as a "major part of her claim", was something that undermined an important part of her claim that she had been discovered with a girlfriend and, as a result of that, both through her husband and her girlfriend's husband the police had harassed her and, indeed, treated her with hostility. If that latter element of her account was disbelieved, it significantly undermined the veracity overall of her claim to be bisexual and, as a result of what had previously occurred to her in Nigeria, to be at risk on return.

33. As regards the mistake in relation to Mr Aminu's evidence, it is plain from paras 85 – 88, that the judge did take into account his misunderstanding of Mr Aminu's evidence in reaching his conclusion, albeit "overall", that he did not find the witness to be credible or reliable. I accept that the judge gave a number of other reasons in paras 85 – 87 for reaching that overall conclusion. However, I am not persuaded that the judge would necessarily have reached the same conclusion in relation to Mr Aminu's credibility had he not fallen into this error.

34. In any event, the error disclosed in relation to para 81 of the determination relates to a significant building block in the appellant's asylum claim that, in itself, materially contributed to the judge's adverse credibility finding which, for that reason, cannot be sustained.

Decision

35. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

36. In the light of the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, and as was agreed between the representatives if I accepted the appellant's submissions, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* re-hearing. None of the factual findings made by Judge Blake are preserved.

37. The appeal is, therefore, remitted to the First-tier Tribunal for a *de novo* re-hearing before a judge other than Judge A J Blake.

Signed

Andrew Grubb

Judge of the Upper Tribunal
12 February 2021