



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

Appeal Number: AA/01413/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 28 April 2017**

**Decision & Reasons Promulgated
On 8 May 2017**

**Before
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**H K O
(ANONYMITY DIRECTION MADE)**

Respondent

**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 him or any member of their 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.

Representation:

For the Appellant: Mr S Staunton, Senior Home Office Presenting Officer
For the Respondent: Ms H Foot, Counsel, instructed by Bindmans LLP

DECISION AND REASONS

1. I shall refer to the parties as they were before the First-tier Tribunal. Therefore the Secretary of State is the Respondent and H K O is once more the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Henderson (the judge), promulgated on 8 February 2017, in which she allowed the Appellant's appeal on the basis that his removal from the United Kingdom would be contrary to its obligations under the Refugee Convention and would also breach section 6 of the Human Rights Act 1998. The Appellant's protection claim has always been predicated squarely on the assertion that he is gay, and would for that reason be at risk if returned to Nigeria. Throughout the protracted history of this case the Respondent has accepted that if in fact the Appellant is gay he would be at risk on return to his home country. However the Respondent has maintained her rejection of his sexuality at all times.
3. The Appellant's appeal was first dealt with within the Detained Fast Track procedure. Tribunal Judge Hembrough dismissed the appeal on 5 February 2015. In light of the litigation in the Detention Action cases, that decision was set aside. The appeal then went before First-tier Tribunal Judge Cohen, and he dismissed it by a decision promulgated on 29 March 2016. His decision was challenged, and by a decision dated 4 August 2016 Upper Tribunal Judge Pitt found there to be material errors of law. She remitted the matter back to the First-tier Tribunal for a complete rehearing. In this way the appeal came before the judge on 13 January 2017.

The judge's decision

4. At paragraph 5 the judge notes the Respondent's concession as to risk on return if the Appellant were in fact gay.
5. Under the sub-heading 'Findings of Fact' the judge proceeds to recite much of the evidence before her. Her findings as such really only begin from paragraph 35 onwards. She makes reference to certain supporting evidence adduced on behalf of the Appellant, but deems it to be of limited assistance to his claim. There is reference too to a medical report from Dr J Reicher, which is said to contain a consistent account of the Appellant's history and was also supportive of the nature of scarring on the Appellant's body.
6. Under the next sub-heading of 'Conclusions' with a subheading of 'Credibility', the judge states at paragraph 41 that she found the Appellant to be a credible and honest witness. She makes reference to his demeanour at the hearing and then goes on in subsequent paragraphs to accept his evidence as to possible inconsistencies relied on by the Respondent. She also refers once again to the medical report. She notes certain omissions in the evidence, makes reference to section 8 of the Immigration and Asylum (Treatment of Claimants, etc.) Act 2004 Act, and also to the cultural context in which she was assessing the Appellant's claim.
7. Then under the sub-heading 'Is the Appellant gay?' the judge refers to the well-known cases of Kaja [1995] Imm AR1 and Karanakaran v Secretary of State for the Home Department [2003] 3 All ER 449 and Ravichandran

[1996] Imm AR 97. In paragraphs 47 to 49 she states and then re-states the need for protection cases to be viewed in the round and, of course, on the lower standard of proof. It is perhaps worth setting out paragraph 49 of her decision in full:

“49. On the basis of the evidence before me, I have taken into account the disparate pieces of evidence as referenced in Kaja and overall I find that the appellant has established on the lower standard of proof that there is a reasonable likelihood that he is gay. There are some pieces of evidence (or lack thereof) which may indicate to the contrary, but looking at the evidence in the round, I find that the appellant has satisfied the burden of proof (on the lower standard) in this case.”

On this basis the appeal was allowed (given the core finding of fact and the Respondent’s concession as to risk on return).

The grounds of appeal and grant of permission

8. The Respondent’s grounds of appeal take issue with the judge’s credibility findings. It is said that her findings of fact are limited in nature, that she has given insufficient reasoning for her core finding that the Appellant was gay, has placed weight on immaterial matters such as the Appellant’s demeanour at the hearing, has placed insufficient weight on the lack of corroborative evidence, that she had failed to have due regard to the delay in claiming asylum, and that she had had no regard to the Appellant’s past conviction for obtaining and/or using a false passport. In summary, the grounds assert that the judge has not in fact assessed the evidence in the round.
9. Permission to appeal was granted by First-tier Tribunal Judge Saffer by a decision dated 6 March 2017. He makes reference to the assertion that the reasons provided were inadequate and confirmed that all grounds may be argued.

The hearing before me

10. At the outset of the hearing I ascertained that all relevant papers were in order including the rule 24 response provided by Ms Foot.
11. Mr Staunton relied on the grounds of appeal and confirmed that this was an out and out challenge against the judge’s credibility findings. He went through the grounds of appeal and submitted that as a result of the errors alleged therein the judge’s decision was unsafe.
12. Ms Foot relied on her rule 24 response. She submitted that the findings were open to the judge, that the judge had taken a balanced view of the evidence in the round, had taken the Appellant’s oral evidence in combination with the medical report, written evidence and the cultural context to the claim, and her findings and conclusions were entirely open to her.

13. Mr Staunton had nothing to add by way of reply.

Decision on error of law

14. As I announced to the parties at the hearing, I conclude that there are no material errors of law in the judge's decision.

15. I remind myself of the need to view decisions of the First-tier Tribunal in the round and in a fair and sensible manner. I also remind myself of the fact that when any judge sets out their findings and conclusions there must always be some form of order to their written decisions: there will always be a sequence, and this is why it is important to look at the decisions in context and in a holistic way. In so doing my overall conclusion is that the judge has very properly expressly directed herself to the need to take all relevant aspects of the evidence into account, to weigh all of these disparate pieces of evidence up, and to reach an overall conclusion based on the evidence in the round and applying the lower standard of proof. What is said in paragraphs 47 to 49 of the decision significantly undermines the assertions set out in the Respondent's grounds.

16. Taking a number of the specific points set out in the grounds in turn I reach the following conclusions.

17. First, the judge was fully entitled to take the Appellant's demeanour at the hearing into account. It is clear that this was not conclusive of credibility in any way but was, in the context of the case before her, a relevant factor given that his explanation for apparent inconsistencies in the evidence and late disclosure of his sexuality were due in part to his own personality (amongst other things).

18. Second, the judge has quite clearly had in mind the absence of certain corroborative evidence. It is apparent from paragraph 49 that she was well aware of concerns as to elements of the evidence or, as she herself stated, the lack thereof. In my view the judge has gone through the evidence with care and has clearly set out that which she regarded as being of greater or lesser weight. It is important of course to remember that weight is a matter for the tribunal of fact.

19. Third, in my view the Respondent is misreading the judge's decision when the grounds state that she had already made her mind up that the Appellant was credible before considering other evidential difficulties. As I have mentioned already, paragraphs 47 to 49 clearly disclose that the judge had at the forefront of her mind the need to look at the evidence as a whole. The reference to the Appellant's demeanour at the hearing was not the sole basis for her finding that the Appellant's evidence was credible. As Ms Foot rightly pointed out in her submissions, the judge had regard also to the medical report, the explanations put forward by the Appellant as to the alleged inconsistencies relied upon by the Respondent in her refusal letter and, importantly, the cultural context of this case

(namely that homosexuality in Nigerian culture is a taboo subject or, at the very least, highly contentious).

20. Fourth, whilst it could have been dealt with more clearly, the judge did have section 8 of the 2004 Act in mind when making her overall assessment of credibility. It would never be conclusive and the judge, as I have already mentioned, did have in mind the evidential shortcomings in the Appellant's case (see paragraph 49).
21. Fifth, as to the failure of the judge to have regard to the Appellant's conviction when making her overall credibility assessment, several points are of note. First, that this issue was never raised in the Respondent's reasons for refusal letter. Second, that from my reading of the Record of Proceedings this was not the subject of any specific oral submissions made at the hearing before the judge. Third, the judge was clearly aware of the conviction and it would do a disservice to her for me to conclude that she had completely disregarded it for the purposes of reaching her findings and conclusions. Finally, as Ms Foot points out in her rule 24 response, if a particular point is not expressly put to the Tribunal it becomes all the more difficult for an aggrieved party to criticise the judge for failing to explicitly address it at some point thereafter.
22. The judge directed herself correctly. She had regard to the evidence as a whole. She made sustainable findings thereon. The Respondent had conceded the issue of risk on return. In light of this, the judge's decision is sound.

Notice of Decision

There are no material errors of law in the decision of the First-tier Tribunal.

The appeal of the Secretary of State is therefore dismissed.

The decision of the First-tier Tribunal stands.

Signed

Date: 5 May 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 5 May 2017

Deputy Upper Tribunal Judge Norton-Taylor