



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

Appeal Number: PA/00669/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 12th September 2017**

**Decision & Reasons Promulgated
On 13th September 2017**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**JBN
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Francis, instructed by Turpin & Miller Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Uganda born in 1971. He arrived in the UK in 1999 as a visitor with entry clearance, he claimed asylum on the basis of having been kidnapped by rebels which he said led the Ugandan authorities to believe he had assisted those rebels, which in turn led to a fear on his part of persecution from the authorities. He was

granted temporary admission. His asylum claim was refused in April 2000, and the appellant did not attend his appeal which was subsequently dismissed.

- 2.** In 2010 the appellant instructed Lincolns Solicitors who made a legacy application which was rejected in 2013. At this point he instructed his current solicitors, and in April 2016 the appellant made a statement which set out that he is an openly gay man who had left Uganda originally for this reason as he feared serious harm, and that this fear continues and is why he now claims asylum in a fresh claim. This claim was investigated by the respondent, who interviewed the appellant in November 2016, and refused it in January 2017. His appeal against the decision was dismissed by Designated Judge of the First-tier Tribunal McCarthy in a determination promulgated on the 8th March 2017.
- 3.** Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law in ignoring an important strand of the appellant's evidence and misunderstanding other points, so that the key decision, that he is not gay, was unsoundly made.
- 4.** I found that the First-tier Tribunal had erred in law for the reasons set out in the Error of Law Decision which appended as Annex A to this decision, and set aside the decision of Judge McCarthy in its entirety. The matter now comes before me to remake the appeal.
- 5.** The appellant attended the hearing on 12th September 2017 but did not give evidence due to his mental health problems, but he tendered three other witnesses: Dr Barbara Harrell-Bond; Mr PS and Ms Yvonne Tyno. Mr Nath stated he understood why the appellant had not been called to give evidence given the psychological report of Dr Chisholm. Aside from the witness evidence I heard submissions from both Ms Francis and Mr Nath.
- 6.** It was agreed by Mr Nath, as it had been by the Home Office Presenting Officer before Judge McCarthy, that the only issue in this appeal is whether the appellant is openly gay. It was accepted for the respondent that if I found the appellant to be an openly gay man that it was not disputed he would then have shown he was a refugee with a well founded fear of return to Uganda. It was agreed by the respondent that it was not therefore necessary to explore any other issues to determine the appeal.
- 7.** Mr Nath relied upon the points made in the refusal letter to say that the appellant had not shown himself to be a gay man along with the observation that none of the witness evidence showed the appellant currently to be in a relationship with another man. Ms Francis relied upon her skeleton argument augmented by further oral submissions to say that the witness evidence demonstrated the appellant to be an openly gay man, and that the reasons in the refusal letter were not valid ones showing he was not one.

Conclusions – Remaking

- 8.** The key aspects of the appellant's evidence are that he contends that he is a gay man who came to an understanding he was gay whilst a school boy in Uganda. He had his first same-sex relationship with a fellow pupil, BT, when he was about 16 years old, in 1991, and as a result of being caught having sex with this boy was expelled from school. He then had to relocate to Kampala, where he managed to do further studies and work, and live with the assistance of a brother, R, and an uncle who had more liberal views away from the rest of the family and community from whom he was estranged. He left his address and regular work in 1996, and left Uganda to come to the UK in March 1999, as he was afraid police were going to question him about another matter and that in the course of that investigation his sexual orientation would come out in evidence from family. He did not make this claim on arrival as he was afraid and did not feel able to do so. Whilst in the UK he had a same sex relationship with a student called BM who had immigration problems between 2005 and 2010, and they lived together for three years. He also had a relationship with a British man who was married to a woman, called MA, in 2010. He has had other casual relationships in this country. The appellant says that he was able to put forward a claim disclosing his true fear of return to Uganda based on his sexuality in April 2016 because he has received help and support from gay and straight friends in Oxford, where he has lived since 2012 who introduced him to his current representatives. He believes his life would be at risk in Uganda as a gay man who cannot hide his sexuality.
- 9.** The Secretary of State argues that the appellant's claim is not credible, in summary for the following reasons:

 - He presented a false claim based on fear of the police due to their believing he was assisting rebels in the north of Uganda initially when entering the UK and initially lied about being married when he entered the UK. He had said he had claimed asylum now on this basis because he understood he could be granted status on this basis, which indicated he was simply opportunistically making this claim.
 - He delayed 17 years before presenting the claim he says is the true one based on his sexuality despite being represented by a number of lawyers since his arrival.
 - Some of the answers the appellant gave at interview did not make sense: for instance, he said he did not claim asylum in the UK before on the basis of his sexuality because he did not feel safe to do so, and yet he also says he came to the UK to find safety from Uganda.

- Some of his answers at interview were vague: for instance, giving the point he realised he was gay as 20 years but saying he realised he did not like girls when he was 15 years old, and that he was aware of his sexuality at 16 years old.
 - Some of his answers at interview and in his statement were inconsistent: for instance, when he last saw his first boyfriend BT in Uganda is given in his statement as 1993 and in his interview as around 1995.
 - At interview the appellant did not give the full names of the men, BM and MA, with whom he had had relationship in the UK.
 - He had never actually been persecuted in Uganda for being gay before he left.
 - His two witness statements submitted with his fresh claim, from AM and AK, were not considered to sufficiently support his claim.
- 10.** Dr Brock Chisholm is a chartered clinical psychologist who is an expert in the diagnosis and treatment of those who have suffered trauma. He is an expert who has provided evidence in the Court of Appeal, Supreme Court, the European Court of Human Rights and to the United Nations. He has written a careful and coherent report on the appellant, and confirmed his duty to the Tribunal. Dr Chisholm gives a reasoned conclusion why he does not find that the appellant is malingering or faking his symptoms. Mr Nath made no submissions that I should not accept his evidence. I find that his evidence should be given significant weight in the consideration of this appeal.
- 11.** The psychological evidence of Dr Chisholm is that the appellant suffers from confusion when asked questions and exhibits a disrupted memory, and finds that this will have affected his ability to recall specific events and thus to present his asylum claim coherently, and would have made him vulnerable to accepting poor advice. He finds that he might have psychotic symptoms which amount to a schizotypal personality disorder, although he was unable to provide an immediate definite diagnosis. He notes that his symptoms also reach the criteria for major depressive disorder. He concluded that the appellant's mental health problems would also have impaired his ability to form relationships; to plan and implement a coherent strategy; and to have asked other for help with his asylum claim.
- 12.** I find that the psychological evidence provides a possible explanation for the appellant having delayed in making his asylum claim; for his being unable to fully explain himself at interview and for his having given vague or inconsistent answers; and for his not wanting to give full names or get others involved with supporting his asylum claim; and also for his not having a current partner or maintained relationships with ex-partners so as to be able to engage their help at this stage.

- 13.** I also observe that the key events and persons have been presented by the appellant in his current claim, both in his interview and statement, in a way which has been broadly consistent and always had the same broad chronology, even if dates have been different. I also note that he has now given the full names of the men in the UK with whom he has had relationships. The appellant's written statement which, from her evidence, I understand was put together with the help of his friend Dr Barbara Harrell-Bond provides a very detailed account of his life, development of his sexuality and motivations. There is also nothing inherently implausible about anything the appellant has put forward, including his ability to trust two of his relatives with basic information about his sexuality as he could trust they were not going to take action against him, due to them being better educated and of a more liberal outlook. Whilst it is correct to say that the appellant has not claimed to have been persecuted in Uganda he has clearly claimed to have suffered discrimination, hostility and exclusion as a result of this, and to have left Uganda because of fear of serious harm if the police obtained information he was gay as a result of their investigations into another matter involving him.
- 14.** I accept that all the witnesses are credible. Mr Nath did not suggest otherwise in any submissions. They all gave evidence which showed that they had listened to the questions carefully and were at pains to be entirely honest. Their oral evidence was consistent with their written statements.
- 15.** Dr Harrell-Bond is an emerita professor and founding director and associate of the Refugee Studies Centre at the University of Oxford. She has met and interviewed hundreds of refugees, she has also spent three years living in Uganda but attends the Upper Tribunal as a personal friend of the appellant. It is her opinion that the appellant is a gay man because she has assisted taking his full testimony, and has spent time with the appellant on a very regular (almost daily) basis since 2012, in which he had said he is gay, and she believes his history to be true. In addition, all of his friendships are with men and he had been brought to her by a man, AK, who is a gay Ugandan who has been granted asylum on that basis. She had not seen him with a current partner but has discussed his past gay relationships with him. She is not a qualified psychologist but in a lay sense she finds the appellant extremely depressed. She observes that the appellant would not attend places like gay bars as he does not drink; and also that he is a shy person who finds it hard to ask people to put themselves out to assist him with his claim. She believes him to be a moral and honest person who is telling the truth.
- 16.** Mr PS is a gay man from Uganda who has been granted refugee status in the UK on the basis of his sexuality. He met the appellant in 2016. He believes that the appellant came to the UK to find safety as he is a gay man and would be in danger in Uganda. He has met the appellant very frequently as he come to Dr Harrell-Bond's flat very regularly, and

because he, Mr PS, shares a flat with Dr Harrell-Bond. He is certain the appellant is gay because both Dr Harrell-Bond and the appellant have told him this is the case.

- 17.** Ms Yvonne Tyno is an American citizen who is visiting the UK. Her daughter has a flat in Oxford in the UK, and the appellant has been her house-sitter caring for the flat whilst she is not there for the past year. Ms Tyno got to know the appellant through Dr Harrell-Bond, and spent 12 weeks working with him on his English language in the summer of 2016. Through this work she learned of his sexuality, about which he was open, telling her the history of his relationship at school with BT, and also about the help he gives to various families in Oxford such as caring for an autistic child and an elderly lady. Ms Tyno says she has witnessed that he has no sexual attraction to women, and finds his sexual orientation history to be true. She notes that he was initially reticent with her about his sexual history until they had a trusting relationship, and that he is not willing to impose on others to assist him. She has come to the UK particularly to give evidence at the appellant's appeal as she believes he is telling the truth about his sexuality and that he will be persecuted if returned to Uganda. She observed that he is not currently involved with LGBT organisations, and although this is partly because he is not that interested to do so, this is also because he has no money for socialising or for any membership fees so it is not really a possibility in his current economic position.
- 18.** The witness evidence is of a very high quality. It comes from Dr Harrell-Bond who has decades of experience with refugees and who has known the appellant for five years and had very regular contact with the appellant and detailed discussions of his past; from Mr PS who is himself a gay Ugandan man, recognised as a refugee as such by the respondent, and who also has had over a year's close contact with the appellant; and Ms Tyno who has tutored the appellant intensively for three months and had detailed personal discussions with him, and an opportunity to observe that he is generally a very reliable and honest person. This witness evidence contends that the appellant is a reticent but openly gay man.
- 19.** When considering whether the appellant is an openly gay man I must weigh against him the fact that he delayed in making the claim he now says is true for a very long period of years and the fact that the he initially told an untruthful story to attempt to obtain asylum in the UK. He has also not been able to provide a history which has a totally consistent timeline with full names, or witness evidence from previous partners, although this is possibly simply reflective of his psychological state/ personality disorder as set out by Dr Chisholm.
- 20.** I must also consider the UNHCR Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation or Gender Identity dated 23rd October 2012. I note that it is important not to make culturally inappropriate or stereotypical assumptions, and that it is not a

factor to be held against the appellant that he does not attend gay bars or campaigning organisations which for reasons of his reticent character, lack of funds and not having an interest in drinking alcohol would not appeal to him. I also note from this guidance that his history of experiencing homophobia in Uganda would be likely to cause difficulties and delays opening up to immigration officials about his sexual history and trusting the asylum system prior to having the excellent social support system he now has in Oxford, particularly given his psychological issues, and that having such difficulties in opening up and making the claim is not inconsistent with having a correct objective understanding that gay people are safer in the UK than in Uganda, which the appellant says motivated his move here. These guidelines also draw attention to the fact that an understanding of sexual orientation is a process that may emerge over time, particularly in societies hostile to same sex relationships, and thus any difficulties the appellant had in explaining when precisely he understood he was gay are not a factor which is an indicator he is being untruthful.

- 21.** I conclude, having considered all of the evidence before me, and particularly that of the witnesses who gave oral testimony, that I am satisfied that the appellant has shown to the required lower civil standard of proof that he is an openly gay man from Uganda. It is conceded by the respondent that in these circumstances that he has a well founded fear of persecution in the light of the country of origin evidence, and I find this to be the case too.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal in its entirety.
3. I remake the appeal allowing it on asylum and human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley
2017

Date: 13th September

Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Uganda born in 1971. He arrived in the UK in 1999 as a visitor with entry clearance, he claimed asylum on the basis of having been kidnapped by rebels which he said led the Ugandan authorities to believe he had assisted those rebels, which in turn led to a fear on his part of persecution from the authorities. He was granted temporary admission. His asylum claim was refused in April 2000, and the appellant did not attend his appeal which was subsequently dismissed.
2. In 2010 the appellant instructed Lincolns Solicitors who made a legacy application which was rejected in 2013. At this point he instructed his current solicitors, and in April 2016 the appellant made a statement which set out that he is an openly gay man who had left Uganda originally for this reason as he feared serious harm, and that this fear continues and is why he now claims asylum in a fresh claim. This claim was investigated by the respondent, who interviewed the appellant in November 2016, and refused it in January 2017. His appeal against the decision was dismissed by Designated Judge of the First-tier Tribunal McCarthy in a determination promulgated on the 8th March 2017.
3. Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law in ignoring an important strand of the appellant's evidence and misunderstanding other points, so that the decision that he is not gay is unsound.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law

Submissions - Error of Law

5. The grounds of appeal contend that firstly the First-tier Tribunal failed to look at the detailed account of how the appellant discovered his sexuality and of being gay in Uganda. This was a failure of anxious scrutiny, and could have led to it being believed that he was gay. It was a material part of a fair hearing that this evidence be properly considered.
6. Secondly the evidence of the witnesses, Dr Harrell-Bond and Mr Sserugo, was rejected for unfair and irrational reasons. It was not safe to reject Dr Harrell-Bond's evidence just because she expressed a view that the appellant may be depressed. It was not safe to reject the evidence of Mr Sserugo because he could not provide documents

confirming the basis he was granted asylum or because of a mistaken belief that he and the appellant gave inconsistent account of when they last met.

7. In a Rule 24 notice the respondent maintains that the First-tier Tribunal has made a legally valid determination which looks at the main issues in dispute. It is said that there was: “no need to refer to every material consideration”. Full reasons are given for rejecting the claim. It was a matter for the judge to decide what weight to give to the evidence of the witnesses, and in any case he found that they were acting in good faith and honestly believed the appellant was gay. A further letter from Ms Alice Holmes of the Presenting Officers Unit did however clarify that the evidence going to what the appellant and his witness, Mr Sserugo, said at the hearing was broadly similar in that it clarified that both Mr Sserugo and the appellant had said he was not there on the last Sunday when Mr Sserugo tried to visit the appellant.
8. I indicated to Mr Tufan that my initial view was that the grounds of appeal were well made out relating to the treatment of the appellant’s own evidence and that of Dr Harrell-Bond, and so I would ask him to commence with a reply to those grounds. At this point Mr Tufan conceding that there were errors by the First-tier Tribunal in dealing with the appellant’s statement and the witness evidence of the two key witnesses, and added that Mr Sserugo had indeed been given refugee status on grounds of his sexual orientation according to the respondent’s records. In this context I informed the parties that I found the First-tier Tribunal had erred in law materially and that I would set aside the decision in its entirety.
9. The parties agreed that the matter should be adjourned and remade in the Upper Tribunal before me, and a date of 12th September 2017 was fixed with a hearing time of 3 hours.

Conclusions – Error of Law

10. The First-tier Tribunal start from the position that: “I am satisfied that if I find the appellant is telling the truth about his sexuality then he would have a well-founded fear of persecution because of being an openly gay man.”
11. In considering whether the appellant is an openly gay man the Judge of the First-tier Tribunal consider that he must “exercise caution in accepting his claim to be gay at face value” due to his poor immigration history, delay in making a fresh claim, admission he exaggerated his initial account and his admission he lied when he said he was married and had children. The First-tier Tribunal then goes on to look at the evidence of the witnesses at paragraphs 28 to 47 of the decision, and finds that none of them establish that the appellant is gay to the lower standard of proof.

12. The records of the evidence of both the respondent's and the appellant's representatives is that Mr Sserugo and the appellant gave consistent evidence about the appellant not being at home when Mr Sserugo came around to visit him on the previous Sunday. There are other points however on which the First-tier Tribunal found that evidence should not be given weight which I find were rationally open to that Tribunal.
13. However, I find that the First-tier Tribunal sets out no good reasons to reject the evidence of Dr Harrell-Bond at paragraph 46 of the decision as "superficial and assumed" simply because it was based on what the appellant had told her over a period of time, and in the context of her evidence being found to be given in "good faith" at paragraph 41 of the decision. Further, it is not rational to criticise Dr Harrell-Bond for believing the appellant might be depressed simply because he has not gone to a doctor when from paragraph 89 of the appellant's own statement there is evidence that others have also believed that might be the case. It is also abundantly clear from her statement at paragraph 11 that this was not meant as a medical diagnosis.
14. The First-tier Tribunal considers the appellant's own evidence at paragraphs 48 to 51 of the decision. It is rejected because of inconsistencies with the witnesses, however there are no identified inconsistencies with the evidence of Dr Harrell-Bond. Other reasons for rejecting the appellant's evidence include that he did not seek support from the gay community in the UK or put forward a claim to be gay sooner despite the lead the case in HJ (Iran) which, it is contended, would have been known to his previous solicitors, Lincoln's, whom he says he told about his sexuality in 2010, and whom it could be assumed would have advised him that he could advance that ground.
15. I find it was an error of law however not to have considered in this context the nature and quality of the appellant's statement, and indeed his oral evidence to the First-tier Tribunal. He has provided an 18 page 94 paragraph statement giving a very detailed description of the development of his sexuality and the issues he has had with it which has not been considered at all in the decision of the First-tier Tribunal. I find this was a material consideration which was not placed in the balance, and that combined with the material error in the lack of valid reasons for rejecting the evidence of Dr Harrell-Bond, means that I conclude that the First-tier Tribunal materially erred in law in the assessment of the key issue of whether the appellant is an openly gay man.

Decision:

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
17. I set aside the decision of the First-tier Tribunal in its entirety.

18. I adjourned the re-make hearing.

Directions:

1. The matter is to be relisted before me on 12th September 2017 with a time estimate of 3 hours.
2. Any new evidence to be relied upon by either party should be filed with the Upper Tribunal and served on the other side 7 days prior to the hearing date, so by 5th September 2017.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 13th June 2017