



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

Appeal Number:
PA/00119/2017

THE IMMIGRATION ACTS

**Heard at: Bradford
On: 26th September 2018**

**Decision & Reasons Promulgated
On: 21st December 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

VS

(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

**For the Appellant: Mr Tampuri, Tamsons Legal Services
For the Respondent: Mr Diwnycz, Senior Home Office Presenting
Officer**

DECISION AND REASONS

1. The Appellant is a national of Nigeria born in 1976. She appeals with permission the decision of the First-tier Tribunal (Judge Hindson) to dismiss her protection and human rights appeal.
2. The basis of the Appellant's linked protection and human rights claims was that she faced a well-founded fear of persecution in Nigeria because she is a gay woman. Alternatively her sexual orientation,

and her status as an unmarried mother, meant that she would face “very significant obstacles” to her integration in Nigeria such that she qualified for leave to remain on the grounds that her removal would amount to a disproportionate interference with her private life. In addition she contended that it would be strongly contrary to the best interests of her three children if they were to be removed from this country; an important part of this limb of her case was that her young daughter would be subject to Female Genital Mutilation in Nigeria.

3. The First-tier Tribunal rejected the Appellant’s case on all grounds. It did not accept that the Appellant was gay; nor did it accept her claim that her former husband in Nigeria would seek to harm their daughter, or that she had been rejected by her natal family. The Tribunal found that the Appellant is an educated and resourceful woman who would be well equipped to re-establish herself in Nigeria. The appeal was thereby dismissed.
4. I granted permission on the 8th February 2018. The grounds, elaborated before me by Mr Tampuri, are various, but broadly cover three areas of the First-tier Tribunal’s findings: the Appellant’s sexuality, her children, and her human rights.

The Appellant’s Sexuality

5. The central ground of appeal concerns the First-tier Tribunal’s treatment of the evidence of three additional witnesses who attended the hearing and gave live evidence. Mr Tampuri contends that these three witnesses were of crucial importance since they could all speak to their personal knowledge of the way that the Appellant lives her life in the United Kingdom. It is submitted that the determination contains no clear findings on the weight to be attached to the evidence of these witnesses, and that to the extent that negative findings are made, the reasons given are irrational.
6. The first of these witnesses, ‘C’, is a woman who claims to have been in an on-off sexual relationship with the Appellant between 2013 and 2017. Since she could speak directly to matter of the Appellant’s sexuality, her evidence was of central importance to the appeal. The Tribunal could conclude that the *Appellant* was a witness devoid of credibility but if it accepted the evidence of C, it could still be satisfied that the Appellant is in fact living as a gay woman in the United Kingdom. The determination notes [at paragraph 37] there were some inconsistencies between C’s evidence and that of the Appellant in respect of “how they conduct their relationship”, but found that this was not a matter in itself capable of undermining the evidence. The Tribunal then notes [at 39] that C was not aware that the Appellant married a man whilst living in the United Kingdom (it being the

Appellant's evidence that she did so in order to appease her family), a matter the Tribunal found to be "surprising". The determination then makes reference to some unspecified inconsistencies in the evidence about how much time the two women spent together [at 40] and that C has been living illegally for much of the time that she has been in the United Kingdom [at 40].

7. The second witness 'M' is a national of Albania who is a close personal friend of the Appellant. She averred that she knows the Appellant to be gay, and knew her when she was in a relationship with C. M's evidence is rejected squarely on the basis that she entered the United Kingdom illegally and was subsequently sent to prison for the use of false documents, matters which she did not disclose in her witness statement.
8. The third witness was Mr Aaron Chady, a Community Development Worker with a sexual health organisation working in the LGBT community. Mr Chady had met the Appellant in his professional capacity and was quite satisfied that she was a gay woman. The Tribunal gives his evidence "appropriate weight".
9. I am satisfied that this ground of appeal is made out. In respect of C the determination gives a number of reasons why the weight to be attached to her evidence might be diminished, but no findings are made on the central plank of the case that this woman has been in a sexual relationship with the Appellant. Paragraph 40 of the determination ends abruptly with no clear conclusion reached about whether that claim is accepted. It is of course possible that C is lying in order to help the Appellant; if that was the conclusion of the Tribunal it should have been clearly stated. In respect of M it is true that a history of criminal deception can fairly result in the evidence of such a witness being critically assessed. In this instance I am however satisfied that the approach of the Tribunal was irrational. M was being called to give her evidence about the Appellant's lifestyle. It is therefore unsurprising that her witness statement was exclusively focused on that evidence. To discount her evidence in its entirety because she did not detail, in advance, the fact that she had been to prison in 2015 seems to me to fail to engage with the actual evidence. As for Mr Chady the determination states that "appropriate" weight has been given to his evidence. What the Tribunal deems appropriate is not entirely clear. No findings are made on his evidence that the Appellant has been seeking support from his organisation since 2016, that he has known her to date another gay woman who attends the group, and that having given the Appellant one-to-one counselling on a number of occasions, he is firmly of the belief that she is in fact homosexual. For these reasons I am satisfied that the Tribunal did err in its approach to the evidence of the witnesses, and so to the overall question of the Appellant's sexuality.

10. It follows that Mr Tampuri need not make out his second ground under this heading: his submission that the Tribunal erred in placing the weight that it did on the fact that the Appellant had twice been married to a man. Mr Tampuri contends that the Appellant's previous marriage has "no bearing" on the question of her sexual orientation. As I observed in granting permission, that is patently not so. The fact that she has been married in the past is obviously of *some* relevance to her claim to be a gay woman. Whilst it is true that the Tribunal found the Appellant's evidence was "fundamentally" and "seriously" undermined by, in particular, her second marriage, I am unable to say that it treated her past heterosexual relationships as determinative of her current sexual orientation. The weight given to those relationships was otherwise a matter for the Tribunal and I am unable to say that it was here irrational in its approach, particularly in respect of that second marriage in the United Kingdom: the Tribunal considers, and rejects, the Appellant's explanation for it.

The Children

11. It is submitted that the First-tier Tribunal has failed to give any reasons why it did not accept that the Appellant's daughter would be at risk of FGM if returned to Nigeria. The relevant finding is at paragraph 46 of the determination:

"Especially given the time that has passed, I do not accept that it is reasonably likely that her husband would seek to find her and to subject her or her daughter to FGM".

12. It is further submitted that the First-tier Tribunal failed to conduct an assessment of the best interests of the children in accordance with s.55 of the Borders Citizenship and Immigration Act 2009.
13. For the Respondent Mr Diwnycz accepts that reasoning on FGM appears sparse. I would agree. If the child's father wants her to be circumcised it is difficult to see why that desire would be lessened by the passage of time. Given the social and cultural reasons underpinning the practice it is arguable that the desire would increase as the child approaches marriageable age. Mr Diwnycz further agreed that the determination does not contain any reference to s55, a statutory requirement of particular importance in a case dealing with FGM, and so invited me to find the decision flawed for that reason.

Article 8

14. In respect of human rights the grounds contend that the determination is flawed for a failure to conduct a *Razgar* Article 8 enquiry, complete with reference to s117B of the Nationality, Immigration and Asylum Act 2002, and, as noted above, a best interests assessment in respect of the children.
15. I need not make detailed findings on this submission since Mr Diwnycz again accepts it to be made out. The Appellant had expressly relied on the private lives of her children, and their best interests, to contend that the family's removal would be disproportionate. The determination fails to address those submissions.
16. It follows that from the above that all of the material findings in this determination have been set aside. In those circumstances the parties invited me to remit the matter to the First-tier Tribunal. Having regard to the extent of the fact-finding required, and that there are three witnesses, I agree that this would be the most appropriate forum.

Anonymity Order

17. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions

18. The determination of the First-tier Tribunal is flawed for material errors of law and it is set aside.
60. The matter is remitted to the First-tier Tribunal for re-determination before a judge other than Judge Hindson.
61. There is an order for anonymity.

Upper Tribunal Judge Bruce
18th December

2018