



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

Appeal Number: PA/02951/2020

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre

**Decision & Reasons
Promulgated**

On the 9 December 2021

On the 23 December 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**T S R A L F
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pickthall instructed by NLS Solicitors (Cardiff)

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. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Tanzania who was born on 2 February 1978.
3. The appellant claims that she arrived in the United Kingdom on 5 February 2019. She claimed asylum on 27 February 2019. The basis of her claim was that she is a lesbian. She claimed to have two relationships with other women in Tanzania and to have realised her sexual orientation from the age of 16. She claimed that in 2007 she was caught with another woman by her brother and consequently she was forced to marry a man in 2007 who abused her. She fled Tanzania in 2016 with the help of an agent, travelling to Oman where she remained until she came to the United Kingdom on a visit visa valid until 6 June 2019.
4. On 15 November 2019, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and under the ECHR. The respondent did not accept that the appellant was a lesbian.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge B Lloyd on 24 May 2021. At that hearing, the appellant gave oral evidence as did her claimed same-sex partner, Ms K. Before Judge Lloyd it was accepted by the respondent that if the appellant was, indeed, a lesbian then there was a real risk of persecution for a Convention reason if she returned to Tanzania. However, Judge Lloyd made an adverse credibility finding and did not accept that the appellant was a lesbian. As a consequence, he dismissed the appellant's international protection claim and also her claims under Arts 2, 3 and 8 of the ECHR.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on two grounds.
7. First, the judge failed to give adequate reasons for his adverse credibility finding. Secondly, the judge was wrong to rely upon an earlier FtT decision (Judge Lever) on 19 November 2019 where, in an appeal brought by Ms K, the judge had not accepted that Ms K was a lesbian.
8. On 1 July 2021, the First-tier Tribunal (Judge Kelly) granted the appellant permission on both grounds.
9. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 9 December 2021. Ms C Pickthall, represented the appellant, and Mr C Howells, represented the Secretary of State. I heard oral submissions from both representatives.
10. Ms Pickthall relied upon the grounds which she elaborated upon in her oral submissions. Mr Howells relied upon the respondent's rule 24 notice which he elaborated upon in his oral submissions.

The Judge's Reasons

11. In his determination, Judge Lloyd recognised, as had been accepted before him, that the case turned upon the credibility of the appellant and whether she was able to establish that she was a lesbian. If she established that, it was accepted that she was at real risk of persecution for a Convention reason if returned to Tanzania.
12. The judge's reasons for his adverse credibility finding are found at paras 37-42 and 48-49 as follows:
 - "37. I do not accept that the Appellant has provided a credible account as to why she fears return to Tanzania. It is not accepted by this Appeal Tribunal that the Appellant is a lesbian.
 38. There are inconsistencies and discrepancies in the Appellant's account. Since the decision to refuse her asylum application was made, the Appellant claims to be in a relationship with [Ms K], also a Tanzanian national. As evidence of their relationship, there are several staged photographs, in the Respondent's submission, within the Appellant's bundle. I also find those photographs not to be genuine representations of the actual relationship between the two women. Also, in my finding, there is with the photographs somewhat contrived digital and hard copy communications between the Appellant and [Ms K] in an attempt to evidence a romantic and sexual relationship. I draw the conclusion that it is not persuasive of a finding of a lesbian relationship between the two women.
 39. The Respondent submits that [Ms K's] claim to be a lesbian was dismissed by IJ Lever on 19/11/2019. IJ Lever stated

'I find in this case that the Appellant is not gay and her claimed relationship both with [P] and [K] are fictional. I find that she has been in a heterosexual relationship with a man called [D] that produced her son. I also find it highly likely that for undisclosed reason that relationship came to an end and the Appellant chose to leave Tanzania and come to the UK as an economic migrant in order to better herself and for the benefit of the child'. [Paragraph 19]
 40. The Respondent submits that both the Appellant and [Ms K] are using each other to bolster an asylum claim to remain in the UK. I agree. It is notable, also, that [Ms K] has provided a very limited witness statement to support this asylum claim.
 41. I do not believe that the Appellant will return to Tanzania as a lone female. Whilst the Respondent accepts that the Appellant was forced to marry her husband, it has not been accepted that he was abusive towards the Appellant. I agree that it cannot be accepted on the available evidence. The Appellant is not a credible witness.
 42. She has not proven her case to the required standard".

13. Then, at para 48, the judge concluded that the appellant had failed to establish that there was a real risk of persecution based upon her sexual orientation. At para 49, he added this:

“49. I do not find that there is any central core of credibility surrounding a decision in the Appellant’s favour. The appeal is a deliberate collaboration between the Appellant and [Ms K] to mutually support and enhance their respective asylum claims”.

Discussion

Ground 1

14. Ms Pickthall submitted that the judge had failed to give adequate reasons in para 38 of his determination.
15. First, Ms Pickthall submitted that he had not clarified what were the “inconsistencies and discrepancies” in the appellant’s account. Even if, which she did not accept, those “inconsistencies and discrepancies” were the ones relied upon by the Secretary of State in her decision letter at para 40-51, Ms Pickthall pointed out that the judge had failed to grapple with the appellant’s evidence in para 6 of her witness statement dated 21 April 2021 which engaged with the points raised and provided explanations.
16. Secondly, Ms Pickthall submitted that the judge had given no reasons why he considered that the photographs, showing the appellant and Ms K in intimate poses, were “staged” photographs which did not support a genuine relationship between the appellant and Ms K.
17. Thirdly, Ms Pickthall submitted that the judge offered no reasons why the “digital and other hard copy communications” between the appellant and Ms K were “contrived” and “an attempt to evidence a romantic and sexual relationship” which was not genuine.
18. Mr Howells submitted it was plain that the judge in para 38 was relying on the “inconsistencies and discrepancies” previously relied upon by the respondent in her decision letter. Mr Howells accepted that the judge had not dealt with the rebuttal points in the appellant’s witness statement.
19. Secondly, Mr Howells submitted that the judge was entitled to conclude that the photographs were “staged” by which he must have meant were “contrived” in order to deceive the respondent as had been the Presenting Officer’s submission as set out at para 21 of the determination.
20. Thirdly, the judge was entitled to infer that the communications were created in order to persuade the Tribunal that the relationship was genuine.
21. Both representatives took me to the respondent’s decision letter and, in particular, paras 40-51, where the respondent identified a number of inconsistencies in the appellant’s evidence about her claimed past

relationship, inadequacies in her evidence concerning that past relationship in Tanzania.

22. The judge made no explicit reference to the respondent's reasoning in the decision letter but I accept, as Mr Howells submitted, that the judge's reference in para 38 to "inconsistencies and discrepancies" in the appellant's account can only be a reference to those matters raised by the respondent.
23. In response to those points, the appellant sought to rebut what was said in para 6 of her witness statement in some detail by reference to the respondent's reasons in paras 41, 42-44, 39 and 45-48 and 49-50. The judge made no reference to that evidence or, indeed, any evidence from the appellant given orally at the hearing. He simply records that the appellant's full account is contained within the Record of Proceedings (see para 30).
24. In reaching findings, a judge has an obligation to provide adequate reasons such that the parties are able to understand the basis upon which they have either lost or succeeded in the appeal.
25. The Court of Appeal set out the duty of a judge to give reasons for their findings and decision in English v Emery Reimbould & Strick Ltd [2002] EWCA Civ 605 where Lord Phillips MR (giving the judgement of the Court) said this at [15]-[19] and [21]:

"15. There is a general recognition in the common law jurisdictions that it is desirable for Judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement - "there is no invariable rule established by New Zealand case law that Courts must give reasons for their decisions", per Elias CJ in *Lewis v Wilson & Horner Ltd* [2000] 3 NZLR 546 at 565. While a constant refrain is that reasons must be given in order to render practicable the exercise of rights of appeal, a number of other justifications have been advanced for the requirement to give reasons. These include the requirement that justice must not only be done but be seen to be done. Reasons are required if decisions are to be acceptable to the parties and to members of the public. Henry LJ in *Flannery* observed that the requirement to give reasons concentrates the mind of the Judge and it has even been contended that the requirement to give reasons serves a vital function in constraining the judiciary's exercise of power - see Professor Shapiro's article 'In Defence of Judicial Candor' (1987) 100 Harv L Rev 731 at 737. The function that judgments play under the common law in setting precedents for the future has also been identified as one of the justifications for the requirement to give reasons, although as Mahoney JA stated in *Soulemezis v Dudley Holdings* (1987) NSWLR 247 at 273:

"The court's order is a public act. The judgment given for it is a professional document, directed to the parties and to their professional advisers. It may, in a particular instance, delineate, develop or even decorate the law but that is peripheral and not essential to its nature."

16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.

17. As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example *Flannery {v Halifax Estate Agencies Ltd* [2000] 1 WLR 377] at page 382. In the *Eagil Trust [Co Ltd v Piggott-Brown* [1985] 3 All ER 119] case, Griffiths LJ stated that there was no duty on a Judge, in giving his reasons, to deal with every argument presented by Counsel in support of his case:

“When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted, and the reasons which led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties, and if need be the Court of Appeal the basis on which he acted... (see Sachs LJ in *Knight v Clifton* [1971] 2 AER 378 at 392-393, [1971] Ch. 700 at 721).” (p.122).

18. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system.

19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge’s conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

.....

21. When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge’s decision.”

26. In Budhathoki (reasons for decisions) [2014] UKUT 00241 (IAC) (Haddon-Cave J and UTJ Coker) re-iterated, albeit in briefer terms, the general approach in the context of immigration appeals in the headnote as follows:

“It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons so that the parties can understand why they have won or lost”.

27. In my judgment, in rejecting the appellant's credibility on the basis of "inconsistencies and discrepancies" in the appellant's account, the judge failed to provide adequate reasons. The judge failed to grapple with the reasons given by the respondent and the appellant's response to those reasons. The reader of his decision cannot discern which reasons he accepted or which reasons he rejected and why he came to such a conclusion.
28. Likewise, the judge offered no reasons why he concluded that the photographs were "staged" such that they were inconsistent with a genuine relationship between the appellant and Ms K. As I pointed out during the hearing, photographs may be "staged" - in the sense of 'posed' - but not necessarily reflect any underlying fraud in the relationship. Many wedding albums of parties to entirely genuine relationships contained "staged" photographs of their wedding day. The point is not whether they are "staged" but whether they have been created or contrived to show a relationship which is not, in fact, genuine. It could, of course, have been the case that the photographs were, essentially, neutral because the judge could not tell whether the underlying motivation for producing the photographs was to deceive the respondent and, on appeal, the Tribunal. If he considered they were contrived or deceitful, he had to explain why. Merely to say they are "staged" - in the sense of 'posed' - was not a sufficient reason. However, the judge offered no reasons why photographs which, in some cases, can be said to be 'posed' were, as a consequence, damaging of the appellant's claim to be in a genuine same-sex relationship because they were deliberately created so as to mislead a decision maker.
29. Much the same point can be made in relation to the digital and hard copy communications which the judge concluded are "contrived". He offered no explanation why that is so. The reader - judge or litigant - cannot tell why these communications were damaging of the appellant's claim.
30. In relation to all these matters, the reader is left 'in the dark' why the judge found these matters dispositive of the appellant's credibility. In itself, this error was material to the judge's adverse credibility finding and his decision cannot stand and is set aside.
31. In addition, under ground 1, Ms Pickthall submitted that the judge had failed to give adequate reasons in para 41 why he did not accept that, although the appellant had been forced to marry her husband, he was not abusive towards her. Ms Pickthall submitted that this went to the credibility of the appellant but was not adequately reasoned.
32. Whilst I agree it was not adequately reasoned, it does not seem that it was taken into account as relevant to the appellant's credibility. Indeed, it would appear that the reason given for not accepting that the appellant's husband had been abusive towards her was simply that the judge had already found that the "appellant is not a credible witness". To that

extent, given that the appellant's credibility was not properly assessed, this finding is also flawed.

Ground 2

33. In addition, there is merit in ground 2 which criticises the judge's reliance upon Judge Lever's finding, in an appeal brought by Ms K in 2019, that she is not a lesbian. It is not entirely clear how the judge took this into account other than he reached his conclusion in para 40 that he agreed with the respondent's submission that both the appellant and Ms K were using each other to bolster an asylum claim to remain in the UK. One difficulty with that is that the appellant's claim arose wholly after Ms K's claim was resolved by Judge Lever. The appellant did not give evidence in Ms K's appeal and, indeed, had not yet formed any relationship with Ms K. It is difficult to see how, then, there was some sort of collusion in the appeals, if that is what the judge meant, to support two false claims.
34. Neither representative took me to any authority concerning what, if any, weight the judge was entitled to give to Judge Lever's finding in relation to Ms K in her earlier appeal in 2019. The relevant decision is that of the Court of Appeal in AA (Somalia) v SSHD [2007] EWCA Civ 1040.
35. A majority of the Court (Carnwath and Ward LJ; Hooper LJ dissenting) accepted that the guidance in Devaseelan [2002] UKIAT 000282 applied, in principle, where there was a previous factual finding in relation to a witness arising from an earlier appeal brought by them (following Ocampo v SSHD [2006] EWCA Civ 1276). The effect is that, although not binding in the subsequent appeal, the earlier judge's findings can be taken into account as relevant in reaching findings in the later appeal. Hence, the finding that Ms K was not, in 2019, a lesbian but was in a heterosexual relationship was a finding which the judge could properly take into account in this appeal as relevant both to assessing Ms K's evidence and her credibility and also in assessing the evidence by the appellant that she is a lesbian and in a same-sex relationship with Ms K.
36. However, the finding was only the "starting point" and was not determinative of any finding, certainly in relation to the appellant who was not a party to the earlier appeal. The judge's findings had properly to be made on the basis of all the evidence. The fact that the appellant was not a party to the earlier appeal is a matter which the majority of the Court of Appeal in AA (Somalia) considered important given that it was a finding, relevant against the appellant's case, but in an appeal in respect of which she had not been a party. So, at [69]-[70] Carnwath LJ said this:

"69. While I do not think it is open to us to depart from *Ocampo* I would suggest two qualifications, which seem to me consistent with it. First, Auld LJ said that the guidelines are relevant to "cases like the present" where the parties are not the same but "there is a material overlap of evidence". The term "material" in my view requires some elaboration. It recognises I think that exceptions to the ordinary principle that factual decisions do not set precedents (see above) should be closely defined. To extend the principle to

cases where there is no more than an "overlap of evidence" would be too wide, and could introduce undesirable uncertainty. In all the cases in which the principle has been applied so far, including *Ocampo*, the claims have not merely involved overlapping evidence, but have arisen out of the same factual matrix, such as the same relationship or the same event or series of events. I would respectfully read Auld LJ's reference to "cases such as the present" as limiting the principle to such cases.

70. Secondly, in applying the guidelines to cases involving different claimants, there may be a valid distinction depending on whether the previous decision was in favour of or against the Secretary of State. The difference is that the Secretary of State was a direct party to the first decision, whereas the claimant was not. It is one thing to restrict a party from relitigating the same issue, but another to impose the same restriction on someone who, although involved in the previous case, perhaps as a witness, was not formally a party. This is particularly relevant to the tribunal's comments, in *Devaseelan*, on what might be "good reasons" for reopening the first decision. It suggested that such cases would be rare. It referred, for example, to the "increasing tendency" to blame representatives for unfavourable decisions by Adjudicators, commenting:

"An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence..."

I understand the force of those comments where the second appeal is by the same claimant, but less so where it is by a different party, even if closely connected. Although I would not exclude the *Devaseelan* principles in such cases (for example, the hypothetical series of cases involving the same family, cited in *TK*), the second tribunal may be more readily persuaded that there is "good reason" to revisit the earlier decision."

37. I particularly draw attention to the second qualification in [70] of Carnwath LJ's judgment. Although, as I have said, it is not entirely clear what weight the judge gave to Judge Lever's earlier finding, it is clear from para 40 that it was important in reaching his decision. Even if he only took it into account as relevant, he was required to reach his findings in this appeal based upon all the evidence from the appellant and, given that the factual matrix relied upon by the appellant arose after Ms K's appeal, Ms K's evidence also. All that the judge said about Ms K's evidence was that she had provided a "very limited witness statement". As can be seen from that statement, it was, indeed, "very limited" in length. However, Ms K also gave oral evidence before the judge and none of that evidence is set out in the determination. It is unclear, therefore, the extent to which the judge, in taking into account Judge Lever's findings, fully took into account Ms K's evidence now and also that of the appellant in reaching adverse findings against the appellant. In my judgment, this was also a material error of law.
38. In the result, therefore, I am satisfied that the judge materially erred in law in reaching his adverse credibility finding. His decision cannot stand and is set aside.

Decision

39. 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.
40. As the parties invited me to do, I remit this appeal to the First-tier Tribunal for a *de novo* rehearing, before a judge other than Judge Lloyd, given the nature and extent of fact-finding required and having regard to para 7.2 of the Senior President's Practice Statement.

Signed

Andrew Grubb

Judge of the Upper Tribunal
13 December 2021