



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00083/2015

THE IMMIGRATION ACTS

Heard at Field House
On 21 January 2016

Decision & Reasons Promulgated
On 26 January 2016

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOR

(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Ms Sreeraman, Senior Home Office Presenting Officer

For the Respondent: Mr Amunwa, instructed by G Singh Solicitors

DECISION AND REASONS

1. This is an appeal against the decision promulgated 20 October 2015 of First-tier Tribunal Judge Callow which allowed the respondent's appeal against deportation. The appeal was allowed because the First-tier Tribunal Judge found that the appellant's claims for asylum and under Article 3 of the ECHR were made out and therefore came within the exception to automatic deportation in Section 33(2) of the UK Borders Act 2007.

2. For the purposes of this appeal, I refer to the Secretary of State for the Home Department as the respondent and to SOR as the appellant, reflecting their positions before the First-tier Tribunal.
3. 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 and to his minor child.
4. The background to this matter is that the appellant came to the United Kingdom in 2005 with a visit visa and remained unlawfully thereafter. He was convicted of conspiracy to fraud on 22 May 2012 and made the subject of a 12 month conditional discharge and £85 costs. On 1 July 2013 he was convicted of conspiracy to defraud and sentenced to 27 months' imprisonment on 6 September 2013.
5. Deportation proceedings commenced on 16 October 2013 when the appellant was asked to identify why he should not be deported and asked to complete and return Form ICD.0350. The appellant's legal representatives made submissions on his behalf concerning Article 8 ECHR only in a letter dated 18 December 2013. The appellant based that claim on his British partner and their child, born in 2006. That letter also enclosed a completed Form ICD.0350 signed by the appellant on 15 November 2013 which referred only to family and private life issues. On 4 December 2014 a deportation order was made. On 16 September 2014 the appellant made an asylum claim on the basis that he was bisexual. The protection claim was refused on 30 April 2015 and the current appeal followed that decision.
6. The respondent's written challenge referred to three grounds. Ms Sreeraman confirmed that the third ground was merely a summary of the first two so it goes no further.
7. I deal with the second ground first which states as follows:
 - "2. Credibility
 - (a) The FTJ finds, after 'material consideration of all relevant and material circumstances', that a finding of credibility needs to be made and that examination of those factors that are material is disclosed in the preceding paragraphs (paragraph 19-20).
 - (b) The SSHD submits that the FTJ does not detail the material consideration given to the evidence, nor provide reasons why the A is deemed to be credible. The FTJ refers to a 'credible explanation' being given, but advances no reasons why the A is credible despite his fraud offence and the concerns highlighted in the SSHD's Reasons for Refusal Letter.

(c) The FTJ's failure to engage with the divergent opinions at appeal is a material misdirection of law that affected the decision to allow the appeal on Asylum and Article 3 grounds."

8. The respondent's Reasons for Refusal letter dated 30 April 2015, referred to in this ground, gives the following reasons for finding the appellant's claim to be bisexual to be without credibility, beginning on page 5:

"As background it is a fact that you have presented specific details of only one relationship, either in Nigeria or in the UK. You have stated that you are currently in a civil partnership with [VA], and that you have a daughter together, [TR], date of birth [2006], (ASI, section 1). While you have claimed to have had same-sex relationships both in Nigeria and in the UK you have not provided any details of these alleged partners. In such matters the burden of proof is on the applicant to establish the facts concerning these relationships. You have only been able to provide details of one heterosexual relationship. In the absence of any evidence of you having a same-sex relationship, it is not accepted that you have sufficiently demonstrated that you have had same-sex relationships.

It is also noted that you provided a statement in an appeal against the deportation order. This document is dated 18 December 2013. That document has been carefully considered and it is the case that you make no mention of any fear of return to Nigeria at this time as a result of your sexuality. It is considered that if you had a genuine fear of return to Nigeria, at that time on account of your sexuality, then you would have mentioned it in your reasons for opposing the deportation. As you failed to do so in your later claim that you would face persecution in Nigeria due to your sexuality is rejected.

You have also provided evidence in response to on ICD 0350 form, dated 16/10/13. In this form the details that you have provided have been carefully examined. In this document you have provided details of your life and problems in Nigeria. It is noted that again you have failed to provide any details regarding your sexuality. You have indicated that you were not wanted at home as you say it interfered with your father's lifestyle as a polygamist man, (ICD 0350 form, dated 16/10/13, page (sic)). This is not consistent with your later claim that your father did not want you around as your sexuality disgusted him, (AIR question 9). You have also indicated that when you came to the UK you were lied to, and that you were told that it was for a holiday, (ICD 0350 form, dated 16/10/13, page 23). It is considered that this account is significantly different from your recent claim that your father decided to send you to the UK due to fears for your safety regarding your sexuality, (AIR question 15). You have been unable to provide a consistent account of central aspects of your claim for asylum. Your claim that you fear return to Nigeria on account of your sexuality is rejected.

It is generally considered that as a genuine asylum seeker will seek protection at the first available opportunity. You arrived in the UK in July 2005, and despite having an appeal against the deportation order (see paragraph 17), you failed to make a claim for asylum until 16/09/14. It is therefore not accepted that this

behaviour is consistent with your claim to have a genuine well-founded fear of persecution in Nigeria.

In conclusion it is not accepted that you are homosexual or bisexual. Your claim to have had same-sex partners in the UK is rejected."

9. The respondent therefore made a number of points on credibility, therefore, summarised as:
 - a. the appellant was able to provide specific details only of one heterosexual relationship
 - b. no mention was made of his bisexuality in the submissions of 18 December 2013
 - c. no mention was made of his bisexuality in the Form ICD.0350 dated 15 November 2013
 - d. the appellant's evidence in his Form ICD.0350 and his AIR was discrepant as to why he was not wanted in his father's home
 - e. the appellant's evidence in his Form ICD.0350 and his AIR was discrepant as to why he came to the UK
 - f. he made his protection claim very late, only after the deportation order was made and after coming to the UK in 2005

10. The First-tier Tribunal deals with credibility at [19] and [20], thus:
 - "19. It is necessary to make a finding of credibility concerning the evidence of the appellant and his partner. I have made such a finding only after material consideration of all relevant and material circumstances. In making this finding, I have taken into account all the available evidence, in the round, and have attached such weight as I consider, after anxious scrutiny, to be properly attributable thereto. The reasons for our finding are set out in the following examination of factors material to the finding.
 20. In giving his evidence the appellant has given a credible explanation of his claim. He rationally explained his personal circumstances. The core details of his claim have been established, notwithstanding the late emergence of his claim. His explanation for the late claim, mindful of sensitivities that exist in gay issues, is understandable and not least of all because of his continuing relationship with his partner. It has been established that he is gay. If he were to be returned to Nigeria, because he is what he is it is inevitable that he will engage in gay relationships, notwithstanding his promise to be faithful with his partner. When last in Nigeria his open conduct resulted in homophobic attacks. Should he be returned to Nigeria it is likely to recur."

11. The First-tier Tribunal gives a reason at [20] for not placing weight on the lateness of the claim, that being the "sensitivities that exist in gay issues". The reasoning does not address any of the other concerns set out by the respondent in the Reasons for Refusal Letter.

12. Mr Amunwa suggested that the judge must be saying that he found the appellant's evidence, recorded at [14] of the decision, to be rational and "credible". That was a finding open to him on the evidence. That conclusion may or may not have been

open to the judge but the challenge here is adequacy of reasons rather than rationality. The reference in [19] to an “examination of factors material to the finding” is not supported by such an examination other than the reference in [20] as to little weight being placed on the lateness of the claim.

13. I find that the First-tier Tribunal decision on the credibility of the appellant’s protection claim is inadequately reasoned and must be set aside and re-made.
14. The respondent’s other challenge is that the First-tier Tribunal Judge erred in the approach to the certification of the appellant’s asylum claim under Section 72 of the Nationality, Immigration and Asylum Act 2002. The First-tier Tribunal Judge’s findings on this point are contained at 12 as follows:
 - “12. While the appellant has been convicted of two counts of what constitute particularly serious crimes, it has not been established that he is ‘a danger to the community’. I hold that the appellant has adduced satisfactory evidence to rebut the presumption so enacted. There is no real risk of repetition. It is accepted that he has rehabilitated himself and is remorseful for his unlawful conduct.”
15. There is nothing more in the decision explaining why it was found that the appellant had rebutted the s.72 presumption regarding “danger to the community”. I am unable to ascertain how a conclusion that there was no risk of repetition of the offence was reached or how the judge came to accept that the appellant “has rehabilitated himself” and “is remorseful”. It was not suggested, quite rightly, that this was the only conclusion open to the First-tier Tribunal, the appellant being a repeat offender and there being no analysis of the OASys assessment dated 9 October 2013.
16. Again, it is my conclusion that the decision as to certification of the asylum claim is inadequately reasoned to the extent that an error of law arises and the decision must also be set aside to be remade.
17. As the appeal was allowed on protection grounds, the First-tier Tribunal decision did not go on to consider other aspects of the deportation appeal, including the appellant’s Article 8 ECHR claim. There are, therefore, no extant findings following my error of law decision. This is therefore a case where it is appropriate to remit the matter to the First-tier Tribunal in line with the Senior President’s Practice Direction. This was also the view of both the representatives.

Decision

18. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside. The appeal will be remade by the First-tier Tribunal.

Signed 
Upper Tribunal Judge Pitt

Date 25 January 2016