



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

Appeal Number: AA/10062/2015

THE IMMIGRATION ACTS

**Heard at Stoke
On 6th September 2017**

**Decision & Reasons Promulgated
On 8th September 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**PN
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. O’Ryan, Counsel instructed on behalf of the Appellant

For the Respondent: Mr C. Bates, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Uganda.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

2. 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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who in a determination promulgated on the 22nd April 2016 dismissed her claim for protection. Originally before the First-tier Tribunal there were two Appellants; the Appellant and her daughter, however this appeal is brought solely by the first Appellant therefore it is not necessary to set out any details relating to the second Appellant's claim.
4. The Appellant's immigration history is set out within the determination at paragraphs [2]-[3] and in the decision letter issued by the Secretary of State. It can be summarised briefly as follows. The Appellant arrived in the United Kingdom on the 20th June 2004 on a visit visa valid for six months. On the 3rd December 2014 the Appellant made her application for asylum which resulted in a substantive interview and a decision letter issued by the Secretary of State dated 3rd July 2015 in which her application for asylum was refused.
5. The primary basis of the Appellant's protection claim is recorded in the decision of the First-tier Tribunal at paragraphs [4] to [20] which is also referred to in the detailed reasons for refusal at paragraphs [21]-[25]. Her claim for protection related to fear on return to Uganda as a result of her membership of a particular social group, namely that of sexual orientation.
6. The Appellant exercised her right to appeal that decision and the appeal came before the First-tier Tribunal on the 24th November 2015. However the decision was not promulgated until the 22nd April 2016 which was almost 5 months after the hearing of the claim.
7. In that decision at paragraphs 113-125, the judge set out her findings and conclusions and rejected the core of her asylum claim and was not satisfied that her account relating to circumstances in Uganda were as she had claimed and was not satisfied also that she was gay as had been claimed. The judge also found that her daughters appeal should be dismissed. It is not necessary to set out the judge's consideration of that claim as there is no appeal against that decision before this Tribunal.
8. The Appellant sought permission to appeal that decision and the grounds are set out in the papers dated the 5th May 2016. In essence those grounds make reference to the issue of the delay in promulgating the determination in the light of having dismissed the claim exclusively on grounds of plausibility or the credibility of the claim. The grounds extensively set out the relevant case law relating to the issue of delay, the likely effect upon the findings of fact and also that the decision failed to engage with the evidence of four witnesses who gave evidence before the Tribunal. The last ground makes reference to the dangers of making credibility findings on the basis of plausibility (paragraphs 13 - 15).

9. Permission to appeal was refused on 24 May 2016 however an Upper Tribunal Judge granted permission on 22 June 2017 in the following terms;

“... the grounds set out in arguable challenge the credibility findings, bearing in mind the delay between the hearing of the appeal and the promulgation of the determination nearly 5 months later, and the points made in relation to the acceptance on the one hand by the judge of the credibility of the witnesses and the adverse conclusions with regard to the Appellant.”
10. At the hearing before this Tribunal Mr O’Ryan, who did not represent the Appellant in the First-tier Tribunal, relied upon the grounds that were before the Tribunal. He relied upon the grounds as pleaded taking the Tribunal to the authorities and by making reference to the decision in SSHD v RK (Algeria) [2007] EWCA Civ 868. He referred the Tribunal to the determination and that on the face of the decision the appeal was heard on 24 November 2015 and was signed on 21 April 2016 which was just short of five months and there was no other indication that it was prepared earlier than the date upon which it was signed. Thus there was significant delay. He further referred the Tribunal to the contents of the determination at paragraph 113 in which the judge recorded that she had “the opportunity of hearing and observing the Appellant and the witnesses who gave evidence”. Later at paragraph 115, the judge refers to her account of the Appellant’s experiences “which does not have the ring of truth about it.” Thus he submitted what the judge had heard and observed was five months prior to making the actual assessment.
11. He referred the Tribunal to the grounds which extensively set out the legal authorities relied upon and which related to the safety of the judge’s decision where credibility findings are made after such a lengthy and significant delay. Whilst the rule of thumb was three months, the authorities set out the principles that should be applied. By reference to the decision in RK (as cited) which was a case where there had been 39 months delay, and the Secretary of State’s appeal was dismissed, he submitted that that case involved no issues of credibility and no oral evidence was given. Thus the present appeal can be distinguished from the decision in RK.
12. Dealing with the second ground, at paragraphs 10 to 12 of the grounds, whilst the judge made reference to the witnesses who gave evidence on the Appellant’s behalf and found that there was no reason to disbelieve their evidence at [113], an assessment of their evidence had been left out of account. He submitted that the judge at [122] made reference to the evidence of “the gay community and organisations” which must make reference to those witnesses, but the judge went on to state “however against the background of my findings in respect for life in Uganda before coming to the United Kingdom, I find that the Appellant’s involvement with these organisations in United Kingdom... lead me to the conclusion the Appellant’s claim to be a homosexual is a fabricated one.” In reaching that conclusion judge had not taken into account or made an assessment of the

detail of the witnesses evidence which was relevant to be taken into account “in the round” when making an assessment of credibility.

13. At paragraphs 13 to 15 of the grounds, he submitted that the judge’s adverse findings on credibility were based on the plausibility of the account. In the light of the case law cited in the grounds, that was an incorrect approach to adopt. Furthermore in the light of an account that was then dismissed after a significant delay gave further reason for reaching the conclusion that the decision was unsafe and could not stand.
14. Mr Bates confirmed that the Secretary of State had not provided any rule 24 response following the grant of permission. He made reference to the issue of delay. He said that the Secretary of State was unable to provide any insight into the delay but accepted that there was significant delay as outlined in the grounds. However he submitted that this was a detailed determination of 30 pages and the judge at length recorded the cross-examination. However whilst he accepted that the findings were brief he submitted that there were findings made by the judge were sufficient to support her adverse conclusion on credibility.
15. As to the witnesses evidence, he submitted that it was not unusual for witnesses to attend and for them to genuinely believe the Appellant but for the judge to find that they have in effect been deceived by Appellant. In this context he referred to witnesses called in Christian conversion cases (Dorodian). If there was an error of law, he submitted that this was a case that should go back before the First-tier Tribunal and that none of the findings of fact could be preserved which mirrored the submission made by Mr O’Ryan as to disposal.

Discussion:

16. I am satisfied that the central submissions made on behalf of the Appellant are correct and that this is case in which it has been demonstrated that the delay between the hearing of the appeal and the decision almost 5 months later has affected the adverse credibility findings made and thus renders the determination unsafe. I have therefore reached the conclusion that the decision cannot stand and will be set aside.
17. I have reached that conclusion for the following reasons. I have carefully considered the jurisprudence set out in the grounds that relate to the issue of delay and have done so in the light of the decision in RK (as cited).
18. The decision of Sambasivam v Secretary of State for the Home Department [2000] Imm AR 85 is referred to in the decision of RK (as cited). That was the case where an asylum seeker unsuccessfully appealed to the Court of Appeal after a delay in promulgation of four months after the hearing. In that case the Appellant referred to a statement made by the IAT in Mario [1988] Imm AR 281 at 287 stating;

“In an area such as asylum, where evidence requires anxious scrutiny, the Tribunal will usually remit the case to another adjudicator where the period between the hearing and the dictation of the determination is more than three months.”

19. This is being referred to as the “rule of thumb” approach where there is a delay in promulgation.
20. At paragraph [16] of Sambavisam, Potter LJ referred to this as “no more and no less than a useful statement of guidance to practitioners upon the usual attitude and likely decision of the IAT in a case where an issue essential to the disposition of the claim for asylum depends upon a careful weighing of the credibility of the applicant and yet it appears that the delay between hearing date and the preparation of the determination exceeds three months.” He went on to state:

“in the absence of special or particular circumstances, that is plainly a useful and proper rule of thumb which, in the experience of the Tribunal, it is broadly just to apply, the twin reasons that substantial delay between the hearing and preparation of the determination then does the assessment of credibility issues unsafe and that such a delay tends to undermine the losers confidence in the correctness of the decision once delivered.”
21. He went on to state “in cases of delay of this kind, the matter is best approached from the starting point that, where important issues of credibility arise, a delay of over three months between hearing and determination will merit remittance for rehearing unless, by reason of particular circumstances, it is clear that the eventual outcome of the application, whether by the same or a different route, must be the same.”
22. There is no dispute that the judgement of Potter LJ needs to be read in the light of the judgement of the Court of Appeal in RK (Algeria) (as cited) as set out in the Upper Tribunal decision in Arusha and Demushi (deprivation of citizenship-delay) [2012] UKUT 00080.
23. It is important to note that the factual circumstances in RK were different to the present appeal- credibility was not an issue and did not require consideration of oral evidence given by witnesses.
24. The court made it plain at paragraph 22 that there was not appeal against the delay but that (the Secretary of State) must “in some rational way, present the delay as a source of infection of the decision.”
25. In my judgement, the decision in RK requires a nexus to be established between any undue delay and any defect in the evaluative process and this requires a careful consideration of the grounds advanced on behalf of this Appellant.
26. Having considered the determination in the light of the submissions, I am satisfied that there is such a nexus established. This was the case that

centred upon the Appellant's credibility and in particular in relation to her claimed sexual orientation. In this respect the Appellant's evidence and that of the four witnesses was key in making an assessment on the credibility of her claim. The judge placed weight on "having heard and observed" the Appellant and the witnesses (see paragraph 113) and at paragraph 15 made reference to the Appellant's account of her experiences which "does not have the ring of truth about it." However the determination is silent as to when the judge made her assessment of the Appellant and the witnesses and the determination gives the appearance of having considered and "observed" the evidence five months before making the eventual assessment. It cannot be said that the determination states when the judge made that assessment-whether it was undertaken straight after the hearing or short time thereafter whether it was in fact five months after having heard the evidence. There is no reference to that within the determination.

27. I take into account, as Mr Bates submitted, that the judge recounted the evidence in the determination, however reciting the evidence five months later is not the same as having had in mind the recent observation of the witnesses at the time and reaching a fair assessment of this evidence.
28. I further take into account that the judge heard and observed four witnesses who gave relevant evidence relating to the Appellant's sexual orientation from having had considerable contact with her whilst in the United Kingdom. The judge summarised that evidence at paragraph 83-93. It is plain from the evidence given by those witnesses that some had experience of working with the LGBT community and in particular with those who have sought asylum (see paragraph 85). Other evidence related to their experiences of having met her, and known her for a significant period of time and their experiences of the Appellant.
29. The judge at [113] stated that she had "no reason to disbelieve "those witnesses and that there" genuine conclusion is that she is a lesbian lady". However the findings of fact made by the judge were relatively brief when seen in the light of the recitation of the evidence. However importantly the findings did not make any real assessment of the evidence of the witnesses. At paragraph 122, the judge appeared to return to that evidence when referring to the evidence of the "gay community "and this must be a reference to the evidence of those witnesses. However, the judge stated "however against the background of my findings in respect of her life in Uganda... I find that the Appellant's involvement with these organisations in the United Kingdom and her attendance at gay pride marches, given how late in the day that she accessed these organisations, lead me to the conclusion that, the Appellant's claim to be a homosexual is a fabricated one..."
30. In reaching that conclusion, the judge failed to make an assessment of those witnesses and the evidence "in the round" and had considered it solely in relation to the events in Uganda and against the background of having made a late claim of asylum. As Mr O' Ryan submitted, the judge

did not engage with the depth of knowledge given by the witnesses in the light of the time that they had known the Appellant and the general factual circumstances outlined in their evidence. It is not sufficient in my judgement to simply dismiss that evidence as the witnesses genuinely holding views, without more.

31. I make it clear that I do not set aside the decision on account of the delay per se. The Appellant is not, nor could she be appealing against the delay but advances this appeal on the basis of presenting delay as infecting the decision thereby rendering it unsafe. Thus for those reasons, I am satisfied that the Appellant has made out the grounds and I have reached the conclusion that the decision involves the making of an error on a point of law. The decision is thereby set aside.
32. As to the remaking of the decision, both advocates submitted that the correct course to adopt in a case of this nature would be for the appeal to be remitted to the First-tier Tribunal because it would enable the judge to consider the Appellant's evidence and that of the witness; this is a case in which the adverse credibility findings are therefore unsafe and cannot be preserved
33. In the light of those submissions, I am satisfied that this is the correct course to take and therefore I set aside the decision of the First-tier Tribunal and it will be remitted to the First-tier Tribunal to hear afresh.

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 her or any member of her family. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed
Upper Tribunal Judge Reeds

Date: 7/9/2017