



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05078/2018

THE IMMIGRATION ACTS

Heard at Field House
On 4th September 2018

Decision & Reasons Promulgated
On 10th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MS. J.A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Miss P Yong, Counsel, instructed by Wimbledon Solicitors
(Merton Road).

For the respondent: Mr E Tefan, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge McClaren who, following a hearing on 18th May 2018 dismissed the appeal.

2. The appellant is a national of Uganda who came to the United Kingdom in 2008 on a visit visa. Thereafter she overstayed. She made various applications for leave to remain and they and consequent appeal were unsuccessful.
3. She then made a claim for asylum on 3 October 2017 which was refused in a decision dated 3 April 2018. This refusal was the subject matter of the appeal dealt with by First-tier Tribunal Judge McClaren.
4. The claim made was that she is a lesbian and this would place her at risk in her home country. She said that in Uganda she had been forced into a marriage and her brother-in-law who was in the Army, along with other soldiers, came to their home, assaulted her husband, and raped her. Her husband died shortly after this and the appellant then left the country. The claim also related to health issues.
5. The respondent did not accept that she was a lesbian and referred to inconsistencies in her account and the absence of evidence from support groups in the United Kingdom. Regarding the health issue, the respondent referred to the availability of treatment in Uganda and the high threshold required for such a claim to succeed.

The First tier Tribunal

6. First-tier Tribunal Judge McClaren referred to earlier determinations which found that the appellant had a scar on her abdomen consistent with a Caesarean section.
7. The appellant's representative had sought an adjournment on the basis she had only received the earlier determinations and she was having difficulty taking instructions because the appellant was a vulnerable witness. Her representative wanted to obtain further medical evidence to challenge the findings made in relation to whether the scar was caused by a Caesarean section. The adjournment application was opposed by the presenting officer who argued that the appellant's representative had adequate time to prepare and that new medical evidence would not assist.
8. The judge referred to the decision of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 and the procedural rules in respect of the adjournment application. The judge also referred to the Presidential guidance on vulnerable witnesses. The judge accepted that the appellant was a vulnerable adult and should be treated as such. However, the judge decided not to adjourn the hearing but allowed time.
9. At paragraph 34 onwards the judge sets out the appellant's case and the arguments advanced. At paragraph 39 there is reference to her having met Kenneth who had been granted asylum in the United Kingdom because of his sexuality. He confirmed he had known the appellant for six years and had seen her in places for Gay people and they had attended Gay Pride together in 2017. Paragraph 41 records photographs of her attending various Gay events. Paragraph 42 refers to letters of support from the outreach officer of a group called Rainbow Sisters. The letter confirmed the appellant had been attending a support group for lesbians since January 2018.

10. At hearing, the appellant denied the scar on her abdomen was due to a Caesarean section but was attributable to the beating. There was a medical report from a Dr Hajioff, a consultant psychiatrist. The doctor indicated experience of scarring and concluded the scarring on her abdomen was caused by knife wounds supporting her account it was due to an assault.
11. The judge referred to an earlier decision that the scarring was due to a Caesarean section. It was suggested that Dr Hajioff was not a gynaecologist and could not give an expert opinion on this issue. The recent nature of the evidence from the LG BT groups was highlighted.
12. At paragraph 69 onwards the judge sets out the findings made. At paragraph 71 the judge recorded there were very few discrepancies within her oral evidence. At paragraph 74 the judge referred to the earlier tribunal decisions which found that the appellant was a victim of sexual and physical violence by unknown assailants. The judge also accepted that the appellant had a child which the judge felt undermined her claim to be lesbian. The judge reasoned that if the appellant had a child there was no reason why her family might suspect she was lesbian. The judge then concluded that her reason for leaving Uganda might have been because of the treatment she received but not because of her sexual orientation. The judge then stated 'I do not accept she is lesbian'.

The Upper Tribunal.

13. Permission to appeal was granted on the basis it was arguable the judge failed to make findings on the evidence of Kenneth. Furthermore, it was arguable the judge failed to fully assess the medical evidence. It was also argued the judge incorrectly applied the Devaseelan principle when the previous claims were on a different basis and did not raise the question of the appellant's sexual orientation. It was also contended the judge erred in accepting that further medical evidence would not have advanced matters when it could be relevant to the issue of scarring.
14. At hearing, the presenting officer acknowledged that the decision did not indicate clear conclusions on the evidence of Kenneth and that it was arguable taken collectively there was an arguable error of law in the decision.
15. I have considered the decision in the round. The judge has clearly taken considerable care over this appeal. The decision records that the hearing took from 10:30 AM until 3.37 PM. The judge sought to accommodate the appellant's Counsel by giving her extra time to read the papers. The judge accepted that the appellant was a vulnerable witness. The decision itself is carefully prepared and accurately sets out the law. It records the adjournment application accurately and sets out the relevant considerations. The judge then records in detail the appellant's claim and the respondent's refusal.
16. Unfortunately, the judge does not then go on to make a clear appraisal of the evidence. The matters recorded are really a preamble to the crucial findings and conclusions of the judge. It is at this stage that what otherwise is a carefully

prepared decision fails. At paragraph 71 the judge acknowledged there were few discrepancies in the appellants oral evidence. There is a reference to section 8 but no clear conclusion.

17. Whether or not the appellant had a child may be relevant in the assessment of overall credibility. There is no evaluation of the evidence of Dr Hajioff in relation to the scarring. It was not sufficient in the circumstances to simply rely upon the earlier decisions.
18. The question of scarring is a secondary consideration to the principal claim of being a lesbian. Having children and being a lesbian are not necessarily contra indicators. Most crucially, the judge does not deal with the evidence in support of her claim of being a lesbian. The judge does not make any findings in relation to Kenneth; the photographs produced or the letters of support.
19. It is not sufficient for the judge to state at paragraph 75 'I do not accept that she is a lesbian'. Reasons must be given and an assessment of the evidence provided.
20. The court file indicates three earlier decisions. The first is from First-tier Tribunal Judge Rothwell; reference IA/28964/2013 after a hearing on 18 December 2013. There is no reference to a claim based on sexuality. There was reference to a report from a Dr Costa, a gynaecologist and, in the absence of any evidence to contradict, the judge accepted the appellant had given birth to a child by Caesarean section. The judge also accepted that the appellant was raped by unknown persons. The next decision, from Judge of the First-tier Tribunal Fowell is from a hearing on 2 August 2016, reference HU/04272/2015. The appeal related to the appellant's medical condition. It was allowed on article 8 grounds. There is no reference to her sexuality. That decision was then set aside by the Upper Tribunal. Consequently, there was no Devaseelan finding in relation to the present claim.
21. In itself I would not have found the refusal of an adjournment necessarily an error of law but when all the challenges are taken together the findings and conclusions are inadequate.

Decision

The decision of First-tier Tribunal judge McClaren materially errs in law and cannot stand. Consequently, the appeal is to be relisted for a de novo hearing in the First-tier Tribunal.

Francis J Farrelly

Deputy Upper Tribunal

Date 4th September 2018

Directions.

1. Relist in the First-tier Tribunal for a de novo hearing excluding First-tier Tribunal Judge McClaren
2. A Lugandan interpreter is required.
3. The appellant has been accepted as a vulnerable witness. The appellant's representatives should advise when there is a new date of hearing of any steps considered necessary to facilitate the appellant in putting forward her appeal. Where possible fact should be agreed and the issues narrowed.
4. Appeal bundles should be prepared to include all relevant medical evidence relied upon. The respondent should provide the three earlier court decisions referred to. The respondent's bundle should be provided within four weeks with the appellant's bundle no later than two weeks before the date of hearing.
5. It is anticipated the hearing should last no longer than 2 1/2 hours.

Francis J Farrelly

Deputy Upper Tribunal Judge

Date 4th September 2018