



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

UI-2021-001730
(FtT ref PA/52577/2020); IA/00016/2021

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
On 12 January 2023

Decisions & Reasons Promulgated
On 24 March 2023

Before

UPPER TRIBUNAL JUDGE MACLEMAN &
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

BEVERLEY KANDJII
(no anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms L McGuigan, of McGlashan MacKay, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. In her decision dated 24 November 2021, FtT Judge Kempton dismissed the appellant's appeal "on asylum grounds" and allowed it "on human rights grounds".
2. The appellant sought permission to appeal to the UT on 5 grounds, set out in detail in her application. On 11 January 2022 FtT Judge Boyes granted permission on all grounds. The principal concern raised was whether the

Judge explained why she did not accept the conclusions of a report by a country expert.

3. The case came before UT Judge Macleman, sitting alone, on 26 October 2022.
4. On that occasion, Ms McGuigan submitted along the lines of the grounds and asked for the decision to be set aside. As to further procedure, she said that there is no significant dispute on the primary facts and no further evidence to consider; the appellant has made her case and has nothing to add; and the UT should remake the decision in her favour on grounds within the Refugee Convention.
5. Mr Mullen argued that the FtT had done “just enough” in its decision to justify its finding that lesbian or bisexual women are not at risk in Namibia as a generality, and that something further would be required in an individual case. However, he came to concede that the analysis of that further matter at [32] is legally inadequate. It is based on the appellant’s age (53) and little more. While it might not be irrational to consider that her family’s interest in forcing her to marry would decline with age, he saw force in the point of Ms McGuigan that the appellant left Namibia not as a young woman but aged around 44. The Judge said that some elders might have passed on, and so they might, but there was little in that to detract from the case. It was also true that the appellant could say she had been abroad, but again that was not much of a reason for finding “no real risk of persecution for her sexual orientation on return”.
6. The decision of the FtT was accordingly set aside by a decision dated 26 October 2022, the substance of which is incorporated above.
7. Following compliance by parties with the UT’s directions, the case came before us on 11 January 2023 for final decision.
8. Mr Mullen submitted further to his skeleton argument dated 16 December 2022. The main points are:
 - (i) The expert report by Dr M Fumanti, dated 28 June 2021, is based on generalisations about the custom of marrying between cousins and to older men, without showing how common such practices are.
 - (ii) The report is no basis for departure from the findings made by Judge Doyle in 2013, rejecting the claim of past persecution.
 - (iii) The report is silent on the risk of pressure on a woman in her 50’s, beyond childbearing years, to marry an older male relative.
 - (iv) Even if the appellant was abused within her extended family in the past, there is no likelihood of recurrence.
 - (v) The expert report and other evidence does not show that homophobia in Namibia reaches the level of a risk of persecution either from the

state or from non-state actors. This is justified by reference to the respondent's *"Country information and guidance: sexual orientation and expression in Namibia"*, updated on 24 November 2021.

- (vi) The report's concerns about how the appellant might be treated by the police are irrelevant. She is not wanted by the police or likely to come to their adverse attention.
 - (vii) The appellant has not shown a real risk.
9. Ms McGuigan submitted further to her written submissions, her main points being:
- (i) The expert report justified departure from previous findings.
 - (ii) The report at [56] states that "in this context of open gender discrimination against women, gender-based violence, violence against LGBT people, the reticence of the police to act and the absence of an effective witness and victim protection programme, Ms Kandjii would find it impossible to reintegrate..."
 - (iii) The report at [57] states that the appellant would be "at real risk of further abuse and violence from her family members".
 - (iv) This is evidence by which the previous tribunal might have reached a different conclusion, and by which the appeal should now be allowed.
 - (v) Since 2013, it was no longer in dispute that the appellant is a lesbian woman, in a relationship for over 6 years; further grounds to depart from previous findings.
 - (vi) The expert report, relying on a US State Dept report and a Freedom House report, both also produced, show a risk of "open discrimination, abuse and often violence" such that the appellant would be forced to "live in the closet", meeting the test explained by Lord Hope at [35] of *HJ (Iran) [2010] UKSC 31*.
 - (vii) There is no effective state protection.
 - (viii) The appellant could not relocate within Namibia. The expert report shows that her presence would become known to her family, given the size of the country and the nature of its ethnic affiliations, and that she would risk destitution and homelessness.
 - (ix) The appellant has shown a risk of persecution on return to Namibia as a member of a particular social group.
10. We raised the question whether Judge Kempton should have allowed the appeal on article 8 grounds (or purported to do so). The SSHD's decision says at page 1 that she qualifies for leave "on the basis of ... family and private life in the UK" and at page 8 that limited leave to remain is granted

“on the basis of your parental relationship”. Such leave was in effect at the time of the FtT hearing and runs until June 2023.

11. Parties agreed that although this aspect of the decision is not the subject of the grounds or of any counterchallenge by the SSHD, it is a mistake.
12. We reserved our decision.
13. We deal firstly with the scope of the appeal.
14. The appellant had advanced her “fresh claim” to the SSHD partly on the basis of her relationship with another woman, but (advisedly, no doubt) she elected to take her appeal to the FtT under the 2002 Act section 84 (1) (a), “removal ... would breach the UK’s obligations under the Refugee Convention”, and not under section 84 (1) (c), “removal ... would be unlawful under section 6 of the Human Rights Act 1998 [public authority not to act contrary to Human Rights Convention]”.
15. The FtT said at [31]:

I was not addressed on ... article 8 ... the appellant has a private life in the UK with her partner ... and a family life with her son. She has been granted 30 months leave ... on account of her filial relationship. Accordingly, to expect her to return to Namibia at this time would be a breach of her rights in terms of article 8 ...
16. The FtT was not asked to resolve an appeal on human rights grounds. There was no decision requiring the appellant to remove after refusal of a human rights claim. She was not expected or required to return “at this time”.
17. Even if the FtT had been presented with an issue to resolve, the decision does not explain why the appellant’s relationship with her partner constitutes private and not family life.
18. We think it is sufficient to record that the outcome in the FtT in terms of article 8 is of no practical effect. Matters under article 8 may arise if and when the appellant applies for further leave, but they were not properly before the FtT, and are not before us.
19. Our starting point is the findings by Judge Doyle in his determination, AA/02689/2013, promulgated on 17 May 2013.
20. That determination does not turn only on adverse conclusions on credibility:

at 15 (i), the claim at highest is one of discrimination and assault by relatives, of which she complained to the police, who accepted her report, and her assailants were fearful because a report had been made; a relationship between consenting female adults was not

illegal; she had lived in various towns in Namibia; her family members were not claimed to have unusual influence;

15 (j), both state protection and internal relocation were available; on her own evidence the appellant had “lived in Namibia for 17 years as a known bisexual”;

15(m), the claim does not succeed even at highest; a press cutting produced to show persecution was in fact a report of a court finding homosexuals to have the same rights as heterosexuals; there was “even debate about legalising gay marriage”.

21. (We note that the appellant no longer perceives herself as “bisexual”, but as lesbian.)
22. The tribunal, alternatively or additionally, declined to take the claim at highest, its principal points being:

at 15 (f), the appellant tried to enter the UK in July 2010, travelling with a Namibian child who was not her own; on being refused entry and interviewed before return, she did not mention any fear of persecution;

15 (h) (l) & (n), the appellant was inconsistent over whether she feared only two male relatives, or her tribe; she admitted lying to the immigration officer when attempting to enter in 2010; she did not claim asylum when in Amsterdam in 2013; dishonesty and failure to claim asylum at the first opportunity were adverse to credibility;

15 (o), she claimed to have been protected by her father from her uncle and half-brother, but no explanation why they delayed for 3 years after his death before attacking her;

15 (p), she said did not leave Namibia earlier as no financial ability to do so, but no denial of regular visits to South Africa; she owned her own property and was in employment;

15 (t), “when I take an holistic view ... I find the appellant’s account ... damaged by inconsistency and implausibility ... [and] not supported by background materials. I find that the appellant has fabricated her claim”.

23. The SSHD’s further decision dated 9 November 2020, now under appeal, accepts at page 8 that the appellant is “in a homosexual relationship” with her British partner and is “a lesbian woman”, but finds no risk based on her sexuality, and that both state protection and internal relocation are available.
24. We also have no difficulty in accepting that the appellant has shown, to the necessary standard, that her sexual orientation is as claimed.

25. Unlike the previous tribunal, on present materials we find that if the appellant were to be at risk in Namibia for her sexual orientation, then state protection would *not* be available to her. The state is able but generally unwilling to provide it. This is accepted in the SSHD's guidance at 2.5.5 – 6, so we do not specify any further sources.
26. We consider next whether there is risk due to sexual orientation, without more.
27. The appellant has not sought to show a risk of direct state persecution of members of the LGBTI community. The SSHD's guidance at 2.4.1 – 2.4.11 concludes:

In general, the available information does not establish that openly LGBTI persons face a risk of persecution or serious harm from the state. Trans persons may be more likely to face harassment or discrimination from the police, than other members of the LGBTI community. Each case must, however, be considered on its facts and the onus is on the person to demonstrate why, in their particular circumstances, they would be at real risk of persecution or serious harm.

28. The guidance is by a party to proceedings and is primarily of value to us as a source of information, not a set of standards. However, that conclusion is plainly well grounded in the evidence cited, and we adopt it.
29. The guidance goes on to deal with non-state actors:

b. Societal treatment

2.4.14 Namibia is generally a tolerant society. However, many Namibians feel the subject of same-sex sexual relationships is taboo. Although sexual and gender diversity are not always discussed openly, there is evidence of a growing tolerance of sexual minorities in and by society, and a wide coverage of LGBTI issues in the media. The 2019 Afrobarometer survey found that 64% of Namibians questioned would like or 'not care' if their neighbour were gay, an increase from 54% in 2017 (see [Public opinion, Religious groups' attitudes, statements and actions](#) and [Prevailing cultural and family attitudes](#)).

2.4.15 Namibia is predominately Christian and church views on LGBTI issues are generally conservative and not supportive of liberalising the laws affecting LGBTI persons. However, opposing views, including among the clergy, on repealing sodomy legislation and same-sex marriage are evident in media coverage (see [Public opinion, Religious groups' attitudes, statements and actions](#) and [Prevailing cultural and family attitudes](#)).

2.4.16 Some LGBTI persons have faced harassment when trying to access public services, with reports of discrimination, stigma, and

hostility from healthcare practitioners, sometimes due to the mistaken belief that being gay in itself is illegal or due to their own moral values (see [Healthcare, gender re-assignment and hormone replacement](#)).

2.4.17 Some LGBTI persons may face discrimination in education and employment (see [Education and employment](#)).

2.4.18 Trans persons and lesbians may find access to public services more difficult, depending on their socio-economic position, and can be more vulnerable to homelessness and unemployment than other members of the LGBTI population (see [Healthcare, gender re-assignment and hormone replacement](#)).

2.4.19 There have been reports of non-state actors subjecting LGBTI persons to harassment and violence including verbal, physical and sexual abuse. There have been reports of 'correctional rape' of lesbians, but there is a lack of recent (last 3 years) information and the available evidence is limited on scale and frequency of such treatment. Sources note homophobic incidents may be underreported due to stigma and fear of discrimination. Transphobic hate speech and attacks have occurred, including the widely reported abduction, verbal and physical assault of a trans woman by a former presidential candidate in 2020, which at the time of writing is subject to both criminal and civil proceedings (see [Treatment by the public](#) and [Treatment of trans persons](#)).

2.4.20 A number of LGBTI organisations exist, predominately based in Windhoek, and function effectively, providing practical, legal support to and advocate on behalf of the LGBTI community. There are some openly LGBTI-friendly venues in Windhoek, drag nights have taken place during 2021 and annual 'Pride' events have occurred without significant incident or violence reported in the capital and other towns (see [LGBTI individuals, communities and groups](#)).

2.4.21. In general, the available information does not establish that openly LGBTI persons face a risk of persecution or serious harm from non-state actors. Each case must, however, be considered on its facts and the onus is on the person to demonstrate why, in their particular circumstances, they would be at real risk of persecution or serious harm.

30. The guidance is based on a comprehensive set of sources, cited in its various paragraphs and listed in a bibliography. Those sources include the US State Dept and Freedom House, as cited in the expert report, grounds of appeal to the UT, and written submissions.
31. We have not been referred to any source which takes the generality of risk to lesbian women in Namibia beyond the level detected in both previous tribunal determinations and in the respondent's guidance.

32. The expert report draws on similar sources. Its reference to “absence of an effective witness and victim protection programme” has no bearing on this case. We find in the report insufficient foundation for a finding that discrimination and violence against lesbian women reaches the level of general real risk.
33. The appellant provided the SSHD with an opinion from Namibian lawyers on the possibility of her partner re-locating to Namibia. That is not an issue in present proceedings, but we note that the opinion ends:

Conclusion

There is no consensus about LGBT issues in Namibian society. Vocal disapproval by parliamentarians and some community members sits alongside attitudes ranging from opposition to tolerance to acceptance in some communities.

There are also different organisations that promote and protect LGBT such as Legal Assistance Centre, Rainbow Project, Sister Namibia, Women Leader Centre and Outright Namibia to mention just a few.

34. That was obtained as a legal opinion not an expert country report, but it comes from well informed insiders. It is very much in line with our general findings.
35. Is there anything in the appellant’s particular circumstances to take her beyond those findings?
36. It has been argued that her credibility is restored by the expert report on the nature of hostility which might be expected from her family and tribe, and by acceptance that she is a lesbian.
37. We do not think those aspects detract significantly from the principal reasons of Judge Doyle for finding her not credible in her particular allegations. While we might make less of the distinction between family and tribal hostility, his further observations, such as there being no reason for the delay in the claim, and inconsistency between an alleged need for protection and moving between Namibia and South Africa over many years, remain equally valid.
38. We think it is possible that the appellant has encountered hostility from male relatives. We consider that, if so, its extent has been embellished for purposes of her claim. Even at the realistically highest level of such hostility, there is nothing in the expert report by which that might reasonably be thought to extend to the present time and to anywhere in Namibia apart from her home area.
39. On close inspection, the matter of the appellant’s age on departure and on return is insignificant to credibility and to risk on return.

40. We are not persuaded by the expert report, taken with the rest of the evidence, that the appellant would, as the report states, “have to live in the closet”. There is no reason for her to be different from other openly LGBTI persons who, as we have found above, live in the capital and in other parts of Namibia without facing real risk of persecution or serious harm from non-state actors. Campaigning groups are also able to operate.
41. The appellant’s written evidence, grounds of appeal to the UT and submissions found partly on her campaigning in the UK, and whether she might give that up in Namibia for reasons falling within the scope of *HJ (Iran)*. We have no reason to think that her public part in LGBTI activities in the UK is anything but genuine. However, on our general view that her credibility is somewhat diminished, and on the evidence of what is publicly possible in Namibia, we find no real possibility that she would feel compelled to refrain from doing anything she might otherwise be inclined to do.
42. If we had found a risk in the appellant’s home area, we would have found that she could reasonably relocate within the country. She has lived elsewhere for most of her life. There is no risk which extends beyond her home area. The experts’ view that she might become “destitute and street homeless” is an unfounded worst-case scenario. The appellant is educated and has had a working life. She can access initial support on return from the respondent. Even if her circumstances might be a little harder than in the UK, there is no reason for her not to succeed in supporting herself.
43. Interwoven in the expert report and the appellant’s past submissions to the SSHD and to the FtT (but not to us) is the question of her relocation to Namibia *with her partner* and various difficulties (such as availability of a visa, and social hostility) which might arise on that hypothesis. We do not purport to resolve these matters because they do not presently arise. Nor are we presently concerned with matters potentially arising from the return of the appellant’s son (now an adult) to Namibia. We record those points only for any utility they may have in further procedure.
44. We thank both representatives for their lucid and helpful presentations of their cases, which has helpfully focused the crucial issues. It was common ground that the appellant is a lesbian woman from Namibia, and that if at risk as such, state protection would not avail her. In summary, we have resolved the issues put to us as follows:
 - (i) The expert report for the appellant does not warrant departure from previous findings either on credibility or on generality of risk.
 - (ii) Lesbian women in Namibia, without more, are not generally at risk.
 - (iii) Beyond the common ground, the adverse credibility findings of the previous tribunal remain broadly sound.

- (iv) Even if the appellant had shown that hostility of male relatives persists to the level of a risk in her home area, there is not a risk anywhere else in the country.
 - (v) The appellant may reasonably relocate within Namibia.
 - (vi) There is no reasonable likelihood that the appellant would feel compelled not to live openly, or to refrain from public activity, for fear of persecution.
45. The decision of the FtT has been set aside. We substitute the following decision: the appeal, as brought to the FtT under the 2002 Act section 84 (1) (a) on grounds within the Refugee Convention, is **dismissed**.
46. No separate human rights grounds were advanced under section 84 (1) (c).
47. Parties agreed there was no need for further anonymity.

H Macleman

20 January 2023
UT Judge Macleman