



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-006186**  
**First-tier Tribunal No:**  
**PA/00273/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 25 April 2023**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**  
**DEPUTY UPPER TRIBUNAL JUDGE SKINNER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**HM**  
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer  
For the Respondent: Mr R. Dunlop KC, instructed by Duncan Lewis

**Heard at Field House on 23 March 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.**

## **DECISION AND REASONS**

### **Introduction**

1. This is an appeal brought by the Secretary of State against the decision of First-tier Tribunal Judge Lewis (“the Judge”) promulgated on 7 October 2022 (“the Decision”), by which he allowed HM’s appeal against the Secretary of State’s refusal dated 12 January 2021 of his protection claim. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 15 December 2022.
2. The hearing of this appeal took place in person. We heard submissions from Mr Lindsay on behalf of the Secretary of State and from Mr Dunlop KC on behalf of HM. We are grateful to both of them for the assistance they provided in relation to the issues we have to decide.
3. HM is a Nigerian national who claims to be at risk on return by reason of his claimed homosexuality. For that reason, it is appropriate to make a direction anonymising his identity in these proceedings (as the First-tier Tribunal also did), which we have done as set out above.

### **Factual background**

4. HM was born in 1964. He initially arrived in the UK on 15 December 1983. His immigration history is long and complicated, but given that the issues in this appeal involve the way in which the Judge considered earlier findings, it is necessary to set out the background in a little detail.
5. HM’s leave was initially valid until 31 December 1984. His subsequent application for leave to remain as a student was refused on 12 June 1985. He made, but then withdrew, an appeal against that decision and then made a fresh application. This was granted until 30 September 1986. He appears to have then overstayed until he left the UK on 15 February 1990.
6. On 17 June 1985, HM was convicted of the theft of electricity and was fined.
7. On 13 May 1988, he was convicted for assaulting a police officer and for driving without a licence and fined.
8. On 22 September 1988 HM was convicted of handling stolen goods and obtaining property by deception and was sentenced to nine months and three months imprisonment respectively, to run consecutively.
9. On 7 October 1988 he was convicted of two counts of theft and sentenced to six months imprisonment for each, to be served concurrently.
10. According to the findings of the Adjudicator (B Watkins CMG) in a decision of 22 December 1993 (addressed further below), on 15 February 1990, HM left the UK, but subsequently unlawfully re-entered.
11. On 8 November 1991, HM was again convicted of handling stolen good and imprisoned for a further 28 days.
12. On 10 December 1991, HM was served with notice as an illegal entrant. He appealed against that decision. On 22 December 1993, the Adjudicator rejected HM’s appeal. In doing so his account that he had lost his passport and that

someone else had left the UK in his name on 15 February 1990 was rejected. In that appeal, he also claimed to have a British national wife, whom he said he had married in 1991.

13. On 3 July 1992 HM left the United Kingdom for Nigeria. There is a conflict in the documents as to whether he left of his own accord, to bury his father, or he was removed. For present purposes nothing turns on this. While in Nigeria, HM's marriage to his then wife apparently broke down.
14. HM then returned to the UK on 27 March 1996, using a false passport and without any form of leave to enter or remain. He claimed asylum, relying on his claimed membership of a political group. By a decision dated 27 April 1996, that claim was refused and the Secretary of State directed his removal. He appealed to the Special Adjudicator (Mr Mark Davies), who dismissed his appeal. The Special Adjudicator "ha[d] no hesitation in finding [HM] to have been a person who has not told me the truth. His evidence did not have even the slightest hint of credibility and I am perfectly satisfied that he lied when claiming political asylum as he has lied before me today."
15. On 18 August 1997, HM was convicted for driving a motor vehicle with excess alcohol and disqualified for 12 months and fined.
16. On 30 January 1998 HM was refused further leave as a student.
17. Notwithstanding the dismissal of his fabricated asylum claim and the refusal of his application for further leave as a student, it does not appear that HM was then removed, as, in 1997 he was further convicted in this country for driving under the influence (for which he was disqualified).
18. On 5 August 1998 HM made an application for leave to remain as the spouse of a Portuguese national, a Ms Lopez. This was refused on 16 February 2000.
19. In March 2000, HM began another relationship with "JS", a Sierra Leonean woman. Nonetheless, on 9 May 2000 HM made an application for a residence document as a family member of an EEA national, i.e. as the husband of Ms Lopez. This was refused on 9 July 2001. The decisions in respect of HM's claimed relationship with Ms Lopez are not in the papers before us. We therefore do not know what the basis was for these refusals. It is however plain that the second of these applications was made deliberately in the knowledge that the claimed basis for the application no longer subsisted. Further, in his 2018 appeal hearing (addressed further below), HM accepted that his marriage to Ms Lopez was a marriage of convenience.
20. HM then submitted further representations to the effect that HM's removal would breach his Article 8 ECHR right to family life with JS, with whom he had, in June 2001, had a son, as well as numerous other family members who were by now in the UK. This was refused on 22 November 2001. On 2 September 2002, his appeal to the Adjudicator (Mrs Jane Reid) against this refusal was dismissed. Any interference with HM's family life rights was found to be in accordance with the law, to pursue a legitimate aim, and to be proportionate.
21. On 29 January 2003, HM was convicted of driving with excess alcohol and sentenced to a Community Rehabilitation Order of 12 months and 18 months disqualification.

22. On 19 February 2003, HM made a further claim to remain in the UK on the basis of his claimed family life with his son. This was refused on 29 May 2004.
23. On 15 August 2003, HM was convicted following a 4-month trial for violent disorder and sentenced to 4 years imprisonment. This related to disturbances at Yarlswood Immigration Removal Centre, where he was then detained, which resulted in the male wing being burned down. The prosecution case against HM for the offence for which he was convicted (he was acquitted of arson) was that he played a prominent part in the incident, was directly involved in smashing the window in a locked security door, pulling a security camera off the ceiling, using a metal bar to force open a telephone cash box. As the Court of Appeal noted in a judgment about the case, "when he was subsequently interviewed, [HM] denied that he was present at the scene, untruthfully asserting that he was at prayers and then had gone straight to his room."
24. On 11 April 2006, HM was served with a Notice of Decision to Deport together with a One Stop Warning under section 120 of the Nationality, Immigration and Asylum Act 2002, in which he was required to state any reasons why he should be permitted to remain in the UK. HM did not appeal the decision to deport him and a deportation order was signed on behalf of the Secretary of State on 2 May 2006.
25. In 2009, HM divorced Ms Lopez.
26. On 18 June 2010, the Secretary of State informed HM that he was to be deported on 24 June. On 21 June 2010, his then solicitors made further representations on the basis of his family life with his son. These were rejected on 24 June 2010 without a right of appeal (presumably because they were considered not to amount to a fresh claim). However HM obtained an injunction against his removal on the same day, with the High Court Judge suggesting that the decision not to afford him an appeal right be reconsidered. Accordingly on 13 January 2011, following that reconsideration, a decision was made refusing to revoke the deportation order on human rights grounds, but affording HM a further right of appeal. HM appealed, however, during the hearing of the appeal on 27 July 2011, the Secretary of State agreed that the decision would be withdrawn as there had been a significant change in HM's family circumstances, namely that HM had separated from JS.
27. On 12 January 2012, HM was cautioned for battery.
28. Due to ongoing family proceedings in relation to HM's son, no decision was made in relation to his deportation order pending the withdrawal of the refusal to revoke. On 15 October 2012, once those proceedings were over, HM made further representations. These were refused on 31 October 2012 and a further decision was made to refuse to revoke the deportation order against HM.
29. An appeal to the First-tier Tribunal against his deportation order was dismissed on 11 March 2013 and permission to appeal from this decision was refused by both the First-tier Tribunal and Upper Tribunal in April 2013. HM and his brother-in-law ("KT") gave evidence. In its decision the FTT concluded that "the appellant is an opportunist who will use others in an attempt to avoid removal". The Tribunal further gave great weight to a letter from JS which stated that HM had been behaving violently towards her and had been using her and their son for his own interests. She said that she had told him that she did not want to see him again, but he had come begging with his friends because of his problems with immigration. In their evidence, both HM and KT sought to underplay the reasons

why JS had taken HM's child with her to the USA, namely HM's mistreatment of her.

30. HM was then due, again, to be removed from the UK on 29 September 2015. However, on 22 September 2015, HM lodged further representations. This time the basis of his claim to be able to stay in the UK was no longer his relationship with his ex-partner and son, but that he was gay, and would accordingly be at risk in Nigeria. There were then various decisions made that did not carry with them a right of appeal to the First-tier Tribunal, and various judicial reviews challenging that lack of appeal right. Ultimately, on 22 December 2016, HM's claim was refused on the basis that the Secretary of State did not accept HM's claimed sexuality, with a right of appeal to the First-tier Tribunal, which right he then duly exercised.
31. HM's appeal was heard on 12 and 13 November 2018 by First-tier Tribunal Judge O'Malley. She heard evidence from HM, his half-sister ("CT") and half-brother ("DM") and from his brother-in law (KT, who had given evidence in his 2013 appeal), and from two friends ("AO" and "OS"). His son gave evidence which was unchallenged by the Secretary of State, and so he was not called.
32. On 13 December 2018, the First-tier Tribunal dismissed his appeal. Judge O'Malley found that the evidence, both oral and written, was "riddled with inconsistencies." OS had embellished his evidence to support HM. AO's evidence was evasive and unclear on the central issue of HM's sexuality and could be accorded no weight in relation to that issue. HM's son's and CT and DM's evidence of what they were told by HM was accepted, but they effectively had no independent evidence relevant to HM's sexuality beyond what he had told them. KT embellished his evidence. HM's own evidence was inconsistent. It was not accepted that he was unaware for the potential to claim asylum on the basis of sexuality until 2015. HM underplayed the length and depth of his previous relationship with JS. The evidence in relation to his claimed ex-boyfriend was inconsistent. HM's contact with organisations supporting LGBTI issues all post-dated his asylum claim and was opportunistic. HM's claim lacked credibility because the chronology did not bear close scrutiny, the documents were not credible and the evidence of those attending was internally inconsistent, and in places no more than their assertion that they accept the information HM had given them. Judge O'Malley was accordingly not satisfied to the lower standard that HM was gay.
33. Permission to appeal from Judge O'Malley's decision was refused by the First-tier Tribunal and Upper Tribunal in January and May 2019 respectively.
34. On 15 January 2020, HM was detained on reporting. Removal directions were set for 29 January 2020. These were however deferred pending an injunction. On 22 January and 6 February 2020, HM lodged yet further representations. These were refused as not amounting to a fresh claim, but that decision was reconsidered in light of yet further threatened proceedings. These were again refused without a right of appeal on 18 June 2020, but this decision was then judicially reviewed. A consent order was then agreed and, on 12 January 2021, a decision made refusing his claim but with a right to appeal to the First-tier Tribunal. HM appealed and his appeal was heard on 7 July 2022. It is not clear why, but the Decision was not then promulgated until 7 October 2022, some three months later.

## **The appeal to the FTT**

35. At the hearing before the Judge on 7 July 2022 it was apparently common ground that “the only real issue” was whether HM was gay. As well as a large number of ‘documents’ (by which we understand the Judge to have meant paper documents), there was in evidence two videos: a ‘long version’ and an ‘edited’ version. It was apparently agreed that the edited version would be used for the purpose of the appeal. Oral evidence was heard from “AOL” (the flatmate of HM’s claimed former boyfriend), KT and DM. KT gave a different first name in these proceedings from that given before Judge O’Malley, but it is clear from the schedule of documents prepared for the purpose of the appeal before the FTT setting out the documents previously considered by Judge O’Malley that they are one and the same person. CT did not give evidence in this appeal. Nor did HM’s claimed ex-boyfriend, Kelvin.
36. The Judge expressly noted at para. 20 that there were many adverse features in HM’s history. He noted that “the immigration history includes previous reliance upon being in heterosexual relationships, and appeal decisions with adverse credibility assessments – including a previous appeal where the Appellant relied upon a claim to be gay”. At para. 22, the Judge noted the following features of the claim:
- “It may be seen that the Appellant has previously relied in immigration applications upon two relationships with women. I acknowledge that such relationships are not inevitably inconsistent with homosexuality. However, it is to be noted that at least one such relationship, with JS, was claimed to have been over a sustained period of time, and the Appellant’s previous attempt to explain such relationships as being formed to please his father or family was rejected by Judge O’Malley. I also bear in mind that notwithstanding the relative freedoms of living in the UK for a sustained period in the 1980s, and subsequently from 1996 onwards, the Appellant - who has claimed that he had had a homosexual relationship in school in Nigeria and was aware of his preference for men from the time of his first arrival in the UK 1983 - seemingly opted for heterosexual relationships up until, on his account, 2010.”
37. At paras. 23-24, the Judge directed himself in accordance with Devaseelan [2002] UKIAT 000702. No criticism is made of the Judge’s self-direction in this regard. In particular he noted that he could take into account facts happening since Judge O’Malley’s decision, which, in this case were, in particular, the claimed relationship with Kelvin. At para. 25, the Judge noted that the principal matters from which he was asked to conclude that HM was gay were (i) the evidence of his relationship with Kelvin, (ii) evidence from a doorman at a gay bar, (iii) evidence from Kelvin’s flatmate; and (iv) that DM and CT had previously been accepted to have been told by HM that he was gay.
38. At para. 26, the Judge noted that the evidence of DM and CT was considered by Judge O’Malley to be insufficient and it seemed that DM’s evidence did not take matters significantly further. At para. 27 he noted that the evidence of a doorman had also previously been considered and no weight had been given to it. The situation was not materially different.
39. Having cleared the ground in relation to evidence which the Judge did not consider took matters any further than Judge O’Malley’s decision, at para. 28 the Judge stated that it seemed to him that “the real issue in the appeal ultimately comes down to what I make of the combination of the video evidence and the testimony of [AOL]”.

40. In relation to AOL's evidence, the Judge, at para. 30, noted that he described himself as neither a friend of HM's or Kelvin's but as Kelvin's former flatmate. In his witness statement he expressed his understanding that HM and Kelvin were very close friends, but added that he could not say whether they were in an intimate relationship, but that he would not have been surprised if so. He stated that he had seen HM come to the flat and spend the night with Kelvin quite regularly. In his oral evidence, AOL added that it was mainly at the weekend - Friday or Saturday - that he would see HM. He had only really had a conversation with HM beyond to say 'hello' when HM turned up looking for Kelvin after his departure in or about March. AOL's evidence was considered by the Judge to be consistent and measured and was accordingly accepted as credible. The Judge therefore accepted that HM was a frequent overnight visitor staying in Kelvin's room. He continued:

"I have considered the possibility that this was no more than a friend staying over after a night out or other socialising, finding it more convenient than trying to travel home late. However, ultimately, it seems to me that I cannot rule out the possibility that such frequent and regular visits - seemingly most weekends for a sustained period of time - carries with it more than an implication of a friend being accommodated after a night out, and is broadly supportive of the notion of [HM] and Kelvin being lovers."

41. Notably, the Judge does not appear to have considered the possibility that HM stayed with Kelvin in order to give the impression of plausibly being lovers to an apparently independent third party for the purposes of bolstering his claim.

42. At paras. 34-40, the Judge considered the video evidence. It is a video interview between a caseworker at HM's solicitors, who is at their offices, and HM and Kelvin, who are sat together in Kelvin's kitchen. It was conducted in October 2020 at a time when the relationship was said to still be casual. (It was also, we interpose to note, a time when HM was involved in proceedings seeking to demonstrate that his claim to be gay had sufficient prospect of success to justify the grant of an right of appeal to the FTT). It was thought to be potentially of value to record the interview while further submissions were pending in case the relationship were later to break down. The Judge candidly recognised that he had struggled in determining the weight to be accorded to the video. He noted the comments of First-tier Tribunal Judge Gibb, who had, at an earlier case management hearing, permitted the video to be admitted into evidence, to the effect that its purpose was to evidence the credibility of HM's claim by reference to his body language and interaction with his partner, but that it would not be appropriate for a judge to draw any inference from body language or interaction, but that would be a matter for the judge who heard the substantive hearing.

43. Paras. 37(iv) and (v) of the Decision merit setting out in full:

"(iv) In some respects the video seeks to stand as an animated witness statement. However, it is in effect unsigned by Kelvin (and indeed it is not even apparent that [he has] given his consent to its use in the hearing). During the video when the possibility of giving evidence in court is raised Kelvin is very clear that he is reluctant to do so, expressing the view that it could get him into trouble. It is entirely unclear why he thinks he might get into trouble - a possible implication being that he does not want to be exposed as untruthful. However, in this context, I cannot rule out the possibility that he is genuinely

suspicious of authority and/or reluctant to further disclose details of his sexuality in a public forum.

(v) Even according to the video weight as testimony similar to a written statement, it is of course the case that such testimony has not been subjected to cross-examination before me. The questions put by the caseworker – perhaps understandably – do not in any way replicate either a properly regulated examination-in-chief or a cross-examination: in part it is clear that she progresses the conversation by way of leading questions – (no criticism is implied of the interlocutory here because I do not expect that she considered herself to be conducting an examination in chief); at stages it appears that Kelvin is conversationally prompted by the Appellant – which of course would not occur were he to be giving evidence before the Tribunal. There is nothing approaching a challenge to any of the narrative; indeed the caseworker is generally supportive and uncritical – again I make no criticism of this conduct because inevitably her role in the interview is very different from the role of an advocate at a hearing, but it is appropriate to recognise and acknowledge this difference of role in considering what, if any, weight should be attached to the video.”

44. At para. 38, the Judge notes that there is merit in Judge Gibb’s observation in respect of attempting to evaluate the body language of an appellant or witness claiming to be gay. In para. 39 however, the Judge goes on to state that “it seems to me that the value of the video lies not so much in what is actually said, or in the individual mannerisms of either the Appellant or Kelvin, but in their interaction. In particular, there is occasional contact of heads in a seemingly natural, intimate, and sensitive manner – one head inclined to the other in a near ‘nestling’. This is more than a gesture of friendship; it appears to be a gesture of very great intimacy such as would be shared by lovers rather than two male friends.”
45. Finally, the Judge at para. 40 acknowledged the possibility that this might not have been spontaneous conduct but in some way performative, as an interaction being observed by representatives. However, ultimately, he found that he could not sensibly exclude from consideration the possibility that the apparent interactions demonstrating considerable intimacy were the product of the affection of lovers. Accordingly, the Judge attached “some credence” to the notion that HM is gay, which in substance determined the ‘real issue’ in the appeal in his favour. The appeal was accordingly allowed.

### **Scope of the appeal to the Upper Tribunal**

46. The Secretary of State’s grounds of appeal raised a number of challenges to the conclusions and findings of the Judge and the weight which he gave to the evidence. As was pointed out by Mr Dunlop in his skeleton, some of the grounds were clearly predicated on a misreading of the Judge’s decision and Mr Lindsay sensibly narrowed the scope of those grounds which he pursued.
47. As refined by Mr Lindsay at the hearing before us, the grounds were essentially two-fold:
- a. first, that, notwithstanding that the Judge properly directed himself in relation to the Devaseelan principles, he failed properly to apply them;



- b. second, that the Judge's reasons for accepting HM's case that he is gay were insufficient.
48. As Mr Dunlop sought to emphasise, the scope of an appeal to this Tribunal is rooted in the grounds as set out in the notice of appeal. This promotes fairness and the overriding objective.
49. As Mr Dunlop noted, there are a number of potential grounds of appeal which the Secretary of State has not pursued, about which it is necessary briefly to say something:
- a. First, there is no general perversity ground pursued by the Secretary of State. Mr Dunlop submitted that it was important to distinguish between a reasons challenge (which is pursued) and grounds challenging the substance of any conclusions reached (which, as noted, is not). We received post-hearing submissions from Mr Dunlop in relation to this distinction (to which there was no response from the Secretary of State), which we address below.
  - b. Second, there is also no ground suggesting that the Judge was wrong to admit or give any weight to the video evidence. While we are therefore not in a position substantively to decide whether a video of this sort is one that can properly be accorded any weight or should in principle be admitted, we should not be taken as endorsing the Judge's approach to it. In particular, we would observe that we are dubious about the Judge's characterisation of the video evidence as a sort of "animated witness statement". Unlike in, for example, Lama (video recorded evidence - weight - Art 8 ECHR) [2017] UKUT 16 (IAC), the video was not being relied on for what was said in it, but rather for how HM and Kelvin interacted in it. In that sense, it is much more akin to a dynamic version of a photograph, than to a witness statement. On any view however it is documentary evidence to which the well-known Tanvir Ahmed principles apply (and to which the Judge did not refer).
  - c. Third, there are a number of other obvious points which the Secretary of State could have, but has chosen not to, pursue in this appeal. In particular, we note that:
    - i. despite the Judge not having considered how and why HM would behave on return to Nigeria, there was no ground taken about the FTT's adherence to the approach required by HJ (Iran) v SSHD [2010] UKSC 31, [2011] AC 596; and,
    - ii. despite there being no reference by the Judge to HM's delay in raising his asylum claim on the basis of his claimed sexuality, no ground is put on the basis that the Judge failed to consider the potentially adverse impact of that delay on HM's credibility, contrary to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, as required by KG (Turkey) v SSHD [2022] EWCA Civ 1578.

The Secretary of State having chosen not to pursue these issues, we say no more about them.

50. By letter to the Tribunal dated 28 February 2023 from Duncan Lewis, HM sought to adduce evidence in this appeal that was not before the FTT, namely a short

witness statement of Mr Giorgio Strumia, a trainee solicitor at Duncan Lewis, together with print-outs of satellite images of the address at which Kelvin resided. The Secretary of State did not oppose the admission of this new evidence and so we admit it.

51. HM has filed a rule 24 response drafted by counsel previously instructed on the appeal. However, Mr Dunlop confirmed to us that it had effectively been superseded by his skeleton argument and we have therefore focused on the arguments as presented by Mr Dunlop therein (as well as orally).
52. It is on this basis that the appeal comes before us.

### **Legal framework**

53. Before turning to our analysis of the Judge's decision and the grounds of appeal, there were various legal points pressed on us by Mr Dunlop. We therefore remind ourselves both of (a) the relevant, relatively low, bar to be surpassed to comply with a judge's duty to give reasons; (b) the limits to our role as an appeal court.
54. Appellate case law is replete with descriptions of what is required by way of reasons by lower courts and tribunals. Many of the relevant cases were reviewed in Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413, [2019] 4 WLR 112 by Males LJ (with whom Peter Jackson and McCombe LJ agreed) at [39]-[47]. The key points for present purposes that come out of that review are as follows:
  - a. A failure to give reasons may be a ground of appeal in itself even where the conclusion reached is one that would have been open to the judge on the evidence;
  - b. The extent of the duty to give reasons, or rather the reach of what is required to fulfil it, depends on the nature of the case. Nonetheless, a judgment needs to make clear not only to the parties but to an appellate court the judge's reasons for his conclusions on the critical issues;
  - c. 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;
  - d. A judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it.
55. As already noted, Mr Dunlop sought to distinguish between challenges based on the alleged irrationality or perversity of findings and those based on a failure to give reasons, seeking to box the Secretary of State's appeal into the latter category. In this regard, he drew our attention in post-hearing submissions to three authorities, which it is convenient to address here.
  - a. First, he directed our attention to the judgment of Patten LJ (with whom Waller and Carnwath LJ agreed) in EM (Zimbabwe) v SSHD [2009] EWCA Civ 1294 in [29] of whose judgment he said that "A challenge on the grounds of a failure to give reasons has to be distinguished from a

challenge to the conclusions which have been reached” and at [33] he deprecated appeals presented as a failure to give reasons which were in reality little more than a challenge to findings of facts.

- b. The second of Mr Dunlop’s trio of cases was MD (Turkey) v SSHD [2017] EWCA Civ 1958 in which Singh LJ (with whom Longmore and Treacy LJ agreed) noted at [26] that “The duty to give reasons requires that reasons must be proper, intelligible and adequate” and that an assessment of adequacy does not “provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits.” This seems to us to be making the same point as in EM, namely that a challenge to the adequacy of reasons is to be distinguished from a challenge to the reasons themselves. This is reinforced by what is said in [36] that “Insofar as [the submission being considered] may be regarded as in substance a complaint about the quality of the judge’s reasoning, it appears to me to come close to a challenge based on perversity. However, that is something which [counsel] has expressly disavowed...”.
- c. The third case to which Mr Dunlop referred us was Herrera v SSHD [2018] EWCA Civ 412, [2018] Imm AR 1033. In that case the Upper Tribunal had concluded that the FTT Judge had “not adequately explained how the appellant has demonstrated very significant obstacles to his reintegration in Argentina.” On the face of it, this was therefore allowing an appeal on the basis of the inadequacy of the reasons. However, the Upper Tribunal then continued that “It would appear the judge was unduly swayed by sympathy for the appellant’s plight, his integration into the United Kingdom and his charitable work, rather than focusing upon the high threshold established in the legislation”. As Underhill LJ said at [17], “The UT’s real point is that the evidence did not justify the conclusion reached”. Notwithstanding the way in which the Upper Tribunal had expressed its conclusion, the issue was not one as to the adequacy of the FTT’s reasons, but their rationality.

- 56. In light of these authorities, we accept the basic distinction drawn by Mr Dunlop between a challenge to the adequacy of the reasons given by a judicial decision-maker and the question of whether those reasons rationally justify the conclusion reached. We do not consider however that this distinction should be pushed too far. These two categories of error are not in our view hermetically sealed from each other. Where no or inadequate reasons are given, it may be impossible to tell whether a judge has reached a conclusion which was open to him or her: see, in this respect, Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 (CA), 381H per Henry LJ (giving the judgment of the Court).
- 57. However, we accept that it is not the role of this, or any appellate, Tribunal to allow an appeal merely because a different conclusion might have been reached or the reasoning might have been expressed differently. It is well established that tribunals may reach different conclusions on the same case without illegality or irrationality. As Carnwath LJ said in Mukarkar v SSHD [2006] EWCA Civ 1045 at [40], “The mere fact that one tribunal has reached what may seem an unusually generous view of a particular case does not mean that it has made an error of law.”
- 58. In relation to reasons challenges, appellate judicial restraint is also justified. It should not be assumed too readily that the tribunal misdirected itself just

because not every step in its reason is fully set out: Jones v First-tier Tribunal [2013] UKSC 19, [2013] 2 AC 48 at [25] (Lord Hope). A judge's reasons should be read, unless he has demonstrated to the contrary, on the assumption that he knew how he should perform his functions and which matters he should take into account: Piglowska v Piglowski [1999] UKHL 27, [1999] 1 WLR 1360 (HL), 1372 (Lord Hoffmann).

59. None of this however immunises a decision of the First-tier Tribunal from appeal. Where an appellate court is satisfied that there is a material error of law, the decision will be set aside. This includes in relation to a judge's evaluation of the evidence: MAH (Egypt) v SSHD [2023] EWCA Civ 216 at [68]-[70] (Singh LJ).
60. The Secretary of State's challenge is not however a pure factual challenge. It is a challenge to the adequacy of the reasons the Judge gave and to his application of the Devaseelan principles to this case. It is to that challenge to which we now turn.

## Analysis

61. We start with matters of common ground. As noted above, it was common ground that the Judge's self-direction in respect of the Devaseelan guidelines, albeit brief, contains no error of law. Similarly, it was agreed that, to the extent that the Judge gave a description of Judge O'Malley's earlier decision and findings, it was not inaccurate.
62. The issue for determination therefore is whether the Judge properly applied Devaseelan and/or gave adequate reasons for departing from the finding of Judge O'Malley that HM is not gay.
63. Pursuant to Devaseelan, the proper starting point for the Judge was the previous decisions, and the findings, in particular of Judge O'Malley in relation to the question of HM's sexuality. The previous credibility findings in this case were crushing. As we have set out above, this was not simply a case in which HM's account had been disbelieved, this was a case of a man who had been dishonest at virtually every stage of his dealings with the immigration system in this country and who, as the FTT found in 2013, uses others in an attempt to avoid removal. He had concocted a political asylum case, used a false passport to gain entry, lied to the Adjudicator about not having left the UK, lied to the Home Office about the genuineness of his marriage to Ms Lopez, persisted in a false application on the basis of his claimed relationship to Ms Lopez when he was already in a relationship with JS and then sought to use JS and their son to stay in the UK even after their relationship was to all intents and purposes finished. He also lied to the Crown Court in relation to his role in the significant disturbances at Yarlswood.
64. The Judge noted Judge O'Malley's decision was "a comprehensive and well-reasoned rejection of the Appellant's credibility and in particular his claim to be homosexual" and we do not infer that, in not setting out the full scope and devastating nature of the credibility findings made, he omitted to take them into account. The Judge states at para. 23 that he took Judge O'Malley's decision as his starting point and the Secretary of State (in our view correctly) accepted that he did so.
65. The Judge was also correct to identify that the relationship with Kelvin was a fact happening since the earlier decision. However, the evidence concerning this

relationship was inextricably linked to HM's own credibility and therefore needed to be considered in the context of the previous findings in this respect.

- a. First, the evidence from AOL was evidence of HM's own comings and goings. While the Judge records having considered the possibility that HM was staying at Kelvin's as a friend after a night out or other socialising, he does not explain whether he has considered (and if not, why not) the obvious possibility in light of the previous credibility findings - and in particular the findings that HM had used others to avoid removal - that these comings and goings were in effect done in order to put AOL in a position as an apparently neutral third-party to give evidence to the Tribunal, HM's visits to Kelvin and AOL's flat having taken place after the Secretary of State had refused HM's asylum claim but granted him a right of appeal, but before the appeal could be heard by the FTT.
- b. Second, the video evidence too was linked to HM's own credibility. He was in it, together with Kelvin. The video was specifically recorded, as the Judge notes at para. 34, in case the claimed relationship between HM and Kelvin subsequently broke down. The Judge records that in the video Kelvin is prompted on occasions by HM. While the Judge at para.40 recognises the possibility that it may in some way be "performative", he does not actually then go on to explain why, in view of the previous findings, he rejects that.

66. We note also that the Judge has not explained the apparent discrepancy between HM's and AOL's account as to how often HM stayed at Kelvin's place between summer 2021 to mid-March 2022. HM's evidence (para. 17 of his witness statement) was that he and Kelvin saw each other around twice per month, whereas AOL's evidence was that he thought HM was at their flat most weekends and there might also have been a couple of days in the week. In light of the history and previous findings in this case, if the Judge was to accept that AOL was a witness of truth, he needed in our view to explain why he did not consider that this was exaggerated evidence. It may have been that the Judge concluded that AOL simply misremembered the frequency of HM's visits, or that this was not, on proper analysis a discrepancy damaging of credibility, but it is not possible to know, because the Judge has not set out his reasons in relation to this issue.
67. Nor does the reader of the decision know why the Judge was apparently prepared to overlook the fact that HM had again relied on one of the same witnesses (KT, and to whose evidence we shall return below) whom Judge O'Malley had previously found to have fabricated his evidence (see her decision at para. 136). HM's reliance on an untruthful witness would have been a factor significantly undermining his credibility before the Judge, on any rational view, a fortiori in doing so a second time once a finding of that nature has been made. The Judge has however simply not dealt with this issue.
68. Mr Dunlop submitted that the Judge's operative reasoning was restricted to the impact of the video and the evidence of AOL, having distilled the issues to those points at para. 28, to the exclusion of all other factors, and in particular those that depended in whole or in part on HM's credibility. There are however difficulties with that approach:
  - a. First, as Mr Dunlop's skeleton argument notes at para. 27, simply because a relevant point is not expressly mentioned does not mean that it was

not taken into account. The Judge has not said that the two matters mentioned in para. 28 of the decision are the only matters he was taking into account and he may therefore have taken into account other matters. We simply do not know, as he has not said so.

- b. Secondly, there appears on the face of the Decision to be some confusion over two witnesses who share the same surname: CT (HM's half-sister) and KT (HM's brother-in-law). At para. 25 of the decision, the Judge refers to "Mr [T]" having written in "her" statement that HM first revealed his sexuality to him (or her) in 2013. The difficulty is that these two witnesses share a surname and each has written a number of statements in support of HM's appeals. Both refer to HM having revealed his sexuality, or the family becoming aware, in 2013. The possibility that the Judge may have erred when distinguishing between these two witnesses appeared to take Mr Dunlop by surprise at the hearing, when we raised a query on this point. Mr Dunlop fairly recognised that the Judge may have made the same mistake as he had made in confusing the two. We agree. As we noted above, the Judge did not finalise the decision until almost precisely the expiry of the "normal three-month limit" (Alam v SSHD [2021] EWCA Civ 1538 at [10] (Underhill LJ)), so it is possible that matters may not have been as fresh in his mind as one would otherwise expect had the decision been written sooner after the hearing. We are in those circumstances required to scrutinise the Judge's findings with particular care: SS (Sri Lanka) v SSHD [2018] EWCA Civ 1391 at [29] (Leggatt LJ). Be that as it may, the Judge's reasoning at para. 25 in respect of KT (or CT) is not intelligible.
- c. Thirdly, the previous adverse credibility findings in relation to HM were of such moment that any assessment of HM's case without express consideration of the impact of those findings is necessarily incomplete and insufficiently reasoned. As Mr Lindsay submitted at the hearing, the issues as marshalled by the Judge at para. 28 omitted any reference to HM's already very damaged credibility in his summary of what the issues "boiled down" to.
- d. Fourth, even if the Judge did intend only to consider the two issues identified in para. 28 and to put out of his mind all other issues on the basis that those issues were untainted by the previous findings, for the reasons we have already set out it is not at all obvious that those issues are unaffected in that way. Accordingly, it was, in our judgment, at the very least incumbent on the Judge to explain the reasons why he considered them to be so (if he did), which he did not do.

69. The Judge's failure expressly to address the impact of HM's poor credibility and the earlier findings of Judge O'Malley in (and on) his operative findings introduce something of a disjoint in the decision. His summary of the procedural background and the Devaseelan principles are sound. The second half however reads as though there were no such prior findings, or as though the Judge has erred in law by not taking them into account. His operative reasoning is silent as to how he addressed the starting point of HM's poor credibility. The Judge did not, for example, say that HM's credibility before him had improved, or that notwithstanding his continued poor credibility, the remaining evidence was sufficient to merit the findings of fact reached by the Judge. Nor did the Judge address the impact of HM's continued willingness to rely on the evidence of KT, as explained above. It may, of course, have been the case that the Judge decided

that, notwithstanding Judge O'Malley's findings, he now found KT to be a credible witness. It is not possible however to know what the Judge's reasons were in these respects, because the Judge did not say so.

70. As Males LJ said in [46] of Simetra, "fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it." There was apparently compelling evidence which militated in favour of a contrary conclusion to that reached by the Judge, which he did not address. He therefore failed to give sufficient reasons for reaching his conclusion. That is not, to return to the distinction pressed on us by Mr Dunlop, to say that the Judge would not have been entitled to reach that conclusion. This is after all not a rationality challenge. But reasons must be adequate, regardless of the rationality of the underlying conclusion, and, for the reasons set out above, we have concluded that the reasons the Judge gave were inadequate.
71. We therefore allow the appeal and set aside the decision of the First-tier Tribunal.

### **Relief**

72. As set out in para. 7 of the Senior President's Practice Statements, re-making rather than remitting is the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary, unless the nature or extent of that fact finding is such that it is appropriate to remit the case to the FTT. Mr Dunlop suggested that the case should be remitted for that reason. Mr Lindsay did not have a firm view on the matter, but recognised that this might be an appropriate case to remit. We agree with Mr Dunlop. There are a number of issues to be considered and this is not a case in which it is appropriate to preserve any findings of fact. In those circumstances, it is in our judgment in accordance with the overriding objective to remit the appeal to the FTT.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be heard by a different judge. No findings are preserved.

**Paul Skinner**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

6 April 2023