



**Upper Tribunal  
(Immigration and Asylum Chamber)    Appeal Number: UI-2022-003171  
PA/00645/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 8<sup>th</sup> December 2022**

**Decision & Reasons Promulgated  
On the 11<sup>th</sup> January 2023**

**Before**

**THE HON. MRS JUSTICE THORNTON DBE  
UPPER TRIBUNAL JUDGE BLUNDELL**

**Between**

**AJA  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant:    Andrew Eaton, instructed by Duncan Lewis Solicitors

For the Respondent: Stephen Whitwell, Senior Presenting Officer

**DECISION AND REASONS**

## Introduction

1. The Appellant is a national of Nigeria. The Respondent seeks his deportation on the basis he is a foreign criminal who has been sentenced to a period of imprisonment of at least 12 months and as such his deportation is conducive to the public good.
2. The Appellant appeals against the decision of the First Tier Tribunal, dated 6 June 2022, upholding the Respondent's decision, dated 5 October 2020, to refuse his protection claim and a human rights claim under Article 3 of the Convention.
3. The Appellant advances four grounds of appeal; that the Judge failed to address evidence said to be corroborative of persecution in relation to his bisexuality (ground 1); failed to consider expert evidence (ground 2); misdirected himself on the burden of proof in relation to the Article 3 claim (ground 3) and failed to consider medical evidence (ground 4).
4. On behalf of the Respondent, Mr Whitwell expresses concern as to the veracity of the Appellant's claim to be bisexual. Nonetheless, he concedes, in succinct and helpful submissions, that the FTT erred materially in law in relation to the burden of proof in the Article 3 claim.
5. We agree.
6. In considering the Appellant's claim under Article 3, the FTT Judge said as follows:

*His claim to be bisexual*

*74. I have proceeded to make findings on this matter as it is also relevant to other factors I need to consider, particularly in relation to his article 3 claim and whether he would have support on return to Nigeria. Having found that the section 72 certificate is upheld, I proceed to make the following findings to the normal civil standard i.e. the balance of probabilities. The burden is on the Appellant.*

7. The Judge went on to analyse the evidence in relation to the Appellant's bisexuality before concluding:

*81. In summary, the burden remains upon him. I do not find that he has discharged the burden to establish that he is a bisexual man and I find that he is not, to the usual civil standard.*

8. In Kacaj [2001] UKIAT 18, the Upper Tribunal concluded that the same standard applies in assessing Article 3 ECHR as in the Refugee Convention. The following extract is from the judgment of Collins J:

39. It may be helpful if we summarise here our conclusions on the general issues raised by this appeal.

(i) Where a prospective breach of Article 3 of the Human Rights Convention is alleged under section 65 of the 1999 Act, the standard of proof is the same as in an asylum appeal. The question is, has the claimant established that there is a real risk that his rights under Article 3 will be breached?

9. A 'real risk' is often referred to in the caselaw as the 'lesser' standard, in contrast with the 'higher' standard, namely the balance of probabilities (See for example; RM (Sierra Leone) v The Secretary of State for the Home Department [2015] EWCA Civ 541 at §35 (Underhill LJ)).
10. Mr Whitwell accepted that the issue of the Appellant's sexuality could be material to his risk on return given the Respondent's approach at 2.4.21 in in her guidance: Nigeria CPIN Sexual orientation and gender identity or expression dated February 2022. Accordingly, he did not resist grounds one to three of the appeal. We consider this concession is also properly made. The Judge failed to take the medical evidence or the expert evidence into account in considering the credibility of the Appellant's account and he erred in respect of the standard of proof (albeit that it is correctly expressed elsewhere in the decision). Whilst we entertain some doubt as to the probative value of either the letter written in compliance with the Detention Centre Rules 2001 or the letter from the GEMREM clinic, it is quite clear that the judge failed to provide adequate reasons for his apparent rejection of those documents.
11. Mr Whitwell sought, however, to maintain the Respondent's opposition to the fourth ground of appeal, disputing any error in the Judge's assessment of the medical evidence and his subsequent conclusion that it did not meet the Article 3 threshold. Mr Whitwell invited us to set the decision aside but preserve the findings in respect of the s72 Certificate which are unchallenged together with the findings in respect of Article 3 (Medical) (both suicide and mental health). Whilst broadly neutral on the point Mr Whitwell indicated that the Respondent would be inclined, on balance, to invite us to retain the matter in the Upper Tribunal.
12. Mr Eaton accepted that the appellant had not sought permission to appeal against the judge's decision to uphold the s72 certificate and to dismiss the appeal on that ground accordingly. His preference was for the remaining issues to be remitted to the First-tier Tribunal for reconsideration afresh, however.
13. In our view the proper course, given the errors disclosed by the first three grounds, is to remit the non-asylum grounds of appeal to a different judge in the First Tier Tribunal for consideration afresh, whilst preserving the findings in relation to the s72 certificate. The advantage of

this course of action, for both parties, is that it will enable the Article 3 claim, based as it is on a fluid medical situation, to be assessed on the basis of any updated medical evidence. Mr Whitwell acknowledged the benefit of this course of action and Mr Eaton was content with our proposed course of action.

### **Notice of Decision**

14. Accordingly, the appeal is allowed. We set aside the decision of the FTT and remit the case to the FTT, for rehearing in front of a different judge. The findings in relation to the Section 72 Certificate are maintained.

### **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 him or any member of their 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.

Signed: MRS JUSTICE THORNTON DBE  
Date: 9.12.2022

The Hon. Mrs Justice Thornton DBE sitting as an Upper Tribunal Judge