



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

Number: UI-2022-001566

Appeal

PA/00139/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 19 May 2023**

**Decision & Reasons Promulgated
On 13 June 2023**

Before

**UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE STOUT**

Between

‘LCO’

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. The reason is that the appeal relates to a protection claim, in circumstances where the appellant has been the victim of sexual violence.

Representation:

For the appellant:
For the respondent:

Ms B Asanovic, Counsel, instructed by Quality Solicitors
Mr Wain, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a South African national, born on 29 October 1973. She is a gay woman. This is an appeal by the appellant against the respondent’s refusal by letter of 27 November 2020 of her refugee and humanitarian protection claims

under sections 82(1)(a) of the Nationality, Immigration and Asylum Act 2002 (as amended). By a decision and reasons promulgated on 14 September 2022 (included in the Annex to this decision), we allowed the appellant's error of law appeal and set aside the decision of First-tier Tribunal Judge Latta (the 'FtT'), promulgated on 17 January 2022, by which he dismissed her appeal. A previous appeal on Article 8 grounds was also dismissed by First-tier-Tribunal Judge Head on 6 March 2020 and there has been no successful appeal against that decision.

2. We retained the appeal in the Upper Tribunal for the purpose of re-making the decision because (having regard to paragraph 7.2 of the Senior President's Practice Statement) the appellant's credibility was not in dispute and it was anticipated at the error of law hearing that the decision could be remade on the basis of the written documentation. It was also thought that this case might be appropriate as a country guidance case and the re-making hearing was adjourned twice to enable the appellant to identify a suitable expert. In the event, none could be found and so the re-making has proceeded on the basis of the evidence that was previously before the FtT, together with a short additional witness statement from the appellant and some additional country information materials. In the circumstances, we emphasise that this decision relates only to the specific facts of the appellant's case and does not set any general precedent.

The evidence

3. The appellant was present at this hearing, and willing to give evidence and be cross-examined, but Mr Wain for the Secretary of State (bearing in mind her status as a vulnerable witness to whom the Joint Presidential Guidance Note No 2 of 2010 applies) elected not to cross-examine her. This appeal has accordingly proceeded on the basis that the facts are as stated in her three witness statements of 8 March 2020, 11 November 2021 and 6 March 2023. We therefore set out in this decision only the facts that are material to the issues we have to decide. What follows is our summary of the evidence that is set out in much greater detail in the appellant's witness statements. Page references are to pages of the Appellant's Bundle for this hearing. We also had available to us the Home Office bundle, and bundles prepared by Tribunal staff for the error of law hearing and this hearing, but have not needed to refer to them in this decision.
4. The appellant was born female on 29 October 1973. She is a gay woman. She was raised in the province of Gauteng, living on small holdings on the West of Pretoria until she finished school at the age of 18 in 1991. She then moved to Pretoria Central in 1992/1993 when she was 19 or 20 years old. She moved to Johannesburg in 1999/2000, living first on the East, Kempton Park side and the West side, West Rand area. After September 2015 she moved back to Pretoria for about a year. She moved to the UK in November 2016.
5. From early childhood, the appellant did not conform to traditional/stereotypical gender norms in terms of clothing, interests and social presentation. Throughout her adult life, her appearance has been such that she is generally perceived as a gay woman. As an adult in South Africa, in all the places in which she lived, she was subjected by different individuals that she encountered to harassment and discrimination, often overtly on grounds of sexual orientation. This harassment and discrimination occurred in many different situations. It occurred within her family home (she describes at p 67 how on a return to the family home at the age of 24, her father physical and verbally abused her explicitly because of his

perception of her sexual orientation and that of her friends). It occurred at work (for example, being made to sign a false statement and dismissed from a sales job in Johannesburg in 2001 explicitly because she was 'openly gay/lesbian' – conduct which she felt unable to challenge because of the risk to her future employment prospects: pp 69-70). It occurred at church (for example, being asked to leave the Dutch Reformed Church community she and her partner had joined in Johannesburg: pp 70-71). It occurred in social situations (as she puts it in her witness statement: *"I have been called lesbian bitch so many times in my life before, told that I don't fit in or belong in society and would go to hell, my breast was grabbed through an open car window, I have been spat on, straight men would grab their private parts and say 'you want some'..."* (p 81)).

6. In addition, she describes in her witness statement certain specific attacks, six of which she considered were motivated by her sexual orientation as follows:
 - 6.1. In 2003, she and her girlfriend were 'gassed' in their flat and burgled and police officers who attended the scene expressed the view that they had been targeted because they were female and because their *"lesbianism was not accepted in the community and that somebody would at some point take some sort of action against us"* (p 72);
 - 6.2. In 2006, her home was burgled again and her partner's daughter left tied up and gagged, and she felt their home, *"was targeted as we were four women, of which three [were] gay, living there and we made easy targets because we would not be able to defend ourselves during these robberies. None of the other homes in our street got broken into as regularly as ours despite the fact that we had burglar proofing on the windows, security gates at every door, motion detector beams and an alarm system connected to an armed response company"* (p 77). She also describes in her statement her distress at finding her partner's daughter and the emotional aftermath of the incident which took *"a huge toll"* on her, her partner and her daughter;
 - 6.3. In 2011, her home was burgled again on two occasions and, *"It made us feel even more vulnerable because we felt targeted, either for being woman, being gay or both!"* (p 78);
 - 6.4. In June 2015 at a casino a man threatened her, saying, *"it is lesbian bitches like you who needs to be beaten to a pulp and raped straight"*, which the appellant found particularly terrifying because of the rape threat (p 81); and,
 - 6.5. In September 2015, she was subjected to a prolonged ordeal by two apparently serving (but off duty and non-uniformed) police officers who got into her car at a fuel station, and kidnapped and robbed her by requiring her to drive and withdraw money from her account whilst threatening her with a gun. They also both raped her. The appellant states: *"In my mind, based on my dress code, jeans and mens shirt, there was no way that my rapists could not have known that I am a gay woman"* (pp 81-84).
7. The appellant was also the victim of crimes that she does not specifically associate with her sexual orientation, including an attack at work in 1998/1999 when she was robbed in the office and in 2006 where she was hit over the head

by a male when she checked whether a monetary note he had given her was fake.

8. The appellant reported all the attacks to the police, apart from the rape and kidnapping by police in 2015. In all cases, the police responded to the call and opened investigations by taking statements, but then did nothing further. There was no follow-up in relation to any of the attacks and no prosecutions. After the rape, robbery and kidnapping in 2015, the appellant was too traumatised and frightened of the police to provide a statement about what had happened to her.
9. On 30 May 2016, the appellant married a female British national in South Africa. The appellant entered the UK on 11 November 2016 on a spouse visa, valid until 26 July 2019. The appellant and her spouse separated in 2017. The appellant remained in the UK, from February 2019 working as a live-in carer for a person with whose family she continues to live as a friend (the person she was originally employed to care for having died in January 2020).
10. On 22 July 2019, the appellant applied for leave to remain in the UK on the basis of her private life. That application was refused, and an appeal was unsuccessful and the appellant became appeal rights exhausted on 23 March 2020.
11. In the meantime, on 18 February 2020, the appellant claimed asylum. That claim was refused by letter dated 27 November 2020 and it is with the appellant's appeal against that decision that we are now concerned.
12. The appellant's experiences in South Africa have affected her mental health. In 2013, the appellant was diagnosed with severe major depressive disorder and post-traumatic stress disorder, and spent a period of time as an in-patient in a psychiatric facility. The appellant attributes this 'nervous breakdown' in significant part to the discrimination that she has experienced as a gay woman and the attacks (p 71). She experienced further trauma and distress as a result of the 2015 attack. The appellant's evidence in this respect is supported by the report of the Clinical Psychologist Lida Tait who treated her in South Africa (pp 128-129), and also (anecdotally) by the evidence of the eleven witnesses who have provided statements in support of her application.

The country background information

13. Both parties have referred us to the *Country Background Note: South Africa* (Version 2.0, August 2020) ("the CBN"). Mr Wain relies on section 11, dealing with Law Enforcement, in particular the following paragraphs:

11.2 Effectiveness

11.2.1 The United States State Department Overseas Security Advisory Council (USSD OSAC) South Africa 2020 Crime & Safety Report stated: 'SAPS has made a strong effort to decrease its response time in recent years. While active crimes will take precedence over crimes that have

happened in the past, SAPS tries to respond to incidents within a reasonable time. SAPS patrol vehicles will typically be the first responding unit and can open a case docket and take statements at the scene, or can advise the complainant to report the crime at the nearest police station. There are effective detective programs at all SAPS stations, and a detective is on duty 24/7. Once the detective receives a case and they are ready to continue the investigation, they will generally contact the complainant.'

11.3 Police operations against crime

11.3.1 The South African Police Service [SAPS] Annual Report 2018/19 stated:

...

'The detection rate for serious crime increased, by 0,40% to 36,37%, in 2018/2019. Contact-related crimes increased, by 1,75% to 49,81%, property-related crimes, by 0,77% to 15,51% and other serious crimes, by 0,01% to 36,16%. Contact crimes decreased, by 0,54% to 50,58...

'The conviction rate for serious crime increased, by 0,39% to 89,79%. Contact-related crimes increased, by 1,87% to 87,86%, property-related crimes, by 0,80% to 90,09%, contact crimes, by 0,44% to 81,95% and other serious crimes, by 0,04% to 96,79%.'

11.4 Alleged human rights violations

11.4.1 The Freedom House Freedom in the World 2020 report, published in 2020, commenting on events in 2019, stated:

'Despite constitutional prohibitions, police torture and excessive force during arrest, interrogation, and detention are commonly reported. The Independent Police Investigative Directorate (IPID) legally required to investigate allegations of police offenses or misconduct. In its annual report for the 2018-19 fiscal year, the IPID reported 607 deaths either in police custody or as a result of police action, 124 rapes by police officers, 270 incidents of

torture, and 3,835 assaults. Overall, there was a 3 percent increase in total reported incidents over the previous fiscal year.'

11.4.2 The USSD 2018 Human Rights Report stated: 'Although the constitution and law prohibit such practices, there were reports police torture and physical abuse occurred during house searches, arrests, interrogations, and detentions and sometimes resulted in death. The NGO Sonke Gender Justice reported that almost one-third of sex workers interviewed responded they had been raped or sexually assaulted by police.'

See also United Nations Committee Against Torture Concluding Observations on the Second Periodic Report of South Africa, 7 June 2019.

11.5 Avenues of redress and oversight of the police

11.5.1 The African Policing Civilian Oversight Forum (APCOF) website noted the following:

'Extensive provision for oversight mechanisms of the police exist in South Africa, on both an internal and external level. In addition to a set of internal mechanisms and procedures within the SAPS to discipline its members, the Constitution provides for the establishment of the Civilian Secretariat of Police and for an independent police complaints body to investigate allegations of misconduct and abuse by its members. Specifically, the Civilian Secretariat of Police (CSP) is mandated to conduct civilian oversight of the police, while the Interdependent [sic] Police Investigative Directorate (IPID) is mandated to investigate complaints involving the police as well as any deaths that occur as a result of police action or while a person is in police custody. While the CSP and IPID are technically independent bodies, the effectiveness of each office has come into question due to inadequate funding and resources.

'In addition to the CSP and IPID, various other mechanisms exist to conduct oversight of the police, including the South African Human Rights

Commission, which is mandated to investigate allegations of human rights violations, as well as the Public Protector, which is mandated to investigate allegations involving corruption by state agencies. Further, there are a various number of non-governmental organisations working on issues relating to the police, which play an integral role in conducting external oversight of its members.'

11.5.2 The USSD 2018 Human Rights Report stated:

'Civilian authorities maintained effective control over the security forces, and the government had effective mechanisms to investigate and punish abuse. The government investigated and prosecuted security force members who committed abuses, although there were numerous reports of police impunity, including of high-ranking members. IPID investigates complaints and makes recommendations to SAPS and to the National Prosecution Authority (NPA) on which cases to prosecute. IPID examines all SAPS killings and evaluates whether they occurred in the line of duty and if they were justifiable. IPID also investigates cases of police abuse, although it was unable to fulfill its mandate due to inadequate cooperation by police, lack of investigative capacity, and other factors. When it did complete investigations, the NPA often declined to prosecute cases involving criminal actions by police and rarely obtained convictions. In cases in which IPID recommended disciplinary action, SAPS often failed to follow IPID disciplinary recommendations.'

'The law provides IPID with additional enforcement powers and requires SAPS and metropolitan police departments to report any suspected legal violations by their own officers to IPID. The law criminalizes the failure to report wrongdoing; from April 2017 to April 2018 IPID recorded 69 cases in which SAPS or metropolitan police departments failed to report wrongdoing to IPID.'

14. Ms Asanovic relies on section 16, dealing with sexual orientation, gender identity and expression, in particular the following paragraphs:

16. Sexual orientation, gender identity and expression

16.1 Legal rights

16.1.1 Same-sex sexual activity between men was prohibited until 1994, when the age of sexual consent was set at 19 for all same-sex sexual activity, regardless of gender. In May 1996, South Africa became the first country in the world to provide constitutional protection to LGBT people, by making discrimination on race, gender, sexual orientation and other grounds, illegal. In 2006, same-sex marriage became legalised.

...

16.2.2 The USSD 2019 Human Rights Report stated:

‘The constitution prohibits discrimination based on sexual orientation. The law prohibits discrimination against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in housing, employment, nationality laws, and access to government services such as health care. In March the High Court of Gauteng ruled that the Dutch Methodist Church’s ban on solemnizing same-sex marriages was unconstitutional.

‘Despite government policies prohibiting discrimination, there were reports of official mistreatment or discrimination based on sexual orientation or gender identity. For example, there were reports of security force members raping LGBTI individuals during arrest. A 2018 University of Cape Town report underscored violence and discrimination, particularly against lesbians and transgender. The report documented cases of “secondary victimization” of lesbians, including cases in which police harassed, ridiculed, and assaulted victims of sexual violence and gender-based violence who reported abuse. LGBTI individuals were particularly vulnerable to violent crime due to anti-

LGBTI attitudes within the community and among police. Anti-LGBTI attitudes of junior members of SAPS affected how they handled complaints by LGBTI individuals.'

16.3 Societal treatment and discrimination

16.3.1 The Amnesty International Report 2017/18 stated:

'LGBTI people continued to face harassment, discrimination and violence.

'On 4 April [2017], the burned body of Matiisetso Alleta Smous, a lesbian woman, was discovered in Kroonstad, Free State province. An eyewitness said she was raped, stabbed in the chest, and then burned to death. Three suspects were arrested on 5 April and released later that month due to insufficient evidence against them. An investigation into the murder was ongoing at the end of the year.

'On 15 May [2017], the body of Lerato Moloi, a lesbian woman, was found in a field in Soweto, Gauteng province. The postmortem examination showed that she had been raped and stabbed in the neck. Two suspects were arrested in May. The National Prosecuting Authority referred the case to the Johannesburg High Court.

'On 11 August [2017], the Potchefstroom High Court sentenced David Shomolekae to life imprisonment for strangling Lesley Makousa, a 16-year-old gay student, to death in August 2016. David Shomolekae was found guilty of murder, robbery and housebreaking.'

16.3.2 The Freedom House Freedom in the World 2020 report stated: 'There are frequent reports of physical attacks against LGBT+ people, including instances of so-called corrective rape, in which men rape lesbians, claiming that the action can change the victim's sexual orientation.'

16.3.3 See also Still no arrests in actor's homophobic hate crime mob attack, and Gay teacher brutally beaten and threatened with a knife by student's parent

in traumatising attack, for details of attacks on gay men in South Africa.

15. Section 17 deals with state protection and includes the following:-

17.6 State protection

17.6.1 The USSD 2019 Human Rights Report stated:

...

'According to the National Prosecuting Authority 2018-2019 Annual Report, the conviction rate for sexual offense crimes was 74.4 percent based on a sample of 4,716 cases that were "finalized" or investigated first as rape cases before being passed to the NPA and tried...Prosecutors chose not to prosecute many cases due to insufficient evidence. Inadequate police training, insufficient forensic lab capacity, a shortage of rape kits, and overburdened courts contributed to low prosecution and conviction rates.

'The Department of Justice operated 74 dedicated sexual offenses courts throughout the country...

'The NPA operated 55 rape management centers, or Thuthuzela Care Centers (TCCs). All TCCs were located at hospitals. Reports of sexual offenses received by TCCs increased 1.7 percent to 34,558 (64 percent of which were rape cases). The TCCs reported a conviction rate of 73.5 percent of rape cases tried...

17.6.2 The Amnesty International Report 2017/18 stated:

'Over 39,000 cases of rape were reported to the police between April 2016 and March 2017, although such cases were believed to be grossly under-reported. In September [2017], the Medical Research Council stated that only 8.6% of rape cases opened by the police in 2012 had resulted in convictions, citing a lack of resources and training for police officers, as well as failures to investigate the crimes and gather forensic evidence.'

16. The appellant also relies on country materials published subsequent to the CBN, including the Committee on the Elimination of Discrimination Against Women's (CEDAW's) fifth periodic report on South Africa, issued on 23 November 2021 which notes at [9]:
- (a) That gender-based violence is exacerbated by a culture of silence and impunity;**
 - (b) The failure by the South African Police Service to systematically investigate, prosecute and adequately punish the negligence and mishandling of cases by police officers;**
 - (c) The lack of regular training for judges, prosecutors and police officers on the strict application of criminal law provisions on gender-based violence against women;**
 - (d) The particularly high risk of gender-based violence against women and girls facing intersecting forms of discrimination, such as lesbian, bisexual and transgender women and intersex persons, refugee women, women with disabilities and women and girls with albinism.**
17. The *Amnesty International Report 2021/22; The State of the World's Human Rights: South Africa 2021* noted that official crime statistics report a 72.4% increase in rape cases in South Africa (p 212). The Appellant also relies on a number of press articles from 2022 and 2023 (pp 217, 220, 222, 225, 226, 230 and 240 which indicate that South Africa continues to have difficulties with funding of the police, that there is low confidence in the police, low responses to emergency calls due to understaffing and destruction of police radio masts and that capacity for rape investigation is undermined by a DNA test backlog and the absence of proper regulation or collection of DNA evidence for storage from violent offenders.

The parties' submissions

18. Ms Asanovic on behalf of the appellant had prepared a detailed skeleton argument. The Secretary of State, through Mr Wain, relied on the original refusal letter. Both parties made oral submissions. We intend no disservice to their arguments by summarising their submissions very shortly as follows:-
19. Ms Asanovic confirmed that the appeal is pursued on all three grounds under s 84(1)(a), (b) and (c) of the NIAA 2002, i.e. that the appellant's removal from the UK would breach the UK's obligations under the Refugee Convention and/or in relation to persons eligible for a grant of humanitarian protection and would be unlawful under s 6 of the Human Rights Act 1998 ("HRA 1998"). She submitted the issues under all three grounds of appeal were the same in this case. She relied in particular on paragraph 339K of the Immigration Rules, and the country information materials we have set out above. She submitted that the treatment to which the appellant had been subjected by state and non-state actors during her time in South Africa was sufficiently serious as to amount to 'persecution', that the appellant had shown that the treatment was causally linked to her being a gay woman, that state protection had in the past proved to be insufficient and

there was no reason to think that things had improved since the appellant left South Africa in 2016.

20. Mr Wain submitted that the attacks that the appellant had experienced that passed the 'persecution' threshold were random attacks and not related to the appellant's status as a gay woman. In the alternative, if we disagreed with that submission, he submitted, with reference to paragraph 339K, that there were 'good reasons' to consider that such persecution would not be repeated because of the information in section 11 of the CBN regarding enforcement by the South African Police Service (SAPS) and mechanisms for monitoring SAPS, in particular by the Civilian Secretariat of Police (CSP), the Interdependent [sic] Police Investigative Directorate (IPID) and the South African Human Rights Commission. He accepted in the course of submissions that these three organisations had been in existence during the time that the appellant was in South Africa, but submitted that the information in the CBN reflected an improvement in enforcement and monitoring mechanisms since the appellant left South Africa. He relied on the same material to argue that there was a sufficiency of state protection. He accepted that if the appellant was at risk of persecution by state actors that no issue as to relocation arose. He submitted that the appellant, even taking account of her mental health difficulties, would not face very significant obstacles to reintegration into South Africa.

Discussion of the law and conclusions

21. We deal first with the appellant's ground of appeal under s 84(1)(a) NIAA 2002 that her removal would breach the United Kingdom's obligations under the Refugee Convention.
22. The burden of proof is on the appellant to show that there are substantial grounds for believing that she has a well-founded fear of persecution for membership of a particular social group (specifically, being a gay woman) and that, owing to that fear, she is unwilling or unable to avail herself of state protection in her country of origin, so that her removal would breach the UK's obligations under the 1951 Geneva Convention relating to the Status of Refugees ("the Refugee Convention").
23. Applications for asylum (and for humanitarian protection) fall to be dealt with by the Secretary of State in accordance with Part 11 of the Immigration Rules. Both parties have (appropriately, given the facts of this case) focused their submissions on paragraph 339K in Part 11, which applies to the consideration of such claims and provides as follows:
- 339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.**
24. In the context of a claim to be a refugee, paragraph 339K thus requires us to consider whether the appellant has already been subject to persecution, which must be for a Refugee Convention reason. If so, that is a serious indication that this will be repeated unless there are 'good reasons' to conclude otherwise. The question of whether there are 'good reasons' to conclude otherwise requires us

also to consider whether South Africa offers the appellant a sufficiency of state protection. We take each issue in turn.

Persecution

25. We begin with the question of whether the appellant has shown that she has been subject to persecution. At [12] of *Hj (Iran)* [2010] UKSC 31, Lord Hope gave guidance on the threshold for 'persecution' as follows:-

12. The Convention does not define "persecution". But it has been recognised that it is a strong word: *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, [2002] 1 WLR 856, para 7, per Lord Bingham. Referring to the dictionary definitions which accord with common usage, Lord Bingham said that it indicates the infliction of death, torture or penalties for adherence to a belief or opinion, with a view to the repression or extirpation of it. Article 9(1)(a) of the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees ("the Qualification Directive") states that acts of persecution must "(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)." In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, para 40, McHugh and Kirby JJ said: "Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

26. Mr Wain for the Secretary of State did not dispute that at least the 2003 attack (when the appellant and her girlfriend were 'gassed' and burgled) and the September 2015 attack (when the appellant was kidnapped, robbed and raped by police officers) crossed the 'persecution' threshold. We further accept that the other attacks that the appellant relies on as being related to her status as a gay woman were, cumulatively (especially when taken with the 2003 and September 2015 attacks), sufficiently serious to cross that threshold. This is because even though the appellant was not herself physically hurt in the other three attacks, the cumulative effect of (criminal) invasions of her home and privacy, coupled with the emotional effects on her of finding her partner's daughter tied up in 2006, and the threat of serious physical violence (rape) in June 2015, was in our judgment of sufficient intensity and duration (through repetition over the course of 12 years) to amount to 'persecution' or 'serious harm'. We take into account in this regard the evidence that these attacks even prior to the most serious incident of rape by the police in 2015 contributed to damage to the appellant's mental health which resulted in a period in a psychiatric institution in 2013. Cumulatively, the attacks that the appellant links to her status as a gay woman constitute in our judgment a pattern of treatment that the appellant cannot reasonably be expected to tolerate and which amounted to persecution.

Causation

27. We next consider whether the appellant has shown to the low standard of 'reasonable degree of likelihood' (*R v SSHD, ex p Sivakumaran* [1988] Imm AR 147) that her membership of a particular social group (gay women) was a reason

for that treatment by those different individuals. We remind ourselves that the appellant needs to show that the Convention reason is an ‘operative’ or ‘effective’ reason for the treatment, not that it was the sole cause for the treatment: *R (Sivakumar) v SSHD* [2003] UKHL 14 at [16]-[17] *per* Lord Steyn, and at [36] *per* Lord Hutton, with both of whom Lord Bingham agreed ([1]); see also [41] *per* Lord Rodger with whom Lord Hoffmann agreed ([22]) (Lord Rodger taking the same approach as the majority on the issue of causation, albeit dissenting as to the significance to be attributed to the ‘extreme torture’ inflicted on the appellants in that case).

28. Mr Wain maintained the Secretary of State’s position as it was in the original refusal letter, and before the FtT, that the attacks on the appellant were isolated and random attacks by different people at different times and that there was insufficient evidence that they were motivated by the appellant being a gay woman. We reject that submission. We acknowledge that it is only the attack in June 2015 where there is direct evidence that the attack was motivated by the appellant’s status as a gay woman (the attacker calling the appellant a “*lesbian bitch*”). However, we find that there is sufficient evidence from which an inference may be drawn that her status was also an effective reason for the other attacks. The particular evidence that leads us to draw that inference is (in addition to that one item of direct evidence):
- 28.1. the appellant’s evidence that the police in 2003 believed that her sexual orientation would make her the target for attacks on her home;
 - 28.2. the explicit homophobia and discrimination that the appellant has experienced throughout her life with her father, at work, in social situations and at church which indicates both the levels of homophobia within South African society generally and the extent to which she, with her particular personal presentation, has attracted homophobic attention in her life – evidence that makes it more likely that this was also the reason for the more serious attacks on her;
 - 28.3. the sheer number of attacks she has experienced, over an extended period, which suggests that there is something about her that attracts violent attention in South Africa, and since her most obvious distinguishing feature is that she is a gay woman, that points towards an inference that this is the reason for the attacks;
 - 28.4. the information in the CBN and other country information materials which supports the drawing of an inference as to the reason for the treatment in the Claimant’s particular case because, despite legal protections for gay people in South Africa, the evidence is that there is a relatively high incidence of homophobia, homophobic violence and violence against women, both within the general population and among the police and security forces (see especially paragraphs 16.2.2 and 16.3.1 of the CBN), and evidence of the perpetration of rapes of women by members of the police and security forces, including one third of sex workers interviewed (11.4.1 and 11.4.2); and,
 - 28.5. the failure by police when she has reported these crimes to do anything more than take her statement also provides the basis for an inference (again, in combination with the information in the CBN about homophobic attitudes in the police force) that the past failure of state protection in her

case is also in part because she is a gay woman. On every occasion that she has reported a crime, although the police have provided an initial response, once they have seen the appellant (and thus likely perceived her to be a gay woman), they have done nothing further.

29. We therefore conclude that the appellant was whilst in South Africa subjected to persecution because of her membership of a particular social group as a gay woman.

Sufficiency of protection

30. The last incident of persecution in September 2015 was persecution by the state itself (the police officers), albeit by officers who were apparently not acting in the course of duty. Previous incidents did not involve persecution by the state but by non-state actors. In relation to all these incidents, we have considered whether the state offered her sufficiency of protection, applying the *Horvath* standard as explained in *Bagdanavicius* [2003] EWCA Civ 1605 at [55], i.e.:

...(4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness and ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear: *Osman* 29 EHRR 245, *Horvath* [2001] 1 AC 489 and *Dhima* [2002] Imm AR 394 .

(5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event: *Horvath*, [Banomova \[2001\] EWCA Civ 807](#), [McPherson \[2002\] INLR 139](#) and [Kinuthia \[2002\] INLR 133](#) .

(6) Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require: [Osman](#). ...

(10) The threshold of risk required to engage article 3 depends on the circumstances of each case, including the magnitude of the risk, the nature and severity of the ill-treatment risked and whether the risk emanates from a state agency or non-state actor: *Horvath* [2001] 1 AC 489.

(11) In most, but not necessarily all, cases of ill-treatment which, but for state protection, would engage article 3, a risk of such ill-treatment will be more readily established in state-agency cases than in non-state actor cases-there is a spectrum of circumstances giving rise to such risk spanning the two categories, ranging from breach of a duty by the state of a negative duty not to inflict article 3 ill-treatment to a breach of a duty to take positive protective action against such ill-treatment by non-state actors: *Svazas* [2002] 1 WLR 1891.

... (14) Where the risk falls to be judged by the sufficiency of state protection, that sufficiency is judged, not according to whether it would eradicate the real risk of the relevant harm, but according to whether it is a reasonable provision in the circumstances: *Osman* 29 EHRR 245.

31. In the appellant's case, on the evidence before us, we are satisfied that the state has not in the past provided her with sufficient protection from non-state actors. Although the legal protections for gay people in South Africa make clear that the state is in principle willing to provide sufficient protection, and the evidence in the country information materials is not such as would lead us to conclude that there is in general in practice an insufficiency of protection by the South African state for gay women, in the appellant's particular case the systems of state protection have both failed to prevent/deter attacks on her by non-state actors and failed to prosecute the offenders. Given the number of attacks on her, over so many years, we conclude that the state has not in the past provided her with a reasonable level of protection. Indeed, we have already drawn the inference above that the reason for the failure by the police to do anything more than initiate enquiries in relation to the attacks the appellant experienced was materially influenced by their perception of her as a gay woman.
32. As regards the September 2015 attack by police officers, the appellant did not report that to the police. In line with the guidance in *Bagdanavicius* we have considered whether the state provided the appellant with sufficient protection against persecution by 'rogue' state officials such as those police officers, but find that it did not. We accept that it was reasonable for the appellant not to report that attack to the police, given the failures in state protection in relation to the previous attacks and the fact that the September 2015 attack was perpetrated by apparently serving police officers who she feared encountering again if she attempted to report it. We take into account in reaching this conclusion the country information materials that we discuss below that show that the systems for monitoring and enforcement in relation to police abuses are frequently ineffective. It follows in our judgment from our conclusion that it was, on the particular facts of the appellant's case, reasonable for her not to report the September 2015 attack by 'rogue' state agents, that the state has in her case failed to provide her with sufficient protection against such state agents.

Risk of future repetition

33. It follows from the above that we are satisfied for the purposes of paragraph 339K that the appellant has in the past been persecuted for Refugee Convention reasons both by the state and by non-state actors, and that the state has in the past failed to provide her with a sufficient standard of protection. We then consider for the purposes of paragraph 339K whether there are 'good reasons' to consider that this treatment will not be repeated if she returns to South Africa. For the reasons we set out below, we are not satisfied that there is any reason to think the treatment will not be repeated.
34. The Secretary of State has not sought to argue that the appellant would not continue to live as an openly gay woman if she returned to South Africa or that if she did live discreetly it would be for any other reason than her fear of further

persecution (*cf HJ (Iran) ibid*). We therefore proceed on the basis that the appellant would on return to South Africa continue to live as an openly gay woman.

35. Mr Wain's argument was that the information in section 11 of the CBN shows that South Africa now has sufficient protection in place, including mechanisms for monitoring the actions of police officers, to prevent a recurrence of the sort of treatment that the appellant has experienced. He did accept, however, that this argument could not assist the Secretary of State if we were satisfied that the September 2015 kidnap, robbery and rape was perpetrated by the state police for Convention reasons (as we have found it was). In any event, we accept Ms Asanovic's submission that, on the evidence before us, there is no reason to think that the situation in South Africa has improved since the appellant left in 2016 – indeed, we agree with her that the evidence tends to suggest things have got worse.
36. So far as the information in section 11 of the CBN is concerned, on which Mr Wain relies, that refers to three state organisations (in addition to the South African Police Service (SAPS)) which are responsible for monitoring or enforcing crime, i.e. the Independent Police Investigative Directorate (IPID), the Civilian Secretariat of Police (CSP) and the South African Human Rights Commission. He accepted in submissions that all of these organisations were operating while the appellant was in South Africa. He submitted that the evidence in the CBN shows that, since she left, they are now providing more effective oversight/enforcement. We do not agree. While we note that SAPS reported an increase in the detection and conviction rate for serious crimes in 2018/2019 (paragraph 11.3.1), there was during the same period a 3% increase in reported human rights violations by the police, including 124 rapes by police officers (paragraphs 11.4.1-11.4.2). The effectiveness of both CSP and IPID was 'questioned' "*due to inadequate funding and resources*" (paragraph 11.5.1) and although civilian authorities investigated and prosecuted security force members, "*there were numerous reports of police impunity, including of high-ranking members*" and IPID was "*unable to fulfil its mandate [investigating cases of police abuse] due to inadequate cooperation by police, lack of investigative capacity, and other factors. When it did complete investigations, the [National Prosecution Authority] often declined to prosecute cases involving criminal actions by police and rarely obtained convictions. In cases in which IPID recommended disciplinary action, SAPS often failed to follow IPID disciplinary recommendations*" (11.5.2). In short, the picture we gain from the CBN is that, as at 2018/2019, there was still a relatively high incidence of homophobic attitudes within the police forces, human rights abuses by police had increased and the systems for monitoring and enforcing in relation to police abuses were frequently ineffective. The more recent country information materials on which the appellant relies do not indicate that there has been any improvement – indeed, they indicate that resourcing issues have probably made the situation worse.
37. Of course, it does not follow from our review of the country information available in this case that there is an insufficiency of state protection for all gay women in South Africa. Rather, what the evidence before us shows is that the appellant's particular characteristics and circumstances have attracted persecution in the past for which the state has failed to provide her with adequate protection and that there is no reason to think that she would not be subjected to further such treatment, and further failures of state protection, if she returned to South Africa. For the purposes of Paragraph 339K this is therefore a serious indication that the

appellant still has a well-founded fear of persecution for a Refugee Convention reason if she were to return to South Africa, and we so find in this case.

38. It follows that the Claimant's appeal succeeds under s 84(1)(a) NIAA 2002 on the basis that she is a refugee whose removal would breach the UK's obligations under the Refugee Convention.
39. There is no need for us to consider the Claimant's humanitarian protection claim under s 84(1)(b) NIAA 2002 since the Claimant as a refugee does not also qualify for humanitarian protection: see paragraph 339C of Part 11 of the Immigration Rules.
40. Nor is there any need for us to give separate consideration to the Claimant's human rights ground of appeal. We record for completeness that we are satisfied for the same reasons that the refugee claim succeeded that the removal of the Claimant from the United Kingdom would breach her rights under Article 8 of the ECHR and thus be in breach of s 6 of the HRA 1998 so that her appeal also succeeds under s 84(1)(c) NIAA 2002.

Notice of Decision

- 1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and has been set aside.**
- 2. We re-make the decision by allowing the appellant's appeal under section 82(1)(a) NIAA 2002 against the refusal of her protection claim on the grounds in section 84(1)(a) (that her removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention); and section 84(1)(c) (that removal of the appellant from the United Kingdom would be unlawful under section 6 of the HRA 1998).**

Signed: H Stout

Date: 5 June 2023

Deputy Upper Tribunal Judge Stout

Annex: Error of Law Decision



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

Appeal Number: UI-2022-001566

THE IMMIGRATION ACTS

**Heard at Field House
On 12 August 2022**

**Decision & Reasons Promulgated
On**

Before

**UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE STOUT**

Between

‘LCO’

(ANONYMITY DIRECTION MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

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

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. The reason is that the appeal relates to a protection claim, in circumstances where the appellant has been the victim of sexual violence.

Representation:

For the appellant:
For the respondent:

Mr J Dhanji, Counsel, instructed by Quality Solicitors
Mr T Mevlin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Latta (the ‘FtT’), promulgated on 17 January 2022, by which he dismissed her appeal against the respondent’s refusal on 27 November 2020 of her protection

and human rights claims. A previous appeal on Article 8 grounds was dismissed by First-tier-Tribunal Judge Head on 6 March 2020.

2. The appellant is a lesbian woman who has suffered adverse treatment in her country of origin, South Africa. The respondent's decision accepted the appellant's account as credible, but held that she was not a refugee within the meaning of the 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention) on the basis that she was not at risk of persecution by the South African authorities because of her sexual orientation and the South African authorities provided sufficient protection against persecution by non-state actors. In the alternative, it was open to the appellant to relocate internally away from her former homes in Pretoria and Johannesburg. She had only entered the UK in 2016, on the basis of her marriage to a British national which had now ended, and there were not very significant obstacles to her integration in South Africa where she had lived continuously from 1973, having been born in that country, educated to university level and worked there until she left to enter the UK.

The FtT's decision

3. The FtT began by noting that the appellant's credibility was not in issue as both the appellant's sexuality and the events in South Africa (described in her witness statement) had been accepted by the respondent ([10]). The appellant gave oral evidence and was cross-examined. The FtT did not record in the decision any significant evidence given orally ([14]-[17]), but referred to the appellant's witness statement as necessary when setting out his findings and conclusions.
4. In particular, he noted that the appellant had suffered harassment and discrimination in employment and during her attendance at church ([43]). She had also suffered attacks and thefts including (in 2015) a kidnapping and rape by serving police officers ([45]). However, the FtT concluded that, from the description of the incidents that she had provided, the attacks appear to have been motivated by theft rather than her sexuality ([46], [53]).
5. At [48] the FtT noted that in her substantive asylum interview the appellant, when asked who in particular it was that she feared, responded "*Not one specific person its society I fear my society. I don't feel like the government is protecting me*". The FtT continued (at [49]): "*When I take this into account, in my view the attacks which the Appellant has suffered to date have been isolated and random attacks. Any issues relating specifically to her sexuality have been harassment, and do not meet the test required for persecution*".
6. The FtT further noted that the six attacks specifically mentioned by the appellant ranged across 16 years from 1998 until 2015 and that apart from the rape and kidnapping by police in 2015, the appellant had reported the incidents to the police who "*turned up at the scene and took details in order to open investigations*", which the FtT concluded indicated a willingness on the part of the authorities to try and assist the appellant ([47]) or, at least, that it "*has not been established that the South African State is unwilling to protect the Appellant against ill-treatment due to her sexuality*" ([53]). The FtT noted (at [52]-[53]) the House of Lords decision in Horvath [2001] 1 AC 489 and recognition that no state can guarantee to eliminate all risk and failure to do so does not mean that there is a risk of the state providing insufficient protection.

7. The FtT further decided that there was no reason to depart from Judge Head's conclusion that there were not very significant obstacles to the appellant's reintegration to South Africa ([55]-[64]) and no grounds for granting her leave outside the rules under Article 8 ECHR ([65]-[75]).
8. The FtT rejected the appellant's appeal.

The grounds of appeal and grant of permission

9. The appellant lodged grounds of appeal, permission for which was initially refused on the papers, but the application was renewed on expanded grounds and permission was granted by Upper Tribunal Judge Macleman on 28 June 2022. The grant of permission was not limited in its scope. There were four grounds:-
10. Ground (1) was that the FtT had failed to identify that the appellant's abduction and rape in September 2015 amounted to persecution on grounds of her sexuality. This was perpetrated by members of the South African police force. She had specifically included in her evidence that her attackers knew she was a gay woman when they attacked her. The FtT had not addressed this issue in his conclusions.
11. Ground (2) was that the FtT had also erred in failing to consider the cumulative effect of the six incidents over the 16 year period as amounting to persecution rather than isolated and unconnected attacks.
12. Ground (3) was that the FtT erred in concluding that the country evidence was that lesbians and other members of the LGBT community were not liable to persecution in South Africa as it had ignored the corruption within the South African police forces and mistreatment of LGBT individuals by the police.
13. Ground (4) was that the FtT had erred in failing to take into account, when concluding that there was sufficient state protection, that she had been robbed and raped by members of the South African police which she believed was partly due to her sexuality.

The hearing before us

14. Mr Dhanji relied on the grounds of appeal, which he acknowledged overlapped. As to Grounds 1 and 4, he referred us to the appellant's evidence in her witness statement about the attack in 2015 and submitted that the judge had simply failed at [46] to deal with her evidence of her perception that this attack happened in part because of her sexuality. He submitted that likewise at [49] the FtT had omitted the appellant's evidence as to the link between the 2015 attack and her sexual orientation. The appellant further submitted that the FtT had conflated the issues of risk of persecution and sufficiency of protection.
15. As to Ground 2, Mr Dhanji submitted that the FtT had failed properly to deal with the cumulative effect of what the appellant had experienced, had not given himself a direction as to what constitutes persecution or explained why it was insufficient to meet the persecution threshold.
16. As to Ground 3, Mr Dhanji acknowledged that at [39] the FtT had referred to the media articles on which the appellant relies to show that there is a general risk of persecution and/or insufficiency of protection for LGBT people in South Africa, despite the constitutional and legal protections for them. However, he submitted

that the FtT had failed properly and rationally to consider that evidence, having omitted the similar information in the CPIN when quoting from that at [40] and summarised what was said in the media articles by stating only: *“From these it is clear that there are certain issues in South Africa with attacks on the LGBT community”*. Mr Dhanji submitted that the FtT’s conclusion was perverse.

17. Mr Melvin in response relied on his Skeleton Argument and further submitted that the FtT’s conclusion that the attacks on the appellant were motivated by theft rather than the appellant’s sexuality was open to him on the facts. He submitted that what was in the appellant’s witness statement was only an assertion that the police ‘would have known’ from her attire and appearance that she was gay, and provided no evidence that the appellant’s sexuality was the motivation for the attack. Although he accepted that the evidence showed that she was targeted as a lone female for robbery and rape, he reminded us that the appellant’s case is founded on risk of persecution because of her sexuality, not because she is female. He submitted that it was clear that the FtT was well aware of the difference between harassment and persecution, and that it was not that threshold that was at issue in this case, the question for the FtT was what the reason was for the attacks on her. He submitted that the FtT had properly considered the objective evidence and that his conclusions that the appellant was not at risk of persecution because of her sexuality and that there was sufficient protection were open to him on the evidence, especially given that South Africa is one of the most liberal of the African countries in legal terms, having introduced constitutional protection for LGBT people as long ago as 1996.
18. As to the question of whether the appeal should, if it succeeds, be re-made in the Upper Tribunal or remitted, Mr Dhanji indicated that the appellant was neutral, but as the facts were not in dispute he submitted it could appropriately be retained in the Upper Tribunal. Mr Melvin agreed, on the understanding that the appellant would not intend to submit further evidence.

Decision on error of law

19. It is well-established that challenges involving allegations of perversity must reach what has been described as an “elevated threshold”. However, in our view there are material errors in the FtT’s approach to this case.
20. One difficulty has arisen because the FtT failed properly to identify the issues that needed to be determined. The FtT at [38] identified as *“the key issue”* the question of whether gay people who live openly in South Africa are in general liable to persecution. While there is no doubt that it was necessary for consideration to be given to that issue, what mattered in the appellant’s case was whether she personally met the definition of refugee in Article 1(A) of the Geneva Convention, read together with regulations 3 and 5 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (the Qualification Regulations). The *“key question”* was thus not a general one, but whether she personally had the requisite well-founded fear of persecution because she personally had been persecuted either by the police or non-state actors because of her sexuality and, if by non-state actors, whether the state had afforded her sufficient protection.
21. There was no dispute that the appellant’s account was credible, and that she had had an extremely difficult upbringing due to her father who rejected her as a result of her sexuality, and that she had suffered harassment and discrimination

in her employment and during her attendance at church because of her sexuality. The FtT mentioned this evidence at [43] and [44] and we infer that it is this evidence to which the FtT refers at [49] when concluding that, *“Any issues relating specifically to her sexuality have been harassment, and do not meet the test required for persecution.”* We take this to be an allusion by the FtT to the threshold that distinguishes ‘mere’ harassment from persecution, guidance on which is to be found in *HJ (Iran)* [2010] UKSC 31 at [12]-[16] *per* Lord Hope (which authority the FtT cited at [37] on the different issue as to the significance of a gay person choosing to live discreetly in their country of origin). Insofar as that sentence in [49] of the FtT’s decision refers to the harassment and discrimination the appellant suffered at the hands of her father, employer and the church, there is no error of law in the FtT’s assessment. It was open to the FtT to conclude that this treatment of the appellant did not cross the persecution threshold.

22. The FtT’s first error, as we find it to be, was in considering the evidence of the attacks that the appellant was subjected to by non-state actors and the police over the 16 years between 1998/1999 and 2015. The FtT does not explicitly address the question of whether these attacks would, if motivated by the appellant’s sexuality, have been sufficient to meet the test of persecution, but as the attacks involved relatively serious physical and sexual violence, it is open to a Tribunal to find that they do satisfy that definition (having regard, in particular, to reg 5(2)(a) of the Qualification Regulations). As there is nothing to indicate the contrary in the FtT’s decision, we assume for present purposes that the FtT accepted that these attacks in principle crossed the threshold from harassment to persecution. However, the failure to address this question explicitly does itself amount to an error of law in our judgment, in that there has been a failure to give adequate reasons for the decision, albeit a failure that, on its own, would not be material. Ground 2 therefore succeeds to that extent.
23. The FtT’s second error in our judgment concerns its approach to the question of whether the appellant’s sexuality was a motivating factor for the six attacks (or any of them). This required careful consideration of the appellant’s evidence as to the motivation behind the attacks. So far as relevant to this issue, the appellant in her witness statement had described in particular:
 - 23.1. In 2003, how she and her girlfriend were ‘gassed’ in their flat and burgled and that police officers who attended the scene expressed the view that they had been targeted because they were female and because their *“lesbianism was not accepted in the community and that somebody would at some point take some sort of action against us”* (PDF, p 100; Appellant’s bundle, p 21);
 - 23.2. In 2006, how her home was burgled again and her partner’s daughter left tied up and gagged, and that she felt their home, *“was targeted as we were four women, of which three [were] gay, living there and we made easy targets because we would not be able to defend ourselves during these robberies. None of the other homes in our street got broken into as regularly as ours despite the fact that we had burglar proofing on the windows, security gates at every door, motion detector beams and an alarm system connected to an armed response company”* (PDF p 105; Appellant’s bundle, p 26);

- 23.3. In 2011, how her home was burgled again on two occasions and, *“It made us feel even more vulnerable because we felt targeted, either for being woman, being gay or both!”* (PDF p 106; Appellant’s bundle, p 27);
- 23.4. In 2013, how these incidents contributed to the appellant suffering a nervous breakdown because she was *“subjected to numerous amounts of physical, mental, emotional and verbal abuse not only as a woman but as a gay woman over the years and it got to a point where I just could not take it anymore”* (PDF, p 107; Appellant’s bundle, p 28);
- 23.5. In June 2015 at a casino a man threatened her, saying, *“it is lesbian bitches like you who needs to be beaten to a pulp and raped straight”*, which the appellant found particularly terrifying because of the rape threat even though, *“I have been called lesbian bitch so many times in my life before, told that I don’t fit in or belong in society and would go to hell, my breast was grabbed through an open car window, I have been spat on, straight men would grab their private parts and say ‘you want some’...”* (PDF, p 109; Appellant’s bundle, p 30); and,
- 23.6. In September 2015, how she had been kidnapped, robbed and then raped by two serving police officers who got into her car at a fuel station and that, *“In my mind, based on my dress code, jeans and mens shirt, there was no way that my rapists could not have known that I am a gay woman”* (PDF, pp 110-112; Appellant’s bundle, pp 30-33).
24. The appellant in this appeal focuses in particular on the most serious attack by the police in 2015, but it is significant in our judgment that none of the above evidence about the links that the appellant perceived between her sexuality and the attacks is referred to by the FtT in the decision. The FtT simply states at [46] that, *“from the description of the incidents that she has provided, the attacks appear to have been motivated by theft, rather than on the basis of the Appellant’s sexuality”* and, at [49], that the attacks were *“isolated and random attacks”*. The FtT has failed here to give adequate reasons, since it is not possible to tell from the FtT’s decision why he has rejected the appellant’s case that these attacks were at least in part motivated by her sexuality. On the face of the decision, there has been a failure to take into account a highly material factor, specifically the appellant’s evidence as to her cumulative personal experience that led her to believe that she was being targeted by the police and others because of her sexuality. Ground 1 therefore succeeds.
25. So far as the FtT’s approach to the country information is concerned (Ground 3), we find that the FtT has also erred. The FtT in this case needed to scrutinise the country information to assess whether and to what extent it supported the appellant’s case. While the FtT was right to note, and place weight on, the legal protections for LGBT people that have long been enshrined in South African law ([40]), on the face of the decision there appears to have been a failure to take into account relevant evidence that potentially bore directly on the appellant’s case that the reason for the attacks she had suffered between 1998/1999 and 2015 was her sexuality. Thus, the FtT failed to quote or refer to any part of the evidence in the paragraphs of the CPIN subsequent to that which he quotes at [40], in particular at paragraphs 16.2.2 and 16.3 which refer to reports of rapes of LGBT individuals by security forces and to LGBT individuals being particularly vulnerable to violent crime due to anti-LGBT attitudes within the community and among police. The FtT also summarises the media articles relied on by the

appellant with the anodyne statement that there are “*certain issues in South Africa with attacks on the LGBT community*” without identifying what those “*issues*” are or addressing the extent to which they do (or do not) have a bearing on the appellant’s case. Again, on their face those media articles provided support for her case as to the motivation for the attacks on her. The FtT was not bound to accept that case (and nothing we say in this judgment should be taken to indicate otherwise), but he did need to deal with it. This was not a peripheral issue. It was the heart of the appellant’s case and it was an error of law to fail to take account of the relevant country information and/or to fail to give adequate reasons in the decision as to why it did not support the appellant’s case.

26. As to Ground 4, which concerns the FtT’s conclusion as to sufficiency of protection, the parties acknowledged the overlap between this and Ground 1, and because Ground 1 succeeds, so must Ground 4 because at this stage too the FtT has failed to take into account and address the appellant’s case as to why she believed the attack on her by police in 2015 was motivated by her sexuality. However, we should add this: at the stage of considering whether there is sufficiency of protection for the appellant, the FtT also needed properly to consider the country information (which we have found he failed to do in upholding Ground 3) and to take into account the material fact (to which, conspicuously, no reference was made at [47]) that there is no evidence that the police did anything further to protect the appellant in relation to any of the attacks other than to ‘open investigations’. While the FtT was right to direct himself (at [51]-[53]) that a state may provide sufficient protection if it takes reasonable steps to do so even if it does not succeed, where someone has been the victim of as many attacks as the appellant in this case and no investigation has progressed beyond the very initial stages, that is a material factor that needs to be taken into account.

Disposal

27. For all these reasons, we find that the FtT erred in law and the decision must be set aside. With reference to paragraph 7.2 of the Senior President’s Practice Statement, the necessary fact-finding in this case is very limited because the appellant’s credibility is not in dispute and her appeal can be determined on the basis of the written documentation, including her witness statement. In the circumstances, we are in agreement with the parties that it is appropriate for the Upper Tribunal to remake the decision.

Directions

28. The following directions shall apply to the future conduct of this appeal:

- 28.1. The Resumed Hearing will be listed before Upper Tribunal Judge Keith and Deputy Upper Tribunal Judge Stout sitting at Field House on the first open date, time estimate 3 hours, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.
- 28.2. The appellant shall no later than 4 PM, 14 days before the Resumed Hearing, file with the Upper Tribunal and serve upon the respondent’s representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which she intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as

the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

28.3. The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4 PM, 7 days before the Resumed Hearing.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and we set it aside. The decision shall be remade in the Upper Tribunal.

The anonymity directions continue to apply.

Signed H Stout

Date: 23 August 2022

Deputy Upper Tribunal Judge Stout