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

**Case Nos: UI-2022-005916**
**UI-2023-001526**
**First-tier Tribunal No:**
**PA/53008/2020**
**IA/01225/2021**

## THE IMMIGRATION ACTS

**Decision & Reasons Issued:**
**On the 28 September 2023**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**TT (Jamaica)**
**(ANONYMITY DIRECTION MADE)**

Appellant (and Respondent)

**and**

**Secretary of State for the Home Department**

Respondent (and Appellant)

**Representation:**

For the Appellant: Ms E. Sanders, Counsel instructed by Duncan Lewis Solicitors
For the Respondent : Ms A. Ahmed, Senior Home Office Presenting Officer

**Heard at Field House on 17 July 2023**

## Order Regarding Anonymity

**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.**

## DECISION AND REASONS

1. By a decision dated 3 October 2022, First-tier Tribunal Judge Karbani ("the judge") dismissed an appeal on asylum grounds but allowed it on Article 8

European Convention on Human Rights ("the ECHR") grounds. The appellant (before the First-tier Tribunal) now appeals against the dismissal of his appeal on asylum grounds with the permission of Upper Tribunal Judge Rintoul. The Secretary of State cross-appeals against the judge's decision to allow the appeal on Article 8 grounds with the permission of Upper Tribunal Judge Macleman.

2. For ease of reference, I will refer to the appellant before the First-tier Tribunal as "the appellant".

**Anonymity**

3. The appellant has been accepted to be a victim of human trafficking by the Single Competent Authority ("the SCA"). He also reports having been a victim of a sexual assault. Victims of trafficking and sexual offences are entitled to anonymity under the Sexual Offences (Amendment) Act 1992. I consider that it is necessary to make an order for anonymity in order to ensure this decision does not reveal details which could lead to a breach of the statutory anonymity enjoyed by the appellant.

**Factual background**

4. The appellant is a citizen of Jamaica. He was born in 1996. He arrived in the United Kingdom when he was five years old, in 2001. He is currently in a relationship with a British woman, S, and together they have a daughter, T, who was born in March 2021.

5. The appellant has held leave to remain at various points, but the most recent grant expired in February 2015. In October 2015, he pleaded guilty to being concerned in the supply of Class A controlled drugs and was sentenced to 15 months' imprisonment. For those convictions, the Secretary of State pursued his deportation. The appellant made a human rights claim to the Secretary of State in an attempt to resist deportation. The claim was refused, and First-tier Tribunal Judge Grant-Hutchinson dismissed his appeal against that refusal by a decision dated 18 November 2016; that decision has not been successfully challenged. Thereafter, the Secretary of State attempted to remove the appellant to Jamaica, unsuccessfully. It was later thought that the appellant needed to remain in the United Kingdom to give evidence at an inquest, although in the event he was not required to do so.

6. The appellant made further submissions on 20 January 2020. They were eventually refused as a "fresh claim", on 4 August 2021. The appellant did not attend his scheduled interview with the Secretary of State ahead of that decision being taken. The Secretary of State was able to interview him in June 2021, leading to a supplementary decision letter dated 4 August 2021.

7. On 6 December 2021, the SCA accepted the appellant to be a victim of modern slavery on the basis of forced criminality, arising from the circumstances leading to the commission of the offences for which the Secretary of State pursued his deportation. The Secretary of State therefore took a supplementary decision, dated 21 April 2022, addressing the impact of the SCA's findings on the appellant's fresh claim for asylum. The proceedings before the judge therefore concerned three refusal decisions, which were to be read alongside each other.

8. In summary, the appellant's fresh claim for asylum and humanitarian protection was threefold. First, he claimed to be at risk of being persecuted in Jamaica as a bisexual man. Secondly, he would be at risk of re-trafficking and criminal

exploitation in Jamaica. Thirdly, as a lone and vulnerable returnee, he would be at risk upon his return on that account.

9. The appellant claimed that his deportation would breach his rights under Article 8 ECHR rights. It would disproportionately interfere with his right to private life, and the impact on his British child and partner would be unduly harsh. Further, there were very compelling circumstances such that his deportation would not be in the public interest.

10. Before the judge, the appellant claimed that he had been forced to deliver drugs by a gang in the UK, and that he had been sexually assaulted by members of the gang. Upon his release from prison, he had been threatened, he said, by the gang to either return the drugs (which had presumably been seized upon his arrest) or pay for their value. He feared that he would be killed, or that his family would be harmed. He could not return to Jamaica; he would be killed there too. He claimed to have been in a bisexual relationship with P, although the relationship had ended and he had lost touch with him. The appellant said that his relationship with P supported his claim to be a bisexual man, thereby demonstrating the risk he would face upon his return to Jamaica.

## Expert evidence before the judge

11. The appellant relied on a number of expert reports before the judge: a report dated 2 April 2021 by Lisa Davies, a forensic psychologist ("the Davies Report"); a report dated 30 November 2020 by Natialia Dawkins, a trafficking expert ("the Dawkins Report"); a country expert report dated 25 November 2020 by Dr Luke de Noronha ("the de Noronha Report"); and a report by Rabina Haque, a former probation officer now acting as a consultant "Independent Risk Assessor", dated 23 August 2018 ("the Haque Report").

12. The Davies Report outlined some of the appellant's mental health conditions and his presentation. It concluded that he exhibited some of the symptoms of PTSD and experienced feelings of shame when attempting to recount aspects of his history. It said, at para. 6.1.3, that the appellant:

> "…is likely to experience significant difficulties recounting his experiences in the formal setting of the court and regular breaks will be required to assist his attention and concentration."

## The decision of the First-tier Tribunal

13. The judge recorded at para. 17 of her decision that she had treated the appellant as a vulnerable witness, in accordance with the recommendations of the Davies Report. The judge summarised the procedural and factual history, the submissions, the evidence, and the law before commencing her operative findings at para. 47.

14. The judge found the appellant's claim to be a bisexual man to lack credibility. While appellant had claimed to have lost all contact with P, and to be unable to enlist his support in his appeal, the judge found that the appellant had not provided any supporting evidence concerning his claimed relationship with P of the sort that would readily be available, and there was no suggestion that they had parted on bad terms. There was no reasonable explanation as to why evidence pertaining to the relationship could not have been obtained from the appellant's own telephone or chat messages. The appellant had given no evidence that he had made any attempt to contact P in order to re-establish

contact for the purposes of supporting the appeal. Further, despite claiming that he became aware of his sexuality around 4 to 5 years previously, and despite having claimed asylum in 2017, the appellant did not raise the issue of his sexuality until February 2020. The delay was relevant to his credibility. There were also inconsistencies in his evidence, the judge found.

15. At para. 50, referring to the evidence of the appellant and his witnesses concerning whether the appellant had lived openly as a bisexual man, the judge said:

> "I find the evidence of his witnesses on this [his sexuality] was very brief and there is no mention of him living an openly bisexual lifestyle in their witness statement [sic]. There is no other evidence that he has an openly bisexual lifestyle. I have considered all the evidence in the round."

16. At para. 51, the judge said:

> "Applying the lower standard of proof, I am not satisfied that he is bisexual, or that he was genuinely in a relationship with a man. I am not satisfied that he has an openly bisexual lifestyle, or that he would be identified as a gay man returned Jamaica. I accept that the appellant was sexually assaulted, however I find that he is unlikely to make this widely known given his delayed disclosure in the UK, and therefore find that there is no risk arising from this being revealed, and him consequently being perceived as gay either. Overall, I find there is no well-founded fear of persecution on the basis of his sexuality."

17. In relation to the appellant's claimed risk of re-trafficking, the judge noted that the Secretary of State had accepted his core claim to have been trafficked into criminality in the UK and had been the victim of sexual abuse. She found, however, that it did not follow that the appellant remained at risk from the organised crime group in question. His claim to owe money to key individuals from the group lacked credibility. His mother and partner had been unaware that any specific threats have been made. In light of the passage of time since the appellant's imprisonment, and the lack of any credible evidence that he had been pursued for the debt, the judge was not satisfied that there was any ongoing threat from the group (para. 52).

18. The judge addressed the risk of re-trafficking generally. She noted that the Dawkins Report concluded that the appellant had been vulnerable to re-trafficking when he had been younger, immediately following his release from prison. But he had moved away from his former criminal associates, changed his number, and had not had any contact with them since his release. The judge noted that the Dawkins Report considered the appellant to be at a reduced risk from the leader of the UK-based gang, but had concluded that he had some general vulnerabilities to re-trafficking due to his fear of being stigmatised and discriminated against due to his sexuality, fears of being economically deprived, and fears of being ostracised from his family in the UK (para. 53). Those observations prefaced the following findings the judge went on to reach, at para. 54:

> "The appellant is now much older and has managed to avoid being re-trafficked in the UK despite finding himself unable to work and

> financially constrained. I find that this is a good indication that he does not present with the same vulnerabilities he had aged 17. I have noted that he is taking medication for depression and anxiety, but accept it is reasonably likely that he will continue to receive his medication which he manages by himself at this time, and therefore will not present with any particular vulnerabilities which will enhance the risks in this regard."

19. At para. 55, the judge found that the appellant's family had always supported him financially and emotionally. He wanted to work and to study. He had avoided being drawn into gang culture. He would enjoy initial financial support from his family upon return to Jamaica, including from his mother who was born in Jamaica, and who had returned for visits. His return would not be complicated by his sexuality, in light of the judge's earlier findings on that issue.

20. Before the judge, the appellant had relied on the de Noronha Report to demonstrate that he would be at risk in Jamaica as a returning deportee. As to that, the judge said at para. 57:

> "Dr de Noronha states that there is a real risk of serious harm to criminal deportees due to perceived notoriety and this increases the risk of being targeted and violent attacks, including murder. There is no supporting evidence that the appellant's offending consisting of two offences for supplying drugs of unknown value some 7 years ago, will be perceived as particularly serious or that he will be identified as notorious."

21. The judge dismissed the appeal on asylum and humanitarian protection grounds and under Articles 2 and 3 ECHR.

22. In relation to Article 8 ECHR (see para. 59ff), the judge took the decision of Judge Grant-Hutchinson as her starting point. Since then, the appellant had become a partner and a parent. It was common ground that the appellant's relationship with S was genuine and subsisting. The judge accepted that he was the father of their daughter; the appellant and S gave consistent evidence that he was an active father. He was involved in childcare, cooking and cleaning. He made decisions about T's life jointly with S. He saw them daily. They occasionally stayed with him at his mother's house (the appellant could not stay with S and T in their supported accommodation). See para. 62:

> "I find there is tangible evidence that he is very much part of her life and intends to be in the future too. I am satisfied that the appellant and his daughter share a close emotional bond and attachment which has been in place since birth."

23. It was common ground that it would be unduly harsh for T to accompany the appellant to Jamaica (para. 63). The issue was whether S and T could remain in the UK in the appellant's absence. The judge directed herself that:

> "the 'unduly harsh' test poses an elevated threshold, beyond mere difficulty or inconvenience, that it denotes something severe or bleak. I have considered whether the effects would be unduly harsh for this particular child."

24. The judge went onto find (at para. 64) that the appellant played a "central role" in S's upbringing, providing care that could not be replaced by modern means of

communication given her "tender age". The "key elements of physical presence" which characterised the relationship would be disrupted if the appellant were removed. S claimed to experience depression (although the judge noted there was no medical evidence), and there would be an indirect impact on T arising form the appellant's removal, because S would no longer benefit from the assistance he provides with bringing their daughter up. The judge concluded para. 64 in these terms:

> "Given that neither parent is working at the moment, I find it is unlikely that [S] will be able to commence visits to Jamaica within a reasonable time, in order to be able counteract the disruption to her daughter's separation from the appellant. In that event, I find that the daughter will suffer from the breaking of the bond that she has forged with her father. On that basis, I find that the impact on his daughter of the appellant being removed will be unduly harsh and therefore am satisfied that the appellant has demonstrated that Exception 2 is met."

25. The judge considered whether there were "very compelling circumstances" for the purposes of section 117C(6) in any event. She ascribed significance to the fact the offences occurred when the appellant was a victim of trafficking (para. 65). The Haque Report had concluded that the appellant presented a low risk of harm to the public, and the Davies Report had reached similar conclusions. The appellant had lived in the UK for around 21 years, albeit not lawfully for most of that time. He had only returned to Jamaica twice, for short holidays, and his ties to the UK were closer than any he had to Jamaica. His daughter with S was only 18 months old, and it was in her best interests for him to remain involved in her upbringing. She would be negatively affected if the appellant is deported; they had a strong bond. Those factors combined to provide "very compelling circumstances" which outweighed the public interest in the appellant's deportation.

26. The judge allowed the appeal.

**Issues on appeal to the Upper Tribunal**

27. The appellant's grounds of appeal to the Upper Tribunal, as amplified by Ms Sanders, may be summarised as follows.

   a. Ground 1: the judge erred in relation to the appellant's vulnerability. While she treated him as vulnerable for the purposes of making reasonable adjustments at the hearing itself (para. 17), she did not take into account the impact of his vulnerability, in particular that arising from his past trauma, on his ability to give consistent and clear evidence.

   b. Ground 2: the judge erred when assessing the appellant's asylum claim based on his sexuality. That included failing to have regard to the Secretary of State's *Asylum Policy Instruction Sexual Orientation in Asylum Claims*, version 6.0, August 2016 ("the API"), despite the appellant having referred to it in his submissions.

   c. Ground 3: the judge erred when assessing the impact of the appellant's status as an accepted victim of trafficking upon his return and overlooked the balance of the expert evidence on this issue.

d. Ground 4: the judge erred when assessing the appellant's humanitarian protection claim by mischaracterising the risk as solely arising from gang-related violence and failing to engage with his multi-faceted vulnerabilities.

28. The Secretary of State's grounds of appeal against the Article 8 findings are listed under the rubric "making a material misdirection of law/failing to give adequate reasons for findings on a material matter". They contend that the judge failed to make the required findings concerning the appellant's level of care for his daughter, did not address why her mother could not continue to care for her, and failed to have regard to, or otherwise apply, the high thresholds for what amounts to "unduly harsh". The judge's reasoning "simply does not establish" that high threshold.

29. The Secretary of State submitted a rule 24 response dated 23 June 2023 in relation to the appellant's grounds of appeal.

## THE APPELLANT'S APPEAL

### Grounds 1 and 2: judge's conclusions concerning the appellant's claimed sexuality open to her

30. It will be convenient to take grounds 1 and 2 together.

31. In my judgment, there is no merit to ground 1. At para. 17, the judge recorded that she would treat the appellant as vulnerable "in accordance with the recommendations of the medical expert". The "medical expert" must have meant the Davies Report, and the judge would have been aware of its "recommendations", as she put it. Indeed, at para. 6.1.3, the report said that the appellant would experience "significant difficulties" recounting his experiences in the formal setting of the court. Ms Sanders submitted that there was no acknowledgement of that aspect of the Davies Report in the judge's operative analysis of all matters relating to the appellant's appeal, thereby failing to calibrate her analysis of his evidence by reference to his accepted vulnerabilities.

32. Properly understood, this criticism of the judge's reasoning is that she did not *additionally* mention and address the appellant's vulnerabilities throughout her reasoning. There was no requirement for her to do so. She was sitting as an expert judge of a specialist tribunal. She can be trusted to have done her job properly. Moreover, the judge did not find against the appellant on the issue of his claimed sexuality exclusively on account of inconsistencies "in the formal setting of the court", which was the focus of the Davies Report's concerns in that respect. The judge assessed the evidence in the round and found that there were features of the appellant's narrative which could reasonably have been expected to be supported by evidence, yet which were not. While she ascribed significance to some of the inconsistencies in the evidence, she did so by reference to the evidence in the round. Accepting that an appellant is vulnerable does not entail glossing over inconsistencies in his evidence. There was no suggestion that the appellant lacked the capacity to give evidence.

33. Ms Sanders submitted that the judge's record of the appellant's evidence concerning when he told S of his sexuality was incorrect. At para. 49, the judge contrasted the appellant's evidence concerning when he told S about his sexuality ("…he said it was a couple of months ago…"), with that of S ("…about a

year ago…”). The grounds of appeal contend that Counsel’s note of the appellant’s evidence was that he in fact said:

> “I think it was – a couple of months ago. Or maybe a year. I don’t know. I am not really good at dates or times sometimes.”

34. Putting to one side (i) the fact that Ms Sanders appeared before me as an advocate and not a witness (as to which, see *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC), headnote (v)) and (ii) the absence of a formal transcript, I consider this submission to be the paradigm example of “island hopping”, as held in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para. 114(iv). See also *Fage* at para. 114(v):

> “The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).”

35. Even if there were a transcript demonstrating that the appellant sought to backpedal on his initial answer in the manner suggested by the grounds of appeal, it is not possible to recreate in this appellate context the atmosphere of the courtroom, and the live evidence given by the appellant. The judge had the benefit of hearing the appellant give evidence before her, and (assuming Counsel’s note is correct) was well placed to make appropriate findings of fact in light of how the evidence unfolded before her. Isolating individual sentences of the oral evidence in the manner attempted by the grounds attempts to duplicate the role of the trial judge, which, according to *Fage v Chobani*, is a largely futile exercise. See para. 114(vi):

> “…even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.”

36. Reading the judge’s decision as a whole, the principal reason the appeal was dismissed rested on the absence of evidence that the appellant had lived as an openly bisexual man in the UK, even taking his case to have done so at its highest. This leads to the second ground of appeal.

37. Expanding on Ground 2, Ms Sanders highlighted the emphasis in the Secretary of State’s API concerning the need to take into account all mitigating reasons why an asylum claim based on an individual’s sexual orientation might feature inconsistencies, or in which a claimant may be unable to provide details of material facts. The guidance emphasises the experiences of shame that those making asylum claims on this basis may encounter, and the impact that recounting painful memories may have on the ostensible credibility of their account. The judge did not take those factors into account in the course of her reasoning, Ms Sanders submitted.

38. This ground is without merit, for the following reasons.

39. First, the API guidance is addressed to the Secretary of State’s officials, not to expert judges of the First-tier Tribunal.

40. Ms Sanders very fairly accepted that distinction during her submissions. Nevertheless, she submitted that the API recognises objective and well-established principles surrounding an individual’s understanding of their sexual orientation, the realities experienced by those making asylum claims on that basis, and the impact of delay, which the judge should have taken into account. They were common points that would affect a person’s ability to talk about their

sexual orientation, Ms Sanders submitted; the judge should have adopted the approach encapsulated by the API in her own analysis whether it originated in the API or elsewhere.

41. In my judgment, it would be inappropriate for a judge of the First-tier Tribunal to apply guidance addressed by the Secretary of State to her officials in the wholesale manner for which Ms Sanders contended. While there may undoubtedly be features of the guidance contained in the API that would correspond with judicial best practice (for example, the need to avoid taking decisions based on stereotypical assumptions: see para. 45 of Chapter 10 of the Equal Treatment Bench Book, and page 31 of the API), there is much in the API that is either of no application to judges of the First-tier Tribunal, or that would be inappropriate to apply, since the API addresses all stages of the asylum process, from the screening interview to the final decision. Considerable care would have to be taken, therefore, by any judge seeking to adopt and apply the approach of the API when considering a claim based on sexual orientation. It will not be an error for a judge not to refer to the API, and the judge in these proceedings did not err by doing so.

42. Secondly, in any event, the appellant did *not* claim in his oral evidence before the judge that he had been unable to manifest his bisexuality in the UK on account of the stigma and shame, fear of rejection in the Jamaican community, or difficulties obtaining a witness statement from a person who fears persecution on account of their association with an LGB person (see para. 41, Chapter 10, ETBB). The appellant's case was that he lived openly as a bisexual man in the UK, and that he would do so in Jamaica, but for the real risk of being persecuted. The appellant relied extensively on his claimed relationship with P in order to provide a key part of the foundation upon which his claim to be bisexual was based, and, according to the judge's summary of his oral evidence at para. 49, he "said that he lives openly". There has been no suggestion that the judge mis-summarised that part of the appellant's evidence, which undoubtedly forms part of the "whole sea of evidence" heard by the judge, in contrast to the present appellate exercise in "island hopping". Much turned, therefore, on whether the appellant was able to make good his claim to have lived openly as a bisexual man in the UK, his country of residence since 2001.

43. The judge was therefore entitled to assess the evidence of the appellant's claimed openness in the UK, including his relationship with P, in order to inform her assessment of his prospective risk. Nothing in the appellant's case in this respect turned on the judge failing to adopt best practice, as it applies to judges, in the examination of claims for international protection based on sexual orientation, and as summarised in the ETBB. The judge's findings of fact concerning the appellant's claimed relationship with P must be assessed primarily by reference to the authorities governing appeals brought against findings of fact. In *Perry v Raleys Solicitors* [2019] UKSC 5, Lady Hale PSC summarised the principles concerning challenges to findings of fact on appeal stating, at para. 52, that the principles:

> "…may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

44. Pausing here, Ms Sanders did not attempt to resile from the appellant's oral evidence concerning his claim to have lived openly as a bisexual man in the UK, for example by submitting that that part of his testimony was clouded by his vulnerabilities and difficulties in giving evidence. Instead, she criticised the judge's failure to define what she meant by "openly". In my judgment, there was no need for the judge to place a gloss on this everyday term which should attract its normal, everyday meaning. The appellant had used it in his evidence. It is well established in the authorities. The judge was entitled to use the term without further elaboration.

45. Returning to the substance of this ground, appellant's evidence concerning why he had been unable to secure P's assistance with the appeal proceedings was *not* that his feelings of shame and fear of stigma prevented him from doing so. There was no suggestion that P himself feared persecution on account of his association with the appellant (c.f. para. 41, Chapter 10, ETBB). It was simply that they had drifted apart. There was, as judge noted at para. 48, no suggestion that they had parted on bad terms. The appellant's written evidence had been that his relationship with P began with an exchange of messages (see para. 10 of his witness statement). The judge's concerns that there were no messages from, or with, P were reasons that any reasonable judge would have been entitled to rely upon. Further, there was no evidence from the appellant concerning any attempts he had made to recontact P for the purposes of securing his assistance in the appeal. Those were all reasons that the judge was entitled to rely on at that part of her analysis; by no means could it be said that the judge there reached findings "that no reasonable judge could have reached." On the contrary, the judge was entitled to conclude that there was no evidence the appellant had lived openly as a bisexual man in the UK for the reasons that she gave.

46. Finally, Ms Sanders submitted that the approach of the judge to the appellant's late claim to be bisexual was inconsistent with that of the Court of Justice of the European Union in *A, B and C v Staatssecretaris van Veiligheid en Justitie* C-148/13 to C-150/13. The operative reasoning in that case was that:

> "Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility **merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution**." (Emphasis added)

47. I reject this submission. The judge did not reject the appellant's claim to be bisexual "merely" because of the delay in making the claim. The judge considered all factors, in the round. Delay was one factor, but not the only factor. The judge's approach was entirely consistent with para. 70 of the CJEU's judgment, from which the operative reasoning quoted above was derived. Paras 70 and 71 emphasised the need to conduct an individual assessment of an asylum claim, taking account of the individual position and personal circumstances of each applicant. Nothing in *A, B and C* is authority for the proposition that delay may never play a part in claims for international protection based on the claimant's sexual orientation. Indeed, to the extent that the appellant contends that the judge should have adopted the approach in the API, it emphases the qualifier "merely" that features in the CJEU's judgment and

provides that delay may be relevant as one factor among others, as it did in the judge's findings of fact below: see page 35.

48. The above findings legitimately provided the foundation for the judge's forward-looking risk assessment concerning the appellant's prospective return to Jamaica, at para. 51, consistent with the approach in *HJ (Iran)* [2010] UKSC 31 at para. 35. Since, on the judge's legitimate findings of fact, the appellant had not lived an openly bisexual lifestyle in the UK, the judge was entitled to conclude that he was not at real risk of having to suppress his claimed bisexuality in Jamaica in order to avoid being persecuted. That was the key finding that underpinned the judge's approach to the appellant's protection claim based on his sexual orientation. It was a finding the judge had been entitled to reach.

**Grounds 3 and 4: the judge's analysis of the expert evidence open to her**

49. Grounds 3 and 4 challenge the judge's findings concerning the appellant's prospective reception in Jamaica. They contend that she failed to take into account relevant considerations in the expert reports and gave insufficient reasons.

50. These grounds are disagreements of fact and weight, for the following reasons.

a. Ms Sanders submitted that the judge failed to engage with the Davies Report's conclusions at paras 7.5 and 7.6 that the appellant's mental health would deteriorate upon his return. The judge considered the appellant's prospective mental health upon his return at para. 54; he currently takes medication and would be able to continue to do so in Jamaica, she found. This ground is a disagreement of fact and weight.

b. Ms Sanders submitted that the de Noronha Report concluded (at para. 15) that the appellant would be a vulnerable deportee upon his return and would be at risk of exploitation. The judge dealt with this from para. 54 onwards; the appellant had managed to avoid being re-trafficked in the UK. He would enjoy financial support from his family in Jamaica, at least initially. They would help him to find accommodation. Whereas the de Noronha Report cited examples of high profile returnees who suffer due to their perceived notoriety, the judge observed that the appellant had two convictions dating back seven years; he would not be identified as notorious upon his return. This ground is a disagreement of fact and weight. See also the analysis below in relation to ground 4.

c. Ms Sanders submitted that the US Department of State's 2021 reporting concerning trafficking in Jamaica demonstrated that the appellant would, in fact, be trafficked. This is a further disagreement of fact and weight. The judge engaged in an overall assessment of the appellant's circumstances. She was well aware of the length of his residence in the UK. This ground is a disagreement of fact and weight.

51. Expanding on ground 4, Ms Sanders submitted that the judge failed to engage with, or misunderstood, the de Noronha Report's conclusions (at para. 8) that the appellant would be perceived as a deportee, regardless of his personal notoriety. The relevant extract states:

> "The relevant point here is that [TT] will be very visible, stigmatised, and therefore vulnerable to crime, in a country more generally defined by high levels of violent crime. [TT] has lived in the UK since

> he was 5 years old, and he will be instantly identifiable as a 'deportee'. He has not lived in Jamaica since 2001, and even if he still speaks patois, the language and idioms have changed. Without close family support, people will ask questions about who he is, where has been, and where his family are. Once his status as a deported person is made apparent, he will likely face stigmatisation and be vulnerable to extortion and other forms of exploitation. All research on deportation in Jamaica has identified these themes of stigma and the increased risk of becoming a victim of crime… This should be considered alongside [TT's] fears of gang reprisals."

52. The extract of the de Noronha Report relied upon by Ms Sanders featured in the section entitled "Family and social support". The judge dealt with that issue at para. 55 when finding that the appellant would benefit from financial support from his mother, at least initially, having observed that the appellant's mother had been born in Jamaica, and had visited in the past. Those findings must be read in light of the judge's earlier findings that the appellant had managed to avoid being re-trafficked in the UK, and that he did not present with the same vulnerabilities as he did when he was aged 17.

53. The judge's findings on the de Noronha Report were at para. 57:

> "Dr de Noronha states that there is a real risk of serious harm to criminal deportees due to perceived notoriety and this increases the risk of being targeted and violent attacks, including murder. There is no supporting evidence that the appellant's offending consisting of two offences for supplying drugs of unknown value some 7 years ago, will be perceived as particularly serious or that he will be identified as notorious."

54. That finding was entirely consistent with the de Noronha Report itself, when read as a whole. Para. 8 should not be read in isolation; see, for example, para. 14 of the report, which states:

> "…it remains unclear whether Mr Thompson will necessarily be targeted on his return to Jamaica. With the available evidence before me, it is impossible to speak with certainty. Mr Thompson's knowledge of the relevant gangs, their whereabouts, or the individuals who might target him remains lacking."

55. It follows that this ground is a further exercise in island hopping; it relies on taking an extract of the de Noronha Report out of context whole ignoring other parts of the report. It ignores the pre-eminent role performed by the judge in assessing the entirety of the evidence in the case.

56. Ground 4 is without merit.

57. The appellant's appeal against the refusal of his protection claim is dismissed.

**THE SECRETARY OF STATE'S APPEAL**

58. Expanding on the grounds of appeal, Ms Ahmed submitted that the judge misdirected herself concerning what amounts to "unduly harsh" and failed to give adequate reasons for allowing the appeal on Article 8 grounds.

59. In my judgment, the Secretary of State's appeal is a disagreement with the judge's decision. Neither the grounds, nor (with respect) Ms Ahmed's submissions, demonstrate the presence of an error of law.

60. First, the judge directed herself at considerable length concerning the meaning of "unduly harsh": see paras 42 to 46. In those paragraphs, which extend to five pages, the judge directed herself extensively concerning the applicable legal framework. The Secretary of State's grounds of appeal do not criticise that aspect of her self-direction. Moreover, in the course of her operative analysis, at para. 63, the judge recalled the essential legal test which lies at the heart of the statutory "unduly harsh" threshold:

> "I have reminded myself that [the] 'unduly harsh' test poses an elevated threshold, beyond mere difficulty or inconvenience, that it denotes something severe or bleak. I have considered whether the effects would be unduly harsh for this particular child."

61. There is simply no merit to the submission that the judge failed properly to direct herself concerning the meaning of "unduly harsh".

62. The judge gave sufficient reasons for her findings. She explained, at para. 62, that the appellant was closely involved in the practical arrangements for bringing his daughter. He sees her daily, although he is not able to live with her and S due to the rules of the sheltered accommodation where S currently lives. The judge accepted the evidence given by S in that respect. The judge also found in the same paragraph that the appellant and his daughter shared a close emotional bond and attachment, which had been in place since her birth. She found at para. 64 that the appellant performed a "central role" in the upbringing of his daughter, and that the care he provides for her could not be replicated by modern means of contact "given her tender age." Were the appellant to be removed, the judge found, that relationship would be disrupted "in its key elements of physical presence and contact she has with him on a daily basis." The judge additionally found, because that the support provided by the appellant to S would not be available in the event of his deportation, there would be additional, indirect, consequences for the child. Since S was not working, the judge found, it would be unlikely that she would be able to travel to visit the appellant in Jamaica, in order to counteract the impact of the separation. That would, in turn, mean that "the daughter will suffer from the breaking of the bond she has forged with her father."

63. The Supreme Court has clarified that there is no notional comparator child, against which the "due" harshness arising from the public interest in the deportation of foreign criminals can be assessed: *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22. In my judgment, those findings were properly open to the judge on the basis of the evidence before her. Moreover, the reasons given by the judge enable the Secretary of State to understand why the judge reached that conclusion; they were sufficient. The Secretary of State's true objection is that she dislikes the outcome of the appeal, and so disagrees with it. That is not an error of law. It is a disagreement.

64. I therefore dismiss the Secretary of State's appeal.

## CONCLUSION

65. I dismiss both appeals.

## <u>Notice of Decision</u>

The decision of Judge Karbani did not involve the making of an error of law such that it must be set aside.
The appeal of the appellant against the refusal of his protection appeal is dismissed.
The appeal of the Secretary of State against the refusal of the Article 8 appeal is also dismissed.

**Stephen H Smith**
Judge of the Upper Tribunal
Immigration and Asylum Chamber
**15 September 2023**