Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA120342015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 25 April 2017	**On 4 May 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

M I A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Neale instructed by Migrant Legal Project (Cardiff)
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Nigeria who was born on [ ] 1989.

3. He came to the UK in 2010 – the precise date is not clear. He had previously been issued with a student visa valid until 10 September 2010. The appellant overstayed. Between 2011 and 2014, the appellant was convicted of a number of offences including using a false identity, shoplifting and possession of a knife or a bladed article in a public place. In relation to the latter, the appellant was sentenced to eight months' imprisonment at the Isleworth Crown Court on 11 April 2014.

4. On 8 July 2014, the appellant was notified that he was liable to be removed as an overstayer. On 6 August 2014, he applied to return to Nigeria under the Facilitated Return Scheme which was approved on 13 August 2014. He subsequently did not return. On 10 August 2014, the appellant was released from his custodial sentence but was detained under immigration powers. Directions for his removal to Nigeria were set for 26 August 2014 but were subsequently cancelled. Those directions were reset for removal on 23 September 2014.

5. On 19 September 2014, the appellant claimed asylum. The basis of the appellant's claim was, at that time, that he was at risk on return to Nigeria because he is a gay man and because he is a Christian.

6. On 15 March 2015, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and under the European Convention on Human Rights.

7. On 17 March 2015, the Secretary of State made a decision to remove the appellant to Nigeria as an overstayer.

The Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal. By this time, it was clear that the appellant suffered from mental health problems, in particular that he suffered from paranoid schizophrenia. The appellant was unable to conduct the litigation and a litigation friend was appointed. The appellant was represented by Counsel.

9. Judge Rolt dismissed the appellant's appeal on all grounds.

10. Before Judge Rolt, Mr Neale who represented the appellant (as he did before me) accepted that the appellant could not succeed on the basis of being a Christian as he could safely relocate within Nigeria.

11. Judge Rolt did not accept that the appellant was a gay man and so would be at risk on that basis on return to Nigeria.

12. In addition, the appellant contended before Judge Rolt that his return to Nigeria would, because of his mental illness, result in him being homeless and destitute and likely to engage in aggressive or bizarre behaviour such that he would commit criminal offences and be imprisoned in conditions which would breach Art 3 of the ECHR. The appellant also contended that

he formed part of a particular social group (PSG) as a result of being mentally ill and would face persecution on that basis.

13. Judge Rolt did not accept that the appellant would be unable to obtain treatment for his mental illness and would become homeless, destitute and commit offences that would result in his imprisonment in conditions breaching Art 3.

14. Further, Judge Rolt did not accept that the appellant was a member of a PSG based upon his mental illness.

The Appeal to the Upper Tribunal

15. The appellant sought permission to appeal to the Upper Tribunal on three grounds. First, the judge had erred in law by failing properly to consider the circumstances the appellant would face on return to Nigeria including whether treatment would be available to him and whether he would comply with any treatment such that he would not be at risk under Art 3. Secondly, the judge had been wrong to find that the appellant was not part of a PSG as his mental illness was an "immutable characteristic" and there was evidence before the judge that mentally ill people in Nigeria suffer stigma and discrimination. Thirdly, the judge had erred in reaching his adverse finding in respect of the appellant's sexuality.

16. Permission was initially refused by the First-tier Tribunal but on 20 September 2016 the Upper Tribunal (UTJ McWilliam) granted the appellant permission to appeal.

17. On 3 November 2015, the Secretary of State filed a rule 24 notice seeking to uphold the judge's findings and decision.

Discussion

18. At the hearing before me, the appellant was again represented by a litigation friend who instructed Mr Neale.

Ground 1

19. Ground 1 seeks to challenge the judge's reasoning and finding at paras 68-72 where the judge rejected the appellant's claim that on return to Nigeria there was a real risk of a breach of Art 3. The judge's reasons were as follows:

> "68. Mr Neale further contends that the Appellant should be granted Humanitarian Protection on the basis that the Appellant faces the real risk of serious harm and of conditions breaching Article 3, because the Appellant would be homeless and destitute on return, would likely engage in aggressive and/or bizarre behaviours as an un-medicated person with mental health problems and suffering from paranoid schizophrenia. He contends that the Appellant would commit criminal offences and would be imprisoned in conditions that would breach Article 3.

> 69. Mr. Neale refers me to various documents as set out in his skeleton argument. I have considered this information and I note that the provision for people with mental health problems is limited in Nigeria.
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> 70. The standard that I have to consider in regard to the Article 3 threshold is a high one and is set out in paragraphs 22 and 23 above.
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> 71. The Appellant is clearly capable of being resourceful. He managed to travel to the UK, he has supported himself here and used false identity and he has some education. The medical records suggest that when taking medication his health is more stable. I do not accept that the Appellant's medical condition reaches the high Article 3 threshold. I find that Mr. Neale's speculation that the Appellant would be one of the 10% who do not get treatment and that as a result he would be homeless, get into trouble, get arrested and convicted of an unknown offence and sent to jail is a step too far.
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> 72. Notwithstanding that I accept that the Appellant is suffering from mental health problems I do not consider that he faces a real risk of serious harm and of conditions in breach of Article 3. The claim for Humanitarian Protection is refused."

20. Mr Neale accepted that the appellant's claim was not put on the basis that the absence of treatment created a breach of Art 3 applying the high threshold in D v UK (1997) 24 EHRR 423 and subsequent case law. The claim was, Mr Neale contended, based upon the impact of the appellant's mental health in Nigeria which would result in aggressive and behavioural problems with a resulting risk of imprisonment in conditions in breach of Art 3.

21. Mr Neale submitted that in para 71 of his determination, the judge had fallen into error.

22. First, the judge failed to explain the basis upon which he concluded that the appellant's health was "more stable" when he was taking medication. Mr Neale referred me to Dr Alison Battersby's report where she identified that he was suffering from paranoid schizophrenia and was experiencing consequential paranoid delusion and formal thought disorder even though the appellant claimed that he was taking his medication. Dr Battersby also noted that the appellant lacked insight and considered that there was a conspiracy against him. Mr Neale submitted that on the basis of Dr Battersby's report the judge could not properly conclude that the appellant was "more stable" on medication. Mr Neale submitted that the judge's reference to the "medical records" also did not sustain his finding. He took me to a number of medical records at A14, A27, A28 and A22 where it was variously noted that the appellant was taking anti-psychotic drugs but indicated that he was "going to kill", stated to "appear quite manic today" and appeared "manic and pressured speech". Mr Neale also pointed out that the appellant had threatened to kill everyone in his previous solicitor's office (which was why they no longer represented him) and had caused damage in his NASS accommodation and subsequent to the interview he had committed further offences.

23. Mr Neale submitted that the evidence either showed that the appellant was not "more stable" when taking his medication or, because of non-compliance despite claiming he was taking the medication, the medication was not effective. The judge had failed to properly grapple with this evidence in his brief reasoning at para 71.

24. Secondly, Mr Neale submitted that the judge had made a mistake in the final sentence in para 71 when he had stated that only "10%" of those requiring treatment for mental health did not receive such treatment in Nigeria. Mr Neale submitted that this was a misreading of the evidence set out at page CB40 of the bundle which stated that:

> "It had been estimated that at least, about 90 per cent of people with clear cut mental health syndromes do not even get any treatment at all in Nigeria." (emphasis added)

25. Mr Kotas, on behalf of the respondent accepted that the appellant suffered from mental illness, namely paranoid schizophrenia. He nevertheless submitted that the judge had been entitled to find at para 71 that there were not reasonable ground to believe that the appellant would be at risk of treatment contrary to Art 3 on return to Nigeria. Mr Kotas submitted that the psychiatric report by Dr Battersby did not say, in effect, that the implications for the appellant of his mental illness if returned to Nigeria were that there would be a breach of Art 3.

26. I accept Mr Neale's submissions on this point. The judge's reasoning in paras 71 and 72 is brief. It is clear, and Mr Kotas did not contend otherwise, that the judge misquoted or misunderstood the evidence at page CB40 of the bundle when he stated that only 10% of those requiring treatment for mental illness did not receive it. The figure given in the evidence, as Mr Neale contended, is that 90% of people did not receive treatment. That was a clear mistake by the judge which, given the brevity of his reasons, formed a significant part thereof.

27. Further, I accept Mr Neale's submission that the judge's reasoning is, even apart from that mistake, inadequate. It is far from clear to me upon what basis the judge found that the appellant was "more stable" when taking medication. That does not appear to be borne out by the evidence of Dr Battersby as to the appellant's presentation if he were, as he claimed, taking his prescribed medication. If he were taking his medication as he claimed, the judge failed to take into account the evidence of the appellant's bizarre and aggressive behaviour even on medication, including damage to his accommodation and further offending. Those matters were highly relevant to the appellant's likely behaviour on return to Nigeria even if he were to receive medication. I accept Mr Neale's submission that the judge failed to consider the alternate scenario which is that, even if treatment were prescribed, the appellant, on the evidence, remains delusional and does not accept that he is ill. The judge does not deal with the issue of whether he would comply with any treatment regime and the consequences for him and his mental health if he did not.

28. In short, therefore, the judge failed, in his brief reasons in paras 71-72, to properly consider all the evidence concerning the appellant's mental health on return to Nigeria and, as a result, whether that would result in him becoming homeless and destitute and liable to conviction and, it is claimed, imprisonment in circumstances in breach of Art 3 given his mental illness.

29. Mr Kotas did not address me on the circumstances that would face the appellant if he were convicted and I express no view upon the material to which Mr Neale made reference in his skeleton argument other than to say that it raises an issue whether those circumstances would amount to a breach of Art 3.

30. For these reasons, ground 1 is made out.

Ground 2

31. Ground 2 relates to whether the appellant could, if the appellant were at risk of persecution, form part of a PSG.

32. Mr Kotas pointed out that the issue of whether the appellant could succeed under the Refugee Convention as a member of a PSG was not raised in Mr Neale's skeleton argument before the judge. That might explain why the judge's reasoning in para 66 was relatively brief and, he submitted, adequate. However, it is clear that Mr Neale did rely on the appellant falling within a PSG in his oral submissions. The judge's reasoning is at para 66 as follows:

> "66. The leading case in regard to membership of a PSG is Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v. [1999] UKHL 20 which found that women can be a PSG. However, I do not agree that 'mentally ill people' can be a PSG. I can find no authority to support such a claim and Mr. Neale provided none. In my opinion 'mental illness' is far too wide a concept for the 'members' of the group to have a cohesion or even to share a similar immutable characteristic. You might as will say that 'physical illness' is a PSG or even 'illness' being a wide PSG combining both physical and mental."

33. As can be seen, Judge Rolt concluded that the appellant could not be a member of a PSG because the group was "too wide" to have "a cohesion or even to share a similar immutable characteristic".

34. Mr Neale relied upon the definition of a PSG in Art 10(1)(d) of the Qualification Directive (Council Directive 2004/83/EC) which provides as follows:

> "(d) a group shall be considered to form a particular social group where in particular:
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> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a

> characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
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> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; ..."

35. Mr Neale submitted that there was no need for "cohesiveness" between the individual to form a PSG following Shah and Islam [1999] UKHL 20. Further, the appellant satisfied the first indent of Art 10(1)(d) as "mental illness" was clearly an innate characteristic which the individual had no power to change. Further, as regards the second indent Mr Neale submitted that there was evidence before the judge (which he set out in para 12 of his skeleton argument) to demonstrate that the mentally ill are perceived as a distinct group within Nigeria and discriminated against because of their illness.

36. Article 10(1)(d) appears, on its face, to set out two cumulative requirements to establish a PSG. First, the group must share an innate characteristic or background that cannot be changed or share a characteristic or belief that is so fundamental to their identity or conscience that they should not be forced to renounce it. Secondly, that group has to have a distinct identity in the relevant country because it is perceived to be different by the society in that country.

37. Clearly if both are satisfied then the group will be a PSG. However, in SSHD v K: Fornah v SSHD [2006] UKHL 46, the House of Lords doubted whether both criteria need be satisfied in order to establish a PSG (see Lord Bingham at [16]; Lord Hope at [46]; and Lord Brown at [118]). The second indent may identify an alternative basis upon which a PSG may be established in a particular country. The House of Lords left the point undecided although it is pretty clear they favoured a broad approach to the concept of a PSG.

38. Whichever approach is correct, and the views in the House of Lords remain highly persuasive, the judge was clearly wrong to require an element of "cohesion" in order for a PSG to be established. Again, the existence of cohesion may assist to establish a group but it is not a necessary requirement of any such group (see, Shah and Islam *per* Lord Steyn at pages 292-293). The judge was, therefore, wrong to seek out "cohesion" in order to establish a PSG.

39. I did not hear detailed arguments on Art 10(1)(d) of the Qualification Directive and its interpretation by the House of Lords in K and Fornah. If the requirements of Art 10(1)(d) are not cumulative, I see considerable merit in Mr Neale's submission that "mental illness" is an innate or immutable characteristic which was not within the appellant's power to change albeit that treatment could alleviate the symptoms. It was not suggested before me that the appellant's paranoid schizophrenia could be cured. Equally, there was at least some evidence before the judge that individuals with mental illness or disability are subject to stigma and discrimination and potentially, at least, perceived as being different in

Nigerian society. The evidence as regards the latter was not explored before me although in para 12 of his skeleton, Mr Neale referred to evidence which, he submitted, established the second indent in Art 10(1)(d).

40. It seems to me that the judge's adverse finding in relation to whether the appellant was a member of a PSG cannot stand. To the extent that his reasoning is based upon the absence of any "cohesion" between members of the group – defined as the "mentally ill" – that reasoning was impermissible. To the extent that the judge's reasoning was based upon the absence of an "immutable characteristic", I am satisfied that "mental illness" is an immutable or in a characteristic which, in the case of paranoid schizophrenia, is beyond the appellant's ability to change. That, on the basis of the approach of the House of Lords in K and Fornah, is in itself sufficient to amount to a PSG. In any event, if the two requirements in Art 10(1)(d) of the Qualification Directive are cumulative or, on the basis that the 'societal perception' category is a distinct basis upon which to establish a PSG, the judge failed to consider the evidence relating to that which at least raised a serious issue on the basis of the background material in relation to Nigeria.

41. It will be a matter for the Tribunal remaking the decision to determine whether the appellant can succeed on asylum grounds on the basis that he is a member of a PSG.

Ground 3

42. Ground 3 challenges the judge's adverse factual finding that the appellant had not established that he is gay and therefore at risk on return to Nigeria. The judge's reasoning is at paras 54-57 as follows:

> "54. The Appellant claims that he became aware of his sexuality between the age of 11 and 14. I do not consider that he claimed to have been aware at the age of 4 as suggested by Mrs. Arnesen. It is my interpretation that he was claiming that looking back at his life he noticed a difference as early as when he was 4. He states that he had one relationship in Nigeria and told Dr Battersby he had one in the UK to an unnamed man. At the asylum interview he claimed to have had no relationship in the UK. It appears that the statement was correct at the time and the relationship occurred after the interview. I find the Appellant's statement to Dr Battersby as to how to recognise a person's sexuality as strange and to demonstrate a lack of understanding. The claim is if anything a stereotypical view. Dr Battersby clearly has taken a view as to his sexuality but her role was to assess his mental health.
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> 55. The Appellant has been in the UK over 4 years. He has been in and out of prison and must have been working to support himself whilst in the UK. He clearly had contacts in the UK and was able to obtain and use a false identity. He would have been exposed to social media. It is possible to live an open gay lifestyle in the UK. I do not find his statement that a relationship would not be possible as he is an asylum seeker credible. There were several years before he made his claim when he was not seeking asylum. He had agreed to return to Nigeria before changing his mind. He has failed to give any detailed account of

> a life in the UK as a gay man since coming here in 2010. The Appellant has provided no supporting evidence in regard to any same-sex relationship in the UK. He does not appear to have a social media presence. If he is gay he is not appear to be living openly as such.
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> 56. Having considered all the evidence in the round I do not find the Appellant credible in regard to his stated sexuality. I consider that he has not established that he is gay, even on the basis of the lower standard of proof.
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> 57. Therefore I find that his application cannot succeed on any ground on the basis of his sexuality."

43. Mr Neale made essentially two submissions in respect of the judge's reasoning. First, it was not open to the judge to, in effect, find it implausible that a gay man would state that he could recognise if someone was gay by reference to their dress, handbag and speech (see the evidence set out at para 46 of the determination). Mr Neale submitted that there was no evidence to support the assumption that the appellant coming from a different culture would not self-perceive in this way. Secondly, Mr Neale submitted that it was wrong for the judge to take into account that the appellant had not had any same-sex relationships in the UK and to infer that, as a consequence, he was not gay. Mr Neale pointed out that the appellant had been mentally ill and homeless and, in any event, his evidence before the judge was that he had had such a relationship with a man whilst he was in the NASS accommodation. That was referred to by the judge in para 54 and, it would appear, the judge had forgotten that when stating in para 55 that he had not had any relationships in the UK.

44. Mr Kotas submitted that the judge had been entitled to take into account that there was no supporting evidence of same-sex relationships in the UK. The judge had adopted a very balanced approach recognising that there was no inconsistency in the appellant's evidence about a relationship in the UK as it had occurred subsequent to his asylum interview but had by the time he had been seen by Dr Battersby.

45. I accept Mr Neale's submissions. Even if the judge were entitled to take into account that the appellant had not had any same-sex relationships in the UK, the appellant's evidence was that he had had such a relationship and, although not supported by any other evidence, the judge does not make a finding that he does not accept the appellant's evidence. Further, whilst the plausibility of an appellant's account, or an aspect of it, can be relevant in assessing the veracity of a claim, caution must be exercised by a fact-finder particularly where the reasoning may reflect a cultural-specific assumption (see HK (Sierra Leone) v SSHD [2006] EWCA Civ 1037). In my judgment, the judge's reasoning at para 54 falls into that category where caution is required. The judge refers to no evidence to support the assumption that however "strange" or demonstrating a "lack of understanding", the appellant's understanding of how he self-perceived as a gay man was implausible given that he came from a different cultural background in Nigeria.

46. Whilst the appellant's claim to be a gay man undoubtedly, on the evidence before the judge, presented him with difficulties in establishing his claim, nevertheless I am satisfied that the judge's adverse finding is flawed and I cannot be confident that inevitably the finding would have been the same.

47. For all these reasons, the judge erred in law in dismissing the appellant's appeal on asylum and humanitarian protection grounds and under Art 3 of the ECHR.

Decision

48. Thus, the decision of the First-tier Tribunal involved the making of an error of law. That decision is set aside.

49. Mr Neale invited me to remit the appeal to the First-tier Tribunal and Mr Kotas invited me to retain it and remake the decision in the Upper Tribunal. Given the nature and extent of fact-finding required, applying para 7.2 of the Senior President's Practice Statement, the appropriate direction is to remit the appeal to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Rolt.

Signed

A Grubb
Judge of the Upper Tribunal

Dated 3 May 2017