Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03688/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 19 October 2018	**On 5 November 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

DOUGLAS MAYOMBWE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Holmes, Counsel instructed by Greater Manchester Immigration Aid Unit
For the Respondent: Mr A Bates, Home Office Presenting Officer

DECISION AND REASONS

1. In response to a decision made by the respondent on 1 March 2018 refusing his protection claim the appellant, a national of Uganda, appealed to the First-tier Tribunal. In a decision sent on 1 May 2018, Judge Davies of that Tribunal dismissed his appeal. Like the respondent the judge did not accept that the appellant had given a credible account of being gay and being at risk on return to Uganda for that reason.

2. The grounds mount a four-pronged attack on the judge's decision contending that he erred in: (1) his treatment of the supporting witness evidence in the case by failing to consider it in the round; (2) in his consideration of the content of the evidence given by supporting witnesses whose evidence was not challenged by the respondent; (3) in conflating the concept of sexuality with sexual activity, and (4) failing to give

adequate reasons for all his findings. I record my gratitude to the representatives for their excellent submissions:-

3. Ground 1 is right at the level of principle to identify that "[i]t is an error of approach to come to a negative assessment of credibility and then ask whether that assessment is displaced by other material" (**AM (Afghanistan)** [2017] EWCA Civ 1123). That is binding authority on me. However, I do not accept that the judge committed this error. The principal paragraph in which the judge is said to have gone wrong is paragraph 44:

> "44. The sole issue in the case was whether the Appellant is gay. The burden of proof is on the Appellant to the lower standard. There are significant credibility issues arising from the inconsistency of his account, including the delay in claiming asylum despite that being the stated purpose of his travel to the UK. The Appellant has produced supporting witness evidence including some oral evidence. Even taking account of the lower standard, I am not able to find that the corroborative evidence produced offsets the damage to the Appellant's credibility caused by his own accounts at different times. I have had no evidence, even a letter, from an ex-boyfriend in the UK."

But in the penultimate sentence the judge does not say he has already reached a negative assessment of credibility but only that the damage done to his credibility by shortcomings identified earlier (which included that it was "riddled with inconsistencies" (paragraph 34) and contained "numerous discrepancies" (see paragraph 35)) could not be offset by the corroborative evidence. That language is consistent with what he undertook to do in paragraph 10, namely "take account of a variety of disparate pieces of evidence" and also in paragraph 18: "I took account of all the evidence". That is to say that in my judgement the language used in paragraph 44 reflects, a proper balancing of considerations and the fact that the judge found the negative pull of the other shortcomings in the appellant's account too strong to be overcome or be "counter-weight[ed]" (to use the judge's term in paragraph 36) by the corroborative evidence.

4. As regards (2), it is correct that the respondent did not in terms challenge the evidence of the supporting witnesses and it is also correct that some of this evidence did not rely on what the appellant had told the witnesses but on their own direct observations of the appellant. However, the reasons why the judge rejected the corroborative evidence were not based solely on his assessment that they relied solely on what the appellant told them but on:

   (i) failure to attend and be cross-examined (paragraphs 38 and 39 regarding E Kiyemba's letter and S Comley's letter of support);

   (ii) lack of specificity (paragraph 40 from P Judge);

   (iii) lack of reasons given for the witness's assessment that the appellant was gay (paragraph 41, P Judge);

   (iv) the likelihood in light of the evidence as a whole, which the witness did not have the benefit of, that the witness relied too much on what the appellant told him (paragraph 42, Mr Jones).

I consider these reasons for attaching only limited weight to the corroborative evidence were within the range of reasonable response, even in relation to the evidence of Ms Jones. On the latter's own evidence, it was an important feature of his own assessment that the appellant was gay that the appellant had told him about two relationships. It was open to the judge to find at paragraph 45 that this evidence also reflected a somewhat stereotypical view of how gay people behave.

5. Ground 3 is right to draw attention to decision-makers understanding that sexual orientation is essentially about sexual identity rather than sexual activity, that is something highlighted both by the Home Office API on "Sexual orientation and asylum claims" and by the UKSC in **HJ (Iran)** and the CJEU in **A, B and C**. However, I do not consider that the judge conflated the two. Certainly, the judge did pay particular attention to the appellant's claims about sexual relationships when he was a boy and subsequently; but that was because that these formed a major part of the appellant's own claim to be of gay sexual orientation. The judge clearly understood that the appellant's claim to be gay also encompassed matters of a non-sexual nature such as the appellant's feelings (paragraph 21), who he felt attracted to (paragraph 22); and his experience of dancing (paragraphs 22, 26). Furthermore, the judge recognised that the fact that the appellant had a sexual relationship did not necessarily mean he identified as gay (see paragraphs 24-25).

6. With respect I find ground 4 a mere makeweight. The point the judge made in paragraph 31 was that he could not see why the appellant's employer would pay for a visa application for another country "if the Appellant was thought to be attending a legitimate business conference". The fact that it is common place that employers use agents does not mean that the judge erred in finding it surprising in this case, particularly given that the application contained untruths and the appellant had not established the employer was ignorant of this. In any event, it simply cannot be said that the judge's assessment of this matter had any material bearing on the outcome of his assessment of credibility

Notice of Decision

7. For the above reasons I conclude that the FtT judge did not materially err in law and accordingly his decision must stand.

8. No anonymity direction is made.

Signed

H H Storey

Date: 25 October 2018

Dr H H Storey
Judge of the Upper Tribunal