



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05844/2017

THE IMMIGRATION ACTS

Heard at Field House
On 31 July 2018

Decision & Reasons Promulgated
On 12 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

OO
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: No appearance
For the Respondent: Mr S Kandola (Home Office Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of OO, a citizen of Nigeria born 22 June 1987, against the decision of the First-tier Tribunal of 12 January 2018 dismissing her appeal on asylum grounds, itself brought against the refusal of her asylum claim on 9 June 2017.
2. The immigration history supplied by the Secretary of State was that she arrived in the UK as a student on 6 January 2010, her leave being extended to 3 February

2014. She was encountered during enforcement activity and detained on 4 May 2017. She claimed asylum on 15 May 2017.

3. Her asylum claim, which I summarise from the evidence set out in the decision below, was based on her gender preference. She was gay. This first caused her difficulties at home when she was caught kissing a girlfriend, OT, during a sleepover at her family home. Her family took objection to this, and she was beaten by her uncle and his wife, and subjected to a "deliverance" session by her uncle at church. Her father sent her to the UK to avoid further violence.
4. In the UK she had had a couple of relationships until the death of her parents in a car crash in February 2013 caused her to completely shut down emotionally. She had registered with some dating websites, though she was vague as to the LGBT websites and magazines she had viewed. Most of her friends were from the Nigerian community and she had hidden her sexuality from them. There was strong disapproval of gay relationships within that society and she feared being reported and arrested under Nigerian law. She was scared of coming out: "I read the bible, I go to church, one leg in one leg out". She would hide her sexuality on a return to Nigeria. The last time she had spoken to her father he had told her not to pursue her sexuality.
5. She also feared persecution for political reasons having been on two pro-Biafra demonstrations before 2013 whilst in the UK.
6. When arrested, a Minute Sheet from 4 May 2017 recorded that she had stated she had a British boyfriend and lived in his accommodation.
7. A Rule 35 report from Yarl's Wood immigration removal centre recorded that the scars she bore on her anterior abdomen were in keeping with severe trauma with different objects, and thus consistent with her having suffered a severe and random battering at some time in the past.
8. Her asylum application was refused by the Secretary of State as her account was not accepted as credible, given the internal inconsistencies combined with her delay in claiming asylum.
9. Her aunt Mrs A gave evidence before the First-tier Tribunal, saying she had been contacted by the Appellant's mother before she arrived here and asked to look after her, following a scandal back in Nigeria. The Appellant had told her she had been beaten but Mrs A had preferred not to look into this for herself. Family members had stopped speaking to her since she had taken the Appellant in. The Appellant's family would not support her if she returned to Nigeria.
10. The First-tier Tribunal noted that the Home Office Country Information and Guidance on Nigeria from March 2015 which indicated that same sex relationships were criminalised, that homophobic attitudes were widely held, that there would

be unlikely to be a sufficiency of protection against a real risk of serious harm, and that internal relocation would not be possible if a person feared the state, but societal actors might be avoided by moving elsewhere to parts of Lagos and Abuna where homophobia was less pronounced. Internal relocation would not be reasonable if it required a person to conceal their sexual orientation.

11. The Tribunal had some concerns as to the Appellant's credibility. It was not credible that she was unaware of the possibility of claiming asylum given she was an educated woman who had mixed with other gay women. She gave a false address when arrested, which might be understandable given the inevitable panic she would have felt at the time, but additionally she had referred to having a British boyfriend as at May 2015 and there was a suggestion elsewhere in the papers that she was in a relationship with a man when arrested in 2017. Nevertheless the Judge accepted that she had clearly been deeply affected by the death of her parents.
12. Having regard to the evidence as a whole, the First-tier Tribunal accepted that the Appellant had had at least one same-sex relationship in Nigeria. The Rule 35 evidence corroborated her claim to have been mistreated by her family and it accepted she had been sent here by her father to study and to avoid further mistreatment from her uncle. She was certainly perceived to be gay by her family.
13. Applying the law to those findings of fact, the Tribunal concluded that, given the country evidence before it, if the Appellant lived openly as a gay person in Nigeria she would face a real risk of persecution. It was then necessary to determine whether she would live openly. It could be anticipated that if she returned there then she would hide her sexuality, as she had done in the UK. She had not had a same-sex relationship for almost five years in the UK, a country where homosexuality was legal and tolerated. It was highly likely she would act similarly on a return to Nigeria. She was conflicted about her sexuality, as shown by her evidence regarding her father's disapproval of her relationship, and as to the influence of the church and community upon her. Thus she fell into the category identified by Lord Rodger at §82 of *HJ (Iran)*: she was a person who would on return foreseeably choose a way of life which would not lead to her being liable to be persecuted because she was gay.
14. On a return to Nigeria she could live apart from her family members. State protection would not be available to her, but it would not be unduly harsh to expect her to relocate internally. She had obtained an accountancy qualification in the UK and was used to living in a large city, having lived and obtained work experience in London.
15. There was no evidence that the Nigerian authorities would have become aware of her participation in demonstrations. As to her private and family life, she was educated and resourceful and the public interest identified by section 117B as to

the relevance of precariousness counted strongly against her given her failure to try to regularise her position sooner.

16. Accordingly, as she had failed to demonstrate that she faced a well-founded fear of persecution on return or that her expulsion would represent a disproportionate interference with her private and family life, her appeal was dismissed on asylum and human rights grounds.
17. Grounds of appeal of January 2018 argued that the First-tier Tribunal erred in law in finding that
 - (a) State protection would not be available to the Appellant whilst not accepting she would be at real risk of persecution;
 - (b) The risks she faced were localised to simply two family members, given that there was every chance of her sexuality being revealed by family members given their knowledge of it;
 - (c) Failing to apply *HJ (Iran)* given that the Appellant's evidence was that she had not pursued same-sex relationships in the UK because of her emotional state following her parents' death;
 - (d) Failing to consider relevant considerations in assessing the undue harshness of relocation, in that she would lack family and thus financial or emotional support, and had not completed her degree.
18. Although the First-tier Tribunal refused permission to appeal on 6 February 2018, the Upper Tribunal granted permission to appeal on 30 May 2018, on the basis that the Tribunal had failed to consider whether any part of the Appellant's motivation for concealing her sexuality on a return to Nigeria was driven by a fear of persecution.
19. Shortly before the hearing, the Appellant's representatives wrote to the Tribunal stating that she was unable to afford legal representation and accordingly requesting that her appeal be determined on the papers. I considered this application. An appeal may proceed without a hearing in the Upper Tribunal: see Rule 34(1). However, before an appeal is so treated, the views of any party to the appeal must be expressly considered (Rule 34(2)). For the Secretary of State, Mr Kandola expressed a wish to participate in proceedings. Given the hearing had been listed for some time and the application was made at short notice, I considered it appropriate in the interests of justice to permit Mr Kandola to defend the appeal. Given that he essentially limited himself to arguing that the First-tier Tribunal's reasoning process was lawful, the Appellant suffered no prejudice by way of unexpected arguments or submissions being raised.

20. Mr Kandola submitted that the First-tier Tribunal had come to a perfectly rational determination of the appeal. The Judge had essentially found that the Appellant was grappling with her own sexuality and for those reasons had not lived openly. Thus she would not be required to suppress her identity on a return to Nigeria. There was evidence from which the inference could reasonably be drawn that the Appellant had acted discreetly in recent years through lifestyle choice. Such a finding was open to a Judge directing themselves in accordance with *HJ (Iran)*.

Findings and reasons

21. The country information before the First-tier Tribunal included the following:

“Country Information and Guidance - Nigeria: Sexual orientation and gender identity (March 2015)

...

1.3.6 Same-sex sexual relations between men are criminalized under the criminal code, while 12 northern states have adopted Islamic Sharia laws criminalising same-sex sexual activities for both men and women. In January 2014, President Goodluck Jonathan enacted the Same-Sex Marriage (Prohibition) Act 2013, which criminalizes same-sex marriage, the 'public show of same sex amorous relationship[s]' and prohibits the registration and operation for LGBT support groups.

...

1.3.8 Nigeria is a religiously and culturally conservative country where homophobic attitudes – which is likely to include those who do not conform to gender norms, i.e. transgender persons – are widely held. In a survey conducted in 2013, 98% of Nigerians stated that they believe 'homosexuality' should not be accepted by society, while state and media rhetoric is anti-LGBT.

1.3.9 LGBT persons have experienced societal discrimination and violence, including incidents of mob attacks, intimidation and harassment, blackmail and extortion. Societal violence is likely to be underreported. LGBT persons have also experienced loss of accommodation and jobs, and been denied access to health services, with several sources reporting an increase following the enactment of the Same Sex Marriage (Prohibition) Act.

...

1.3.12 With the existence of anti-LGBT legislation and widespread societal discrimination, the accumulation of measures that affect a LGBT person may be sufficiently serious by their nature and repetition in individual cases to constitute a severe violation of basic human rights and amount to persecution. Decision makers must ensure that they take into account the latest country information, and consider each case on its facts taking account of the person's past experience of any ill-treatment.

...

Are those at risk able to seek effective protection?

1.3.13 Same sex sexual acts are criminalised in Nigeria, while some elements within the police have harassed and used violence against LGBT persons. The state cannot be considered willing or able to provide effective protection to LGBT persons.

Are those at risk able to internally relocate within Nigeria to escape that risk?

1.3.14 Where the threat is from the state, internal relocation is not a viable option.

1.3.15 Where LGBT persons encounter hostility from societal actors they may be able to avoid this by moving elsewhere in Nigeria, but only if the risk is not present there and it would not be unduly harsh to expect them to do so. Homophobic attitudes are widespread across Nigerian society. However, in parts of the Lagos and Abuja homophobia is less pronounced. The onus is on the applicant to demonstrate why they believe they cannot relocate within or to these cities to avoid persecution from non-state actors. However, internal relocation cannot be relied on if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution.”

22. It seems to me that the findings of the First-tier Tribunal were properly open to it on the available evidence. Lord Rodger stated in *HJ (Iran)* [2010] UKSC 31 §81:

“If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living 'discreetly'.

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear

of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.”

23. The penultimate paragraph of that passage demonstrates that it is open to a decision maker, in the appropriate case, to find that a person will foreseeably act discreetly on a return to their country of origin for reasons other than a fear of persecution.
24. In this appeal the Judge had evidence before them that the Appellant had not pursued a same-sex relationship for some five years. Her emotional state had precluded them. She may well have had heterosexual relationships; at least that is what she is recorded as having told the immigration authorities. The Judge drew the inference that if this was how she chose to live her life in the UK, it could reasonably be predicted that she would continue to do so in Nigeria.
25. The Judge accepted that she might be at risk from those family members with whom she had previously lived. However, the Judge concluded that she could pursue internal relocation to avoid harm from her close family members to a large urban area where she could live anonymously.
26. It seems to me that these findings were open to the Judge. There was evidence (see e.g. the Home Office reference to Lagos and Abuja at 1.3.15 of the Guidance cited above) to support the conclusion that, in one of the more cosmopolitan areas of urban Nigeria, the Appellant would not face persecution were she to express the full span of her sexual identity and continue to involve herself in sexual relationships. And thus if she chose not to do so, her reasons for so doing would not be driven by any fear of persecution. Accordingly the observation of the Upper Tribunal, that it was necessary to consider whether any material element of her motivation for so behaving in future was attributable to a real risk of persecution, does not lead to the appeal’s success.
27. As to the other grounds of appeal, there is no inconsistency between the findings on the absence of state protection and the possibility of the Appellant facing a real risk of serious harm. The First-tier Tribunal clearly accepted that she might face harm in her home area but nevertheless concluded that she could reasonably locate to an urban centre. That is perfectly consistent with the effect of the country evidence cited by the Home Office Guidance, which is that state protection will not be available to ameliorate a genuine risk of persecution, but that such a risk may be abated by departing the area where non-state actors pose a danger. In an urban environment such as Lagos there would be no real risk of her sexuality’s exposure to the broader community by her family members. Indeed, as I have already noted, it would seem that even were her sexuality so exposed, she would not face pronounced homophobia in those parts of the country.

28. Contrary to the suggestion in the grounds of appeal, there was evidence of motivations for discretion beyond her emotional state following her loss of her parents, such as her conflicted status and her pursuit of heterosexual relationships over an extended period in the UK. It was not unreasonable for the Tribunal to find that she would be able to use the advantages she had obtained from studying in the UK to help assimilate in a new city in her country of origin.
29. I accordingly find that the findings of the First-tier Tribunal were properly open to it, and that there is no material error of law in its decision.

Decision:

The appeal to the Upper Tribunal is dismissed.

Signed:

Date: 13 August 2018

A handwritten signature in black ink, appearing to read 'M. A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes