Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07300/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 21 November 2018	**On 03 January 2019**

Before

THE HON LORD MATTHEWS
UPPER TRIBUNAL JUDGE CRAIG

Between

AA
(ANONYMITY DIRECTION MADE)
Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

For the Appellant: Mr Eric Fripp, Counsel
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Nigeria who was born in October 1981. He appeals against a decision of First-tier Tribunal Judge Griffith promulgated on 16 August 2018 following a hearing at Hendon Magistrates' Court on 26 July 2018. I set out the immigration history of the appellant essentially from what is contained within that judgment.

2. The appellant arrived in the UK in May 2004 with leave as a student valid until 2007. While here within that leave in March 2006 he was convicted of driving without insurance for which he received a fine and his licence was endorsed. He was subsequently in July 2007 convicted of drink

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driving again without insurance and on that occasion he was disqualified from driving for eighteen months.

3. On 29 October 2007 he submitted a student application for further leave to remain but some seven days later on 5 November he was convicted at Greenwich Magistrates' Court of driving whilst disqualified again using a vehicle while uninsured and also failing to give his name and address. He received a community order and was disqualified from driving for two years.

4. Unsurprisingly, three days later on 8 November 2007 his application for further leave to remain as a student was refused but he did later apply successfully for leave to remain as a student and was granted further leave until 31 May 2009. An application submitted two days prior to the expiry of that leave was refused in July but allowed on appeal and he was granted further leave until 28 April 2010.

5. Prior to the expiry of that leave he applied again to be allowed to remain as a student but this application was refused in June 2010 as were two further student applications. He appealed against this decision and that appeal was dismissed in March 2011; his application to appeal to the Upper Tribunal was dismissed in August 2011 and he was appeal rights exhausted by 15 September 2011.

6. Thereafter the appellant remained in the UK without leave and in February 2012 he lodged a human rights application based on his relationship with a British citizen, a lady. That application was refused in November 2013 and the refusal was maintained on reconsideration. His appeal was dismissed in the First-tier Tribunal in August 2014 and he was refused permission to appeal to the Upper Tribunal becoming appeal rights exhausted in respect of that decision in November 2014.

7. Notwithstanding his immigration status the appellant's driving habits did not improve and in May 2015 he was convicted of dangerous driving and failing to provide a specimen for analysis for which on 14 August 2015 he was sentenced to twelve months' imprisonment in respect of dangerous driving and three months for the refusal to provide a specimen for analysis to be served concurrently. The appellant did not appeal against either conviction or sentence.

8. On 3 September 2015 the appellant was served with a stage 1 decision to deport and following that decision representations were made on his behalf that he had established a relationship with a British citizen and her two children. Nonetheless on 5 November 2015 a deportation order was signed against him and the following month a stage 2 decision to deport was made which was certified under Section 94(3) of the Nationality, Immigration and Asylum Act 2002. He was served with removal directions the removal being scheduled to take place on 12 November 2015.

9. There followed an application for judicial review but he was refused permission on the papers to proceed with that application in April 2016.

10. A further application for leave to remain was submitted on 25 April 2015 which was refused on 24 October 2016 as he had failed to submit biometric information.

11. Thereafter, following the further detention of the appellant under immigration powers in January 2017 in order to effect removal, on 20 January 2017 he made an asylum claim. That claim was refused and it was his appeal against the refusal of asylum and the maintenance of the deportation decision (which would be unlawful were he entitled to asylum) which came before Judge Griffiths and which as already noted above Judge Griffiths dismissed.

12. The basis of the appellant's claim as advanced and as maintained during his appeal before Judge Griffiths was that he had a well-founded fear of persecution in Nigeria because he is bisexual. In this regard he claimed that he was entitled to asylum and also that his removal would be in breach of his Article 3 rights. He also claimed his removal would be unlawful because it would be in contravention of his Article 8 rights, although for the reasons that follow we do not need to consider this aspect of his claim.

13. In support of his application the appellant adduced psychiatric evidence and evidence relating to scarring which he said established that he had received injuries because he had been beaten and mistreated in Nigeria due to public awareness of his claimed sexuality. At first blush it appears surprising that none of the matters now raised had been mentioned earlier when the appellant had been challenging previous decisions made against him.

14. In a very well-reasoned, detailed and thorough decision Judge Griffiths considered the claim now made but made adverse credibility findings against the appellant. However, there is one aspect of the decision which is sufficiently troubling as to cause this Tribunal to question whether the decision properly can stand.

15. We have regard to paragraph 96 of the decision in which the judge stated as follows:

> "96. Commenting on the appellant's possible scarring, the doctor could only find two scars on his scalp but he considered them consistent with the appellant's account of incisions being made there. He also found that his remaining scars were consistent with blunt instrument injuries. The doctor considered other possible causes of the injuries, such as accidental trauma, but the appellant could recall no significant injuries. The doctor did not rule out self-harm by proxy but found the pattern made that unlikely. His diagnosis was that the appellant was suffering from PTSD. I have had regard to *JL (medical reports – credibility) China* [2013] UKUT and, as the medical report was based on [the] exclusive testimony [of] the appellant whom I have found to be

unreliable, I do not feel able to attach weight of any significance to it".

16. It appeared to this Tribunal at the outset that it was arguable that the judge in an otherwise very thorough and well-reasoned decision had made his finding as to credibility before considering the medical evidence which had been adduced which would fall foul of the guidance given by the Court of Appeal in *Mibanga* [2005] EWCA Civ 367. What the Tribunal is required to do in cases such as this is consider all the evidence including the medical evidence in the round **before** reaching conclusions as to credibility. This was particularly important in this case, because, as the judge noted and as is common ground between the parties, the issue of credibility is central to the appellant's claim.

17. On behalf of the respondent, Mr Jarvis, having considered this particular issue very carefully indeed, set out the respondent's current position as follows:

> "On reflection, the respondent accepts there is merit to the appellant's first ground of appeal in respect of the misapplication in this judgment of the principle described by the Court of Appeal in *Mibanga* with specific reference to paragraph 96 of the First-tier Tribunal judgment.
>
> It does appear from the wording of paragraph 96 that the judge deferred the consideration of the psychiatric and scarring evidence until after the assessment of the underlying credibility of the appellant's core claim.
>
> The respondent accepts that the medical report was capable of informing the judge's assessment of both the appellant's consistency in oral evidence as well as the claim to have been beaten and mistreated in Nigeria due to public awareness of his claimed sexuality.
>
> That being the case and without reference to any of the other grounds, the respondent would accept that the First-tier Tribunal Judge's otherwise very careful analysis of the evidence is materially flawed and would require a complete rehearing of the refugee asylum/Article 3 claim".

18. With some reluctance, because as Mr Jarvis has stated the decision is otherwise very well-reasoned and is also thorough and detailed, we feel obliged to agree that this error is sufficiently material that the decision cannot stand but must be remade. As credibility is core to the claim, we agree also with Mr Fripp (and Mr Jarvis on behalf of the respondent did not seek to argue otherwise) that the appropriate course now is to remit this hearing back to the First-tier Tribunal for the decision to be remade by any judge other than First-tier Tribunal Judge Griffiths, and we will so order. None of Judge Griffiths' findings are to stand and the appeal will be a fresh rehearing.

Notice of Decision

We set aside the decision of First-tier Tribunal Judge Griffiths as containing a material error of law and direct that the appeal be reheard at Taylor House before any First-tier Tribunal Judge other than Judge Griffiths. No findings of fact are to be maintained.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Upper Tribunal Judge Craig Date: 27 December 2018