Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02824/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination & Reasons Promulgated**
On 3rd July 2019	**On 18th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

V O O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Frances Shaw (Counsel), I A S (Sheffield)
For the Respondent: Mr David Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Butler, promulgated on 13th April 2018, following a hearing at Birmingham on 28th March 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 8th August 1986. He appealed against the decision of the Respondent dated 14th February 2018, refusing his claim for asylum and for humanitarian protection pursuant to paragraph 339C of HC 395.

The Appellant's Claim

3. The basis of the Appellant's claim is that he is a homosexual. He discovered he was gay when he was 17 years of age. He had a relationship with a boy at his boarding school. In October 2013 he was attacked by six homophobic men in a shop and badly beaten up. His father took him to stay at a church where he confessed to the pastor that he was gay. The pastor told his parents in breach of confidence and his life became difficult so that he decided to leave Nigeria and come to the UK. He fears persecution if he returns to Nigeria now because homosexuality is illegal in that country. In the UK he has lived as a gay man where he has had relationships with two men.

The Judge's Findings

4. The judge concluded that the Appellant's account contained "many inconsistencies" (paragraph 34). One of these inconsistencies involved the account as to when the Appellant first realised he was gay (paragraph 35). He had also given different versions of his how his parents discovered that he was gay (paragraph 36). Moreover, there had been a delay in his claiming asylum (paragraph 37). Furthermore, none of his two previous partners in the UK attended to give evidence (paragraph 38). He had also produced a profile of details on an LGBT website which was only two days before the appeal hearing, thus casting doubt on his bona fides (paragraph 39). There was evidence from Mr [S], who had stated that he was convinced that the Appellant was gay, and that he had attended the Tribunal to support other asylum seeker's applications, and had not ever come across someone who was not gay as he claimed to be. The judge held, however, that the lack of material evidence and support meant that the Appellant could not succeed. Moreover, there was no psychiatric report and the GP's report in his favour did not demonstrate the GP as having the requisite medical expertise to be able to attest to that which was being attested to in the Appellant's case. All in all, therefore, the appeal was dismissed.

Grounds of Application

5. The grounds of application state that the judge did not give proper consideration to the evidence from Dr Brinkley, the Appellant's GP, in the form of a written letter of support. Moreover, the judge had failed to have regard to the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. Furthermore, the judge held that "there was no corroborative evidence even though it should have

been available" (paragraph 42). Although it was the case that neither of the Appellant's two previous partners in the UK had given evidence by attending court, there was evidence from Mr [S], and this was live witness evidence that the judge should have given proper credence to.

6. On 6th August 2018, the Upper Tribunal granted permission on the basis that it was arguable that the judge failed to treat the Appellant as a vulnerable witness and that this clearly resulted in the judge really neglecting to ensure that the Appellant had a proper opportunity to respond to the concerns of the judge which had not been identified by the Respondent.

Submissions

7. At the hearing before me on 3rd July 2019, Ms Shaw, appearing on behalf of the Appellant, relied upon the grounds of application. She submitted that the proper way to approach this appeal was to ask whether there was a material error of law, and if so whether any additional evidence could be admitted. With regard to the latter, she wished to draw attention to a report from the Sheffield Teaching Hospitals, dated 18th September 2018, which was six months after the decision appealed against, and this confirmed that the Appellant was associated with homosexual sexual activity.

8. I indicated that I would first have to determine whether the judge, on the evidence before him, had erred as a question of law, before deciding whether the additional evidence could be admitted pursuant to Rule 15(2).

9. For his part, Mr Mills submitted that there was no error of law. The judge was aware of the medical evidence, and this consisted of a letter from the GP (at page 16) who had only recently moved to his practice in the area, and did not appear to be qualified to opine upon psychiatric damage to the Appellant. There was, however, no psychiatric evidence and the judge had expressed concern over this by pointing out that "his medical issues are not supported by a detailed psychiatric report" (paragraph 44). That left the question of the Joint Presidential Guidance. This was not raised before the judge. It was too late to now draw attention to this and to rely upon this in order to impugn the determination of the judge.

10. Most asylum seekers suffer from some degree of vulnerability or other, and it was the Appellant's responsibility to demonstrate why the Joint Presidential Guidance failed to be applied in his case. Moreover, the vulnerability has to explain the inconsistencies in the evidence. This it did not do. It is difficult to see exactly what it is that would have been helped by treating the Appellant as a vulnerable witness, given that the judge fundamentally disbelieved the Appellant's core account. The judge expressly looked at the Appellant's evidence and found that it lacked weight.

11. In reply, Ms Shaw submitted that the judge should not have not disputed the GP's medical evidence. That indicated that the Appellant was a vulnerable witness. Furthermore, the Appellant had explained that because of his mistreatment in Nigeria, he had felt ashamed about his homosexuality and did not initially place reliance upon it and had only done so eventually in a reluctant manner.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law such that it falls to be set aside (see Section 12(1) of TCEA 2007). My reasons are as follows.

13. First, this is a case where there was evidence before the judge from Dr Brinkley dated 22nd March 2018. As the judge makes clear this "refers to symptoms which he says 'appear to be significant PTSD and depression'. He refers to the Appellant suffering from flashbacks and hearing voices" (paragraph 41). Although it is the case, as the judge points out that the Appellant had not previously referred to any of these matters in his asylum interview or in his witness statement, the fact was that this was evidence from a medical practitioner who would have been able to identify "significant PTSD and depression" as matters that lay within his medical competence. The question then is as to why the Appellant has not previously drawn attention to this. This brings me to the second reason.

14. Secondly, it is a feature of this appeal that the Appellant, who claims to have realised that he was gay either at the age of 13 or 14 or 17 (see paragraph 35), had confided in a pastor, who had publicly in a church, and during a sermon, before the congregation, directly referred to him as being a homosexual, which had led to the Appellant being summoned at home by his parents, and being humiliated (see paragraph 14). The Appellant makes it clear that he had "been ashamed of his sexuality" (paragraph 15). In the circumstances, it is difficult to see why the reference to the Appellant having PTSD should not have been taken at face value. The judge refers to this in the determination at a number of places, including, at paragraphs 23, 27, 41, and 44.

15. Third, this should have alerted the judge to the advocation of the Joint Presidential Guidance Note of 2010. This requires judges to consider, where there are discrepancies in the oral evidence, the extent to which the vulnerability of the witness was an element of that discrepancy or lack of clarity. This would have been the case in relation to when the Appellant discovered that he was a homosexual, and whether this was at the age of 14 or 17. Moreover, the judge is required, upon application of the Joint Presidential Guidance, to confirm whether the Appellant is a vulnerable or sensitive witness. In addition, it should be stated whether vulnerability had any impact on the evidence.

16. Finally, it is in the light of the matters above, that I have decided to admit under Rule 15(2) the latest evidence, namely, the letter from the Sheffield Teaching Hospitals, dated 18th September 2018 from Dr J Bassett. This makes it clear that upon the Appellant attending the clinic "he was initially treated for non-specific urethritis and chlamydia with a week of Doxycycline" at paragraph 1. The letter goes on to say then on the attendance at the clinic on 4th September 2018 there was a full sexual health screen undertaken of the Appellant and the hospital found that the Appellant "had evidence of rectal chlamydia infection which we have treated. This result would back up his disclosure related to his sexuality as a rectal infection in men is almost associated with homosexual sexual activity" (at paragraph 3). In the light of this, this matter needs to be remitted back to the First-tier Tribunal so that the evidence can be looked at on the basis of the application of the Joint Presidential Guidance in relation to vulnerable witnesses.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Butler pursuant to practice statement 7.2(b) of the Practice Directions.

18. An anonymity direction is made.

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 Date

Deputy Upper Tribunal Judge Juss 12th July 2019