



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01646/2014

THE IMMIGRATION ACTS

Heard at Field House

On 29 October 2014

Determination

Promulgated

On 9 March 2015

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**Y S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sills, Counsel

For the Respondent: Mr Duffy

DECISION AND REASONS

1. The Appellant is a citizen of Uganda born in 1979. He appealed against a decision of the Secretary of State made on 11 March 2014 to make removal directions. The Appellant was refused asylum.
2. The immigration history, which is not in dispute, is as follows:

He arrived in the UK on 23 October 2010 with entry clearance as a visitor (sportsman) valid until 13 April 2011. He did not compete in the competition that his visa was issued for. On 30 October 2012 he claimed asylum which was refused on 27 November 2012.

3. On 10 January 2013 his appeal against this refusal was dismissed by Judge of the First-Tier Alakija. Appeal rights were exhausted on 6 February 2013.
4. On 18 November 2013 he made further submissions which were refused on 21 January 2014. On 11 March 2014 the Secretary of State reconsidered the further submissions. The renewed claim was refused on 11 March 2014.
5. He appealed again. Following a hearing at Birmingham on 14 April 2014 Judge of the First-tier Graham allowed the appeal on asylum and human rights grounds (Article 3).
6. The Secretary of State sought permission to appeal which was granted. Following an error of law hearing at Field House on 23 July 2014 before The Honourable Mr Justice Lewis and Upper Tribunal Judge Allen remitted the case for rehearing.
7. It is relevant to set out at this stage the basis of the claim. It is contained in the refusal letter dated 27 November 2012:

“8. You had a Screening Interview on 30 October 2012 (hereafter referred to as SCR). You submitted a witness statement on 7 November 2012 (hereafter referred to as WS). You had a Substantive Asylum Interview on 9 November 2012 (hereafter referred to as AIR). You claim that:

- 9. You were born on 15 April 1979 in Kampala, Uganda. Your father was an employee of the Ugandan Muslim Supreme Council. From 1988 - 1994 you attended Kasubi Islamic Primary School. From 1995 - 2000 you attended Kawempe Secondary School (WS para 2 - 5 & SCR 1.5 & AIR q4, q15 - q17).*
- 10. You first realised you were gay when you were young. In 1995 you started a relationship with N S, a boy from school, after you admitted to him that you loved him. That same night you were sexually intimate in the school bathrooms and you continued to meet there whenever possible. Your relationship did not cause any problems until 2000 because you kept it secret (WS para 6 & AIR q60 - q70).*
- 11. On Friday 1 December 2000 you were caught by other students having sex in the school washrooms. They beat you and took you to the Headmaster, who hit you over the head with a bit of wood. You sustained an injury and your head was bleeding. He took you to Kawempe Police Station. The police rang your parents but you were not released that day as the police said*

they don't grant bail at night. You were released on Monday 4 December 2000. There were no conditions attached to your release and you were not charged with anything. Your mother treated your head wound upon your release (WS para 6 - 7 & AIR q18, q40, q79 - q88).

12. *Rumours spread around the village, your father disowned you and made you sleep in the servants' quarters. You were fed once a day and called names like "demon" and "curse". Your uncle H banned you from his mosque and local traders wouldn't sell you goods. Your father told your mother to take you away. In February 2001 she took you to Buwekula, your father's birth place. Your uncles threatened to kill you so your mother stayed there with you for two weeks to ensure your safety. In March 2001 she took you to Mabindi, her birthplace and your uncles there made similar threats. You stayed for two days. Alternatively, you stayed for one week. Your mother then took you to your grandfather's house in Bukeeka. He told you he would find you a wife but you said that you did not wish to marry. Alternatively, you lied and told him that you would marry. Your mother went home and you stayed with your grandfather. You did not experience any problems whilst living with him (WS para 8 - 10 & AIR q18, q23 - q47).*
13. *In April 2003 your mother came and took you to Bombo to learn mechanics at a garage. She also insisted that you marry. The employer of the garage knew you were gay as your uncle H had told him. You were offered the job on the condition that you marry. You were employed there until December 2004 (WS para 10 & AIR q18 - q19, q48 - q52).*
14. *You joined a Kick Boxing club in Bomba. On 22nd November 2004 you were promoted to General Secretary of the Uganda Kick Boxing Association. This job was also offered on the condition that you marry (WS para 10 - 11 & AIR q18- q19, q56 - q57).*
15. *On 1 February 2005 you were offered a position in 'Action to Positive Change' as a coach for people with disabilities. You were doing this job until you came to the UK. The director insisted that you marry or you would lose your position. They bought you a woman, A N from Kiconi, whom you wed on 11 May 2005. She never knew that you were gay although she had heard rumours (WS para 11 & AIR q19, q53 - q55).*
16. *On 14 March 2006 you began working for Lieutenant K, an officer in charge of security at the Presidential Guard Brigade (PGB). You worked for him until you came to the UK. Your duty was to train officers on kick boxing techniques. You were good at tackling people so Lieutenant K gave you authorisation to make arrests. You arrested robbers, murderers and homosexuals. If*

you knew you were going to arrest a homosexual you would ring and give them a warning. You helped about eight people to escape. You took the arrested people to a safe house where they would be tortured. You were not allowed in the torture chamber (WS para 12 - 13, para 15 & SCR 5.7 & AIR q19 - q22, q89 - q102).

17. *In 2007 you had a relationship with a man called M K K. Alternatively, Mr M K K was just your friend. You met at the TeaCosy in Kampala Road, a place for gay people. You were only together for a short time as he had another partner. You visited the TeaCosy about four times during 2007, on one occasion for Mr M K K's birthday (WS para 17 & AIR p71 - q79).*
18. *You were arrested at your home on 10 September 2007, about one month after the birthday party. You were taken to Wandagea Police Station and put in a cell with M K K and three gay men who had been here. Later that night you were taken to another location where you were tortured and questioned about the recruitment of gay people. You were also given food that had been poisoned. You were kept there for ten days. On 17 September 2007 you were blindfolded and taken somewhere in a van. You were then put in a car where Lieutenant K was waiting. You think he may have assisted in your release. He took you to Mbuya hospital where your injuries were treated and you were told you had been poisoned. Your toe is now permanently dislocated and you still sometimes feel pain in your private parts and stomach. You left the hospital on 27 September 2007 and went home. One month later you went back to your job working for the PGB and continued to arrest people. Lieutenant K told you to join the army but you did not (WS para 17 - 25 & SCR 4.2 & AIR q103 - q106, q131 - q 136, q138).*
19. *On 26 September 2008, on your way to Busan for a kickboxing competition, you met S N when you boarded the same flight. You exchanged telephone numbers and agreed to keep in touch. Upon your return to Uganda on 3 October 2008 you discovered that the community knew you were gay. Your landlord asked you to leave as people were threatening to burn down the house. You moved to Makerere in January 2009 with your wife and children. You started up a relationship with S N again and would stay with him at his house in Jinja (WS para 26 - 31 & AIR q145, q149).*
20. *In 2010 you were invited to a kickboxing competition in Edinburgh. You went home one day and found your passport burnt on the ground. You went to the counsel who wrote you a letter which you took to Wandegeya Police Station. The police then wrote a letter to the Ministry of Affairs for a replacement passport. Alternatively, you obtained your replacement passport*

through Lieutenant M K. S N drove you to the airport and you travelled to Edinburgh, via Amsterdam, on 23 October 2010. You did not participate in the competition that you had come here for. Upon your arrival you called S N and everything was fine. You called again on 24 October 2010 but his phone was off. You called his shop and his employee told that he had been arrested for being a homosexual. You called your wife and she said that security agents had been to your home and shown her pictures of you and S N. They kicked her in the stomach and her caesarean scar burst open. She died of her injuries in January 2011. Before she died she sent you two arrest warrants that the security agents had accidentally dropped in your house and also your staff pass, which you thought would help you get into the army in the UK (WS para 32 - 39 & SCR 2.1, 2.10, 4.1 & AIR q108 - q130, q140 - q149, q151 - q154).

21. *You fear that if returned to Uganda you would be at risk of being killed by the government and its security organisation, religious people, the media, the community or your family (AIR q169 - q172)."*

8. The case was remitted by The Honourable Mr Justice Lewis and Upper Tribunal Judge Allen as follows:

"2. *Essentially this claim came down to the question of whether or not the appellant is homosexual, and there had been an earlier appeal before Judge Alakija in January 2013 and Judge Alakija like Judge Graham accepted that if the appellant was found to be a gay man then his appeal must be allowed, given the voluminous background evidence on ill-treatment of gay people in Uganda. So there were no issues as to background evidence, the simple matter was a lack of credibility.*

3. *I think it is necessary to look first of all, not in a great detail but in a little detail, at Judge Alakija's determination since it was very close in time to Judge Graham's. There were various matters that led Judge Alakija to doubt Mr S's credibility. First, there was the delay of two years between his entry into the United Kingdom and the asylum claim, the second, not accepting his account that in the year 2000 when he was aged 21 and at school he was caught having sex with his partner in the school bathroom. He was beaten at school and taken to the police station. The judge did not accept that he would still be at school at 21 nor that he had been indulging in gay sex in a school bathroom where there were shower cubicles with no more than curtains to hide the occupants.*

4. *He also found it lacking in credibility that, having married in May 2005 (he had been told he must get married or he would lose his position in the APCPD) all the people who had insisted that he*

should marry in order to become respectable would have allowed him to continue to ignore the condition imposed on him (of getting married) and did not accept the explanation he had given for this.

5. *He also did not accept that his landlord had told him to leave because the local community were threatening to burn his house down because the judge did not think he would have been able to stay in the house for two months if the problems in the school were true.*
6. *Then there was reference to an incident in 2007. The appellant had taken up work in the security office of the President of Uganda in 2006 and in September 2007 he was arrested and taken to the police station, he said, and placed in a cell full of people some of whom he said he had met at a gay club with a friend. He said he was beaten and tortured and asked where he recruited the gays from and held for a week and further ill-treated, then released into the custody of his boss. Following a period in hospital he said that he returned to work in the security office of the President.*
7. *The judge said with reference to this:*

'I find it so improbable as to beggar belief that the appellant having allegedly been arrested and tortured as a homosexual then released into the custody of his boss would be allowed back to work at the security office of the President of Uganda.'
8. *He also did not find it credible that the authorities would have provided the appellant with a new passport and allowed him to obtain a visa and allowed him to leave the country if it was the case that, as he maintained, he was as a matter of fact under investigation because arrest warrants had been issued as he left and served at his home in October 2010.*
9. *The judge was also concerned about a medical report that had been provided. This was a report from Dr Roberts. The judge noted that the report did not mention the Istanbul Protocol, which was a weakness, but he said that he had been able to obtain a general idea from it and said it was regrettable that although the report suggested that many of the scars reported were consistent with the appellant's claimed injuries it did not make any mention of the possible causes, and in this regard it was relevant to bear in mind that the appellant had for a number of years been involved in kickboxing, and the judge thought that the very physical and rough nature of the combination of sports in which he had taken part made it particularly relevant to*

identify other possible causes of his injuries, and the judge said that some of the injuries may well have been caused in a similar way to that alleged by the appellant for completely different reasons. So the conclusion was that the report did not assist his claim.

10. *Subsequently he made a fresh claim and the matter came again before Judge Graham in April 2014, and the judge set out the appellant's history and the relevant legal principles, in particular concentrating on the determination of the IAT in Devaseelan, which is first referred to in paragraph 23 where the effect of a first appeal determination on any subsequent appeal was considered and it was stated that the first Adjudicator's determination should always be the starting point for and should be taken into consideration in any further appeal. The judge was clearly aware of the Devaseelan guidelines and came back to refer to those in a number of different places.*
11. *There was further medical evidence in relation to specific health problems referred to in paragraph 30 of the determination. There was a supplementary report from Dr Roberts and there was a report and oral evidence from Mr W and a report, and it will be necessary to return to those shortly.*
12. *The judge set out what had been decided by Judge Alakija and noted what was said in the Devaseelan guidance about the need to refer to the determination being the starting point and went on to say at paragraph 38:*

'In this case Immigration Judge Alakija dealt fully with the issue of the appellant's credibility and for the reasons set out in her determination she found that the appellant's account that he was a practising homosexual in Uganda and in the UK was not credible. Given this I am unable to go behind the Immigration Judge's findings without good reason to displace them.'

That represents an accurate summary of the law.

13. *The judge then noted the supplementary report of Dr Roberts, who did not accept that the scars on the appellant's body could have been inflicted by his participation in sports such as kickboxing and gave reasons as to why each scar was unlikely to have been caused accidentally and splitting that report between the injuries from the alleged assault in 2000, in particular the long scar on the vortex of his scalp, and then in relation to a number of injuries and scars, about eighteen scars, and other deformities and the loss of a nail of a toe and reduced movement of the thumb coming from the 2007 incident and stating that the*

injury to the toe was fully consistent or highly consistent with the account he gave of an assault using pliers causing wrenching or crushing of the toe and less consistent, it might be fair to summarise, with the kind of injury you might get from a blow where the skin is not broken and, as I say, considered the possibility that the injuries could have been caused by kickboxing but considered that those kind of injuries would cause different scars from the type that he had sustained.

14. *The judge was satisfied that this report was supportive of the appellant's account and also noted a letter referring to the practice of "bye-bye" which is claimed to take place at the end of the school term in senior schools in Uganda and confirmed that that tradition occurred, and that was taken into account as being relevant to credibility and confirmed the tradition of sexual freedom between students at the end of term in secondary schools in Uganda.*
15. *But there were particular matters in relation to which the judge felt unable to depart from the earlier findings. He noted what was said about the lack of credibility of the claimed incident at school aged 21 and also the claim that he resumed his employment with the intelligence forces following his arrest for homosexuality. There was also the matter of two arrest warrants dated 2010 which he said were left by officials with his wife and sent on, and the first judge had not considered the account of how he came by those documents to be credible.*
16. *The judge adopted the adverse credibility findings of the first judge in relation to the appellant remaining in school when 21 years old, his continued employment following his arrest and the arrest warrants but, he said, that even so there was medical evidence which supported the appellant's account that he was tortured following arrest for homosexual activities, so he was able to accept the core of the appellant's account, and in relation to this he took into account evidence from Mr W, who had, as I say, given oral as well as written evidence. The appellant had joined Oxford Friend, which provides a telephone helpline for the LGBT community in the Oxford area. He had been interviewed by them, he had said what had happened to him in Uganda, and had extensive training, which continues.*
17. *The witness said that whilst he had no positive proof that the appellant was a gay man he had no doubt that he was. He said he often sat in when he was manning the telephone lines, that he also attended monthly debrief meetings and throughout his dealings with the appellant he had never said anything inappropriate to his claim to be a gay man. He found Mr W to be a most impressive witness and was satisfied that the appellant*

would be unable to undertake the work with Oxford Friend working closely with LGBT people if he was not a gay man, and taking all this fresh evidence into account, he said that he found on the lower burden of proof that the appellant was a gay man.

18. So that was the decision of the judge with which we are concerned today, and the Secretary of State sought and was granted permission to appeal on the basis largely of inconsistencies as they were said to be between the adoption of the finding in respect of the rejection that he had been at school at the age of 21 and the rejection of the arrest warrants and the continued employment following arrest, and the earlier findings, and we have had helpful oral submissions today from both representatives, Mr Jack on behalf of the Secretary of State and Mr Sills on behalf of the appellant. We also have had provided to us by Mr Sills a Rule 24 response.
19. The question then is whether there is any error of law in the judge's determination or whether it remains a sound determination, and we concentrate on two particular matters in addressing this point. The first is the issue of the non-acceptance by the first judge, Judge Alakija, of the claimed age of the appellant being at school at the age of 21 and indulging in gay sex in the school bathroom. As I say, this adverse finding was adopted by Judge Graham. She said she adopted the adverse credibility findings of Judge Alakija in relation to the appellant remaining at school at 21 years old, and the difficulty, as we see it, with this is that the medical evidence of Dr Roberts in relation to the scar on the head was that this was a scar that had been inflicted as it was claimed to be by the appellant at the time when he was held and beaten when he was at school in 2000 at the age of 21. We do not consider that Judge Graham has made it clear how it is that on the one hand she could endorse the earlier finding of the judge of not finding this claim to be credible and yet accept in effect that the incident nevertheless occurred.
20. We take of course Mr Sills' point about the fact that not everything that the appellant says has to be believed for him to be found to be at risk. Some aspects of the claim can be believed and other aspects of the claim can be disbelieved but it seems to us that there is a fundamental inconsistency between the adoption of the earlier finding and nevertheless an acceptance of an account of having suffered the injuries that he said he suffered on that occasion.
21. The second matter that we find of particular concern relates back to paragraph 37 of Judge Alakija's judgment which we set out earlier,

'I find it so improbable as to beggar belief that the appellant having allegedly been arrested and tortured as a homosexual then released into the custody of his boss would be allowed back to work at the security office of the President of Uganda',

and it seems to us that this is a wholesale finding not accepting any of these matters: he did not accept he was arrested, did not accept he was tortured and did not accept he was released into the custody of his boss.

22. *Given the adoption by Judge Graham of the adverse credibility findings in respect of the appellant's claimed employment subsequent to the arrest, to reconcile that conclusion with her acceptance of his claim to have been ill-treated following arrest required a clear analysis which we find to be lacking in the determination.*
 23. *We do not think it can simply be said that Judge Graham had made findings that the appellant is gay and that is a sufficient finding. It has to be properly reasoned and if there are matters that are accepted and those that are not accepted then there has to be a rational explanation given as to why particular matters are accepted and others not accepted. There is an issue here as to the quality of the reasoning of the judge in this regard which, in our view, goes beyond simple disagreement but shows irrationality in the assessment of the evidence in the light of the Devaseelan guidance and the earlier determination.*
 24. *Those are the essential matters then that we see of being of particular concern in this case, and as a consequence we find that there are material errors of law in the judge's decision such that it falls to be set aside. From that we have to decide whether we remake the decision in this case ourselves or whether it has to be remitted to the First-tier Tribunal. Having heard submissions, we accept that it will not be possible to conclude matters today. The appeal will be reheard in the Upper Tribunal, if possible before Judge Allen."*
9. For the rehearing before me I noted three statements by the Appellant (12 November 2013) at E12 Respondent's bundle; 3 April 2014 in Appellant's bundle (which also contained a medical report and a supplementary medical report by Dr Roberts), also 22 October 2014 in a supplementary bundle lodged for the hearing which included inter alia a statement of Oxford Friend (23 October 2014). A skeleton argument was also lodged for the hearing.

10. The Appellant gave oral evidence. In examination-in-chief he adopted his witness statements (12/11/13), a witness statement in the Appellant's bundle (3/4/14), and his supplementary bundle (22/10/14).
11. He also made reference to a letter (undated, lodged for this hearing) purporting to be from his school in Uganda giving his dates of attendance. He had called his mother and asked her to go to the school and ask for it.
12. He said that after December 2007 he went back to the Presidential Brigade (PGB). Asked if on return he faced any issues as he had previously been arrested, he said one group within the PGB said he was gay, another group said he was fine as he was married. His boss, Lieutenant K, was with the latter group.
13. After his detention his landlord told him to leave giving him two months to do so. He sent his wife away and went himself to Jinja and Makerere.
14. In cross-examination he agreed that he has been in the UK since 2010. He said he had had four sexual relationships since then. None of these former partners had come to give evidence. He had asked one of them, P, with whom he still has contact to attend but he had declined because he is bisexual with a wife who does not know he is gay. They also have a child. He has no contact with the other three. He had made efforts to find them but with no success.
15. He said that a witness Mr W had come to give evidence on his behalf. The Appellant said that from about April 2013 he has done some volunteering for a counselling group in Oxford for which Mr W is the coordinator. He has discussed his problems with Mr W. His involvement with Oxford Friend was his first involvement with an LGBT group.
16. He was asked about his role in the PGB. He said he trained colleagues in kickboxing and also took part in raids to arrest criminals.
17. I also heard oral evidence from Mr W. He adopted his statement (23 October 2014). He was asked about his contact with the Appellant. He said it is about two or three times a month. Asked if he had given evidence on behalf of other asylum seekers he said he had not.
18. In cross-examination it was put to the witness that it was because the Appellant had presented himself as gay and because he does some work at Oxford Friend, he accepted that the Appellant was gay. The witness said that eight or nine months before, he would have agreed. However, the Appellant had now been with Oxford Friend for about eighteen months. He had been assiduous in his training and his duties. It would be very difficult for someone showing such commitment to be pretending about his sexuality.
19. The witness could not say why the Appellant had only gone to Oxford Friend after losing his first appeal. However, if he was lying he had been

an extremely good actor since 2013. The witness said that he and other members of the group did not doubt the Appellant's sexuality.

20. The witness was asked if he had ever seen the Appellant with another man. He said he had not. The Appellant had said he had had such relations but such matters were not discussed. Indeed, the witness said, he would not talk about his own intimate experiences to others.
21. The witness thought that the Appellant had said that he had contacted someone in the hope of getting him to come to court to corroborate his sexuality but that the person refused.
22. In re-examination asked again how he could be sure about the Appellant's sexuality the witness again noted his commitment to Oxford Friend. That apart he said it was a difficult question to answer. He nonetheless accepted that he was gay.
23. Asked further about the Appellant's commitment he said it involved taking phone calls. Such often come from people wishing to come out but worried about family reaction. Also from parents of young people who had come out and who wanted to know how they could support them.
24. The witness said he had sat in with the Appellant while he answered such calls. He said the Appellant had also had involvement with emails drafting responses which would be checked by colleagues. The witness's conclusion was that the Appellant's commitment speaks for itself. He could not have done what he had if he had not been gay.
25. In submissions Mr Duffy noted that in the first determination the Appellant's account had been disbelieved. As such it was the starting point. The question was whether the new evidence shows good reason to go behind the findings of the first judge.
26. Mr Duffy sought to rely on the findings of the first judge and on the refusal letter. He submitted that the subsequent evidence had not been sufficient to displace the negative findings of the first judge. In that regard he submitted that the supplementary report by Dr Roberts did not greatly assist the Appellant's case. It indicated that the Appellant has various scars and that they were not likely to have been the result of his kickboxing activities. However, Mr Duffy, queried whether the doctor was aware that as part of his job the Appellant arrested people who might be violent. Such a possible cause of injury and scarring had not been considered. Dr Roberts should have looked at other ways in which the scarring could have been got and ruled them out.
27. As for the arrest warrants and school letter the first judge had noted the case of **Tanveer Ahmed [2002] UKIAT 00439** and found that he could not rely on them. Mr Duffy submitted that the new documentary material was of uncertain provenance and was not strong enough to displace the previous adverse finding.

28. Mr Duffy noted the support of Oxford Friend. He did not seek to undermine Mr W who it was clear had given an honest view but who had accepted that it was not for him to question someone who claimed to be gay. Indeed, why should he as most will be genuine. However, here the Appellant had not become involved with the group until the failure of his first appeal. Perhaps he was simply a good actor.
29. It was also significant that despite claiming to have had relations with several men none had attended. He would surely have done his utmost to get such particularly in view of his immigration history and the earlier adverse findings.
30. It was Mr Duffy's conclusion that the Appellant had not moved his case on and it fell to be dismissed.
31. Mr Sills in reply sought firstly to rely on his written submissions. The only issue is whether or not the Appellant is gay. If so he must succeed in his asylum application. Such was not disputed by the Respondent.
32. Mr Sills agreed that the determination of the first judge was the starting point. However, in his submission, there were now good reasons to revisit it.
33. First, the medical reports are significant. The criticisms in the first determination had been addressed by Dr Roberts who had properly sought to apply the guidance in the Istanbul Protocol referring to scarring as being 'consistent' or 'highly consistent' with the claimed causes. Dr Roberts had adequately addressed the issue of whether the injuries could have been got in the Appellant's line of duty.
34. As for the further school letter it had been got in light of the criticism made previously. Such was understandable and proper. It provided further support for his account.
35. On the issue of the Appellant being able to go back to work after having been arrested as a homosexual Mr Sills submitted that the background material gave support for the claim that problems for LGBT persons came less from the authorities directly and more from wider society. His claim to have been given the benefit of the doubt by those in authority, albeit that he received some bullying from his group was plausible.
36. As for his ability to get a new passport, again the background material was relevant. It indicated that registration of LGBT persons was ineffectual. Thus, the authorities might simply not have known about him.
37. Making a number of references to the background material Mr Sills submitted that such, when considered with the new evidence dealt adequately with the implausibility issues found by the first judge.
38. Turning to the Appellant's life in the UK. Mr Sills accepted that apart from the Appellant's own evidence about his sexuality there was only the

evidence of Mr W. The Appellant had given good reason why he had no further witnesses on the matter. It was clear that he had not had any significant relationships since arriving here. Mr W had given his honest belief about the Appellant and his reasons for that belief. It was not a blind acceptance. In the context of the case his evidence was important.

39. In considering this matter I look first at the contemporary general background material in respect of LGBT persons.
40. The Country of Origin Information document (6 February 2009) sums it up thus:

“The USSD Report 2007 stated ‘Homosexuals faced widespread discrimination and legal restrictions. It is illegal for homosexuals to engage in sexual acts, based on a legal provision that criminalizes ‘carnal acts against the order of nature’ with a penalty of life imprisonment’.

Human Rights Watch summarised the relevant law in a press release dated 7 September 2006 as:

‘Same-sex relations are criminalised in Uganda under a sodomy law inherited from British colonial rule. Section 140 of the Penal Code criminalizes ‘carnal knowledge against the order of nature’ with a maximum penalty of life imprisonment. Section 141 punishes ‘attempts’ at carnal knowledge with a maximum of seven years’ imprisonment. Section 143 punishes acts of ‘gross indecency’ with up to five years in prison. In both Britain and Uganda, these terms were long understood to describe consensual homosexual conduct between men.’

In addition, the Constitution has been amended to ensure that marriage is defined as heterosexual union, with the Sodomy Laws website running an article from 365Gay.com news site, dated 7 July 2005, ‘Uganda to jail same-sex couples who marry’, which stated:

‘Parliament has adopted a proposal to amend the Constitution so as to criminalize same-sex marriages,’ Bernard Eceru, a spokesperson for the government told the Ugandan Newspaper. Eceru said that 111 MPs voted in favour of the amendment, 17 against and three abstained. ... Specific jail terms for offenders were not included in the legislation but are to be laid out in revisions to the Ugandan penal code at a later date, Eceru told the paper.’

An article dated 7 October 2008 on the website of Behind the Mask reported ‘The Ugandan government said Saturday it would strengthen anti-gay laws and step up police operations against homosexuals amid concern over the ‘mushrooming’ number of gays and lesbians in the East African nation.’

Government/societal attitudes

The USSD Report 2007 noted that 'Public resentment against homosexuality sparked demonstrations and significant public debate during the year. The government took a strong position against the practice. A local NGO, Sexual Minorities in Uganda, protested several members' alleged harassment by police for their vocal stand against sexual discrimination'.

Behind The Mask in an article dated 18 September 2008 reported:

'Turmoil has erupted once again in Uganda as police clamp down on homosexuals in that country, which started this Monday 15 September [2008]. Two men have already been arrested and charged with 'recruitment of homosexuals', something which according to Human Rights Watch, is not even a legislation in Uganda's laws. Many members of the LGBTI community are in hiding avoiding detention as it is believed police are in possession of a list of a about 40 people said to be homosexuals in that country'."

41. The preliminary observation can be made that the Appellant's account, if he has been truthful about his sexuality is broadly consistent with the contemporary background material about what could happen to people in the LGBT community at the time he was there.
42. The sole issue in this case is the Appellant's credibility. His claimed sexuality is disputed. Various credibility issues with his historical account were raised by the Respondent. It is agreed that the starting point in assessing the claim is the determination of Judge Alakija who heard the first appeal (per **Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702**).
43. I noted my findings on credibility contemporaneously.
44. The adverse credibility findings made by Judge Alakija can be summed up as follows: the Appellant delayed in claiming asylum; the account of his education and relationship at school was improbable; his delay in marrying until May 2005 was implausible; he only had problems with the authorities twice; that having been told by his landlord to leave because of threats by the local community to burn the house down he was able to stay there for two months without problems; he was permitted to return to work at the security office of the President; it was not credible that the Appellant could have obtained a new passport; the medical report did not refer to the Istanbul Protocol and did not consider whether the injuries could have been inflicted in other ways.
45. In considering the credibility issues taken against the Appellant, in my judgement there are good reasons to revisit the findings made against him.
46. In that regard I look first at the supplementary report by Professor Roberts (3 April 2014). His original report was criticised by the (First-tier) Tribunal

for failing to make mention of the Istanbul Protocol and whether the injuries noted could have been the result of causes other than assaults he claimed to have suffered at the hands of the headmaster and students at his school in 2000 and the sustained serious of assaults he alleged he suffered after his arrest in 2007.

47. The Protocol at [186] states that:

“... for each lesion and for the overall pattern of lesions the physician should indicate the degree of consistency between it and the attribution:

- (a) *Not consistent: the lesion could not have been caused by the trauma described.*
- (b) *Consistent with: the lesion could have been caused by the trauma described, but it is not specific and there are many other possible causes.*
- (c) *Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes ...”*

187. ... Ultimately it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story.”

48. It was submitted by Mr Duffy that the injuries could have been the result of the Appellant’s kickboxing activities. I note several of Dr Roberts’ conclusions. In respect of the deformity and missing nail of a toe which the Appellant said happened in 2007, the doctor states that such are *“highly consistent”* with the account he gave of an assault using pliers causing wrenching and crushing of the toe. The *“gross destruction of the joints of the toe would be fully consistent or highly consistent with wrenching and crushing of the toe by pliers and very unlikely to be caused by trauma”*. He continues: *“I considered that a fracture may have been caused by kickboxing but the degree of deformity of the joints of the toe and the degree of deformity to the nail are highly consistent with a crushing injury as would be expected to be caused by pliers and not a simple closed fracture caused by a blow where the skin is not broken ...”*.

49. A further example: *“The position and number of the eighteen wounds on his right and left leg are highly consistent with the account he gives of an assault comprising a series of stabs and cuts with a broad bladed, sharp pointed bayonet. The number of separate scars is high and their number and position make accidental trauma and self-inflicted trauma very unlikely. The position of the scars on the shins and outer surface of the arms would be typical of cuts produced while he was protecting his head and neck and torso with his arms and legs.”* The doctor considered the possibility that such injuries could have been caused by kickboxing,

however *“kicks would not cause linear fibrous scars which indicate open wounds caused with a sharp instrument were present ... Moreover the location of scars is not typical with injuries from kickboxing as most injuries in skilled kickboxers are to the head, neck and chest as these are the target area as described in surveys of kickboxing injuries”*.

50. The doctor also found in connection with a long scar on his head that its position and irregular outline was fully consistent or highly consistent with the claimed assault in 2000. While he could not exclude the possibility that the scar was the result of an accident *“this is not a common place for an accidental injury.”*
51. The doctor concluded his detailed report thus: *“[The Appellant] gave a clear and detailed account of the alleged assaults. I have considered the history, evidence from the physical examination and the number, character and location of the multiple scars and therefore am of the opinion that taken together, the deformity of his right toe and scars on his left arm, legs and feet are fully consistent or highly consistent with the wounds caused with a pair of pliers and a knife while he was restrained on his back and while protecting his head and face. The history of the assaults, his injuries, the treatment he reports he received and the time to recovery are fully and entirely internally consistent or highly consistent”*.
52. Mr Duffy submitted that Dr Roberts had not commented on the possibility of the injuries having been got as a result of violent resistance by criminals who the Appellant in the course of his duties in the PGB , sometimes arrested. This seems to me a little unfair as it does not seem that the Appellant’s duties in the PGB were raised other than in a general way by the Respondent or at the previous hearings. There was thus no reason for the doctor to specifically consider such. In any event, it is difficult to see how an injury such as the one to his toe (*“the deformity of his right toe... (is) highly consistent with the wounds caused by a pair of pliers...while he was restrained on his back...”*) which he said were got during torture in 2007 could be consistent with an injury caused by someone resisting arrest.
53. It is clear that the doctor is highly qualified. He has been trained by the Medical Foundation in the assessment of injuries and has significant experience in doing so. I find the medical reports on which I place considerable weight to give support to the Appellant’s historical account of receiving the injuries in the way he claimed at the school in 2000 and while detained in 2007.
54. That ill treatment during detention happens to LGBT persons is clear from the background material (Danish Immigration Service Report (January 2014) (1.2.1.3).
55. A further concern was that the account of the Appellant’s education and relationship at school was improbable. It was not believed that he would still be at school aged 21 years and would engage in sexual activity there.

I note the letter from the school confirming his attendance at that age. I also note a letter (4 April 2014) from Dr Melissa Peters, Northwestern University, an academic, who states that she spent two years conducting research among LGBT people in Uganda.

56. She confirms the existence of the practice known as “bye bye”. She states *“The tradition is commonly known as ‘kiro more’, the last night ... It is in most cases a crazy night, characterised with booze, sex and drugs ...”*
57. I see no reason to disbelieve his evidence that he got the letter via his mother following the criticism by the previous First tier judge as to a lack of documentary evidence about his school attendance. While it may seem somewhat unusual to western eyes that a person would still be at school aged 21, the letter from the head teacher confirms his attendance from 1995 to 2000. I see no reason why I cannot rely on the contents of the letter from the school. As for the evidence about “bye bye” the expertise of the academic was not challenged and I accept it. I conclude that the account of the Appellant’s sexual activity at school is credible.
58. Another significant issue is that he only had problems with the authorities twice and indeed was permitted to return to work at the security office (PGB) of the President.
59. His explanation is that he had been discrete about his sexuality indeed denying he was gay to others including his employer. As a result although there was some bullying from colleagues others did not believe he was gay particularly as he was married.
60. I find some support for that claim in the background material. The Danish Immigration Service Report states (at 1.2.1): *“According to a Western embassy, the Inspector General of Police has publicly stated that the UPF is not going to arrest homosexuals as long as they are consenting adults and that the police should not monitor what goes on in people’s bedrooms. The IGP has also provided the LGBT members with a hotline contact in case they are arrested arbitrarily. The same position has been repeated by the public prosecutions office ... The Minister of Justice, who according to a Western embassy is a respected general in the army, has publicly stated that the Bahati Bill [i.e. the AHB] violates human rights.”*
61. In light of the background material I found credible his evidence that he was effectively given the benefit of the doubt by those in authority in particular his employer.
62. A concern was how he was able, despite threats, to remain safely in his rented property for two months having been given notice of eviction. The Danish report (1.4) gives some support for his claim to have been evicted: *‘Evictions from rented housing could be initiated by concerned neighbours, who could try to round up support from the local community and ultimately present this to the local council.’* His evidence was that he could not go at once because he needed a letter of recommendation from

the local council in order to move to another community. He got this again with the help of his employer. That such is indeed the practice is also confirmed by the Danish report (1.4). His further evidence was that he was not untroubled in the period before he left but received threats. I find that evidence credible.

63. As for concern that those family members seeking to get him a wife so that he would become “respectable” would not have allowed him to not marry for so long, I find plausible his evidence that rumours about his sexuality spread by an uncle might have discouraged potential partners. I note the Danish report which refers to some LGBT persons being given the condition of either getting married or being disowned by the family (3.1).
64. A further concern was how the Appellant was able to get a new passport.
65. His evidence was that having received threats from the community he moved to Makerere and to Jinja.
66. Again I note the Danish Report: *“An anonymous human rights organisation in Uganda explained that if a LGBG person who has been arrested on the grounds of homosexuality and later released should decide to move to another location, he or she would not face any problems with the police in the new setting. The police do not have an electronic registry of arrests of LGBT persons and a person could start afresh in a new district, where neither community nor police would know about the person’s sexual orientation”* (1.2.1).
67. I note the evidence that the arrest warrants were not issued until after the Appellant left Uganda. I again find credible his claim that he had once more the help of his employer this time in making the application. Also he was not in prison at that time, and there were no charges. In light of that evidence and also the evidence as to limited record keeping, I find credible he would have been issued with a passport and was able to leave Uganda untroubled.
68. Having arrived in the UK it was two years before he claimed asylum. His evidence is that having learned of the authorities’ interest in him soon after his arrival in the UK he feared return. However he overstayed before claiming asylum. I do not find credible his claim that he was scared that if he approached the UK authorities he would be sent back, a situation which later changed when he decided that he did not want to continue indefinitely living here illegally. Under s8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 I take account as damaging his credibility his failure to take advantage of a reasonable opportunity to make an asylum claim when in a safe country. However, I do not see that to distract from the overall assessment of the evidence. It is a global assessment of credibility that is required.
69. In that regard there was oral evidence not only from the Appellant but also from a witness, Mr W.

70. I may say that I find Mr W to be a compelling and impressive witness. His evidence was that he has worked for the LGBT support group Oxford Friend for a considerable time. He said that from observations of the Appellant over many months at the group's office where he has been working he was under no doubt that the Appellant is, indeed, gay. It was not suggested by Mr Duffy that Mr W was being untruthful in his evidence and I have no doubt whatsoever that he was being truthful. The suggestion was that the Appellant may have been acting a part, pretending to be gay.
71. The witness, whose evidence was that he himself is gay, said he was sure that was not so. It would have been extremely difficult for a person to have carried out such an act of pretence over such a period during which he has been increasingly involved in the group's activities including dealing with phone calls and emails from concerned individuals and families.
72. I find that the witness was not only truthful but correct in his assessment of the Appellant.
73. I do not find it an adverse factor against the Appellant that he only started his activities at the group after the dismissal of his appeal by the First-tier Tribunal.
74. Nor do I find it significant that there was no evidence oral or written in support from any of the partners who the Appellant said he had been involved with. I found credible his evidence that he had approached one previous partner but that being married with a child that man had refused to get involved.
75. I remind myself of the obligation to consider the Appellant's case "with the most anxious scrutiny." Looking at the evidence in the round and having sought to take account of all relevant material some of which was not available at the time of the first appeal I find it appropriate to revisit the earlier credibility findings. For the reasons stated I find to the lower standard that the core aspects of his historical account are credible. I accept his evidence that he is gay and for that reason he faced the difficulties amounting to persecution in Uganda. Specifically that he suffered the assaults claimed in 2000 and when detained in 2007 and that subsequently arrest warrants were issued. I have no doubt that he fears the possible consequences of return and of living as a gay man in Uganda.
76. In **HJ (Iran) and HT Cameroon) v SSHD [2010] UKSC 31** it was established that where a person would in future refrain from behaving in a way that would expose him to a danger because of the risk of persecution that behaviour brings, that person is a refugee. Would a gay man or lesbian woman have to conceal aspects of their sexuality in order to avoid persecution. A distinction is drawn between someone who may choose to live discreetly due to simply societal pressures for example not wishing to

distress his parents or embarrass his friends and those for whom a material reason for living discreetly on return would be a fear of persecution which would follow if he were to live openly as a gay man.

'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.' (Lord Roger) [82].

77. I consider the situation for homosexuals in Uganda at present.
78. I can do so in brief because the Respondent accepts that gay people face persecution in Uganda.
79. Detail is given in the recent UK Home Office, Country Information and Guidance - Uganda: Sexual Orientation and Gender Identity and in the Danish Fact Finding Mission of 2014. Both these documents show the problems of societal discrimination and state persecution. Pressure being brought on landlords to evict gay tenants. The Danish report refers to people living secret lives. Evidence of gay activity at university. Family problems faced by gay people. The evidence shows varying levels of discrimination and hostility to gay people, and those suspected of being gay.
80. The following passages are pertinent:

"2.1.1 The Civil Society Coalition on Human Rights and Constitutional Law, in a submission on LGBTI issues to the UN Human Rights Council's Universal Periodic Review on Uganda, dated 11 March 2011 (before the Anti Homosexuality Bill was passed), stated:

'... The retention of laws and the threatened enactment of new ones that further criminalize sexual relationships between same-sex consenting adults has a devastating impact on same-sex practicing people in Uganda. They live in constant fear of arbitrary arrest and detention, discrimination in education, employment, housing, and access to services (especially health services), excommunication from places of worship and extortion - all buttressed by the existence of laws that criminalize same sex and lack of specific legal protections for LGBT under Ugandan law as they are not even recognised as minorities under the Equal Opportunity Commission Act.'

'According to OHCHR Uganda, the peaks in the discrimination, harassment, arrests and violence against LGBT persons can be linked to specific periods of time when LGBT issues have been raised by

national public media. For instance the introduction of the AHB in October 2009, the publication of the Rolling Stone article "Hang them" in September 2010, the murder of David Kato on 26 January 2011, the resolution to retable the AHB in October 2011, the re-introduction of the AHB in Parliament, the widely applauded statement of the Speaker of Parliament in her visit to Canada in 2012, the closure of work-shops by the Minister of Ethnics and Integrity in February 2012, the article against homosexuality and the public attention on the Marriage and Divorce Bill, etc. on 24 February 2013.

2.5.6 The joint Danish FFM Report 2014 provides extensive information on arrest and prosecution of LBT persons. The following is an excerpt from this section of the report:

'Co-coordinators Clare Byarugaba and Geoffrey Ogwaro of the CSCHRCL stated that the police usually do not proactively pursue LGBT persons on their own initiative. It is family, partners, employers, neighbours, etc., who inform the police or the local Church about suspected LGBT persons. For example in Jinja a local radio station aired programmes that incited hatred against homosexuals and encouraged the local people to be vigilant and report homosexuals to local authorities, meaning the police and LC's Local Councils.

'Representatives of Icebreakers stated that the main concern for LGBT persons is not the police or the Ugandan authorities. The fundamental concern is that LGBT persons are denied the very backbone of society, i.e. family ties, education, work, housing and societal acceptance.

'An anonymous human rights organization in Uganda stated that the main security issue and concern for the LGBT community stem from Ugandan society. The police are not the main security concern, as they in reality would not proactively seek out and hunt down LGBT persons. Rather, security issues of concern to LGBT persons would relate to being disowned by the family, poverty, false accusations resulting from private rivalries, fear of being outed by neighbors or colleagues.'

81. In assessing the situation for the Appellant he is a gay man. I believe his evidence that he wishes to live openly in public as well as in private as a gay man but that he fears were he to do so in Uganda that he would be at risk of persecution from the authorities and individuals. He cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. From my reading of the background material, in Uganda gays or persons who are believed to be gay do face persecution and that persecution is something that may reasonably be feared. He has a well-founded fear that he will be persecuted. Internal relocation is not an option. I see nothing in the evidence to suggest that there is any area of

Uganda where gay men could live openly without fear of persecution. In no sense would he be returning to a part of the country where the state would protect him from persecution.

82. The Appellant satisfies me that he has a well-founded fear of persecution (membership of a particular social group) if returned to Uganda. His appeal succeeds.

Notice of Decision

The appeal is allowed on asylum grounds.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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

Upper Tribunal Judge Conway