IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07047/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 26th November 2015	**On 11th January 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

SNM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Patel (Counsel)
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal to the Upper Tribunal, brought with permission, in respect of a decision of the First-tier Tribunal (Judge Turnock) promulgated on 20th July 2015, dismissing her appeal against the Respondent's decision of 9th April 2015 refusing to grant her asylum or any other form of international protection and deciding to remove her from the UK.

2. The Appellant entered the UK on a date in July 2004 having obtained entry clearance as a student. She subsequently received further in-country

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grants of leave to remain, on the same basis, until 31st October 2009. Subsequent applications for further leave to remain as a student were refused and, on 10th October 2014, having been arrested under immigration provisions, she claimed asylum. This was on the basis that if she were to be returned to her home country of Malawi she would be persecuted as a consequence of her membership of a particular social group being that of “lesbian women in Malawi”. In this context, she claimed that lesbians were persecuted in Malawi and that she was known to be a lesbian because she had had a relationship with a woman called Alice whilst living in Malawi, that the relationship had been kept secret but that the two had been discovered together, in a compromising situation, by her cousin H at a time in 2008 when she had returned to Malawi for a break from her studies. She said that H had been aggressive towards her and had informed her parents and that her father had said he would kill her. As a consequence of that she had returned to the UK where she had, until her leave expired, resumed her studies. She said that, since the incident in 2008, she had disclosed her sexuality to a UK based nurse, whom I shall simply refer to TM, who is also from Malawi, that she had joined a group called the Equity Partnership (an organisation which supported the local lesbian gay bisexual and transsexual communities) that she had attended Pride days and marches and that she had sometimes attended clubs which catered for the lesbian community.

3. Judge Turnock (hereinafter “the judge” heard oral evidence from the Appellant and was provided with documentary evidence which included, amongst other things, a letter written by TM and a letter provided by the Equity Partnership.

4. The judge accepted that lesbian women in Malawi did form a particular social group. However, he decided that the Appellant was not a lesbian and that, even if she was, and even if the whole of her account were to be true, she would only face discrimination, as opposed to persecution, in Malawi and that she would be able to safely relocate away from her family members whom she had claimed would wish to harm her.

5. The judge, in his credibility assessment, set out, from paragraphs 30 to 38 of his determination the detail of the Appellant’s claim and certain of the evidence which she had provided. He then said this;

> “40. The letter provided from the Equity Partnership is a letter addressed to ‘Dear Member’ and contains no specific information at all about the Appellant. There is no confirmation that she has attended any events and there was no one at the hearing to confirm that she had participated in any of the organisation’s activities. Her own evidence is that she did not join the organisation until the beginning of 2015, a time after she had applied for asylum.
>
> 41. Although there is the statement from [TM] the comments to her were made only shortly after her claim for asylum.
>
> 42. The weight to be given to the evidence provided by the letters from [TM] and the Equity Partnership must, necessarily, be limited in the

absence of the attendance at the hearing of either author who could not, therefore, be cross-examined on behalf of the Respondent.

43. The Appellant makes reference to having taken part in Pride days at both York and Bradford but again there is no evidence from anyone who can confirm that is the case. Similarly with regard to claimed activity in Wakefield or Chelmsford there is no evidence written or oral to support her claims.

44. The Appellant claims that after returning to the UK she had several casual relationships with women, which included a brief relationship with a woman from Malawi who she knew from school. There is no supportive evidence produced to support that assertion.

45. There is no evidence from Alice nor any evidence of the efforts the Appellant claims to have made to contact her.

46. The Appellant came to the UK after the alleged discovery of her relationship with Alice in 2008 but did not claim asylum on arrival. At that time she had leave to remain as a student and it may be the case that her legal status in the UK provided her with a degree of security. However her applications for leave to remain were subsequently refused and she was served with notice as an overstayer and was then arrested on 21st September 2014. She did not claim asylum until 10th October 2014. That is not consistent with her claim that she faced persecution and serious harm if returned to Malawi.

47. The Appellant claims that she did not claim asylum because she did not know about asylum until she had received legal advice following her arrest. She claims that she had not worried about her immigration status because she had not received a decision on her application so she had presumed that she was in the United Kingdom legally.

48. I find that the repeated failure on the part of the Appellant to pursue a claim for asylum until 10th October 2014 damages her credibility.

49. I have, however, taken into account the decision in the case of **SM (Section 8: Judge's process) Iran [2005] UKAIT 00116** that even where Section 8 applies, an Immigration Judge should look at the evidence as a whole and decide which parts are more important and which less. Section 8 does not require the behaviour to which it applies to be treated as the starting point of the assessment of credibility.

50. The Appellant was arrested at home on 9th September 2014 and was asked whether she was working. She stated that she was not working but was helping out covering a shift. The Respondent stated that it was later confirmed that she had been working at the establishment for ten years and her employer had also provided her with accommodation. The Respondent considered that her protestation that she had not been working in the UK was an attempt to conceal information. The Appellant, in response, says that she was not asked how long she had been working at the care home and the answer she gave regarding covering for a shift was true and she was not trying to mislead. Nevertheless she accepts that she had been working for a considerable period of time, and latterly whilst having no leave in the UK. The Appellant states that after completing her studies she began

to work at [a residential home] on a part-time basis throughout her studies and she increased her hours following her graduation.

51. The Appellant claimed asylum on 10th October 2014 following her arrest on 9th September 2014. When asked why she had not made a claim prior to her arrest she stated that she thought she needed a lawyer first and that she was afraid (asylum interview question 131).

52. I accept that the Appellant has been internally consistent, as found by the Respondent, which clearly has significance. However that is only one aspect of the assessment of her credibility. Assessing the evidence overall and for the reasons set out above I do not find her to be a credible witness. I am not satisfied, even to the low standard required in cases of this nature, that the Appellant has established that she is a lesbian."

6. The judge then went on to consider some background country material concerning Malawi and to conclude that such information did not indicate that lesbians in Malawi were subjected to persecution as opposed to discrimination. He also made the point that whilst the background material contained reports of family members taking action against lesbian women, the Appellant would be "able to relocate away from her family".

7. The very extensive Grounds of Appeal to the Upper Tribunal were drafted by an organisation known as the Manuel Bravo Project. Those grounds took various points with respect to the assessment of credibility and the assessment as to the risk to lesbians in Malawi. Certain of the points made, though, were mere matters of disagreement with the outcome.

8. Permission to appeal was granted by a Judge of the First-tier Tribunal and the salient part of the grant reads as follows;

"2. It is arguable that Judge Turnock may have materially erred in law in failing to set out with sufficient clarity or particularity the reasons why, despite internal consistency in her account, the Appellant was found not to be credible (paragraph 52 refers).

3. It is arguable that Judge Turnock may have made a material error of law in the assessment of risk for lesbians in Malawi in general and the Appellant in particular."

9. Permission having been granted there followed a hearing before the Upper Tribunal, in fact before me, in order to consider whether the decision should be set aside for error of law. At that hearing I received careful and helpful oral submissions from both representatives. I am grateful for those submissions and I have taken them fully into account. I have, in fact, concluded, for the reasons which I will explain below, that the decision did contain material errors of law and that, accordingly, it should be set aside despite the obvious care the judge has taken.

10. First of all, I turn to the adverse credibility finding. The judge, as indeed had the Respondent, accepted that the account offered by the Appellant was internally consistent. Of course, as he himself pointed out, that, of

itself, will not be determinative as to an assessment of credibility. Nevertheless, it was a factor of some force. In stating why, despite that finding as to internal consistency, the Appellant was to be disbelieved, the judge relied upon the Appellant's delay in claiming asylum together with, it seems, dishonesty as evidenced by her having worked in the UK without permission to do so. The Appellant's inability to produce further evidence as to matters such as her attendance on Pride days do not seem to have counted against the Appellant as such but, on my reading, the lack of persuasive evidence as to such matters merely meant, in the view of the judge, that these could not be treated as positive factors weighing in her favour.

11. I do not accept Ms Patel's submission to the effect that the credibility assessment is necessarily unsafe simply because the judge relied exclusively upon factors which might be felt to fall within the scope of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. I have, though, concluded that the credibility assessment is incomplete such that the judge has failed to provide adequate reasons for his disbelief as to her sexuality and her account of events. In this context, the judge notes that the Appellant gave oral evidence before him. Since there was a Presenting Officer representing the Respondent at the hearing, it is reasonable to suppose that she was cross-examined. However, there is no mention in the determination of the degree to which the Appellant did or did not withstand cross-examination. Presumably, given the judge's acknowledgement that her evidence had been internally consistent, her oral evidence was consistent with that of her evidence as given in interview and in any other sources seen by the Respondent and which had led the Respondent to conclude that she had been internally consistent. So, it appears that she had been able to maintain that level of consistency even under challenge. The judge does not, in fact, say whether that was so or not but, since it appears to have been so, it seems to me that he ought to have expressly referred to that and weighed it in the balance when considering her credibility on the basis that there is a difference between being consistent in such as statements and interviews and in being consistent in the face of a specific challenge.

12. Further, the Appellant was asked a number of questions, in interview, concerning how she came to realise that she was attracted to other women. There is a relevant passage of questions running from question 45 to 50. The Appellant appears to have answered those questions in a direct manner which lacked any form of evasiveness. She also gave quite significant detail in answering interview questions regarding Alice, the relationship she claims to have had with her and what happened when the two were discovered together. There is a relevant passage of questions running from question 55 to 85. It seems to me that it was incumbent upon the judge to have regard to these elements of detail in the Appellant's claim to a greater degree that he had and it was not giving her sufficient credit to simply say that her evidence had been "internally consistent". I do not say that he had to accept the account because of the

level of detail contained in it but he had to take account of that level of detail when weighing matters in the balance.

13. In the above circumstances, therefore, I do consider that the credibility assessment is unsafe and that, in consequence, the decision has to be set aside.

14. I have gone on to consider how matters should proceed from here. Ms Patel urged me to remit to a differently constituted First-tier Tribunal on the basis that that would be the most appropriate course of action where the question of credibility has to be looked at entirely afresh. Mrs Pettersen did not express a view. I have decided, taking into account what the representatives had to say, bearing in mind that a consequence of my decision is that credibility will have to be looked at afresh and bearing in mind that it may be thought there might be a degree of unfairness in the Appellant losing her second stage appeal rights (other than an appeal to the Court of Appeal) if matters are retained within the Upper Tribunal, that remittal to the First-tier Tribunal is the appropriate course of action. I have, therefore, decided to remit with directions which are set out below.

15. Finally, an anonymity order was made by the First-tier Tribunal and I have concluded it is appropriate for me to make a similar order.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision. The case is remitted to the First-tier Tribunal in accordance with the directions set out below and on the basis that it be heard by another Judge of the First-tier Tribunal.

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.

Directions for the Rehearing Before the First-tier Tribunal

1. The case is remitted to the First-tier Tribunal to be heard by a judge other than Judge Turnock.

2. The new hearing shall take place at the Bradford hearing centre and the time estimate for the new hearing shall be three hours. The Appellant's representatives are to advise the First-tier Tribunal of any interpreter requirements forthwith.

3. If either party is to rely upon further documentary evidence not already filed then that evidence should be produced in the form of a paginated

and indexed bundle and sent to the First-tier Tribunal and the other party so that it is received at least five working days prior to the date of hearing.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Upper Tribunal Judge Hemingway