



**Upper Tribunal  
(Immigration and Asylum Chamber)  
AA/07254/2011**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On March 11, 2015**

**Determination  
Promulgated  
On March 13, 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MISS A W M  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss McCarthy, Counsel, instructed by Paragon Law  
For the Respondent: Mr McVeety (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The Appellant, citizen of Kenya. On April 27, 2011 she entered the United Kingdom and applied for asylum on May 4, 2011. The respondent refused her application on June 3, 2011 under paragraph 336 HC 395 and on June 7, 2011 a decision was taken to remove her as an illegal entrant from the United Kingdom by way of directions under paragraphs 8-10 of schedule 3 to the Immigration Act 1971.

2. On June 21, 2011 the Appellant appealed to the First-tier Tribunal under Section 82(1) Nationality, Immigration and Asylum Act 2002 (hereinafter called the 2002 Act), as amended. The matter came before Judge of the First-tier Tribunal M Davies (hereinafter called "the FtTJ") on August 4, 2011 and he refused her appeal in a determination promulgated on August 10, 2011.
3. The appellant lodged grounds of appeal on August 26, 2011. Permission to appeal was refused initially by Upper Tribunal Judge Goldstein on September 6, 2011 and then following a renewed appeal to the upper Tribunal by Upper Tribunal Judge Gleeson on January 23, 2012. The appellant lodged an application for judicial review and at a hearing on February 5, 2014 and by consent the decision of Upper Tribunal Gleeson was set aside and the Court directed that the permission to appeal be re-considered afresh by the Upper Tribunal. The matter was considered by Upper Tribunal Judge Warr on March 17, 2014 and he gave permission to appeal finding there were "viable complaints about the extent of the reasoning in the decision".
4. The matter came before me on the date set out above. The appellant was in attendance and represented by his counsel.
5. The appellant had filed a Rule 24 response in which it was argued the FtTJ had given adequate reasoning for the decision.

### **PRELIMINARY ISSUE**

6. Miss McCarthy addressed me on five matters that she argued amounted to an error in law. For the purposes of this decision I will refer only to two matters because Mr McVeety conceded there was an error in law on those issues alone.

### **ERROR OF LAW ASSESSMENT**

7. Miss McCarthy argued before me that the FtTJ had failed to give any reasons for rejecting the appellant's claim that she was a lesbian despite there being evidence before him of her relationship and the death of "C" the former girlfriend. The FtTJ gave no reasons why this evidence was rejected but simply found she was not a lesbian mainly because he rejected her claim about her former pimp, M M. The FtTJ had not had regard to how credibility should be assessed in such circumstances and there was no clear finding about whether the appellant was now a lesbian. The FtTj failed to consider the risk she could face as a lesbian. In paragraph [46] he rejected her claim to have been a lesbian in Kenya but went on to find that even if she was then there was no risk but in doing so he failed to have regard to the content of the refusal letter and the report entitled "Kenya: Mungiki-Abusers or abused" despite the fact both were before the FtTJ. In dismissing a risk if she were a lesbian the FtTJ failed to consider the independent evidence that was before him. The FtTJ also failed to consider the decision of HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31.

8. Mr McVeety accepted these deficiencies and agreed that there was a material error.
9. The appellant's solicitors had already indicated that as the appellant had been unrepresented in 2011 a bundle of evidence was required and up to five witnesses would be called. Miss McCarthy invited me to remit the matter back to the First-tier tribunal for a fresh hearing. Mr McVeety did not disagree with this approach.
10. I considered Part 3, Section 7.1 to 7.3 of the Practice Statement.
11. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

“Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.”

12. In light of the Practice Direction I agreed the case should be remitted to the First-tier Tribunal to be reheard on all matters any private and family life issues that may now be relevant. Consideration will also have to be given to the Immigration Act 2014, if appropriate.
13. I directed that the appellant's representatives serve a bundle of evidence including a paginated index and where appropriate key passage index for any country evidence by April 16, 2015. No interpreter is required.
14. The parties should ensure compliance with any directions issued in light of the fact the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 will apply to this appeal from hereon.

## **Decision**

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I have set aside the decision.
16. The appeal is remitted back to the First-tier Tribunal for a fresh appeal hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.
17. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order has been made and no application has been made to alter the position.



Signed

DEPUTY UPPER TRIBUNAL JUDGE ALIS  
IMMIGRATION AND ASYLUM CHAMBER