



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA001782015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 8th June 2016

Decision Promulgated
On 9th June 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

ARW
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Nicholson, Counsel instructed by Greater Manchester
Immigration Aid Unit

For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a female national of Nigeria born in 1991. She appeal against the decision of the First-tier Tribunal (Judge Heynes)¹ to dismiss her appeal against a decision to deport her.

¹ Determination promulgated 15th July 2015

2. The Appellant faces deportation as a 'foreign criminal'. She is designated as such because on the 26th August 2014 she was convicted at Liverpool Crown Court of assisting unlawful immigration into an EU member state for which she was sentenced to 12 months imprisonment. On appeal to the First-tier Tribunal the Appellant sought to resist deportation on protection grounds. She stated that she had a well founded fear of persecution in Nigeria on grounds of her membership of two particular social groups: as a bisexual/gay woman she will face serious harm as result of societal prejudice against homosexuals and as a woman she would be at risk of FGM.
3. The Respondent refused the protection claim on the grounds that the Appellant was not believed.
4. When the matter came before the First-tier Tribunal the Appellant asked for an adjournment. She said that there were a number of witnesses that she would like to call but none could arrange to attend the hearing because of the short notice; one was unwell. There is a dispute about how many potential witnesses there were, but since the record of proceedings mentions four I proceed on that basis. In respect of one of these witnesses the First-tier Tribunal was handed an email from a woman in London [VL] who said that she had been unwell for a few days and would not be able to make the journey to Manchester. VL, and at least one other of the potential witnesses, were being called to testify to the matter of the Appellant's sexuality. It was claimed that these were both women with whom she had had sexual relations. The other two potential witnesses mentioned in the determination were the Appellant's sisters. The Home Office Presenting Officer objected to the adjournment request on the grounds that as the witnesses were all friends or relatives of the Appellant they would not be reliable. The First-tier Tribunal refused the adjournment. It took into account the fact that there would be a delay in determining the appeal because of the "parlous state of listing" and the fact that the email from VL did not indicate when if at all she would be able to attend a further hearing. There was no communication at all from the other woman. At paragraph 19 the determination concludes

"Taking all of the above into account, I concluded that the appeal could be justly heard without granting an adjournment and refused the application".

5. The Tribunal proceeded to hear the evidence of the Appellant and having done so dismissed the appeal on the grounds that she had not demonstrated that she was either gay or at risk of FGM.

Error of Law

6. Mr Nicholson drafted the grounds of appeal. It is submitted, in essence, that the Tribunal erred in its decision not to adjourn. That submission is advanced on two grounds.

7. Firstly, as Judge Froom pointed out in granting permission, the test applied by the Tribunal at paragraph 19 of the determination is no longer that to be applied when considering whether a hearing should be adjourned. The test set out at paragraph 19 appears to be that contained at rule 21(2) of the *Asylum and Immigration Tribunal (Procedure) Rules 2005*. The current procedure rules are *The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014*. These do not stipulate that a Tribunal must, before deciding to adjourn, be satisfied that the case “cannot otherwise be justly determined”. There is instead the more nebulous guidance at rule 2 under the heading “Overriding objective and parties’ obligation to co-operate with the Tribunal”. This explains that the overriding objective is to deal with cases fairly and justly. Five factors are identified – in the form of a non-exhaustive list – which might be pertinent to that objective. One of those is delay, a matter expressly considered by the First-tier Tribunal. The others include “seeking flexibility” and ensuring that parties are able to participate fully. These are not matters which appear to have been addressed.
8. The second limb of Mr Nicholson’s submissions was that in all of the circumstances it was manifestly unjust for the Tribunal to have proceeded in the absence of the witnesses. He drew my attention to the chronology. On the 24th June 2015 there was a CMR. The direction given by Judge Davies on that occasion was that there were to be five witnesses called and the case was therefore to be listed for 1 whole day. Mr Nicholson is instructed that the representative who attended the CMR took notes to the effect that the case would not be listed for some months because of the delays in listing then being experienced in the First-tier Tribunal. As it happens a notice of hearing was sent out two days later. It was received by the Appellant’s solicitors on the 1st July 2015 and the hearing date fixed for the 9th July 2015. An application was made for the matter to be adjourned on the grounds that with such short notice the appeal could not be properly prepared. The application was refused on the grounds that there had been no application for an adjournment at the CMR. As Mr Nicholson points out, that was hardly surprising given that the representative was given to understand that it would be some months before a date could be set. In any event, it was the Appellant’s case before the First-tier Tribunal that were numerous witnesses who wanted to give evidence going to the central matter in issue and that they were prevented from doing so because of the short order of listing and the decision of the First-tier Tribunal not to adjourn.
9. I have had regard to the Presidential guidance in Ngaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). Whilst a decision to adjourn might involve consideration of a multitude of factors, the central question to be asked is whether or not a refusal to do so would deprive a party of their right to a fair hearing. I am satisfied, given all the circumstances, that in this case that is precisely what happened. Mr Harrison was able to confirm that the Respondent had known since the CMR that there were to be numerous witnesses and that the case was supposed to be listed for a whole day: he also

confirmed that as far as the Respondent was concerned this would be at a date sufficiently in the future to enable the SSHD to conduct her customary 'witness checks'. As it was none of that had been done. The matter was listed just two weeks after the CMR with a matter of days notice. Instead of the full day time slot agreed at the CMR it was only allocated 3 hours. I am satisfied that in the circumstances the First-tier Tribunal erred in proceeding on the day. A central matter in issue was the Appellant's claimed sexuality and the absent witnesses all wanted to speak to that issue. The decision is therefore flawed for procedural unfairness and the matter is set aside.

10. In the circumstances the parties agreed that the appeal must be heard afresh and in the First-tier Tribunal.

Decisions

11. The determination of the First-tier Tribunal contains an error of law and it is set aside.
12. The Appellant having been deprived of a fair hearing the matter is remitted to the First-tier Tribunal to be heard afresh.
13. Having regard to the nature of the evidence I make the following direction for anonymity, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders:

"Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings"

Upper Tribunal Judge Bruce
8th June 2016