



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

Appeal Number: PA/01587/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 December 2019  
*Extempore decision***

**Decision & Reasons Promulgated  
On 31 December 2019**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**EA  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Claire, Counsel instructed by Moorehouse Solicitors  
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nigeria. He was born on 18 February 1977. He appeals against the decision of First-tier Tribunal Judge Colvin promulgated on 30 July 2019 dismissing his appeal against the respondent's refusal of his asylum and humanitarian protection claim on 19 January 2018. The appellant made the asylum and human rights in the context of making representations against a decision of the respondent to deport him taken on 11 March 2016 pursuant to section 32(5) of the UK Borders Act 2007. The basis for the appellant's asylum claim was that he

is a homosexual man who would be at risk of being persecuted upon return to Nigeria.

### *Factual Background*

2. The appellant claims to have arrived in the United Kingdom in 2007 on a visitor's visa using a passport in the name of another person provided to him by an agent. In 2009, he was granted an EEA residence card as the family member of an EEA national. Following an immigration enforcement visit, that card was later revoked on the basis that his relationship was deemed to be a marriage of convenience.
3. On 13 February 2015 in the Crown Court at Southwark, the appellant was found guilty following a trial of a single count of fraud by abuse of position contrary to section 1(2) of the Fraud Act 2006. He was sentenced to a term of 36 months' imprisonment. Consecutive to that, he was sentenced to three months' imprisonment in relation to the possession of false or improperly obtained identity documents, giving a total of three years, three months' imprisonment. The appellant also had a previous conviction for common assault, for which he received two four-month concurrent sentences of imprisonment, each of which was suspended for eighteen months. The index offence relating to the fraud by abuse of position triggered the automatic deportation provisions in the UK Borders Act 2007.
4. Very shortly after the respondent informed the appellant that she had decided to deport him to Nigeria, he claimed asylum on the basis of his homosexuality. That claim was refused by the respondent and the appellant appealed to Judge Colvin, who heard his appeal on 2 July 2019. At the appeal the appellant gave evidence, as did two persons from the LGBT community. There were a number of documents that were before the judge and I shall turn to those shortly.
5. In the course of a careful and detailed decision, the judge summarised both the respondent's case (see [27] and [29]) and also the case advanced on behalf of the appellant. At [46] to [64], she considered and rejected the appellant's asylum claim, although had found that the appellant rebutted the presumption contained in section 72 of the Nationality, Immigration and Asylum Act 2002.
6. The judge did not accept that the appellant was gay. The relevant statutory exception to the automatic deportation decision could not be engaged on that basis. Secondly, she did not consider that any of the exceptions to deportation contained in the Immigration Rules or in Section 117C of the Nationality, Immigration and Asylum Act 2002 applied.
7. The grounds of appeal to the Upper Tribunal focused on the credibility assessment conducted by the judge, and also her application of Rule 399 of the Immigration Rules.
8. First-tier Tribunal Judge Kelly granted permission to appeal in these terms:

“It is arguable that in its ‘overall assessment’ (paragraph 57 onwards) the Tribunal had regard only to those aspects of the evidence that weighed against the credibility of the appellant’s claim and thus failed to reach its conclusion upon the basis of the evidence as a whole. Permission to appeal is therefore granted.”

### *Discussion*

9. At the outset of my analysis of the judge’s decision, it is necessary to recall that challenges to findings of fact reached by the First-tier Tribunal are only appealable to this Tribunal in the event that those findings disclose or otherwise feature an error of law. The test for whether or not an error of law featured in a finding of fact in the court below is now well-established. It was set out with clarity in R (On the application of Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982. At [9] of that decision, the Court of Appeal summarised the various headings upon which it may be possible to establish that a finding of fact has been infected by an error of law:

- “(i) Making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) Failing to give reasons or any adequate reasons for findings on material matters;
- (iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) Giving weight to immaterial matters;
- (v) Making a material misdirection of law on any material matter;
- (vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or fairness of the proceedings;
- (vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.”

It is a high hurdle to pass.

10. Developing his submissions orally, Mr Claire submitted that [57] of the judge’s decision and following was skewed. He draws upon and develops the permission to appeal judge’s view that the assessment of the appellant’s credibility only featured the points militating against him. I disagree with this submission. At [57] and following, the judge was giving clear and decisive findings in relation to her analysis of the case. The judge had already outlined what the appellant’s case was at [30]. It was not necessary for her to repeat her previous recitation of what he claimed the position was. This was the point in the decision where the judge reached her operative findings and she took a methodical and careful approach to assessing the appellant’s overall credibility.

11. Mr Claire submits that in her analysis at [58] the judge held matters against the appellant which were unfair and irrational. In [58] the judge found that the appellant was a dishonest individual. She drew extensively on his previous conduct to reach that finding. She said:

“For example, he came to the UK on a passport with a false visa, and even though this may have been organised through an agent he was an educated man aged 30 at the time and therefore has a responsibility for the falsehood. He then entered into a marriage with an EEA national on the basis of which he was granted a 5-year residence card. However, this was revoked in January 2012 on the basis that no evidence was found of a relationship or cohabitation and, in particular, the appellant was unaware of the EEA national’s whereabouts during an immigration enforcement visit in September 2011 and therefore it was considered to be a non-genuine relationship and a marriage of convenience. Then there is the appellant’s conviction for fraud which clearly involved serious dishonesty with the sentencing judge remarking upon the appellant having lied in his evidence at the trial.”

12. In my view there is nothing irrational or unfair about the judge’s analysis of those matters relating to the appellant’s credibility. They were legitimate considerations which she was entitled to take into account. They were not the only factors the judge considered. At [59] the judge rejected an account the appellant had given of a relationship with a lady which had led to the birth of his daughter with whom he still enjoys a relationship in this country. The appellant had claimed that he had engaged in sexual activity with a total of four people, two of whom were women. One of the women became pregnant during that incident and was later to bear the appellant’s daughter. The judge rejected that account and she stated that his relationship with one of them had been said to have existed for two years prior to the appellant’s common assault conviction against her for which he was sentenced to suspended terms of imprisonment.
13. The judge had sight of a social worker’s report prepared in another context and, although she noted that the appellant’s relationship with the other lady, the mother of the child, was not mentioned in that report, she said that there is no doubt that it is indicated that there was a sexual relationship over a period and this resulted in the conception of the daughter. The judge also noted information that had been revealed in the appellant’s OASys Report prepared as part of the criminal proceedings, which suggested that he was in a relationship with another woman in 2010. These were rational findings which the judge was entitled to arrive at on the basis of the evidence before her. This analysis led to the judge’s findings at [60] that the appellant’s evidence featured a significant degree of lying and dishonesty. The judge then reached the entirely rational conclusion that these significant levels of lying and dishonesty that she had found in relation to the appellant led her to question his credibility on other matters.

14. It was at this stage that the judge noted that the appellant claimed asylum on the basis that he was gay very shortly after being threatened with deportation proceedings: the deportation order was signed on 11 March 2016 and the appellant claimed asylum on 17 March 2019. The judge noted that there was no reference in the OASys Report to the appellant claiming to be homosexual, and there was no evidence to confirm either of the two claimed relationships that the appellant purported to have with men in the United Kingdom. The judge also noted that there was no reasonable explanation for the lack of evidence from relatives of the appellant in the United Kingdom as to the appellant's sexuality. Again these are all factors which the judge was entitled to consider in reaching her findings.
15. At [61], the judge considered the impact of medical evidence which had been adduced by the appellant. A psychiatric report had noted that he was suffering from post-traumatic stress disorder as a result of claimed persecution that he had experienced in Nigeria before coming to this country. At [61] the judge noted that:

"The appellant has at no time sought medical assistance for such matters - neither in prison after the deportation decision was made in March 2016 or of his GP at any time thereafter but rather informed the probation office in October 2016 when the OASys Report was being completed that he had no psychiatric problems. This clearly in my view undermines the weight that can be attached to such a mental health diagnosis but it also seriously undermines the appellant's whole account for the cause of the diagnosis, namely being detained in Nigeria for being gay."
16. The judge then considered the evidence of the two witnesses from the LGBT community who had given evidence to support the appellant. She stated at [62] that their evidence was "insufficiently substantial when considered in the overall evidential circumstances of this case". Mr Claire submits that that is a finding which involves holding against these two independent witnesses the adverse credibility findings which she had already reached in relation to the appellant. I disagree. The judge was entitled to take into account the overall evidence that she had heard including the evidence of these two witnesses in this manner, and she found that their evidence lacked weight, when considered in the round with the remaining evidence. She noted later on in paragraph 62 that both witnesses had made written statements about the appellant being very active within the LGBT community and at gay events in the UK including events with them, but neither could back that up with any detailed evidence of what that involved. She noted that in the case of one of the witnesses, M, he effectively retracted from that statement. In the course of submissions, Mr Claire did not suggest that the judge had misrecorded M's evidence in that way. The judge also noted that the appellant knew very little about the personal circumstances of the witness. For example, she did not know that one of them, H, had a partner even though the evidence that she heard was that the partner had recently had an appeal hearing.

17. Mr Claire submits that the judge's treatment of the witness evidence was ambivalent. He submits the judge did not make the required findings that the witnesses were either being dishonest or had been thoroughly misled by the appellant into wrongly believing that he was gay. There was an unresolved evidential point on a key issue in the case, he submitted. I disagree. In her penultimate sentence at [63], the judge addresses precisely that point in these terms:

“Whether the witnesses have been duped or not by the appellant's actions in believing that he is gay is not something I need to decide. I have however decided that their evidence does not alter the conclusion reached on the appellant's own evidence.”
18. In discussing the evidence of the two witnesses in this way the judge was simply referring to the evidence in the case in the round. She directed herself that that approach was necessary when prefacing her evidential analysis in [57] of the decision. She said this:

“I must consider the evidence in the round and apply the lower standard of proof of whether a matter is reasonably likely.”
19. Having conducted that analysis, the judge then reached her global conclusion on the issue of the asylum claim. At [64] she said, “in these circumstances”, which I take to mean in light of her overall analysis of the entire factual matrix of evidence in the case, “I am satisfied that the appellant has not shown that he has been the subject of persecution or ill-treatment on the part of the Nigerian authorities before coming to the UK on grounds of his sexuality and that there is no risk on return”. Accordingly the judge dismissed the asylum limb of the appeal.
20. There is a point that Mr Claire suggests the judge failed to consider when reaching her conclusion on this point. That relates to some of the transcripts of so-called “gay chats” which had been included as part of the appellant's evidence. I have had the opportunity to view those transcripts.
21. I find that the judge did not fail to consider these materials. First, she noted at [23] that such materials had been provided. Secondly, at [63] she noted that she had considered those transcripts. For my own part, having considered them, I find that the extracts to which I have been alerted provide very little by way of qualitative assistance to Mr Claire's submissions. It is clear that discussions of a sexual nature have taken place between people in the transcripts. Some of the discussion is sexually explicit and would therefore be inappropriate for any Tribunal to take into account one way or another when deciding whether a person's claimed sexuality is reasonably likely to be the case. Other extracts of the chat records provide very little by way of indication as to who was making the remarks and who is receiving the commentary or the communications. For example, Mr Claire drew my attention to some screenshots which feature at pages 241 to 245 of the appellant's bundle. These appear to be thumbnail images of individuals who have an account on the social media platform from which the screenshots were taken. It is not clear from the printout who has sent the messages, who has received them nor what the

contents of them are. For example, and by way of example only, there is a photograph of a man who does not appear to be the appellant with the name “sweetpompey100100” and the hyperlinked text underneath it “*i am fine how are you today*”. Similar thumbnails and account names feature with other ambiguous wording.

22. In my view these are not matters which take the appellant’s case any further. The judge below clearly had regard to all the relevant facts before her, and reached a conclusion which was open to her on the evidence that she had seen. I conclude my analysis of this limb of the appellant’s case by recalling that the judge below had the benefit of hearing all the witnesses give evidence, and of seeing and analysing the entirety of the evidential landscape in the case. The submissions made by Mr Claire in relation to the judge’s analysis of those issues do not undermine the judge’s analysis, but rather simply serve to highlight that this was a careful and well-reasoned decision.
23. In relation to the second ground of appeal concerning the judge’s consideration of Rule 399 of the Immigration Rules, Mr Claire did not develop his submissions orally and nor did he choose to do so once Mr Bramble had responded on behalf of the respondent.
24. Having considered the judge’s analysis of the Article 8 limb of the appellant’s case, it is in many respects a model analysis. The judge correctly identifies that the appellant was sentenced to less than four years’ imprisonment but at least twelve months’ imprisonment, meaning that it was necessary to consider whether the exceptions under paragraphs 399 and 399A of the Immigration Rules applied.
25. The essential issue which the grounds of appeal suggested that the judge failed properly to consider was whether it would be “unduly harsh” on the appellant’s daughter for him to be deported. The judge correctly directed herself by reference to the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 that the expression unduly harsh assumes that there is a “due” level of “harshness” namely a level which may be acceptable or justifiable in the relevant context. The judge quoted the extract from Lord Carnwath’s judgment which said that unduly requires something going beyond that level. As Mr Bramble submits, the appellant has not demonstrated that the tragic impact upon the appellant’s daughter of his deportation goes beyond the harshness which would necessarily be expected to flow from deportation in such circumstances. The sad reality of deportation and criminal offending is that it wrecks family lives and leaves a trail of destruction which often greatly exceeds the initial ambit of the primary offending. Tragically this case is one such example of that principle in action. However the test for my consideration is not whether the deportation of the appellant would affect his daughter in a way which would necessarily be expected, but whether the impact on her goes beyond the impact which would normally be expected to apply in such circumstances. Nothing in the submissions to me have revealed that the judge below erred in that respect.

26. Finally, the judge concluded her consideration of Article 8 by reference to an extensive quotation from Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. She correctly directed herself that the countervailing factors that would be required to outweigh the Secretary of State's view in relation to deportation would need to be very great indeed or as Lord Reed put it "by a very strong claim indeed". The judge also noted that in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, the Supreme Court held that the very compelling circumstances test establishes that the provisions of Part 5A are intended to provide for a structured approach to the application of Article 8 which produces a result which is compatible with, and not in violation of, Article 8. Of course, in that case the Supreme Court held that there is an inherent degree of flexibility within the provisions contained in Part 5A. However nothing in the submissions made in the grounds of appeal or by Mr Claire before me reveal that this was a case where the minimal level of inherent flexibility in those provisions should have benefited the appellant.
27. The judge concluded at paragraph 74 that she was satisfied:
- "...that the appellant has not put forward any additional circumstances over and above those already assessed under the exceptions above. Whilst he has been in the UK for the past twelve years and may well have become socially and culturally integrated during this time, he entered the UK illegally and has remained without immigration status apart from a period when he had a residence card which was subsequently revoked on the basis that the marriage was a sham. He has been convicted of offences whilst being here including a serious conviction for fraud."
28. In conclusion, the judge reached findings of fact concerning the asylum issue that were open to her on the evidence that she had. They are not findings which all judges would have adopted but they were findings which were legitimate for the judge to reach. Her treatment of the Article 8 issues was sound and the submissions from Mr Claire revealed no error of law. This appeal is dismissed.

## **NOTICE OF DECISION**

The decision of Judge Andrew did not involve the making of an error of law.

This appeal is dismissed.

## **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 *Stephen H Smith*  
2019

Date 20 December

Upper Tribunal Judge Stephen Smith