



IAC-AH-SAR-V1

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

Appeal Number: AA/03001/2015

THE IMMIGRATION ACTS

**Heard At Field House
On 30th November 2015**

**Decision & Reasons Promulgated
On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UCO

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr E Papi of Counsel instructed by Rehoboth Law

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Cockrill of the First-tier Tribunal (the FtT) promulgated on 24th July 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to her as the claimant.

3. The claimant is a female Nigerian citizen. On 10th February 2015 the Secretary of State made a decision to deport her and refuse her protection and human rights claim. The decision to deport was made because on 28th March 2014 the claimant was convicted of obtaining or seeking to obtain leave to remain in the UK by deception for which she received a sentence of twelve months' imprisonment. The claimant had entered into a marriage of convenience on 18th June 2012 with an EEA citizen. She had then applied for a residence card as the spouse of an EEA national. That application had been refused and the claimant had appealed, and her appeal was dismissed by Judge Davey of the FtT in a decision promulgated on 25th September 2014.
4. The claimant's appeal against the Respondent's decision dated 10th February 2015 to refuse her protection and human rights claim and to make a deportation order was heard by the FtT on 6th July 2015. The FtT heard evidence from the claimant and two witnesses. The claimant's case was that she was entitled to asylum because she is a lesbian. The Secretary of State accepted that if the claimant is a lesbian, then she would be entitled to asylum, but did not accept that the claimant is a lesbian. The main issue before the FtT was therefore whether or not the claimant had proved that she is a lesbian.
5. The FtT found that the claimant had demonstrated her sexual orientation, and had proved that she is a lesbian, and therefore the appeal was allowed on that basis.
6. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT had erred in law in considering the standard of proof by stating in paragraph 67;

"I am conscious also that there is this low standard that is applicable in asylum cases and if there is a doubt that the benefit of that doubt should be resolved in favour of the Appellant."
7. The Secretary of State referred to KS (benefit of the doubt) [2014] UKUT 552 (IAC) contending that to state that the claimant is entitled to the benefit of the doubt as a principle of law was a misdirection in law.
8. In addition it was contended that the FtT had given inadequate reasons when assessing the claimant's credibility at paragraphs 56-69 and had made no reference to the findings made in the earlier FtT decision promulgated on 25th September 2014, in which the claimant's appeal against refusal of a residence card was dismissed, and it was found that she had entered into a marriage of convenience.
9. Permission to appeal was granted by Judge Lambert of the FtT in the following terms;

"1. The Respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Cockrill) who in a decision promulgated on 24th July 2015 allowed the Appellant's appeal against the Secretary of State's decision to deport.

2. The grounds contend error at paragraph 67 in the judge's statement that the lower standard of proof relating to asylum meant giving the benefit of the doubt to the Appellant.
 3. They further contend inadequate reasoning as to the credibility of the Appellant's claim to be a lesbian and, in particular, failure to take account of adverse credibility findings made by a previous judge as to the Appellant's claimed marriage to a female.
 4. The findings made in Judge Davey's earlier decision are not obviously examined by this judge. The content of the present decision is such that both grounds are arguable. There is therefore an arguable error of law disclosed by the application."
10. It appears that the judge granting permission misunderstood, in paragraph 3 of the grant, the position relating to the claimant's marriage, as the marriage was with a male, not a female.
 11. Following the grant of permission, the Tribunal issued directions making provision for there to be a hearing before the Upper Tribunal to decide whether the FtT decision should be set aside by reason of error of law.

The Secretary of State's Submissions

12. Mr Duffy relied upon the grounds contained within the application for permission to appeal. It was submitted that the FtT had used the wrong standard of proof, and had applied a standard lower than a reasonable degree of likelihood.

The Claimant's Submissions

13. Mr Pipi relied upon his skeleton argument. In summary Mr Pipi submitted that the decision of the FtT did not disclose an error of law. The FtT had taken into account all the evidence and made sustainable findings. The correct standard of proof had been applied.
14. Mr Pipi submitted that the FtT had not given the benefit of the doubt to the claimant, as much of her evidence had been rejected, and the FtT had allowed the appeal based upon the evidence of SW, a witness with whom the claimant had had a lesbian relationship.
15. The failure to refer to Judge Davey's decision was immaterial because the FtT had rejected the claimant's evidence in any event, and the witness whose evidence was accepted, did not give evidence before Judge Davey.

The Secretary of State's Response

16. Mr Duffy argued that the core of the claimant's account had been accepted by the FtT, and therefore in reality the FtT had not rejected the claimant's evidence.

My Conclusions and Reasons

17. I find no error of law in relation to the standard of proof applied by the FtT. The Upper Tribunal in KS decided that the benefit of the doubt is not to be regarded as a rule of law, but as discussed in paragraphs 203 and 204 of the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, is a general guideline.
18. I set out below paragraph 2 of the head note in KS in part, and paragraph 3;
 - “2. ... What is involved is simply no more than an acceptance that in respect of every asserted fact when there is doubt, the lower standard entails that it should not be rejected and should rather continue to be kept in mind as a possibility at least until the end when the question of risk is posed in relation to the evidence in the round.
 3. Correctly viewed, therefore, TBOD adds nothing of substance to the lower standard of proof, which as construed by the Court of Appeal in Karanakaran v Secretary of State for the Home Department [2001] 3 All ER 449, affords a ‘positive role for uncertainty’”.
19. The FtT in this appeal correctly sets out the standard of proof in paragraph 65 which is set out below;
 - “65. I have to say that this case is very far from clear cut. The standard of proof that is applicable in relation to asylum is that of real risk. Put differently, a reasonable degree of likelihood is the test”.
20. Read as a whole, I am satisfied that the FtT applied the correct standard of proof, recognising that this is a reasonable degree of likelihood.
21. I do not accept that the FtT gave inadequate reasons for findings. The FtT thoroughly examined the evidence, and considered the evidence given by and on behalf of the claimant critically. The FtT noted in paragraph 64 that the claimant had “quite plainly used deception by entering into a sham marriage and the reason or reasons for that are not known fully”.
22. The FtT noted in paragraph 57, as being adverse to the claimant’s case, that she had not referred to her relationship with SW when she was interviewed in connection with her claim to be a lesbian.
23. In paragraph 60 the FtT found the claimant’s explanation for not mentioning SW when interviewed to be “weak”.
24. The FtT also noted in paragraph 62, the considerable delay that had occurred before the claimant made her asylum claim. This was only made after her criminal conviction.
25. The FtT found in paragraph 69;
 - “69. I express some appreciable disquiet about certain features of the Appellant’s case. The very fact that she did not refer to SW still troubles me but at the end of the day, I do consider that there is a

sufficient thread of evidence to show that the Appellant has demonstrated being lesbian”.

26. The FtT went on to conclude that in the final analysis, it was the evidence of SW that persuaded the FtT that the claimant is a lesbian. The FtT noted that SW had come to the hearing to give evidence and be cross-examined about her relationship, even though that relationship had ended.
27. I set out below the head note to Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC);

“It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost”.
28. The FtT has applied the principles set out in Budhathoki, and examined the evidence with care, and given adequate reasons for findings that have been made. In my view it is clear when reading the FtT decision, why the appeal was allowed. I do not accept the Secretary of State’s contention that inadequate reasons have been given.
29. Turning to the previous decision by Judge Davey, I note that no oral evidence was heard in that appeal. The finding made in that appeal was that the Appellant, the claimant in this appeal, had not shown that she had entered into a genuine, subsisting marriage, but had entered into a sham relationship. The principles in Devaseelan Sri Lanka [2002] UKIAT 00702, indicate that when there is a previous decision by the FtT, this stands as an assessment of the claim that the Appellant was making at the time of that decision. It is not binding on a subsequent judge but is the starting point as an assessment of the matters that were before the judge who heard the first appeal. I find no error of law by the FtT on this issue. The finding made by Judge Davey was that the claimant had entered into a sham marriage. This is clearly stated by the FtT in paragraph 64. The FtT was aware that the claimant had been sentenced to a term of imprisonment as a result of seeking leave to remain, by reliance upon that sham marriage. This is clearly set out by the FtT, who also set out that the claimant’s appeal against her application for a residence card was dismissed by the Tribunal on 24th September 2014 (paragraph 12 of the FtT decision). I do not find that there is anything relevant in the decision of Judge Davey, that has not been considered by the FtT in this appeal.
30. There is reference in the Secretary of State’s Grounds of Appeal to the decision of the FtT to allow the claimant’s appeal being arguably irrational. There is a high threshold in order for irrationality to be proved. That threshold has not been reached in this appeal. The conclusions made by the FtT have been made after a careful examination of the evidence. Sustainable and adequate reasons have been given for the findings made

and the grounds submitted by the Secretary of State do not disclose an error of law.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

The First-tier Tribunal made an anonymity direction and I continue that order pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date 3rd December 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The decision of the First-tier Tribunal stands and therefore so does the decision not to make a fee award.

Signed

Date 3rd December 2015

Deputy Upper Tribunal Judge M A Hall