Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11494/2016**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated:**
On 5 October 2018	**On 16 November 2018**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

BLO

(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr M Karnik	(Counsel)
For the Respondent:	Mr A McVeety	(Senior Home Office Presenting Officer)

DECISION AND REASONS

Introduction

1. This is the claimant's appeal to the Upper Tribunal. On 5 October 2016 the Secretary of State refused to grant the claimant international protection and decided he should be deported. The claimant appealed and, after a hearing of 6 February 2007, the First-tier Tribunal dismissed his appeal. On 9 March 2018 I set aside the decision of the First-tier Tribunal because it contained errors of law. My full reasons for setting aside that decision may be found in my written reasons of 9 March 2018. But put simply and briefly, I decided that the First-tier Tribunal had erred through failing to have proper regard to the evidence of the claimant's wife (a person I shall simply refer to as K) when considering claims he had made regarding his sexuality; and had erred through failing to properly direct itself with respect to arguments he had pursued under Article 8 of the European Convention on Human Rights (ECHR) concerning his child. I directed that there be a complete rehearing of the appeal to take place before me in the Upper Tribunal. That hearing took place on 5 October 2018 and this is the decision I have made as a result.

The claimant's claim and the previous immigration and adjudication history

2. The claimant, to whom I have granted anonymity in these proceedings because of the sensitive nature of certain of the subject matter, was born on 2 December 1985. He is a national of Nigeria. In 2004 he applied for entry clearance to come to the United Kingdom (UK) as a student. Although this was refused, an appeal brought against that refusal decision was successful and he entered the UK on 24 January 2007 with leave until 31 October 2010. On 10 September 2010 he obtained a certificate of approval for marriage and married K who is a female British citizen. He was subsequently granted leave to remain as a spouse. It seems that that leave expired on 6 December 2012. On 3 July 2013 he was issued with a removal decision but the Secretary of State did not actually take steps to remove him. On 11 July 2013 he applied, presumably on the basis of his marriage, for indefinite leave to remain in the UK. That application was not immediately determined. On 29 January 2015 he received a sentence of 2½ years imprisonment for concealing and converting criminal property. The sentencing judge referred, in sentencing remarks, to the "sophisticated nature" of the offending and suggested, seemingly on the basis of that sophistication and the large amount of money involved, that the offending fell into the "high culpability" category in terms of sentencing guidelines. On 14 February 2015 the Secretary of State decided to make a deportation order in relation to the claimant. On 8 May 2015 the Secretary of State decided to refuse a human rights claim which had been made by the claimant alongside his application for indefinite leave referred to above and issued him with a signed deportation order. On 16 December 2015 the claimant made an asylum and a human rights claim. The asylum claim was based upon a contention that if he were to be deported to Nigeria he would be at risk of being harmed by his half-brother (a man I shall simply refer to as E) as a result of previous family tensions. As to Article 8, he asserted that his marriage to K was still subsisting and said that the two now had a child who had been born on 10 October 2015 and who is a British citizen. The respondent refused all the outstanding claims for reasons set out in a document headed "Notice of Decision" but which is in the form of a lengthy letter of 3 March 2016 (served on 17 March 2016).

3. The Secretary of State decided, first of all, that the claimant was excluded from international protection in consequence of the content of Article 33(2) of the 1951 Refugee Convention and section 72(2) of the Nationality, Immigration and Asylum Act 2002. That was on the basis that, having been convicted of an offence in respect of which he had been sentenced to a period of imprisonment of at least two years, he was presumed to constitute a danger to the UK community.

On the basis of the same relevant factual background, the Secretary of State concluded, having regard to paragraph 339D of the Immigration Rules that the claimant was also excluded from entitlement to a grant of humanitarian protection. Additionally and in any event, the Secretary of State decided that the claimant would not be at risk if he were to be returned to Nigeria. As to that, the Secretary of State thought that if E had an adverse interest in the claimant he would be able to obtain protection from the Nigerian authorities. The Secretary of State went on to give short shrift to a claim that the claimant would be at risk at the hands of the organisation known as Boko Harem or that if he were to have to perform national youth service that would somehow amount to ill-treatment. The Secretary of State found the Article 8 arguments to be unpersuasive and appears to have treated them, primarily, as amounting to an application to revoke the deportation order which it rejected.

4. The claimant then made a further protection claim and human rights claim. This time he said that he is bisexual and would face risk on that account if returned to Nigeria. He said that family members had discovered his sexuality prior to his leaving Nigeria, that he had been beaten by the police because of it, that he had once been sexually abused by an uncle and that he had had some sexual relationships with men whilst in Nigeria. He said that, since coming to the UK, he had indulged in some sexual activity with males and that he had been enjoying a sexual relationship with a particular male British citizen whom I shall simply refer to as P. He explained that his wife, whilst not at all happy with the situation, had agreed to his having such liaisons from time to time subject to conditions including one that he be discreet. As to Article 8, he asserted that, despite all of the above, his marriage subsisted.

5. The respondent issued another "Notice of Decision", again in the form of a lengthy letter, which is dated 5 October 2016. In that letter the Secretary of State, essentially for the same reasons as before, decided once again that the claimant was excluded from the protection afforded by the 1951 Refugee Convention in light of his offending and that that offending also had the consequence of his being excluded from a grant of humanitarian protection. But anyway, the Secretary of State disbelieved the claimant regarding his sexuality making the point that he had previously claimed on a different basis and that, if he had genuine fears due to his sexuality, he would have claimed earlier on that specific basis. The Secretary of State had nothing to add to the reasons why it had been decided that he could not succeed under Article 8 and that the deportation order ought not to be revoked. It was the 5 October 2016 decision which led to the claimant's appeal to the First-tier Tribunal and to the decision of that tribunal which I decided to set aside.

6. As to my task on remaking the decision, the issues were as follows:

(a) Is the claimant excluded from the protection afforded by the 1951 Refugee Convention?

(b) Is the claimant excluded from the benefit of a grant of humanitarian protection?

(c) Is the claimant at risk upon return to Nigeria?

(d) Can the claimant rely upon Article 8 of the ECHR in seeking to have the deportation decision revoked?

7. With respect to any entitlement to international protection on the basis of asylum, humanitarian protection or protection afforded by Article 3 of the ECHR, the burden rests upon the

claimant. The standard of proof is that which is often referred to as the "real risk test". The date for assessment, with respect to all matters, is the date of the current hearing before me.

The evidence

8. I had much documentary evidence before me. It included bundles which had been prepared for the hearing before the First-tier Tribunal and the various documents which had come into existence as a result of the subsequent application for permission to appeal, the grant of permission to appeal and the error of law consideration. In addition to all of that documentation I had before me an additional bundle filed on behalf of the claimant and which included original witness statements, updated witness statements, some documentation relevant to the Article 8 issues, some documentation relating to the claimant's commission of a further criminal offence and some background country material concerning Nigeria. In addition to the documentary evidence I heard oral evidence from the claimant, from K and from P. I do not propose to set out all of the oral evidence here but I shall, nonetheless, refer to aspects of it where necessary or otherwise appropriate, when I am explaining the decision I have reached on this appeal.

The submissions of the representatives

9. Having heard the oral evidence, I heard from the two representatives. Before I say anything further I would wish to thank each representative for their clear and concise submissions. Mr McVeety, for the Secretary of State, urged me to conclude that the claimant was excluded from protection as a refugee. In addition to what had been said about that in the decision of 5 October 2016, he had gone on to commit a further offence (about which I shall say more below) and that undermined his argument that he does not constitute a danger to the UK community. Nevertheless, Mr McVeety acknowledged that even if the claimant was excluded from certain types of protection, the protection afforded by Article 3 could not be excluded as a result of his offending. As to that, though, he had raised his claimed bi-sexuality at a late stage. It appeared, on his own account, that any gay sexual or romantic activity is conducted by him in an extremely discreet manner and it would be reasonable to expect him to behave in the same way in Nigeria. But Mr McVeety accepted that if I were to find the claimant is bi-sexual and would not act discreetly upon return or would do so simply to avoid persecution or serious ill treatment, he would succeed under Article 3. As to Article 8, deportation would separate him from his child. But that is what deportation does.

10. Mr Karnik, for the claimant, pointed out that there are some differences between the regimes for exclusion of a grant of asylum and for exclusion of a grant of humanitarian protection. The claimant should not be excluded from either because the evidence demonstrates that he presents a low risk in terms of re-offending or in terms of causing serious harm. His more recent offence should be regarded as being isolated and out of character. Further, he has shown clear remorse and there has been proper engagement with the process of rehabilitation. All of the oral evidence given to me had been detailed and credible. It was understandable, in the context of a claim based upon sexual orientation, that there had been delay. In any event, that has been explained in the circumstances of this case by the evidence not only of the claimant himself but also of K. He would not be able to live openly as a bisexual person in Nigeria. As to Article 8 of the ECHR, it would be unduly harsh to separate the family. In the context of the Article 8 related Immigration Rules concerning deportation his was not a "four years" offence. It would be in the best interests of his child for all of the family members to remain living together in the UK.

Is the claimant excluded from protection as a refugee?

11. Article 33 of the 1951 Refugee Convention reads as follows:

> " 1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

12. Section 72 of the Nationality, Immigration and Asylum Act 2002, relevantly provides as follows:

> " **72. Serious criminal**
>
> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
>
> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is -
>
> (a) convicted in the United Kingdom of an offence, and
>
> (b) sentenced to a period of imprisonment of at least two years.
>
> (3) …
>
> (4) …
>
> (5) …
>
> (6) A presumption under sub-section (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person."

13. Since the claimant was convicted of an offence and sentenced to a period of imprisonment in excess of two years, then the rebuttable presumption that he is a danger to the community applies. It is, therefore, for him to rebut that presumption. But the situation here has been complicated by an additional factor of some potential importance. At the time the appeal was before the First-tier Tribunal there was only the offences of concealing criminal property and converting criminal property, being linked offences, to be considered. Those were, of course, not offences of violence though I note there is nothing in the relevant Article nor the relevant statute (see above) to limit the concept of danger to the commission of offences of violence. There was also plenty of evidence relevant to the claimant's ability, or otherwise, to rebut the presumption to be found at section 72(2) of the 2002 Act. That included an OASys report of 13 April 2016, an OASys report of 19 January 2017 and a National Probation Service Progress Report and Risk Assessment (the NPSPRRA) of 19 January 2017. But between the decision of the First-tier Tribunal and the date of the hearing before me for the purposes of my remaking of the decision, the claimant was convicted of an offence of possessing an offensive weapon in a public place. That offence was committed on 31 March 2018 and, on 19 April 2018, the claimant

appeared at the Leeds Magistrates Court in respect of it and received a six months custodial sentence suspended for 12 months. That offence, in isolation, would not have triggered the statutory presumption which arises under section 72(2) of the Nationality, Immigration and Asylum Act 2002. But, of course, as has already been noted, that presumption had already been triggered. The fact that the later offence would not have triggered the presumption does not mean it is to be ignored. It is, and no argument to the contrary was presented to me, relevant to the question of whether or not the claimant is able to rebut that presumption.

14. I shall, first of all, evaluate the position with respect to the initial offending which did trigger the presumption. As has been illustrated by what I have already said, the offences were dishonesty offences of some seriousness, as was mirrored in the sentencing judge's remarks. But there is much in the two documents of 19 January 2017 which, on one view, weigh in favour of the claimant with respect to rebuttal. In the OASys assessment of that date, it was observed that there was no indication that the claimant at that time "presents a risk of serious harm to the general public or indeed any individual". It was suggested that, his having by the time of the compilation of that report been released in circumstances where he did not have a regular income, there was what was described as a slight risk that he might become involved in similar offending for monetary gain. But it was said that he presented "as a very positive individual", that he was "determined to make a new start in life" and that he could not be assessed as posing a "risk of serious harm at this stage". It was also suggested that if his immigration status could be resolved in the way he would want it resolving, with the consequence that he would be free to undertake gainful employment, then any risk of reoffending would be further reduced. The report also indicated, that whilst in prison, he had held "a trusted mentoring position" with respect to his fellow detainees and that he had received positive reports from senior staff at the institutions where he had been incarcerated as a result of that. The NPSPRRA had been prepared by the claimant's former offender manager. In summary, it was suggested therein that the claimant had shown remorse and had engaged well with support services. The assessment based view was that there was a low risk of him reoffending and of causing serious harm to others and that it was "only the absence of a category of very low" which prevented a lower assessment being made.

15. Turning now to the more recent offending, the claimant's explanation for what happened is, essentially, that unusually for him he had consumed alcohol. He says he was pressurised by others to do so. He has limited recall of events due to the alcohol he had consumed but his friend had been refused admittance to a nightclub by a "bouncer" and this had led to matters becoming heated. Though he could not recall doing this, CCTV had shown him running to a motorcar and obtaining an item which constituted the offensive weapon but he had not used it. It was not an item which by its nature was an obvious weapon but it was an item which had the potential to be used as one. He had pleaded guilty to that offence and another closely related charge had been dropped. In a letter sent to him by the Solicitor who had acted for him in connection with these criminal proceedings and which he has willingly disclosed, the basis of his guilty plea is explained as amounting to his accepting the offence but denying he made any threats after obtaining the relevant item and returning to the scene. A letter from a Case Manager at the West Yorkshire Community Rehabilitation Company of 27 September 2018 indicates that he has subsequently, and seemingly more quickly than usual, completed 150 hours of unpaid work which also formed an aspect of his sentence. The author of the letter says this:

> "[The claimant] has also completed all 10 RAR sessions with his Case Manager and during supervision he has fully co-operated with his rehabilitation programme. Initially [the claimant] was classified as medium risk of harm however, having completed all aspects of his sentence requirement and taking into consideration his attitude and behaviour during his supervision with WY CIC Probation, I have repossessed [the claimant] in

> accordance with probation guidelines and now consider him as being low risk of serious harm to the general public and has a low risk of reoffending."

16. Of course, from the claimant's self-interest perspective, the timing of all of this is quite appalling. Further, the impressive speed with which he has completed his 150 hours of unpaid work may owe something to his knowledge that he was about to appear before the Upper Tribunal in circumstances where his offending record would be scrutinized.

17. The material in the OASys report of 19 January 2017, as noted, places the risk of reoffending and the risk of him causing serious harm as being low. That sort of assessment is also reflected in the NPSPRRA. Those reports seem to me to be documents it is appropriate to accord significant weight to. They have clearly been prepared by persons experienced in the field. The reports are clear and the latter document is thorough and well-reasoned. Had there not been any incidents of further offending I would have concluded, on the basis of that material, that the claimant had, in fact quite comfortably rebutted the presumption. But Mr McVeety says that the claimant's case as to that is now fatally undermined by his subsequent offending.

18. It is worth making the point, once again, that the more recent offending would not, of itself, have been sufficient to trigger the presumption which the claimant now seeks to rebut. But it is concerning because, in the context of danger to the community, a willingness to seek out an item which is capable of being used as a weapon, as a response to tensions arising, is hard to ignore. Having heard the claimant's oral evidence I accept that he is remorseful and that at least some of his obvious regret for his actions is not linked to concern about the adverse consequences it may have regarding his immigration status. The claimant is, by now, aged 32 years and has not, otherwise, been convicted of any offence involving violence or the threat of it. Notwithstanding his accepted possession of an item which constituted an offensive weapon there is no suggestion that he was actually violent in possession of it and it seems the basis of his guilty plea was that he had fetched the item but had not made threats once it was in his possession. The letter of 27 September 2018 does contain an opinion, notwithstanding all of the offending, that he is currently a person who has a low risk of reoffending and poses a low risk of serious harm to the general public. It does not inevitably follow that because he has committed the crime he has, that he does constitute a danger to the community in the way in which the phrase is used at section 72(2) of the 2002 Act. The view of a number of persons involved with the Probation Service, as noted above, is to the effect that he is at low risk of reoffending and of causing serious harm to the public. In the circumstances, whilst this is finally balanced, I have concluded that notwithstanding the recent offending which I accept is of an isolated nature, the claimant does successfully, albeit very narrowly, rebut the presumption.

Is the claimant bisexual?

19. Although the claimant has expressed other fears, it seems to me that, in reality, it is the claimant's assertion that he is bisexual which forms the cornerstone of any realistic claim he has to be entitled to international protection. The respondent, however, does not believe him.

20. The claimant, despite having been in the UK for some considerable time and despite his having made a number of applications of various sorts to the Secretary of State, only asserted he is bisexual at a very late stage. Indeed, he pursued an earlier claim for asylum without mentioning it. Mr McVeety argues that if the claimant believed his life was at risk he would have made his claim at an earlier stage than he did. I accept that, generally speaking, one would expect a claimant to seek international protection as soon as practicable and that this claimant did not do that. It is a matter which weighs with me but it is necessary to look at other aspects of the evidence rather than to allow the delay, of itself, to be determinative in this case.

21. The claimant has claimed to have had a number of sexual liaisons, at various points in his life, with males. The most recent example is what he presents, in his oral and written evidence, as a regular sexual relationship with P. In describing the quality of the relationship, it is fair to say that he emphasises the sexual aspect over any emotional aspect. In other words, he does not really talk of his having a romantic relationship with P. P gave evidence before me about the relationship and was cross-examined. He too indicated that the attraction between the two was primarily sexual adding that there was "a little bit of affection". It is fair to say he was not really challenged, in cross-examination, as to his assertions regarding his own sexuality or as to his assertions that he has been having an ongoing sexual relationship with the claimant. What both parties have to say about the nature and history of the relationship appears consistent and no apparent inconsistencies have been highlighted. P's evidence about the relationship was in line with what he has had to say in his witness statement and whilst his oral evidence was brief it was internally consistent. I find that evidence to be weighty.

22. Then there is the evidence of K. What the claimant and K have to say about all of this is that, at some point after they had commenced their relationship but prior to their getting married, K discovered the claimant looking at gay pornography. The evidence of both of them is that, after he had initially sought to obfuscate, he confessed to her that he is bisexual. K and the claimant both say that, unconventional though this may seem, they have come to an agreement whereby the claimant is permitted to have sexual liaisons with men subject to conditions regarding his practicing safe sex and regarding his keeping that activity secret. K is, she says, fearful that otherwise, her community and her family will get to know about the claimant's activities and their unconventional relationship and will disapprove.

23. K's evidence and the claimant's own evidence about all of this seems to me to be strikingly consistent. Of course, it is possible that they have simply concocted a story. But I found K's evidence to be particularly persuasive. She was able to articulate her feelings, stressing that she was prepared to stand by the claimant and that, while she could not say what would happen in the future, she was "happy with the relationship for now". She was clear that she knew about his sexuality prior to the marriage. It is perhaps a somewhat hackneyed phrase but, to my mind, her clear and consistent evidence had the ring of truth about it.

24. As to the delay in claiming asylum, both the claimant and K have said that that was due to her reluctance for there to be any public disclosure of his bisexuality. Given that there is background evidence that, within the ethnic Nigerian community, a community to which K belongs, that there is significant disapproval of persons who do not have a conventional sexual orientation, I find that explanation to be plausible.

25. In truth, having heard the evidence of P and K, both of whom I found to be straightforward and frank witnesses, I am comfortably satisfied that the claimant is bisexual as he claims. That is so notwithstanding his previous failure to rely upon that when he made his initial claim for asylum.

How might bisexual persons be viewed in Nigeria?

26. I have been provided with a good deal of background country material concerning the way in which persons who do not have a conventional sexual orientation might be treated. But it is not necessary for me to go through that material. That is because Mr McVeety very properly conceded that if the claimant is bisexual and would not be sufficiently discreet to hide the matter, he would be at risk upon return to Nigeria on that account, even if other claims he has made as to why he might

be at risk in Nigeria are to be disbelieved. I will simply say that, having looked at the background material which has been prepared for the purposes of this appeal, I consider that concession to have been properly and correctly made.

If the claimant is returned to Nigeria will he, as a bisexual person, be discreet?

27. This brings us to a consideration of the principles set out by the Supreme Court in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. The case involved two gay men, one from Iran and one from Cameroon, who asserted that they would be persecuted upon return for reasons of sexual orientation. But a key issue was the extent to which, if at all, they could be expected to be discreet with the consequence that persecution or serious ill-treatment would be avoided. At paragraph 82 of the Court's judgment under the heading "The approach to be followed by tribunals" this was said:

> " 82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of origin.
>
> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the appellant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living 'discreetly'.
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social purposes, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he would avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving State gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

28. That is the approach which I have to apply. Although the judgment talks of those who are gay, I see no reason to adopt a different approach with respect to those who are bisexual, so long as they would wish to be actively so, and Mr McVeety has not sought to persuade me otherwise. I have found that he is bisexual. Mr McVeety accepts that persons who are male and bisexual and would live openly as such, would be liable to persecution in Nigeria. So, I must now go on to consider how the claimant would behave upon return.

29. I do not believe that the claimant would, in fact, live openly as a practising bisexual person in Nigeria. He does not assert that he would do that and, indeed, on the background country material and on Mr McVeety's concession, doing so would simply invite danger. He has shown that he is prepared to be discreet, at K's urging, even in the United Kingdom where his activity does not in general terms (though I note he has been the victim of an attack which was said to have a homeophobic cause) invite violence. So, I would conclude that if the claimant were to return to Nigeria he would practice his bisexuality discreetly. The question then is what would motivate him to do so.

30. It is right to say, my accepting the evidence as to this, that the claimant has been discreet in the UK and that that is essentially for family reasons, being the insistence of K which he has decided to honour. That might be capable of suggesting that, if he was to be returned to Nigeria, he would be similarly discreet perhaps because he did not wish to cause embarrassment to his own family or other associates or because of social pressures of other sorts. But the claimant's decision to be discreet, I accept, whilst in the UK has come about because of a very particular and specific pressure linked to the fact that, notwithstanding his sexual liaisons with males including P, he wishes his marriage to continue to subsist. Linked to that, of course, is K's understandable insistence that he be discreet for the reasons set out above. As the claimant himself points out, if he is to return to Nigeria that is likely, in consequence of the geographical separation, to be the end of his marriage to K. I accept that, in reality, that would be so. So, that particular pressure, which I find has been the pressure which has caused him to be discreet, would not be present. It was also suggested, at one point, that because the claimant had been discreet about his sexuality whilst in prison that was an indicator that he would be so in Nigeria for reasons other than a wish to avoid persecution. I do not think, though, that that is a credible suggestion. It is understandable that a person in prison would wish to hide a non-conventional sexual orientation and it is plausible that the claimant had witnessed, as he claims to have done, a person being bullied and ill-treated in prison because of that person's sexual orientation becoming known.

31. The claimant, despite the restrictions understandably imposed upon him by K, has continued to have sexual relations with men. There is no reason to think that, upon return to Nigeria, he would behave any differently. The specific pressures which cause him to be discreet in the UK would not, as I have already observed, be present in Nigeria. Whilst, of course, it is difficult to predict how someone will behave in a hypothetical situation, I have concluded that, to the lower standard of proof applicable in international protection cases, I can be satisfied that the claimant will be discreet but only because he will have to be so in order to avoid persecution. So, following the caselaw set out above, I conclude that he makes out his claim to be a refugee.

The implications of what I have decided.

32. Since I have decided that the claimant has been able to rebut the presumption contained within section 72(2) of the 2002 Act and since I have concluded that he has made out his claim to be a refugee on the basis of sexual orientation, that means his appeal succeeds on asylum grounds. In consequence of that, it is not necessary for me to consider whether he is excluded from a grant of humanitarian protection and whether, if he is not, he is entitled to such a grant. It is simply not necessary or appropriate to consider humanitarian protection once a claimant has succeeded on asylum grounds. But, I would also make the point that had I concluded that the claimant had failed to rebut the presumptions, his claim to be entitled to international protection would still have succeeded under Article 3 of the ECHR because the persecution I have found he would be at risk of experiencing would also amount to Article 3 ill-treatment. So, in a sense, my conclusions regarding

exclusion from protection under the 1951 Refugee Convention does not significantly impact upon the overall outcome.

33. Since the claimant has demonstrated entitlement to international protection that, effectively, constitutes an absolute bar to his deportation. Futher, since I have concluded he is entitled to international protection, there is little to be gained by my going on to analyse the arguments concerning Article 8 of the ECHR.

34. In remaking the decision, therefore, I allow the claimant's appeal on asylum grounds. I also allow his appeal on Article 3 ECHR grounds.

Decision

The decision of the First-tier Tribunal has already been set aside.

In remaking the decision, I allow the claimant's appeal on asylum grounds. I also allow the claimant's appeal on human rights grounds under Article 3 of the ECHR.

Signed: Date: 12 November 2018

Upper Tribunal Judge Hemingway

Anonymity

The First-tier Tribunal granted anonymity to the claimant. I continue that grant under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or Court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the claimant and to the Secretary of State. Failure to comply with this direction could lead to Contempt of Court Proceedings.

Signed: Date: 12 November 2018

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

As no fee has been paid and no fee is payable, there can be no fee award.

Signed: Date: 12 November 2018

Upper Tribunal Judge Hemingway