



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/05705/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 10<sup>th</sup> May 2019**

**Decision & Reasons  
Promulgated  
On 22<sup>nd</sup> May 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**Y T  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Gilbert of Counsel instructed by Duncan Lewis Solicitors

For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant appeals against a decision of Judge Kinnell (the judge) of the First-tier Tribunal (the FtT) promulgated on 7<sup>th</sup> March 2019.
2. The Appellant is a Russian citizen who on 7<sup>th</sup> February 2017 applied for international protection on the basis of her sexuality. She claims to be a lesbian. The Appellant has a daughter who is a dependant in her claim, who was born in the UK on 9<sup>th</sup> August 2017. The application was refused

on 26<sup>th</sup> May 2017 and the appeal was heard by the judge on 8<sup>th</sup> February 2019.

3. The judge heard evidence from the Appellant and a witness, Mr R L. The judge did not accept the Appellant's claim to be a lesbian. The judge noted that the Appellant had been in the UK since 7<sup>th</sup> July 2009 and made a claim for asylum two days after arrival which was refused on 14<sup>th</sup> December 2009 although the Appellant was granted discretionary leave until 10<sup>th</sup> September 2010. The Appellant appealed and the appeal was dismissed on 12<sup>th</sup> January 2011. The judge noted that the previous claim and appeal did not relate to the Appellant's sexuality.
4. The judge concluded at paragraph 52;

“52. The Appellant's belated claim that she is a lesbian is unsupported by other evidence and, looked at in the round, the evidence indicates that she is heterosexual. I find that the reason why she has made the claim based on her sexuality is because she had knowledge of conditions in Chechnya and Russia and has fabricated a claim designed to fit in with those conditions. I find her not to be a credible witness. She is not at risk of Convention persecution in Russia because of her sexuality.”
5. The appeal was dismissed on all grounds.

### **The Application for Permission to Appeal**

6. In summary it was submitted that the judge had failed to consider relevant matters and/or acted unreasonably with respect to the implicit finding of a discrepancy between YT's claimed disclosure to her mother in relation to her sexuality, and her claim of a lengthy period of difficulty in coming to terms with her sexuality.
7. It was contended that the judge had erred by failing to provide any reasons why it was incredible that YT and her partner had been able to carry on a serious long term relationship for seven years without either the Appellant's foster carers or the partner's parents knowing about it.
8. It was submitted that the judge had erred by failing to give adequate reasons why YT's conduct, observed by Mr L which included kissing and cuddling, was not indicative of the Appellant being a lesbian. The judge had failed to make a finding as to whether the witness was credible or not.
9. It was submitted the judge in making reference to a MARAC report had failed to consider relevant matters.
10. It was contended at paragraph 50 that the judge had erred by making the following finding;

50. It is also very difficult to understand how, if the Appellant's claim that she had been raped as a child while living in Chechnya were true, she would willingly have engaged in congress with a man, particularly when, according to other parts of her evidence, she has no interest in men.

11. It was contended that the judge had erred in finding that YT's opportunity to develop a new relationship after her relationship with her partner ended, was flawed by a failure to consider relevant matters and the judge failed to give adequate reasons for his conclusion.
12. Finally, it was contended that the judge failed to make core findings, and failed to make a finding as to whether YT was raped in Chechnya in 2008 and in the UK in 2018 as claimed. It was submitted that both claimed events were arguably material to the assessment of her account.

### **The Grant of Permission to Appeal**

13. Permission to appeal was granted by Judge Povey of the FtT in the following terms;
  2. The grounds allege that, in rejecting the Appellant's claimed sexuality, the judge erred in his assessment of the evidence, failed to make relevant findings and failed to provide adequate reasoning.
  3. The Appellant claimed to be a lesbian, which was rejected by the judge. The grounds focused on the judge's fact-finding at [47] - [51] of the determination. At [50], the judge expressed difficulty in understanding the Appellant's sexual history, given her claim to have been raped in the past. It was arguable that the judge failed to provide sufficient reasons for why or from where that difficulty arose. In addition, the judge did not make any findings in respect of the allegations of rape, despite the same being related to the Appellant's claimed sexuality. Both of these omissions appeared material to the judge's assessment of the credibility of the Appellant's account and constituted arguable errors of law.
  4. As the application for permission disclosed arguable errors of law, permission to appeal is granted. All grounds may be argued.
14. Following the grant of permission, the Respondent lodged a response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was contended that the judge had not materially erred in law and had directed himself appropriately.
15. Directions were given that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it must be set aside.

### **My Analysis and Conclusions**

16. At the oral hearing Mr Gilbert relied and expanded upon the grounds upon which permission to appeal had been granted. Miss Isherwood relied upon the rule 24 response, arguing that the judge had not materially erred in law, and the grounds amounted to a disagreement with conclusions reached by the judge, which were open to him to make on the evidence.
17. In considering the submission made on behalf of the Appellant that the judge provided inadequate reasons for findings, I follow the guidance in

Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) and set out below the headnote to that decision;

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.

18. The judge found at paragraph 47 that it was not credible that the Appellant could have carried on a serious same sex relationship for seven years in the UK without her foster carers or her partner's parents knowing about it. No reasons are given for that conclusion.
19. In the same paragraph the judge comments upon the evidence of Mr L finding that he had never known her to be in a same sex relationship, and the evidence that he gave about having observed the Appellant in an embrace with another woman is not necessarily indicative of anything other than a close friendship.
20. I find that the judge has not made a specific finding on Mr L's credibility. In addition, I find that the judge has not considered all of the evidence given by Mr L, which should have been considered and findings made upon it.
21. In addition to giving oral evidence, Mr L had provided a letter dated 2<sup>nd</sup> April 2017 contained at pages 158 - 159 of the Appellant's bundle. In this letter he described seeing the Appellant with another woman in a park, and Mr L indicated that they seemed embarrassed when they caught sight of him, and "they were being quite intimate and stopped when they saw me."
22. Mr L then described in the letter having a private meeting with the Appellant in which

"She broke down in my office, owning up to her sexuality and that of her lady friend. She had wanted to keep that side of her life private and discreet. She was embarrassed by this and did not feel that she was ready to come out in the open about her sexual orientation. That was the winter of 2012, Christmas week".
23. Mr L then stated "I became the person she came to when she had matters of her sexuality unnerving her. I believe I was the only person who knew her secret."
24. Mr L also provided a witness statement dated 22<sup>nd</sup> September 2017 at pages 23 - 25 of the Appellant's bundle in which he described the incident he had witnessed and which was described in his letter, stating that the Appellant and the other girl were hugging and kissing. At paragraph 5 of the witness statement Mr L describes the meeting with the Appellant in which she disclosed to him her sexuality.

25. The judge does not consider Mr L's evidence in relation to his meeting with the Appellant and her confession to him in relation to her sexuality. The judge only considers Mr L's evidence of seeing the Appellant hugging and kissing another girl which the judge found was "not necessarily indicative of anything other than a close friendship."
26. In my view the judge has failed to consider material evidence and therefore failed to make findings upon that evidence and has failed to give adequate reasons for not taking into account and attaching weight to the evidence of Mr L.
27. I find this amounts to a material error of law. Mr L's evidence is potentially significant.
28. In addition, I do find the judge has made an unclear finding at paragraph 50 in which he appears to indicate that it is difficult to understand that if the Appellant had been raped as a child, why she would willingly have engaged in sexual relations with a man. The Appellant did give evidence to explain she had a specific arrangement with a man that she would become pregnant, and the judge has not demonstrated that he has considered her explanation and therefore it is not clear why he has rejected it.
29. In my view the judge is entitled at paragraph 52 to describe the Appellant's claim in relation to her sexuality as "belated" but errs in recording that the claim "is unsupported by other evidence" as the judge has not analysed all of the evidence given by Mr L.
30. I conclude that the judge has materially erred by failing to give adequate reasons in relation to findings, and not demonstrated that all material evidence has been considered. The decision must therefore be set aside with no findings of fact preserved.
31. The decision must be remade. I am conscious that there have already been three hearings before the FtT, two of which related to the claim based on sexuality. I am therefore faced with an appeal which involves considerable judicial fact-finding, which has already been heard in the FtT. I have considered the Senior President's Practice Statement at paragraph 7.2 and despite the previous hearings in the FtT find that the appropriate course is to remit the appeal back to the FtT to be heard afresh. In my view it is more appropriate for the substantial judicial fact-finding that is required, to be carried out by the FtT rather than the Upper Tribunal.
32. The appeal will therefore be heard again by the FtT and the parties will be advised of the venue, time and date in due course. The appeal is to be heard by an FtT Judge other than Judge Walters, Judge Dineen, and Judge Kinnell.

## **Notice of Decision**

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

**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 them 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

Date 16<sup>th</sup> May 2019

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT  
FEE AWARD**

I make no fee award. The issue of any fee award will need to be considered by the FtT.

Signed

Date 16<sup>th</sup> May 2019

Deputy Upper Tribunal Judge M A Hall