Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02934/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 27 January 2022	**On: 10 February 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ODA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms G Capel, counsel instructed by Duncan Lewis Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Munonyedi, promulgated on 25 August 2021. Permission to appeal was granted by First-tier Tribunal Judge Grant 27 on 27 September 2021.

Anonymity

2. An anonymity direction was made previously and is reiterated below because the respondent is a survivor of childhood sexual abuse who also experiences poor mental health.

Background

3. The respondent arrived in the UK during 1999, aged 15. He first came to the attention of the authorities in 2014 when he sought leave to remain as a victim of trafficking as well as his bisexuality. That application was refused on 10 August 2015, with his appeal (IA/28755/2015) against that decision being allowed on 13 March 2018. That decision was subsequently set aside by the Upper Tribunal and the matter was remitted to the First-tier Tribunal for reconsideration. In the meantime, the respondent made a protection claim in response to a decision to deport him following his conviction for robbery and sentence of 18 months' imprisonment.

4. The basis of the respondent's protection claim was that he was at risk from those that had trafficked him to the UK and to whom he owed money. In addition, he feared persecution as a bisexual man.

5. The protection claim was refused by way of a decision letter dated 19 March 2019. In summary, the Secretary of State was of the view that there was a functioning police force in Nigeria which the respondent could approach for protection from his traffickers. Alternatively, it was reasonable to expect the respondent to relocate to an area of Nigeria other than Lagos. The respondent's claim to be bisexual was rejected owing to his varying accounts of his sexuality. The respondent's Article 8 claim was based on his 19-year residence in the UK as well as having three minor British children. The Secretary of State did not accept that it was unduly harsh for the respondent to return to Nigeria while his children remained in the UK, it being said that he could maintain relationships with them through modern means of communication. It was not accepted that the respondent met the private life exception to deportation. In deciding whether there were no very compelling circumstances, the Secretary of State had regard to the entirety of the respondent's offending history, the orders of the Family Court and his claim to suffer from PTSD as a result of sexual abuse.

The decision of the First-tier Tribunal

6. The respondent's outstanding remitted appeal was merged with the appeal against the decision of 19 March 2019. The First-tier Tribunal judge allowed the protection claim on the basis that the respondent would be at risk of serious harm and death at the hands of the criminals who trafficked and abused him as well as that he would be at risk of persecution in Nigeria were he to explore his bisexuality. The appeal was further allowed on Article 3 health grounds owing to an absence of access to treatment for the respondent's complex mental health needs. The Article 8 appeal was allowed as the judge found that the respondent's removal would be unduly harsh on his two of his three daughters (D2 and D3), noting that there

were Family Court proceedings in relation to one daughter (D1) for the reinstatement of contact.

The grounds of appeal

7. The grounds argued as follows:

- that the judge did not make an express finding on the risk arising on account of the respondent's sexuality
- there was no engagement by the judge with material evidence from the respondent's asylum interview concerning his sexuality
- the judge had not resolved the discrepancy regarding the respondent's sexuality or provide reasons why she accepted that he was bisexual
- the judge failed to give adequate reasons as to why the respondent could not seek the assistance of his mother in order to relocate from Lagos
- there was a lack of adequate reasoning for the judge's finding that the extent of criminal networks extends to every region of Nigeria
- the judge materially misdirected herself in not taken into account the leading cases relating to risk of suicide of *J* [2005] EWCA Civ 629 and *Y (Sri Lanka)* EWCA Civ 362.
- the judge materially misdirected herself by not considering the judgment in *AXB* [2019] UKUT 397 regarding procedural aspects arising from *Paposhvili*.
- The judge afforded weight to the fact that the index offence did not involve firearms or drugs and arguably downplayed the weight to be afforded to the public interest
- The judge erred in finding that the effect of the respondent's removal on his children would be unduly harsh on the basis of the expert evidence which did not point to the elevated threshold. The judge did not consider the respondent's motives for initiating court proceedings with D1 and erred in importing earlier findings regarding suicide risk into the findings on undue harshness.

8. Permission to appeal was granted on the basis sought.

9. The respondent's Rule 24 response was received on 21 October 2021. It suffices to say that the Secretary of State's appeal was opposed on all bases. In addition, it was highlighted that the respondent's mother had sadly passed away a year earlier and the evidence of this was not subject to any challenge during the hearing before the First-tier Tribunal.

The error of law hearing

10. Mr Whitwell immediately amended the grounds of appeal with reference to paragraph 11a, accepting that it was factually incorrect given that the

respondent's mother had died. He apologised to the respondent, stating that the bundle was not before the drafter of the grounds.

11. Mr Whitwell relied on the remainder of the grounds which he helpfully categorised as grounds one to four. The first ground he described as the sexuality point, the second ground concerned organised crime gangs and internal relocation, the third ground addressed Article 3 with regard to suicide risk and the last ground concerned the findings on unduly harshness.

12. Mr Whitwell accepted that if the judge's findings on either the respondent's sexuality or the risk from organised crime groups were upheld, the appeal would succeed. In relation to the first ground, it was not suggested that the judge made no findings regarding the issue of the respondent's sexuality, it was that, at [60], she did not grapple with the inconsistency arising from the asylum interview record, where the respondent described himself as heterosexual. Mr Whitwell accepted that the Secretary of State's policy was that, in general, someone who was bisexual would be at risk if they openly expressed their sexuality, albeit this was to be considered on a case-by-case basis. The failure to address the inconsistency could be termed either inadequacy of reasons or an omission of a material consideration.

13. On the second ground, Mr Whitwell argued that the expert, Debbie Ariyo was unable to indicate the reach of the particular gang responsible for trafficking the respondent. In addition, when dealing with internal relocation, Ms Ariyo made no reference to the reach of the gang while discussing reasons why the respondent could not be expected to relocate.

14. In terms of the judge's Article 3 findings, Mr Whitwell argued that the judge, in relying on *Paposhvili*, had not addressed the binding authorities of *J* and *Y*. Further, in *Paposhvili*, it was held that the onus was on an appellant to raise a prima facie case, and this was not apparent from the judge's decision and reasons. He submitted that it could not be said for certain that another tribunal would come to the same conclusion.

15. Mr Whitwell relied mainly on his grounds regarding the fourth matter. The judge relied on factors which showed that the respondent would not be playing a hands-on role as a father. The drafter of the grounds was not aware of the Family Court proceedings albeit the point remained as to the respondent's motivation for bringing those proceedings. He urged me to set aside the decision.

16. In addressing Mr Whitwell's submissions, Ms Capel relied on her detailed Rule 24 response and helpfully took me to the references made in that document to the various reports before the judge as well as referring me to her skeleton argument for the First-tier Tribunal hearing. Mr Whitwell had no submissions in response to those of Ms Capel.

17. At the end of the hearing, I announced that the judge made no error in relation to her findings on the protection appeal. I reserved my decision in relation to the freestanding Article 3 and Article 8 findings.

Decision on error of law

18. I will address the grounds in the order they were made. Mr Whitwell rightly accepted that the judge made express findings on the risk to the respondent arising on account of his sexuality. For completeness, I note that the judge engaged with the country information, including the CPIN and the opinion of Ms Ariyo and reproduced them in her decision between [62] and [68]. The judge made no error in concluding that bisexual men are, in general, at real risk of persecution in Nigeria.

19. As was clear from Mr Whitwell's submissions, the Secretary of State's real concern was with the apparent inconsistency as to the respondent's description of his sexuality in his asylum interview when compared with other statements he had made. The Secretary of State argues that the judge did not engage with this evidence nor resolve the discrepancy regarding the sexuality or provide reasons why she accepted that he was bisexual.

20. I am satisfied that the judge did address her mind to the evidence as to the respondent's description of his sexuality. The judge referred to the Secretary of State's decision at [20] and would have been aware of the reasons for refusal. In addition, the respondent addressed the discrepancy in depth in his witness statement, explaining his personal struggle with his sexuality which is linked to the sexual abuse he experienced as a child. The judge addressed this evidence at [25] and the Rule 24 response sets out the respondent's answer to a question on this discrepancy posed by the Home Office Presenting Officer at the hearing. In short, the respondent explained that he feared, for good reason, that the information he gave during his interview, which took place in prison, would be divulged and his sexuality was a complex question which he had yet to clarify for himself.

21. Dr Wooton's assessment also addressed the aforementioned issue, the judge setting this out at [51-52]. This evidence included reference to the respondent's sexual abuse having affected his ability to come to terms with his sexuality. At [57] the judge accepted Dr Wooton's evidence in full, commenting that there was no challenge on behalf of the Secretary of State to that evidence. Lastly, the judge found the respondent to be a witness of truth, as she states at [33] and at [60] she made a clear finding that the respondent is a bisexual man. In finding that the respondent had given truthful evidence regarding all matters, the judge dealt adequately with this discrepancy and as such there was no error in her approach. There was no challenge to the judge's remaining findings as to the risk to the respondent in Nigeria as a bisexual man or her application of the

principles in *HJ (Iran)* which are set out between paragraphs [60-66] of her decision.

22. The second ground argued that the decision of the First-tier Tribunal contained inadequate reasoning to support the finding that the criminal network feared by the respondent extended nationwide. This argument does not accord with the expert country evidence before the judge, which she accepted in full at [41] and [58]. It is relevant that the Secretary of State accepted the respondent's account of having been trafficked to the United Kingdom as a child and being subjected to domestic slavery as well as sexual abuse.

23. There is no challenge to the judge's findings at [59] that the respondent is at risk of persecution by his former traffickers in his home area. The respondent provided a detailed account to Ms Ariyo which included the reasons why he believed that his captors were using children as drug mules. Ms Ariyo's opinion was that the respondent's captors were '*likely to be part of an organised criminal gang involved in human and drug trafficking between Nigeria and Europe*,' that the gang members were '*significant players*,' and that they were '*part of a wider criminal confraternity due to the width and coverage of their operations*…'.

24. Ms Ariyo fairly stated that she was not '*certain*' whether the network which trafficked the respondent was a '*stand-alone organisation or a cell within a wider network spanning many other countries, operations and operatives across Nigeria and Europe*,' however her expert opinion was that this was the case. It is uncontroversial that in an asylum case, there is no requirement for certainty, given the lower standard of proof applicable. Accordingly, the judge did not err in concluding that the criminal network which trafficked the respondent extended to every region of Nigeria, based on Ms Ariyo's opinion. Even had the judge erred it would have been immaterial given her findings that the respondent would have been at risk of re-trafficking, the evidence as to the lack of services for male victims of trafficking and the respondent's poor mental health. These factors, along with the fact that he has no family to support him, would have inexorably led to a finding that it was not reasonable to expect the respondent to relocate.

25. It follows that the judge's finding that the respondent's removal would cause the United Kingdom to be in breach of its obligations under the Qualification Regulations, on the basis of his sexuality as well as being at risk of re-trafficking, stands.

26. The third ground concerns whether the judge materially misdirected herself by not taking into consideration the judgments in *J*, *Y* and *AXB*. Specifically, the criticism is that the judge did not consider the following modification from Y:

> *"Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effect mechanisms, that too will*

weigh heavily against the applicant's claim that removal will violate his or her Article 3 rights."

27. In AXB the following was said:

> *'No obligations on the United Kingdom authorities to make enquiries of the country to which a person is to be returned to obtain any assurances in respect of treatment on the return of that person. The burden is on the individual appellant to establish that, if he is removed, there is a real risk of a breach of article 3 to the standard and threshold which apply. If the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant's evidence or dispelling doubts arising from that evidence'*

28. It is the case that the judge made no direct reference to the aforementioned authorities and that the judge directed herself by referring to the *Paposhvili* standard. Subsequent to the hearing, the decision in *MY (Suicide risk after Paposhvili) Occupied Palestinian Authority* [2021] UKUT 232 was promulgated. The aforementioned case confirmed that the correct test in suicide cases was that set out in *AM (Zimbabwe),* referencing *Paposhvili*. At [120] the Upper Tribunal stated that the six factors in *J* and *Y* did not impose a test or burden on a claimant. At [123] the Tribunal said the following:

> *'in order to reflect properly the applicable Paposhvili test, the guidance [set out at points 5 and 6 of J] should now apply to mental health cases generally where fear is unfounded.'*

29. The respondent has established that he has a well-founded fear of persecution in Nigeria based both on his risk of being re-trafficked as well as his bisexuality. Furthermore, the judge notes at [57] that the Secretary of State did not dispute the evidence of the consultant psychiatrist (Dr Wooten). Dr Wooten's opinion, in summary, was that the respondent's risk of suicide would increase to a high level upon removal from the United Kingdom. Furthermore, the opinion of Ms Ariyo was that adequate treatment would not be available, accessible or affordable to the respondent in Nigeria. Indeed, the Secretary of State cites evidence in the decision letter which states that '*professional psychiatric care is basically inaccessible for most Nigerians*.' Accordingly, there was no requirement for the judge to grapple with the fifth and sixth factors in *J.*

30. Mr Whitwell argued that the respondent had not raised a prima facie case, as required by *Paposhvili.* I do not accept that submission. At [47], the judge refers to the respondent having written to the Secretary of State three years ago to state that he was feeling '*really suicidal*.' In addition, Survivors UK wrote to state that the respondent '*expresses significant suicidal ideation,'* Dr Wooten referred to '*recurrent threats of self-harm*' along with her conclusion that the respondent was at risk of '*suicide and self-harm'* both in the context of his desperation to resist removal as well

as that the risk would increase to a high level should he be removed to Nigeria.

31. The fourth and final challenge was that in her assessment of undue harshness, the judge placed weight on the fact that the respondent's offending did not involve firearms or drugs and as such downplayed the weight to be afforded to the public interest. While the judge made a comment about the nature of the index offence at [74], this comment did not form part of her human rights assessment, which commenced at [87] of the decision. There is therefore no support for Mr Whitwell's argument. On the contrary, had the judge factored in the level of severity of the offence in her Article 8 assessment she would have erred in light of *KO (Nigeria)* [2018] 1 WLR 5273. The judge directed herself correctly regarding *KO* at [83] as well as at [90], where she weighed the public interest consideration against the effect of the deportation of the respondent on his daughters D2 and D3.

32. The second criticism raised within the fourth ground was that the evidence before the judge did not meet the elevated threshold for undue harshness, because the respondent would not be playing a hands-on role as a father. This ground, which was not elaborated during the hearing, appears to amount to little more than disagreement with the judge's decision.

33. The judge clearly accepted the opinion of the independent social worker Ms Opie Greer regarding the effect of the respondent's removal on D2 and D3, as can be seen from [86-88] of the decision. The judge found that that the effects of paternal deprivation on the children would be unduly harsh, would cause them emotional trauma, would destabilise them and have far-reaching negative effects. The judge also took into account the respondent's mental health difficulties which include a high suicide risk if removed to Nigeria. She did not err in doing so, given that the undisputed evidence of two consultant psychiatrists was that the respondent was suffering from Complex PTSD owing to his years of trauma, as well as mixed anxiety and depressive disorder.

34. Contrary to Mr Whitwell's submission that the respondent was not a hands-on father, the ISW quoted the mother of two of the respondent's children (D2 and D3) as stating that he was involved with "*every aspect*" of their care jointly with herself, notwithstanding the fact that he lived apart from them. This was not challenged on behalf of the Secretary of State and the judge placed reliance on this report.

35. There is also no support for the Secretary of State's concerns as to the respondent's motives for initiating court proceedings regarding one of his three daughters (D1). The evidence before the judge was that this application was made because the respondent wished to reinstate the contact which he had previously enjoyed [89]. Furthermore, Mr Whitwell's submission does not take into account the preserved findings of First-tier Tribunal Judge Aujla who allowed the respondent's appeal in 2018, that he

had a genuine and subsisting parental relationship with all three of his daughters. In any event, the judge's finding of undue harshness addressed only the effect of the respondent's removal on D2 and D3 and not D1.

36. The decision of the First-tier Tribunal contained no errors of law and is upheld in its entirety.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent 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: T Kamara Date: 28 January 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email