**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-000156

First-tier Tribunal Nos: PA/50512/2023
LP/01837/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 7th of March 2024

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**AWM**
**(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr M Fazli of Counsel
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

**Heard at Field House on 23rd February 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the Appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The Appellant is a citizen of Kenya whose date of birth is recorded as 26th December 1967. Having entered the United Kingdom as a visitor, she subsequently, on 19th July 2022, made application for international protection as a refugee on the basis of a relationship with another woman. On 12th January 2023 a decision was made to refuse the application. The Appellant appealed. Her appeal was heard in the First-tier Tribunal on 6th October 2023 by First-tier Tribunal Judge Steadman. In a decision dated 25th October 2023 Judge Steadman dismissed the appeal on all grounds.

2. By notice accompanied by grounds dated 8th November 2023 the Appellant made application for permission to appeal to the Upper Tribunal. There were four grounds. On 15th January 2024 Judge Chowdhury granted permission and in so doing so, summarised the grounds and the reasons for granting permission as follows:

> "(i) …
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> (ii) The first ground contends the judge applied an incorrect standard of proof. The Appellant made her protection claim on 19th July 2022. The 2006 Regulations are revoked by Section 30(4) of the NABA 2022. As Section 30 of NABA 2022 came into force on 28th June 2022 the 2006 Regulations ceased to apply from that date. As the Appellant submitted a claim in July 2022, NABA 2022 applies to her. Section 32 states the decision maker must first determine on the balance of probabilities whether the asylum seeker has a characteristic which would cause her to fear persecution for reasons of membership of a particular social group and whether the asylum seeker does in fact fear such persecution in her country of nationality. The decision maker thereafter must determine whether there is a reasonable likelihood that if she were returned to Kenya she would be persecuted as a result of her sexuality. It has therefore not been demonstrated that the judge arguably applied the incorrect standard of proof.
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> (iii) The second ground contends the judge failed to appreciate that corroboration is not required in protection appeals and proceeded on the basis it was required. The judge failed to consider the Appellant's evidence including her attempts to contact her former partner, Florence. The Appellant contends it is well established it is a misdirection to imply that corroboration is necessary for a positive credibility finding. It is arguable that the judge did not have regard to the Appellant's attempts to contact Florence.
>
> (iv) It is arguable that the judge did not consider whether it could reasonably be expected to secure corroborative evidence from Kenya. Further, it is not clear the Judge considered the lower standard of proof applicable in Article 3 appeals when assessing the risk that her relationship had come to light in Kenya.
>
> (v) In the third ground the Appellant contends that the judge failed to properly consider the relevant objective country evidence. The judge had accepted those who lived openly would be persecuted (see paragraph 10). It is arguable that if the Appellant chose to live discreetly it was contradictory to his earlier findings that it was

because of societal pressures only and not persecution (see paragraph 14 of the decision).

(vi) It is arguable that the judge had not considered how difficult it would be for the Appellant to return to live in a country to live in secret again after living relatively freely in the United Kingdom. The grounds just meet the threshold for granting permission".

3. In his opening remarks to me Mr Fazli abandoned pursuing Ground 1. He was right to do so.

4. He went on to invite me to find that the judge had erred in requiring corroboration. As it was I indicated to him that I was not sympathetic to the submission being made but I did not in the event need to make a finding on the error of law on that point because Mr Parvar very fairly reminded me of the Rule 24 notice which had been provided by the Secretary of State in this case.

5. Whilst generally the Secretary of State joined issue with the Appellant on the Grounds of Appeal the Secretary of State accepted that the First-tier Tribunal Judge had made materially inconsistent findings at paragraphs 10 and 14 of the decision and that the judge appeared to find that an openly gay person would be persecuted in Kenya yet contrastingly found that such persons were able to live without being targeted or persecuted such that any findings made at this point were unsafe. Reference was made to the leading case of **HJ (Iran) [2010] UKSC 31**.

6. After some discussion with both representatives it was agreed that the decision of the First-tier Tribunal should be set aside. There was then some discussion about whether the matter should remain in the Upper Tribunal or be remitted to the First-tier Tribunal.

7. The preference of the Secretary of State was for certain findings to be maintained but in my view if the matter was to be referred back to the First-tier Tribunal where in my view the outstanding matter would best be determined because evidence would need to be called (I have had regard to paragraph 7.2(b) of Practice Statement of 25 September 2012), then preserving findings of fact is very difficult for a First-tier Tribunal Judge because the evidence as it emerges at the rehearing below may be different to the way in which it emerged in the first hearing leading to the potential of the judge being compromised by way of having his or her hands tied.

8. Usually when a case is set aside the decision being set aside is not referred to by any of the parties but it was agreed by both Mr Fazli and Mr Parvar that in remitting this matter to the First-tier Tribunal the judge at the rehearing is to be entitled to have regard to that decision and that the parties may use that decision for the purposes of examination and cross-examination without, for the avoidance of doubt, any of the findings in that decision being preserved.

**Consequential Directions**

9. This decision is set aside, remitted to the First-tier Tribunal to be reheard.

10. No interpreter is required.

11. In the allocation of points, four points is appropriate and this is a remitted case on an international protection case.

**Notice of Decision**

12. The decision of the First-tier Tribunal is set aside for it containing an error of law as recognised by the Secretary of State in the Rule 24 notice. The matter will be reheard on the first available date before the First-tier Tribunal.

13. There was no indication of any further evidence that either party sought to rely upon. In those circumstances the matter can be relisted as soon as reasonably practical in the First-tier Tribunal.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

**1 March 2024**