Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01902/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th October 2014	**On 27th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

S S

(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan, Counsel instructed by Turpin and Miller LLP
For the Respondent: Mr N Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of First-tier Tribunal Judge Andrew who, in a determination promulgated on the 18th June 2014, dismissed his appeal against the respondent's decision to refuse him asylum and to remove him to Uganda.

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2. The issue in the appeal was the credibility of the appellant's claim to be gay, to have experienced persecution in Uganda on account of his sexual orientation, and to wish to live an openly gay lifestyle. An appeal against his original claim for asylum had been dismissed by Judge Alakija in a determination promulgated on the 17th February 2010. The instant appeal arose from the rejection of a fresh claim for asylum, which largely turned upon the credibility of evidence that he had been living an openly gay life in the UK since the dismissal of his earlier appeal.

3. The core of the First-tier Tribunal's reasons for dismissing the appeal can be found at paragraph 35 of its determination –

> It is all too easy for the Appellant to tell people that he is gay. I accept that he attends gay meetings and has helped organise gay events but this does not mean that he is gay. Both the earlier Immigration Judge and I have found his claims as to what happened to him in Uganda to be incredible. As I have already indicated it is only after the Appellant's previous appeal failed that he has started to amass evidence which he hopes will support his claims of being gay. For the reasons which I have given I do not find he is [in] the relationship he claims with his claimed partner. I am satisfied that the evidence that I have before me has effectively been manufactured for the hearing in an attempt to show that the Appellant is, in fact, gay. I am not satisfied, even to the lower standard, that he is and would thus be at risk on his return to Uganda.

4. It can be seen from the above that the Tribunal viewed the appellant's actions since he lost his appeal in February 2010 as insincere and self-serving. The relationship to which the Tribunal referred at paragraph 35 was to that which was claimed existed between the appellant and Mr S. Mr S gave oral testimony at the hearing. The Tribunal set out its conclusions in relation to that testimony at paragraph 29:

> Whilst I accept that no great reliance can or should be placed on body language I have to say that I have never before in hearing before me seen such disconnected people as the Appellant and the witness. There was no eye contact between them. They did not acknowledge one another in the hearing room. Immediately after he had given his evidence the witness left despite an invitation to remain, as I would have expected him to do so. If the appellant and the witness are indeed in the relationship they claim then the outcome of this appeal would be of the utmost importance to them both and yet the witness was disinterested.

5. It is finally necessary, for the purposes of explaining my decision in this appeal, to refer to the Tribunal's treatment of the oral testimony of a second witness, Mr K. The Tribunal dealt with this at paragraph 30:

> I also heard from Mr K who told me that he knows the Appellant is an openly gay man, although he gives no reasons for saying this. He has also met the Appellant's claimed partner [Mr S, above] on one occasion.

6. Based upon his written grounds of appeal, I had at first thought that Mr Chelvan's complaint about the approach of the Tribunal to the testimony of Mr S was that it was not (and never could be) appropriate to assess the

credibility of a witness by reference to his demeanour and behaviour at the hearing. However, during the course of his oral submissions, it became apparent that his argument was that the Tribunal had acted unfairly in failing to raise its concerns about Mr S's behaviour at the hearing with the appellant's representative before relying upon it as a basis for making adverse credibility findings. In order to reinforce that argument, Mr Chelvan referred to a letter that the witness had written, post-hearing, in which he provided an explanation for having left the hearing room after he had completed giving his testimony. It not appropriate for me to comment upon the plausibility of that explanation. This is because it is not my present task to assess the credibility of the appellant's claim. I am at this stage considering only whether the First-tier Tribunal materially erred in law. The letter does however serve the purpose of underscoring the need to act with great caution before placing weight (however slight) upon the demeanour and behaviour of a witness at the hearing, and the need to investigate the possibility that there may be an alternative explanation for the conduct in question to that which the Tribunal is otherwise prepared to assume. It <u>may</u> be (and I put it no higher) that the Tribunal would have accepted the explanation for Mr S's conduct that has now been placed before me, had it given the appellant's representative the opportunity of taking instructions before reaching a settled conclusion on the matter. As it is, the appellant was effectively 'ambushed' in respect of a matter that was material to the Tribunal's decision to dismiss his appeal.

7. It is right, as Mr Bramble pointed out, that the Tribunal later returned to the issue of the appellant's claimed relationship with Mr S. At that stage, the Tribunal remarked upon the failure of Mr S and the appellant to take every available opportunity to be together. Nevertheless, I am satisfied that the appellant would have a legitimate sense of grievance if a decision of such potential importance to him was allowed to stand, in circumstances where he had been deprived of an opportunity to address one of the reasons that led to it.

8. Mr Chelvan further argued that the Tribunal's finding that Mr K had failed to give any reason for stating that he knew the appellant to be an 'openly gay man' was factually inaccurate. Thus, at paragraph 5 of his witness statement, Mr K stated as follows:

> When I found out [the appellant] was Ugandan I really wanted to support and help him, as I could tell he was in a very difficult situation. In early 2011 I first invited him to our house and I would say that is when we really started to become good friends. It was then that he opened up to me and told me his whole story and that he was gay. There were other people in our church who are openly gay. After he had told me he told the rest of the church and we have all accepted him as an openly gay man.

It is possible of course to make a distinction between knowledge and belief. However, if the Tribunal was seeking to make a distinction at that level of subtlety, then the appellant was in my view entitled to have this made clear to him in the determination. It would also be fair and reasonable to expect that such a distinction would be investigated in the course of questioning

the witness, whether in cross-examination or by way of clarification from the Bench. As it is, the Tribunal's finding that Mr K had given no reason for his knowledge or belief that the appellant was leading the life of an openly gay man was, on the face of it, contrary to the evidence.

9. In my judgement, the above failures in procedural fairness are such that the determination of the First-tier Tribunal must be set aside. In light of the reasons that I have given for arriving at this conclusion, it would be inappropriate for any of the original findings to stand. The matter is therefore remitted to the First-tier Tribunal in order for it to be determined afresh.

Decision

10. The First-tier Tribunal made a material error of law and its decision is set aside.

Signed Date: 17th October 2014

Deputy Judge of the Upper Tribunal