



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/10630/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
on 2 November 2017**

**Decision & Reasons
Promulgated
on 16 November 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**SW
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Iengar, Counsel, instructed by Biruntha Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Zahed (Ftj), promulgated on 1 June 2017, dismissing the Appellant's appeal against the Respondent's decision dated 21 September 2016 refusing his asylum and human rights claims.

Factual Background

2. The Appellant is a national of Sri Lanka, date of birth 20 November 1985. He entered the United Kingdom on the 9 September 2009 as a Tier 4 (General) Student and was subsequently granted a further

period of leave in the same capacity. On the 14 August 2012 he was encountered at a registry office attempting to enter into a sham marriage with a Lithuanian national. After being served with papers informing him that he had no lawful right to remain in the UK he made an asylum claim. This was however withdrawn on 5 November 2012. The Appellant then made two further applications for leave to remain as a Tier 4 (General) Student, both of which were granted. The last period of leave was however curtailed so as to expire on 7 February 2016. He then made an application for leave to remain on the basis of his family life under the 10-year route but this was refused and certified as clearly unfounded on the 24 June 2016. After being detained at an interview he claimed asylum on 9 July 2016.

3. It is not necessary to consider the specifics of the asylum claim, which revolves around the Appellant's assertion to be a bisexual man and his fear of persecution in Sri Lanka because his sexual orientation. He maintains that he has been charged under the Sri Lankan Penal Code with committing an act of gross indecency and that an arrest warrant has been issued against him. He fears both the state authorities and the father of someone with whom he had an intimate relationship.
4. The Respondent does not accept that the Appellant is bisexual or that he had a relationship with a man in Sri Lanka. The Respondent relied on inconsistencies and vagueness in the Appellant's account in doubting his credibility as well as his earlier attempt to enter a sham marriage and the lateness of his asylum claim. The Respondent additionally rejected the Appellant's claimed relationship with MT, a British national woman.

The decision of the First-tier Tribunal

5. The Appellant exercised his rights of appeal in relation to both the refusal of his protection claim and the refusal of his human rights claim (there had been no further certification of the human rights claim raised by the Appellant in his asylum claim). The appeal was initially listed for hearing on 3 November 2016, but this was adjourned following an application by the Appellant's solicitors stating that he had severe back and knee pain and was 'not fit to travel'. Medical support came in the form of a "Statement of Fitness for Work for Social Security or Statutory Sick Pay" certificate issued on 27 October 2016. The hearing was adjourned to 2 February 2017. On 31 January 2017, the Appellant's solicitors again requested an adjournment and attached a certificate similar to that previously provided. This new certificate stated, "back pain, leg and knee pain. Not fit to travel." It was issued in respect of the period 27 January 2017 to 3 February 2017. On 1 February 2017 the First-tier Tribunal informed the Appellant and his solicitors that the GP had not certified that the Appellant was unfit to attend a Tribunal hearing, and there was no indication as to when he was likely to be able to do so. The Tribunal noted that the application was made on the same grounds as that made in October 2016. On the same date, having received the

Tribunal's response, the Appellant wrote to the Tribunal stating that he was not in a position to attend the hearing due to backache and reiterated that his GP had informed him that he was not fit to travel. The GP surgery declined to issue a further report as the medical certificate issued covered the period from 27 January 2017 to 3 February 2017. The Appellant again requested that the hearing be adjourned.

6. There was no attendance at the appeal hearing on 2 February 2017 by the Appellant or his representatives. The judge instructed his clerk to make inquiries with the Appellant's solicitors. They then faxed a letter stating that they were without instructions and requested that their attendance be excused.
7. In his decision, the judge noted that a Reply Notice dated 17 October 2016 indicated that the Appellant was ready to proceed to full hearing and there was no reference to any medical difficulties. The judge additionally noted the previous adjournment granted in October 2016, and the Tribunal's refusal to adjourn dated 1 February 2017. The judge finally noted that on 6 February 2017, following the hearing, the First-tier Tribunal received a further medical certificate making reference to ongoing back pain and sciatica. This certificate, which was valid from 3 February 2017 to 17 February 2017, did not make any reference to the Appellant being unfit to travel. At [19] the judge stated,

I note that the Appellant was able to travel to the surgery the day after the hearing and was able to travel to the surgery on 2 previous occasions just days before the hearing.

8. At [20] the FtJ stated,

In coming to my decision as to whether to grant an adjournment request I have taken into account the case of Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC). I have carefully looked at the history of this appeal and find that this Appellant simply is delaying his appeal. I do not find sufficient evidence has been provided to state why the Appellant cannot come to the tribunal and give evidence given that he lives in Uxbridge and the hearing Centre is in Hatton Cross. I take into account that the Appellant has been able to provide these sick certificates by going to the surgery days before and a day after the hearing.

9. The judge then concluded that the Appellant was 'malingering' and that the hearing should proceed. The judge described the Appellant's immigration history and held against him his earlier withdrawal of an asylum claim, his delay in claiming asylum, and the fact that his current asylum claim was made after he was detained. The judge found that the Appellant had inconsistently claimed to be gay and then bisexual, that he failed to produce any medical evidence of his ill-treatment while in custody, and found that the documents provided, including a letter from his father and a letter from a lawyer in Sri

Lanka, were 'self-serving'. The judge found that the Appellant was not gay or bisexual, that he did not have a relationship with a man in Sri Lanka, that there was no arrest warrant issued against him, and that he held no fear of ill-treatment. It is apparent from the judge's decision that he found the Appellant to be incredible. The judge dismissed the asylum appeal but gave no consideration to the article 8 human rights claim, which was based on the Appellant's relationship with MT.

The grounds of appeal and the error of law hearing

10. The grounds contend that the judge acted unlawfully in refusing to grant the adjournment. Although acknowledging that the judge referred to Nwaigwe, it is submitted that he failed to apply the principles enunciated in that decision.

11. In granting permission to appeal Upper Tribunal Judge O'Connor stated,

It is arguable that the FtJ's hearing was vitiated by procedural unfairness. The FtJ refused to adjourn the hearing of the appeal (set down for 2 February 2017) in the face of medical evidence from a qualified medical practitioner dated 30 January 2017 stating that the Appellant was 'not fit to travel' until after 3 February 2017. Underpinning the FtJ's refusal of application to adjourn can be resolved into a rejection of the evidence as to the Appellant's fitness to travel on 2 February. Such reasoning is arguably irrational. I further observe that in [19] of its decision the FtJ relies upon evidence from the 6 February 2017 as part of its rationale for refusing the adjournment of the hearing on 2nd February. This of itself is arguably irrational.

12. At the error of law hearing, which was attended by both the Appellant and MT, Ms Lengar relied on and expanded the grounds of appeal. She submitted that the judge acted in a procedurally unfair manner by going behind the medical evidence that the Appellant was not fit to travel. The judge engaged in unwarranted speculation in concluding that the Appellant must have travelled to his GP in order to obtain the sickness certificate. There was said to be no rational basis for the judge's conclusion that the Appellant was malingering. The judge failed to give adequate reasons for discounting the medical evidence. Ms Lengar additionally submitted that the judge failed to give any consideration at all to the article 8 claim. The Appellant had clearly relied on his relationship with MT in his asylum claim, and the Respondent specifically engaged with this claimed relationship in her decision under challenge. The bundle prepared for the appeal hearing included a witness statement from MT, evidence of joint bank statements and a tenancy agreement. None of this had been considered by the judge. It was finally submitted that the judge was not entitled to attach no weight to the lawyer's letter on the basis that it was 'self-serving', applying R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 00164 (IAC).

13. In his brief response Mr Melvin accepted that the issue of the Appellant's relationship with MT had been raised in the asylum claim and that the judge failed to deal with this issue.
14. I indicated that I was satisfied that the judge's decision was vitiated by several material legal errors, and that it was appropriate to remit the matter back to the First-tier Tribunal for a *de novo* hearing.

Discussion

15. I am satisfied that the three independent bases advanced as to why the judge fell into legal error are made out. While it is clear that the judge considered in some detail the application to adjourn the hearing, and was entitled to consider the procedural history of the appeal, including the adjournment granted in October 2016, the judge impermissibly went behind the opinion of a qualified medical practitioner without providing satisfactory reasons, and engaged in unsupported speculation.
16. The fax sent to the Tribunal on 31 January 2017 included a "Statement of Fitness for Work for Social Security or Statutory Sick Pay" certificate. It indicated that the Appellant was assessed on "30/1/2016" but this is highly likely to be a typographical error and that it should have read 2017. The certificate indicated, "back pain, leg and knee pain. Not fit to travel." It was issued in respect of the period 27 January 2017 to 3 February 2017. While a pro-forma certificate of this kind will not usually be sufficient to demonstrate that an individual is unfit to attend a tribunal hearing and give evidence (the certificate relates to "fitness to work", not to an inability to give evidence to a tribunal), this particular sickness certificate specifically indicated that the Appellant was not fit to travel. It is obvious that in order to attend a hearing one must normally travel. No issue has been raised with the authenticity of the sickness certificate. It was completed by a qualified medical practitioner and must be taken to reflect his or her professional opinion.
17. The judge rejected the assertion as to the Appellant's fitness to travel by stating that the Appellant must have been sufficiently fit to travel to the GP surgery, that the hearing centre was not far from the Appellant's home, that no reference was made in the reply notice sent to the Tribunal on 17 October 2016 to any medical difficulties, and to the fact that the appeal was previously adjourned in October on the same basis. There was no evidence before the FtJ as to whether the Appellant did in fact travel to his GP surgery to obtain the sickness certificate. This was speculation by the judge. It is equally possible that the Appellant's GP could have visited him at his home. Even if the Appellant did travel to his GP surgery to obtain the sickness certificate, there was no evidence in respect of the circumstances in which this travel occurred, how far the GP surgery was from the Appellant's home, whether the Appellant needed assistance to travel,

or the impact on the Appellant of having to travel. The fact that an individual may have to undertake a journey to a GPs surgery does not mean that that person is in a medically fit state to travel. There was simply no basis for the judge to go behind the conclusions of the medical practitioner. The absence of any reference to medical problems in the Reply Notice dated 17 October 2016 is not of itself sufficient to entitle the judge to reject the truthfulness of the assertion contained in the medical certificate. It is quite possible for sciatica or serious back pain to have developed after the issuance of the Notice of Reply. The fact that an appeal hearing was adjourned on the same basis at the end of October 2017 does not entitle the judge to conclude that the Appellant is malingering or intentionally delaying the hearing of his asylum appeal. It is a matter of common knowledge that sciatica may afflict individuals for several weeks or months.

18. Because of his refusal to grant the adjournment the judge proceeded to hear an appeal relating to a protection claim in which the Appellant's credibility was very much in issue. Had the appeal been adjourned, and had the Appellant attended the adjourned hearing, a judge may have had an opportunity to test the Appellant's evidence and the basis for the adverse credibility findings. For these reasons, I am satisfied that the Appellant was deprived of a right to a fair hearing.
19. For entirely independent reasons I am additionally satisfied that the judge materially erred in law by failing to consider the Appellant's human rights claim based on his relationship with MT. There was no dispute that the Appellant advanced a human rights claim within the context of his asylum claim. This was specifically considered by the Respondent in her Reasons for Refusal Letter. The rejection of this further human rights claim was not certified under s.94 of the Nationality, Immigration and Asylum Act 2002, nor was it rejected under paragraph 353 of the immigration rules. The appeal bundle contained a statement from MT describing her relationship with the Appellant, and their claimed relationship was supported by other evidence including joint bank statements and a tenancy agreement. It was incumbent on the judge to have considered the human rights appeal. The judge failed to engage with this aspect of the appeal at all, a point accepted by Mr Melvin. This constitutes a further material error of law.
20. I am finally satisfied that the FtJ's decision to attach no weight at all to the letter from a Sri Lanka lawyer, Mr Talangalla, which was supported by a Sri Lankan Bar Association ID card, on the basis that it was 'self-serving' was one he was not entitled to make for the reasons identified in R (on the application of SS). The FtJ does not explain why the letter is 'self-serving', or why the assertions contained in the letter were incapable of belief. I am satisfied this amounts to a further, independent error of law.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors of law. The case is remitted to the First-tier Tribunal for a fresh (de novo) hearing, all issues open, to be heard by a judge other than Judge of the First-tier Tribunal Zahed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant in this appeal 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 Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



16 November 2017

Signed
Upper Tribunal Judge Blum

Date