



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/13821/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 24th July 2017**

**Decision & Reasons Promulgated
On 17th August 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KCK
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr J Collins, instructed by OTS Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a national of Cameroon born in 1989. His appeal against the decision to refuse his protection claim was allowed by First-tier Tribunal Judge Zahed on 20th February 2017.
2. The Secretary of State appealed on the grounds that there had been procedural unfairness at the hearing before the First-tier Tribunal. It was

alleged that before the Appellant's witness [BD] gave evidence he was handed a piece of paper by someone who was sitting with the Appellant at the back of the courtroom. The judge failed to investigate the content of the note and the hearing was unfair (Alubankudi (Appearance of bias) [2015] UKUT 542 (IAC) and Elayi (fair hearing - appearance) India [2016] UKUT 508).

3. Permission was granted by Upper Tribunal Judge Rimington on the ground that it was arguable that there was procedural unfairness following Alubankudi because the matter was not investigated by the judge and the judge relied on the witness' evidence in the decision.
4. Judge Zahed was invited to comment on the assertion in the grounds of appeal. He stated that counsel for the Respondent [AJ] had stated that BD was looking at a piece of paper. He could not remember whether it was at the start of the cross-examination or sometime during the course of it. On being alerted to this the judge told BD that he could not refer to any notes or his witness statement and that he should give evidence from his own memory and put the piece of paper away. That was the end of the matter. It was never raised again by any party either during the course of the evidence or in submissions, although the judge did ask AJ whether she had a view on whether BD was credible or not given he was a third party. The judge noted in his record of proceedings that the presenting officer was neutral on BD.
5. In the Rule 24 response, counsel for the Appellant [RD] stated that AJ did not contest the reliability of the evidence of BD in closing submissions. BD testified that he had seen evidence of the Appellant's openly gay lifestyle, kissing his boyfriend. AJ indicated that she was neutral as to BD's evidence even though RD had indicated that this was insufficient and amounted to a failure to challenge.

Submissions

6. Mr Melvin relied on the grounds, the statement dated 10th April 2017 by AJ and the reply from the judge. He submitted that there was a material error of law and the matter should be remitted to the First-tier Tribunal for rehearing because the note that had been handed to the witness amounted to procedural unfairness.
7. Mr Collins submitted that there was a difference of opinion between the statement of AJ and the statement made by the judge. What was said by AJ at paragraph 6 of her statement was not reflected in the judge's note or in the note of RD. There was also the question of why this matter was not mentioned at the hearing. If AJ was concerned that the witness' evidence had been tainted by the note, then there was no explanation for why she failed to mention it in closing submissions and why she did not challenge the witness on the point during cross-examination. In any event, the

Appellant and his partner were cross-examined at length and the judge's findings at paragraphs 17, 21 and 23 of the decision were not challenged. The judge found that the Appellant was gay and that he would behave in an openly gay way if returned to Cameroon. This disposes of the appeal and since there was no challenge to these findings by the Respondent in the application for permission, there was no material error of law. The evidence of BD was not determinative of the appeal.

Discussion and Conclusions

8. In her statement, AJ stated: "I confirm that I was representing the Secretary of State as a Home Office Presenting Officer at the time of the said hearing (12th January 2017) at Hatton Cross. I confirm that I witnessed from the beginning of the hearing that a friend or associate of the Appellant sat at the back of the court throughout the hearing. The man at the back of the court handed a small folded piece of white paper to the witness BD before BD gave evidence. I confirm that I had noticed that the man at the back of the courtroom had written on a small piece of paper and handed the folded note to the witness as the witness walked into the tribunal hearing. I confirm that the witness took the piece of paper as he sat down, he unfolded it and appeared to read the contents of the said note. The witness then glanced around the courtroom where his eye caught mine as he gave evidence. At the start of my cross-examination I alerted Immigration Judge Zahed of what had taken place, the judge then told the witness to put the paper away and allowed him to continue to give evidence. At the end of the hearing Immigration Judge Zahed asked me to confirm that the witness was reliable. I stated that I could not provide a comment. This was because I had reported the passing of a note to Immigration Judge Zahed about that very witness, (BD) earlier on during the hearing. I made a note of my observations. I confirm that the contents are true to the best of my knowledge and belief."
9. Judge Zahed, in his statement, stated: "I have been asked to comment as to what happened at the hearing on 12th January 2017. I have seen the grounds of appeal, my Record of Proceedings, my Decision and Reasons and the witness statement of AJ of counsel who represented the Secretary of State for the Home Department. As far as I can recollect AJ during cross-examination stated that BD (the appellant's landlord) was looking at a piece of paper. I cannot remember whether it was at the start of the cross-examination or at some time during the course of it. On being alerted to this I told BD that he could not refer to any notes or his witness statement and that he should give evidence from his own memory and put the piece of paper away. That was the end of the matter. It was never raised again by any party either during the course of the evidence or in submissions before me. If it were a more serious matter I would have made a note if it in my Record of Proceedings. I did ask AJ as to whether she had a view on whether Mr B was credible or not given he was a third party. I see from my Record of Proceedings I have recorded that the Presenting Officer was

neutral on BD. I certainly do not recall that AJ had told me that there was a person who had been in the hearing room from the start and had written something on a piece of paper that he handed to BD as he walked in to give evidence. If that was the case I would have expected AJ to have raised it as soon as BD sat down or when he began to give his evidence in examination-in-chief. I note from my Record of Proceedings that BD adopted his witness statement and then gave quite a lot of evidence in examination-in-chief. If I was aware that this was a note passed to BD from someone who had been in the hearing room when the Appellant and his partner was giving evidence, then I would have investigated as to what was on the note. Otherwise the whole point of having the witness sit outside the hearing room so that he would not hear the evidence would have been frustrated. However, I note that BD was the Appellant's landlord and not his partner where questions were asked of the Appellant and then of the partner to see whether the same evidence was give [sic]. There was no question asked of the Appellant or his partner that was also asked of BD to see if his answer was consistent with them. He simply gave evidence as to the fact that he saw the Appellant and his partner together and he knew they were in a gay relationship."

10. Having considered the contents of both statements and the Rule 24 response, I find that the judge was not aware that the note that BD appeared to be reading from was given to him by somebody who was sitting at the back of the courtroom prior to him giving evidence. If that had been the case the appropriate action would have been for AJ to notify the judge prior to BD giving evidence-in-chief. She did not do so. Her evidence is that she raised the matter before she started her cross-examination.
11. I am satisfied that if the judge had been made aware that the note had been passed to the witness by somebody who had been in the hearing room for the duration of the hearing, including the evidence of the Appellant and his partner, the judge would have investigated the matter further and asked to see the note from which BD appeared to be reading.
12. The judge was alerted by AJ to the fact that the witness was reading from something and the judge warned the witness to put the piece of paper away and give evidence from his own recollection. If AJ was aware that a note had been passed to BD and therefore his evidence could be tainted, she could have raised the matter at that point with the judge. She did not do so, nor did she raise it in her closing submissions or when specifically asked by the judge to comment on the credibility of BD. She stated that she could not provide a comment. It was recorded by the judge that she was neutral as to the credibility of BD.
13. The judge found at paragraphs 18 and 19: "I have taken into account the evidence of the appellant's landlord. I found him to be a credible witness. He stated that he was aware that the appellant and Mr A have been in a relationship for over two years. He stated, 'I have no doubt about the

nature of their relationship because on a number of occasions I have walked in on them kissing each other in the living room'.... Having heard and seen BD give his evidence and be cross-examined by the presenting officer I found him to be a credible and reliable witness. I note that in submissions the presenting officer was neutral with regard to the evidence of BD and did not submit that he was not a credible witness."

14. Accordingly, on the Respondent's own evidence, the credibility of BD was not challenged, notwithstanding the allegation that he had been passed a note by somebody present in the hearing room. It could not be said that the judge had acted in an inappropriate way or that there was apparent bias in the way that he dealt with the hearing.

15. Further, there was no material error of law as a result of any procedural unfairness because the evidence of BD was not material to the judge's decision to allow the appeal. The Appellant and his partner gave consistent evidence and the judge gave clear findings at paragraphs 17, 21 and 23 in which he stated:

"17. Both the appellant and Mr A were cross-examined at length by the presenting officer. I find that they have been consistent with each other regarding the evidence that they had given. I note that both the appellant and his partner stated that the appellant had received a silver plated ring from his partner although there was some confusion as to which Xmas it was. I remind myself that the appellant must prove his case to the lower standard of a real possibility."

"21. I have taken into account that the appellant's family, principally his aunt from the United States, has funded his MSc in International Business and Politics at QMC University of London last year. I find that the appellant is an intelligent and articulate man and having heard him give evidence as to his journey into realising his sexuality as well as what he has stated in his witness statement, I find that he is a gay man."

"23. Having found that the appellant is a gay man in a gay relationship with Mr A, and having heard the appellant state that he feels very comfortable in his skin as a gay man I find that he would not choose to hide the fact that he is gay if he were returned to Cameroon. I thus find that in these circumstances that the appellant is at risk of [sic] return to Cameroon given the background evidence and thus I allow his asylum appeal."

16. I find that the judge's conduct of the hearing was not procedurally unfair nor was there any appearance of bias such that a hypothetical fair-minded observer might well conclude that the hearing was unfair. There was no

error of law in the judge's decision and I dismiss the Respondent's appeal to the Upper Tribunal.

Notice of Decision

The appeal is dismissed

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 her or any member of her 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.

J Frances

Signed

Date: 1st August 2017

Upper Tribunal Judge Frances