



Upper Tribunal a  
(Immigration and Asylum Chamber)

Appeal Number: PA/10158/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 9 May 2018

Decision & Reasons Promulgated  
On 15 May 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

A E T Z  
[Anonymity direction made]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mrs G Brown, Counsel instructed by Hackney Community Law Centre

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

## DECISION AND REASONS

### Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge C Greasley promulgated on 17 November 2017 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 29 September 2017 refusing his protection and human rights claims. The appeal before me concerns the protection claim.
2. The Appellant is a national of Cameroon. He came to the UK in 2014 with leave as a student. Thereafter he made two applications for an EEA residence permit (as the dependent of his uncle) before claiming asylum on 3 April 2017.
3. The Appellant’s protection claim is based on his sexual orientation. He claims to be gay. The Judge found him not to be credible and it is those adverse credibility findings which are the focus of the appeal before me. In essence, as Mrs Brown submitted, this is a perversity challenge based on the evidence before the Judge together with one ground which challenges the fairness of the hearing based on the Judge’s failure to adjourn.
4. The detail of the grounds is conveniently summarised in the grant of permission by First-tier Tribunal Judge Ransley as follows:
  - “... [3] Ground (1) – it is arguable that the Judge failed to apply the lower standard of proof in assessing A’s protection claim.
  - [4] Ground (2) – it is arguable that the Judge’s decision to refuse an adjournment is unjust in the light of the Appellant’s prior request for the witness in France to give evidence via video link had not been granted.
  - [5] Ground (3) – the Judge failed to give adequate reasons for not attaching weight to the corroborative evidence of [MO].
  - [6] Grounds (4-6) – the Judge failed to assessing [sic] the evidence in the round with reference to the report of ELOP, the report by Ms Nina Nasim of UKLGIG, the evidence of Mr [AT] and the other two witnesses.
  - [7] Ground (7) – the Judge erred in law by speculating on how the Cameroon police would behave.
  - [8] Ground (8) – the Judge failed to consider A’s reasons for his delay in claiming asylum.
  - [9] Ground (9) – the Judge failed to have regard to the Respondent’s Guidance to caseworkers on assessing protection claims on the basis of sexual orientation.
  - [10] The Judge’s Decision has been shown to involve any arguable error of law that might have made a material difference to the outcome of the appeal. Permission is granted.”

5. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.
6. Having heard Mrs Brown's submissions, Mr Walker conceded that the Decision does disclose errors of law. I accept that concession was rightly made. I therefore indicated that I found an error of law in the Decision and would issue a decision setting out my reasons for so finding which I now turn to do.

### **Discussion and conclusions**

7. Ground one is an overarching one to the effect that given the evidence before him as to the Appellant's sexuality, it was not open to the Judge to find as he did that the Appellant is not gay. I do not need to consider that ground further given what I say about the Judge's findings on various aspects of the evidence below.
8. I would not have found an error in relation to what is said at ground three about the Judge's findings at [53] and [54] of the Decision. The findings there made are that the Judge did not accept as credible that the Appellant would engage in a sexual encounter with another boy with his family in the near vicinity and a public display of affection with another man whilst still in Cameroon given anti-gay sentiments in that country. I do not accept Mrs Brown's submission that this is based on the Judge's personal preconceptions. That such behaviour is not accepted in Cameroon is evident from the fact that the Appellant has claimed protection on this account. It was open to the Judge to find it implausible that the Appellant would behave in that way based on his own claim.
9. Neither do I find any error in the Judge's treatment of the Appellant's delay in claiming asylum (ground eight). It was open to the Judge to find as he did at [67] of the Decision that the Appellant's actions in delaying, particularly after his student leave had expired, and claiming to remain on EEA grounds rather than claiming asylum are not the actions of a genuine asylum seeker.
10. Whilst there may be a little more force in grounds five, six and nine, I would not have found that the Decision contains errors of law on account of the Judge's findings on those issues. However, ground seven as argued before me does disclose an error of law (as Mr Walker conceded). This concerns the arrest warrants which the Appellant produced as showing that he was arrested in 2008. The Judge dealt with those at [65] of the Decision as follows:

"[65] It is also relevant to my mind that no original arrest warrants have been provided to the tribunal despite ample opportunity to do so. Copies of three warrants have been provided; they are dated 14 March 2008, 17 March 2008 and 4 August 2014. In interview at question 116 the appellant stated his mother went to the police and she was given an arrest warrant. However at question 97 the appellant claimed that an arrest warrant was dropped off at the family home. The appellant fails to provide any credible explanation as to why two warrants of arrest for homosexuality were issued in March 2008 (barely 3 days apart), and one issued six years later in August 2014, again generally alleging

homosexuality. The appellant's mother's statement appearing at pages 91 and 92 of the appeal bundle, makes no reference at all to any arrest warrants being either dropped off at home, or indeed collected at a police station. I am unable to afford her statement any evidential weight...."

11. Although as Mrs Brown pointed out, this was a case which was listed quite shortly after the appeal was lodged, it was still open to the Judge to make the point he did about the fact that only copy warrants were provided (particularly since the Appellant had, on his case, been aware of the basis of his claim for many years before making it). That only copies were provided is relevant to the weight to be given to those warrants. However, as Mrs Brown pointed out, the Judge has misunderstood the evidence in two regards. First, the warrants in 2008 are a warrant to detain the Appellant and an order releasing him. Those relate therefore to the Appellant's detention and release. That those events should occur in close proximity is not implausible. The Judge was though entitled to draw attention to the significant gap in time after those warrants before the warrant in 2014. That error alone might not therefore have been material.
12. However, of greater moment is what is said about the Appellant's mother's statement. Contrary to what is suggested by the Judge, the Appellant's mother says in her statement that "[she] was given a national arrest warrant; [she] attended the police station of the Gendarmerie Nationale in Mamfe to collect some documents about him because I was told that he had been arrested in 2008." The Judge's failure to note that evidence is material because it impacts on the weight which he gave to that statement as a whole.
13. There is also a material error of law disclosed by ground four which deals with the evidence of ELOP and UKLGIG. The Judge dealt with that evidence at [57] of the Decision as follows:
 

"[57] It is also relevant, to my mind, that the appellant has only sought to engage the assistance and services of the ELOP, an LGBT mental health and well-being service on 4 April 2017, barely one day after the appellant was the subject of a screening interview on 3 April 2017. I have considered the report from Ms Claire McCombe, a councillor with the charity, and note that her conclusions are based entirely upon an account given by the appellant during meetings. There is no suggestion within her report that at any stage has she considered any of the respondent's documentation, including the important refusal decision. Accordingly, I therefore afford and limited evidential weight to both the report, and her comments that she accepts that the appellant is gay. I adopt the same evidential approach, and indeed findings, to a similar account provided by Miss Nina Nasim who provided a letter 14 September 2017 which again notes that the appellant has only sought support from the UK Lesbian and Gay immigration since January 2017. Again, this report fails to indicate any consideration of important respondent's documentation, including the refusal decision, and the observations and conclusions are based wholly upon an account given by the appellant."
14. The Judge was entitled to take into account that the two reports/letters were based on the Appellant's account. It was open to the Judge to take the view that this

lessened the weight which could be given to the documents. The point made about the late stage at which the Appellant approached those organisations given the nature of his claim is also something on which the Judge was entitled to rely. There are however two difficulties with the Judge's analysis of this evidence.

15. First, the reports/letters were generated prior to the Respondent's decision refusing the Appellant's claim. That decision was not taken until 29 September 2017. Of course, the Appellant could have asked these witnesses to comment on that refusal letter thereafter but, based on the evidence before him, it was not open to the Judge to find that less weight should be given because the writers had not had regard to the Respondent's refusal.
16. Second, and more importantly, the Judge fails to take account of the fact that, as professional persons, the writers' views are not based solely on the Appellant's account but include their views as professionals with some personal experience of these issues. The Judge's failure to take into account their relevant expertise is a material error as it potentially impacts on the weight to given to that evidence.
17. I have left until last the ground on which I would have found an error of law absent any concession by the Respondent – ground two – coupled with [18] which forms part of ground three. Mr Walker also conceded that the Judge has erred in law in this regard. This ground concerns the Judge's refusal to adjourn to permit oral evidence to be given by the Appellant's former partner (MO). [MO] lives in France. Again, Mrs Brown pointed out that this was a case which was listed quite shortly after the appeal was lodged and with limited notice. As a result, [MO] was unable to get time off from work. There was evidence before the Judge to that effect. A request was made for his evidence to be given by video-link but that was refused. The Judge also refused to allow evidence to be given by Skype via the laptop of the barrister who appeared for the Appellant.
18. The Judge dealt with the adjournment request at [20] to [22] of the Decision as follows:

“[20] At the appeal hearing, Ms Braganza, for the appellant, sought an adjournment. She indicated that a written request had been made by instructing solicitors on second November 4 [sic] for arrangements to be made for video link evidence for [MO] who lived in France. She indicated that the tribunal had responded to that request on 7 November 2017 indicating that insufficient time had been provided to arrange a video link for a foreign witness. Ms Braganza indicated that an email has been provided from the witness in France 1 November 2017 indicating that he worked at a nuclear power plant and that his employers could not allow him to leave to attend the appeal hearing. It was, in her view, essential for the tribunal to hear oral evidence from the witness given that credibility lie at the heart of the appeal and that [MO] was a former partner. She indicated that the relevant caseworker had abroad between 13 and 27 October [sic] on other business. In the interests of justice, she sought an adjournment.

[21] For the respondent, Ms Hall objected to the application to adjourn. It was relevant, she submitted, that the witness has provided a full statement on 27 September 2017 where he fully set out all of the relevant issues. The appellant and advisers had ample opportunity to obtain all necessary supporting evidence to obtain a request for a video link evidence in a timely manner.

[22] I indicated to both representatives, and the appellant, that I was not prepared to adjourn proceedings in this matter. I had regard to my overriding application [sic] to ensure a fair and timely disposal of this appeal, and had specific regard to the Upper Tribunal decision in **Nwaigwe**. I indicated that there had been ample opportunity for the appellant and advisers to secure all necessary and supporting evidence. It was of concern a caseworker had been absent from the file between 13 and 27 October when matters should have proceeded in a timely manner. The appellant had also provided a detailed witness statement on 27 September 2017 setting out the issues which he wished to rely upon. I believed that there had been ample opportunity to make a time [sic] application for arrangements for video link evidence with a witness overseas but unfortunately this had not been done. I indicated that I believed I could proceed to hear the appeal in a fair manner and proceed to make all relevant findings on credibility and all other related matters. The hearing would therefore proceed."

19. The Judge set out [MO]'s evidence at [43] of the Decision. He made the following findings on that evidence at [55] and [56] of the Decision:

"[55] I have also carefully considered the witness statement of the appellants claimed former boyfriend [MO] who continues to reside in France. Although an e mail from this individual dated 1<sup>st</sup> November 2017 claimed that his employers would not permit him to travel to the United Kingdom to give evidence, I find that there is no written evidence from the employers seeking to confirm this. In addition, I find that the appellant's representatives have had sufficient time in which to either secure in a timely manner video link evidence so that [MO] could have provided evidence. Alternatively, they could have sought an adjournment in advance the appeal hearing so that he could attend.

[56] I therefore, in the circumstances, afford the written evidence of [MO] little evidential weight particularly having regard to the circumstances in which the appellant claims they were both arrested when kissing and embracing in Cameroon at a beauty location regularly patrolled by the police; an account which I reject as lacking credibility."

20. Although the Judge says that he has regard to the decision in **Nwaigwe** when considering whether to grant the adjournment sought, I am not satisfied that he has directed himself correctly based on the guidance therein contained. As was pointed out when the adjournment request was made, the evidence of [MO] was particularly important to the Appellant's case as he is the only witness with whom the Appellant is said to have had a relationship. That was a factor telling strongly in favour of granting the adjournment.
21. The Judge was entitled to make some criticism of those representing the Appellant, particularly surrounding the lack of cover in the absence of the allocated caseworker.

Some of the criticisms which serve as reasons to reject the request though are particularly harsh, such as that the application for an adjournment was not made until the hearing itself. Since the Tribunal had only refused to allow video-link evidence by letter sent on 7 November 2017, there might not have been time to make such a request between receipt of that communication and the hearing on 9 November 2017. Further, the criticisms ignore the chronology in this case. Notice of the hearing date was given on 30 October 2017, [MO] indicated by e mail on 1 November 2017 that he could not attend and an application for video-link evidence was made on 2 November 2017. Overall, the Judge's criticisms of the Appellant's representatives are, on that analysis, harsh.

22. More importantly, those failures (if failures they are) are not material to the weight to be given to [MO]'s witness statement. The Judge has provided one reason for rejecting that evidence namely the lack of plausibility of the Appellant's account of his arrest when with [MO]. However, that fails to consider the consistency of [MO]'s evidence with that of the Appellant. It was unfair not to take into account the content of the written evidence alongside the account of the Appellant in circumstances where [MO]'s evidence could not be tested precisely because the Judge refused an adjournment to permit him to be called or to give evidence remotely.

23. The headnote in Nwaigwe reads as follows:

*"If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."*

24. For the reasons I have given above, I am satisfied that the Judge has erred in failing to grant an adjournment in the circumstances of this case. He has ignored when dealing with the reasons why [MO] could not attend, the very short timescale in this case for the Appellant's representatives to organise for [MO] to attend and to take steps to arrange for his evidence to be given remotely once it was clear that he could not attend. The Judge has failed to note the relative importance of the evidence which [MO] could give for the Appellant's case. He has also failed to provide reasons for giving [MO]'s evidence little weight and has failed to take into account in the Appellant's favour the consistency of [MO]'s evidence with that of the Appellant (or to point out any inconsistencies).

25. For the above reasons, the Appellant's grounds two, four and seven in particular disclose errors of law. I therefore set aside the Decision.

26. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

“[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

27. My decision is based in large part on the lack of fairness of the hearing, given the Judge’s refusal to adjourn to allow [MO] to give evidence. That procedural unfairness potentially impacts on the adverse credibility findings made. Accordingly, and in the interests of a fair and just disposal of the Appellant’s protection claim, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Greasley.

**DECISION**

**I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Greasley promulgated on 17 November 2017 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Greasley.**



Signed  
Upper Tribunal Judge Smith

Dated: 9 May 2018