Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10025/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25 February 2019	**On 28 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

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[NO ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms M Owoyina, instructed by Victory Legal Services
For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Andonian promulgated 20.12.18, dismissing his appeal against the decision of the Secretary of State, dated 1.8.18, to refuse his application for international protection made on 11.11.15, on the basis of risk on return because of political opinion and bisexual orientation.

2. First-tier Tribunal Judge Murray granted permission to appeal on 29.1.19 but on the single ground of the appellant's assertion that the judge erred in refusing to grant an adjournment requested because neither the

appellant nor his legal representative had received a copy of the respondent's bundle in advance of the hearing and no copy was provided at the hearing. It is asserted that in the circumstances, the appellant was unable to challenge the respondent's case on a number of material points and thus that the hearing was procedurally unfair.

3. Judge Murray considered that there was no merit in the other grounds of appeal, suggesting that the First-tier Tribunal Judge adequately dealt with the medical evidence and reached conclusions open on the facts of the case, as set out at [54] of the decision of the First-tier Tribunal.

Error of Law

4. For the reasons summarised below, I found a material error in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Andonian to be set aside.

5. As Judge Murray noted in granting permission to appeal, there is no reference in the First-tier Tribunal's decision to any application for an adjournment on the basis of failure to provide the appellant and/or his legal representatives a copy of the appellant's bundle.

6. With his grounds of appeal to the Upper Tribunal, the appellant produced a letter from his solicitors dated 26.11.18 stating that they are not in possession of the respondent's bundle. However, there was no supporting witness statement or evidence from the representative who attended the hearing to confirm the alleged procedural irregularity by the tribunal proceeding with the appeal when the appellant did not have access to the respondent's bundle. Judge Murray indicated that whilst permission was granted on the assertion made, it was for the appellant to rectify the omission pursuant to the guidance in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC).

7. There had been a request for an adjournment made by letter dated 28.8.18, prior to the initial appeal hearing date of 14.9.18, asserting that the appellant was unfit to attend the hearing because of high blood pressure and chest pains because of his heart. In fact, the hearing was adjourned, following a further letter of 3.9.18. Whilst some medical evidence was attached, it did not state that the appellant was unfit to attend the hearing.

8. The appeal was relisted for 30.11.18. However, in a further letter of 19.11.18 the appellant again asserted that he was unfit to attend on medical grounds, stating that the results of an ECG indicated that his heart was unstable. Once again, the evidence adduced did not support the assertion that he was unfit to attend the hearing.

9. This second request for an adjournment on medical grounds was refused by the Tribunal Case Worker, on the basis that the appellant failed to provide any medical evidence to confirm he was unfit to attend the

hearing listed for 30.11.18 or which indicated a reasonable period within which he would be fit to attend his appeal hearing. It also noted that he had had since August 2018 to prepare his appeal. This refusal was notified to the appellant by letter sent on 21.11.18.

10. In the event, the appellant did attend the hearing on 30.11.18, and was legally represented by Mr Laing of Dar & Co Solicitors. The application for an adjournment on medical grounds was renewed orally at the hearing by Mr Laing. However, it remained the case that there was no medical evidence indicating that the appellant was unfit to attend the hearing. Not only did the appellant attend but he gave evidence in English, dispensing with the Lugandan interpreter.

11. Turning to the ground of appeal relating to an alleged request for an adjournment on the basis having had the opportunity to consider the respondent's bundle, I have looked through the tribunal's case file and the judge's Record of Proceedings, but the handwritten notes are difficult to decipher and I can find no reference to a request for an adjournment on this basis. I confirm that a letter from Dar & Co dated 26.11.18 is in the case file, but only as an attachment to the application for permission to appeal. Whilst it is dated on its face 26.11.18, the fax header indicates it was sent on 7.1.19. It is not clear that this letter was received by the tribunal at any earlier date.

12. For the purpose of the appeal to the Upper Tribunal, the appellant has engaged the services of Victory Legal Services, instructed on 12.2.19. As part of the appellant's bundle for the Upper Tribunal hearing, there appears a witness statement from Ian Laing dated 15.2.19. Mr Laing's statement asserts that despite requests to both the tribunal and the respondent, neither he nor the appellant had received a copy of the respondent's bundle. At [9] of the statement it is asserted that at the outset of the First-tier Tribunal appeal hearing Mr Laing raised the issue of no respondent's bundle. He also explained that there were a number of evidential issues relating to the assertions of the respondent that the appellant had (i) returned to Uganda after entering the UK; (ii) been issued with a visa to renter the UK; and (iii) had been issued with various passports. As all of these issues were in dispute, Mr Laing wanted sight of the evidence relied on to support these assertions.

13. Mr Laing's statement confirms that he also made an application for an adjournment on medical grounds, as indicated in the decision of Judge Andonian. However, it is asserted that the tribunal briefly considered the adjournment application and refused it without giving reasons at the time.

14. It is significant that Mr Laing's statement points out that during the hearing the respondent did not provide any documentary evidence to support the assertion that the appellant had left and reentered the UK or had been issued with various passports. The respondent simply relied on the contents of the refusal letter.

15. From [20] onwards of the decision of the tribunal, Judge Andonian addressed the issue as to whether the appellant had or had not left the UK after first arriving in 1989. Reference was made to an interview in 2009 and enquiries made by the respondent with the authorities in Uganda. The evidence relied on is set out at [24] of the decision and at [25] the judge was satisfied that the Secretary of State had discharged the burden of proof to the civil standard that the appellant had left the UK and returned as the respondent asserted. It is not clear to me what evidence on these issues was before Judge Andonian. The refusal decision refers to an earlier IA appeal decision, which is not in the tribunal's case file.

16. At the hearing before me, Mr Tarlow provided a copy of the presenting officer's hand-written record of proceedings at the tribunal below. This makes clear that there was an application for adjournment based on not having received the respondent's bundle. This resolves the factual issue.

17. Given that the respondent adduced no evidence before the First-tier Tribunal to support the contentions in the refusal decision of 1.8.18 that the appellant had left the UK, returned on a visa, and had various passports issued, it is not clear that the refusal to adjourn on grounds of not having received the respondent's bundle was necessarily an error of law.

18. However, if there was no external evidence adduced by the respondent at the appeal hearing on these issues and if it were only the assertions made in the refusal decision on which Judge Adonian made his findings between [20] and [28] of the decision, it appears to me that that would be an error of law, given that the appellant hotly contested the assertions, maintaining he had never left the UK and remained throughout from 1989 to date.

19. In the light of these issues canvassed by me with the two legal representatives at the outset of the hearing, Mr Tarlow conceded that he could not continue to defend the decision and accepted that it needed to be remade. I have considered whether any of the factual findings of Judge Andonian could or should be preserved. However, they are to some extent bound up with the findings as to the appellant's alleged departure from and return to the UK, which bear on his credibility. In the circumstances, the decision should be made de novo.
20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
21. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to

deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

22. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal.

Signed DMW Pickup
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal has not been decided.

Signed DMW Pickup
Deputy Upper Tribunal Judge Pickup

Dated