Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11241/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2019	**On 23 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MISS A C J O
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Burrett, counsel
For the Respondent: Mr Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 25 September 1990. She appealed against a decision of the respondent on 4 September 2018 to refuse her asylum claim on the grounds of her sexuality. Her appeal was heard by Judge of the First-tier Tribunal C Greasley ("the FTTJ") who, in a decision promulgated on 25 October 2018, dismissed her appeal.

2. Permission to appeal was granted on 15 November 2018 because it was arguable the FTTJ had erred in finding the appellant had failed to provide any text messages between the

appellant and her partner when it was said he had declined to admit such evidence at the hearing. Hence the matter came before me.

3. The appellant pursues this appeal on various grounds including a failure to have regard to evidence and guidelines relating to the appellant's characterisation of her sexuality, failure to have regard to evidence which supported the appellant's credibility and procedural unfairness in failing to allow the appellant to rely on text messages between the appellant and her partner.

4. Before me, both representatives agreed that the appellant's counsel had attempted to adduce text messages in the course of the hearing during the examination of a witness. There is no reference to this in the decision of the FTTJ, however. The appellant's solicitors provided me with a statement by counsel who had represented the appellant at the hearing before the FTTJ. This was not Mr Burrett. Counsel had set out the sequence of events at the hearing before the FTTJ.

5. Mr Kotas helpfully indicated, at the start of the hearing, that the respondent accepted the FTTJ had failed to refer in his decision to a relevant document, namely a discharge note from Croydon University Hospital of 13 November 2017, and that this constituted potentially corroborative independent evidence of the appellant's claimed lesbian relationship.

6. Mr Burrett, for the appellant, set out the course of events at the hearing before the FTTJ. He accepted that the attempt to adduce evidence of text messages in the course of examination of a witness might not have been the correct course but submitted that counsel had been entitled to do so. The issue, he submitted, was the failure of the FTTJ to refer to this event in his decision. That was, he submitted, procedurally unfair: if the FTTJ had refused to admit the evidence he had to provide his reasons for so doing. Furthermore, he had made an adverse credibility finding at [43] on the basis that the appellant had not been able to produce evidence of any text messages between herself and any former partners or indeed her current partner. This was not correct because the appellant had attempted to adduce such evidence but had been prevented from so doing by the FTTJ himself. Furthermore, he submitted, the FTTJ had failed to have regard to relevant evidence relating to her sexuality. He had used the appellant's previous exercise of deceit as his starting point; that was not inappropriate but the FTTJ was required to check for corroboration of her claim nonetheless: the text messages and the medical evidence. He had not referred to the latter. Taking this missing evidence together, balanced against the adverse factors, the outcome of the appeal might have been different.

7. Mr Kotas, for the respondent, accepted the FTTJ had made no reference to the medical evidence which indicated the appellant had overdosed as a result of the proposed separation from her female partner. The FTTJ had noted this evidence but made no findings on it. This was despite a submission that he should do so. It was accepted, for the respondent, that the FTTJ should have made a finding on evidence which was potentially corroborative of the appellant's claim to have a female partner. He submitted it was difficult to say whether the outcome of the hearing would have been different if the FTTJ had taken it into account.

Discussion

8. The FTTJ notes the appellant's counsel objected to the late admission by the respondent of two documents relating to the appellant's partner: a letter of refusal of her human rights claim and an initial contact and asylum registration form. The appellant's counsel argued that the appellant was prejudiced by late production. The FTTJ did not allow these documents to be

admitted for the respondent because they had only been served on the day of the appeal hearing and "had clearly taken the appellants [sic] Counsel by surprise. It would be unfair to admit it [sic] at this late stage".

9. There is no reference, however, in the FTTJ's decision, to the appellant seeking to adduce evidence of text messages at any stage in the hearing, contrary to the statement of counsel representing the appellant at the hearing. I accept that she attempted to adduce such evidence albeit there is no reference to an application in the decision: there was no dispute on this issue before me.

10. I bear in mind the guidance in **R (on the application of AM (Cameroon)) v AIT [2007] EWCA Civ 131** in which the Court of Appeal stated that unfair decisions on interlocutory matters, such as adjournments or the admission of evidence, can amount to errors of law. Such decisions will have to be grounds for arguing that they display gross procedural unfairness or a complete denial of natural justice.

11. I also have in mind that the FTTJ was required to consider the significance of the evidence of text messages, the reason for late submission, and any problems late service would cause to the respondent (**MD (Pakistan) [2004] UKIAT 00197).** Good reasons required more than simply that the evidence was relevant but could include that it was highly pertinent. It may be that it could not be served in accordance with directions and that the admission would cause no undue difficulty to the respondent. In the present case, the fact the FTTJ made an adverse finding on credibility as a result of his belief that the appellant was unable to obtain such messages, suggests that he considered them to be highly pertinent to his assessment of her credibility. The issue was whether there were good reasons for consideration of the evidence, not the failure to serve on time (**AK (Iran) [2044] UKIAT 00103**). In that case it was said that, as a general principle, the requirement to ensure that justice was done in appeals requiring the most anxious scrutiny would, in most cases, outweigh the understandable desire on the part of the Immigration Appellate Authority (as it then was) to ensure that its directions and the provisions of the Procedure Rules are not flouted with impunity. This is such a case, being an appeal against a decision to refuse protection.

12. The FTTJ made a procedural error of law: the appellant sought to adduce such evidence and no reason has been given in the FTTJ's decision for the refusal to allow them to be admitted.

13. As regards materiality, it is highly relevant that, at [43], the FTTJ states this:

> "Nor has the appellant been able to provide any text messages between herself and any former partners, or indeed that of her current partner. She seeks to rely only in essence on the contents of nine photographic copies of photos appearing within the appeal [sic]. There is no evidenced indicating when these photos were taken, or indeed when."

14. Thus the FTTJ has drawn an adverse inference as to the appellant's credibility (the core issue in this appeal) from the appellant's failure to be "<u>able to provide</u> any text messages between herself and … her current partner" (my emphasis). This is a mistake of fact. The appellant was able to provide such text messages but was prevented from so doing by the FTTJ. This is both a procedural error (the failure to address the issue of whether the text messages should be admitted late) and a mistake of fact (the appellant being able to produce such messages contrary to the finding at [43]).

15. The FTTJ notes at [7] under the heading "the evidence" that he has taken into account both the respondent's and appellant's respective bundles. At [37] he refers to having considered the evidence in the round and assessed it cumulatively. He also refers to having considered the totality of the evidence, "including that which I have not specifically referred [sic]".

16. Mr Kotas accepted that the FTTJ had failed to address his mind to the content of the discharge note issued by Croydon University Hospital NHS Trust dated 13 November 2017. This document refers to an intentional drug overdose by the appellant. It is recorded that the overdose was precipitated by "increasing life stressors – the Home Ofice wants to relocate her to Leeds away from her female partner". I also note this document records the appellant as having had a termination of pregnancy ("TOP") in the past; to that extent it is potentially reflective of the appellant's own evidence in her witness statement at paragraph 24. The appellant's counsel had made specific reference to this document in her skeleton argument which was before the FTTJ.

17. According to paragraph 49 of **MA (Somalia) [2010] UKSC 49**, "Where a tribunal has referred to considering all the evidence, a reviewing body should be very slow to conclude that that tribunal overlooked some factor, simply because the factor is not explicitly referred to in the determination concerned". However, as was said in **MK (Duty to give reasons) Pakistan [2013] UKUT 00641 (IAC),** "If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons." In the present case, no reasons have been given for rejecting the medical record which is relevant and potentially corroborative of the appellant's claim to be in a lesbian relationship. The failure to consider this material evidence is an error of law.

18. As was said by Keene LJ in **IA (Somalia) v Secretary of State for the Home Department [2007] EWCA Civ 323**:

> "… in public law cases, an error of law will be regarded as material unless the decision-maker must have reached the same conclusion without the error … [A]n error of law is material if the Adjudicator might have come to a different conclusion … "

19. The FTTJ erred in making, at least in part, an adverse credibility finding on the false premise that the appellant was unable to obtain text messages. He also failed to take into account independent potentially corroborative evidence. Had he not erred, he might have reached a different conclusion. The credibility of the appellant's account was the crux of the appeal. The FTTJ's credibility findings are tainted by these errors of law and cannot stand. The decision must be set aside in its entirety. The parties were agreed that, in such circumstances, it was appropriate for the appeal to be decided afresh in the First-tier Tribunal.

Decision

20. The making of the decision of the First-tier Tribunal involved material errors on points of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ C Greasley.

21. Given the nature of this appeal, the appellant is entitled to anonymity in these proceedings.

A M Black
Deputy Upper Tribunal Judge Dated: 11 January 2019

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 their 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.

A M Black
Deputy Upper Tribunal Judge Dated: 11 January 2019

DIRECTIONS

1. Any further documentary and/or witness evidence relied upon by either party is to be filed with the Tribunal and served upon the other party by no later than 28 days before the date of the hearing in the First Tier Tribunal.

2. The appeal is listed at Hatton Cross with a time estimate of three hours to be heard at 10.00 am on …….

3. An interpreter is not required.

A M Black

Deputy Upper Tribunal Judge Dated: 11 January 2019