Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/04710/2019**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On the 7 July 2022	**On the 15 August 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MLA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The appellant did not appear and was not represented
For the Respondent: Mr A. Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Hutchinson ("the judge") promulgated on 19 December 2019. The judge dismissed an appeal by the appellant against a decision of the Secretary of State dated 3 May 2019 to refuse his claim for asylum and humanitarian protection. The appeal was heard pursuant to section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

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Anonymity

2. The judge made an anonymity order, which I maintain so as to ensure that the publication of this decision does not inadvertently expose the appellant to a risk he does not otherwise face.

3. I use the initial "M" to describe the group in respect of which the appellant claims to be at risk through imputed political opinion, using the term "M Liberation Front" or "MLF", and "M Crew" where necessary.

Procedural background

4. These proceedings have a somewhat complex procedural history. The appellant is a litigant in person. He was granted permission to appeal against the decision of the First-tier Tribunal by Upper Tribunal Judge Bruce on 4 July 2020. Judge Bruce gave directions stating that it was her provisional view that the question of whether the decision of the First-tier Tribunal involved the making of an error of law and whether, if so, it should be set aside, could be determined without a hearing. She gave directions for an exchange of submissions on those issues. Neither party responded. On 23 September 2020, Upper Tribunal Judge Rintoul, acting under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the rules") decided without a hearing that the decision of the judge did not involve the making of an error of law and dismissed the appeal.

5. Thereafter the Presidential guidance pursuant to which the above process took place was the subject of an application for judicial review, resulting in parts of the guidance being quashed: see *Joint Council for the Welfare of Immigrants v President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin), 20 November 2020. The tribunal took steps to draw the judgment in *JCWI* to the attention of certain appellants whose appeals had been dismissed under to the process established by the Presidential guidance. In response, on 29 December 2020, the appellant applied to set aside the decision of Judge Rintoul under rule 43, which permits decisions disposing of proceedings to be set aside in certain circumstances.

6. On 2 September 2021, the decision in *EP (Albania) & Ors (rule 34 decisions; setting aside)* [2021] UKUT 233 (IAC) was reported, addressing the circumstances in which a decision of the Upper Tribunal may be set aside by the Upper Tribunal on grounds of a procedural irregularity, in light of the *JCWI* decision. On 1 November 2021, Judge Rintoul issued directions requesting the parties to make any further submissions in relation to the appellant's application to set aside his decision in light of *EP (Albania)*. Neither party responded.

7. By a decision dated 14 January 2022, Judge Rintoul set his decision of 23 September 2020 aside, stating:

> "Having had regard to the submissions made by the appellant submitted on 3 August 2021, and bearing in mind that the appellant

> is not represented, it transpires that the error identified in my decision may be material. Accordingly, I consider that it is in the interest [sic] of justice to set aside my appeal, and for the matter to be listed for an oral hearing before another Upper Tribunal Judge."

8. It was in those circumstances that the matter was listed before me in Belfast on 7 July 2022.

Non-attendance of the appellant

9. On the morning of the hearing on 7 July 2022, I was presented by my clerk with an email that the appellant had sent to the Home Office on 4 July, which had not been copied to the tribunal:

> "Dear UT,
>
> I was kindly informing you that I am not fit to appear at the hearing due to mental breakdown. I have joined the 'pop up shop' at the northern wall and that's where I attend as my volunteering is concerned. I don't go often, when I feel better, I volunteer. I have been having insomnia and this has affected my well-being and has made me vulnerable. I have been trying day by day to divorce the thoughts that I have been having, for me to come to the hearing will exacerbate my situation.
>
> Regards,
>
> [MA]"

10. The Tribunal Procedure (Upper Tribunal) Rules 2008 make provision for the tribunal to proceed in the absence of a party, in the following terms:

> "38. Hearings in a party's absence
>
> If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

11. I was satisfied that the appellant had been notified of the hearing, as required by rule 38(a): the notice of hearing was sent to him on 16 June 2022, and the terms of his email indicate that he was aware of the matter having been listed.

12. When assessing "the interests of justice" for the purposes of rule 38(b), the tribunal's overriding objective must inform that assessment. The overriding objective may be found at rule 2(1): it is to deal with cases fairly and justly. That includes, pursuant to the indicative examples at paragraph (2) the following relevant considerations: sub-paragraph (c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings"; sub-paragraph (d), "using any special expertise of the Upper Tribunal effectively"; and sub-paragraph (e), "avoiding delay,

so far as compatible with the proper consideration of the issues." Where, as here, and appellant is a litigant in person, particular allowances must be made in case management decisions in order fully to enable their participation in the proceedings, where appropriate.

13. I considered the following factors:

a. There was no medical evidence to support the appellant's contention that his mental health had deteriorated to the extent that he would be unable even to attend the tribunal. The appellant, while a litigant in person, has sent many documents to the tribunal in support of his claim. While some are not relevant to the issue of whether the judge erred in law (a matter to which I return below), for present purposes they demonstrate that the appellant is adept at engaging with the tribunal and providing documentary evidence where he considers it necessary to do so. That contrasts with the contents of his email, which do not so much feature confirmation of even an appointment with his GP, copies of any medical notes, or any other material to demonstrate that the appellant's claimed mental health conditions are such that he cannot attend the error of law hearing;

b. The notice of hearing warned the appellant that his failure to attend may result in the tribunal proceeding in his absence;

c. The appellant did not request an adjournment. His email indicated that it was the prospect of attending the hearing that caused him anxiety, and that his attendance would exacerbate the situation. Taking his medical claims at their highest for these purposes, there is nothing to suggest that an adjournment would result in the appellant being willing or able to attend on a future occasion. An adjournment at the hearing may well simply have resulted in a repeat of the appellant's non-attendance;

d. The proceedings have taken a considerable length of time to reach even this stage; the original hearing before the First-tier Tribunal took place on 5 December 2019, which is over two and a half years ago. The overriding objective involves avoiding delay, so far as is compatible with a proper consideration of the issues;

e. While I am mindful of the need for anxious scrutiny of asylum claims, and the highest levels of procedural fairness in proceedings of this nature, in the circumstances of this case there is no suggestion that the appellant actually seeks an adjournment, nor that there is a good reason to grant one in any event.

14. Drawing these factors together, I decided that it was in the interests of justice to proceed with the hearing. I reserved my decision.

Factual background

15. The appellant is a citizen of Zimbabwe born in July 1991. He arrived in the United Kingdom on 8 December 2018 and claimed asylum on 18

December 2018. The appellant's screening interview took place on that date. He completed a *Preliminary Information Questionnaire* ("PIQ") on 28 February 2019. His substantive asylum interview took place on 25 March 2019.

16. The appellant's claim for asylum was refused on 3 May 2019, and it was that decision that was under appeal before the judge. The appellant's case was that he was born and lived in Bulawayo, and that he is of Shona ethnicity through his father. His mother's ethnicity was Ndebele. His mother's brother, SN, was an aspiring politician who campaigned for a better future for his local community, through the 'M Liberation Front'. The appellant claimed that he would be at risk on his return on account of being related to SN who, he claimed at the hearing, had been murdered in September 2019. The appellant said that he had never been involved in politics himself and had not experienced any threats from the authorities or mistreatment personally. He also said that in 2007 his house had been damaged in an attack carried out, he thought, by Zanu-PF or by the police. His case was that upon his return he will be identified by the authorities because he did not have a passport and "they know I have been there".

17. The respondent refused the appellant's claim on the grounds that he had not been threatened or mistreated in Zimbabwe. On his journey to the United Kingdom, he travelled through the Netherlands but did not claim asylum there. He arrived in London but did not claim asylum until he reached Belfast. His credibility was damaged as a result.

18. In her findings, the judge set out a number of credibility concerns with the appellant's account. A news article purportedly from the Zimbabwean press dated 5 November 2018 which the appellant claimed identified SN and corroborated his account had been produced at a late stage. It was not credible that the appellant was not in a position to obtain the report before he left Zimbabwe. The account the appellant provided in his asylum interview was inconsistent with the account in the article; when answering questions 164 and 251, the appellant said that his uncle had never received threats and had never been arrested. By contrast, the article said that SN *had* been arrested. The judge found that the appellant's explanation for the discrepancy lacked credibility: see [10] to [12]. She found the appellant's oral evidence to be vague and evasive in relation to central matters such as whether he had spoken to his uncle after his arrest, and when he had last spoken to him. At [14] the judge found that the appellant was willing to say whatever he considered to be the most advantageous to his asylum claim, with no regard for the truth.

19. A passage in the judge's credibility analysis which lies at the heart of this appeal is at [16]. It relates to the consistency of the appellant's account of his uncle, as revealed by the materials presented by the appellant to the tribunal (and the Secretary of State) for the first time at the hearing ("the new evidence", as the judge put it):

> "There were other aspects of the appellant's new evidence that was not adequately explained. The appellant had always maintained that

> his uncle although a prominent person was only an 'aspiring' politician and that he was yet to establish his political party: 'it is only what he wants to start with, it is not yet. It is just a skeleton' (asylum interview record ASR 175). However the article provided refers to the appellant's uncle is one of the members of the '[M] Liberation Front'. There is no adequate explanation why the appellant failed to mention his uncle was a member of this group at interview. His credibility is reduced. I am not satisfied, considered in the round, that this article can be relied on as claimed."

20. The judge found that there was a lack of evidence to demonstrate that the appellant was related to SN. The appellant's case that SN had been murdered lacked credibility, as did his explanation for why he had not mentioned that fact at an earlier stage in the asylum process. There was minimal evidence as to the cause of his uncle's death, which the appellant sought to explain by saying he had not asked his family for details. An affidavit the appellant produced, apparently from a cousin of his, raised more questions than it answered. The appellant could have, but had not, obtained a death certificate in respect of SN, since he had allegedly died over three months before the hearing. The appellant's account on that issue was vague and inconsistent. See [18] to [22].

21. At [25], in the context of reaching her global conclusions, the judge said:

> "I also take into account in the round that the appellant in his screening interview made no mention of his uncle, stating only that he was at risk on return from the authorities and 'the things I have seen against other families in my tribe and the other things that have happened through history' [.] Although I take into account that the appellant was not required to give a full account at his screening interview, there is no adequate evidence why he would not have been able to tell the truth and mention that his fear related to his claimed uncle."

22. The judge dismissed the appeal.

Grounds of appeal

23. The grounds of appeal contend, in essence, that the judge made an error of fact when she stated, in terms, that the appellant had not raised SN's claimed involvement in the M Liberation Front in his screening interview. He had.

Submissions

24. In the grounds of appeal, the appellant submits that he did mention the M Liberation Front in his interview, and that he said that it spoke out against the government. The audio recording demonstrates what he actually said, he contends. He adds in the grounds:

> "'M' is not really a political party, but 'human rights'. If you ask me about political parties I won't be able to say 'M'."

25. For the Secretary of State, Mr Mullen submitted that the judge found the appellant to lack credibility for a host of other reasons. His accounts had changed, she found. The appellant had never been mistreated himself. There was nothing that placed the appellant at risk upon his return. The appellant was not at real risk of being targeted by the Government of Zimbabwe. Any error was immaterial.

Legal framework

26. Appeals lie to the Upper Tribunal from the First-tier Tribunal on any point of law: see section 11(1) of the Tribunals, Courts and Enforcement Act 2007. However, some errors of fact may amount to an error of law. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, the Court of Appeal of England and Wales summarised the different facets of an error of law. At [9(vii)], the court held that one such error may be:

> "vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

27. Appellate tribunals and courts are subject to significant restraints when reviewing findings of fact reached by first instance judges. The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently (re)summarised by the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464 in these terms, per Lewison LJ:

> "2. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> > i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
> >
> > ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
> >
> > iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
> >
> > iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course

> consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

DISCUSSION

28. Asylum claims demand the highest standards of procedural fairness. They must be examined with anxious scrutiny. Claims that a judge made a mistake of fact must be assessed against that background. There is a low threshold to demonstrate materiality in this context.

29. By way of a preliminary observation, the judge's findings at [16] and [25] fall within a broader series of credibility concerns. The grounds of appeal do not challenge those other findings, and the appellant does not enjoy permission to appeal against them.

30. This appeal is brought on the sole basis that the judge erred when stating the appellant did not mention the M Liberation Front at his interview. To establish this, it is important to examine what the judge said against the transcript of the interview. Since I have already set out the judge's essential reasoning above, I turn here to the appellant's answers given in the interviews.

The screening interview

31. The judge was correct to say at [25] that the appellant had not mentioned his uncle, or the M Liberation Front, during his screening interview. She correctly took into account the fact that the appellant could not be expected to provide full details of his claim at that stage. However, in light of the centrality of SN to his claim, the judge was entitled to ascribe significance to the fact the appellant had not mentioned his uncle, or the MLF, at that stage. As the judge noted, the appellant had referred in broad terms to "the things I have seen against other families in my tribe…", but he had not mentioned his uncle. The judge was entitled to raise that concern; it was merely one factor that she took into account, and was not central to her conclusions. In isolation, it was not a finding that no reasonable judge could have reached.

32. The judge had before her the appellant's substantive asylum interview. As I will set out below, the appellant did make some references to the M "crew" during that interview, but that was in the context of saying who helped him to travel to the UK: see question 91. I will address in due

course whether the judge was mistaken to say that the appellant had not mentioned his uncle's involvement in the M Liberation Front, but the fact that he travelled with that group to the UK means that the judge's concerns arising from the omission of any reference to it during the appellant's screening interview, conducted very shortly after his arrival, acquire a new significance. Not only did he not mention that group at the screening interview, but on his own case, he would later say that he travelled with them to the UK, at his uncle's behest. The judge would have had these facts firmly in mind when finding that the appellant should have mentioned the MLF during his screening interview. She was entitled to do so.

33. It may be that the appellant's grounds of appeal were motivated by the detail he provided concerning his uncle and the MLF in the PIQ, completed in February 2019. There was greater detail in that form than the appellant provided at the screening interview. However, the judge was not referring to that form at [25]. She was concerned that the appellant did not mention the central basis of his asylum claim, namely SN's involvement with the MLF, at the outset of the process.

The substantive interview

34. At the substantive interview, the appellant said that his travel to the United Kingdom had been arranged by the 'M *crew*', and that his uncle had been involved with that group. He did not in terms say that his uncle was a politician for the M *Liberation Front*. When he was pressed for further details concerning his uncle's political affiliations, he said that his uncle wanted to start a new party. I set out a selection of the relevant exchanges below.

35. These questions were asked in relation to the appellant's travel to the United Kingdom:

> **91. Who did you travel with?**
>
> It was the M Crew, it is not a political group but they stand for the rights of the people in the village.
>
> **93. How many of these people [that is, the 15 people the appellant had travelled with] worked for M Crew?**
>
> It was 2 that I went with.
>
> **96. How do you know these two people?**
>
> They were connected to my uncle. They were known by my uncle.

36. In his answer to question 161, the appellant said that his uncle "testifies" against the government, which he clarified to mean "the authorities" (Q162). I accept that the appellant may actually have said "speaks against", as stated in the grounds of appeal. Certainly, the timing of this question, a considerable period after the interview had commenced at 09:30 hours, but before the first break at 12:00 hours, is commensurate with the appellant's suggestion that the voice recording features the

answer at the 2 hours, one minute time mark. I accept that the appellant said his uncle "speaks against" the authorities in the interview.

37. The appellant was later asked the following:

> **174. Has your uncle been involved with any political party in Zimbabwe?**
>
> I don't know if he is involved like voting or when you say involved (IO – is your uncle a member of any political party in Zimbabwe?) No, just the one he is wanting to establish, not any other
>
> **175. So he is not involved with any established parties in Zimbabwe?**
>
> It is only what he wants to start with, it is not yet. It is just a skeleton
>
> **176. How long has your uncle been attempting to establish a political party?**
>
> I don't know when you start to
>
> **178. What is the name of the party your uncle is hoping to establish?**
>
> It is not finalised on that
>
> **179. Have you heard of any names he is thinking about?**
>
> No. Not yet. I haven't heard.
>
> **180. What are the aims of the party going to be that your uncle is hoping to establish?**
>
> The aim is to defend the people. To stand for justice if I can just summarise everything.

38. As can be seen from the transcript summarised above, the appellant only referred to the "M Crew" and did not refer to the M Liberation Front. When asked about SN's political involvement, he had every opportunity to say that SN worked or campaigned for, or otherwise had expressed his allegiance to, the M Liberation Front. He did not do so. The only references to the term "M" were in the context of the appellant addressing those who aided his journey to the United Kingdom and did not relate to SN's claimed political activities. The judge was entitled to ascribe significance to these factors. It follows that the judge was correct to state, at [16], that the appellant had not said that is uncle had been involved in the MLF at the substantive interview. At best, he had said that his journey to the UK was aided by the M *Crew*, and had been unable to say which party or cause his uncle was involved with when questioned specifically about the identity of his political party.

39. As held in *Volpi v Volpi* at [2(vi)], the reasons given in a judgment will always be capable of having been better expressed. I consider the reasons given by the judge on this issue to be tolerably clear. It is also important to recall the broader credibility findings reached by the judge, which have not been challenged The findings that she reached concerning the extent to which the appellant mentioned the MLF in his screening

interview and substantive interview must be viewed in that wider context. This was a well-written and clear decision, promulgated only a short time after the hearing. It is based on findings that were open to the judge on the evidence before her. The judge did not make an error of fact. An error of law has not been made out.

40. This appeal is dismissed.

Postscript

41. Following the submission of the grounds of appeal, and the grant of permission to appeal, the appellant has sent to the tribunal a number of additional documents. I have not addressed those documents in this decision (although I have read them) because they are not relevant to the question of whether the judge made an error of law, which is a question to be determined on the basis of the materials that were before the judge. I intend no discourtesy to the appellant by not subjecting those documents to detailed examination. As Judge Bruce noted when granting permission to appeal:

> "The appellant, who is unrepresented, should be aware that the tribunal will not consider the new documents that he has submitted when considering whether the decision of the First-tier Tribunal contains an error of law… The appellant may provide the Secretary of State with copies of those documents at any time."

Notice of Decision

The appeal is dismissed.

The decision of Judge Hutchinson did not involve the making of an error of law such that it must be set aside.

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 him 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.

Signed Stephen H Smith Date 8 July 2022

Upper Tribunal Judge Stephen Smith