Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11339/2011

THE IMMIGRATION ACTS

Determination promulgated On 7th June 2013
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Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

ML

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Mr D Balroop, instructed by Whitehorse solicitors
For the respondent: Ms H Horsley, Senior Presenting Officer

DETERMINATION AND REASONS

1. I make an anonymity direction in this appeal. There is evidence before me to the effect that the appellant is a vulnerable person. Whilst I make no findings in relation to this evidence, it is nevertheless appropriate that the appellant be granted anonymity unless and until a relevant Court or Tribunal directs otherwise. The appellant is to be referred to as ML throughout these proceedings. No report of these proceedings shall directly or indirectly identify the appellant. Failure to comply with this direction could lead to a contempt of court.

2. The appellant is a citizen of Nigeria. He arrived in the United Kingdom in 2004 and in July 2005 he claimed asylum, in a different name to that which he now claims. This application was refused on 27 July 2005 and, although the appellant appealed against this refusal, he subsequently withdrew that appeal, admitting his claim to be false. In August 2005 he was removed to Nigeria. The appellant then re-entered the United Kingdom in January

2006 using a passport in a third identity. He was arrested on 11 March 2009 for a sexual assault committed against a woman, and was convicted of such an offence in 12 November 2010. He was sentenced to 6 month's imprisonment.

3. On 8 June 2009 (i.e. after his arrest) the appellant made human rights representations, claiming to be at risk in Nigeria as a consequence of being homosexual. This application was refused on 22 April 2010. The appellant made a further claim on the same basis on 10 March 2011. Such application was refused on 16 March 2011 and, on the following day, a decision was made to remove him to Nigeria.

4. The appellant appealed this decision to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge M A Khan on the 17 May 2011 and dismissed in a determination dated 19 May 2011. The appellant appealed to the Upper Tribunal against this determination. The appeal was heard by Upper Tribunal Judges Allen and Waumsley on 5 December 2012 and, in a decision of 13 January 2013, they declined to set aside the determination of First-tier Tribunal Judge Khan; concluding that whilst his determination contained errors which were to be 'deprecated', such errors were not material to the outcome of the appeal.

5. The appellant appealed this decision to the Court of Appeal, with the permission of Sir Richard Buxton granted on 1 June 2012. After oral hearing, Maurice Kay and Moses LJJ, sitting with Sir Stanley Burnton, allowed the appellant's appeal to the extent that it was remitted to the Upper Tribunal 'to be reheard'.

6. Although a transcript of the court's judgment has yet to be drawn up, a case analysis relaying the judgment is to be found on Westlaw. I handed this to the parties at the outset of the hearing. Mr Balroop acted as junior Counsel in the Court of Appeal. Neither he, nor Ms Horsley, took objection to the tribunal treating the aforementioned Westlaw case analysis as providing a materially accurate summary of the Court's judgment. The Westlaw case analysis details the Court of Appeal as having given the following reasons for remitting the appellant's appeal to the Upper Tribunal:

> (1) M's case was an unfortunate example of the First-tier Tribunal judge displaying an absence of care regarding the facts and arguments advanced in an asylum claim. He made several errors: he referred in his judgment to counsel's skeletons, yet there were not any, and to screening and asylum interviews which did not happen in relation to the case M was advancing. His judgment also referred to events in Sri Lanka, which had nothing to do with M's case, and to a "record of proceedings" which did not exist. However difficult a claimant's case was, however falsely optimistic, he was entitled to have his submissions deployed. The judgment referred to counsel, wrongly named, seeking to rely on written submissions, yet there were none, and it purported to have taken them into account. The Upper Tribunal misdirected itself: a series of factual errors could amount to an error of law. Factual errors, if significant to the court's conclusion, could amount to an error of law. Taking account of written submissions that did not exist was an error of law. In M's case the factual errors made by the

judge in the First-tier Tribunal plainly amounted to an error of law. The essential question for the Upper Tribunal was whether M had had the fair hearing to which he was entitled before adverse findings were made against him. However poor a claimant's case was, and M's was poor, he was entitled to a fair hearing, Singh v Belgium (33210/11) applied. The Upper Tribunal and/or the Court of Appeal should judge whether a claimant had had a fair hearing by looking at the determination and procedures by which the judge had reached conclusions adverse to him. In M's case the judge had taken account of skeletons and interviews that did not exist. In that context, the carelessness of referring to Sri Lanka took on a more sinister timbre. It could not be said that the judge had given serious consideration to M's case before deciding against him, R. (on the application of YH Iraq) v SSHD [2010] EWCA 116, followed. The procedure was very flawed. In those circumstances the only conclusion the Upper Tribunal should have reached was to set aside the judge's decision and retry or remit the matter. (2) It would be wrong to judge M's chances of success based on the judge's decision. His case appeared to contain many contradictions and inconsistencies, and he might have a very difficult run, but he could not be denied a fair opportunity. The reputation of the courts was at stake; that could not be preserved and protected if a decision such as the judge's was allowed to stand.

7. It is plain from the above reasoning that, insofar as the Court of Appeal has not already done so, the determination of First-tier Tribunal Judge Khan is to be set aside. Both parties agreed that this was so.

8. Both parties also agreed, and I so direct, that paragraphs 23 to 34 of the First-tier Tribunal's determination should remain standing as a record of evidence given before that tribunal. The weight to be attached to such evidence will, of course, be a matter for future consideration.

9. I next turn to the issue of whether the decision on the appeal ought to be re-made in the Upper Tribunal or whether the First-tier Tribunal is a more appropriate forum. It was agreed between the parties that the most appropriate forum for a de novo consideration of the appellant's appeal would be the First-tier Tribunal. I also agree that this is so, for the following reasons.

10. The Senior President of the Tribunals' Practice Statement of 25th September 2012 provides as follows:

> "7. "Disposal of appeals in Upper Tribunal
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> Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
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> [7.2] The Upper Tribunal is likely on each 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."

11. It is clear from any reading of the Court of Appeal's judgment that it concluded that the effect of the errors in Judge Khan's determination was to deprive the appellant of a fair hearing. Consequently the requirements of paragraph 7.2 (a) of the Senior President's Practice Statement are met.

12. In addition it is equally plain that the requirements set out paragraph 7.2 (b) of the Practice Statement are also met. Substantial fact-finding will be required in re-making the decision in this appeal. The nature and extent of this fact finding has only been added to by the production by the appellant, at 2pm of the day of the hearing before the Upper Tribunal, of a detailed medical report going to his ability to accurately recall historic events, amongst other things. I was provided with no explanation as to why this report, dated as long ago as March 2012, was only produced on the day of the hearing, but whilst this reflects extremely poorly on the appellant's solicitors it was agreed that such document should be admitted.

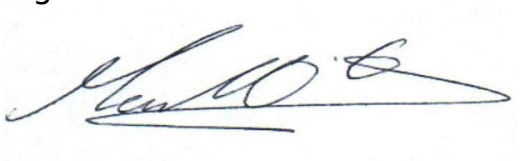
13. In all these circumstances I remit the appeal to the First-tier Tribunal for the decision on it to be re-made. Whilst deployment of judicial resources is a matter for the First-tier Tribunal, it may be thought that it is appropriate for a Designated Judge to determine this appeal, given its history.

14. A hearing date of 26 July 2013 at Hatton Cross has been fixed and, subject to any further directions of the First-tier Tribunal, the appellant is directed to file and serve a consolidated bundle of documents to be relied upon, save for those documents already contained within the Secretary of State's Rule 13 bundle, so that it is received no later than 12 July 2013. He is, at the same time, to file and serve a skeleton argument setting out all lines of argument to be relied upon, with appropriate cross referencing to the documents before the First-tier Tribunal. The consequences of any failure to adhere to these directions will be a matter for the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal is set aside. The Upper Tribunal allows the appellant's appeal to the limited extent that it is remitted to the First-tier Tribunal to be re-heard de novo.

Signed: M O'Connor



Judge of the Upper Tribunal Dated: 5 June 2013