



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/06282/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 19 April 2018**

**Decision &  
Promulgated  
On 2 May 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**ABC  
(ANONYMITY DIRECTION MADE)**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

Respondent

**Representation:**

For the Appellant: Mr. T. Shah, Taj Solicitors

For the Respondent: Mr. D. Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by ABC against the decision of First-tier Tribunal Judge Cohen, promulgated on 17 January 2018, in which he dismissed ABC's appeal against the Secretary of State's decision to refuse a grant of asylum.
2. I have made an anonymity direction, given that this is an asylum appeal.
3. Permission to appeal was granted as follows:

“It is arguable that the Judge has set out an insufficient analysis of the Appellant’s brother’s evidence. At paragraph 18 of the decision the Judge refers to the further documentation submitted in support of the appeal including a witness statement from the Appellant and a witness statement from the Appellant’s brother. At paragraph 42 of the decision the Judge referred to the Appellant having been found in his brother’s restaurant. At paragraph 43 of the decision the Judge found that it was totally implausible that the Appellant and his family members would not know about political asylum. The Judge found the Appellant’s failure to claim asylum until apprehended in his brother’s restaurant to be extremely damaging. At paragraph 45 of the decision the Judge refers to the significant adverse credibility findings which had been made against the Appellant herein. The index to the Appellant’s bundle at items 4 and 5 bears the endorsement “excluded” against the names of the Appellant’s two brothers. Given the reference by the Judge to the inclusion of at least one statement from one brother it is arguable that the Judge should have set out a fuller analysis in relation to that evidence before reaching conclusions as to credibility or set out the reasons in the decision for omitting consideration of such evidence.”

4. I heard submissions from both representatives following which I reserved my decision.

### **Error of law**

5. It was submitted by Mr. Shah that, even if the appeal went the same way, the failure to give the Appellant his day in court by refusing to hear from his witnesses was a procedural error which amounted to a material error of law.
6. I have carefully considered the grounds of appeal and the decision. I am not assisted by the fact that there is no reference either to the decision taken by the Judge to exclude the evidence of the Appellant’s brothers, and to refuse to hear oral evidence from them, or to the Judge’s request for a shorter handwritten statement. The Record of Proceedings unfortunately does not assist either.
7. Mr. Clarke stated that the note of the hearing taken by the Home Office Presenting Officer indicated that the Judge had said that the evidence of the brothers would not add anything.
8. As stated in the grant of permission, the index to the copy of the Appellant’s bundle on the Tribunal file states “excluded” next to the brothers’ statements, and indeed these statements are not included in the Tribunal’s copy of the Appellant’s bundle. Although therefore the decision refers to “witness statement from the appellant’s brother” [18], there is no copy of this statement on file, and it is therefore difficult to see how it has been taken into account by the Judge, or why he has referred to it.

9. I find that the appeal had previously been adjourned, one reason being that the Appellant's brothers were not in the country on the previous date, and they wished to give evidence in support of the Appellant's appeal. They attended the hearing on 20 December 2017.
10. The Appellant was apprehended in his brother's restaurant when his brother was present. His brother was not prosecuted in respect of this raid. It was submitted by Mr. Clarke that there was no detail in his statement about this. However, it was countered by Mr. Shah that this was not raised as an issue in the reasons for refusal letter, and the document recording the visit made by the immigration officers was only provided to the Appellant on the day of the hearing. This is recorded by the Judge at [19] of the decision. The Judge made findings about the visit at [42]. I find that even though the statement did not refer to the enforcement visit, the Appellant's brother could have given oral evidence on this point. It would have been for the Judge to decide on the weight to be given to that evidence.
11. At [43] the Judge finds it implausible that the Appellant's family members would not know about political asylum, but he did not hear from those family members who had attended the hearing to give evidence.
12. The Judge has failed to give any reasons in his decision for why he did not allow the Appellant's brothers to give evidence, or why he considered that their evidence would not be significant. This is especially relevant given that his adverse credibility findings relate to matters on which the Appellant's brothers could have given evidence. He has referred to the witness statement of one of them, even though he excluded this statement, and it was not even present in the copy of the Appellant's bundle on file. I find that he has erred procedurally in his treatment of the Appellant's brothers' evidence.
13. In relation to the Appellant's own witness statement, again I am not assisted as there is no reference in the decision to the Judge's request that the Appellant produce a shorter one. The Appellant's typed statement is in the bundle at pages 14 to 27. There is also a handwritten one on file. It was submitted by Mr. Shah that the Appellant had not formally adopted the typed one he had prepared for the hearing, and the Judge had stated that he was excluding it. There is reference at [18] to "a witness statement from the appellant", but given that two witness statements were provided, it is not possible to know to which one the Judge is referring. At [20], when setting out the proceedings, there is no reference to the Appellant having adopted any statement. However, at [33] there is a reference to "paragraph 21" of the Appellant's statement which must be a reference to the typed statement in the bundle, as the handwritten statement only goes up to paragraph 15. It was submitted by Mr. Clarke that the Judge therefore had taken into account the typed statement. However, this statement was not formally adopted by the Appellant, who was told that it was not going to be considered.

14. It was submitted by Mr. Clarke that any procedural irregularities were not material given the findings of the Judge. First, I find that the brothers could have given evidence on matters central to the appeal, both the activities of the Appellant and the enforcement visit. It would then have been for the Judge to decide the weight to be given to their evidence. Secondly, where there has been a procedural error, it is a question of fairness. It is quite possible, as accepted by Mr. Shah, that the appeal would go the same way. However, in failing to allow the Appellant to present his case both in excluding the evidence of his witnesses, and in excluding his typed witness statement prepared for the hearing, or taking it into account even when he had stated that he would not and when it had therefore not been formally adopted, I find that the Judge has materially erred.
15. I do not therefore need to consider the grounds of appeal any further, given this finding.
16. I find that the decision involves the making of a material error of law. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given that the procedural errors mean that the Appellant has not had a fair hearing before the First-tier Tribunal, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

### **Decision**

17. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
18. The appeal is remitted to the First-tier Tribunal to be re-heard.
19. The appeal is not to be heard by Judge Cohen.

Signed

Date 27 April 2018

**Deputy Upper Tribunal Judge Chamberlain**