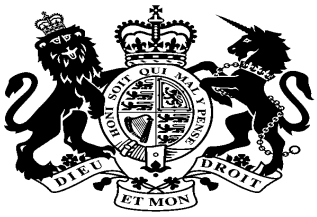

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10035/2019**

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype	**Decision & Reasons Promulgated**
On 8 October 2020	**On 14 October 2020**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MA
ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Wood, Immigration Advice Service
For the respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Introduction

1. The appellant has appealed against a decision made by First-tier Tribunal ('FTT') Judge Stedman, sent on 11 February 2020 in which his appeal was dismissed on protection and human rights grounds.

2. I have anonymised the appellant's name because this decision refers to his claim for international protection. The appellant is a citizen of Nigeria and claims that he is at risk of persecution because he is a bisexual man.

Background

3. The SSHD did not accept the appellant's claim to be sexually attracted to men and to have been involved in sexual relationships with men in Nigeria and the UK. The FTT was therefore obliged to resolve this dispute. The appellant did not have any legal representation before the FTT. The SSHD was also unrepresented. The FTT set out 'preliminary matters' at [4]-[6] of the decision: the SSHD's detailed refusal letter dated 30 September 2019 comprised the SSHD's case; the FTT's primary concern was to ensure the appellant had a fair hearing and was enabled to present his case as fully as possible. The FTT also recorded that the appellant described feeling uncomfortable because two persons sitting at the back of the court room were his ex-partner's parents (and his child's grandparents). I have checked Judge Stedman's record of proceedings which contains the following (that I have attributed to the appellant and the judge respectively):

> A: "There are parties in this court and I am feeling uncomfortable and I feel that I would uncomfortable to give evidence in their presence. I made a Court Order re a British child on 29.12.20 and these are the grandparents sitting behind me."
>
> J: "Inform appellant that is. Public hearing and have not been given a reason or sufficiently strong reason to exclude them from court."

4. On behalf of the appellant Mr Wood relied upon two grounds of appeal against the FTT decision:

   (1) The FTT acted unfairly in failing to consider or apply the Joint Presidential Guidance Note No 2 of 2010 ('the Guidance') when dealing with the appellant's claim to feel uncomfortable as a result of the grandparents' presence in the hearing room.

   (2) The FTT acted unfairly in not granting the appellant an adjournment in order to obtain material in family court proceedings relevant to his child.

5. In a decision dated 27 August 2020, FTT Judge granted permission to appeal to the Upper Tribunal ('UT') on both grounds.

UT hearing

6. At the hearing, Mr Bates accepted that ground 1 was made out because the judge unfairly failed to address and seek to resolve the appellant's articulated

discomfort and this unfairness vitiated the factual findings, such that the decision of the FTT must be set aside. For the reasons I set out below Mr Bates was correct to make this concession. Both representatives accepted that there was no need to address ground 2 and in these circumstances and I say no more about it.

Error of law

7. In the particular circumstances of this case fairness demanded the judge to make further enquiries regarding the appellant's claim to feel uncomfortable with a view to taking measures to ensure that he felt sufficiently comfortable to give the best evidence possible. The judge's record of proceedings and the decision itself do not set out what steps were taken in this respect. This is a case in which the appellant clearly felt very uncomfortable to give evidence in the presence of the grandparents. Not only did the appellant raise this before the judge but it appears that prior to the hearing he wrote a note to be passed to the judge. A copy of that handwritten note appears on the file and says this: "*I want the court clerk to kindly inform the judge urgently before my case proceeds. I took the mother of child to court in regards my child and the judge asked me some questions in the family court proceedings. I am feeling very uncomfortable seeing the presence of my child mum parents in the court. I don't understand what is really going on.*"

8. The appellant's articulated discomfort must be seen in context. Both he and the SSHD were unrepresented. He therefore had no representative to explain the relevant procedures to him before the hearing began. The disputed issue before the FTT was an intensely personal one – the appellant's sexual orientation. Although the appellant gave detailed answers to questions during the course of two lengthy interviews with the SSHD, there was no witness statement to rebut the detailed reasons provided by the SSHD rejecting the appellant's claim to be bisexual. It may be that the appellant perceived that the grandparents might use evidence relating to his sexual orientation against him in the family proceedings, given the state-sanctioned hostile attitudes toward homosexuals he was accustomed to in Nigeria. Although, the appellant had already been open about his claimed sexuality to many including some members of his family, he claimed that they rejected him as a result. It is unclear whether the grandparents of the appellant's child knew about his sexuality.

9. In these circumstances the FTT was required to consider what steps could be taken to alleviate the appellant's discomfort. The Equal Treatment Bench Book ('ETBB') includes a section in Chapter 10 on sexual orientation called "Being 'outed' in court". This states that:

> "Many lesbian, gay and bisexual people are deeply fearful of the consequences of 'coming out'. For many, the fear is of potential personal rejection by family, friends and work colleagues. Employment can be lost, families devastated and relationships damaged by unnecessary and prurient court reporting. Courts and tribunals should be aware that these factors may place additional burdens on

> LGB parties, witnesses and victims of crime, and should consider what measures might be available to counteract them."

10. Although the appellant had already 'come out' as bisexual to some it is unclear whether this information was before the family court and the extent to which the appellant believed that what he said before the FTT might adversely impact his prospects in the family proceedings.

11. The FTT decision and the record of proceedings both make it clear that the judge did not consider that she was *provided* or *given* a sufficient reason to exclude the grandparents. The judge had earlier emphasised that her primary concern was to ensure a fair hearing. That entailed eliciting all relevant evidence from the appellant given the absence of representatives. Yet the judge has not particularised what questions were asked to probe the appellant's reasons for feeling very uncomfortable or what steps were taken to ameliorate this. There were a number of options open to the judge short of excluding the grandparents from the entire hearing: exploring the reasons for the discomfort in the absence of the grandparents for a short period; reassurance as to the FTT's role as distinct from the role of the family court; excluding the grandparents for the more sensitive aspects of the appellant's oral evidence. I do not suggest that the judge was obliged to take these options but fairness required a better understanding of the reasons for the appellant's discomfort to inform appropriate measures to combat it.

12. Ground 1 is narrowly pleaded. Mr Bates did not take issue with this and accepted that where, as here, an appellant claims that he would feel very uncomfortable giving oral evidence, it was incumbent upon the FTT to explore why. Judges have at their disposal aides to assist in this process. These include the ETBB and the Guidance - see AM (Afghanistan) v SSHD [2017] EWCA Civ 1123.

13. As the grounds of appeal note, para 2 of the Guidance makes it clear that sexual orientation may be a factor to assist in the identification of a vulnerable person. Para 10.1(iv) states:

> "Consider restricting or barring members of the public/family members in other cases to enable oral evidence to be given freely and without covert intimidation. If, from reading the papers you suspect abuse or trafficking, you should consider excluding individuals not associated with the presentation of the case to enable the witness to give evidence unhindered. You may notice individuals in the Tribunal who have no apparent bearing on the hearing and you may consider closing the hearing to the public."

14. I do not cite these provisions as a means of suggesting that this appellant should have been treated as vulnerable. Rather, these provisions serve to underline the point I have already made that sexual orientation can be a factor of particular sensitivity and consideration may need to be given to barring members of the public to enable oral evidence to be given freely. The judge does not appear to have given any consideration to excluding the grandparents

even for a brief period, on the basis that "*these hearings are held in public*". The Guidance makes it clear that although FTT hearings are public, there are (limited) circumstances which justify the public being barred.

Conclusion

15. It follows that FTT decision is vitiated by procedural unfairness and needs to be remade.

Disposal

16. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT. This is because completely fresh findings of fact are necessary.

17. It would be helpful if the FTT holds a directions hearing in order to address issues arising from the family proceedings, which I understand to be ongoing.

Decision

18. The decision of the FTT involved the making of a material error of law. Its decision cannot stand and is set aside.

19. The appeal shall be remade in the FTT de novo, by a judge other than Judge Stedman.

Signed: *UTJ Melanie Plimmer*
Judge of the Upper Tribunal

Dated: 8 October 2020