



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/06567/2016**

THE IMMIGRATION ACTS

**Heard at Field House
On January 19, 2018**

**Decision & Reasons
Promulgated
On January 23, 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR D O U
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sesay (Legal Representative)

For the Respondent: Mr Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I extend the anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
2. The appellant is a citizen of Nigeria. He entered the United Kingdom on false documents in 2009. Between April 21, 2010 and May 30, 2014 he applied for an EEA residence card firstly based on his relationship to his

uncle, secondly based on his marriage to VE and thirdly based on his marriage to MR. Each application was refused and following the refusal of his last application on September 15, 2015 the appellant was served with an enforcement notice and detained.

3. The appellant then applied to remain based in private and family life grounds but this was refused and his decision was certified on October 6, 2015.
4. On December 31, 2015 the appellant applied for asylum/humanitarian protection. The respondent refused his application on June 6, 2016.
5. The appellant appealed that decision on June 24, 2016 and the appeal came before Designated Judge of the First-tier Tribunal Shaerf (hereinafter called the Judge) on July 28, 2017. In a decision promulgated on August 4, 2017 the Judge dismissed his appeal on all grounds.
6. The appellant appealed that decision on August 21, 2017 arguing the Judge had erred. Permission to appeal was given by Designated Judge of the First-tier Tribunal McCarthy on November 7, 2017. No Rule 24 response was filed.
7. The case came before me on the above date and the parties were represented as set out above. Having heard submissions I reserved my decision.

SUBMISSIONS

8. Mr Sesay adopted grounds one and two of the grounds of appeal and submitted the Judge had erred materially. He submitted that the Judge had misdirected himself at [72] of the decision because he failed to have regard to the evidence of Mr N that he and the appellant were in same sex relationship. Alternatively, the Judge should not have expected such a disclosure as such a request went contrary to the decision of A, B and C v Staatssecretaris van Veiligheid en Justitie (Cases C-148/13, C-149/13 and C-150/13). He submitted requiring the appellant to answer questions about his sexuality breached European Law. The Judge erred by holding against the appellant the fact he had not adduced evidence of any LGBT activity. This also breached the same principle. The second ground argued concerned the fact the Judge should not have allowed the hearing to proceed in light of the fact the respondent failed to serve evidence. The onus was on the Judge to ensure the hearing was fair.
9. Mr Nath opposed the application. Dealing with Ground One he submitted no inappropriate questions were put to the appellant or his witnesses. The Judge set out the evidence and thereafter made findings. His findings on the appellant's sexual relationships were open to him. As regards the LGBT issue it should be noted that the appellant put the letter in as evidence and it was open to the Judge to make a finding that there was no activity with the organisation before that date. Turning to the second

ground of appeal Mr Nath submitted the Judge clearly adjourned the hearing until the parties were happy with what they had. It was wrong to now argue that the Judge should have adjourned the hearing when the opportunity to do that was when the Judge stood the matter down and on resuming the hearing asked if all parties were ready to proceed. The time for complaining about missing documents was at that point and not today.

ASSESSMENT OF ERROR IN LAW

10. Mr Sesay has submitted there were two grounds he wished to address the court on. The first ground concerned the Judge's approach to the evidence of the appellant's relationship with Mr N. His argument had two points. The first point concerned whether the Judge should have requested the information as it breached the decision of A, B and C v Staatssecretaris van Veiligheid en Justitie. This case was highlighted by Designated Judge of the First-tier Tribunal McCarthy when granting permission but I am satisfied the case does not support the argument being advanced in this particular case. The court in that case held that when verifying an asylum seeker's claimed sexual orientation, on account of which that asylum seeker feared persecution in his country of origin, Member States' freedom of action was constrained by the Charter of Fundamental Rights of the European Union. Although Member States did have the right to verify the credibility of such claims, certain verification methods such as medical and pseudo-medical examinations, intrusive questioning and requiring evidence of sexual activities were all incompatible with the Charter. Questions concerning details of an applicant's sexual practices were contrary to the Charter.
11. Having read the Judge's decision I find no evidence that the Judge contravened any of the matters highlighted by the Court.
12. I now turn to the second limb of the first ground. The Judge noted at [16] the appellant's testimony about him being gay. The Judge recorded in some detail his testimony and thereafter the Judge set out the evidence from other witnesses including Mr N who claimed he was the appellant's current boyfriend.
13. I am in no doubt that most of the findings would be sustainable but I find there is a major difficulty with one important aspect of the Judge's findings which goes to the heart of whether the appellant is either gay or bi-sexual.
14. At [72] of his decision the Judge found that neither his previous nor present boyfriend expressly or explicitly admitted to having a sexual relationship with the appellant. However, this finding contradicts firstly, the Judge's decision at [39] of the decision when he wrote, "He (Mr N) confirmed their relationship was sexual" and secondly, it contradicts the Judge's handwritten record of proceeding where at Q187 he recorded the question put to the witness as, "Is it a sexual relationship" to which the witness replied "yes".

15. The Judge could have rejected that evidence and I am in no doubt, due to the otherwise thorough reasoning of the decision, he would have given reasons for reaching that conclusion. On the face of it the Judge assessed the evidence incorrectly and as it goes to the core issue of his sexuality the error must be material.
16. By way of completeness I find no merit in the second ground of appeal. The Judge delayed the hearing until he was satisfied everyone had the same paperwork. It was only then that he proceeded and both representatives indicated their happiness to proceed. Raising unfairness in these circumstances has no merit.
17. The decision is therefore set aside and remitted back to the First-tier Tribunal for a de novo hearing.

NOTICE OF DECISION

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the Judge's decision.

Signed

Date January 19, 2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award is payable because no fee was paid.

Signed

Date January 19, 2018



Deputy Upper Tribunal Judge Alis