



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

Appeal Number: PA/12048/2017

THE IMMIGRATION ACTS

**Heard at Field House
Oral judgment given at hearing
On 21 September 2018**

**Decision & Reasons
Promulgated
On 23 October 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**LA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J. Trumpington, Counsel

For the Respondent: Ms A. Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born in 1979. He arrived in the UK in March 2011 with limited leave until 2012. It appears that thereafter he overstayed. He made a claim for asylum and that claim was refused by the respondent on 2 November 2017. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Telford on 25 January 2018. Judge Telford dismissed the appeal on all grounds. Permission to appeal against Judge Telford's decision was granted by a judge of the Upper Tribunal.

2. The basis of the appellant's claim is a fear of persecution on return to Ghana on account of his sexuality. Judge Telford did not believe his claim as to his sexuality and decided that he could return safely to Ghana. It is said on behalf of the respondent that there was an alternative finding to the effect that the appellant, even if bisexual, could live discreetly on return to Ghana.
3. The grounds of appeal in relation to Judge Telford's decision are lengthy and raise multiple complaints. Judge Telford's decision itself is a lengthy one and is obviously the result of considerable industry on his behalf. I have however, concluded that his decision contains errors of law which cumulatively, even if not individually, require his decision to be set aside.
4. In giving my reasons and in referring to the grounds in support of the appeal to the Upper Tribunal ("UT") I do not propose to refer to each and every ground, either because aspects of the grounds have not been relied on or because I have focused on what I consider to be the grounds which have most force.
5. I summarise the submissions made on behalf of the parties before me as I give my reasons.
6. In my giving of reasons I shall also refer to aspects of Judge Telford's decision which, together with my reference to the submissions, will explain why I have concluded that Judge Telford's decision should be set aside for error of law.

Conclusions and reasons

7. In paragraph 3 of the grounds complaint is made about Judge Telford's assessment of background evidence. There was background evidence in the form of the Country of Origin and Information Report on Ghana ("COI report"). There was also a Human Rights Watch Report ("HRW report"), the US State Department Report ("USSD report") and an Amnesty International Report ("AI report"). At para 71 Judge Telford said that background material is made up of case reports, opinion pieces and letters, and individual statements.
8. He said that such "forms some kind of evidence with which to at least get a sense of what it is like for gays in Ghana". He then said as follows:

"COIR are much better placed to transfer into something objective in the sense that there are more measured statements with care taken to avoid being the tool of an agenda driven organisation."
9. What Judge Telford appears to have been saying there, in effect, was that the document produced by the Country of Information service was more likely to be reliable. The complaint that is made about that conclusion is that the COI reports are compiled by the Secretary of State for immigration officials and cannot be said to be either objective or independent. The complaint is that the readiness with which Judge Telford

accepted as objective the evidence produced by the respondent without due consideration of other reports such as the HRW report and AI report is indicative of a flawed approach.

10. It is true that at paras 72 and 73 Judge Telford referred to the HRW report and the USSD report for 2015 and an AI report for 2016/17. He referred to the HRW report as dealing with information received from gay people about life in Ghana whereby the gay population hid their sexuality in order to live otherwise normally. He made reference to some content from the USSD report.
11. I am satisfied that it was an error for Judge Telford to conclude that COI reports are more objective and therefore more likely to be reliable than the other sources which he obviously had in mind namely HRW and AI. Whether he also meant the USSD is not clear. His conclusion in relation to COI reports as against the others mentioned is indicative of a flawed approach in his assessment of the background information. Alone however, I would not have considered that this was a basis upon which to set aside his decision because he clearly appreciated the difficulties that arise for openly gay people in Ghana.
12. Aspects of para 6 of the grounds are disavowed on behalf of the appellant and I need say no more about those. It is however, argued that there are parts of the judge's decision which are confusing and difficult to read; certain paragraphs are cited. I do not think it necessary to make reference to those parts of the decision complained about in that regard. Having heard the submissions of the parties, it seems to me that it is possible to make sense of the judge's decision in those respects.
13. However, I do consider that there is merit in the suggestion that Judge Telford made conflicting findings to the effect that on the one hand the appellant was not gay or bisexual yet on the other hand that he could live a discreet life. At para 59 he said:

"I conclude that he can and would live a discreet gay life in Ghana and as this is the key issue in terms of social group and Convention reason, I find that he has not shown that he is here for reasons other than economic betterment and lifestyle choices rather than fear of harm for a Convention reason".
14. Although in her submissions Ms Fijiwala, understandably, sought to present this as an alternative finding, that is not the effect of what Judge Telford said. If he was making an alternative finding, and to avoid the complaint that it was an inconsistent finding, he should have made it clear that he was making a finding in the alternative.
15. I should also say that it seems to me that there are significant problems with terminology used in Judge Telford's decision. At para 6 he said as follows:

“I must point out at this stage that purely for reasons of ease of typing, at points where I state ‘gay’ it also includes bisexual.”

16. Quite apart from what seems to me to be an obvious infelicity in the judge’s expression here by using the terms gay and bisexual interchangeably when, for obvious reasons, they are not interchangeable terms, this approach has led to confusion in his decision, for example where he refers to the appellant not having given information about gay relationships in circumstances where he married a female. It is not clear whether here he is referring to same-sex relationships in using the term gay. In addition, he has not maintained the mode of expression that he identifies at para 6 (gay/bisexual being used interchangeably) throughout his decision.
17. Para 7.1 of the grounds makes complaint about paras 24 and 25 where Judge Telford said that both the appellant and the witness called on his behalf had either departed from their witness statements or had substantially added to them. When I asked Ms Fijiwala about this aspect of the grounds she ultimately accepted that it was not clear from the decision in what respects Judge Telford concluded that the appellant or his witness’s evidence was deficient in this way.
18. Thus, it is not possible for anyone reading his decision to assess whether there was any merit in this aspect of his adverse credibility findings. It is necessary for the parties to understand why the losing party has lost and why the winning party has won. In circumstances where one cannot see why a judge attributed weight to a particular issue there is a clear danger of an error of law in the assessment of that evidence. That danger has been realised in this case because it is impossible to see what he was referring to in that respect.
19. At para 37 of his decision Judge Telford said that the appellant had said that he was private with his family about most matters including sexual emotions and feelings due to social conventions, religious conventions, family reasons and cultural factors. He then said that “I have rejected his claim to have told not a trusted family member but a mere employee” about his sexuality. The complaint made in the grounds is that what the appellant is said to have said about being private was not evidence that was before the judge.
20. In relation to this and similar complaints, it was submitted on behalf of the respondent that aside from the fact that otherwise the judge’s decision was sustainable, there were no Home Office Presenting Officer’s notes of the hearing before the First-tier Tribunal (“FtT”) and thus the matter could not be resolved one way or the other, or at least not so far as the respondent is concerned.
21. I have to say that in my view that is not a satisfactory state of affairs. The matters in issue in the grounds have been known to the respondent for long enough. There is nothing to contradict what is said in this respect on

behalf of the appellant. In addition, there is a witness statement from counsel who appeared before the FtT which attaches a transcript of the record of evidence. Ms Fijiwala very fairly made no complaint on behalf of the respondent about the admission of that evidence. That witness statement is evidence as to what was said at that hearing and it supports this aspect of the grounds.

22. Judge Telford also said, at para 38, that the appellant could return as a discreetly gay person

“as the evidence pointed to a person who would not ‘rock the boat’ because he was a very conservative individual much in tune with his family who were there to help him and whom he greatly respected due to their shared Christian religious beliefs”.

23. A similar complaint is made in this respect to the one which I have previously referred to, namely that it is not clear what evidence Judge Telford was referring to, since the appellant had never asserted that he was either a conservative individual or had a supportive family which shared Christian beliefs. Indeed on the contrary, his claim was that his adopted father and uncle had targeted him and sought to convert him to Islam because they were not supportive of his sexual orientation. On the face of it therefore, for the reasons also previously given, it is apparent that Judge Telford has taken into account material that was not before him.

24. At para 66 there is mention of evidence appearing in a sense “piecemeal” to use Judge Telford’s word and that that was a matter that was adverse to the appellant’s claim. The response to that in the grounds is that the appellant was in the detained fast track process and had sought to produce any evidence he could to support his claim even if that was to be done in stages. However, Judge Telford also said that at no point was he given a straight answer by the appellant as to why he had not taken reasonable steps to obtain any of that evidence prior to the various points in time that he had provided it. The appellant was given an opportunity to deal with that matter but failed to do so. Thus, I am not satisfied that the complaint about this aspect of the decision has any merit.

25. At paragraph 8.3 of the grounds complaint is made about Judge Telford’s consideration of letters from friends. He concluded that there was no evidence apart from the friends who gave evidence at the hearing that those (other) persons existed, or that if they existed (for example where photographic identity had been provided) they were not simply friends from school who were helping out the appellant in his claim to remain. The complaints about that are two-fold. First of all the letters in most cases were supported by copies of the individual’s passports. Thus there was evidence that those people existed. Secondly, so far as it was said that this could be evidence from friends from school, that failed to take into account that three of the witnesses who produced the letters were actually female friends. As was accepted by Judge Telford and is

uncontentious, the appellant went to an all-boys school. It is evident therefore that in this respect the judge has misunderstood the evidence.

26. At para 69 of his decision Judge Telford said that in relation to evidence produced by the appellant it indicated that there were three gay people in the same school as the appellant and virtually in the same class of close age, all of whom knew each other and formed relationships “of differing degree” with the appellant. He said that the class sizes were not given exactly but were said to be not large. Judge Telford then said that the school (which he named) was an exclusive and sought after private school. The implication from this paragraph is that he concluded that it was not credible that there would be three gay people in the same school and virtually of the same age all being together.
27. As to his having said that the school was an exclusive and sought after private school, it was submitted on behalf of the appellant, and the submission was not resisted on behalf of the respondent, that there was no evidence of the exclusivity etc of that private school. More significantly, at para 70 he said this:

“The respondent thought this must be either the most remarkable of coincidences or a statistical anomaly given the Office for National Statistics (“ONS”) indicate that the actual level of self-identifying homosexual males in the population is between 1.5% and 3%. I have no evidence to counter that large study which was subject to meta-analysis and peer review and which was not conducted by anybody with any political or religious agenda. I have no evidence to indicate Ghanaians are any different to northern Europeans. Whilst it is an interesting point, I find it only assists to a very small degree in terms of likelihoods and propensities.”
28. The problems with this aspect of the judge’s decision are legion it seems to me. First and foremost, neither party was able to establish that there was actually any documentary evidence of the type referred to in that paragraph. It is asserted on behalf of the appellant that there was no such evidence and on behalf of the respondent it was conceded that there was nothing to indicate that such evidence was adduced.
29. Secondly and importantly, according to what Judge Telford said, this was a study in relation to northern Europeans. One does not know the extent to which that would translate or read across to self-identification in terms of sexuality in Ghana. There are many reasons to think that it might not. Although Judge Telford said that it only assists to a very small degree in terms of likelihoods and propensities it is nevertheless a matter that he referred to and took into account, and added it to what he said at para 69. This reveals a further error of law in his decision.
30. At para 64 he made the point that emails, WhatsApp and text messages are easily produced and in relation to emails said that they were only evidence of what the last version of them was. He said that it was remarkably simple to take an old email, retain the old date, alter the text when sent and print out the results. He said that given that the appellant

had not shown how he came by this evidence he was not prepared to place any weight on them based solely on the appellant's word.

31. There are two problems with this aspect of the judge's decision. First and foremost there is nothing to indicate that this was an issue that was ever put to the appellant. Secondly, even if what the judge said about the emails and the ease with which they can be altered is correct, the same could not be said to apply to WhatsApp messages, as asserted in the grounds.
32. Para 14 of the grounds contends that Judge Telford erred in finding that there was no evidence of people in Ghana who knew that the appellant was gay. Again that was contrary to the evidence because albeit the judge may for good reasons have been entitled to reject the evidence of those in Ghana that knew the appellant was gay, there was in fact evidence to that effect. That was evidence from the appellant's friends which was in the respondent's bundle. It supported the claim that they were aware of the appellant's sexuality and indeed had witnessed the appellant being targeted as a result of it whilst in Ghana.
33. Lastly, I also consider that there is merit in para 15 of the grounds which relates to Judge Telford's para 58 under the sub-heading "his 'journey'". In that paragraph he said as follows:

"I look at the refusal letter and consider what was said there about his lack of credible evidence of being gay. He did not contradict in any credible way any of the conclusion drawn or the reasoning behind them of the respondent. In particular, he was not able to properly explain any of the journey into sexuality that must have gone on if he really were having gay feelings as a young person. He failed to elaborate on it today."
34. The underlining is mine because it seems to me that that is significant in that Judge Telford concluded that the appellant must have gone on a journey in relation to his sexuality. In my judgement that does amount to a stereotypical approach to issues of this nature. The obvious difficulty with stereotypes is that they are apt to lead to error in an assessment of the facts. In that respect also therefore, I am satisfied that the judge erred in law.
35. I referred at the outset of this judgment to what I consider to have been the judge's flawed approach in terms of terminology, as set out at paragraph 6 of his decision. There are two other places in his decision where (mis)use of terminology is problematic, to put it mildly. I do not propose to spell them out but simply to refer to the first sentences of paras 50 and 51. In any appeal care must be taken in the use of terminology. That however, is not an issue which would have led to my deciding to set aside the decision for error of law.
36. Looking at matters cumulatively however, for the reasons explained above I am satisfied that the decision of Judge Telford involved the making of an error on a point of law and his decision is set aside. The appropriate

course is for the matter to be remitted to the FtT to be heard before a judge other than First-tier Tribunal Judge Telford, with no findings of fact preserved.

37. I have decided to remit the appeal to the FtT having regard to paragraph 7.2 of the Practice Statement of the Senior President of Tribunals. There needs to be a full factual assessment of the basis of the appellant's claim. Despite the fact that there may be elements of Judge Telford's decision which identify reasons to doubt the credibility of the appellant's claim, those matters will require a fresh appraisal before another judge.

Decision

38. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Telford, with no findings of fact preserved.

An anonymity order was made by the First-tier Tribunal and I continue that order.

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 his 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.

Upper Tribunal Judge Kopieczek

18/10/18