**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/05067/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 14 July 2017** | **On 26 July 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**MR EGT**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Chakmakjian of Counsel
For the Respondent: Mr S Whitwell, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Egypt whose date of birth is shown as [ ] 1997. The appellant arrived in the United Kingdom on 16 April 2014 having left Egypt by boat, being stopped by the Italian authorities in the

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Mediterranean and having spent some eight months in Italy. Asylum was not sought in Italy. The appellant then travelled of the claim was that the appellant feared the family of a girl with whom he had had a relationship. The respondent refused the appellant's asylum claim on 5th March 2015.

**The appeal to the First-tier Tribunal**

2. The appellant appealed against that decision to the First-tier Tribunal. In a decision promulgated on 24 January 2017 First-tier Tribunal Judge Cockrill dismissed the appellant's appeal. The First-tier Tribunal found that the appellant would be safe to return to Egypt and could internally relocate and do so safely and reasonably.

3. The appellant applied for permission to appeal against the First-tier Tribunal's decision to the Upper Tribunal. On 24 May 2017 First-tier Tribunal Judge Osborne granted the appellant permission to appeal.

**The appeal to the Upper Tribunal**

4. The grounds of appeal assert that the judge, in failing to grant an adjournment, made a material procedural error so that the appellant did not have a fair hearing. It is submitted that at the outset of the hearing the respondent and the Tribunal were notified that the appellant had very recently been made aware that his family had been arrested by the Egyptian authorities in events unrelated to his asylum claim. The arrest was made because the appellant's father was involved in the Muslim Brotherhood. The appellant produced two documents in Arabic which were said to be police reports obtained by a lawyer in Egypt. The appellant's solicitors had not had time to apply for funding to obtain certified translations. The documents had only been received a few days before the hearing. It is submitted that although notice of the further claim was only given on the day of the hearing, no due weight was given by the judge to the fact that the substance of the claim had only arisen very recently. It is submitted that by deciding to deal with the further claim in existing proceedings but refusing to adjourn the judge deprived the appellant of a proper opportunity to fully set out his claim and to provide supporting evidence. Reliance is placed on the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**, specifically at paragraph 5. It is asserted that in this case the judge gave no consideration as to whether the case could be justly determined. There was an obvious disadvantage to the appellant caused by curtailing the time to investigate and prepare and translate documents.

5. In ground 2 it is asserted that the judge erroneously gave undue weight to the late disclosure of the further asylum claim and failed to consider all the evidence as a whole. With regard to the appellant's claim that he was in danger as a result of an imputed political opinion following the arrest of his family and association with the Muslim Brotherhood, the judge made a negative credibility finding. At paragraphs 38 to 39 the judge gave reasons for the negative credibility finding. It is submitted that this is the

totality of the First-tier Tribunal Judge's reasoning on this important factual issue. The judge erred by basing his conclusions exclusively on the failure to refer to the claim in the witness statement and making the disclosure a few days later at the appeal hearing instead. It is submitted that such general credibility findings about the timing of the claim should not be the starting point of the credibility assessment. The timing of the claim is a relevant factor, but it must be one that is considered in the balance when regarding the case as a whole. Reliance is placed on the case of **JT (Cameroon) [2008] EWCA Civ 878** where the court held that Section 8 factors should be taken into account in assessing credibility, but it should not dictate that relevant damage to credibility inevitably results. It is submitted that by contrast it is apparent in this case that the judge regarded the belated claim essentially determinative of credibility. There was a failure to consider the positive credibility of the appellant regarding his earlier asylum claim, the limited time to substantiate the claim due to refused adjournment, the detail the appellant gave about his father's role in the Muslim Brotherhood and the objective evidence about the Muslim Brotherhood being outlawed.

6. In oral submissions Mr Chakmakjian submitted that whilst it is accepted that it is relevant for a judge to take into account the appeal history and the public interest in expediting hearings, the key principle is fairness. He referred to paragraph 18 of the First-tier Tribunal decision and submitted that the judge failed to consider actual fairness. There is no consideration in that paragraph of the disadvantage to the appellant without being able to submit the documents which required translation. The judge placed reliance on the fact that there was a very recent witness statement in which the appellant had not set out the new claim. He submitted that whilst that might be relevant to credibility it was not a sufficient reason to prevent the appellant from properly developing the freestanding aspect of this asylum claim. There had been insufficient consideration of the claim and undue weight had been given to the late disclosure by the judge. He referred to paragraphs 38 and 39 of the decision which set out the only consideration of the new claim. The judge failed to take into account the appellant's general credibility regarding the original asylum claim which was not disputed. He submitted that the starting point for a subsequent claim should have been the appellant's accepted credibility. He submitted that the focus of the late admission and the failure to consider the substance of that claim linked in to the failure to adjourn to enable the appellant to produce supporting evidence led to the proceedings not resulting in a fair hearing for the appellant. Mr Chakmakjian confirmed that there was no appeal against the findings of the judge regarding internal relocation.

7. Mr Whitwell submitted that the judge set out at paragraph 40 credibility findings with regard to the appellant's asylum claim. He submitted that it was not a question that the appellant's evidence had been accepted in its entirety. He referred to paragraphs 2 and 3 where the judge refers to the appellant's adverse immigration history. He submitted that at paragraphs 38 and 39 these were matters for the First-tier Tribunal Judge. It was a

matter for the judge to decide whether the lateness of the claim adversely affected the appellant's credibility. The judge had considered fairness when making a decision not to adjourn the hearing. The incident happened before Christmas on 14 December 2016. The appellant had known about that but had prepared a witness statement on 6 January 2017 and had failed to refer to that matter. He submitted that the failure to mention in the witness statement was a matter that severely affected the appellant's credibility and it was quite correct that the judge viewed this late claim through that lens. He submitted that there was nothing unfair in the judge not allowing new evidence.

8. In reply Mr Chakmakjian submitted that the First-tier Tribunal did not refuse to consider effectively the new claim and the respondent's representative did not object to the judge considering the matter.

## Discussion

9. There is no appeal directly against the First-tier Tribunal Judge's findings in respect of what I shall refer to as the 'original' asylum claim. That original claim was based on the appellant's assertion that he was at risk from the family of a girl that he had had an unlawful sexual relationship with. With regard to that claim the judge found:

> "35. It is noteworthy that a lot of the appellant's narrative has been accepted by the respondent and that represents, therefore, a very proper starting point for my consideration. The appellant's nationality has been accepted and his age is not in any way in dispute. The main features of the appellant's account of the sexual relationship with the girl, A, have been acknowledged and accepted by the respondent. Indeed, the reaction of the girl's family has been accepted by the respondent as being a natural and understandable one and consistent with what is known about Egyptian society. ...
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> 36. The appellant would wish me to accept that the father of the girl, A, is of sufficient power and influence, such that the police could be manipulated to work against the appellant. That point has really not been made out, as I see it, by the appellant. ...
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> 37. Over and above that there are two further elements that have been added to the appellant's case. ..."

10. The appeal essentially is brought on the basis of the judge's failure to adjourn for evidence to be translated with regard to what is in effect a new element to the claim for asylum and with the judge's consideration and findings in relation to that claim (the 'new' claim).

11. At paragraph 18, when considering the application for an adjournment the judge set out:

> "18. The situation was that Mr Chakmakjian indicated to me that there was a new strand of concern in this case. The appellant, with the assistance of his solicitors, had made an up-to-date witness statement

> which had been prepared on 6 January 2017. This particular issue had not been referred to at all in the course of that updated statement. In essence, the appellant was now saying that his family had suffered arrest and detention about three weeks ago. There were some documents produced which had not been translated and which purported to be relevant to that issue. I considered the overriding objective and what was a fair course of action, looking at the circumstances as a whole. I concluded, given the overall history of this case, and the very fact that this issue had not been raised by the appellant even as late as 6 January 2017 in his witness statement, that the interests of fairness were to proceed with the appeal and not to accede to any request for an adjournment."

12. The judge had noted at paragraph 16 the history of the case:

> "16. The case had originally been listed as long ago as 4 April 2016 but had been adjourned. Efforts had been made to try to gain a report from a country expert but there were funding difficulties. In any event, the Tribunal expressed the view that there was ample country evidence available. The appeal was then relisted for hearing on 15 August 2016 but, again, was adjourned and it was in that way that the matter came for hearing at Taylor House on 13 January 2017."

13. I do not consider that the judge's failure to adjourn necessarily gave rise to any unfairness in the proceedings on the facts of this case. There were delays in the matter being called on for hearing, the application was made only on the day of the hearing (despite the appellant having had the information for over three weeks), and in preparation for the hearing a witness statement had been made that did not make any reference to a matter which, by that point, he had known about for three weeks. The appellant was able to give evidence regarding the arrest. The judge dealt with that evidence from the end of paragraph 19 through to paragraph 23.

14. With regard to the second ground of appeal which is essentially that the judge focused entirely on the lateness of the new claim, that this issue had not been set out in the appellant's witness statement and made adverse credibility findings purely on the basis of the lateness of the new claim. The judge decided to deal with this new claim at the hearing setting out:

> "38. The other strand in the appellant's case was only brought out, in effect, before me at Taylor House on 13 January 2017. Mr Chakmakjian drew attention to this apparently recent development in the appellant's situation whereby his immediate family, that is his parents and, indeed, the second wife and two children, both extremely young being aged 4 years and 10 months old, have all been the subject of arrest by the Egyptian authorities. I accept, of course, that I refused an adjournment in all the circumstances and I am conscious, therefore, of that position in assessing this aspect of the case but I have to say that, in my overall assessment, it has simply been grafted on to the appellant's case, with a view to trying to bolster it. I do not think it is a credible account that has been provided by the appellant about this recent arrest and detention. **I say that for the following reasons.** The appellant was given a perfectly clear and proper opportunity to

express this matter in a witness statement which had only been prepared, it seems, on 6 January 2017. It is conspicuous that there is not the slightest reference at all to any arrest and detention of his family in that witness statement. The alleged arrest and detention took place before Christmas and, if it really had taken place, I can see absolutely no good reason why it would not have been brought up properly in the witness statement. In my assessment and judgment, this is something that has been added by the appellant to try and give some extra weight and force to his account. [**Emphasis added**]

39. The appellant's father has apparently been associated, for a long time, with the Muslim Brotherhood. However the timing of this alleged arrest and detention just before this appeal hearing seems far too convenient and is not credible. I do not accept that it has taken place in that manner and that the reality is that the family of this appellant are still back in Egypt and are not under arrest." The matters set out by the judge (as accepted by Mr Chakmakjian at the hearing) are factors that could properly be taken into consideration when assessing credibility. It was open to the judge to consider that the timing of the arrest and detention was far too convenient and to take into consideration the surprising failure to mention the arrest in the witness statement. The judge has however not given any other reasons for the finding is that the arrest has not taken place other than the focus purely on the lateness of the new claim. I accept the submission that the judge has simply dismissed the new claim (that the appellant would be at risk because of an imputed political opinion because his father had been arrested) on the basis that the appellant had not mentioned this in his witness statement on 6 January and it had arisen just before the appeal hearing. Whilst this might affect credibility, it was incumbent upon the judge to take into consideration the factors set out by the appellant in oral evidence and to give reasons for rejecting that evidence. I therefore find that there is a material error of law in the First-tier Tribunal's decision.

15. It was open to the judge to consider the timing of the arrest and detention was far too convenient and to take into consideration the surprising failure to mention his in the witness statement only raining this at the hearing when assessing credibility. However, I do accept the submission that the judge has dismissed the claim (that the appellant would be at risk because of an imputed political opinion because his father had been arrested) simply on the basis of the lateness and that the appellant had not mentioned this in his witness statement on 6 January. The judge has not given any other reasons for the finding that the arrest has not taken place other than the focus purely on the late claim. Whilst this might affect credibility, it was incumbent upon the judge to take into consideration the factors set out by the appellant in the oral evidence and as set out by the judge in the decision. I therefore find that there is a material error of law in the First-tier Tribunal's decision.

16. I find that there is a material error of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

17. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

18. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge Cockrill pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed on the next available date.

19. No appeal was made against the findings of the judge concerning the original claim, the conscription issue or the Article 8 findings. I indicated at the hearing before me that the findings of fact in relation to the original claim would be preserved. Although no direct appeal was made against the findings in respect of safety on return and re-location clearly the safety of return and reasonableness of re-location must be assessed in light of any findings on the new claim.

20. The following findings are preserved:

> "35. It is noteworthy that a lot of the appellant's narrative has been accepted by the respondent and that represents, therefore, a very proper starting point for my consideration. The appellant's nationality has been accepted and his age is not in any way in dispute. The main features of the appellant's account of the sexual relationship with the girl, A, have been acknowledged and accepted by the respondent. Indeed, the reaction of the girl's family has been accepted by the respondent as being a natural and understandable one and consistent with what is known about Egyptian society. ...
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> 36. The appellant would wish me to accept that the father of the girl, A, is of sufficient power and influence, such that the police could be manipulated to work against the appellant. That point has really not been made out, as I see it, by the appellant. I have heard absolutely no evidence which really would underpin any finding that this particular father of A is someone sufficiently powerful to influence the police. That has basically not been made out, albeit to the lower standard, by the appellant. It has not been made out that any influence that that particular gentleman may have would extend the immediate locality of Alexandria where the appellant had been living...
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> 37. Over and above that there are two further elements that have been added to the appellant's case. The first is that, with the passage of time, the appellant is now over 18 and of course, therefore, liable for military service. He had left Egypt, unofficially, and he might be treated, it is said, as someone who is avoiding military service upon his

> return and he will be detained by the authorities. The situation, in that regard, is that the appellant has not made out, in my judgment, that simply by being returned now as a teenage to Egypt that he would be seen as someone who has evaded conscription and he has not adduced evidence to show that he would be a victim of sufficiently serious mistreatment, such as to warrant international protection upon return.
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> ...
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> 40. I had the clear and obvious benefit, of course, of seeing the appellant and heard him give oral evidence, subject to cross-examination. I conclude that the 1951 Refugee Convention is not engaged on the particular facts of this appellant's case, as I find them. His fear is of the father of the girl, A, with whom he had a sexual relationship and that does not, in itself, engage the 1951 Convention. The appellant, in all the circumstances, has not had any adverse contact with the Egyptian authorities in the past. He has no reason to fear the police. He has not done anything wrong in the criminal sense, as he has described. ... This is not really an Article 8 case. The appellant has developed some private life, of course, whilst he has been here. He has pursued education and that is creditworthy. He has got ambitions to try and study at graduate level. These are all perfectly understandable ambitions that the appellant has, but they do not translate into giving any justification for the appellant being permitted to stay in this country."

21. With regard to the finding of the judge that the appellant can safely and reasonably settle in a different area of Egypt I am unable to preserve those findings in relation to the original claim because it is not clear that the judge reached those conclusions entirely separately from the finding that the appellant has family support available to him upon return to Egypt. It is of course open to the First-tier Tribunal to consider the safety and reasonableness of the appellant's return quite apart from whether or not he has any family support.

## Notice of Decision

The appeal is allowed. The case is remitted to the First-tier Tribunal at Taylor House before any judge other than judge Cockrill for a fresh hearing on the new claim issue with the findings as set out above preserved.

Signed P M Ramshaw Date 25 July 2017

Deputy Upper Tribunal Judge Ramshaw