



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/18164/2019

Appeal Number:

THE IMMIGRATION ACTS

**Decision made without a hearing
under rule 34 (P)**

**Decision & Reasons
Promulgated
On 21 September 2020**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

**S E
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

It is appropriate to grant anonymity because the case involves potential protection issues. 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.

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 22 October 2019 to refuse a human rights claim.

2. First-tier Tribunal Judge Abebrese (“the judge”) dismissed the appeal in a decision promulgated on 25 March 2020.
3. First-tier Tribunal Judge Boyes granted permission to appeal to the Upper Tribunal in an order dated 12 June 2020.
4. The Upper Tribunal reviewed the file following the start of the Covid-19 pandemic. Upper Tribunal Judge Frances sent directions to the parties on 05 August 2020 with the following indication:

“2. It is difficult to decipher from the decision of First-tier Tribunal Judge Abebrese which evidence he considered and in what context. Further, the judge failed to properly consider the evidence of the Appellant’s mental health difficulties and in particular the high risk of suicide if the appellant returned to Nigeria.

3. I am of the provisional view that the decision promulgated on 25 March 2020 should be set aside and remade by the Upper Tribunal. None of the judge’s findings are preserved.”

5. The directions provided for the parties to respond. If the decision were to be set aside, Upper Tribunal Judge Frances took the view that it would be appropriate to remake the decision by way of a face to face hearing in the Upper Tribunal given that the appellant is a vulnerable witness and was unrepresented at the time.
6. The respondent responded to the directions in email correspondence dated 14 August 2020. The respondent agreed that the First-tier Tribunal decision should be set aside and that it would be appropriate to remake the decision by way of a face to face hearing. The respondent also accepted that the appellant should be treated as a vulnerable witness.
7. The appellant responded to the directions by email on 19 August 2020. By this stage he had instructed counsel by Direct Access. Counsel agreed that the decision should be set aside but submitted that the case was suitable for remittal for a fresh hearing in the First-tier Tribunal. The decision would be set aside in its entirety and the remaking would involve extensive findings of fact that would require evidence to be given by the appellant and his family members. Having received further legal advice, it was said that the appellant now intended to make a protection claim relating to the risks arising from his sexual identity. He would be referred to a legal aid solicitor for assistance as soon as possible. Given that the issue would need to be considered in this claim as well as the protection claim, it would not be in accordance with the overriding objective to determine the issue before the Secretary of State had considered the protection claim. Counsel suggested that the most effective course of action would be to remit the case to the First-tier Tribunal, which could then list the matter for a case management hearing in order to review the progress of the protection claim and to make further directions. Counsel applied for an anonymity order given that protection related issues were raised.

8. Neither party objected to Upper Tribunal Judge Frances' provisional decision finding that the First-tier Tribunal decision involved the making of errors of law. I am also satisfied that the grounds disclose errors of law in the First-tier Tribunal decision. The respondent does not oppose the appellant's appeal before the Upper Tribunal. The decision is set aside.
9. The thornier issue relates to the appropriate forum for remaking. The usual course of action would be for the case to be remade in the Upper Tribunal even if it involves making further findings of fact. The appeal is against a decision to refuse a human rights claim, which was primarily argued with reference to Article 8 but could also include arguments relating to Article 3 of the European Convention if protection related issues are raised. Although it might be necessary for the appellant and other witnesses to give evidence again, the case does not turn entirely on credibility findings. The main criticism of the First-tier Tribunal decision was that the judge failed to make his findings in the context of the evidence taken as a whole. Although some aspects of the evidence are disputed, other findings are likely to be made with reference to expert evidence about, for example, the appellant's health.
10. Upper Tribunal Judge Frances was right to suggest that the case was likely to be appropriate for remaking in the Upper Tribunal on the information that was before her when she made her order but I must consider the further submissions now made on behalf of the appellant.
11. At this stage, it is unclear whether the appellant has in fact made a protection claim or how long it might take for the respondent to determine it considering that delays might occur as a result of the Covid-19 pandemic. The current need to take measures to prevent the spread of Covid-19 is likely to affect the ability of government departments to function in the normal way. Even before the pandemic it could take several months, or even longer, to decide a protection claim. I bear in mind that it is not likely to be in accordance with the overriding objective of the Procedure Rules for there to be an extensive delay in remaking the decision in this case. Nor is it likely to be in the appellant's interests to delay the resolution of the human rights claim unduly given that he is a vulnerable witness.
12. The protection related issue relating to the appellant's sexual identity has already been raised in this appeal and evidence was produced to support the claim. However, the evidence contained in the respondent's bundle indicates that the issue was not raised in the original human rights claim and was not considered by the respondent in the decision letter. Because the respondent agreed that the First-tier Tribunal decision was unsustainable, no issues have been raised relating to section 85(5) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") in response to the appellant's appeal before the Upper Tribunal. It is unclear from the First-tier Tribunal decision whether the respondent gave consent for the

tribunal to consider what appeared to be a significant 'new matter'. The result is that the respondent has not expressed any clear view on the issue.

13. This is a finely balanced decision because it would be possible for the Upper Tribunal to deal with all the matters that require determination in this appeal, but in light of (i) the extent of the failure of the First-tier Tribunal to consider relevant matters; (ii) the fact that the protection related issues were not considered by the respondent previously; (iii) that section 85(5) NIAA 2002 may need to be considered; and (iv) it is said that the appellant now intends to make a protection claim in which the respondent will consider those issues, I find that it is appropriate to remit the case to the First-tier Tribunal.
14. It is a matter for the First-tier Tribunal to consider what directions to make thereafter, but counsel's suggestion for a case management hearing seems sensible. The parties are expected to be ready to update the First-tier Tribunal as to whether the appellant has made a protection claim, and if so, when it is likely to be decided. It is a matter for the First-tier Tribunal to consider whether it would be in the interests of justice to delay the remaking of this decision until after a decision has been made in relation to any protection claim or whether those issues could be determined in this appeal with appropriate consent under section 85(5) NIAA 2002.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The case is remitted to the First-tier Tribunal for a fresh hearing

Signed M. Canavan Date 16 September 2020
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

- 5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
- 6. The date when the decision is “sent’ is that appearing on the covering letter or covering email**