Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01788/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 July 2014	**On 6 August 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

NV
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C H Bexson
For the Respondent: Mr L Tarlow

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria. He applied for indefinite leave to remain as the spouse of a person present and settled in the United Kingdom but that application was refused. The respondent found that on balance there was insufficient evidence to show that the appellant is in a

subsisting relationship. There was also insufficient evidence to show intention to live together with his spouse.

2. The appellant appealed that decision. In a determination promulgated on 16 May 2014 a First-tier Tribunal Judge dismissed the appeal under the Immigration Rules and on human rights grounds.

3. The appellant sought permission to appeal that decision on three grounds. Firstly, that the judge failed to accede to an application to adjourn the hearing of the appeal; secondly, the judge erred in law by failing to direct himself properly as to paragraph 287 of the Immigration Rules; thirdly that he erred in misdirecting himself as to the standard of proof applicable in this appeal.

The Grant of Permission

4. In granting partial permission to appeal the judge doing so found that the second and third grounds were not justified when the totality of the assessment of the evidence, credibility findings and "comparison with the law" is taken into account. She found, however, that it was arguable that the adjournment was wrongly refused because the appellant had had inadequate notice of the Secretary of State's fresh evidence which had not been served in accordance with the directions given. Although Counsel was offered time to take instructions at court there was no opportunity to consider the evidence as a whole, to ascertain whether other evidence could be called for by the appellant to rebut the new evidence or whether the person at the appellant's home when the Immigration Officer called could be a pertinent witness. The appellant was therefore possibly deprived of the opportunity to rebut the implications of the new evidence or to enhance his own evidence by other material. The interests of justice demand the appellant be given the means to present his case. The respondent should not be permitted to ambush the appellant on the day of hearing with new evidence that he could not rebut for want of witnesses.

5. The respondent filed a Rule 24 response which argued that the judge's decision should be upheld, giving reasons.

The Error of Law Hearing

6. I sought clarification from both representatives at the hearing that they agreed that the only live issue before me was in relation to the arguable error concerning the adjournment application, the reasons for it, and the rejection of it. Both representatives agreed that this was indeed the only issue.

7. The judge at paragraphs 1-4 of the determination records the history concerning missing evidence from the respondent, the application for the adjournment made before him and his reasons for not granting it. He noted that two adjournments were granted to the respondent to enable the respondent's representative to secure copies of two documents. The

first was the record of a marriage interview of the appellant and sponsor. The second document was the statement of an Immigration Officer who undertook an operational visit to the appellant's address in 2012.

8. The judge goes on to record the reasons for seeking an adjournment at the hearing before him. The first ground was that an adjournment was required to consider properly the two aforementioned documents and to prepare statements of the appellant and sponsor in response to them because they were served only on the day of the hearing. The second and more important ground was that while it was a matter for the respondent as to how he [sic] presented his case nonetheless there should be produced the notes on which the Immigration Officer's statement was based and the IS126 report prepared. Further, the Immigration Officer should be produced for cross-examination.

9. The judge records that he refused the adjournment firstly on the basis that the appellant and the sponsor could in oral examination-in-chief give evidence as to the marriage interview record. Secondly, as acknowledged by the appellant's Counsel, the respondent's decision not to produce the Immigration Officer and make her available for cross-examination went to the weight to be attached to her statement. The same consideration related to the respondent's decision not to produce that officer's notes and her IS126 report.

10. The judge records that he offered an adjournment to enable the appellant's Counsel to take any further instructions that he required in respect of the documents produced on behalf of the appellant and was informed that no further time was sought.

11. Before me it became apparent that the documents to which the judge referred and which were produced at the hearing consisted of a completed marriage interview record form and a witness statement from the said Immigration Officer. Miss Bexson did not represent the appellant at the earlier hearing and appears to have been instructed only very shortly before the hearing before me. Miss Bexson based her submissions upon the grounds seeking permission to appeal. One of the main points raised is that the adjournment application was made in order to obtain detailed evidence "in response to the interview transcript and that given in the statement of the named Immigration Officer".

12. The witness statement of the Immigration Officer is dated 5 November 2013 and refers to an operational visit having taken place some 22 months earlier in January 2012. Questions from the officer and replies appear to indicate that the appellant was not "at the moment living with his partner" and in answer to a question whether they had ever lived together since the ceremony the recorded response is "no". The appellant asserts that the words attributed to him were wrongly recorded. He deals with this issue in paragraph 6 of his witness statement and puts an entirely different spin on the conversation. His version is to the effect that his partner was living with him and they were not together at that moment

because they had agreed that his partner should spend more time with his father who was in the UK at the time, had had surgery and needed his care. His partner in his statement gave evidence confirming the position of the relationship to the appellant and to his own parents at the time.

13. However, upon looking at the statements of the appellant and his partner which were both signed some three months prior to the hearing before the First-tier Judge it is wholly apparent that the marriage interview record had already been served before the making of those statements. There is reference in them to specific paragraph numbers of the interview record and explanations given about various answers that were given – for instance see paragraph 12 of the appellant's statement where he refers to question 83 of the interview record.

14. This appears to have gone completely unnoticed until I raised the matter at the hearing before me. I gave Miss Bexson some time to take instructions from her client as a result of which I gathered that it was accepted that the marriage interview record had been in her client's possession as indeed it must have been for him to have commented upon it.

15. The only parts missing from the marriage interview record form were the completed formal details regarding the appellant's spouse, the signatures of the applicant and his spouse and the concluding questions and final page of that interview that contain formal details also. The only important concluding question is as to whether there are any reasons other than those told to the interviewing officer during the interview why the appellant and his spouse would wish to remain in the United Kingdom. The responses are to the effect that there would be problems or worse for them in Nigeria because of their sexuality.

16. I conclude from this therefore that so far as the marriage interview record form is concerned there was no good reason whatever for the judge to accede to a request to adjourn so that further evidence could be obtained on matters contained within it. Only the formal parts of the marriage interview record form had not been served prior to the hearing day and dealing with those formal parts, even supposing that anything of importance arose out of them, should have caused no difficulty for the appellant or his representative. Clearly the judge thought this as well and made a decision accordingly.

17. As far as the witness statement of the interviewing officer is concerned the appellant gave his version of events in his statement. If the appellant did not already have the statement prior to the hearing he was nevertheless challenged at the interview about why he had answered "no" to the question "have you ever lived together" with your partner – a clear reference to the Immigration Officer's record of the events that took place in January 2012. He did not deny that the officer had come to his premises and found the appellant's friend in his bedroom and he gave his version of events both in his statement and in oral evidence.

18. The judge had the benefit of hearing from the appellant and his partner and although it may have been interesting to have heard from the Immigration Officer it is not at all clear that it was necessary to do so in the interests of justice. The overriding objective is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible and members of the Tribunal have responsibility for ensuring this in the interests of the parties to the proceedings and in the wider public interest. The appellant is a long way from showing that the judge erred in deciding as he did not to adjourn the appeal and although it is not now a live challenge I would venture to add that on the evidence before him the judge was fully entitled to conclude that the appeal should be dismissed for the reasons given.

Decision

19. It follows from what is said above that the challenge to the decision of the judge is unsuccessful and the appeal therefore remains dismissed.

20. I was addressed on the matter of anonymity. I was just persuaded that an anonymity direction should be granted in this appeal as I was told that the appellant has not "gone public" about his sexuality and his partner's parents would be devastated if they were to find out his sexuality also. I bear in mind that the appellant's future may well lie in returning to Nigeria and a concern would be that he might be in danger in certain parts of the country if his true sexuality were known.

21. An anonymity direction is therefore made in those circumstances.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

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.

Signed Date

Upper Tribunal Judge Pinkerton