



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

Appeal Number: PA/00389/2018

THE IMMIGRATION ACTS

Heard at Glasgow

**Decision & Reasons
Promulgated**

On 21 September 2018

On 21 November 2018

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE CONWAY**

Between

[E K]

~~(No anonymity order made)~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Farrell, Solicitor.

For the Respondent: Mr Govan, Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe born in 1981. He appeals against a decision of the respondent made on 6 December 2017 to refuse his claim for asylum and on human rights grounds.
2. The basis of his claim is that he fears persecution because he is a deserter from the Zimbabwean Army and because he is homosexual. He has been diagnosed as HIV positive and is receiving anti-retroviral medication in the

UK which would not be available in Zimbabwe. As a result his life expectancy might be reduced.

3. The basis of the refusal is that his claim to have been in the army was not believed. His claim to be gay was *"vague and lacking in detail"*.
4. He appealed.

First tier hearing

5. Following a hearing at Glasgow on 12 February 2018, Judge of the First-tier Tribunal Kempton dismissed the appeal on asylum and human rights grounds.
6. She noted at paragraph [5] that the appellant did not attend the hearing, nor did a representative. She proceeded to hear a *"very brief submission"* from the Presenting Officer who, as well as relying on the refusal letter, said that the appellant did not attend for his last reporting session on 20 December 2017 when he was due to be served the refusal decision.
7. In going on to consider the merits of the case the judge began:

"20. The appellant failed to attend his hearing. There is no suggestion that the decision sent to him has not been received by him. No letters have been returned by the Post Office from his address.

21. The appellant has simply failed to fully engage with the asylum process. He did not attend for reporting. He has not instructed a representative on his behalf. He did not attend court for this hearing or submit any statement of evidence or other evidence on his behalf. The only information which I have from the appellant is contained in his grounds of appeal, which does not really assist in assessing his overall credibility. The appeal was in fact listed as a paper appeal."

8. The judge found that the appellant has the HIV virus for which he is being treated. There was a lack of evidence as to the availability of his current or of alternative medication in Zimbabwe.
9. She went on at [24]:

"While the appellant may fear return to Zimbabwe for a number of reasons, he has not presented himself either to be cross-examined or with a written statement of evidence setting out his full position in response to the reasons for refusal letter. His grounds of appeal are inadequate to form a claim for asylum. He refers to losing his social situation and economic situation in Zimbabwe but there is no

reason for that to affect him in relation to the Refugee Convention. There is no external evidence to back up his claim to be gay."

10. Further, at [25] she found that while he claimed to be in a relationship no witness statement had been provided or details given "*so his evidence cannot be tested either*". Having HIV "*may indicate that he is gay, but it is not definitive.*"
11. She concluded "*... his sexuality has not been proved to the lower standard on the basis of the scant evidence before me.*"
12. He sought permission to appeal which was refused. It was granted on 22 May 2018 on renewal to the Upper Tribunal.

Error of law hearing

13. The appellant attended before us.
14. The crux of the grounds, reiterated before us by Mrs Farrell, was that the appellant, who had sought the matter be dealt with "on papers", did not receive the notice dated 25 January 2018 directing him to lodge a statement and submissions by 9 February 2018. The address the notice was sent to is that of Waverley Care in Edinburgh which provides accommodation for vulnerable and destitute persons such as him. He did not stay there and the arrangement he had with them to pass on correspondence did not happen. His claimed "*failure to engage with the process*" was not his fault.
15. Mr Govan did not oppose the submission that the decision to proceed by the judge showed procedural unfairness such that the case must be heard again.
16. We agreed.
17. It is clear that despite the respondent's claim that the appellant did not receive the refusal decision because he failed to report on 20 December 2017 he nonetheless received it at some point because he lodged an appeal against it.
18. The administrative history thereafter shows unfortunate mistakes. On the appeal form he intimated that he wished the matter to be dealt with "on papers", that is, without an oral hearing. Whether or not an appeal may be dealt with or without an oral hearing is a matter of discretion for the Tribunal. It was noted that as the appellant's claim involved asylum and the respondent wished to be heard the case should be listed for oral hearing. However, the notice that was sent to the appellant on 25 January 2018 was the wrong notice. It should have been a "Notice of Hearing" which goes on to state the date and time of the hearing and the address of

the hearing centre. It adds that the appellant should arrive 15 minutes prior to the hearing.

19. Instead, the notice sent on 25 January 2018 states *“You have indicated that you want the appeal to be decided without a hearing.”* It goes on *“The Tribunal may determine the appeal on the basis of the appeal documents together with any further written evidence or submissions you may wish to make.”* It continues by stating that any further written evidence or submissions that he may wish to make must be received by the hearing centre by 9 February 2018. It concludes *“If you have no further evidence or submissions, no action from you is required...A copy of the Tribunal’s decision on the appeal will be sent to you in due course.”*
20. The appellant claims that he did not receive that notice dated 25 January 2018. Mr Govan did not dispute that the address to which it was sent is that of Waverley Care, a postal address for a charity whose work includes accommodation for the homeless. Nor did he dispute the appellant’s claim that at that time he was not residing there and that the notice was not forwarded to him.
21. Even if he had received it, as indicated it was not a notice to attend for the hearing of his appeal but a direction for him, if he wished, to lodge further evidence or submissions by 9 February 2018, with the appeal to be determined at some date thereafter on the papers without a hearing. In other words, no intimation was given to the appellant that an oral hearing was to be heard.
22. The error of the judge was in failing to note that no notice of oral hearing had been sent to the appellant. There was no lawful service. That such was a material error is because she received submissions, albeit brief, from the Presenting Officer, and the appellant through no fault of his own was deprived of the opportunity of attending to speak on his own behalf.
23. In summary, the judge committed a procedural irregularity capable of making a material difference to the outcome or fairness of proceedings.
24. The decision of the First-tier Tribunal is set aside. The nature of this case is such that it is appropriate under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2 to remit to the First-tier Tribunal for an entirely fresh hearing. No findings stand. The member(s) of the First-tier Tribunal chosen to consider the case are not to include Judge Kempton.

Signed

Date 16 November 2018

Upper Tribunal Judge Conway