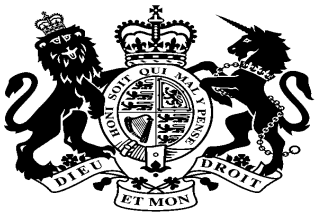

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01567/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
on 22 January 2019	**on 11 February 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

EBAH [N]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ell instructed by Duncan Lewis.
For the Respondent: Mrs R Pettersen - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Hanbury promulgated on 29th March 2018 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant, a citizen of Cameroon born on 23 January 1989, entered the United Kingdom lawfully as a Tier 4 student on 20 April 2014. Such leave was revoked as the college where the appellant was studying closed before he completed his course. On 27 April 2017 the appellant claimed asylum which the respondent refused. The appellant claims to face a real risk on return to the Cameroon as a gay man as homosexuality is prohibited in his country and he will be killed or subjected to cruel and inhumane treatment there. The appellant claims that Cameroon has an intolerant attitude to same sex relationships with wide societal prejudice and that although gay people engage in homosexual acts this has resulted in convictions and violent assaults [4]. The Judge, having considered the evidence with the required degree of anxious scrutiny, sets out findings of fact from [21]. The questions the Judge indicates are those that are to be answered are set out in this paragraph.
3. The Judge considered the documents the appellant produced which are described as 'being of such poor quality they could easily have been generated at home and did not add anything to documents already produced to the respondent', which included a French arrest warrant claiming the appellant was either a homosexual or paedophile the first dated 19 August 2009 and the second 3 February 2010. At [27] the Judge refers to the fact the documents have identical red stamps and despite being separated by a number of years the same magistrate appeared to have been involved in issuing several of them. The Judge finds he would not be surprised if they were generated by the appellant. The Judge concludes that no weight can be attached to the documents for the reasons given.
4. The Judge carefully considered the country information showing same sex activities are illegal in Cameroon and punishable by prosecution and conviction and acts of homosexuality in public are not tolerated although many people simply exercise their sexual preferences in private and that those who do so publicly may be subject to violent assaults with reports of murders of homosexuals [30].
5. The Judge considered the appellant's mental health but found he had not been supplied with sufficient evidence to reach any conclusions on any medical condition or mental health issues.
6. In relation to the first question set out by the Judge, whether the appellant's account is reasonably likely to be true, the Judge finds that having considered all the available material the appellant has given an incredible account of the events he describes, had not adequately explained why he claimed asylum late, supplied documents piecemeal to the respondent, and failed to produce any oral evidence from his witnesses to back up his own account [23]. In relation to the second question which, assuming the appellant's claim is true, is whether he will be entitled to international protection on one basis or the other, the Judge concludes that the appellant will be a discrete homosexual even if he had that

sexual inclination which fundamentally undermines his claim he will be persecuted in Cameroon or otherwise be subject to inhuman and degrading treatment that will cross the necessary article 3 ECHR threshold [37]. The Judge considers the third question, the appellant's risk on return, on the basis he does not qualify for international protection and finds the appellant failed to show he would be persecuted and concludes the appellant does not qualify under the immigration rules or any other provision of ECHR.

7. Permission to appeal was refused by another judge of the First-Tier Tribunal but granted on a renewed application by the Upper Tribunal on the basis the grounds are said to raise issues as to the procedural fairness of the hearing which proceeded in the absence of the appellant's representatives.

Error of law

8. The appellant alleges procedural irregularity sufficient to amount to an arguable error of law as he was unrepresented during the course of his asylum claim. The appellant claims he made contact with a Mr Matthew Burns on the recommendation of a friend. Mr Burns requested £500 to prepare the appeal and represent the appellant at the hearing. The appellant states he paid the money and believed Mr Burns was now acting for him and although he had no face-to-face contact with Mr Burns he was reassured repeatedly by telephone he will be in attendance on the day of the hearing. The Judge notes it then transpired that Mr Burns could not attend due to difficult family circumstances. The appellant claims he was not prepared to represent himself and had not prepared a final witness statement and was not in a position to make submissions. The appellant claims he is a vulnerable asylum seeker with mental health problems. Following the appeal the appellant sought assistance from a community organisation and was referred to Duncan Lewis; although by this time the appeal had been dismissed.

9. The Judge notes the following at [6 - 9]:

> "6. The appellant was unrepresented throughout the proceedings and attended the hearing without representation. He claimed at the hearing that he had in fact instructed a solicitor or barrister called Matthew Burns to represent him. He claimed that Mr Burns had taken £500 off him for this but he did not know his firm's name or Chambers address. They had been in touch as early as 17 January 2018, but he had received a phone call that morning (at 9.41 hours) saying that Mr Burns daughter had attempted suicide therefore he was unable to come to court to represent Mr Nzeme. I pointed out to the appellant, having checked with my usher, that no contact had been received from Mr Burns to the HMCTS and that the onus was on him secure representation at the hearing, the hearing having been listed as long ago as 20 February 2018. I indicated to the appellant that every assistance will be given to allow him to present his case fully. I refused to delay the case further for Mr Burns' attendance, if indeed Mr Burns exists and is qualified and in funds to represent the appellant. In fact, Mr Burns neither attended nor submitted any

documentation during the morning. There was no formal application to adjourn but if one had been made I would have rejected it.

7. Following the hearing a fax was forwarded to me via email on 9 March 2018 at 11.34 by HM Courts and Tribunal Service. The fax contains a handwritten letter, purporting to be written by Mr Burns, on un-headed and un-dated notepaper. There is no indication of Mr Burns' firm or other details. The letter suggests the appeal should be adjourned to permit Mr Burns to attend on a future date, as his daughter had attempted suicide on the day of the hearing.

8. Mr Burns was not on the record as a person acting for the appellant and to date I am not aware of any application being made by him to do so. I note that Mr Burns drafted a letter for the appellant on 27 January 2018 but did not indicate there that he had any legal qualifications.

9. Had the letter been brought to my attention prior to my decision to proceed with the case, I would not in any event of adjourn the case, as no proper basis for doing so has been shown. If the appellant wanted to seek legal representation he should have indicated why he had not hitherto sought to instruct a lawyer and that there is a reasonable prospect of him securing representation with funding in place."

10. The Judge notes from [10] the procedure at the hearing in which the appellant gave evidence in English, produced additional documents, and was asked a number of questions relevant to his case. The Judge notes the appellant was cross-examined. The Judge noted at [14] that the appellant handed further documents in during the course of cross-examination. It is clear that the appellant was given the opportunity and assistance to enable him to present his case in full. As noted at [18], after cross-examination had been completed the Judge gave the appellant an opportunity to clarify any points he had been asked about, of which none was forthcoming, and gave the appellant an opportunity to expand upon any points he wished to expand upon, for which he addressed the Judge.

11. It was established prior to the hearing before the Upper Tribunal that Mr Burns does exist, is a former Home Office Presenting Officer, who it is believed has been practising as a solicitor for about 10 years. There is no evidence to challenge Mr Burns commitment to his clients generally and Mrs Pettersen confirmed that she was aware that he had appeared at the Manchester Hearing Centre from time to time. There appears nothing to suggest that the unfortunate family incident referred to by Mr Burns did not occur and no suggestion that the actions Mr Burns took in light of the same was in any way unreasonable or unprofessional.

12. Mr Ell submitted that even if there was no application to adjourn, as noted by the Judge, the Judge should of his own motion considered whether the proceedings should have been adjourned. I find no arguable merit in the claim the Judge did not consider whether it was appropriate to adjourn or not. The appellant attended and advised the Judge that he was expecting his

representative but that his representative had not attended. The Judge noted there was no formal application to adjourn but considered it was appropriate on the facts of the matter to proceed, this must have included consideration of the option to proceed or not.

13. There are a number of relevant cases including *AK (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 941* in which the Court of Appeal said that where a claimant found himself unexpectedly without legal representation at a second stage reconsideration hearing, because the Appellant's representative had withdrawn the day before, and it was apparent that professional representation would be of benefit (not least because two previous judges had taken opposite views of the proper outcome) it was incumbent on the judge to consider whether the appeal could be justly determined without a fair opportunity to obtain representation. The Appellant was entitled to the opportunity, which the law allowed of a fair chance to secure representation for the hearing of an appeal which was of critical importance to him. In this case the appeal had been adjourned once before to obtain representation which was found to be needed. However, the Court of Appeal went on to say that the previous judges immediate estimate of the demands of fairness could not be conclusive. New lawyers were later found; the case was complex; research had established grounds for support for the Appellant's case as a result of which his case was not hopeless. The evidence now showed that an opportunity to find a lawyer might have made a difference and thus the judge should have adjourned the case to give the appellant a further chance to find a lawyer despite the fact that it had been adjourned once before.

14. In contrast, in *R (on the application of Bosombanguwa) 2004 EWHC 1656 (Admin)* the IAA received a fax from the claimant's solicitor on the morning of the hearing stating that they were no longer acting. The claimant asserted that he had not been aware of this. The Adjudicator proceeded to hear the appeal. Before Charles J, the claimant argued that, had he been represented at the hearing, it would have been demonstrated to the Adjudicator that there was objective evidence to support his claim and, in effect, that the appeal should have been adjourned by the Adjudicator. Mr Justice Charles said that it was for claimants to advance their case for an adjournment and there was no general duty on Adjudicators to initiate an enquiry as to whether one was required. (It was, however, arguable, assuming that there had been an application for an adjournment, that the Adjudicator had erred by not explaining why she rejected the application and, in the circumstances, by not making further enquiries as to whether the appellant had reasonably been expecting his solicitors to attend, as to what material they might have been bringing and as to whether the hearing should have proceeded. On that basis, the correct way in which to proceed was for the Tribunal to ask whether the facts now relied on by the claimant showed either that an appeal to the Tribunal would have a real prospect of success on the merits if reheard or that there was some other compelling reason for the Tribunal to hear the appeal.)

15. In *AD (Fresh Evidence) Algeria (2004) UKIAT 00155 (Ouseley)* a representative withdrew at the hearing when an Adjudicator refused an adjournment. The

appellant then decided not to give evidence. The Tribunal held that it would be wrong for an Adjudicator to grant an adjournment, which would not otherwise be merited, simply because of the withdrawal or threatened withdrawal by a representative if an adjournment is refused. The Tribunal also held that it was not impractical, even with a late change of story, for a statement to be taken prior to the hearing on the day.

16. In *DMK, Petition for Judicial Review of a decision by the Secretary of State for the Home Department [2012] CSOH 25* the IAS withdrew representation 1 week before the hearing because of differences in the Appellant's account. The Claimant asked for an adjournment because he did not have a solicitor. The Immigration Judge refused as he had had sufficient time to instruct legal representation and his case could be justly determined as all of his witnesses were present. The court held that this was not the case of a last-minute withdrawal or other failure by a prior representative. The Claimant had brought his witnesses and did not suggest that there was other evidence that he needed time to gather. It was not unusual for parties to represent themselves before a specialist tribunal. The provision of appropriate assistance to parties in such circumstances was a routine part of the work of a tribunal judge and formed part of their judicial training. Parties did not have any absolute right to be represented at fast track hearings. The Judge had exercised her discretion in a proper judicial manner and her ultimate decision was one which was open to her in the circumstances (para 46).

17. In *HH (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 504* the Immigration Judge refused to adjourn to enable the Appellant to find a representative even where the Asylum Support and Resource Team had asked for more time to review the file to decide whether to represent him. The Court of Appeal said that it was common enough for Tribunals to deal with unrepresented claimants if there was no point of law to be decided. Here the simple question was whether the Appellant had given a truthful account and the decision to refuse the application was within the discretion of the judge. Article 6 of the ECHR was not engaged. It was impossible to say that legal representation was indispensable in this case. The state was not compelled to provide the assistance of a lawyer for every dispute involving a civil point in any event.

18. The difficulty for the appellant in relation to this application, although it is accepted that the factual matrix is as he outlined and that he found himself unexpectedly without legal representation, is that it has not been made out that this is a case in which it was apparent either to the Judge or now that professional representation would be of benefit. Mr Ell was specifically asked to identify why it was apparent that professional representation would be of benefit but other than referring to the fact the appellant expected his advocate to be present, this was a protection appeal, and that a representative could have assisted, nothing of appropriate weight sufficient to justify a finding in the appellant's favour on this point was made out.

19. The Judge clearly considered the question of whether the appeal could be justly determined without a further opportunity to obtain representation making it

clear in the early part of the decision, as demonstrated by the Judge's conduct during the hearing, that the appellant was assisted at every opportunity to ensure that his case was properly put before the Judge.

20. Mr Ell was also asked whether his client had given a truthful account of his case in his evidence before the Judge which he confirmed he had. Reference was made in submissions to the fact the appellant had produced a number of documents that had not been previously disclosed, but the decision clearly shows the Judge allowed the appellant to introduce such evidence, with no application being made by the respondent claiming prejudice if the Judge did so.

21. I find the Judge did all that could reasonably be expected to ensure that the appellant had a fair hearing at which he was able to advance his case and all the evidence he sought to rely upon in both written and oral form. I find this is not a case in which it is made out that a professional representative would have provided any greater opportunity for the appellant to do so. I accept a professional representative would have been able to prepare witness statements and file appeal bundles but it has not been made out these would contain information the Judge was unable to elicit by other means.

22. It was not made out by Mr Ell that the decision to dismiss the appeal is not within the range of decisions reasonably open to the Judge on the evidence. It is also not made out that the appellant would have sought to rely on evidence not before the Judge that would have made any difference to the outcome.

23. Whilst the appellant, understandably, was concerned about the failure of his representative to attend it is clear he engaged fully with the Judge in presenting his case. I do not find the appellant has established procedural error sufficient to amount to an arguable error of law material to the decision to dismiss the appeal in the manner in which the Judge dealt with either the position that arose once it was clear Mr Burns was not in attendance and/or the manner in which the Judge conducted the hearing in ensuring the appellant had a fair hearing and the opportunity to present his case. It is clear the Judge took into account all relevant evidence, understood the factual matrix and the appellant's concerns, and understood and applied relevant legal principles before coming to the decision under challenge.

24. No arguable legal error material to the decision to dismiss the appeal is made out on any pleaded ground.

Decision

25. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

26. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 23 January 2019