Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00744/2017**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 05 June 2017	**On 20 June 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

G C
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Topstone Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Amin (FtJ), promulgated on 24 February 2017, dismissing the appellant's appeal against the respondent's decision of 12 January 2017 refusing his protection and human rights claim following a decision, dated 10 October 2014, to deport him under the automatic deportation provisions of the UK Borders Act 2007.

Factual Background

2. The appellant is a national of Sierra Leone, date of birth 23 October 1989. He claims to have entered the United Kingdom illegally in 2003. AC, his aunt, sought to regularise his status in April 2003 and applications for ILR were made

in June 2003 and March 2005, but these were refused when the deportation decision was made.

3. On 9 September 2011 the appellant was convicted in respect of 14 robberies and 5 counts of having an imitation firearm. On each of the counts of robbery he received a sentence of 6 years imprisonment, and on each of the counts of having an imitation firearm with intent he received a sentence of 2 years imprisonment. The appellant received a total sentence of 8 years imprisonment.

4. In July 2015 the appellant made an asylum claim based on his fear of unknown individuals who were said to be responsible for the death of his parents. In December 2015 the appellant signed a National Referral Mechanism claim form contending that he had been treated as a slave and trafficked into the UK. On 30 December 2015 the Competent Authority concluded that the appellant was not a victim of trafficking. On 21 January 2016 his asylum claim was refused, a certificate was issued under section 72 of the Nationality, Immigration and Asylum Act 2002, and the asylum claim was certified under section 94 of the same Act as being clearly unfounded.

5. On 2 August 2016 the appellant, through his previous representatives, made a fresh claim for asylum, this time based on his sexuality (he claimed to be gay or bisexual) and his conversion to Islam, which would place him at greater risk of being persecuted as a gay man in Sierra Leone. Although the respondent accepted the further representations as a fresh asylum claim she comprehensively rejected the appellant's claim to be either gay or bisexual, and to have converted to Islam. The respondent harboured considerable doubts as to the appellant's credibility because he could not recall the names of his partners, or the names of gay clubs and pubs that he frequently frequented. There were said to be inconsistencies in his accounts of his relationships. In his asylum interview the appellant indicated that he had only informed one acquaintance that he was gay and did not appear to have informed his own relatives, despite the fact that they were not Muslims. The respondent additionally drew adverse inferences based on the failure by the appellant to disclose his new fear of persecution when he made his earlier asylum claim. The respondent excluded the appellant from a grant of Humanitarian Protection under paragraph 339D(iii) of the immigration rules. The respondent finally considered the appellant's private life and family life rights as protected by article 8 of the ECHR and the immigration rules relating to deportations (and in particular paragraphs 398, 399 and 399A) but concluded that there were no very compelling circumstances over and above those described in paragraphs 399 and 399A.

The decision of the First-tier Tribunal

6. The appellant produced a bundle of documents before the First-tier Tribunal running to some 49 pages. This included, *inter alia*, a statement from him, statements from his adoptive mother (a Canadian citizen residing in Canada), a

witness statement from HD (the appellant's sister), and a witness statement from AC (the appellant's aunt).

7. The FtJ heard evidence from the appellant, his sister and his aunt. The FtJ concluded that appellant had not rebutted the presumption that he no longer posed a danger to the community. At [36] to [50] the FtJ gave reasons in support of her rejection of the appellant's claim to be gay or bisexual and his claim to be a convert to Islam. At [48] the FtJ noted that the appellant's sisters and aunts knowledge of his homosexuality was based on information provided by him to them and that they were only repeating what he had told them. From [54] onwards the FtJ considered the appellant's article 8 claim. At [54] the FtJ stated that the immigration rules were "a complete code for considering article 8 claims and reflects Parliament's view of what the public interest requires for the purposes of article 8(2)".

8. The FtJ thereafter considered the basis of the appellant's article 8 claim highlighting his length of residence in the UK, his claim to have integrated into the UK, his relationship with his sister and his aunt, and the absence of any known relatives in Sierra Leone. The FtJ did not accept that the appellant had integrated into the UK as his offending demonstrated a disregard for the laws of the UK and his offences were detrimental to the wider community. Although accepting that his integration into Sierra Leone would involve some difficulties and may involve some discomfort the FtJ was not satisfied that this amounted to very significant obstacles. Having regard to the fact that the appellant had no children in the UK, did not have a partner, could maintain contact with his family through modern communications and was in good health, she found that he could re-establish his private life in Sierra Leone and that there were no very compelling circumstances over and above those contained in paragraphs 399 and 399A of the immigration rules. The appeal was dismissed.

The grounds of appeal

9. The grounds challenge the FtJ's conclusion that the appellant's aunt and sister were simply repeating what he had told them, and contend that the FtJ failed to make any credibility finding in respect of the aunt and sister. The grounds argue that the FtJ failed to 'factor in' the evidence that the appellant informed his sister and aunt of his sexuality "well before any deportation proceedings and during his teenage years", and that their evidence was not challenged in cross examination. It was additionally submitted that the FtJ failed to consider evidence from the aunt that she physically met 2 of the appellant's former partners.

10. The grounds additionally content that the FtJ failed to give sufficient reasons for rejecting the evidence given by the appellant's sister that he had learning difficulties, and that the FtJ assumed the role of "expert" with reference to a letter written by him in which she saw no evidence of learning difficulties. The grounds contend that the FtJ failed to give any reasons for rejecting the

appellant's claim to be a convert to Islam, or how his conversion to Islam bolstered his claim to remain in the UK. The grounds finally challenge the FtJ's assertion that the immigration rules constitute a complete code in light of the Supreme Court decision in *Hesham Ali* [2016] UKSC 60, and that the judge failed to consider or apply the factors listed in *Maslov v Austria* [2009] INLR 47. Permission was granted on all grounds.

Submissions at the error of law hearing

11. Mr Karim adopted and expanded upon his grounds. He drew my attention to the relevant part of the witness statement from the appellant's aunt in which she described a brief conversation between her and the appellant at a bus stop in which he introduced his friend as being his partner, but then "laughed it off", and the part of the sister's statement in which she recalled the appellant once asking her opinion about gay people and her belief that he was joking when he smiled at her and said "do you know I am one". It was submitted that both events were significant to the credibility issues because they disclosed an intimation by the appellant that he was gay. Mr Karim submitted that the FtJ failed to attach adequate weight to the sister's evidence that the appellant suffered from learning difficulties, even in the absence of independent evidence of such learning difficulties, and that the FtJ erred in law by acting as an expert when assessing a letter written by the appellant. The issue of the appellant's conversion to Islam was described as a "red herring". Mr Karim finally submitted that the failure by the FtJ to appreciate that the immigration rules did not constitute a complete code was material and that she failed to apply the *Maslov* criteria.

12. Mr Melvin submitted that the FtJ's assessment of the evidence from the appellant's aunt and sister should not be read in isolation and that the FtJ gave full and detailed reasons for rejecting his claim regarding his sexual orientation. Despite the evidence from the appellant's sister relating to learning difficulties there was no independent or medical evidence confirming the existence of learning difficulties. Although the FtJ may have mistakenly stated that the immigration rules were a complete code this was not material to the decision as the FtJ undertook a full article 8 assessment. In any event, that *Ali* had not lowered the significant hurdle which must be overcome by a foreign criminal to succeed in demonstrating that it would be disproportionate to deport him from the United Kingdom, and the FtJ had in fact considered all of the *Maslov* factors. I reserved my decision.

Discussion

13. Mr Karim's 1st ground takes issue with the FtJ's approach to the evidence from the appellant's aunt and sister. At [28] the FtJ considers the evidence given by the appellant's aunt and sister and disagrees with their description of the appellant's offending as a 'mistake' and 'an unfortunate incident'. The FtJ found that it was natural for the appellant's aunt and sister to minimise his

involvement in the offending. In so doing the FtJ did not hold that the evidence from the aunt and sister was incredible, or that they were giving untruthful evidence. Giving valid reasons in support the FtJ disagreed with the opinion expressed by the aunt and sister. This was a conclusion rationally open to the FtJ. The focus of Mr Karim's submissions however relates to the alleged failure by the FtJ to properly consider the evidence given by the aunt and sister in relation to their knowledge of the appellant's sexual orientation.

14. It is necessary to consider the evidence given by the appellant's aunt and sister in more detail. In AC's statement, at paragraph 15, she recalled meeting the appellant one day at a local bus stop with a male friend. He introduced his friend as his 'partner', but both of them laughed it off, so she thought he was joking. AC saw the appellant in the company of the same person a few times 'hanging around the house' but she never thought they were in a relationship until the appellant expressly informed her that he was gay and in a relationship with a boy called John. AC does not indicate when the incident at the bus stop occurred. In her statement, at paragraph 11, the appellant's sister recalled the appellant once asking her opinion about gay people. The appellant apparently smiled and said 'do you know I am one?' His sister thought the appellant was joking and brushed the topic aside. The appellant's sister does not indicate when this incident occurred. Both the sister and aunt believed that the person claimed by the appellant to be his partner was simply a friend.

15. The absence of any timescale in which the appellant's utterances to his aunt and sister occurred is significant as his earlier asylum claim was refused in January 2016 and his fresh protection claim based on his sexual orientation was made in August 2016. The only date provided by either the appellant's aunt or sister in respect of his express assertion to them that he was gay was July 2016, when the appellant informed his sister that he was gay and was in a gay relationship. The evidence from the appellant's aunt and sister do not support the assertion contained in the grounds of appeal that he informed them of his sexuality "well before any deportation proceedings and during his teenage years." Further, while there was no challenge in cross examination to this evidence, and the FtJ did not find that the witnesses were giving untruthful evidence, the FtJ correctly stated that the sister and aunt were wholly reliant on what the appellant told them. Whilst the aunt, in oral evidence, did indicate that she met 2 of the individuals whom the appellant claimed were former partners, she explained that she was not aware of their sexual orientation at the time. It is clear from a holistic assessment of the evidence that, when the appellant's sister and aunt met the individuals now claimed to be former partners, they regarded them as friends of the appellant and no more.

16. In determining whether any failure by the FtJ to make adequate findings in respect of the evidence from the appellant's aunt and sister was material it is also necessary to contextualise the evidence from the aunt and sister against the totality of the other unchallenged adverse credibility findings. From [36] to [47] the FtJ identifies a number of factors that seriously undermine the appellant's

claim to be gay. These included inconsistencies in the appellant's account of when his relationships commenced, his inability in his asylum interview to give the full names of his partners, his inability to name any of the clubs or pubs he claimed to have frequently attended with his partners, and his failure to mention his sexual orientation or his conversion to Islam in respect of his earlier asylum application. In the absence of any clear chronological framework in which to posit the brief conversations described by the appellant's sister and aunt, and having regard to the nature of the conversations and the other cogent reasons relied on by the FtJ in rejecting the appellant's account of his sexual orientation, I am not satisfied that the absence of any express reference to these conversations materially undermines the safety of the FtJ's findings of fact.

17. I see no merit in the 2nd ground of appeal. The evidence provided by the appellant's sister intimating that he suffered from learning difficulties was unsupported by any independent or medical evidence. It is for the appellant to discharge the burden of proof in a protection claim, albeit to the lower standard. While the sister may genuinely believe that the appellant suffers from learning difficulties the FtJ was entitled, for the reasons given, and in the absence of any independent supportive evidence, to find that he did not suffer from learning difficulties. Nor did the FtJ fall into legal error in relying on a letter written by the appellant making representations against deportation as evidence that he did not have learning difficulties. The FtJ was not unlawfully acting as an expert but making a necessary and relevant evaluation of the evidence before her.

18. In respect of the appellant's conversion to Islam, Mr Karim submitted that this was a "red herring". If it was a red herring it was one advanced by the appellant in his asylum claim. He maintained that he would be at greater risk as a gay Muslim man in Sierra Leone. The FtJ, at [42] to [45], gave detailed reasons for rejecting the appellant's claim to be a convert to Islam. This was a conclusion rationally open to the FtJ on the evidence before him and for the reasons given.

19. Grounds 4 and 5 relate to the appellant's article 8 human rights claim. I accept Mr Karim's submission that the FtJ erred in referring to the immigration rules relating to deportations as being a complete code. In the light of *Hesham Ali* the immigration rules do not amount to a complete code.

20. In Hesham Ali the Supreme Court stated, at [51] and [53]

> In *MF (Nigeria)* [2014] 1 WLR 544 the Court of Appeal described the new rules set out in para 23 above as "a complete code" for article 8 claims (para 44). That expression reflected the view that the concluding words of rule 398 required the application of a proportionality test in accordance with the Strasbourg jurisprudence, taking into account all the article 8 criteria and all other factors which were relevant to proportionality (para 39). On that basis, the court commented that the result should be the same whether the proportionality assessment was carried out within or outside the new rules: it was a sterile question whether it was required by the rules or by the general law (para 45).

…

> 53. As explained at para 17 above, the Rules are not law (although they are treated as law for the purposes of section 86(3)(a) of the 2002 Act), and therefore do not govern the determination of appeals, other than appeals brought on the ground that the decision is not in accordance with the Rules: see para 7 above. The policies adopted by the Secretary of State, and given effect by the Rules, are nevertheless a relevant and important consideration for tribunals determining appeals brought on Convention grounds, because they reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In particular, tribunals should accord respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders, and also consider all factors relevant to the specific case before them, as explained at paras 37-38, 46 and 50 above. It remains for them to judge whether, on the facts as they have found them, and giving due weight to the strength of the public interest in deportation in the case before them, the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate.

21. In *EA v Secretary of State for the Home Department* [2017] EWCA Civ 10 the Court of Appeal held, at [19], that *Hashem Ali* had "… not lowered the significant hurdle which must be overcome by a foreign criminal to succeed in demonstrating that it would be disproportionate to deport him from the United Kingdom." Moreover, *in NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239, a Court of Appeal decision in which sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 were considered (unlike *Hesham Ali*), Sir Stephen Richards stated, at [14],

> Part 5A of the 2002 Act, by contrast [to the immigration rules], is primary legislation directed to tribunals and governing their decision-making in relation to Article 8 claims in the context of appeals under the Immigration Acts. I see no reason to doubt what was common ground in *Rhuppiah* and was drawn from *NA (Pakistan)*, that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8. In particular, if in working through the structured approach one gets to section 117C(6), the proper application of that provision produces a final result compatible with Article 8 in all cases to which it applies. The provision contains more than a statement of policy to which regard must be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is one to which the tribunal is bound by law to give effect.

22. It is clear from the above authorities, and in particular the extract above from *NE-A*, that the approach identified in section 117C must be followed by a Tribunal and that the appellant would need to demonstrate the existence of very compelling circumstances over and above exceptions 1 and 2. Section 117C effectively mirrors the immigration rules at paragraphs 398 to 399A. The FtJ was clearly aware of her statutory obligation to consider and apply the factors in section 117C. In the circumstances I do not find that her mistaken categorisation of the immigration rules as a complete code amounts to a material error. From [54] to [60] the FtJ considered the appellant's article 8 claim taking full account

of his length of residence and his relationship with his family in the UK. Although the FtJ did not make reference to the case of *Maslov* of by name she did take into account the criteria identified in that case. The FtJ was entitled to find that the appellant had not integrated into the United Kingdom by reason of his serious criminality and the absence of any evidence to show any positive contribution to UK society. The FtJ was clearly aware of the length of time the appellant resided in the UK and his age when he arrived in 2003. The FtJ considered the relationship between the appellant and his aunt and sister but was entitled to conclude that these relationships could continue through remote forms of communication. The FtJ considered that, whilst the appellant may face difficulties in integrating into Sierra Leone society, these were outweighed by the serious nature of his criminality. Having considered the appellant's circumstances and the impact of his deportation on his relationship with his aunt and his sister the FtJ was entitled to conclude that there were no very compelling circumstances justifying a grant of leave to remain on the basis of article 8.

23. In the circumstances I find that the FtJ did not materially err in law and I formally dismiss the appeal.

Notice of Decision

The First-tier Tribunal did not materially err in law. The appeal is dismissed.

Signed

Upper Tribunal Judge Blum Date 19 June 2017

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Upper Tribunal Judge Blum Date 19 June 2017