



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: PA/06520/2018**

**THE IMMIGRATION ACTS**

**Heard at Manchester Civil Justice  
Centre  
On 6 February 2019**

**Decision and Reasons Promulgated  
  
On 28 February 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**LOT [H]**

**(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr Holmes instructed by GMIAU

For the Respondent: Mr C Bates Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Appellant was born on 8 June 1989 and is a national of Namibia.
3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Tobin promulgated on 31 October 2018, which dismissed the Appellant's appeal against a refusal of a refugee claim dated 4 May 2018 on all grounds.

#### Grounds of Appeal

4. Mr Holmes relied upon 4 grounds of appeal in relation to which First-tier Tribunal Judge Blundell had granted permission.
  - (a) Ground 1 that the Judge had gone behind a concession made by the Respondent (paragraph 44-50 of the refusal letter) that the Appellant was a gay man and had been attacked by family members on two occasions because of his sexuality in August 2016 and April 2017.
  - (b) Ground 2 that the Judge failed to apply the Refugee Convention that he repeatedly referred to the Appellant *only* being persecuted by family members as if to suggest that this was therefore not persecution. Thus the Judge failed to adequately consider state protection and internal relocation.
  - (c) Ground 3 that the Judge failed to adequately engage with the expert report in particular in relation to the likely attitude of the state and internal relocation.
  - (d) Ground 4 that the Judge made adverse findings about the actions of the Appellants family at paragraphs 23 and 28 and the police at paragraph 19 while providing no basis for these findings.
5. Mr Holmes and Mr Bates had an opportunity to discuss the case before it was called on. Mr Bates made clear that he conceded that errors of law were made out on all of the grounds.

#### **Finding on Material Error**

6. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

7. The refusal letter explicitly conceded that the Appellant had been '*attacked in Namibia because of your sexual orientation*' as a gay man by family members on two occasions. The Judge however while recoding this concession at paragraph 5 of the decision went on at paragraphs 19-23 of the findings to consider these incidents and rejected his claim that he was attacked by family members in the way he describes. While the Judge states at paragraph 26 that he rejected only one of the two incidents that is far from clear in the findings as both appear to be rejected. There is nothing to suggest that the Respondent indicated that this concession was withdrawn at the hearing and while the Tribunal is not obliged to accept the concession, it must indicate to the parties that it regards the concession as wrongly made and give the parties an opportunity to address the matter and there is no indication that this was done. The failure of the First-tier Tribunal to follow the concession without alerting the parties of his intention to do so constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
8. Mr Bates properly conceded that having accepted that the Appellant was a victim of persecution at the hands of his family the key issues were sufficiency of protection and internal relocation neither of which are not addressed by the Judge and in particular he fails to engage with the expert report in so far as it addresses those issues.
9. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters to be redetermined afresh.
10. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25<sup>th</sup> of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:
  - (a) *the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*

*(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.*

11. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure to follow concessions. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.
12. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed, before me.

Signed

Date 6.2.2019

Deputy Upper Tribunal Judge Birrell