



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: PA/11200/2018**

**THE IMMIGRATION ACTS**

**Heard at Manchester Civil Justice**

**Decision & Reasons Promulgated**

**Centre**

**On 20 March 2019**

**On 22 March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**HENRI [D]**

**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr C Holmes instructed by Ashwood Solicitors

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

**DECISION AND REASONS**

### Introduction

1. No anonymity direction was made previously in respect of this Appellant. I consider it unnecessary to make an order.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hudson promulgated on 28 November 2018, which dismissed the Appellant's appeal on all grounds.

### Background

3. The Appellant was born on 26 May 1985 and is a national of Cameroon.
4. On 16 March 2018 the Appellant applied for asylum on the basis that he was gay and would be at risk on return to Cameroon.
5. On 6 September 2018 the Secretary of State refused the Appellant's application.

### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Hudson ("the Judge") dismissed the appeal against the Respondent's decision.
7. Grounds of appeal were lodged arguing that the Judge (i) failed to take into account material factors;(ii) adopted plausibility as a criterion to determine how individuals ought to have acted and (iii) failed to apply Upper Tribunal guidance on the treatment of witness evidence.
8. On 8 January 2018 First-tier Tribunal Judge McCarthy gave permission to appeal on all grounds and on the additional basis that having accepted that the Appellant had joined LGBTQ groups and therefore the Judge was required to consider whether he might be perceived to be gay on return because of such activity.

## **Discussion**

9. Mr Bates conceded that the errors raised in the grounds were made out and both parties agreed that the decision should be remitted to the First Tier for a complete re hearing.

## **Finding on Material Error**

10. Having heard those submissions and read the decision I reached the conclusion that Mr Bates was correct to concede that the errors of law raised in the grounds were made out and were material errors of law.
11. This was a claim based on risk on return as a gay man in Cameroon. Any assessment of such a risk must examine, inter alia, whether the Appellants conduct was such that he might be received as a gay man in accordance with the guidance given in HJ Iran. The Appellant's claim that he was involved in an organisation called CAMFAIDS was accepted by the Judge at paragraph 22 but the Judge did not accept that this would result in him being perceived to be gay. The Judge failed in reaching that conclusion to engage with the material at page 54 of the bundle which recorded that the leadership of CAMFAIDS had been summoned for the 'promotion of homosexual practices.' I also note that in granting permission Judge McCarthy observed that having recognised that 'perception' was part of the assessment and having accepted that the Appellant had attended Manchester Gay Pride and joined various LGBTQI organisations he was at risk of being perceived to be gay. These errors 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.
12. In relation to the second ground that the Judge adopted a test of plausibility in relation to the behaviour of gay men and their sexual relationships and general behaviour Mr Bates conceded that he was uncomfortable with some of the findings made by the Judge. He accepted that it was not open to the Judge to make an adverse credibility finding on the basis that the male (Samuel) propositioned by the Appellant (paragraph 19) did not immediately respond to his advances. Having found that such relationships were risky in Cameroon she allows for only two responses- an immediate yes or no and fails to allow for the

possibility that he may have wanted to consider whether he was prepared to take the risk of engaging in such a relationship.

13. Ground 3 also argued that the Judges approach to the evidence of the witness Mr Jones was flawed relying on the guidance found in R (on the application of NK) v The Secretary of State for the Home Department IJR [2015] UKUT 00431 (IAC). The Judge gave no weight to the fact that the facilitator of an LGBTQI group and Church elder who is himself gay accepted the Appellant was gay based on his behaviour and engagement with the LGBTQI males as she found that his own sexuality was irrelevant. The Upper Tribunal case accepted that this was in fact a matter the Judge could take into account: *'it was not just a decision made on what the applicant had told them but because of their own experiences and their own sexuality'*
14. 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.
15. 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.*
16. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the approach to the evidence. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.

17. 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 20.3.2019

Deputy Upper Tribunal Judge Birrell