



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

Appeal Number: PA/02806/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28<sup>th</sup> October 2019**

**Decision & Reasons  
Promulgated  
On 05<sup>th</sup> November 2019**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**E T M  
(ANONYMITY DIRECTION MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss U Dirie of Counsel, instructed by the Cardinal Hume Centre

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Hussain promulgated on 7 August 2019, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 20 February 2018 was dismissed.

2. The Appellant is a national of Cameroon who first arrived in the United Kingdom with leave to enter and remain as a Tier 4 student until 27 June 2015. He subsequently made a number of unsuccessful applications for an EEA Residence Card and claimed asylum in 2017. The basis of the Appellant's claim was that he would be at real risk of persecution on return to Cameroon as a gay man.
3. The Respondent refused the application the basis that the Appellant's account was considered to be inconsistent, lacking in detail and implausible; such that it was not accepted that he was gay, nor at risk on return to Cameroon as such. No separate human rights matters were accepted for a grant of leave to remain on private life or health grounds either.
4. The Appellant's appeal was initially dismissed by First-tier Tribunal Judge Mailer in a decision promulgated on 26 April 2018 but remitted to be heard de novo in the First-tier Tribunal following the finding of an error of law by Upper Tribunal Judge Gleeson in a decision promulgated on 27 September 2018. The Appellant's appeal was again dismissed on all grounds by First-tier Tribunal Judge Hussain in a decision promulgated on 7 August 2019. In that decision, the Appellant was found not to be a credible witness who had made a very late claim for asylum, such that section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 applied. The adverse credibility findings were made primarily in paragraph 13 and the decision went on to include the following:

*"14. The appellant now claims to be in a relationship with [A]. He attended and adopted his witness statement at page 11 of the appellant's bundle. In particular he identified himself as gay and said that he was in a relationship with the appellant and knew the appellant as gay also as they spend a lot of time together. I did not find the evidence of [A] reliable and consequently do not accept that he and the appellant are in a relationship as claimed. This is because whilst both claim to have been in a relationship for about 5 months, having had the opportunity to observe the appellant and [A], there was a distinct absence of affection between them. Similarly there was an absence of outward signs of any commitment between them such as shared personal or financial commitments, or signs of affection such as gifts or support.*

*15. I also heard evidence from [...] of the Croydon Area Gay Society (CAGS). I also heard evidence from [...] of UK Lesbian and Gay Immigration Group. All attended and supported the appellant in his claim to be gay. Whilst I accept all to be sincere in their support I do not accept their view of the appellant. This is because all appear to have a limited knowledge of the appellant who only appear to have been approached after he claimed asylum or his last negative immigration decision. Their evidence of support fails to detract from the considerable adverse credibility of his own evidence. The evidence from [...] was most revealing when he stated that he could not be sure whether the appellant*

*was gay. I find the appellant accessed these organisations or befriended these individuals in an attempt to bolster his claim for asylum."*

## **The appeal**

5. The Appellant appeals on two main grounds. First, that the First-tier Tribunal materially erred in law in failing to consider the delay in the Appellant's asylum claim in the context of the complexity of disclosure of sexual orientation and that in this case, the claim was only made after the Appellant's brother found out about his sexuality and he ceased to support him and his application for an EEA residence card. There was further documentary evidence that was not considered in the round. Secondly, the First-tier Tribunal materially erred in law in rejecting the Appellant's current relationship on the basis of observations in the hearing which were entirely inappropriate and in failing to consider the supporting documentary evidence about the relationship. Further, there was a failure to give reasons for rejecting the evidence of four other witnesses and more generally a failure to consider the totality of the evidence before the Tribunal.
6. At the oral hearing, the parties were in agreement that the First-tier Tribunal materially erred in law and that the decision should be set aside and remitted to the First-tier Tribunal for a de novo hearing. In particular, Mr Kotas submitted that in paragraph 14 there was an impermissible reliance by the Judge on observation of the Appellant at the hearing which was of itself a material error of law.

## **Findings and reasons**

7. As properly accepted by the Respondent, I find a material error of law in the First-tier Tribunal's decision specifically in relation to the findings in paragraph 14. It is wholly inappropriate and impermissible for a Judge to base findings on whether a person is in a relationship on observations made during an appeal hearing. Not only are such observations inappropriate but they are highly unlikely to be fair or accurate. An appeal hearing is a formal occasion in which public displays of affection would not necessarily be expected, but in any event, in the context of this particular claim, would arguably be even less likely. This is in addition to the fact that the level of public affection shown by any person in any relationship is not indicative one way or another as to whether they are in a genuine relationship.
8. Further, the First-tier Tribunal Judge placed weight on the absence of shared personal or financial commitments or signs of affection such as gifts. In the context of a relatively short relationship of five months without cohabitation, it is unreasonable to expect shared personal or

financial commitments; and the absence of the same is again not indicative either way of whether there is a genuine relationship.

9. There is, contrary to the impermissible reasons relied upon by the First-tier Tribunal Judge, no reference at all to the actual evidence given by the Appellant's claimed partner or to the supporting documentary evidence, including *whatsapp* messages, photographs and letters from friends.
10. In these circumstances there is a clear error of law in the Tribunal's assessment of whether the Appellant is in a relationship as claimed which clearly has a material impact on the overall question of whether the Appellant is gay and therefore at risk on return to Cameroon, regardless of the other adverse credibility findings made. This error alone is sufficient to require the decision to be set aside and remade. For completeness, I deal more briefly with the other grounds raised by the appellant.
11. In relation to the delay in claiming asylum, I find that the First-tier Tribunal also erred in failing, in accordance with the principles in A, B, C v Staatssecretaris van Veiligheid en Justitie (Cases C-148/13 - C-150/13) to consider the full context of the claim as to whether there is a reasonable explanation for the delay in making it and thus whether section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 should apply to this case.
12. Finally, in relation to the other witnesses, the reasons given for rejecting the evidence are relatively brief but alone I would not find that this was a material error of law. However, the reasons are arguably inadequate and in light of the above, the appeal must be re-heard in any event such that this evidence will be considered afresh by a de novo Tribunal.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit it to the First-tier Tribunal (Hatton Cross hearing centre) to be heard de novo by any Judge except Judge Mailer or Judge Hussain.

### **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 their 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 

Date 30<sup>th</sup> October 2019

Upper Tribunal Judge Jackson