



IAC-FH-CK-V1

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

Appeal Number: PA/06184/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 11 March 2020**

**Decision & Reasons
Promulgated
On 19 March 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**CN
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, Counsel, instructed by AC Gilead Solicitors
For the Respondent: Ms S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. This is a remade decision following the identification of a material legal error in the decision of Judge of the First-tier Tribunal Ripley, promulgated on 2 September 2019, dismissing the appellant's appeal against a decision dated 14 June 2017 by the respondent refusing his protection and his human rights claim.
2. In an 'error of law' decision promulgated on 17 January 2020 the Upper Tribunal satisfied itself that Judge Ripley acted in a

procedurally unfair manner by drawing an adverse inference based on her belief that the appellant and SM, his claimed same-sex partner, met in June 2019 in circumstances where neither of them referred to such an encounter and where the issue was not put to the witnesses or raised with the appellant's legal representative. Despite a range of other adverse credibility findings made by Judge Ripley the Upper Tribunal found, albeit by a narrow margin, that the identified legal error was material and required the judge's decision to be set aside.

3. The Upper Tribunal retained jurisdiction to determine the appeal and it was listed for a de novo hearing. As there had been no challenge to the accuracy of the recording of the oral evidence from the appellant and SM, as set out in the First-tier Tribunal judge's decision, the Upper Tribunal indicated that, in re-making the decision, it would be entitled to consider the oral evidence that was given by the appellant and SM in the First-tier Tribunal.

Background

4. The appellant is a national of Cameroon, born in 1982. He entered the United Kingdom on 23 August 2009 as a Tier 5 Migrant. His leave was subsequently extended until July 2015. Thereafter he made applications for further leave to remain, but these were refused and he became an overstayer. On 19 December 2016 the appellant applied for asylum. He claimed that he was gay and that he feared persecution from his family and society in general in Cameroon.
5. I summarise the appellant's claim. He became attracted to boys when he was around 15 years old. When he was at school he felt like he liked boys, and his feelings were realised when he was secretly kissed by another boy at a party; he felt a 'current' flowing through him. He had a secret relationship with someone in Cameroon when he was 20, although this person was now deceased. After he entered the UK the appellant was taken by a friend to a gay sauna in Vauxhall and started to go every weekend. The appellant's Facebook posts, and his activities identified through Facebook, made after he entered the UK, caused people in Cameroon to question his sexual orientation and this came to the attention of his father. His father telephoned the appellant and asked if he was gay, but the appellant did not give an answer. The appellant returned to Cameroon in December 2014 but his father refused to see him. His father died from a heart attack on 27th December 2014 and the appellant soon returned to the United Kingdom following threats made by his paternal uncle. The appellant attends gay nightclubs and bars and Gay Pride events in the UK, has gay and lesbian friends, and is a member of a gay gym. In 2015 he formed a relationship with SM, who is a national of Sierra Leone and is a recognised refugee whose refugee status was premised on his sexual orientation. They met on Adam4Adam, an online gay dating website. SM lives in Manchester and the appellant lives in London but

they travel to see each other. The appellant was living an openly gay life in the UK and feared being persecuted in Cameroon if he was openly gay.

6. The respondent did not accept that the appellant was gay. She considered he gave a vague explanation for his realisation of his sexual orientation and that there were inconsistencies in his account. The appellant exercised his right of appeal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002. His appeal was dismissed by another First-tier Tribunal judge on 8 August 2017 but this decision was set aside by the Upper Tribunal on 19 June 2018 and remitted for a fresh hearing before Judge Ripley on 12 August 2019.

The oral evidence given at the hearing before judge Ripley

7. In his oral evidence at the hearing in August 2019 the appellant claimed he had last seen SM when he visited Manchester in May or June 2019, but SM's oral evidence was that they had last seen each other in London in July 2019. SM believed the appellant last came to Manchester in March 2019. SM stated that he was busy with work and had spent time with the appellant twice in 2019 by the date of the hearing, which was less than that suggested by the appellant in his evidence.

The documentary evidence lodged with the Tribunal

8. The respondent's bundle contained, inter alia, the screening and asylum interviews and the Reasons for Refusal Letter. The appellant produced a bundle for the First-tier Tribunal hearing on 18 April 2018 running to 97 pages and including, inter alia, the appellant's membership contract with Sweatbox dated 14 November 2016, official documentation confirming the appellant's email address, email correspondence to the appellant's email address from Adam4Adam using the username 'AndyJohn', including his membership email dated 3 November 2012, confirmation that the appellant used a different username for the website Adam4AdamLive, which he joined in February 2016, various photographs of the appellant and SM (including some at gay pride events), and letters by several individuals attesting to the appellant's homosexuality.
9. A 2nd bundle of documents prepared for the First-tier Tribunal hearing in 2019 contained evidence of the appellant's travel to Manchester on various dates in 2017 and 2018 and further photographs of the appellant and SM, a 2nd statement from the appellant dated 12 June 2019, and further letters by individuals attesting to the appellant's homosexuality. The bundle additionally contained invoices relating to SM's stay at Premier Inns in London in 2017. A bundle prepared for the Upper Tribunal hearing on 11 March 2020 included a further contract between the appellant and Sweatbox dated 5 May 2019 and

many screen shots of communication between the appellant's Adam4Adam username and other individuals in 2013, 2014, 2016 and 2017. At the hearing the appellant produced a Christmas card he claimed was sent by SM. At the hearing the appellant, after being requested to do so by myself and in the presence of both representatives, produced a large number of text messages on his mobile phone between him and SM and a voice note recording made by SM. I have taken account of all these documents in reaching my decision.

The hearing

10. The appellant adopted his statements and confirmed he had been in a relationship with SM since 2015. SM was not present at the hearing. The appellant described how he had an argument with SM following the First-tier Tribunal hearing on 12 August 2019 relating to when they had last seen each other. The appellant informed a friend of what happened at the hearing and this friend then contacted SM. SM was angry about this phone call and shouted at the appellant on the phone. SM then refused to answer the appellant's texts or calls throughout September to November 2019. SM did however extend an olive branch by sending the appellant a Christmas card, which the appellant produced at the hearing. They started exchanging text messages again and talking, although the appellant was doing most of the talking. After receiving notice of the resumed hearing the appellant asked SM to attend the Upper Tribunal hearing. SM said he would ask his manager for time off but that he was having problems at work, he was stressed and his mother was sick. SM's manager did not respond to him even when the appellant asked SM a week before the hearing whether he was coming. The appellant claimed that SM had left him a voice note on WhatsApp saying he was still awaiting his manager's reply.
11. In cross-examination the appellant explained that Sweatbox closed for refurbishment in 2018 and the appellant had to reregister with the company in 2019. When asked to explain why he had to different usernames, one for Adam4Adam, the other for AdamAdamLive, he explained that the latter was an associated website offering communication through webcams. The appellant claimed that, although he was in a relationship with SM, he still wanted to make friends with other gay men. The appellant claimed he had mentioned the threats from his uncle when he returned to Cameroon in his asylum interview.
12. After the cross-examination I asked some questions by way of clarification. I reminded the appellant of his oral evidence relating to his text communication with SM and his evidence of a voice note left by SM on WhatsApp. I asked the appellant to explain why he did not produce any of this evidence. The appellant immediately said that the

evidence was on his mobile phone and offered to give his phone to the Tribunal. At this point I asked the appellant to place his mobile phone on the table in view of both representatives. I indicated to the representatives that I was prepared to consider evidence of text communication between the appellant and SM if it appeared on the mobile phone, and to hear the voice note if that was also available. I asked both representatives to stand simultaneously behind the appellant whilst he accessed this information to ensure there was no addition or deletion of any messages. After rising for a short time to enable this to be done I was provided with the appellant's mobile phone and invited to consider the text messages and the voice note. Neither representative raised any issue as to the possibility of fabrication or addition or deletion of the evidence on the appellant's mobile phone, or in respect of the identities of individuals whose messages were being considered.

13. There were many text messages between the appellant and SM. A significant number of the messages sent by the appellant to SM used terms of endearment. For example, the word "dear" was used by the appellant on several occasions when enquiring about SM. The appellant would often text "good morning dear" or "good evening dear". Among the text messages were requests from the appellant asking whether SM would be able to attend his next hearing. SM first answered, "I have to see if I can get time off from my work." There were then several other messages from SM referring to his manager and indicating that he has been very busy at work, that his life was stressful and that his mother was sick. Many of the text messages discussed what the appellant and SM had been doing. One text message describing a meal the appellant had prepared ended with a love heart symbol. Other messages contained the symbol for kisses and lips and other love heart symbols. On occasion the appellant sent messages such as "good morning love". The appellant sent a digital Valentine's Day card to SM and his message read "happy Valentine's Day sweetie pie". Other text messages sent by the appellant included "how was your night Sweetheart?", "Good night love", "good evening my beloved", "good evening Sweetheart". In his voice note SM explained that his manager had not been in the office, that his mother was still sick, and that SM was still waiting for his manager's approval to enable him to attend the hearing.
14. In re-cross-examination the appellant explained that he shared a room with 3 other family friends and that it was therefore impossible for SM to spend the night at the appellant's place of residence. It was for that reason that SM stayed in hotels when he visited London.
15. Both parties made submissions which are a matter of record and which I have fully considered.

Legal principles

16. The burden of proof in asylum claims rests on the appellant, and the standard of proof is whether there is a 'real risk' of the appellant being subjected to treatment sufficiently serious to amount to persecution.
17. In **HJ (Iran) v SSHD** [2007] EWCA Civ 1024 the Supreme Court mandated a sequential four-stage test when determining whether a person would be at risk of persecution on the basis of their sexual orientation.
 - (i) Is the appellant gay, or is he someone who would be treated as gay by potential persecutors in his country of origin? If no, the claim should be refused. If yes:
 - (ii) Do openly gay people have a well-founded fear of persecution in the country of origin? If no, the claim should be refused. If yes:
 - (iii) In respect of his sexual orientation, on his return, will the appellant be open? If yes, he is a refugee and his claim should be allowed. If no:
 - (iv) If he would not be open, but rather live discreetly, is a material reason for living discreetly that he fears persecution? If yes, he is a refugee and his claim should be allowed. If no, then his claim should be refused.
18. In her submissions Ms Jones clarified that the central issue to be determined was whether the appellant was gay. She confirmed that if I was satisfied the appellant was gay then the respondent accepted, applying the **HJ** principles, that he would face a well-founded fear of persecution in Cameroon, that the state would be unable or unwilling to offer him a sufficiency of protection and that internal relocation would not be an available option.

Findings of fact and conclusions

19. The respondent did not find that the appellant gave a credible account in his asylum interview of how he came to realise that he was gay. Having considered the totality of the asylum interview, I cannot agree with the respondent's view. In my judgement the appellant gave a coherent and plausible account of how his understanding of his sexual orientation developed (see paragraph 5 above for a summary of the appellant's account). The appellant's explanation of how he felt a 'current' pass through him when he was first kissed by another boy at a party has a strong ring of authenticity. In his 1st statement he explained that he thought having feelings for other boys was abnormal and he pretended to his friends that he was more interested in books than girls to deflect any perception that he was

attracted to boys. This is a credible description of how he dealt with his feelings as a youngster. The appellant's awareness of his own feelings towards boys when he was at school, and the furtive kiss at a party that precipitated his full realisation, is a plausible narrative of a person's initial awareness of their sexual identity.

20. The appellant has now provided cogent and persuasive evidence that he has been registered with a gay dating website (Adam4Adam) since November 2012. The relevant documentation, unchallenged by Ms Jones, established the link between the appellant's personal email address and the username he used on the website. The date that the appellant joined the dating website is relevant as it was nearly 3 years before he became an over stayer and when he still had lawful leave to remain in this country. The screenshots produced in his 3rd bundle of documents demonstrate beyond doubt that he received and sent messages using the website in 2013, 2014, 2016 and 2017. Although I cannot entirely discount the possibility that the appellant may have been 'laying the tracks' for making a future asylum claim on the basis of his sexual orientation, I do not find this is likely to be the case, and certainly not on the lower standard of proof. The fact that the appellant was actively using a gay dating website since 2012 supports his claim to be a gay man.
21. The appellant gave a plausible account of his membership of Sweatbox, a gay sauna in Oxford Street, and this was supported by registration documents dating from 2016 and 2019 and a photograph of him at the sauna. The appellant's claim that Sweatbox closed for refurbishment for several months in 2018, requiring him to re-register, was not challenged by Ms Jones in her submissions and is inherently plausible. The appellant gave details of a gay bar he frequented in Soho, both in respect of the interior and surrounding area, the accuracy of which has not been challenged, and his claim to have attended gay pride festivals is supported by photographs. Whilst I am aware that anyone may attend a gay pride festival, this nevertheless remains a factor to take into account, one to be considered 'in the round'.
22. I had concerns at the outset of the hearing that SM was not present. Given the importance of hearing for the appellant and the significant consequences that would flow from its dismissal, and in light of the adverse credibility findings made by Judge Ripley, I was surprised by SM's absence. Although the appellant offered a detailed account of an argument he claimed to have had with SM following the hearing in the First-tier Tribunal and the efforts that were made to re-establish the relationship, the appellant's solicitors failed to serve on the Tribunal any supporting evidence. Neither Mr Gajjar nor Ms Jones sought to ascertain from the appellant whether he possessed any evidence supporting his claimed contact with SM and SM's explanation for not attending the hearing. It was only when I asked questions by way of

clarification that the appellant made mention of his mobile phone. The evidence contained in the WhatsApp text messages and the voice note would not have otherwise have come to light. This is significant as it supports the reliability and the authenticity of the digital evidence.

23. The text messages and the voice note, the contents of which have been outlined at paragraph 13 above, strongly support the appellant's account of his relationship with SM and his explanation for SM's absence at the hearing. This evidence has turned what might otherwise have been an implausible explanation into one upon which I can attach weight. Moreover, the entirely unsolicited evidence of the text messages between the appellant and SM strongly suggest, at the very least, emotional intimacy between them and is supportive of the appellant's claim to have been in a genuine relationship with SM, even if that relationship is now precarious and unstable. Ms Jones suggested that a Valentine's card can be sent by anyone to anyone. This, with respect, entirely misses the context in which the Valentine's card was sent and the fact that it was sent from one adult man to another adult man. No mention had been made by the appellant of the digital Valentine's Day card until I enquired about his text messages. The fact that the appellant sent a digital Valentine's Day to SM, and the endearing terms of his communication with SM, together with the fact that SM has been recognised as a refugee based on his sexual orientation, the evidence of the appellant's trips to Manchester, the photographs of the appellant and SM in both Manchester and London, the hotel receipts relating to SM's stays in London and the explanation offered by the appellant for why they could not stay at his residence, and the statement from SM confirming their relationship, all support the appellant's claim to have been in an intimate relationship with SM.
24. I appreciate that both the respondent and the previous judge identified some legitimate concerns surrounding the appellant's relationship with SM. In his asylum interview in 2017 the appellant initially gave the wrong year for SM's date of birth, although he subsequently corrected this within the same interview giving SM's full date of birth. SM had only provided a very short statement for the appellant's initial asylum claim, but he subsequently produced a more detailed statement and attended the previous appeal hearing. There was inconsistent oral evidence before Judge Ripley relating to when the appellant and SM had last seen each other, and when appellant last came to Manchester, and how often they had seen each other in 2019. This suggests that the relationship between the appellant and SM was much more strained than the image presented by the appellant at the First-tier Tribunal, and this embellishment is likely to have accounted for the inconsistencies in the evidence between the appellant and SM. I do not however find, applying the lower standard of proof and having holistic regard to the evidence before me, that

the existence of the relationship itself has been fabricated. Whilst the appellant had attempted to embellish the relationship, I am entirely satisfied, based on the unsolicited WhatsApp communication, that the relationship is, or at least was, genuine.

25. I do not however accept that the appellant was threatened by his paternal uncle. In his asylum interview the appellant was asked whether any family member said anything to him following the death of his father. Although the appellant claims he informed the interviewer that his uncle threatened him, this is not recorded in the asylum interview. No attempt was made to correct the interview record after it was given to the appellant and no complaint was lodged against the respondent for this alleged omission. Given the importance of this threat I am not persuaded that it was omitted from the interview record. If a threat was made to the appellant's life this would have been an important factor in his asylum claim. The failure of the appellant to mention this in his asylum interview undermines his claim regarding the threat from his uncle. I find the appellant has embellished this aspect of his claim. This does not however mean that he has lied in relation to the other elements of his case, although I take the lie into account when assessing the credibility of the appellant's claim to be gay and his claim as a whole.
26. Whilst I am bound to consider the appellant's delay in claiming asylum as damaging his credibility under section 8 of the Asylum and Immigration (treatment of claimants, etc.) Act 2004, I must determine what weight to attach to the delay taking account of all relevant circumstances and the particular facts of his case (**JT (Cameroon) v SSHD** [2008] EWCA Civ 878). In his asylum interview the appellant explained that he did not claim asylum immediately because he was lawfully present in the UK and hoped to be able to obtain settlement through his lawful residence. Making an asylum claim is a relatively drastic measure and the appellant's claim that he hoped to be able to reside in the UK without doing so is a credible explanation when considered in the context of his immigration history and my other credibility findings.
27. Whilst there were several letters from individuals attesting to their knowledge of the appellant's sexual orientation, none of these individuals attended the hearing. There was therefore no opportunity to test their evidence. In these circumstances I find I can place very little weight on their letters.
28. Despite rejecting the appellant's claim that he was threatened by his uncle, and despite having found that he embellished his relationship with SM to some degree, I am persuaded, having cumulative regard to the totality of the appellant's evidence and for the reasons given above, that he is a gay man. I accept that the appellant lives an openly gay lifestyle in this country, having regard to his frequenting

gay nightclubs and bars, gay pride events, and through his use of a gay dating website.

29. Ms Jones accepted that, if I find the appellant was gay, then he would hold a well-founded fear of persecution in Cameroon if he lived his life openly, and that internal relocation would not be an option. This position is, to a significant extent, reflected in the Country Policy and Information Note - Cameroon: Sexual orientation and gender identity or expression (February 2020). After summarising the treatment of gay people by the government and by society in general (2.4.3 to 2.4.14), the CPIN concluded at 2.4.15, "In general, LGBTI persons are likely to face mistreatment from state and societal actors which, by its nature and frequency, may amount to persecution. Each case, however, needs to be considered on its facts, with the onus on the person to demonstrate that they face such a risk." The CPIN states that same-sex sexual relations are prohibited, and sexual minorities are afraid to go to the police as once their sexual orientation is known they are at risk of abuse or extortion by police officers. If the appellant were to live as an openly gay man in Cameroon, there is a real risk his conduct would be likely to come to the attention of the authorities. There is therefore a real risk that he would not receive a sufficiency of protection from the authorities. At 2.6 the CPIN explains that, in general, given the widespread societal and state hostility towards and discrimination against LGBTI persons, it will not be reasonable for a person to relocate, although each case must be considered on its particular facts. Given that the appellant will want to live as an openly gay man and in light of the treatment of gay people by society and the government, I am not satisfied that an internal relocation option would be available, even if this was not already conceded by Ms Jones. In his statements and his oral evidence before me the appellant maintained that he feared being persecuted if he was open about his sexual orientation in Cameroon. I am therefore satisfied that a material reason for the appellant living discreetly as a gay man in Cameroon would be as a result of his fear of persecution. I am consequently satisfied that the appellant is entitled to refugee status under the 1951 Refugee Convention and that his asylum appeal must be allowed.

Notice of Decision

The appellant's asylum/protection claim is allowed

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.

D.Blum

13 March

2020

Signed

Date

Upper Tribunal Judge Blum