



**Upper Tribunal  
(Immigration and Asylum Chamber)  
AA/10444/2014**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 9<sup>th</sup> March 2016**

**Decision & Reasons  
Promulgated  
On 10<sup>th</sup> May 2016**

**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

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

Appellant

**And**

**PATRICK JAMES PAUS BANYA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr J Parkinson  
For the Respondent: Halliday Reeves

**DECISION AND REASONS**

1. This is the Secretary of State's appeal against the decision of Judge Robson made following a hearing at Bradford on 3<sup>rd</sup> July 2015.
2. The claimant is a citizen of Sierra Leone who arrived in the UK as a student in 2001. He was convicted at the Hull Crown Court of five counts of

supplying a controlled drug on 24<sup>th</sup> July 2007 and sentenced to a term of imprisonment of 42 months.

3. A deportation order against him was signed on 11<sup>th</sup> July 2008. He subsequently applied for asylum, was refused and his appeal rights were exhausted from 27<sup>th</sup> August 2010.
4. On 26<sup>th</sup> August 2011 he was convicted of possessing with intent to supply crack cocaine and heroin and sentenced to six years' imprisonment. He was notified on 3<sup>rd</sup> March 2014 that the Secretary of State intended to exclude him from protection under the 1951 Convention pursuant to Section 72 of the Nationality, Immigration and Asylum Act 2002. On 19<sup>th</sup> November 2014 the Secretary of State considered further representations and granted a right of appeal against refusal.
5. The judge considered all of the oral and written evidence and concluded, at paragraph 95:
  - (a) the claimant was a child soldier as claimed;
  - (b) he did suffer abuse as claimed; and
  - (c) as a result of being a child soldier and the consequences of the same he has suffered from posttraumatic stress disorder.
6. He said that the claimant would be at risk of ill-treatment under Article 3 of the ECHR but, since the claim was not one of asylum but one under the Human Rights Convention, he could disregard the exclusion imposed by Section 72.
7. He then wrote:

“In view of the above I do not propose to address the issue of the appellant's claimed sexuality/bisexuality save as follows. Although I have seen the objective evidence in relation to the appellant's claimed sexual inclinations I note that he says he has been able to conduct his activities discretely within the UK even though it appears that his family were aware of his claimed sexuality. Whilst he said that he might well take a different view in Sierra Leone were the opportunity to arise, that is of a relationship, I do not accept that he would in fact do other than practise his sexuality discretely.”
8. He allowed the appeal on humanitarian protection grounds.
9. The Secretary of State sought permission to appeal on the grounds that the judge had misapplied the standard of proof in stating that it was possible that, should people become aware that he had been a child soldier, he would be at risk on return. Moreover he had abdicated the requirement for a decision maker to make express findings on material matters.
10. Permission to appeal was granted by Judge Bird on 28<sup>th</sup> August 2015.

11. Although the claimant defended the determination in relation to the burden of proof, he accepted that the determination was flawed for the reasons argued by the Secretary of State, particularly since there was no analysis in the determination as to why he would be at risk on return.

### **Notice of Decision**

12. The judge erred in law.

13. First, there is a misapplication of the standard of proof. The judge said that:

“It is possible, and I cannot put it higher, that should people become aware that he had been a child soldier, that would put him at risk on return”.

A possibility of risk is lower than the correct threshold which is whether there is a reasonable degree of likelihood of risk.

14. Second, the judge failed to identify what the risk was to the claimant. He has been out of Sierra Leone for fifteen years and did not provide evidence of how persons there now would have been aware of his past.
15. Third, the judge was obliged to make findings on the issue of the claimant’s sexuality since this was a ground of appeal before him.
16. Accordingly the decision is set aside and remitted to the First-tier Tribunal. The next judge will be required to deal with all of the grounds of appeal.
17. Paragraph 95 as set out above is preserved. There has been no challenge to the findings of fact in this determination. Both parties asked that the matter be listed for a CMR in the first instance.

No anonymity direction is made.

*Deborah Taylor*

Signed

Date 4 May 2016

Upper Tribunal Judge Taylor