



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07055/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 28 October 2021

Decision & Reasons Promulgated
On 18 November 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Dieu instructed by JD Spicer Zeb Solicitors

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

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant, who claims to be a citizen of Afghanistan, but has been found by the First-tier Tribunal to be a citizen of Pakistan, was born on 17 March 1989.
3. The appellant claims to have most recently arrived in the United Kingdom clandestinely on 9 January 2019. He claimed asylum on 26 January 2019. The basis of his claim was that he is an Afghan citizen who is at risk on return to Afghanistan as a gay man.
4. On 24 July 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR. The Secretary of State did not accept that the appellant was a national of Afghanistan and concluded that he was, in fact, a national of Pakistan. In addition, the Secretary of State did not accept that the appellant was gay and so would be at risk on return whether to Afghanistan or Pakistan on that basis.

The Appeal

5. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Solly on 21 October 2019. The central issues at that hearing were first, the appellant's nationality and secondly, whether he is gay. The appellant gave evidence before Judge Solly as did "RE" (a British citizen) with whom the appellant claimed to be in a gay relationship in the UK.
6. In a decision promulgated on 29 October 2019, Judge Solly rejected the appellant's claim to be an Afghan citizen and found that he is a citizen of Pakistan. Further, Judge Solly did not accept that the appellant is gay and, therefore, at risk on return to Pakistan. As a consequence, she dismissed the appellant's appeal.
7. The appellant appealed to the Upper Tribunal. He did not seek to challenge the judge's finding that he is a citizen of Pakistan. Instead, he challenged the judge's finding that it was not established that he was gay and so at risk on return.
8. Following the refusal of permission to appeal by the First-tier Tribunal on 23 December 2019, the Upper Tribunal (UTJ McWilliam) granted the appellant permission to appeal on 9 January 2020.
9. Following a rule 24 response filed by the Secretary of State on 28 January 2020 and pursuant to directions issued by UTJ Allen, together with responses from the appellant and respondent dated 28 April 2020 and, 13 May 2020 and 29 April 2020 respectively, the error of law issue was determined by UTJ Allen under rule 34 without a hearing in a decision promulgated on 14 August 2020.
10. In that decision, UTJ Allen accepted that Judge Solly had materially erred in law in reaching her adverse finding that the appellant had not established that he is gay and so at risk on return to Pakistan. At para 17, UTJ Allen concluded as follows:

“But bringing these matters together it does seem to me that the judge erred materially in her conclusions as to the appellant’s sexuality and on that basis, and that basis only, the appeal requires to be reconsidered. There is no challenge to the findings on nationality or with regard to risk on return on account of his work for AADA and the threat from the Taliban or others in that regard. The risk on account of sexuality requires to be reconsidered in the light of proper findings being made on the appellant’s sexuality. To that extent this appeal is allowed. I direct that it be reheard in the Upper Tribunal since, as I say, the other credibility findings are preserved”.

11. The appeal was listed before me at the Cardiff Civil Justice Centre on 28 October 2021 to re-make the decision as contemplated by UTJ Allen in his earlier decision.
12. At that hearing, the appellant was represented by Mr Dieu and the respondent by Mr Bates. I heard oral evidence from the appellant and RE. The appellant gave his evidence with the assistance of a Tribunal appointed interpreter.

The Issues

13. It was common ground between the representatives that there were two factual issues that required resolution:
 1. Has the appellant established that he is gay?; and if so,
 2. How would the appellant behave in Pakistan? Would he be “open” or discreet and, if the latter, would that be in order to avoid persecution or for another reason.
14. Mr Bates accepted, on the basis of the Home Office’s *CPIN* “Pakistan: Sexual Orientation and Gender Identity or Expression” (July 2019) that if the appellant establishes that he is gay and that he would either behave openly in Pakistan or would be discreet in order to avoid persecution, then he would be at real risk of persecution on return to Pakistan for a Convention reason and he could not be expected to internally relocate.
15. Mr Bates referred me to the relevant paragraphs upon which his concession was based. He did not accept that the appellant would be at risk from the Pakistan authorities relying on paras 2.4.3–2.4.6. However, the appellant would face a real risk of persecution from non-state actors due to his sexual orientation which followed from para 2.4.18 and that the state could not provide adequate protection followed from paras 2.5.4–2.5.5. Finally, if the appellant is gay and would openly express his sexuality in Pakistan or would only not do so in order to avoid persecution then, on the basis of paras 2.6.2 and 2.6.4–2.6.5, Mr Bates accepted that the appellant could not be expected to internally relocate.
16. Mr Dieu accepted that that was the basis of the appellant’s asylum claim in this appeal.
17. In the result, the two factual issues, based upon credibility determinations in relation to the appellant and RE, were accepted by the representatives as determining the outcome of the appeal.

18. In addition, it was accepted that my relevant factual findings had to be made in the context of three matters found by the First-tier Tribunal:
1. The appellant has been found not to be telling the truth about his nationality.
 2. The judge accepted that RE to be a credible witness and found that RE is gay and is in a sexual relationship with the appellant.
 3. The judge accepted that RE believes that the appellant is gay and that he and the appellant are in a genuine same-sex relationship.

The Law

19. The burden of proof is upon the appellant to establish that there is a reasonable likelihood, or that there are substantial grounds for believing that there is a real risk, that he will suffer persecution on return to Pakistan (which is his country of nationality as found by the judge) for a Convention reason, namely that he is a member of a particular social group (PSG) as a gay man in Pakistan.
20. It is not suggested that in Pakistan gay men do not form a PSG. Indeed, the Home Office's *CPIN* at para 2.3.3 accepts that "LGBTI persons in Pakistan form a PSG".
21. Applying the approach in HJ (Iran) v SSHD [2010] UKSC 31 (especially at [82] per Lord Rodger), it is also common ground between the parties that, if the appellant is gay, and on return to Pakistan he acts 'discreetly' in order to avoid persecution, then he has established his asylum claim. If, however, the appellant would choose to live discreetly because that is how he would wish to live or because of social pressures, but not in order to avoid persecution, then he would not have established a well-founded fear of persecution for a Convention reason. As I have already pointed out, it is accepted by Mr Bates that if the appellant is, in fact, gay then he could not live openly in Pakistan without there being a real risk of persecution.

The Evidence

22. The principal evidence relied upon was that of the appellant and RE, his claimed partner. What follows is a summary of the relevant statements and oral evidence.

The Appellant

23. As regards the appellant, in his oral evidence he adopted his two written statements which were before the First-tier Tribunal. The first dated 12 August 2019 is at pages 1-8 of Part B of the bundle. The second dated 20 September 2019 is at pages 1-3 of Part C of the bundle.
24. In adopting those statements, the appellant maintained his claim that he is an Afghan citizen who had been married in Afghanistan but had had been encountered in a field having sex with another man. This caused the appellant to leave his home and travel to Kabul where he, with the aid of an agent, went to Lahore in Pakistan where

he stayed for a couple of months before coming to the UK by plane on 10 March 2011. He claimed that he remained in the UK until the end of 2013. Whilst in the UK he had a gay relationship with a man from Hong Kong who was a student in the UK and whom he met at a club. He also had a relationship with another man. He claimed that he returned to Afghanistan at the end of 2013 and went into hiding. He went to Jalalabad where he worked for an NGO called AADA from 2016. He also attended secretly Bacha Bazi dances which were only attended by gay men. He claimed that he was attacked by the Taliban in 2018 and that he came back to the UK, via Iran and a number of European countries, arriving clandestinely by lorry in January 2019. He was detained when he was caught trying to go to Ireland by flying to Belfast from Bristol Airport.

25. In his oral evidence, confirmed in his written statements, the appellant maintained that he is in a gay relationship with RE. He said that they had met in a club in London; it was a gay club called "Heaven". This was in 2019. The appellant said that RE had been in the club with his friends - girls and boys - but he did not remember exactly but they were there. The appellant's evidence is that he and RE exchanged numbers and began texting and speaking to each other on the telephone. They then met in person again and began a sexual relationship in April 2019. They met at a friend's house and started dating properly in May 2019. On their dates they would stay in and order food whilst watching a movie and having a drink together. They would sometimes go to clubs in Soho such as GAY and Heaven. The appellant says that they were together until approximately June 2019 when, because RE was living and working in London and the appellant was living in Swansea, they were not spending much time together and they decided that it was "best to have a break". They kept in contact and in August 2019, they met again at a friend's house and had dinner together and their relationship began once more.
26. In his oral evidence, the appellant was asked about these events. In examination-in-chief, the appellant said that he and RE still lived in Swansea and London respectively. He said that he could not go to London easily as he did not have the financial means to travel. However, RE came to Swansea sometimes and they met once or twice a month. He did sometimes go to London to see RE. He said that they messaged and chatted on the phone every day.
27. In relation to their initial meeting in the "Heaven" nightclub, he confirmed that RE had friends with him, and was not alone, when they met.
28. During their relationship, the appellant said that he had not talked to any of RE's friends. RE had, however, met some of his (the appellant's) friends. He named two, "Fareed" and "Abdul".
29. When asked about his meeting with RE at a "friend's place" in April 2019, the appellant said that he did not know the name of the friend. He confirmed that it was in Hayes in Middlesex. He said that he had never met RE's friend who owned the house.

30. When asked about the meeting in August 2019, again at a friend's house where the appellant and RE had dinner, the appellant said he did not remember the name of the friend. He was also unable to remember how many were present because he was drunk and could not now remember.
31. The appellant was asked about who, other than RE, knew about his sexuality. He said that others did know. In Swansea, his friends knew but he did not know their names; they were people who he played football and tennis with. He said they knew about his sexuality because he did not do friendships with girls. He said he knew their surnames but not their other names. He said he had never thought about asking any of these individuals to give evidence on his behalf.
32. As regards RE, he confirmed that RE's family did not know about RE's sexuality. He was asked why RE's family did not know and he said it may be because of embarrassment or because he might be afraid of being "kicked out of the house" and he is a manager at his workplace. When he was asked whether he knew these things, he said he did not know - he guessed. He confirmed that RE lived with his family, namely his mother, sister and brother but he did not have a father.
33. The appellant confirmed that he had not joined any LGBTQ organisations in the UK and when asked what that term "LGBTQ" meant said it represented gay rights. He said he had not attended any Gay Pride celebrations in the UK because they were in London. However, he did accept that events took place in Swansea but he had not been to any. He was not aware whether RE had ever attended any such events because they had not talked about it.
34. The appellant was asked about whether people were aware that he is gay and he referred to a friend from Hong Kong. He said he was no longer in touch with anyone from that time but there were others that knew about his sexuality.
35. The appellant said that RE stayed with him in his accommodation when he came to Swansea. He said that he lived in shared accommodation; it is NASS accommodation and he had his own room. He said that the people he shared with were not aware of his sexuality but they did have suspicions. He said he did not introduce RE as his boyfriend to the people with whom he shared the accommodation because they would make a joke out of it and he was embarrassed. He said that he did and could reveal his sexuality in the UK. But, he did not want to cause hatred and he was sharing a house with a majority of Muslims so he kept quiet. He was asked whether he had ever asked to move to accommodation where he could be more open and he said that he had once spoken to the manager but he had been told he had no choice.
36. The appellant was asked about his claimed partner RE and what qualities attracted him to RE. He said that he was "sweet" and he was "good" in the appellant's eyes. He said that RE helped him out and RE is happy with the appellant and he is happy with RE. He said they had discussed living together but not where they would live; they had talked about staying together.

37. In re-examination, the appellant was asked whether he was open with people in the UK with his sexuality and whether he ever went out to places together with RE. He said that he did and when asked whether they displayed affection towards each other, the appellant said that they did.

RE

38. The second witness was RE who adopted his statement dated 20 September 2019 which is at pages 4-6 of Part C of the bundle. He says he met the appellant in March 2019 at a Soho club where they began talking and exchanged telephone numbers. He says they started texting each other and speaking on the telephone and they met a few times in April 2019 before they began a sexual relationship. In his witness statement, RE says that they met at a friend's place as his family were unaware of his sexuality. They started dating properly in April 2019 after speaking on a daily basis. They went on dates when they stayed in and ordered food while watching a movie and having a drink together. They would sometimes go to clubs together in Soho.
39. In his statement, RE says they were together until approximately June 2019 when they became distant as he (RE) was working quite a bit due to a promotion and that he lived in London whilst the appellant lived in Swansea. They kept in contact and in August 2019, they met at a friend's house, had dinner together and realised that they wanted to be back together. Their relationship began again at that point. In his statement, RE says that he has developed a lot of feelings for the appellant. They are extremely close and try to spend as much time together as possible. They speak each day and try to go on dates as much as they can.
40. In his oral evidence, RE confirmed that it was still the case that his own family was unaware of his sexuality because it was a difficult situation his brother and sister would not like it.
41. In cross-examination, RE when asked how he would describe his sexuality. He said that he is a "gay man". He said that two or three of his friends were aware of his sexuality but they are not people that he sees in person. They were not part of his active friendship group. They were just on social media. He said that the friends that he physically saw were unaware of his sexuality. He said he would not describe himself as openly gay.
42. RE was asked about the time when he said he had met the appellant at a club but, he said, he could not remember the name. He said he was with one friend there but not with them at the point when he met the appellant. He said he had gone together with his friend but they were not together in the club at that time. It was a gay club. He said his friend was aware of his sexuality but he did not see him anymore, just online. He said that he was only there with one friend.
43. RE was asked about the friend's house at which he and the appellant met but he said he could not remember who the friend was. When he was asked that it must have been a significant meeting and why did he not remember the friend, RE said it was just someone he knew. He said that they were sometimes present when the

appellant and he met and then he said maybe it was "Jack". When asked whether his friend was aware of his sexuality, RE said he presumed so, he was not providing us with a house RE said, we were just "hanging out" there.

44. RE said that he and the appellant, having split up, and possibly had got back together late August or possibly mid-August. They had been apart for a couple of months. When they got back together, he said that they had met up at the same friend's house and they had gone for walks in the area. He said they had not met up at a "dinner party" but had just been having dinner at the house. He said that he and the appellant had been present and had dinner together and also the friend was present. When asked whether anyone else was there, RE said the house was shared but it would not be right to say that the others were present. RE said that they had no mutual friends who knew about their relationship. When asked whether he knew any of the appellant's friends, RE said they led separate social lives, his in London whilst the appellant was in Swansea. They had "general chit chat" but did not necessarily know each other's friends. However, when it was suggested to him that the appellant said that he (RE) knew some of the appellant's friends, RE said, off the top of his head, that he knew "Fareed" and "Abdul". He said that he believed he had met "Fareed". He was not too sure whether "Fareed" was aware of their relationship. It was not something that came up in conversation and he did not have enough information to answer.
45. RE said that he lived with his mother, brother and sister. When asked whether he was openly affectionate in public, RE said it depended on the situation - in London they were not but in Swansea they were. He said that he was "100%" satisfied that the appellant was being honest about their relationship. When asked what made him so confident in saying that, RE said it was difficult to say but the appellant did not lie to him. He said they were in a relationship; they had good times together; and he had no reason not to believe him. He said that the appellant was honest with him.
46. He was asked about how it was possible to be more open in Swansea, RE said that in London they walked more at a distance apart and there were no photographs but in Swansea he could hug the appellant in public and be closer. Asked whether they ever held hands in public, RE said sometimes but not in London.
47. RE was asked whether they had ever talked about any previous same-sex relationships and RE said yes but the appellant had not given any names. The appellant had talked about Afghanistan but that was quite a while ago that he mentioned it. He was asked whether they had ever discussed the possibility of living together and RE said "briefly" but it was more about putting the idea out there. They had not specifically discussed where that might happen but RE said he guessed it would be somewhere in London.
48. Asked about the appellant's accommodation in Swansea, RE said it was shared and there were other rooms. He was asked whether he had met any other people in the accommodation and had been introduced to them or spoken to them. He said he had not necessarily been introduced; there were brief interactions, he was not really there

to see the other people. RE said that as far as he knew the appellant was living openly in Swansea. He was asked whether, as regards the friends that had been mentioned, the appellant talked as if they knew of his sexuality. RE said it was not something that came up in conversation and not something that they were really talking about. He was asked whether they went to any clubs in Swansea and RE said no. They went to a nice Afghan restaurant near the station and otherwise they just walked, had takeaways and watched movies, stuff like that.

49. RE was asked whether he had any reason to doubt the appellant's sexuality and he replied "no".
50. There was no re-examination.

The Submissions

51. On behalf of the respondent, Mr Bates relied upon the decision letter dated 24 July 2019 as a starting point.
52. Mr Bates accepted that there were preserved facts concerning the appellant's nationality and also in relation to the witness RE.
53. Mr Bates relied upon the fact that the appellant continued to maintain the false narrative of being an Afghan national contrary to the judge's finding. Mr Bates submitted that the respondent did not accept that the appellant had gone back to Afghanistan, having come to the UK, as he claimed. He submitted that the appellant had been in the UK since he arrived in 2011. Mr Bates submitted that the respondent did not accept his account about entering the UK otherwise.
54. Mr Bates submitted that the appellant was not a witness of truth. His claim relied entirely upon the evidence of the witness, RE. There was no evidence from anyone else to support the appellant's claim. There was no evidence from anyone who may know him and know of his sexuality. There was no evidence from anyone with whom he shared accommodation in Swansea. The appellant had said that he had approached the manager of the accommodation with a view to moving so that he could be more open but there was nothing from the manager.
55. Mr Bates submitted that there were some discrepancies in the evidence. He submitted that neither the appellant nor RE knew the name of the friend whose house they had been in in April or August 2019. There were also inconsistencies about how many people had been with RE when he had initially met the appellant in the Soho club in April 2019.
56. Mr Bates submitted that ultimately the issue rested on the credibility of RE. He said that it had not been appropriate to cross-examine RE on his sexuality. Clearly they were friends as evidenced by the fact that RE had travelled from London to Cardiff to give evidence. Mr Bates asked rhetorically whether their relationship was a same-sex relationship or was it one of friendship? He accepted that they did not have to

have corroboration and that I should determine the factual issue on the basis of the oral evidence.

57. Finally, Mr Bates submitted that there was no evidence that the appellant would be open about his sexuality if he returned to Pakistan. There was no evidence of him being open in the UK with RE. He had been here over ten years. He invited me to find that the appellant would be discreet on return, just as he had in the UK. He asked me to dismiss the appeal.
58. On behalf of the appellant, Mr Dieu submitted that the Secretary of State's case was now that RE was actively making up what he said was his interaction with the appellant. That was against the finding of the First-tier Judge who had found RE to be credible in all respects. Mr Dieu submitted that the evidence was simply not there that RE had schemed to make up with the appellant an account of how they interacted and the nature of their relationship. He submitted that I could rely upon RE's evidence and their daily contact and that they met once or twice a month and that RE was 100% sure of the appellant's sexuality.
59. Mr Dieu submitted that to the extent that the respondent relied on the decision letter that raised points doubting the appellant's sexuality, these largely related to expectations of how a gay man would realise or experience his sexuality. He submitted that that was not appropriate.
60. Mr Dieu accepted that there were some discrepancies on the face of the evidence but even in a genuine relationship there had to be a tolerance for differences of recollection.
61. As regards how the appellant would behave on return to Pakistan, Mr Dieu submitted that the appellant was open about his sexuality when he was "out and about" in the UK even if not with those other asylum seekers with whom he shared accommodation which he had explained on the basis of a difference in their faith and being afraid of causing hatred amongst them.
62. Mr Dieu invited me to find that the account of RE and the appellant as to his sexuality was credible and to find that he is gay. Further, he invited me to find that on return, as in the UK, the appellant would be open in Pakistan about his sexuality and would, as a result, applying HJ (Iran) be at risk of persecution.

Discussion and Findings

63. The burden of proof is upon the appellant to establish his asylum claim on the lower standard. On the central issues in dispute in this appeal, as a part of that burden, he must establish that there is a reasonable likelihood or real risk that he is a gay man and would be at risk on return due to his sexuality in Pakistan.
64. It is, of course, as I have already pointed out, accepted by the respondent that if the appellant is a gay man and he would either act openly in Pakistan or would act discreetly in order to avoid persecution in Pakistan, then he is at risk on return from

non-state actors against whom the Pakistan state would be unable or unwilling to provide a sufficiency of protection. Internal relocation would not be a viable option.

65. My factual findings turn, in essence, upon the credibility of the appellant and, as Mr Bates accepted in his submissions, the credibility of RE and whether I accept his evidence that he is 100% sure that he is in a genuine same-sex relationship with the appellant.
66. In approaching the issue of credibility I note the guidance given by the Upper Tribunal in KB & AH (credibility – structured approach) Pakistan [2017] UKUT 491 (IAC). In the judicial headnote the UT said this:

“1. The 'Credibility Indicators' identified in the Home Office Asylum Policy Instruction, Assessing credibility and refugee status Version 3.0, 6 January 2015 (which can be summarised as comprising sufficiency of detail; internal consistency; external consistency; and plausibility), provide a helpful framework within which to conduct a credibility assessment. They facilitate a more structured approach apt to help judges avoid the temptation to look at the evidence in a one-dimensional way or to focus in an ad hoc way solely on whichever indicator or factor appears foremost or opportune.

2. However, any reference to a structured approach in relation to the subject matter of credibility assessment must carry a number of important (interrelated) caveats, among which are the following:

-the aforementioned indicators are merely indicators, not necessary conditions;

-they are not an exhaustive list;

-assessment of credibility being a highly fact-sensitive affair, their main role is to help make sure, where relevant, that the evidence is considered in a number of well-recognised respects;

-making use of these indicators is not a substitute for the requirement to consider the evidence as a whole or 'in the round';

-it remains that credibility assessment is only part of evidence assessment and, as Lord Dyson reminded decision-makers in MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 at [33], 'the significance of lies will vary from case to case';

-in the UK context, use of such a structured approach must take place within the framework of EU law governing credibility assessment, Article 4 of the Qualification Directive in particular; and,

-also in the context of UK law, decision-makers (including judges) by s. 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are statutorily obliged to consider certain types of behaviour as damaging to credibility.

3. Consideration of credibility in light of such indicators, if approached subject to the aforementioned caveats, is a valid and useful exercise, based squarely on existing learning.”

67. I bear in mind that important indicators in reaching factual findings are: sufficiency of detail, internal consistency, external consistency and plausibility. However, the

assessment of credibility is necessarily “fact-sensitive” taking into account all the evidence in the round.

68. In respect of “credibility” and “plausibility”, the Court of Appeal’s observations in the trafficking/modern slavery case of R(MN and IXU) v SSHD [2020] EWCA Civ 1746 at [127] merit repetition here:

“127....The term "credibility" is used a good deal in the context both of asylum appeals and of decisions whether a person is a victim of trafficking, and we have detected a tendency to treat it as having some special technical meaning. But in truth it connotes no more than whether the applicant's account is to be believed. In making that assessment the decision-maker will have to take account all factors that may bear on that question. Likewise the term "plausibility" is not a term of art. To say that a particular account, or element in that account, is implausible is simply to say that it seems to the decision-maker to be inherently surprising, or the kind of thing that you would not normally expect to happen; and such an assessment will obviously feed in to the overall assessment of credibility, though the weight to be given to it will depend on the degree of unlikelihood and how confident the decision-maker can be about it. Perhaps both points are too obvious to need making; but if terms are used too regularly they sometimes get in the way of the process of common sense decision-making.”

69. In this appeal, there is a preserved finding of fact that the appellant lied about his nationality. He claimed to be an Afghan citizen but the judge found that that was untrue and, in fact, he is a Pakistan national. Judge Solly did not accept the appellant’s connected narrative to that nationality. In particular, she did not accept that the appellant had come from Afghanistan and that the events that he claimed occurred in Afghanistan had in fact occurred. As UTJ Allen made clear in his error of law decision, apart from the judge’s adverse finding in relation to the appellant’s sexuality, the remaining adverse credibility findings in relation to the appellant made by Judge Solly are preserved. Indeed, the appellant did not seek to challenge those findings at the error of law stage. Consequently, the appellant’s evidence concerning those events has been rejected and there is no basis for going behind Judge Solly’s findings as regards those matters even though the appellant, in cross-examination, maintained expressly that he is an Afghan citizen.
70. The appellant, therefore, in this appeal begins with that adverse finding both in relation to his nationality and, importantly, that he has lied about it. Indeed, in his evidence before me, the appellant maintained in cross-examination that he was an Afghan citizen. However, the fact that the appellant has been found to have previously lied about his nationality, and as a result the narrative that he constructed around that, does not mean that he is necessarily lying about other matters, such as his sexual orientation.
71. In Uddin v SSHD [2020] EWCA Civ 338, the Court of Appeal reminded Tribunal Judges of the direction given to juries in criminal cases concerning the relevance of a defendant’s lie in relation to one matter in assessing the veracity of the defendant’s evidence in relation to other matters. This is the so-called “Lucas direction”. At [11], the Senior President of Tribunals (Sir Ernest Ryder) said this:

“11. I note in that regard the conventional warning which judges give themselves that a person may be untruthful about one matter (in this case his history) without necessarily being untruthful about another (in this case the existence of family life with the foster mother's family), known as a 'Lucas direction' (derived in part from the judgment of the CACD in *R v Lucas* [1981] QB 720 per Lord Lane CJ at 723C). The classic formulation of the principle is said to be this: if a court concludes that a witness has lied about one matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. That is because a person's motives may be different as respects different questions. The warning is not to be found in the judgments before this court. This is perhaps a useful opportunity to emphasise that the utility of the self-direction is of general application and not limited to family and criminal cases.”

72. I remind myself of that self-direction. I agree with the view expressed by David Lock QC (sitting as a Deputy High Court Judge) in *T(TVN) v SSHD* [2021] EWHC 3019 (Admin) at [31] that:

“[i]t is an essential standard of fairness to be observed by anyone who is having to make a judicial, quasi-judicial or even administrative decisions.”

73. Although, in this appeal, the appellant maintains that he did not lie as he maintains that he is, and was, an Afghan national. Nevertheless, I bear in mind that there are many reasons why an individual might lie about the narrative of his account in a foreign country but not necessarily be lying about other matters, such as his private life in the UK including his sexual orientation.
74. As Mr Bates submitted, there are discrepancies in the evidence given by the appellant and RE concerning the details of their accounts of their life in the UK. There are some differences as to precisely who was in the club with RE when the appellant and RE first met. There are also gaps in their respective knowledge concerning, for example, the name of the friend in whose house the appellant and RE met. These are matters which are relevant when assessing the credibility of the appellant and RE himself. There is a need for caution in attaching significance to minor discrepancies in the account of a witness (or between witnesses) on matters that may be somewhat peripheral (see, e.g. *R(MN and IXU) v SSHD* at [168]: said in the analogous context of a trafficking/modern slavery claim). It is curious, at least, that RE does not know the name of the friend whose house he met the appellant in. However, equally, if as Mr Bates was suggesting in his submissions, the appellant and RE have concocted a story which has now been the subject of cross-examination at two Tribunal hearings, it might be surprising that they would not agree on the name of a friend as part of that fabrication.
75. By contrast, in their accounts the appellant and RE are mostly consistent. They are consistent as to when they met and, apart from some details, the circumstances of that. They are also consistent about meeting at a friend's house for dinner in April and August 2019. They are also consistent on how they interact now: living apart in Swansea and London respectively and that they meet up a couple of times a month and are in contact otherwise by phone and social media. They are also consistent that RE has been discreet with his family and has not told them that he is gay. Also,

RE correctly identified two of the appellant's friends by name: "Fareed" and "Abdul".

76. There was evidence that the appellant has not discussed with his housemates (who are also asylum seekers) his sexuality and his relationship with RE even though RE visits him at that house. However, the entirely plausible explanation for that is that the appellant fears the implications of disclosing to housemates who are Muslims his sexual orientation and relationship with RE.
77. The underlying characteristic of their respective accounts is a total lack of exaggeration. If, as Mr Bates suggests, the appellant and RE have actively made up their relationship, they have done so without 'crossing every t' and 'dotting every i'. The plain fact of the matter is that, in everyday life, accounts given by two witnesses even of their shared private life may not precisely match. Their accounts are, in my judgment, essentially consistent with the nature of the relationship that the appellant and RE claim to have, namely living at a distance, visiting occasionally and maintaining contact by phone and social media and, at least in London, not openly presenting as a same-sex couple because of RE's reluctance to be generally open about his sexuality.
78. That latter point, in my view, provides a plausible explanation for the lack of supporting witnesses from either the appellant or RE. Whilst the appellant said, in his evidence, that he had talked about his sexuality with friends with whom he played sport, I do not consider it to be of any great significance that such individuals did not attend to give evidence on his behalf. Likewise, RE's sexuality is largely, for him, a private matter and I do not consider it significant that no witnesses were called to attest to RE's sexuality or, given the nature of the relationship between the appellant and RE, as to their relationship.
79. Importantly, Mr Bates accepted in his submissions that the appellant's case turned largely upon an assessment of RE and his belief that the appellant is gay and that he is in a genuine same-sex relationship with the appellant.
80. Judge Solly accepted that RE is gay and genuinely believed that the appellant and he were in a genuine same-sex relationship. That is the backdrop or 'starting point' in this appeal as that finding has not been challenged and I see no basis upon which it could be.
81. The judge made that finding in October 2019 which was, on the evidence of the appellant and RE, two months after their relationship resumed in August 2019. I heard evidence from RE in October 2021, 2 years later. RE has, therefore, on his account been in a genuine same-sex relationship with the appellant now for some 2 years and 2 months since their relationship resumed in August 2019. RE is 100% certain that the appellant is gay and his evidence is that he and the appellant are in a genuine same-sex relationship. I see no reason to doubt, and there are even stronger reasons for accepting, Judge Solly's conclusion in the First-tier Tribunal hearing in October 2019 that RE is credible and, is a gay man who genuinely believes the

appellant and he are in a same-sex relationship. I do not accept that RE, being genuine in this belief, has had the 'wool pulled over his eyes' by the appellant who is being disingenuous. In my judgment, taking the evidence in the round, I accept that RE is being truthful and that I can rely upon his evidence.

82. I do, of course, take into account as Mr Bates invited me to do, the appellant's pre-arrival conduct under s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as set out by Judge Solly in para 66 of her determination as follows:

"To the extent that Section 8 of the Asylum and Immigration (Treatment of [C]laimants, etc.) Act 2004 damages the appellant's credibility, a breach is not determinative but a factor to be considered. The evidence must be looked at as a whole. The Section 8 assessment is part of the global assessment of credibility on JT (Cameroon) v SSHD [2008] EWCA Civ 878 and SM (Section 8: Judge's process) [2005] UKAIT 00116. The appellant did not claim asylum until detained on leaving the UK for Ireland. He did not claim asylum until detained. Section 8(2) applies. He failed to apply for asylum in the 1st safe country he came to on his journey from Afghanistan in 2008 (France) and I find that Section 8(4) also applies".

83. That conduct is, of course, only "potentially" damaging of the appellant's credibility and, whilst it must be taken into account, that requires that it be considered on the basis of all the evidence looked at in the round.

84. Mr Bates, in his submissions, relied upon the decision letter. He did not specifically draw my attention to any part of the respondent's reasoning in that decision letter. Some of the reasoning arose in the course of his submissions which I have set out earlier. Other reasoning did not.

85. In the section headed "Sexual Orientation" at paragraphs 42-49, the respondent made a number of generalised assumptions to doubt the appellant's sexual orientation. First, in para 44 having set out the appellant's account in interview as to his sexual and physical attraction towards men, the decision letter notes:

"It is considered that your claim is focused on the physical attraction towards men, rather than the emotional realisation of your claimed sexuality".

86. Secondly, at para 47, having set out the appellant's evidence at interview regarding his account of the realisation of his sexuality, the decision letter states:

"It is noted that there was an absence of any indication of introspection, self-awareness or uncertainty as to your sexual identity; such feelings might be expected to be evident in the experience of young men becoming aware of their sexuality in a homophobic society".

87. Thirdly, at para 49, having set out the appellant's evidence concerning a claimed relationship with a man in Afghanistan, the decision letter continues:

"Considering your relationship with [N] was your first relationship after you realis[ed] your sexual orientation, it is reasonable to expect that you would be able to provide detail about your feelings towards him, and more focus would be placed upon your emotional account of how [N] made you feel".

88. As I have said, Mr Bates did not directly refer me to, nor did he directly rely on, this reasoning. He was, in my judgment, right not to do so. There are well-known dangers in relying upon 'plausibility' in determining the veracity of evidence or an account (see, e.g. HK v SSHD [2006] EWCA Civ 1037 at [30] per Neuberger LJ). Whilst it most certainly can form part of the reasoning that leads to an account being rejected, it must reflect a defensible common-sense reaction to the circumstances or be supported by evidence (country background or otherwise) which justifies "reasonably drawn inferences and not conjecture or speculation" (see Awala v SSHD [2005] CSOH 73 at [20] per Lord Brodie cited with approval by Neuberger LJ in HK v SSHD at [30]). The particular dangers of reasoning that entails "stereotyping" of behaviour by, and imposing unjustified expectations on the conduct of an individual, claiming to be gay has been recognised by the CJEU (see, A, B, C v Staatssecretaris van Veiligheid en Justitie (Cases C-148/13 to C-150/13) [2015] 1 WLR 2141 at [60] *et seq*).
89. The reasoning in the decision letter enshrines unsupportable assumptions about the behaviour of gay men (whether in Afghanistan or otherwise) and how as individuals they would be expected to both rationalise and vocalise emotional feelings experienced when either first discovering their sexuality or when entering into same-sex relationships. Those assumptions were not supported by any expert or other evidence to suggest that they represent the 'norm' such that the appellant was departing from what should be expected of him and, therefore, something that was relevant in doubting his claimed sexuality. I place no weight on that reasoning which, in my view, is unsustainable and cannot assist in determining whether the appellant is credible as to his claimed sexuality.
90. In summary, therefore, I accept the evidence of RE as being credible.. I accept that he is a gay man who genuinely believes the appellant is gay and, in fact, they have been in a same-sex relationship since at least August 2019. On the basis of all the evidence, it is not likely, in my judgment, that the appellant has been able to disingenuously conduct a same-sex relationship with RE. I accept that the appellant is gay.
91. Further, I accept that the appellant, to the extent that he is able in the UK, has been open about his sexuality whilst being with RE who is a private and discreet gay man. They have, and I accept their evidence on this, been affectionate in public when RE is comfortable with that on visits to Swansea but not in London where he is not comfortable with open affection. I accept that the appellant has not been open about his sexuality with his housemates (who are asylum seekers) because he fears, based upon their religious views, that he will engender hatred towards himself from them. In my judgment, on return to Pakistan, it is reasonably likely that the appellant will, unless he fears persecution, be open about his sexuality. He will only be discreet if, in the circumstances he finds himself, he fears that he will be at risk from non-state actors.
92. Accordingly, bearing in mind Mr Bates' acceptance of the circumstances that the appellant will face on return to Pakistan in the light of the July 2019 *CPIN* (see above

paras 14-15), I accept that there is a real risk or reasonable likelihood that on return to Pakistan the appellant will face persecution or serious ill-treatment as a result of being a gay man (which is a PSG). He will be at real risk of those consequences either because he will be open about his sexuality or because, if required, he would be discreet in order to avoid those consequences.

93. In the light of that, I allow the appellant's appeal on asylum grounds.

Decision

94. The decision of the First-tier Tribunal was set aside by UTJ Allen in his decision sent on 14 August 2020 on the basis that there was an error of law in the First-tier Tribunal's decision.

95. No reliance was placed upon Art 8 before me.

96. I re-make the decision allowing the appellant's appeal on asylum grounds.

Signed

Andrew Grubb

Judge of the Upper Tribunal
12 November 2021