Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00766/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination & Reasons Promulgated**
On 27 April 2017	**On 2 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

S. G.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Cleghorn, Counsel, instructed by French & Company
For the Respondent: Mr McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Iran, entered the United Kingdom illegally and claimed asylum on 23 December 2001. That application was refused, and an appeal against the refusal was dismissed by decision of an Adjudicator promulgated on 19 August 2002 [D1]. On 6 January 2010 he made further submissions which were

treated as a fresh claim, although no decision was made in relation to them until 11 February 2014 [R1]. This followed by some margin a decision to make a deportation order on 3 June 2013 pursuant to section 3(5)(a) of the 1971 Act [L1], the Respondent having relied upon section 77(4) of the 2002 Act to make a deportation order whilst an asylum claim was pending.

2. The decision pursuant to section 3(5)(a) of the 1971 Act was made because of the Appellant's convictions for drugs offences. On 4 May 2010 the Appellant was convicted of possession of Class B drugs and fined. On 10 December 2010 he was convicted of two counts of possession of Class B drugs and in relation to each, sentenced to a term of eight months imprisonment suspended for two years. On 11 January 2013 he was convicted on his own plea of a further count of possession of Class B drugs, within the term of the suspension. The basis of his plea, which was accepted by the Crown, was that he was no more than the custodian of the drugs, which were the property of others who were the true dealers. On 1 February 2013 HHJ Mooncey sentenced him on that basis to a term of four months immediate imprisonment for that offence, and in addition, directed that he should serve consecutively a period of five months of the original suspended sentence. Thus, in total, he was sentenced to a term of immediate imprisonment of nine months.

3. There is no dispute over the fact that since his first arrival in the UK the Appellant has consistently claimed to be a homosexual. The Adjudicator in 2002 rejected his evidence about his experiences in Iran as not credible, but commented that "*it may well be that he is a practising homosexual*". This comment was identified by the Respondent as the reason for her making the concession that the Appellant "*was gay*" in the course of making her decision to refuse his claim to asylum on 11 February 2014.

4. The Appellant pursued an appeal before the First tier Tribunal ["FtT"] against the decision to deport him. In the course of that appeal the Appellant served a witness statement of 30 June 2014, and a report dated 28 November 2013 by Dr Kaul a Consultant Forensic Psychiatrist. These documents rehearsed the psychiatric issues which had led to a number of hospital admissions from May 2012 onwards. In the course of the rehearsal of what were understood by Dr Kaul to be the Appellant's instructions it was disclosed that the Appellant had engaged in a heterosexual affair. Dr Kaul's report indicated that he had been told the length

of that affair had been two years, although the Appellant disputed this in his June 2014 witness statement, and said that he had been misunderstood, and that the affair lasted merely three months. The explanation he offered for entering into this relationship was his desire to be a father, and his explanation for its termination was his inability to live a lie in relation to his sexuality.

5. The appeal was first called on for hearing on 7 July 2014, but it was adjourned at the hearing when the Respondent sought to withdraw the concession that the Appellant was gay in the light of the new evidence. Directions were made that required her to set out her position in writing, with reasons, and the Appellant was given an opportunity to respond with further evidence (if so advised) before the appeal was to be relisted. By letter of 8 July 2014 the Respondent formally withdrew the concession and gave her reasons for doing so.

6. The appeal was dismissed by the decision of an FtT panel, promulgated on 5 September 2014. No more need be said about that because by decision of Upper Tribunal Judge Rintoul promulgated on 4 March 2016 that decision was set aside with no findings of fact preserved.

7. The appeal was then relisted for a hearing de novo before the FtT. It was dismissed by decision promulgated on 21 November 2016. The Judge directed himself that at the core of the appeal lay the Appellant's disputed claim to be a homosexual. He went on to conclude;

"(*i) The findings of my brother immigration judge in 2002 amount to an acceptance that the appellant at the very least lived a clandestine life as a gay man in Iran. I note that since 2001 the appellant has consistently claimed that he is a gay man. For 12 years the respondent accepted that the appellant is a gay man. In 2002 it was judicially determined that the appellant is a gay man.*

(j) The evidence led by the appellant in 2002 was that he is a gay man. When the appellant made further representations in 2010 it was on the basis that he is a gay man. When the appellant was interviewed on 14 August 2013 he stated that he is a gay man. The psychiatric report produced for the appellant disclose that the appellant has told psychiatrists and his CPN that he is a gay man.

(k) Taking my brother immigration judge's decision from 2002 as a starting point, and looking at the consistency and duration of the appellant's representations that he is a gay man, I find that the appellant is a gay man who

has lived in the UK for 15 years and now has the expectation of being able to lead an openly gay life".

8. The Respondent's application to the FtT for permission to appeal was made on two grounds. First, on the basis no reasons had been provided for the finding that the appellant would wish to lead an openly gay life. It was asserted that the evidence was that he has always lived discretely even in the UK. Second, on the basis that there had been no consideration of whether the appellant would be required to modify his behaviour upon return to Iran, and thus the test in HJ (Iran) [2010] UKSC had not been correctly applied.
9. Permission was granted on 13 December 2016 by First tier Tribunal Judge EB Grant on the basis it was arguable the FtT had failed to follow and apply HJ (Iran) when assessing risk on return. She opined that although there was a brief reference to that jurisprudence in the decision the conclusion was entirely unreasoned. Both grounds were said to be arguable.
10. The Appellant has filed no Rule 24 notice in response to that grant of permission. Thus the matter comes before me.
11. The grounds do not in my judgement disclose any arguable error of law. The central issue of dispute before the FtT was the true nature of the Appellant's sexuality. The Judge's reasons for his conclusion that the Appellant had told the truth about his sexuality are perfectly clear, albeit brief. Whilst it might have been open to the Respondent to challenge the central reason offered for that conclusion on the basis that the 2002 decision had been misread, that was not the course taken, and there has been no subsequent attempt to enlarge the grounds.
12. Once the Appellant was identified as a gay man, then it was not in dispute that it followed that he was at real risk of serious harm in Iran if he were ever identified as such. That conclusion followed whether the identification of his sexuality was by state agents, or non state agents. As identified by the Supreme Court in HJ (Iran) v SSHD, if a person is required to conceal their true sexual identity out of a well founded fear that they will otherwise be persecuted, then they continue to have a well founded fear of persecution even if it may be argued that they might be successful in avoiding that persecution by attempting such a concealment.
13. Although the Judge did not rehearse the matter at any great length it is in my judgement plain from his decision that he directed himself appropriately in relation to the approach recommended by the Supreme

Court in such cases. There was no issue between the parties that in Iran a gay person living openly as such would be liable to persecution. Thus if the Judge accepted (as he did) that the Appellant would wish to continue to live as an openly gay man as he had done in the UK, then it followed that he had a well founded fear of persecution. It was plainly well open to the Judge on the evidence before him to accept this aspect of the Appellant's case, once he had concluded that the Appellant was indeed a gay man as claimed. The correct burden and standard of proof were employed in undertaking the analysis of the evidence, and the Judge's findings were briefly, but adequately, reasoned and they are plainly rational.

14. In the circumstances, the Judge did not make any material error of law in his decision to allow the appeal, and that decision must stand.

DECISION

The Decision of the FtT which was promulgated on 21 November 2016 did not involve the making of any error of law and is accordingly affirmed.

Deputy Upper Tribunal Judge JM Holmes
Dated 27 April 2017