



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/10388/2016

**THE IMMIGRATION ACTS**

Heard at Liverpool On 14 March 2018  
And at Manchester Civil Justice Centre  
On 8 June 2018

Decision & Reasons Promulgated  
On 22 June 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

N K

Respondent

**Representation:**

For the Appellant: Ms Aboni, senior Home Office Presenting Officer  
For the Respondent: Mr J Howard, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as NK. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. Following a hearing in Liverpool on 14<sup>th</sup> March 2018, Dr H H Storey, judge of the Upper Tribunal set aside the decision of First-tier Tribunal Judge Smith allowing the respondent's appeal against a decision by the Secretary of State

to refuse his protection claim. He retained various findings – set out below- the appeal was transferred to me and came before me on 8<sup>th</sup> June 2018.

2. The essence of NK’s protection claim is that he, an Iranian national, is gay and would be at serious risk of being persecuted if returned to Iran.
3. Dr Storey found the First-tier Tribunal Judge’s principal finding at paragraph 43<sup>1</sup> unsafe. NK did not seek to challenge the First-tier Tribunal Judge’s adverse findings before him and Dr Storey held that the findings in paragraph 21 to 41 stand.
4. Paragraphs 21 to 41 of the First-tier Tribunal decision are, in so far as they are findings of fact, as follows:

21. ...

22. ... the appellant is from Iran. There is no dispute about the date of birth which he now puts forward which is 8 August 1990. It is accepted that if the appellant is gay then he will be at risk of persecution upon return to Iran.

23. The significant matter in dispute is whether the appellant is gay and whether the account that he gives as to being filmed while being raped and subsequently blackmailed in Iran is true.

24. ....

25. ....

26. ....

**The claimed incident in Iran [ the alleged rape]**

27. ....

28. ....I am satisfied that if this incident did take place, even taking account of the trauma that the victim of such an assault would face, the appellant would be able to give a consistent account with regard to how many men were involved in the assault and whether they were strangers or whether they were known to him. I am satisfied that it is a significant discrepancy which leads me to doubt the credibility of this aspect of the appellant’s account.

29. I also find it significant that the appellant failed in the SI to tell the interviewer that in fact the police had found out about the video and had attended to arrest the appellant at his house...Any claim that the appellant knew that the police had attended at his flat with a warrant for his arrest because of clear evidence that he was taking part in gay sex would be the most pressing of the appellant’s concerns. The fact that he did not mention this in the SI in my judgment is a serious inconsistency.

30. Furthermore the suggestion that the appellant’s attackers would publicise a film that would incriminate themselves for being involved in at least an illegal gay act and at worst a very serious criminal sexual assault is in my judgment an implausible account.

31. ...I am not satisfied the appellant was engaged in a gay relationship in Iran. I am not satisfied that he as subjected to the sexual assault he claims. I am not satisfied that an attempt was made to blackmail him by publicising the video and I am not satisfied that he is wanted by the police as he claims.

**The relationship with [MA] in the United Kingdom.**

32. ....

33. ....

34. [MA] was not available to give evidence before me. The appellant says the relationship is now concluded. This in itself is no reason why [MA] could not been asked to attend to give evidence of their past relationship. Take into account all the factors that I have set out above I am not satisfied that the appellant was in a gay relationship with [MA].

**The evidence of Mr Irving/written evidence of [RA]**

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<sup>1</sup> “Despite the fact I am satisfied the appellant has told a significant number of untruths I nonetheless do take the view in this case that the appellant is genuinely a gay man. Without the evidence of Mr Irving I doubt I would have come to that conclusion. It is not simply that there is something in this claim. It is against the background of Mr Irving’s evidence there I can consider what may be more plausible parts of the appellant’s case. The details of the relationship with Mr Irving and Mr Abdi satisfy me the appellant is gay.”

35. I did find Mr Irving an impressive witness. He previously had never met the appellant and is not in a physical relationship with him. They have been involved in an intimate exchange of pictures and messages for a number of months online. Mr Irving is of the view that he is definitely corresponding with a gay man. He has travelled a long distance to give evidence at no doubt some personal inconvenience and I accept that his motivation for doing this is genuine. Between he and the appellant they have produced a large amount of printouts of online communications. I asked Mr Irving to consider the proposition that the tribunal's experience was that there may at least be some occasions where "straight" men would pass themselves off as being gay for asylum purposes. I asked him to consider whether that may be the case here and that the appellant in corresponding with him was in some way using him. Mr Irving's answer I found to be considered and thoughtful. He mentioned the way the appellant has expressed his feelings on a number of occasions. This was not just about passing naked images between them. He said that the appellant obviously "thought like a gay man".

36. I give limited weight to the letter from [RA]. He did not attend for cross examination. Although he says he has had a physical sexual relationship with the appellant a number of occasions his letter is light on detail with regard to when and where that took place. There is no real explanation as to why he was not available to give evidence before the tribunal. He was potentially an important witness. As his evidence stands I accept to give some limited support for the contention that the appellant is involved in gay relations whilst he has been in the United Kingdom.

**The application of section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004**

37. ...

38. ...The fact that the appellant was prepared to continue a difficult journey across Europe to enter the United Kingdom illegally is behaviour which I find to be far more consistent with that of an economic migrant.

39. ...[NK] gave an incorrect date of birth...the appellant says that this was simply misinterpretation by the interpreter...if this was so I am satisfied the appellant would have corrected it much more quickly. I am satisfied that he would have been aware that an age assessment was being carried out. I am satisfied that he deliberately gave a younger age to try to seek advantage upon arrival in the United Kingdom. This too is behaviour which damages his credibility pursuant to the operation of section 8. ....

Assessment of those findings

40. ...I have found the appellant not to be a credible witness with regard to a large number of issues that I have set out above. I am not satisfied the appellant left Iran in the circumstances he suggests. I do not believe the account he gives about being blackmailed by people who raped him. I do not believe his account the police are looking for him. I am satisfied that he did not claim in Hungary because he preferred to establish himself in the United Kingdom. I am not satisfied that he was in the relationship that he claims with [MA] because of his inability to answer detailed questions about the relationship.

41. On the other hand I have the evidence of Mr Irving which I have addressed above. I did find him a particularly impressive witness. He is a gay man and I acknowledge that having communicated with the appellant on a regular basis over several months his conclusions should be given some significant weight....

5. I heard oral evidence from the respondent and Mr R A<sup>2</sup> through a Farsi interpreter. Mr Irving did not attend for oral evidence and there was no updating witness statement from him and there were no further email or other exchanges produced.
6. There were significant and damaging contradictions in the evidence of NK and RA. These included very different times when they last saw each other, how often they saw each other, what they did when they saw each other and opposing evidence on whether they visited gay clubs. The only explanation offered was that they didn't keep a record of the times they were together but

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<sup>2</sup> I have anonymised his name because he has an outstanding asylum claim

that they were in a relationship. The evidence that was before the First-tier Tribunal was described by the First-tier Tribunal judge as “light” in detail. The evidence before me did nothing to dispel that. The only conclusion that could be drawn from their evidence was that although they knew each other they were not in a relationship together and never had been.

7. NK said that he and Mr Irving had had a sexual relationship for a short time but that he had now left the country, gone to Spain and could not give evidence. NK said they chat occasionally. It is extraordinary that having produced voluminous evidence of their on-line relationship to the First-tier Tribunal Judge there was nothing other than assertion of the contact since that hearing. Yet it is claimed that the relationship had changed from being online to an actual relationship. There was not even a letter from Mr Irving confirming he still considered NK to be gay and that they had had a relationship outside of on-line contact. Texts, emails, Facebook messages, Instagram and so on were not produced. I do not accept that NK has been in a relationship with Mr Irving. Mr Howard submitted that the discrepancies in the account may mean that he is not in a relationship with RA but it should be noted that NK has given frequency of meetings as less than RA rather than more and this should be a positive factor.
8. At most the evidence before me is that Mr Irving, who has not communicated further with the Tribunal since the hearing, considers NK to be a gay man. The Facebook entries corroborate a gay relationship, Mr Howard submitted. Although the First-tier Tribunal judge found Mr Irving to be an impressive witness and I do not go behind that finding, that is not a finding other than that Mr Irving believed NK was a gay man. Although there are Facebook extracts before me, they in themselves do not support a finding that NK is gay, in the context of the other evidence. As Ms Aboni says, he can delete those extracts which, as a non-gay man, would not be a matter of expecting him to change his behaviour. There is considerable evidence and findings that NK has very little credibility, he has not told the truth about his age, his life in Iran, his claimed rape, his claimed blackmailing, his relationship with RA and MA and Mr Irving.
9. The First-tier Tribunal Judge found NK to be gay based on Mr Irving’s evidence; that is the only piece of significant evidence that remains yet it has not been updated despite it being known that the issue of whether NK was gay was fundamental to this appeal. The lack of any confirmation from Mr Irvine that they had a non-on-line relationship and that they remain in contact casts significant and serious doubt upon NK’s claim to be gay.
10. Taking account in full of the findings of the First-tier Tribunal Judge and the evidence before me I find NK is not gay as he claims to be. He has fabricated his whole account. He is not at risk of being persecuted if removed to Iran.
11. I dismiss his appeal against the decision of the Secretary of State to refuse his protection claim.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision was set aside by Dr Storey

I re-make the decision in the appeal by dismissing it. NK's appeal against the refusal of his protection claim is dismissed.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 20<sup>th</sup> June 2018



Upper Tribunal Judge Coker