



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

Appeal Number: PA/01392/2019

THE IMMIGRATION ACTS

**Heard at Bradford
On the 27 November 2019**

**Decision & Reasons Promulgated
On 14 January 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**M H
(ANONYMITY DIRECTION MADE)**

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Rogers instructed on behalf of the Appellant
For the Respondent: Mr Mills, Senior Presenting Officer

DECISION AND REASONS

**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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

- 1.** The appellant is a national of Iran. He appeals with permission against the decision of First-tier Tribunal (“FtTJ”), promulgated on the 7 August 2019 dismissing his appeal against the decision to refuse his protection and human rights claim.
- 2.** The appellant’s history is set out in the decision letter of the 1 February 2019 and the decision of the FtTJ at paragraphs 1-16. The appellant arrived in the United Kingdom on a spouse visa which was curtailed on the 22 May 2018. It was asserted that he claimed to have returned to Iran in February 2018 but returned to the UK in May 2018 and made a claim for asylum on 18th July 2018.
- 3.** He provided a screening interview and was interviewed about the factual basis of his claim on the 14th December 2018. In addition, there is a screening interview and a Preliminary Information Questionnaire completed by appellant.
- 4.** The basis of his claim related to his sexual orientation and that on return to Iran he would be at risk of harm. In a decision letter dated the 1 February 2019, the respondent refused his claim for asylum and humanitarian protection. It was accepted the appellant was an Iranian national but did not accept his claim relating to his sexuality and therefore membership of a particular social group.
- 5.** As can be seen within those paragraphs, the Secretary of State set out a number of credibility and plausibility issues relating to the core aspects of his claim.
- 6.** It is common ground that following his interview, the respondent sent a letter to the appellant’s legal advisors and the Tribunal dated 12th March 2019, setting out a new issue which arose from what the appellant had said in his interview and that notice was given that if the appellant’s credibility was accepted, he should be excluded from the Refugee Convention under Article 1F (b) on the basis that he had committed a serious non-political crime (sexual activity with a minor). The letter set out the primary position, which was that the appellant was not credible and that none of the activity took place and the appeal should be dismissed on credibility grounds.
- 7.** The appellant sought to appeal that decision. In a decision promulgated on the 26 July 2019, the FtTJ dismissed the appeal on the basis of an admission in his interview that he had been involved with a minor and thus he should be excluded from the Refugee Convention under Article 1F (b) and then having concluded that the appellant had not given a credible or plausible account as to his sexual orientation that he would not be at risk of persecution or serious harm contrary to Article 3.
- 8.** Following the dismissal of his appeal, grounds of appeal were issued for permission to appeal and that application was refused by Judge Chohan on

the 6 September 2019. On reconsideration permission to appeal was granted by Upper Tribunal Judge Smith on the 26th September 2019.

- 9.** As a result of the grant of permission the appeal comes before the Upper Tribunal, Ms Rogers relied upon the grounds as drafted. Mr Mills relied upon the Rule 24 response dated 9 October 2019 and I have heard oral submissions from each of the advocates.
- 10.** I am grateful for the submissions made by each of the advocates and I have taken into account the matters raised both in the written grounds and in the oral submissions. Having done so, I am satisfied that the decision of the FtTJ involved the making of an error on a point of law. I shall set out my reasons for reaching that decision below and shall do so by reference to the decision of the FtTJ and the submissions that I have heard.
- 11.** The basis of the appellant's claim related to his sexual orientation. The appellant gave evidence concerning both events in his country of nationality and also in the United Kingdom, which included evidence from a partner and from an organisation with whom he had been involved with. The FtTJ did not accept his account of his sexuality and also reached the conclusion that he should be excluded from the Convention as a result of admission concerning sexual activity with a minor.
- 12.** There are a number of grounds that are advanced on behalf of the appellant. I begin with ground 4 which relates to the evidence concerning his sexual orientation in the United Kingdom. The appellant relied upon evidence from his partner and also evidence from an organisation who have provided support for LGBT asylum seekers. This evidence is set out in two letters (pages 15 - 19 of the appellant bundle) and in addition the FtTJ heard oral evidence from the appellant's partner and from a member of the organisation.
- 13.** The FtTJ considered the evidence from his partner and at paragraphs 61 - 62 reached the conclusion that she could give little weight to the evidence. The judge questioned the support given to the appellant by his partner as "self-serving" on the basis that his partner had an ongoing asylum claim and that the evidence did not add anything to the appellant's relationship. The FtTJ accepted that there were photographs showing him and his partner together but that they did not illustrate whether they were in a relationship.
- 14.** It is asserted in behalf of the appellant that the FtTJ engaged in speculation in the finding made that the evidence was "self-serving" and that there was no evidential basis for such a finding. Mr Mills on behalf of the respondent submitted that it had been open to the FtTJ to make that finding of fact as it was not speculative and was a reasonable conclusion to reach. The written rule 24 response asserts that the evidence generally added little to the appellant's claim.

- 15.** I have considered those submissions in the light of the evidence and the assessment made. In my judgement there are no clear findings of fact concerning the evidence of the appellant's claimed partner. Whilst I accept that the witness statement submitted was brief in its contents, the appellant's partner did give oral evidence as to the relationship. The FtTJ did make some reference to that evidence concerning where he had lived but did not make reference to the other evidence given concerning the nature of this relationship. I am conscious of the fact that a same-sex relationship cannot define a person's orientation however whether the appellant had been in such an intimate relationship with his partner was a relevant factor to be considered in the round.
- 16.** I would accept that the photographic evidence on its own could properly be viewed as having limited weight because photographs as they stand in isolation do not demonstrate whether a relationship is genuine. However, here there was evidence of his relationship in the written witness statement and this was evidence in support of his claimed sexuality even if the FtTJ did not find this to be evidence of a genuine relationship.
- 17.** Furthermore I accept the submission that there was some speculation concerning the partner's position. Mr Mills submits this was not a speculative finding because there was no suggestion that his asylum claim was not related to the current claim. Whilst there appears to be no dispute that the appellant's partner had made a claim for asylum in his own right as a fresh claim, it does not appear that any further details had been given as to the basis of this fresh claim either in writing or in cross examination. Notwithstanding this, the FtTJ questioned whether the support given to the appellant by his partner was "self-serving". There are no clear findings of fact as to the nature of the relationship or whether he had been untruthful in his evidence or even the factual basis of his present or earlier claim.
- 18.** Dealing with ground five, this relates to the other supporting evidence advanced on behalf of the appellant. It is submitted on behalf the appellant that the FtTJ erred in her assessment and in her approach to the evidence of the author of the letter and that the judge's finding that the witness could not have made a proper assessment of the appellant over 10 hours when the appellant spoke broken English failed to take into account that the witness had confirmed in his assessment that whilst the appellant's English was limited, it had been sufficient for him to understand and reach an assessment. It is further contended that the FtTJ failed to put those concerns to the witness and did not give him the opportunity to give evidence on that issue to support the assessment made.
- 19.** Mr Mills on behalf of the respondent submitted the findings of the FtTJ were open to her on the basis that the judge gave adequate reasons as to why she did not accord that evidence any weight and because he did not have the experience to make a reliable assessment (see paragraph 62 of the decision).

- 20.** I have considered the submissions in the light of the FtTJ's findings and the documentation. I am satisfied that the grounds have merit. While the FtTJ was not bound to accept the assertions made in the letter or in the oral evidence, it was evidence nonetheless which was relied upon in determining the appellant's account of his sexuality as a gay man. The assessment of that evidence is set out at paragraph 62 and it is plain that the judge gave little weight to that evidence for two reasons. Firstly, because the FtTJ was "not convinced "that the witness could make an assessment due to the appellant's level of English and because it had not been said that he had the appropriate experience to deal with this type of case.
- 21.** Dealing with the first reason, it is recorded in the oral evidence that the witness had given evidence that he understood the appellant sufficiently well for an assessment take place. As the grounds set out, given that evidence it had not been further suggested to the witness or put to the witness that his assessment had been undermined in anyway. The difficulty with finding is that the witness did not have the opportunity to answer that criticism. Whilst I would accept the submission made by Mr Mills in general terms that it is not a requirement that every point is put to witness, in this case it was the principal reason for reaching the conclusion that little weight could be attached to the evidence. In the light of the oral evidence of the witness who had said that he understood the appellant sufficiently well for an assessment take place, if that was to be rejected the witness should have been given the opportunity to say why that was not the position.
- 22.** Furthermore as I understand the evidence of the witness, he was not giving evidence as an "expert" or evidence that could properly be characterised as "expert evidence" and therefore the FtTJ's assessment that he and his colleague did not have the necessary expertise to deal with "this type of case" ignored the type of evidence they were able or could give which related to their conversations, their work and understanding of the appellant and importantly his partner, who they also made reference to in the documentary evidence which did not feature in the assessment.
- 23.** For those reasons, the grounds at paragraphs 4 and 5 have been made out and therefore the undermined the assessment made of his sexuality which is relevant to the issue of risk on return.
- 24.** I now turn to ground 2 which relates to the issue of Article 1F and the appellant's exclusion from the Convention as a result of evidence given in his asylum interview where it is said that he gave an account of engaging in a sexual relationship with a minor.
- 25.** As set out earlier, the issue of Article 1F and his exclusion from the Convention had not been raised in the decision letter issued after the asylum interview had taken place. As a result, neither the appellant nor his legal representatives had been asked to put forward any written

submissions concerning this issue. It is normally the case that when an Article 1F issue arises from evidence submitted by the appellant, it is properly raised in a decision letter as a result of the serious consequences exclusion from the Convention can have for an appellant (as referred to in the respondent's guidance).

- 26.** It appears from the documents before Tribunal that the presenting officer raised this as a further submission and as a “new issue” two days before the substantive hearing which at that time had been set down in March 2019. The “new issue” was set out in writing in a letter where it was noted that upon preparation for the hearing a “significant new issue” had come to light. It made reference to the part of the interview relied upon which made reference to an admission made as to sexual activity with a minor but also made reference to the relationship continuing when the appellant was an adult. The hearing was adjourned on the application of the appellant's representatives who required time to consider the issue given the late introduction and identified that there were issues with the translation and the phrase “sexual relationship” which, it was said, was not an accurate translation. Subsequently, the appellant provided a written statement in which he stated that he did not have a sexual relationship with the minor concerned and made reference to the word or phrase in Farsi which had been incorrectly interpreted (see paragraph 3).
- 27.** The FtTJ considered the appellant's evidence at paragraphs 47 - 49 but reached the conclusion that the interview questions and replies at question 75 - 77 were “clear and specific” and that he had repeated that he did have such a relationship with a minor and that it could not have been misinterpreted. The FtTJ had stated that she could not see how the interpreter could have taken the word used out of context.
- 28.** The grounds assert that the FtTJ was wrong to make this finding when the FtTJ had also made the finding that on the same part of the interview there had been confusion in his answers and that the appellant had given varying answers (see paragraph 48 of the FTT J decision) but then went on to find that those answers were “clear and specific”. Therefore Miss Rogers submits that the reasoning of the FtTJ was contradictory and it was not open to the judge to find that the interpreter could not have taken the word in Farsi out of context despite the earlier finding that there had been confusion over the evidence in that part of his interview.
- 29.** Mr Mills by way of response to the Tribunal through the relevant questions both the earlier questions are questions 54 - 58 and then the questions at 75 - 77 and submits that the appellant gave a particular chronology as to the events concerning the alleged conduct. He therefore submits that it was open to the judge on a reading of those questions taken together that the appellant had given a clear and specific response which was in support of the finding made by the judge.
- 30.** I have considered the FtTJ's assessment of the appellant's evidence and in the light of the interview and the other evidence provided. On the face of

the asylum interview replies set out questions 54 – 58, the appellant appears to be making reference to discussing “his feelings” and that he had spoken to a younger person who was in a different position and who had been involved in sexual relations with other men (see question 54) which he later clarified as not taking place with men but “with boys” (see question 58). However the interviewing officer does not pick up on an inconsistency concerning the reply. As the appellant was not the same age as the younger boy concerned, when he stated that the boys and he were of the same age that could not be correct. The appellant’s reply at Q 56 he referred to his relationship with the young man as “close” but made no reference to it being an intimate relationship. The following questions concerned the sexual relationship. At question 75 the appellant made reference to a relationship with the younger boy. The interviewer at question 76 then put to the appellant that he had never raised a relationship with this boy and that he had only spoken to him and asked the appellant to explain why he now stated he had a relationship with him and that his account had changed. The response to that question made reference to the fact that he did have a sexual relationship with him “many times”. A similar reply was elicited in answer to the question asked at question 77 when the interviewer sought clarification.

- 31.** On the face of the questions asked and those replies, it was open to the FtTJ to reach the conclusion that he had made an admission concerning a sexual relationship. However, in rejecting the appellant’s explanation, there was no reference made to the general confusion that he had in the interview in expressing his feelings and explaining his background. There was some acceptance of this in the FtTJ’s assessment generally at paragraph 48 where the judge did make reference to elements of confusion from questions 50 onwards and also in her findings at paragraph 62 where the FtTJ made reference to the misunderstanding of the asylum interview record even with an interpreter present. What gives rise for concern is that it had not been clarified at any stage what the term given in Farsi and identified in the witness statement means in this context. I would accept as Mr Mills submitted that this should have been the subject of evidence. However I can find no evidence as to whether this was in fact clarified in the oral evidence and whether this potentially could have had a different meaning. In my judgement this should have been clarified by the advocates in order to set the interview in context. This is equally of importance given that there had been accepted confusion in the interview generally and that both issues were relevant in reaching an overall assessment particularly when that evidence was the basis for his claim as one which should be excluded under Article 1F of the Convention.
- 32.** However, even if the appellant’s evidence was correct the FtTJ was required to consider whether this met the threshold of Article 1F. Beyond the recitation at paragraph 37 and the reference to “serious reasons” there was no assessment beyond the admission made by the appellant before reaching the conclusion that he was excluded from the Convention. Whilst paragraph 46 of the decision appears to make reference to a concession, I have not been able to resolve that issue from the material

before me and in the light of the submission made by Ms Rogers that there were no instructions given for such a concession to be made and there are no notes of evidence in the papers.

- 33.** There is also a tension in the findings made. The FtTJ then went on to find that his account did not demonstrate homosexuality but paedophilia (see paragraph 52) then stated that the appellant had outlined his early experiences in order to explain the confusion about his own sexuality and at paragraph 53 then considered further the account given by the appellant relating to the young man concerned and reached the conclusion that the appellant's account did not ring true. It is therefore unclear whether the FTT J did find the appellant's account to be a credible or not which formed the basis of the Article 1F assessment. There are other findings at paragraphs 57 and 58 where the FtTJ did not find to undermine his credibility and potentially lent support to his account. However the FtTJ did not make it clear whether she accepted the appellant's relationship with "A" and similarly with paragraph 59 and the relationship with his wife and the appellant's attempts to contact A and no clear findings were made in those paragraphs beyond the statement that the FtTJ did not find that those issues undermined the appellant's credibility.
- 34.** I have not found this to be an easy decision to reach and the issues are not straightforward. The FtTJ made an adverse findings which has not been challenged (see paragraph 56). I am equally mindful that the FtTJ had the advantage of hearing oral evidence. However, for the reasons that I have set out of the on balance and applying anxious scrutiny to the evidence, I am satisfied that there were errors which affected the assessment of the appellant's claim concerning his claimed sexuality. This was relevant whether or not he was to be excluded from the Convention which went to his Article 3 claim and was therefore material in that respect. As to the admission made by the appellant, there are conflicting findings upon this which I have identified above and when taken together I have reached the conclusion that as a result no safe findings can be made therefore the decision should be set aside.
- 35.** Given the nature of the errors none of those findings of fact can be preserved. The evidence as to the appellant's replies an interview remain as set out in the written documentation and if the respondent seeks to rely on the point raised concerning Article 1F the issue, this will need to be properly considered in light of the evidence presented and in accordance with the law relating to Article 1F.
- 36.** Consequently it has been demonstrated that the decision of the First-tier Tribunal judge involved the making of an error on a point of law.
- 37.** In the light of the conclusion that there are no factual findings that can be preserved, I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement

of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

38. As it will be necessary for the appellant and the witnesses to give evidence and to deal with the evidential issues, further fact-finding will be necessary alongside the analysis of risk on return in the light of the relevant law and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a further hearing.

39. I note that there was medical evidence before the FtTJ. The parties should raise with the Tribunal in advance whether there are any issues arising from the AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 in which Sir Ernest Ryder, Senior President, referred to the Joint Presidential Guidance Note No. 2 of 2010 and also the Practice Direction.

Decision:

40. The decision of the First-tier Tribunal did involve the making of an error on a point of law, the decision to dismiss the appeal is set aside and shall be remitted to the First-tier Tribunal for a rehearing.

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds

Date 10/1/2020

Upper Tribunal Judge Reeds