Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13601/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 3 August 2020	**On 11 August 2020**

Before

Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

AR
[Anonymity direction made]

Respondent

Representation:
For the appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the respondent: Mr T Bahja, instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. 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(s).

1. For convenience, I will refer to the parties as they were before the First-tier Tribunal.

2. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Clarke promulgated on 8 October 2018 in which the judge allowed the appellant's

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appeal on Article 3 grounds against the decision of the Secretary of State, dated 2 December 2017, to refuse his protection and human rights claims, and to maintain the deportation order made on 24 February 2017.

3. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 5 December 2018. The matter then came before Deputy Upper Tribunal Judge Juss on 7 March 2019. The decision of the Upper Tribunal promulgated on 21 March 2019 found an error of law in the decision of the First-tier Tribunal and set that decision aside remitting it to the First-tier Tribunal to be determined afresh.

4. The appellant then sought permission to appeal to the Court of Appeal against the Upper Tribunal's error of law and remittal decision. That was considered by Upper Tribunal Judge Gill who, on 3 May 2019, decided to review the decision instead of considering permission to appeal, pursuant to Rules 43(a) and 46 of the Upper Tribunal Procedure Rules.

5. Judge Gill considered that Judge Juss failed to apply relevant legal authorities to the effect that it was necessary for the Upper Tribunal to consider the extent of the fact-finding that is necessary when an appeal is remitted or a decision on appeal is to be re-made. Judge Juss failed to consider whether the error of law he identified infected Judge Clarke's findings of fact, and failed to explain why the First-tier Tribunal should consider the appeal "on the merits". Judge Gill stated,

> *"It was not possible to discern from the reasons he gave at paras 10 to 14 for setting aside the decision of Judge Clarke whether he considered that the judge's error included any errors in relation to his assessment of credibility so as to shed light on his reasons for deciding that the First-tier Tribunal should decide the appeal on the merits".*

6. Consequently, Upper Tribunal Judge Gill set the decision of Judge Juss aside. In the circumstances, the matter had to be considered again by the Upper Tribunal on the error of law complaint by the Secretary of State against the decision of Judge Clarke.

7. Thus the matter came before me at Manchester Civil Justice Centre on 21 January 2020. For the reasons set out in my decision promulgated on 31 January 2020, I found that there were errors of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside. I summarise those reasons below but reference should be made to the decision itself for my full findings.

8. At the hearing before me in January 2020, the respondent relied on two principal issues, that of credibility and the judge's treatment of the respondent's asserted sexuality and any risk on return to Afghanistan. Between [75] and [78] of the First-tier Tribunal decision, the judge identified alleged inconsistencies in the appellant's claim for international protection. The judge identified a number of difficulties with the sexual orientation claim but ultimately concluded that it was made out to the lower standard of proof.

9. The respondent also pointed out that the previous judge, First-tier Tribunal Judge Andrew, made a number of adverse credibility findings against the claimant. It is submitted that Judge Clarke should have applied the Devaseelan principle to take those credibility findings as the starting point in relation to assessment of credibility. However, it is relevant in this regard that in that previous case the claimant did not make any claim with regard to his sexual orientation. Whilst the judge has made a reference to the respondent's reliance on Devaseelan at paragraph 37 of Judge Clarke's decision, nowhere else in the decision does the judge address the principle or adopt any of those credibility findings as the starting point in considering the claimant's credibility in relation to his sexual orientation.

10. In summary, in my decisions promulgated on 31.1.20 I found an error of law in the making of the decision in the appeal for the following reasons:

    (a) Failure to take as a starting point in assessing credibility the adverse credibility findings made in a previous First-tier Tribunal (First-tier Tribunal Judge Andrew) appeal decision from 2017, and failure to take into account in assessing credibility the circuit judge's sentencing remarks;

    (b) When giving weight to the expert report of Dr Thomas, incorrectly assuming that she was aware of the respondent's reasons for deportation and was aware of the previous adverse credibility findings;

    (c) Giving undue weight to the scarring report as consistent with the appellant's claim when only one of six scars was consistent with assault;

    (d) Giving weight to the NRM conclusion that the appellant had given a credible account when that assessment dealt with his trafficking claim and not the 'new' claim to gay sexual orientation, to the point that the judge relied on the NRM as conclusive of the credibility of the sexual orientation claim ;

    (e) Failure to apply the Country Guidance of AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 0001 (IAC), which held that a practising homosexual returning to Kabul who would not attract or seek to cause public outrage would not face a real risk of persecution.

    (f) That the judge appears to have regarded sexuality as determinative of the protection claim, when the appeal was only allowed on article 3 grounds and there has been no cross-appeal against the finding that the appellant failed to rebut the s72 certificate so that he was excluded from both asylum and humanitarian protection.

11. I, therefore, concluded in my January 2020 decision that there was such error of law within the decision of the First-tier Tribunal as to require it to be set aside and remade, which Mr Bahja agreed should take place in the Upper Tribunal. However, I preserved the judge's findings concluding that the Section 72 certificate has not been rebutted. It followed that the only remaining avenue of appeal available to the claimant is under Article 3.

12. In a legally erroneous application, the appellant sought the Upper Tribunal's permission to appeal my error of law decision to the Court of Appeal before the remaking of the decision. As the Principle Resident Judge pointed out in the Notice dated 2 March 2020, the finding of an error of law does not of itself represent a 'decision' within the meaning of s13 of the 2007 Act, as the Upper Tribunal has not yet completed its functions. Consequently, there is no right of appeal against my decision promulgated on 31 January 2020, and the application for permission was refused for want of jurisdiction.

13. For the continuation hearing listed before me on 3 August 2020, the appellant's representatives have submitted:

    (a) a further skeleton argument, dated 28 July 2020;

    (b) A consolidated bundle; and

    (c) What is said to have been a supplementary bundle put before the First-tier Tribunal;

14. The appellant accepts that as the s72 findings have been preserved, in the remaking of the decision in the appeal the sole issue is that of article 3 ECHR in the context of a claim to be of gay sexual orientation on return to Afghanistan. If the decision is to be remade as anticipated in January 2020, the Upper Tribunal would first have to decide on the lower standard of proof whether the appellant's late-disclosed sexual orientation is as claimed. If that is accepted, the Tribunal would then have to decide whether he would be at risk of treatment contrary to article 3 ECHR on return to Afghanistan, the risk on return.

15. However, before addressing those issues, Mr Bahja applied to set aside that part of my decision of 31.1.20 that appears between [13] and [14], which relates to my finding an error of law in relation to the judge's reliance on the NRM assessments. In fact, as advanced before me, the argument is somewhat wider in scope than those two paragraphs.

16. Reliance is made on AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC), where it was held that:

> *"(1) Before it has re-made the decision in an appeal, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal has jurisdiction to depart from, or vary, its decision that the First-tier Tribunal made an error of law, such that the First-tier Tribunal's decision should be set aside under section 12(2)(a).*
>
> *(2) As Practice Direction 3.7 indicates, that jurisdiction will, however, be exercised only in very exceptional cases. This will be so, whether or not the same constitution of the Upper Tribunal that made the error of law decision is re-making the decision in the appeal …".*

17. I accept that as the decision-making process of the Upper Tribunal has not concluded, it remains open for me to review and, if necessary, change my earlier findings and the basis on which I found an error of law. I have carefully considered

the further submissions of Mr Bahja and the response of Mr Diwnycz and considerable time was spent addressing again the issue of an error of law in the decision of Judge Clarke.

Failure to Consider Previous Adverse Credibility Findings & Sentencing Remarks

18. With respect to the failure to take into account the previous adverse credibility findings, Mr Bahja accepted in his submissions to me that the adverse credibility findings from the previous First-tier Tribunal appeal were relevant to the issue of the credibility of the appellant's sexual orientation claim and should have been taken into account. However, he submitted that in the overall consideration of the evidence, the error was not material. Whilst those findings should have been taken into account, they are not determinative of the sexual orientation claim and the Judge Clarke was not bound by them. I agree that the judge was not bound by them, as I made clear at [9] of my earlier decision, I found only that they were relevant to any assessment of credibility, even on a different issue. I accept, however, that they are only a starting point and it has to be borne in mind that Judge Clarke was addressing a different issue to that of Judge Andrew.

19. Mr Bahja makes the same point in relation to the judge's sentencing remarks. It is accepted that they should have been taken into account but submitted that the error is not material or fatal to the outcome of the appeal. I have considered both these two points further below in the overall assessment of the error of law issue.

Were the Experts Aware of the Reasons for Deportation?

20. In relation to whether Dr Thomas was aware of the reasons for deportation, contrary to my findings at [10] of my January 2020 decision, and having been directed to the list of documents (as seen at p20 of his report and page 106 of the consolidated bundle) Dr Thomas claims to have read, I now accept that these included the Deportation Order and the HO bundle, which included the decision to revoke refugee status. Reference is also made to the decision of Judge Andrew. Whilst it is accepted the respondent's decision of 2.12.19 rejecting further submissions could not have been before Dr Thomas, whose report is dated 3.11.17, Mr Bahja is correct in asserting that Dr Thomas would have been aware of the reasons for deportation. Mr Bahja accepts that Dr Grant-Peterkin's report did not include any documents relating to the reasons for deport. However, at [82] of the First-tier Tribunal decision it was only Dr Thomas's report to which the judge was prepared to give greater weight because she was aware of the reasons for deportation. In the premises, there is no error in this regard by the First-tier Tribunal.

Scarring Report

21. In relation to the scarring report and the finding that only one of six scars could be attributable to assault, Mr Bahja points out that scars 4-7 related to self-harm. Mr Bahja took me to various passages of Dr Thomas's report where it is clear that the claim of sexual abuse and sexual orientation were detailed by the appellant in 2017. At section 7.13 to 7.23 of the report the expert related the self-harm to being

consistent with symptoms of severe depression and PTSD. At 7.23 the expert considered that multiple trauma including sexual assaults were of an exceptionally threatening nature, "likely to cause pervasive distress as defined in the Diagnostic Guidelines for PTSD." From sections 3.12 to 3.32, it is clear that the appellant had given a detailed account of gay sexual orientation and of being raped on multiple occasions. I, therefore, accept that there was no error in the judge's acceptance at [84] of the decision that the scarring was consistent with the appellant's account.

NRM/CA Referral and Decisions

22. In relation to the specific issue of the NRM/Competent Authority (CA) decisions , the appellant also relies on the recent decision of the Supreme Court in MS (Pakistan) v Secretary of State for the Home Department [2020] UKSC 9 (18th March 2020), of which the headnote reads:

> *"Whether tribunal bound by NRM decision – When determining an appeal that removal would breach ECHR rights, the tribunal was required to determine the relevant factual issues for itself on the basis of the evidence before it, albeit giving proper consideration and weight to any previous decision of the competent authority under the NRM. The tribunal was in no way bound by the decision reached under the NRM, nor did it have to look for public law reasons why that decision was flawed. Its jurisdiction, pursuant to the Nationality, Immigration and Asylum Act 2002 s.82(1), was to hear appeals against the immigration decisions of officials: it did not have jurisdiction judicially to review the decisions of the competent authority under the NRM. Appeals against immigration decisions were clearly intended to involve the hearing of evidence and the making of factual findings, Huang v Secretary of State for the Home Department [2007] UKHL 11, [2007] 2 A.C. 167 followed. The "proper consideration and weight", which the secretary of state accepted should be given to any previous decision of the competent authority, would upon the nature of the decision and its relevance to the issue before the tribunal. The decision of the competent authority under the NRM process was essentially factual, and both the FtT and the UT were better placed than the competent authority to decide whether the appellant was the victim of trafficking (paras 11-15)".*

23. Addressing the same issue the Upper Tribunal in DC (trafficking: protection/human rights appeals) Albania [2019] UKUT 351 (IAC) held:

> *"(a) In a protection appeal, the "reasonable grounds" or "conclusive grounds" decision of the CA will be part of the evidence that the tribunal will have to assess in reaching its decision on that appeal, giving the CA's decision such weight as is due, bearing in mind that the standard of proof applied by the CA in a "conclusive grounds" decision was the balance of probabilities".*

24. In relation to the NRM referral and the CA's reasonable grounds and conclusive grounds decisions, it now transpires that the referral and both CA decisions were put before the First-tier Tribunal, as confirmed by the new evidence from the appellant's legal representative and the submission of what has been described as a supplementary bundle. Whilst there was no bundle in the Tribunal's case file marked

as a supplementary bundle, some of the documents including one of the CA decisions appear attached to the back of an unpaginated skeleton argument. I also accept that the other was within the appellant's core bundle. I was unable to verify at the January 2020 hearing that these documents were before the First-tier Tribunal but am now satisfied that they were.

25. On the basis of the authorities cited, I accept that the First-tier Tribunal was entitled to take the CA decisions as part of the evidence to be considered and give appropriate weight to them. However, as Mr Bahja conceded, neither of the CA decisions made any reference to the sexual orientation claim or of the appellant being trafficked because of his sexual orientation. Whilst that is a feature of the Salvation Army's NRM referral that is not the same thing as there being any conclusion drawn by the CA. Mr Bahja submitted that all three documents need to be read together for the inference to be properly drawn that his claim of trafficking because of sexual orientation had been accepted as credible. I find that is going too far, reading into the CA decisions something which is not there. However, having considered the First-tier Tribunal decision further, I accept that the judge was entitled at [102] to [103] of the decision to rely on the credibility findings on his trafficking claim to "add weight to the Appellant's claims regarding his sexual orientation." The judge did not go as far as Mr Bahja submitted the Tribunal could or should, by reading into the CA's decisions a finding of credibility of being trafficked because of sexual orientation. Nevertheless, I accept that the judge was entitled to find that the NRM/CA decisions supported the appellant's credibility. These credibility findings perhaps should have been set against the negative credibility findings of Judge Andrew and the sentencing remarks. However, the fact is that the judge was entitled to assert that the appellant was not coming to the tribunal without any credibility. In the circumstances, there is no error in the Tribunal's reliance on the NRM/CA decisions to the limited extent it did.

26. In summary, it is clear from both authorities relied on by the appellant that the NRM decisions are part of the evidence the Tribunal was required to assess, giving due weight to the CA's assessment made on the balance of probabilities rather than the lower standard of proof applicable to this issue in the Tribunal. However, I do not accept the further submission of Mr Bahja that in light of the NRM/CA decisions it is now not open to the Secretary of State to argue on appeal before the FtT or the UT that the appellant is not gay. As pointed out the actual decisions made no reference to sexual orientation. Further, whether the respondent is or is not prohibited from resisting the claimed sexuality was a matter for the Tribunal to decide as a finding of fact.

Delay in Making the Sexual Orientation and Abuse Claim.

27. The appellant not only claims to be gay but his account includes being abused and raped by men on multiple occasions. I bear in mind in relation to credibility that whilst the sexual orientation is a late-made claim, delay in disclosing sexual orientation or abuse was considered in the expert evidence as entirely consistent with known behaviour. Mr Bahja pointed out that the first reference to the sexual

orientation claim was on 4.7.17 and that further references were made in correspondence from his legal representatives in August 2017. At [98] to [100] of the impugned decision the judge cited the expert evidence to the effect that it is not unusual for people who have suffered trauma or sexual abuse to delay disclosing their experiences. It was also noted that both experts concluded that the appellant was not feigning his symptoms. I am satisfied that the judge was entitled to regard the delay in making the sexual orientation claim as not undermining of credibility.

Risk on Return: Failure to Address Country Guidance

28. The second strand of complaint made by the respondent related to the risk on return to Afghanistan, the judge having found that the claimant was homosexual as asserted. It was asserted that the judge failed to apply the Country Guidance case of AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 0001. This explains that though homosexuality remains illegal in Afghanistan there is a lack of appetite by the government to prosecute and it is concluded that so far as non-state actors are concerned a practising homosexual on return to Kabul who would not attract or seek to cause public outrage would not face a real risk of persecution. It further held that a homosexual may be relatively safe in a big city (especially Kabul) and it would take cogent evidence in a particular case to demonstrate otherwise. The position in small towns and in rural areas can be different and will depend on the evidence in a specific case. Relocation to Kabul is generally a viable option for homosexuals who have experienced problems elsewhere though individual factors will have to be taken into account.

29. Mr Bahja submitted to me in January 2020 and again in August 2020 that AJ was made before the HJ (Iran) decision and subsequent strand of cases in which it was held that a claimant is not required to suppress his sexual orientation and, if he would be discreet on return to his home country only because of a fear of persecution, then he is entitled to protection. It was submitted that AJ had to be read in the light of HJ (Iran).

30. I was also referred in the Consolidated bundle to the CPIN at 2.4.3 which sets out the respondent's policy in relation to gay men returning to Afghanistan. It is there stated that as the 'reasonably tolerable' test of AJ was found to be incorrect and rejected in HJ (Iran), headnotes 3, 4, 5, 6 and 7 should not be followed and the test should be as set out at [35] and [82] of HJ (Iran). However, it became clear during submissions to me that whilst this policy document features in the appellant's consolidated bundle prepared for the Upper Tribunal appeal hearing, it was not what was put before the First-tier Tribunal in 2019, and could not have been, as it is dated February 2020. The CPIN put before the First-tier Tribunal was an earlier version from 2017 which did not express any caution about applying AJ.

31. The difficulty is that the judge failed to adequately address Country Guidance in the impugned decision. At [71] the judge stated, "I remind myself of the approach to be taken when assessing someone's sexuality as set out in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31." At [72] of the

decision the judge also referred to the CPIN on Afghanistan from January 2017, which also refers to AJ. At the January 2020 hearing, Mr Tan complained that the summary of the CPIN at [72] was not accurate. At [72] the judge stated, "as the objective evidence confirms that same-sex acts are illegal in Afghanistan it follows that there is no sufficiency of protection and the appellant's subjective fear of persecution is objectively well-founded". In this regard, at the January 2020 hearing Mr Bahja drew my attention to section 2.3.6 to 2.3.7 and 2.4.1 of the CPIN which stated that,

> "As same-sex sexual acts are prohibited in Afghanistan, it would be unreasonable to expect a person identifying as LGBT who fears persecution or serious harm by non-state actors to seek protection from the authorities without themselves facing prosecution/persecution by the state".

32. The difficulty with the First-tier Tribunal decision on this issue is that the judge appears to have regarded the conclusion that the appellant is of homosexual orientation as entirely determinative of the protection claim. Whilst the judge claims to have adopted the HJ (Iran) approach, Mr Bahja accepted that there was no reasoning within the decision to indicate an assessment as to whether the appellant would behave discretely on return or live openly as a gay man, and whether if he would live discretely he would do so only because of the fear of persecution or harm.

Conclusions on the Error of Law Issue

33. In the premises, I remain satisfied that whichever Country Guidance applied, the judge erred by failing to adequately address the risk on return to Afghanistan and for that reason the decision cannot stand. However, having carefully reviewed the reasons I cited in January 2020 and in the light of further submissions and clarity as to what evidence was before the First-tier Tribunal, I am satisfied that the primary finding of the First-tier Tribunal that the appellant is a gay man is sufficiently cogently reasoned by the First-tier Tribunal to disclose no material error. I have noted above the apparent failure to take into account previous adverse credibility findings, as well as the sentencing remarks. However, it is clear that the judge was not ignorant of the previous decision of the First-tier Tribunal, or of the sentencing remarks, which are referenced in the chronology and the sentencing remarks are referred to again at [70] and [106] of the decision. The judge noted a number of difficulties with the sexual orientation claim and carefully addressed the issue of delay. The judge carefully assessed the expert evidence, concluding that it overwhelmingly supported the claim and explained the delay in disclosing his sexuality and abuse. The judge was also entitled to take into account that the appellant been found credible in relation to the NRM/CA trafficking assessment. Those factors relied on by the judge in support of the claim would, I am now satisfied, outweigh the failure to specifically take account of the previous adverse credibility findings of the previous Tribunal appeal decision, which was on a different issue, so that the failure is not a material error of law.

34. In summary, the single error found is in failing to go on to assess the risk on return of a gay man to Afghanistan. For that reason alone, that part of the decision has to be

remade. Both representatives agreed that this could be done immediately with the appellant giving evidence. That evidence was taken after a short break.

Risk on Return

35. I bear in mind that the only route now open to the Appellant is on article 3 ECHR grounds. He is prohibited from pursuing asylum and humanitarian protections grounds by the s72 certificate and the preserved finding that this had not been rebutted.

36. I have to proceed on the basis that the appellant is of gay sexual orientation.

37. The respondent continues to rely on AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001, heard in October 2008. Mr Diwnycz pointed out that as of May 2020 this case was still on the Upper Tribunal's list of current Country Guidance Cases. The headnote reads:

> *"1. Though homosexuality remains illegal in Afghanistan, the evidence of its prevalence especially in the Pashtun culture, contrasted with the absence of criminal convictions after the fall of the Taliban, demonstrates a lack of appetite by the Government to prosecute.*
>
> *2. Some conduct that would be seen in the West as a manifestation of homosexuality is not necessarily interpreted in such a way in Afghan society.*
>
> *3. A homosexual returning to Afghanistan would normally seek to keep his homosexuality private and to avoid coming to public attention. He would normally be able to do so, and hence avoid any real risk of persecution by the state, without the need to suppress his sexuality or sexual identity to an extent that he could not reasonably be expected to tolerate.*
>
> *4. So far as non-state actors are concerned, a practising homosexual on return to Kabul who would not attract or seek to cause public outrage would not face a real risk of persecution.*
>
> *5. If some individual, or some gay lobby, tried to make a political point in public or otherwise behaved in a way such as to attract public outrage, then there might be a sharp response from the Government.*
>
> *6. A homosexual may be relatively safe in a big city (especially Kabul) and it would take cogent evidence in a particular case to demonstrate otherwise. The position in smaller towns and in rural areas could be different and will depend on the evidence in a specific case.*
>
> *7. Relocation to Kabul is generally a viable option for homosexuals who have experienced problems elsewhere, though individual factors will have to be taken into account.*
>
> *8. The evidence shows that a considerable proportion of Afghan men may have had some homosexual experience without having a homosexual preference. A careful assessment of the credibility of a claim to be a practising homosexual and the extent of it is particularly important. The evaluation of an appellant's behaviour in the UK may well be significant."*

38. Mr Bahja submitted that AJ and the 'reasonable tolerance' test at [3] above is inconsistent with HJ (Iran) [2010] UKSC 13 principles. He submitted that the appellant cannot be expected to act discretely and conceal his sexual identity if he would only do so for fear of persecution.

39. It is now well established following HJ (Iran) that if it is accepted that a gay person will be returned to a country where people who live openly are subject to persecution, the Tribunal must go on to determine what the individual would do. If the individual would in fact live discreetly and so avoid persecution, then it must be asked why he would do so. HJ (Iran) stated:

> *"[82] If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.*
>
> *If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted."*

40. Of course, that begs the question whether an openly gay person would be subjected to persecution on return to Afghanistan. There is a distinction to be drawn between AJ and HJ (Iran), as it is not clear that an openly gay person would attract persecution in Kabul so that the HJ (Iran) issue may not arise at all. [35] of AJ noted the high prevalence of sexual activity between men in Afghanistan and elsewhere the lack of appetite to prosecute is noted. Headnote [4] of AJ held that a practising homosexual on return to Kabul would would not attract or seek to cause public outrage would not face a real risk of persecution. There was no evidence in this case that the appellant would attract or seek to cause public outrage. The case also suggests that a practising homosexual will be relatively safe in Kabul. As stated above, the HJ (Iran) test applies only to countries where people who live openly are subjected to persecution. It follows that there is no inconsistency between HJ (Iran) principles and the findings in AJ as to risk on return to Afghanistan for gay men who relocate to Kabul.

41. However, as I am remaking the decision in the appeal, I also have to apply the CPIN dated February 2020, as reflecting the respondent's current policy. This includes a clear direction to caseworkers not to follow headnote paragraphs [3] to [7] but instead to adopt that test set out at [35] and [82] of HJ (Iran). If the application were being remade to the Secretary of State, she would be expected to decide the matter on the basis of her own extant policy.

42. 2.5.1 of the CPIN indicates that where a person has a well-founded fear of persecution from state actors, they will not be able to avail themselves of the

protection of the authorities. 2.5.4 states, "*Same-sex sexual acts are prohibited in Afghanistan, and it would be unreasonable to expect a person identifying as LGBTI, who has a well-founded fear of persecution from non-state actors because of their sexuality, to seek protection from the authorities as they are unwilling to provide effective protection*."

43. It is also stated at 2.6.1 that "*where a person has a well-founded fear of persecution from state actors, they will not be able to relocate to escape that risk*." 2.6.3 confirms that homophobic and traditional attitudes are prevalent throughout the country and "*there is very little space in Afghan society to openly identify as an LGBTI person… Whilst Kabul and other large cities might offer a degree of anonymity, there is unlikely to be any place in Afghanistan to which a person who openly identifies as LGBTI, could reasonably relocate without making fundamental changes to their behaviour. Therefore, headnotes 6 and 7 of AJ (Risk to Homosexuals) should not be followed*."

44. Applying the respondent's current CPIN, it seems to me that the only parts of AJ that can survive, are headnotes [1], [2], and [8], which note that whilst homosexuality remains illegal in Afghanistan, its prevalence demonstrates a lack of appetite by the government to prosecute. Some conduct that would be seen in the West as a manifestation of homosexuality would not necessarily be seen the same was in Afghan society. Further, a considerable proportion of Afghan men may have had some homosexual experience without having a homosexual preference. That last element is not relevant to the present case, the claim to be of homosexual orientation having been accepted and preserved.

The Evidence

45. The appellant relied on a new witness statement, dated 24 July 2020. Whilst his previous statement of 5 July 2018 was adduced, it did not address the issue of discretion or how the appellant would live on return to Afghanistan and was not specifically relied on. However, in the new statement, it is made clear that on return to Afghanistan the appellant asserts that he would live openly as a gay man. This is a new assertion but on the other hand he has never before been questioned about that. When asked in interview at Q67 whether he had lived openly gay in the UK he said he had. He was not asked in interview whether he would continue to live openly on return. In his most recent statement he stated that he would like to live openly gay in Afghanistan but could not do so because the police would not protect him and he would be killed by the government for being gay. "*So the only reason why I would hide my identity on return to Afghanistan is the fear of persecution and not for reasons of embarrassing family or friends*."

46. The appellant relied on his witness statements and was not asked further questions in chief. In cross-examination he confirmed to Mr Diwnycz that if return to Afghanistan he would wish to live as openly as a gay man. In summary, the oral evidence was clear that the appellant would wish to live as a gay man and would only not do so on return to Afghanistan for fear of persecution. I have to assess the credibility of that assertion.

47. Reliance was also placed on Dr Thomas' report at 3.37 where in October 2017 the appellant expressed to her that what he feared most if returned to Afghanistan, stating he wanted to live normally but feared that if his homosexuality was discovered he would be killed straightaway.

48. In assessing the credibility of this aspect of the claim that the appellant would live openly as a gay man on return to Afghanistan, I, of course, have to begin from the preserved finding that he is of homosexual orientation and would, therefore, remain a gay person on return to Afghanistan.

49. I consider that some part of the First-tier Tribunal's positive credibility findings have to be offset by the negative credibility findings of Judge Andrew which may not have been properly taken into account by Judge Clarke. However, I accept that the NRM/CA decisions found the trafficking claims credible and that is in general terms supportive of the sexual orientation claim and the claim that the appellant would wish to live openly as a gay man. Further, whilst those assessments did not specifically address the late-disclosed sexual orientation claim, it is clear from the referral that the claim to be gay and to have been abused and raped on multiple occasions was very much part of the appellant's claim at least back to 2017. There is some support as to why he did not disclose this element of his claim sooner. The medical evidence of mental health issues is generally supportive of both the claimed sexual abuse and the credibility of late-disclosure of his sexual orientation. Taking into account overall the credibility findings of First-tier Tribunal Judge Clarke, having identified difficulties with the sexual orientation claim, and even taking into account that the appellant was found not credible by a previous Tribunal on the trafficking claim, the appellant has demonstrated such an overall level of credibility so that applying the lower standard of proof, I find that he has demonstrated that on return to Afghanistan he would wish to live openly as a gay man and would only not do so for fear of persecution.

50. Whilst I would have concluded that, following the principles and headnotes of AJ as set out above, there would be no risk on return to Afghanistan and relocation to Kabul for the appellant even living openly as a gay man, I find that my hands are effectively tied by the recent CPIN, including that part which clearly states at 2.6.3 that there is unlikely to be any place in Afghanistan to which person only identifying as LGBTI could reasonably relocate without making fundamental changes to their behaviour, which cannot be expected of them, pursuant to HJ (Iran) principles.

51. It would be an error of law to fail to apply the respondent's current policy and I cannot both apply AJ and follow the CPIN. In the circumstances, I must conclude that as an openly gay man returning to Afghanistan the appellant has demonstrated to the lower standard of proof that he would face a risk of treatment contravening his rights under article 3 ECHR.

Decision

52. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it on article 3 grounds only.

Signed *DMW Pickup*

Upper Tribunal Judge Pickup

Dated 4 August 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email