Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10590/2014

THE IMMIGRATION ACTS

Heard at Stoke	**Decision and Reasons Promulgated**
on 7th May 2015	**On 14th May 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ROKAN MOHAMMEDI
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Manning instructed by Sultan Lloyd Solicitors.
For the Respondent: Mr McVeety – Senior Home Office Presenting officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge J.W.H Law promulgated on the 29th January 2015 in which the Judge dismissed the appeal against the refusal of further leave to remain dated 21st November 2014.

Background

2. The Appellant is a citizen of Iran born in 1996. His immigration history shown he entered the UK in February 2011. His claim for asylum was refused but he was granted discretionary leave to remain until 1st June 2013 under the terms of the Respondent's discretionary policy for unaccompanied child asylum seekers.

3. The Appellant appealed against the 2011 refusal and the Judges starting point as per the Devaseelan principle was an earlier determination in which the Appellant was found to lack credibility for the reasons set out at paragraph 24 of the determination under challenge. The Judge also considered the more recent evidence which he found had to be treated with circumspect for the reasons stated, before concluding that in light of his agreement with the original judge that the Appellant had lied in order the enhance his claim, the material part of the claim was not accepted as being true. In paragraph 31 the Judge found:

> 31. I have therefore determined the appellants asylum claim (and any Article 3 claim, to the extent that it stands and falls with it) on the same basis as the immigration judge in 2011, namely that the appellant's claim is not credible and he does not have a well founded fear of persecution in Iran. I am not satisfied that he has a political opinion opposed to the authorities in Iran, or that the authorities would impute such an opinion to him. With regard to the issue of tracing, I do not believe that the appellant ever did complete a Red Cross questionnaire; this is both because of his general lack of credibility and also because if he had completed such a questionnaire he surely would have tried to find out subsequently whether the Red Cross had had any success. I therefore agree with the conclusions of the respondent on the issues of tracing and find that the appellant is indeed at the "negative end of the spectrum" referred to in KA (Afghanistan). I am not satisfied that there is anything to prevent him returning to live with his family in his own village; alternatively, if they have moved away of is (contrary to my findings) he is at risk there, it would not be unreasonable or unduly harsh for him to relocate. He is no longer a minor and, having had the opportunity to observe him giving evidence in English, I find there is nothing childlike in his demeanour or behaviour such as might put him at risk of being treated like a child on return.

Grounds and submissions

4. Ground 1 is a challenge to the methodology used by the Judge in assessing the Appellants credibility. Although First-tier Tribunal Judge Gibb in granting permission expressed the view that this ground appeared to him to be "misguided and unarguable" permission was not specifically refused and Miss Manning pursues it today, in accordance with instructions.

5. The Appellant relies upon the judgment of the Grand Chamber of the Court of Justice of the European Union (CJEU) in ABC v Staatssecretaris van Veilgheid en Justitie, United Nations High Commission for Refugees (UNHCR) intervening. C-148/13 to C-150/13.

6. That case involved a referral by the authorities in Holland for a preliminary ruling concerning the interpretation of Article 4 of Council Directive 2004/83/EC. The main part of the text of the judgment is as follows:

> **Consideration of the question referred for a preliminary ruling**
>
> *Preliminary observations*
>
> 45 It is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (judgment in *N.*, C-604/12, EU:C:2014:302, paragraph 27).
>
> 46 Directive 2004/83 must, therefore, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter (judgment in *X and Others*, C-199/12 to C-201/12, EU:C:2013:720, paragraph 40).
>
> 47 Furthermore, it should be recalled that Directive 2004/83 does not contain any procedural rules applicable to the examination of an application for international protection, nor, therefore, does it lay down the procedural guarantees that must be afforded to an applicant for asylum. It is Directive 2005/85 that establishes minimum standards applicable to procedures for examining applications and specifies the rights of applicants for asylum that must be taken into account in the examination of the cases in the main proceedings.
>
> *Consideration of the question*
>
> 48 By its question, the referring court asks, in essence, whether Article 4 of Directive 2004/83, read in the light of the Charter, must be interpreted as meaning that it imposes on the competent national authorities, acting under the supervision of the courts, certain limits when they assess the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation.
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> 49 In that regard, it should be noted at the outset that, contrary to the submissions made by the applicants in the main proceedings, according to which the competent authorities examining an application for asylum based on a fear of persecution on grounds of the sexual orientation of the applicant for asylum must hold the declared sexual orientation to be an established fact on the basis solely of the declarations of the applicant, those declarations constitute, having regard to the particular context in which the applications for asylum are made, merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4 of Directive 2004/83.

50 It is clear from the very wording of Article 4(1) of the directive that, in the context of that assessment, the Member States may consider it to be the applicant's duty to submit as soon as possible all elements needed to substantiate the application for international protection, the Member State assessing, in cooperation with the applicant, the relevant elements of the application.

51 Furthermore, it follows from Article 4(5) of Directive 2004/83 that when the conditions listed under (a) to (e) of that provision are not met, statements made by applicants for asylum with respect to their declared sexual orientation may require confirmation.

52 It follows that, although it is for the applicant for asylum to identify his sexual orientation, which is an aspect of his personal identity, applications for the grant of refugee status on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to an assessment process, provided for in Article 4 of that directive.

53 However, the methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of those applications must be consistent with the provisions of Directive 2004/83 and 2005/85 and, as is clear from recitals 10 and 8 in the preambles to those directives respectively, with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7 thereof.

54 Even though Article 4 of Directive 2004/83 is applicable to all applications for international protection, whatever the ground for persecution relied on in support of those applications, it remains the case that it is for the competent authorities to modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the Charter.

55 As regards the assessment of the facts and circumstances under Article 4 of Directive 2004/83, that assessment takes place, as was held at paragraph 64 of the judgment in *M.* (C-277/11, EU:C:2012:744), in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are satisfied.

56 During the first stage, to which the questions of the referring court in each of the cases in the main proceedings relates, while the Member State may consider that it is generally for the applicant to submit all elements needed to substantiate his application, the applicant being, besides, best placed to provide evidence to establish his own sexual orientation, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of assessing the relevant elements of that application, in accordance

with Article 4(1) of the directive (see, to that effect, judgment in *M.*, EU:C:2012:744, paragraph 65).

57 It should be noted in that regard that, in accordance with Article 4(3)(c) of Directive 2004/83, that assessment must be made on an individual basis and must take account of the individual situation and personal circumstances of the applicant, including factors such as background, gender and age, in order for it to be determined whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

58 Furthermore, as is recalled at paragraph 51 of this judgment, in verifications carried out by the competent authorities, pursuant to Article 4 of the directive, when certain aspects of the statements of the applicant for asylum are not substantiated by documentary or other evidence, those aspects do not require confirmation provided that the cumulative conditions laid down in Article 4(5)(a) to (e) of the directive are met.

59 As regards the methods of assessing the statements and documentary or other evidence at issue in each of the cases in the main proceedings, it is appropriate, in order to provide an answer useful to the referring court, to restrict the present analysis to the compatibility with Directives 2004/83 and 2005/85 and the Charter of, first, the verifications carried out by the competent authorities based on, in particular, stereotypes as regards homosexuals or detailed questioning as to the sexual practices of an applicant for asylum and the option, for those authorities, to allow the applicant to submit to 'tests' with a view to establishing his homosexuality and/or of allowing him to produce, of his own free will, films of his intimate acts and, second, the option for the competent authorities of finding a lack of credibility on the basis of the sole fact that the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the grounds for persecution.

60 As regards, in the first place, assessments based on questioning as to the knowledge on the part of the applicant for asylum concerned of organisations for the protection of the rights of homosexuals and the details of those organisations, such questioning suggests, according to the applicant in the main proceedings in case C-150/13, that the authorities base their assessments on stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of each applicant for asylum.

61 In that respect, it should be recalled that Article 4(3)(c) of Directive 2004/83 requires the competent authorities to carry out an assessment that takes account of the individual position and personal circumstances of the applicant and that Article 13(3)(a) of Directive 2005/85 requires those authorities to conduct the interview in a manner that takes account of the personal and general circumstances surrounding the application.

62 While questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not, nevertheless, satisfy the requirements of the provisions referred to in the

previous paragraph, in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.

63 Therefore, the inability of the applicant for asylum to answer such questions cannot, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility, inasmuch as such an approach would be contrary to the requirements of Article 4(3)(c) of Directive 2004/83 and of Article 13(3)(a) of Directive 2005/85.

64 In the second place, while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof.

65 In relation, in the third place, to the option for the national authorities of allowing, as certain applicants in the main proceedings proposed, homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter.

66 Furthermore, the effect of authorising or accepting such types of evidence would be to incite other applicants to offer the same and would lead, de facto, to requiring applicants to provide such evidence.

67 In the fourth place, as regards the option for the competent authorities finding a lack of credibility when, in particular, the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the grounds for persecution, it must be held as follows.

68 It is clear from Article 4(1) of Directive 2004/83 that Member States may consider it the duty of the applicant to submit 'as soon as possible' all elements needed to substantiate the application for international protection.

69 However, having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

70 Moreover, it must be observed that the obligation laid down by Article 4(1) of Directive 2004/83 to submit all elements needed to substantiate the application for international protection 'as soon as possible' is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) of Directive 2005/85 and Article 4(3) of Directive 2004/83 to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability

of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.

71 Thus, to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph.

72 Having regard to all the foregoing, the answer to the question referred in each of the cases C-148/13 to C-150/13 is:

– Article 4(3)(c) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities founded on questions based only on stereotyped notions concerning homosexuals.

– Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.

– Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.

– Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 4(3)(c) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and

> **Article 13(3)(a) of Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals.**
>
> **Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.**
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> **Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.**
>
> **Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.**

7. The ground as pleaded asserts that the effect of the decision is that under EU law an assessment of the Appellants credibility was warranted only if his asylum application was not supported by "documentary or other evidence". The Appellant asserts that as his account was supported by such evidence in the form of the Danish immigration Service Reports which provided corroborative evidence of his claim and the workings of the Kurdish parties, including the PJAK, there should not have been an assessment of the credibility of those elements of his claim supported by documentary of other evidence.

8. Article 4(5) was considered in detail by the Upper Tribunal in the case of **KS (benefit of doubt) 2014 UKUT 00552** in which the Tribunal was considering when assessing the credibility of an asylum claim, the benefit of the doubt ("TBOD"), as discussed in paragraphs 203 and 204 of the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. In relation to the position in EU law the Tribunal stated:

> 78. We find it unnecessary in this decision to seek to interpret the precise import of the approach to TBOD set out by the ECtHR in its jurisprudence relating to Article 3 in the context of assessing risk on return, but we would make this observation. Whilst that approach is clearly wider than an "end-

point" approach, we are not convinced that it is as holistic or pervasive as Mr Bazini submits, since the Court appears to envisage that in certain circumstances the notion is disapplied "when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions": see I v Sweden, 61204/09 [2013] ECtHR 813, at [50] (*supra* paragraph 8. (Insofar as it might be suggested that in R.C. v Sweden the Court was envisaging that in certain circumstances the burden of proof shifts from the applicant to the state, we would regard ourselves as bound to follow domestic authority to the contrary: see PJ (Sri Lanka) [2014] EWCA Civ 1011, approving NA (UT rule 45: Singh v Belgium) Iran [2014] UKUT 205 (IAC) and MJ (Singh v Belgium: Tanveer Ahmed unaffected) Afghanistan [2013] UKUT 254 (IAC).)

Article 4(5) of the Qualification Directive (QD)

79. Perhaps unsurprisingly given the dearth of case law, neither party was able to give us much assistance in relation to the question as to whether Article 4(5) QD has replaced or modified the UNHCR Handbook's formulation of TBOD notion. Since our hearings dealing with the appellant's case some light has been shed on Article 4(5) by Advocate General Sharpston in her Opinion in Joined Cases C-148/13, C-149/13 and C-150/13, A, B and C, 17 July 2014. At [50] she observes that in general terms neither the Qualification Directive nor the Procedures Directive (2005/85/EC) make specific provision for the manner in which an applicant's credibility is to be assessed and that "the general position is that, in the absence of EU rules on a subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection conferred by EU law." Earlier, at [42], she observed that:

> "42. Article 4(1) allows Member States to place the onus upon applicants '… to submit as soon as possible all elements needed to substantiate the application for international protection …'. That provision also places a positive duty on Member States to act in cooperation with the applicant to assess the relevant elements of his application. The assessment should be carried out on an individual basis and should include taking into account the applicant's individual position and personal circumstances. Article 4(5) of the Qualification Directive acknowledges that an applicant may not always be able to substantiate his claim with documentary or other evidence. Such evidence is therefore not required where the cumulative conditions of Article 4(5)(a) to (e) are met."

80. The Advocate General goes on to emphasise at [56]-[57] that " it does not follow from the lack of any express wording in the Directive regulating Member States' discretion regarding the practices or methods for assessing an applicant's credibility, that EU law places no limits on that discretion." She highlights the role of the Charter:

> "57. The Charter provides overarching standards that must be applied in the implementation of any directive. The Qualification Directive harmonises by introducing minimum standards for obtaining refugee status within the European Union. It would undermine the CEAS, in

> particular the Dublin system, if Member States were to apply widely divergent practices when assessing such applications. It would be undesirable if the differences in its implementation led to applications being more likely to succeed in one jurisdiction than in another because the evidentiary requirements were easier to satisfy. "

81. In light of this Opinion and other academic commentary it can be discerned that the effect of Article 4(5) (for those Member States who opt to apply the principle according to which it is the duty of the applicant to substantiate the application for international protection) is limited to the situation where aspects of the applicant's statements are not supported by documentary or other evidence (i.e. a situation where there is a lack of corroboration). By Article 4(5) the applicant in such a situation will not need to provide confirmation (corroboration) when the conditions enumerated under (5) are cumulatively met[1]. These conditions relate to genuine effort (4(5)(a)), satisfactory explanation (4.5(b)), plausibility (4(5)(c), earliest possible application (4(5)(d) and general credibility (4(5)(e)).

82. As such, does Article 4(5) enunciate a TBOD rule? We have already referred to the position taken by the respondent in the APIs which is that this provision does enunciate such a rule (see above paragraphs 18,21). That is lent some degree of support by the observation made by Hailbronner in EU Immigration and Asylum Law-Commentary, 2010, at p.1030 that the text of Article 4(5) was based in part on the UNHCR Handbook.

83. However, stating that Article 4(5) is based "in part" on the HCR Handbook does not demonstrate that this provision codifies such a rule and the idea that it does so is not shared by the most in-depth academic commentary so far, that by Gregor Noll, "Evidentiary assessment and the EU qualification directive", UNHCR Working Paper no. 117 in New Issues in Refugee Research, June 2005. Describing Article 4(5) as comprising overall "a qualified alleviating evidentiary rule", Noll cautions at p.12:

> "The wording of [this rule] signifies a heavier burden for the applicant than the analogue principle of "benefit of the doubt", as this is described in UNHCR's handbook. In addition to the requirements given in the handbook, article 4.5 places at least one additional condition on the applicant', s/he is required to have applied for international protection as early as possible unless s/he can provide good reasons for not doing so".

84. Of course, had we accepted that Article 4(5) of the QD is to be read as codifying a TBOD rule, then we would have to revise our earlier statement that this notion is not a rule of law. That is because, in the UK, Article 4(5)

[1] In the IARLJ study (op.cit. at para 9) the requirements of Article 4(5) are said to "form an exhaustive list and each must be satisfied for the claimant to have the benefit of that lack of need for confirmation. This gives partial statutory effect in those circumstances to the concept of the application of the 'benefit of the doubt' to which the UNHCR Handbook refers at paragraphs 203 and 204. Article 4.5, however, applies only '*where Member States apply the principle according to which it is the duty of the applicant to substantiate the application*' – that is where the MS exercises its option to rely on the first sentence of Article 4.1 either specifically or because this principle forms part of its national law concerning evidential requirements".

has been implemented by paragraph 339L of the Immigration Rules (see above, paragraph 20) which for most purposes do have the force of law.

85. But (like Noll) we think it unwise to refer to Article 4(5) as reflecting or encapsulating a TBOD rule. In part that is because we think that the provision seeks primarily to identify one particular application of the lower standard of proof (which in our view affords a positive role for uncertainty). In part this relates to the point we have already emphasised, namely that this provision is, limited to cases where there is a lack of corroboration: viz., "where aspects of the applicant's statements are not supported by documentary or other evidence" (chapeau to Article 4(5)); that on its face is more limited in scope than the notion as set out in paragraph 204 of the UNHCR Handbook (where the precondition is that "all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility"). In part is because whereas the notion is formulated in the UNHCR Handbook in defeasible and contingent terms, Article 4(5) sets out in mandatory terms[2] four conditions which have to be cumulatively met in order for an applicant not to be required to substantiate his application. As such we think Article 4(5) (and paragraph 339L of the Rules) should be applied as it is without any gloss or reference to the UNHCR Handbook "analogue". We understand UNHCR's concern, as expressed in the 2013 CREDO study, that if not read in the light of the UNHCR Handbook, Article 4(5) could operate as a policy for withholding TBOD from asylum-seekers; but we consider that danger to be offset by (i) the fact that the ambit of Article 4(5) is limited to cases of non-corroboration/confirmation; and (ii) the fact that applicants benefit throughout the assessment of credibility from the lower standard of proof, which in the terminology of Karanakaran, ensures that the entirety of that assessment affords a positive role for uncertainty.

9. The Immigration Rules contain reference to the way in which a judge is to assess the merits of an appeal before them in paragraph 399L. This was recognised KS where it is said:

20. Despite figuring little in UK case law, TBOD notion is given great prominence in the aforementioned APIs, which also see it as an integral part of paragraph 339L of the Immigration Rules. Paragraph 339L specifies that:

> "It is the duty of the person to substantiate the asylum claim or establish that he is a person eligible for humanitarian protection or substantiate his human rights claim. Where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects will not need confirmation when **all** of the following conditions are met:
>
> (i) the person has made a genuine effort to substantiate his asylum claim…;

[2] Albeit only "[w]here Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection …" (Article 4(5)).

(ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of material has been given;

(iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;

(iv) the person has made an asylum claim… at the earliest possible time, unless the person can demonstrate good reason for not having done so; and

(v) the general credibility of the person has been established ."

21. By way of an attempted gloss on paragraph 339L, paragraph 4.3.4. of the APIs states:

"4.3.4 Benefit of the doubt and general credibility

Facts which are internally credible but lack any external evidence to confirm them are deemed to be "unsubstantiated" or "uncertain" or "doubtful". However, a decision must be made whether to give the applicant the benefit of the doubt on each uncertain or unsubstantiated fact – this means that the decision maker must come to a clear finding as to whether the fact can be accepted or rejected. It is not acceptable to come to a final conclusion that a claimed fact (about which you are uncertain), "may have happened". The benefit of the doubt needs to be considered and applied appropriately to these uncertain facts when considering all the evidence in the round at the end of the credibility assessment. This means that the benefit of the doubt can only be considered after a finding on the material facts that are to be accepted or rejected has been made.

…

However, it is important to understand paragraph 339L and its limitations. What it is saying is that if an applicant meets all 5 criteria, a decision maker should give the benefit of the doubt – there would, after all be no reason not to do so. However, the reverse is not automatically true. Because an applicant fails to meet one or more of the criteria, this in itself does not permit a decision maker to disregard all unsubstantiated areas of an applicant's claim because an unsubstantiated statement can be credible if it is generally internally consistent, compatible with known facts and plausible. It is, once again, a matter of determining the **weight** to be given to these issues in the light of the material facts of the case.

…

Decision makers must ensure that wherever possible, the applicant is given the opportunity to provide a reasonable explanation where and when required under the provisions of 339L. If the applicant has **met** all 5 of the criteria set out in Paragraph 339L of the Immigration Rules, the benefit of the doubt should be given to any unsubstantiated facts. If the applicant has not met all the criteria,

> decision makers nevertheless must consider whether giving the benefit of the doubt to any uncertain facts is justified. …
>
> Any decision not to apply the benefit of the doubt to a material claimed fact that is otherwise internally credible must be based on reasonably drawn, objectively justifiable, inferences. "

10. It is important to note the wording of the Article which is reflected in the Immigration Rules and which speaks of there being no need to substantiate an application if it is supported by documentary or other evidence.

11. Art 4 (5) does not say that if documentary evidence has been provided there is no need to provide further evidence, irrespective of the quality of the available material. To assess whether a claim is supported by evidence requires an assessment of that material. Such may not be sufficient and may require more which the decision maker is not arguably barred from seeking. The Article sets out the circumstances in which a person is not required to provide confirmation where supporting material has been provided if all the conditions have been met. This recognises that in some cases there may be no supporting material and that it will be unreasonable to expect the same to be provided if the Appellant has done all in their power to substantiate the claim. The Article is a provision relating to the way in which the burden of proof can be discharged and how such should be assessed and what can be expected of an applicant.

12. The challenge in this case is in reality to the weight the Judge gave the evidence relied upon. The Judge was required by domestic law and good practice to consider the merits of the case based upon the available evidence including the previous determination. The adverse credibility findings are not contrary to that evidence. The Judge has not erred in requiring the Appellant to substantiate his claim in a situation where the same is not required per the provisions of the Immigration Rules and Article 4(5). No arguable legal error is made out.

13. Ground 2 is a mere disagreement with the findings relating to the tracing obligation. It has not been shown the Appellant is or was entitled to the corrective relief sought. The finding he has family in Iran has not been shown to be irrational or contrary to the evidence. The fact he was granted discretionary leave as a minor is not determinative. It has not been shown the Respondent failed to comply with her statutory duty to endeavour to trace the family of the Appellant whilst a minor, especially in a country such as Iran where there is no diplomatic presence. It has also not been shown any such failure had caused the Appellant such prejudice that it would be unfair now to remove him to Iran.

14. Ground 3 refers to the assessment of the Article 8 element of the appeal. In paragraph 40 of the determination the Judge found:

> 40. Under appendix FM, the relationship between the applicant and the partner must be genuine and subsisting: E-LTRP 1.7. I do not doubt that Ms Aladag has a genuine affection for the appellant, but I am not satisfied

> that they are in a subsisting relationship. It has not reached the stage where she is willing to acknowledge his existence to her parents and I find that they have is a friendship rather than a relationship. They do not co-habit and they spend only limited periods together.

15. As the above finding was made the Judge did not consider EX.1.

16. The grounds assert the Judge erred in failing to give proper consideration to cultural differences and to the fact it is more difficult for a Muslim female to tell her parent of a relationship than it may be for a non Muslim female.

17. Whilst cultural elements are important when assessing the evidence they are not determinative. The Judge refers to Ms Aladag not informing her parents of the relationship but that does not means there is no form of relationship or the one that exists satisfies the relevant Rule. The evidence shows there is a relationship in that the Appellant and Ms Aladag are a young couple who have formed an attachment. She stays at his accommodation occasionally even though she has not informed her parents. They on the facts appear to be a courting couple in a 'boyfriend girlfriend' type relationship.

18. The relevant provisions of Appendix FM are those relating to the 'partner route'. At the date of application the Appellant was under 18 which fell foul of the requirements of E-LTRP 1.3. Although over 18 at the date of the hearing the rule contains a specific timeline and the need to satisfy the age requirement at the date of the application.

19. The Judge found against the Appellant on E-LTRP1.7 which required the relationship to be genuine and subsisting. There is, however, a more fundamental element that needed to be considered in relation to the Appellants claim the Judge erred in finding he was unable to succeed under the Rules, which relates to the definition of a partner to be found in Gen 1.2 which states:

> GEN.1.2. For the purposes of this Appendix "partner" means-
>
> a. the applicant's spouse;
>
> b. the applicant's civil partner;
>
> c. the applicant's fiancé(e) or proposed civil partner; or
>
> d. a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application,
>
> unless a different meaning of partner applies elsewhere in this Appendix.

20. The Appellant and his girlfriend are not married in law, not civil partners, not engaged to be married and have not been living in a relationship akin to marriage. E-LTRP.1.7. requires the relationship between the applicant and their partner to be genuine and subsisting, but the definition of the term partner in this requirement must be assessed by reference to Gen 1.2.

21. No material legal error has been shown in the decision to refuse the appeal under the Immigration Rules.

22. The Judge considered Article 8 and found the decision proportionate. In light of the facts and the limited nature of the rights being relied upon, which form part of the Appellants private life, it has not been shown the legitimate aim relied upon by the Respondent is arguably displaced in this matter. The finding as to proportionality is one open to the Judge on the evidence.

Decision

23. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….

Upper Tribunal Judge Hanson

Dated the 8th May 2015