**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/14328/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 19 December 2017** | **On 19 December 2017** |

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**R S**
(ANONYMITY DIRECTION MADE)

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms A Patyna, Counsel instructed by Montague Solicitors LLP
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
Although an anonymity direction was not made by the First-tier Tribunal, as a protection claim, it is appropriate that a direction is made. Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

## DECISION AND REASONS

### Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Cassel promulgated on 29 June 2017 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 3 October 2016 refusing his protection and human rights claim.

2. The Appellant is a national of Iran. He was encountered by police in the UK on 25 April 2016 whilst leaving the back of a lorry. He claimed asylum on 26 April 2016.

3. The Appellant's protection claim is based on his sexuality. He claims to be gay. It is also at the core of his claim that he says that the authorities in Iran raided a party he was attending with his long-term partner and discovered video evidence of him and his partner engaging in sexual activity. The Appellant claims that the police have raided his home whilst he was in hiding in Iran and asked about his whereabouts.

4. The Appellant raises four grounds of appeal. First, he says that the Judge has unlawfully required corroboration for the protection claim. Second, he submits that the Judge has unlawfully failed to consider photographic evidence produced in support of his case which show him attending a gay club in Basildon. Third, he says that the Judge unlawfully failed to identify the inconsistencies relied upon to support the adverse credibility finding. Fourth, he says that the Judge has failed properly to apply HJ (Iran) in stating that, even if the Appellant were gay, he would not be at risk because it is not accepted that he came to the attention of the authorities in Iran.

5. Permission to appeal was granted by First-tier Tribunal Judge Farrelly on 2 October 2017 in the following terms (so far as relevant):-

> "…4. The fact that corroboration is not required does not mean that the judge is required to leave out of account the absence of evidence which might reasonably be expected. An appeal must be determined on the basis of the evidence produced but the weight to be attached to oral evidence may be affected by a failure to produce other evidence in support. Consequently, I find no fault with the judge's comments about the appellant's uncle. It was a matter for the judge to decide what weight to attach to the photographs.
> 5. The judge considered the alternative: that the appellant was gay. The judge did not accept that the authorities had expressed any interest in him. The judge referred to para 33 of SSH and HR. This decision is concerned with the risk for someone who left Iran illegally who was not otherwise wanted. On the basis the primary finding that is not Gay is sustainable how the judge dealt with the alternative is not material."

6. As will be immediately apparent on a reading of the above and although the Respondent has failed to notice this in her Rule 24 response, the reasons given by FTTJ Farrelly appear as a refusal of the application for permission to appeal and not a grant. There is no arguable error of law identified by Judge Farrelly's decision.

7. I raised this issue with the parties' representatives at the outset and it was agreed that the appropriate course is for me to disregard the substance of Judge Farrelly's decision and proceed on the basis that he intended to grant permission as there are arguable errors of law. Although this means that the Appellant has no opportunity to renew the application for permission to appeal to this Tribunal, he derives a benefit from being able to put his case orally and to demonstrate that there are indeed errors of law in the Decision. I put out of my mind the substance of Judge Farrelly's decision when determining the error of law issues.

8. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

**Decision and Reasons**

9. As Judge Cassel pointed out, the central issue in this case is whether the Appellant is credible in his claim to be gay ([5] of the Decision). The Judge had before him both documentary evidence relating to that claim (in the form of the photographs on which the Appellant relies) and the oral evidence of the Appellant.

10. Dealing first with the photographs, the Judge sets out at [29] of the Decision what those show as follows:-

> "[29] A number of photographs of the Appellant standing beside a sign or signs showing "Colours" have been produced. All but one of them show him on his own in various poses. The majority appear to be taken outside of the club in the entrance hall. One of the photographs shows the Appellant sitting next to an unnamed person. He does not refer to these photos in his statement nor his oral evidence today. He has simply produced them. I place no evidential weight upon these 'photos."

11. I have carefully considered the photographs on their face. The description of what those show as set out by the Judge is a fair one. Of course, this is only one element of the Appellant's evidence. However, the Judge was entitled to find that he could place no weight on those photographs in terms of his assessment whether the Appellant is indeed gay. They simply do not add to his case.

12. I turn then to the oral evidence. The first ground challenges the Judge's requirement for corroboration. This was in large part the focus of the oral submissions before me. The requirement for corroboration is

said to arise in two different contexts. The first is evidence from the Appellant's uncle who it appears remains in Iran and with whom the Appellant has retained contact. The Appellant says that his uncle has endeavoured to find out what happened to the Appellant's partner in Iran (with whom the Appellant says he was videoed having sex) and the others at the party when the police raided it. There is an inconsistency identified at [13] of the Decision between what it is said that the Appellant's uncle told him about the fate of these persons. On the one hand, the Appellant says that his uncle was told that the Appellant's partner is in prison. On the other, the Appellant's evidence is that his uncle had no news of these persons. I will come back to that when dealing with the Judge's findings about inconsistencies as appears elsewhere within the Decision.

13. The Appellant says that the Judge should not have required corroboration. There is no duty on an asylum seeker to provide corroboration of a claim. That is right. However, the Judge's reference to the lack of evidence from the Appellant's uncle at [26] of the Decision is not in the context of requiring corroboration of the claim but in deciding what weight to give to the Appellant's oral evidence in this regard. The Appellant's oral evidence on this point is self-evidently hearsay. Clearly the Appellant's uncle could not provide direct oral evidence. However, the Judge was entitled to question why it was that no letter or other written evidence was provided by the Appellant's uncle given the Appellant's case that he remains in contact with his uncle. The Judge is entitled to take into account that lack of direct evidence when deciding what weight to give to the Appellant's oral evidence.

14. A similar point arises in relation to the other aspect of the Appellant's case which the Appellant says he was being required to corroborate. That relates to the Appellant's relationships in the UK. As I have already observed, it is central to the Appellant's case that he is a gay man. He has provided oral evidence that he has been in two relationships since he came to the UK. The Judge had the Appellant's own oral evidence about that. However, he found at [27] and [28] of the Decision that the lack of evidence from his ex-partners was relevant to the credibility assessment.

15. Ms Patyna made much of what is said at [27] and [28] of the Decision and submitted that the Judge was actually requiring the Appellant to provide evidence from these men. She submitted that the Judge has failed to consider the difficulties in obtaining that evidence. When I asked what those difficulties were, she responded that the one relationship (with "R") was a short-term one and that the Appellant was not in contact with him. As Ms Everett pointed out, though, there was no evidence that this relationship ended acrimoniously or that the Appellant had no means of contact.

16. The second relationship was with a Mr A with whom the Appellant accepts he has retained contact. Ms Patyna submitted that the Judge

has failed to take into account that Mr A does not live locally, that the Appellant only has contact with him by telephone and that he is an asylum seeker. Leaving aside that Mr A lives only in Bedford and that he is an asylum seeker does not obviously present a difficulty to him giving evidence, there is no reason given why he (and indeed R) could not have provided at the very least a letter in support of the Appellant's case even if they were unwilling to attend to give oral evidence.

17. The Judge did not impose a requirement on the Appellant to call evidence from these ex-partners. As he finds in the last sentence of both [27] and [28] of the Decision, he has merely taken into account the lack of any "credible reason" for this lack of evidence. He was entitled to ask himself why the Appellant had not called at least one of those men to give supporting evidence given that both men remain in the UK and that evidence of his sexuality was so important, indeed fundamental, to the success or otherwise of his case. The Judge was entitled to give the Appellant's own evidence less weight in those circumstances.

18. Turning then to the third ground, the Appellant says that the findings of inconsistencies are non-existent, unclear and/or insufficiently reasoned. This is said to arise in the particular context of [23] to [25] of the Decision. I therefore set out those paragraphs below:-

> "[23] [The Appellant's] evidence in relation to E's whereabouts and his knowledge also changed. At Paragraph 23 of his statement he stated "I asked my uncle to find out about I (sic) but he told me that he has not heard of him." In evidence today he first said "I have been in contact with my uncle who doesn't know what has happened to them" (the three present at the party and including E). When cross examined he stated "I asked my uncle 3 or 4 times to make enquiries but he said that he had no news". He added "Even if I find out where E is what can I do?" I find that these inconsistencies damage his credibility.
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> [24] The relationship was conducted, he said, with some degree of secrecy. At AIR Q126 he added "In Iran I would take [E's] hand and walk in the street with him tjat o the only thing we could do". In his statement however at Paragraph 15 he gave a different account and stated "It is not like I and [E] were comfortable and free to walk hand in hand in the street or parks or generally in public". Today he said in evidence that he had been afraid of being exposed as gay although could give no sensible explanation as to why on the night of the party he had been warned on two occasions to turn down the music, creating noise and bringing attention to himself.
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> [25] He stated that his fear of discovery centred on the video of him having sex with E. At 4.1 of the SIR he stated "On 9 October me and my boyfriend were at a birthday party, he filmed us having sex. The authorities raided the house and found the evidence". At AIR Q87 he stated "The others watched clips they had recorded of us, M said he would delete it". Today in giving evidence he referred to the video being on his mobile 'phone. These inconsistencies also damage his credibility."

19. If the only inconsistency relied upon by the Judge were that appearing at [23] of the Decision, I would have considerable sympathy for the Appellant's case on this ground. If there are discrepancies within those answers they are extremely nuanced (as Ms Everett accepted). However, those answers have to be read also in the context of what was said in evidence and most importantly in light of the Appellant's evidence recorded at [13] of the Decision where the Appellant when dealing with this issue first said that his uncle had been told that E was in prison which contradicted the Appellant's evidence that his uncle had no news of his (the Appellant's) partner. Read in the context of the Decision overall, therefore, there is an inconsistency in this aspect of the case even though that is not spelt out at [23] of the Decision.

20. Ms Patyna sought to persuade me in her submissions that there is no discrepancy in what is said at [24] of the Decision. I disagree. If the evidence given in interview was that all that the Appellant and E could do is hold hands in public and in the statement that they could not, as a couple, be comfortable and free to behave as they wished in public that might not be inconsistent. However, in circumstances where the Appellant very clearly says at [15] of his statement that he and E were not free to hold hands in public and where he is recorded as stating in answer to [Q126] of his asylum interview that this they could and did in fact do so, there is a very clear inconsistency.

21. There is also the additional point made at [24] of the Decision that, if the Appellant was seeking to avoid drawing attention to himself and his sexuality by the Iranian authorities, it is difficult to see why he would fail to respond to requests to reduce the volume of the music at the party which forms the other core part of his claim. As Ms Everett pointed out, the core of the claim is two-fold. On the one hand, it is the Appellant's sexuality per se. On the other, the Appellant says that his sexuality has been discovered by the authorities by reason of their raid of the party. As such, the Appellant's evidence about this event is also clearly central.

22. That brings me on to what is said at [25] of the Decision which deals with the Appellant's evidence about why he fears that the authorities have come to know of his sexuality by reason of the videoing of the Appellant involved in sexual activity with E, at the party. The inconsistencies relied on by the Judge are first, in relation to who filmed the Appellant and his partner having sex, second whether that was a matter just between the Appellant and his partner or extending also to the others at the party, third whether the video was deleted or remained in existence and fourth where that video was stored. If that were on the Appellant's mobile phone that does not sit easily with the Appellant's case that the Iranian police may have discovered it.

23. Ms Patyna drew my attention to the answers given by the Appellant on the first of those issues and on which the Judge relies, namely

whether it was E who filmed the sexual activities. In the screening interview, the Appellant said this ([4.1]):-

> "… On 9 October me and my boyfriend were at a birthday party, he filmed us having sex. The authorities raided the house and found the evidence."

She then directed my attention to what is said in response to [Q87] of the asylum interview:-

> "Q87: Were you caught by anyone, did anyone see you?
> As I was the host I didn't cook anything. Once we had sex [E] said he would have a shower, the others watched clips they had recorded of us. [M] said he would delete it. I put my clothes on and [M] asked for chips."

24. Ms Patyna first made the submission that answers in, in particular, screening interviews are not recorded verbatim. I assume that submission is intended to infer that one of those answers might have been wrongly recorded. However, I reject that inference. The Appellant has clearly seen the interview records as he refers to them in his statement. He has taken the opportunity to respond to some answers with which he disagrees or inferences drawn from those answers. Neither of the two answers which I have recorded above form part of that statement.

25. Second, Ms Patyna said that it was not clear who "he" was in the screening interview answer. Again, I reject that submission. It is patently clear from the answer read in context that "he" in the first answer is E and that "they" in the second answer cannot conceivably be read as being E. Indeed, in answer to Q101 of the interview, the Appellant says expressly that he "didn't remember the boys video recorded what we were doing". The Judge was entitled to rely on that as an inconsistency.

26. Ms Patyna also submitted that the evidence that M said he would delete the video and that this may have been seized by the authorities was not inconsistent with the video being on the Appellant's mobile phone. There may be some way of squaring this evidence. However, it is difficult to see why on the face of the Appellant's answers he would refer to M having control over the deletion of the video evidence (and the Appellant's answer at Q101 that he had forgotten about the video recording) and what was said in evidence as recorded at [12] of the Decision that this video was, all along, on his own mobile phone. It also appears from what there follows that the mobile phone has remained in his possession since he refers to trying to contact E but being unable to do so because E changed his number; not because the Appellant had himself changed his mobile phone. If the video was stored on the Appellant's own mobile phone it is difficult to see why he would think that the video might have been seized by the authorities.

27. Ms Patyna's other submission regarding the inconsistencies was that the Judge had failed to explain exactly what were the inconsistencies. As the foregoing demonstrates though, what the Judge says at [23] to [25] of the Decision has to be read in the context of the evidence to which the Judge there refers and also other parts of the Decision where the Judge has recorded the evidence which he was given.

28. Taken individually, those inconsistencies may not appear particularly significant. However, taken together and when coupled with the lack of evidence from others who might reasonably have been expected to provide written evidence in support at the very least and given the lack of evidential weight of the only documentary evidence which the Appellant did produce (the photos), the Judge was entitled to reach the conclusion which he did as to the credibility of the Appellant's central claim.

29. The Judge's conclusions as to credibility appear at [36] of the Decision as follows:-

> "[36] Apart from the Appellant's oral evidence, which is inconsistent in a number of material particulars there is no supporting evidence to any aspect of his appeal. He has been in the UK for over a year and there has been no credible explanation as to why no effort has been made to obtain such evidence. I do not find the Appellant a credible witness and do not believe his account that he is gay, that he was the subject of interest by the authorities in Iran and would be at risk if he returned."

Those are conclusions which the Judge was entitled to reach based on the earlier part of the Decision.

30. That then leads me on to the fourth ground concerning the alternative conclusion which appears at [37] of the Decision as follows:-

> "[37] If I am wrong and the Appellant is gay I do not believe the Appellant's account that the authorities have shown any interest in him while he was living in Iran. There is no other or credible evidence to suggest this is the case, irrespective of the lack of credibility shown by the Appellant. I have considered **SSH and HR** and note the conclusions at Paragraph 33. The conclusion I reach in these circumstances is there is not a real risk of prosecution leading to imprisonment. I do not consider that the Appellant is at any risk on return. In these circumstances I do not need to consider relocation."

31. If the point which the Judge is there seeking to make is that the Appellant would not be identified on return as a person of interest, questioned and prosecuted for illegal entry, there is no difficulty with it. However, if what is intended is to consider the risk to the Appellant as a gay man living in Iran, the conclusions are clearly flawed. First, such a conclusion sits uncomfortably with what is said at [6] of the Decision where both representatives agreed that if the Appellant were gay he would be at risk on return. Second, the concession on the

Respondent's part as there recorded is subject to the issue whether the Appellant would live discreetly on return and if so his reasons for so doing. That issue would engage the necessity to consider how HJ (Iran) applies to the facts of this case, as the Appellant submits in his fourth ground.

32. If this were the Judge's primary conclusion, I would have no hesitation in finding an error of law. As it is, though, it is only a secondary conclusion to his primary conclusion that the Appellant is not credible in his claim to be gay. I have already found that the Judge's conclusion in this regard is unimpeachable. It follows that any error in the secondary conclusion can be of no material consequence because the Judge has found that the Appellant is not a gay man.

33. For the above reasons, I am satisfied that the Decision does not contain a material error of law. I therefore uphold the Decision.

**DECISION**

**I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Cassel promulgated on 29 June 2017 with the consequence that the Appellant's appeal stands dismissed**

Signed Dated: 19 December 2017

Upper Tribunal Judge Smith