



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/06437/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 26<sup>th</sup> June 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

N A  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Burrett, instructed by J D Spicer Zeb Solicitors

For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Afghanistan born in January 1985. His appeal against the refusal of his protection claim was dismissed by First-tier Tribunal Judge Wylie in a decision promulgated on 5 February 2018.
2. The Appellant appealed on the grounds that the judge:
  - (1) failed to have due regard and/or to make findings in respect of key evidence, namely the Appellant's witness;

- (2) failed to take account of the concession made by the Respondent at the hearing;
  - (3) failed to properly consider whether the Appellant could be expected to live discreetly on return to Afghanistan.
3. Permission was initially refused by the First-tier Tribunal but was granted by Upper Tribunal Judge Kopieczek on 1 May 2018 for the following reasons:

“I have read First-tier Tribunal Judge Wylie’s (“the FtJ”) decision carefully. There is something to be said for the proposition that one can infer that she did not find the witness [SR] credible as to his knowledge of the Appellant being gay. However, as far as I can see, the only reference to inconsistency between his evidence and that of the Appellant is recorded at [67] in terms of the amount of contact that they had since Felix left the UK. Also at [76], but that was after (s)he had expressed his view that the Appellant was not gay.

It seems to me that, arguably, part of the problem with this aspect of the FtJ’s decision is that she does not record what evidence was given by the witness or summarise his witness statement. His witness statement is brief and from counsel’s note it is possible to see what the witness said in oral evidence. She did not need to set out verbatim the evidence of the witness, either from the witness statement or from the oral evidence. However, I do consider it arguable that she ought to have said why she did not believe the witness, if that is what she thought. In other words, the reasons for what appears to be an adverse credibility assessment of this witness are arguably lacking.

There are other reasons given by the FtJ for rejecting the Appellant’s claim to be gay but the assessment does not need properly to consider all the evidence.

I see the point made in the grounds about the ‘concession’ but it could be said that this is accurately reflected in the FtJ’s decision, for example at [31] and [80]. On the other hand, there is, arguably a significant difference between what counsel has recorded as the ‘concession’ and what the FtJ recorded because the FtJ uses the expression ‘openly gay’ in terms of what was accepted by the Respondent as creating a risk whereas counsel’s note is not so restricted. My reading of the FtJ’s manuscript Record of Proceedings is more consistent with counsel’s note.

On that basis, there is arguable merit in the complaint made about the FtJ’s alternative findings in terms of how the Appellant would behave on return and the lack of opportunity to address the FtJ on the point. In this, however, the applicant’s representatives will have to grapple with the fact that it should have been known that HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31 requires a consideration of what a person would do on return in terms of living openly as a gay person or not, as part of any assessment of an appeal of this nature.

All grounds may be argued.”

### The Judge's decision

3. The judge made the following relevant findings:

- “67. The Appellant described one relationship with the Romanian man in 2013, and his witness confirmed the relationship. The evidence of the Appellant and the witness of the amount of contact they had with each other was inconsistent. The witness said that he had seen the Appellant about two or three times since Felix left. The Appellant said that he met him sometimes once a week, sometimes they met in the park, sometimes they spoke on the phone.
68. The Appellant described spending time with Felix and gay friends in Manchester, and going to a club in Soho where Iranian gays went. There is no evidence from any persons who he met there, despite being sufficiently friendly with one who let him into the club for free. There was no evidence of any photographs, texts or any messages between the Appellant and any gay friends.
69. There was no evidence of any suspicion on the part of any of the Appellant's family in Afghanistan that he was gay. The Appellant told the psychiatrist that two other students at the Madrassa became suspicious, and in oral evidence said that Asadullah had told other people. In any event there were no repercussions.
70. As noted, he only made his claim on the ground of sexuality after his initial claim had been rejected. He had disclosed that he was raped when in Calais before coming to the United Kingdom at the screening interview, and it is surprising that he had failed to disclose his sexuality at that time.
71. It was suggested by Ms King that the Appellant had not disclosed his sexuality at an earlier stage because of feeling ashamed, relying on the medico-legal report for this submission, but this was not supported by the content of the report.
72. The medico-legal report commented that persons with PTSD experience difficulty in dealing with direct interviewing, especially in contexts which seem to them adversarial, and that PTSD can result in particular difficulties in recalling contextual details of traumatic experiences; and that people who have experienced sexual violence have particular difficulties in disclosing what had happened to them. The Appellant had disclosed the rape in Calais at his initial screening interview. He was not questioned in oral evidence about this incident.
73. Taking account of all the inconsistencies, I do not accept that the Appellant is gay, and therefore he does not pass the first test.
74. If I am wrong, however, I do not consider, based on his life in the United Kingdom, that he would live as an openly gay man in Afghanistan. In describing his life in the United Kingdom, he said that for six months he lived with Felix, and they went out in Felix's car to a non-gay club in High Wycombe and to friends in Manchester. He did not know the address of the accommodation he shared with Felix, but was able to describe it as being at the back of Nando's. Other descriptions he gave of places were 'by Tesco'; 'behind Morrisons'; 'near the petrol pump'.

75. He said he went to one club in Soho, the name of which he had forgotten, although he used to go regularly. He thought it may be called the 'village something'. He did not give a similar description of how he would find the club in Soho.
76. His witness said that he had seen the Appellant and Felix kissing and walking hand in hand in the street. The Appellant did not describe doing this.
77. The Appellant said that none of his Afghan friends knew about his sexuality. He would not tell them. They therefore knew nothing of his six month relationship with Felix.
78. It appears to me that the Appellant is not living freely and openly as a gay man in the United Kingdom.
79. It is not likely that he would live openly with another man in Afghanistan: he has not done so in the United Kingdom. The relationships he claimed to have had in Afghanistan appeared to have been conducted discreetly, certainly there were no adverse consequences. In Iran, a country where there is discrimination against gay men, he was able, on his evidence, to live with another man for some months, with that man being able to use his contacts with the authorities to have release from detention, and his employer providing funds to enable him to come to the United Kingdom. It would appear that he was living discreetly and without adverse attention by others.
80. It was accepted that he could not live as an openly gay man without being at risk of persecution in Afghanistan. However, I find that he would not live such a life.
81. He would therefore be able to return to Afghanistan. I have found that there is no risk to him due to political opinion. He is now a man of 30 who has lived in the United Kingdom without family support for ten years.
82. I am not satisfied, on the lower standard of proof, that the Appellant is at risk of serious harm on return to Afghanistan.
83. Therefore, having considered all the evidence, including that not specifically mentioned in my decision, and taking into account the background evidence on Afghanistan, I find that the Appellant has not established that he is entitled to the grant of asylum. I do not accept that the Appellant has established that he is entitled to the grant of asylum. I do not accept that the Appellant has established that he is entitled to refugee status."

### **The evidence**

4. Counsel's note on the evidence given by the Appellant in relation to his witness, Mr SJR is as follows:

*Why only one witness prepared to give evidence?*

It is a matter of whether or not they are comfortable. Some of them do not have status themselves so are scared to come to court. Afghans I am scared to mention. If I had to be pushed I could have found one or two others.

*What's the name of the witness?*

J - his name is S. His family name is R.

*Is he British?*

Yes.

*How did you meet him?*

He was also friends with Felix. I met him through Felix. That is how we got to know each other.

*Is he gay?*

We have never had a chat about these things. I think he is because he was friends with Felix and he hangs out a lot.

*You told him you were gay?*

Yes, I have told him.

*Why not ask him?*

I just didn't feel that I should ask him. He is older than me.

*Did he ever attend these gay establishments with you?*

Maybe with Felix but not with me.

*Where does he live?*

Kingsbury.

*Where in Kingsbury?*

I don't know the full address, but it is near the petrol pump. He would come to the park. There is a Morrisons or something nearby. He also came to Felix's house.

*Where is Felix?*

He went to Romania and never came back.

*Is the witness still in contact with Felix?*

No, I don't think so because he was asking me about Felix and I told him he has not come back since he left.

5. In response to questions from the judge the Appellant said the following:

*How often do you see SJR?*

Sometimes once a week.

*Where go with him?*

I don't go anywhere.

*Where meet?*

Sometimes Kingsbury park. Sometimes elsewhere.

*Where?*

By the Tesco or around that area near the shops. Sometimes we speak on the phone.

*Is there a reason you meet him sometimes once a week or regularly?*

He was a friend of Felix so we had good times. He is a good man. When we meet him we just chat.

Re-examination.

*Before today, when last see SJR?*

On Monday.

*Say meet once a week – this the case in the current time – last few weeks?*

Now I don't really see him much. Now I don't really see him much. It was when Felix was here we would meet regularly.

*How regularly seen SJR?*

Sometimes when Felix was here we would meet regularly. He is an Uber driver. So we speak over the phone and occasionally meet.

6. The evidence of SJR is set out below:

*Who meet [the Appellant] through?*

Felix.

*How long known Felix before meet [the Appellant]?*

Eight/nine months.

*How know [the Appellant] and Felix in a relationship?*

Body language. They kissed. They would hold hands.

*Where Felix live?*

Kingsbury. I don't know the name of the road but it was behind Nando's.

*See them being physical when others away?*

Some other Europeans. Myself. Other room mates I don't know their names.

*How often see them?*

I saw them two to three times at the house.

In response to the judge:

*Elsewhere?*

In the street I saw them hand to hand.

*That the only time?*

That's the only time.

*See them separately?*

No.

*Since Felix returned to Romania how often see [the Appellant]?*

I am very busy with my work. I don't have time for my friends.

*Seen him at all?*

I have seen him two to three times after that.

*Why [Appellant] ask you to be a witness for his appeal?*

In my country it is very embarrassing to say things about this to say to people about this. Maybe he trusts me. I am older. He can trust me. I will not say to older people.

Might be suggested that he is not gay?

It is for the judge and the Home Office to decide. What I see I will say to you.

7. In relation to the concession, counsel for the Appellant before the First-tier Tribunal records that at the outset of the hearing the Home Office conceded that if the Appellant was gay he would be at risk on return. That was consistent with what is stated in the Record of Proceedings: "If gay - risk on return. HOPO accepts."

### **Submissions**

8. Mr Burrett submitted that there was a lack of findings in respect of one witness and corroboration of the Appellant's claim to be homosexual was an essential part of his claim. SJR saw the Appellant with Felix hand in hand and they kissed on one occasion.

There was no finding on the credibility of SJR, and accordingly the decision was flawed. The reasons given at [67] were insufficient. The judge stated that the Appellant's evidence was inconsistent with that of the witness in relation to the number of times they had seen each other. It did not relate to the contact with Felix. The judge therefore failed to engage with the substance of the evidence. If the judge was going to reject the evidence of SJR, which corroborated the Appellant's account of being in a relationship with Felix, then the judge should have given adequate reasons for doing so.

9. SJR saw the Appellant with Felix and corroborated his claim that he was in a relationship. There was no difference in the accounts given. The Appellant had given a fuller account and it was important to bear in mind the context that the Appellant had been careful as to whom he disclosed his relationships. What was said at [76] was not sufficient because the witness described something that he saw and therefore there was no inconsistency with the Appellant's evidence. Corroboration was an important aspect in sexual orientation claims and there was an error of law in this case such that the Appellant's credibility should be re-assessed.
10. In relation to the concession, Mr Burrett submitted that it was conceded at the outset of the appeal hearing that if the Appellant was found to be credible then he would be at risk on return to Afghanistan because other people had known of his relationships in Madrassa. This was not just a sur place claim. The Appellant had homosexual relationships in Afghanistan. If the Appellant's evidence in relation to Felix was credible then this had to be considered in the light of what the Appellant had said occurred in Madrassa.
11. There was no consideration of internal relocation because the appeal proceeded on the understanding that if the Appellant was credible then his claim succeeded and therefore the judge erred in law in going behind the concession and the matter should be reheard. Mr Burrett submitted that I should not rely on the alternative findings because there was a lack of argument on the point, given the potentially conflicting record of the Home Office concession.
12. Mr Burrett submitted that it was not possible to infer a rejection of SJR's evidence from what the judge stated at [67]. The reason that appears to have been given there would be that the Appellant and his witness had given inconsistent evidence about their contact with each other. It was not reasonable to reject the account of SJR on the basis of when SJR had seen the Appellant. When the accounts of the Appellant and SJR are looked at together, the inconsistency was not as wide as what was alleged in [67]. The witness said that he had seen the Appellant two or three times since Felix left. The Appellant said he sometimes saw him once or twice a week.
13. Mr Walker submitted that there may be some confusion in describing the Appellant's evidence, but the judge disbelieved the Appellant as he had not described his relationship with Felix in the same way as his witness. There was no note of what the Home Office Presenting Officer had said on the file. However, the judge had made

correct findings on what he had heard in evidence including the findings at [76] onwards.

14. In response, Mr Burrett submitted that it was not enough to say that the Appellant could live as an openly gay man. The judge had to consider the relationships in Afghanistan and they needed to be separated from the sur place claim. On the facts of this case it was not possible for the judge to go on and find in the alternative. Mr Burrett submitted that the Appellant had explained the inconsistencies in his account, but the judge had failed to deal with those explanations. The judge had used the rejection of the relationship with Felix as a basis to find that the Appellant was not gay and therefore the evidence of SJR was of crucial importance.
15. The judge's reasons were not sufficient to demonstrate why the Appellant's account was rejected and there were no findings on the credibility of his witness. It was possible to reject his claim to fear the Taliban and accept his claim to be homosexual although the credibility finding in relation to the Taliban would obviously be a factor in assessing the Appellant's overall credibility. The judge had shortcircuited the appeal and only addressed the relationship in relation to Felix. It was important that all relevant matters on that issue were dealt with and the judge's failure to make findings on SJR's evidence was crucial. If his evidence was credible then other matters needed to be looked at in detail.

### **Discussion and Conclusions**

16. There was no challenge to the credibility findings with respect to the claim to be at risk on return to Afghanistan from the Taliban. The Appellant's evidence was inconsistent and the judge gave adequate reasons for her conclusion at [62]. Having found that the Appellant was not credible in respect of this part of his claim, the judge went on to consider risk on return as a homosexual.
17. The judge properly directed herself following HJ (Iran) and first considered whether the Appellant was gay. She found that his account in his witness statement was inconsistent with his oral evidence. The account given to his psychiatrist was inconsistent with his witness statement. The Appellant's account was inconsistent with that of his witness. There was insufficient evidence of his relationship with Felix. The Appellant only made his claim to be at risk as a homosexual after his claim in respect of risk from the Taliban was refused. The Appellant disclosed rape in the screening interview, but not his homosexuality. The judge rejected the Appellant's explanation for why he failed to disclose his sexual orientation claim on the basis of the content of the medico-legal report.
18. I find that the judge's failure to specifically state whether she found SJR to be a credible witness was not material to her assessment of the Appellant's credibility because SJR's account was inconsistent with the Appellant's and the judge gave numerous other reasons for why she did not find the Appellant's claim to be gay credible.



19. Further, it could be inferred from the judge's findings at [67] and [76] that she found that SJR did not support the Appellant's account and rejected his evidence. The inconsistent evidence about when the Appellant met SJR was relevant to how well they knew each other.
20. In any event, taking SJR's evidence at its highest, it amounts to seeing the Appellant with Felix on one occasion holding hands and kissing. Therefore, even if the judge accepted SJR's evidence in its entirety, put together with the other reasons that the judge gives at [68] onwards, it was not material to her overall finding that the Appellant was not credible.
21. I conclude that the judge's finding that the Appellant was not homosexual was open to her on the evidence before her and her reasons were sufficient to support her findings. Accordingly, any error in respect of her failure to acknowledge the concession by the Home Office was not material. The judge found that the Appellant's account was not credible and therefore the concession did not bite.
22. It would appear from reading counsel's note and the record of proceedings that what the judge records at [31] (that if the Appellant's account that he was openly gay was credible he would be entitled to protection) is incorrect. The Respondent conceded that if the Appellant's account was credible, his appeal would succeed.
23. However, I find that there was no material error of law in the judge's conclusions in the alternative. The Appellant had not lived as an openly gay man in the UK or in Iran. Her conclusion that he would not do so on return was one which was reasonably open to her on the evidence and she gave adequate reasons for coming to this conclusion at [74] onwards.
24. The submission that it was unfair to deal with this matter, given the concession, has no merit. It is quite clear that the relevant case law was HJ (Iran) and that is the basis upon which the case was decided. The Appellant's representative was fully aware of the case that they had to meet and, notwithstanding the Respondent's concession, that was the threshold test and the one which should be applied. Therefore, there was no error of law in the judge considering the case in the alternative.
25. Further, the judge's findings at [74] to [80] show that the judge did consider separately each of the Appellant's claims to have had a homosexual relationship in Afghanistan, Iran and in the UK and she accepted that if they had occurred the Appellant had behaved discreetly in that respect and therefore he would not be at risk.
26. Accordingly, for the reasons given I find that there is no material error of law in the judge's decision and I dismiss the Appellant's appeal.

### **Notice of Decision**

The appeal is dismissed.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

*J Frances*

Signed

Date: 25 June 2018

Upper Tribunal Judge Frances

**TO THE RESPONDENT**  
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

*J Frances*

Signed

Date: 25 June 2018

Upper Tribunal Judge Frances