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

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 7th March 2019	**On 21st March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

A S R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr V Sharma (Solicitor)
For the Respondent: Mr A Tan (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge G Clarke, promulgated on 8th October 2018, following a hearing at Harmondsworth on 13th July 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Afghanistan, and was born on 1st August 1993. He appealed against the decision of the Respondent dated 2nd December 2017 refusing his protection claim and refusing his human rights claim, and decided to maintain the deportation order which had been signed on 24th February 2017. The deportation is for reasons of the Appellant possessing a controlled drug of class A with intent to supply (heroin) and possessing a controlled drug of class A with intent to supply (crack cocaine) and the Appellant was sentenced to two concurrent sentences of four years' imprisonment.

The Appellant's Claim

3. The Appellant's claim is in essence that he was abducted by the Taliban and held for six months when he was aged 11, during which time he was raped 40 times and forced to dance for the Taliban. After six months he was taken to a person called Salim's house who then took him to Kabul. He was then taken to Pakistan and then to India.

The Judge's Findings

4. The judge held that the Appellant's claim, that he had been abducted and raped 40 times and then made to dance, was consistent with objective evidence in that the practice of abusing young boys is called "bacha bazi" or dancing boys. The judge referred to the Country Policy and Information Note on Afghanistan, "Sexual orientation and gender identity" (Version 2.0, January 2017), which confirms the sexual exploitation of young boys and teenagers by older men. The judge held that "the Appellant's evidence of sexual abuse and sexual exploitation by the Taliban is entirely consistent with the objective evidence" (paragraph 104).

Grounds of Application

5. The grounds of application state that the judge had identified a number of inconsistencies in the Appellant's claim (see paragraphs 75 to 78) and these included a lack of witnesses attending at the hearing, despite the claim that the Appellant had many family and friends who are aware of his sexuality, together with his inability to provide Facebook evidence of his sexuality. The grounds state that it was irrational to conclude that the Appellant has been a victim of trafficking for sexual exploitation, and to a lesser extent domestic servitude. Although the judge may well have concluded that the Appellant had been a victim of trafficking, this did not confirm the Appellant's sexuality. This is because the starting point, in line with the jurisprudence in **Devaseelan**, is that the Appellant was a man who was not of truth, and a previous determination of 11th May 2017 had confirmed this. Second, the judge placed reliance on medical reports but failed to heed the strictures in **JL (medical reports – credibility) China [2013] UKUT 145**, which makes it clear that experts should be aware of previous negative credibility findings. Third, the judge did not

have regard to the binding authority in relation to gay people from Afghanistan, of **AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001**, which confirmed that Kabul would be a place to which the Appellant would be able to return if he was indeed gay as he claimed to be.

6. On 5th December 2018 permission to appeal was granted with reference to four specific points. First, that the judge concluded that the Appellant was trafficked, but this did not mean to say that he was gay. Second, that the previous finding by a judge was that the Appellant was "not a man of truth". Third, that the judge failed to have regard to guidance given in **JL (medical reports – credibility) China [2013] UKUT 145**. Fourth, that consideration was not given to the fact that even if the Appellant was a gay person the case of **AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001**, stood to be applied.

Submissions

7. Appearing before me, Mr Tan relied, on 7th March 2019 on the grounds of application. He submitted that the Appellant had attended the hearing without any witnesses. The judge had referred to medical reports, but failed in not taking account of the fact that the medical reports had to factor in the negative findings by a previous judge. Third, even if the NRM had found that the Appellant was a victim of trafficking, this did not mean to say that his homosexuality was proven. In any event, the medical evidence referred to the delay in the Appellant's claiming asylum, but did not refer to the discrepancies in his evidence.

8. For his part, Mr Sharma, appearing on behalf of the Appellant, relied upon his detailed and extensive skeleton argument. In particular, he relied on the fact that there was no error of law if regard is had to the well-known judgment in **R (Iran) [2005] EWCA Civ 982**, where Brooke LJ had said (at paragraphs 11 to 12) that "perversity" represented "a very high hurdle" and that here irrationality was raised as a Ground of Appeal which amounted to nothing more than "simply wasting time". He also relied on the fact that there was 2017 guidance that confirms abuses that LGBT people face in Afghanistan (see paragraph 30 to 32 of his skeleton argument) and he submitted that the decision reached by the judge was sustainable.

Error of Law

9. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. My reasons are as follows.

10. This is a case where the Appellant had not ever relied upon the fact that he was gay during his earlier applications for leave to remain in the UK. Thereafter, when deportation proceedings had been taken against him, he

"only claimed that he was gay on the day prior to his removal from the United Kingdom despite the fact that he claims he knew he was gay from the age of 17" (paragraph 78). This is also a case where the Appellant at the hearing attended without any witnesses who could confirm his sexuality (paragraph 75). At the same time, this is a case where there were medical reports. There was a report by Dr Thomas which confirmed that the Appellant had scarring and suffered from severe depression and PTSD. There was another report by Dr Grant-Peterkin, who did not go as far as Dr Thomas in his diagnosis that stopped short of making a diagnosis that the Appellant had PTSD (see paragraph 96). Be that as it may, it remains the case that the Secretary of State has accepted that the Appellant has thrice attempted to commit suicide in Afghanistan and has twice attempted to do so in the United Kingdom (see paragraph 45).

11. Even so, there were conclusions reached here by the judge that were not subject to the Country Guidance. These are that the NRM on 26th January 2018 does mention that the Appellant is gay, and does find that claim to be a credible one (paragraph 103). There is also the reference to the sentencing judge's remarks. These are with respect to the Appellant's relationship with his co-defendant, which were that, "I have observed the relationship between you which is clearly one of some proximity, closer than perhaps you might like the world to realise" (paragraph 106). These are both conclusions, which, when arrived at by the judge in this case, were not subjected to the country guidance in relation to the treatment of homosexuals in Afghanistan.

12. In **AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001**, it was stated (see paragraphs 58 to 62) 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" (see subparagraph 4). It was also stated 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 smaller towns and in rural areas could be different and will depend on the evidence in a specific case" (see subparagraph 6).

13. It ends with the firm statement that "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" (see subparagraph 7). This is a case where the Appellant has maintained that when he was in prison, he "has not been openly gay" because he was afraid of being bullied (paragraph 27).

14. Whether the Appellant has been openly gay, however, is a matter that needs to be looked in the context of **HJ (Iran)**, although the evidence suggests that he has not been openly gay, particularly in Afghanistan. But even so, whatever the position, the country guidance case of **AJ [2009]**

does need to be applied, and the failure to do so amounts to an error of law.

Notice of Decision

15. The decision of the First-tier Tribunal involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I set aside the decision of the original judge. I re-make the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Clarke, on the basis of Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding, which is necessary in order for the decision in the appeal to be re-made, is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

16. An anonymity direction is made.

17. This appeal by the Secretary of State is allowed.

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.

Signed Date

Deputy Upper Tribunal Judge Juss 20th March 2019