



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/13696/2016

THE IMMIGRATION ACTS

Heard at Birmingham

On 3 May 2018

**Decision & Reasons
Promulgated
On 14 May 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AN

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs Aboni, Senior Home Office Presenting Officer

For the Respondent: Ms Imamovic, instructed by Greater Manchester Immigration

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, AN is a male citizen of Iraq who was born in 1972. On 7 October 2014 the appellant was convicted at Lewes Crown Court for production of a class B controlled drug (cannabis) and abstracting electricity. He was sentenced to two years and six months' imprisonment. His appeal against that decision was dismissed on the papers (25 September 2015). The appellant made further written submissions,

claiming that he was a homosexual but the fresh claim was refused by a decision dated 28 November 2016 but the appellant was given a right of appeal. The First-tier Tribunal (Judge S Meah) in a decision promulgated on 27 April 2017, allowed the appeal on asylum grounds and (curiously) on humanitarian protection grounds together with Article 3 and Article 2 ECHR. Having allowed the asylum appeal, it was not open to the judge to allow the appeal on humanitarian protection grounds.

2. The Secretary of State now appeals, with permission, to the Upper Tribunal. There are two grounds of appeal. The first concerns the judge's findings that the appellant was a homosexual. The Secretary of State relies on *AB (Somalia)* [2004] UKIAT 00125 in particular at paragraphs 4 and 8:

"4. We have several difficulties with the Adjudicator's reasons. First and foremost, he failed to give any reasons that related to the claimant's evidence as such or indeed to the witness's evidence as such. He relied simply on the fact that the claimant and his witness corroborated each other's accounts. In our view that was an error on his part. If A and B concur in their evidence that does not without more prove that they are telling the truth, even under the lower standard of proof. It may be that A and B are telling the truth; equally it may be they are lying. The Adjudicator should have identified something about the claimant's evidence, other than that it was corroborated, which made it creditworthy.

...

8. A further difficulty was that the Adjudicator did not explain why he considered the witness was to be believed, notwithstanding he was related to the claimant. Obviously, being a relative does not prevent a person from giving truthful testimony, but such a person cannot be regarded as a wholly independent witness and, given the decisive weight the Adjudicator sought to attach to this man's evidence, it was incumbent on him to explain why he did not consider the family connection lessened the veracity of the account he gave. We are not helped by the Adjudicator's failure to clarify whether the witness was present during the appellant's evidence: if the witness had not been present, the fact that his evidence accorded with the appellant's may have meant it carried more weight. It may be that the Adjudicator, in assessing the witness, attached weight to the documentary evidence showing he had been granted refugee status, although in the absence of further evidence that the grant was made on the basis of the witness being from the Shansiya tribe that may have added little. On all these matters we simply do not know what was in the Adjudicator's mind."

3. The Secretary of State considered that the judge had wrongly rejected the discrepancies highlighted by the respondent in the refusal letter as "ancillary or peripheral" [42-43].
4. In addition to the appellant, several other witnesses gave evidence before the First-tier Tribunal on his behalf. The judge noted that the previous judge had not had the benefit of hearing from those witnesses [25]. Given that the first judge had not heard from the witnesses or, indeed, from the

appellant himself given that it had been a paper appeal, the judge placed limited weight on the previous judge's decision. The judge found that the appellant's "sexual history" was as claimed by him and included relationships with both women (he had been married to a British woman previously) and also men. The judge found that the appellant had spent the majority of his life "hiding the true nature of his sexuality". He accepted the appellant was openly gay in the United Kingdom. At [35], the judge considered the evidence of the witnesses. One of the witnesses gave evidence that the appellant had had a sexual relationship with her son. He found this woman's evidence to be "particularly compelling". The appellant's cousin's evidence was also accepted as credible [37] including the witness' belief that the appellant's relatives in Iraq knew of his sexual activities through Facebook. The evidence of a housemate of the appellant [38] was also accepted as truthful. This housemate had stated that "the appellant had asked him permission to bring other gay men to the home when he was out and he had granted the appellant such permission." At [41] the judge found that the appellant had "gone to great lengths to explain the background to his sexuality and how this has evolved and progressed over time culminating in the current position where he now positively identifies himself as an openly gay man." The judge specifically rejected the Presenting Officer's submission that the appellant's account was discrepant given that he had previously described himself as bisexual and was now gay. The judge dealt with that submission at some length at [27-28]. The judge noted that Mr Hogg, the Presenting Officer before the First-tier Tribunal, had cross-examined the witnesses, the appellant in particular, describing the cross-examination as "extensive and pertinent."

5. I agree with Ms Imamovic that the dictum in *AS (Somalia)* does not readily apply to the judge's analysis in this case. This was not simply a case where the judge found the evidence of various witnesses to be consistent. Indeed, at [45] the judge found that it would have been extremely difficult for the appellant to deceive the variety of witnesses from very different social backgrounds who had attended to give evidence on his behalf. One of the witnesses was a cousin but the others were not related to him nor were they also homosexual men or the appellant's friends. One witness was a housemate and the other a woman whose son had had a relationship with the appellant. I find it was open to the judge to find that the appellant's credibility was strengthened by the fact that this diverse group of witnesses had testified on his behalf. Further, the evidence of the witnesses had given the judge context for the comprehensive account of his developing sexuality which had impressed the judge in the oral hearing.
6. I find that it was open to the judge to accept the appellant's account of his sexuality. Indeed, if I were to accept the Secretary of State's argument, then it would follow that any First-tier Tribunal hearing exactly the same evidence including the appellant and his witnesses would be bound to conclude that the appellant had failed to discharge the burden of proof. I

do not accept that that can be right. The judge's decision was neither perverse nor was his analysis anything other than cogent and thorough.

7. Before the First-tier Tribunal, the parties accepted that, if the Tribunal found that the appellant was homosexual, he would be at risk on return to Iraq. The judge found at [46] that the appellant would wish to live as an openly gay man and that the only reason why he would conceal his sexuality in Iraq was in order to avoid persecution (see *HJ (Iran)* [2010] UKSC 31). Given that I have found that the judge did not err in law in his assessment of the evidence and the findings which he reached, it follows that the Secretary of State's appeal should be dismissed. The second ground concerns the availability of internal flight for the appellant within Iraq. That ground is not material given that the appellant will be at risk as a homosexual anywhere within Iraq. I therefore make no ruling as regards the second ground of appeal.

Notice of Decision

8. The Secretary of State's 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 their 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 8 MAY 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT **FEE AWARD**

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

Signed

Date 8 MAY 2018

Upper Tribunal Judge Lane