Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08907/2019**

THE IMMIGRATION ACTS

Heard at: Field House
On 20th October 2021

Decision & Reasons Promulgated
On 16 November 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SA
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Griffiths, Counsel instructed by Duncan Lewis Solicitors**
For the Respondent: **Ms Cunha, Senior Home Office Presenting Officer**

'DECISION AND REASONS

1. The Appellant is a national of Afghanistan born in 1978. He seeks protection on the basis that he has a well-founded fear of persecution in Afghanistan for reasons of his membership of a particular social group. The Appellant claims that he is gay.

Case History

2. The Appellant's claim to international protection has already been rejected, in undisturbed decisions, by two judges of this chamber, First-tier Tribunal Judge NMK Lawrence (in his decision of the 17th April 2007) and First-tier Tribunal Judge Shand (27th February 2017). On the 19th March 2020 the factual basis of this claim was rejected for a third time, by First-tier Tribunal Judge Plumptre. Judge Plumptre's decision, insofar as the refugee claim was concerned, was however set aside, by consent, for error of law. By his decision of the 10th November 2020 Upper Tribunal Judge Hanson identified the errors in approach to the refugee claim as being taking irrelevant matters into account, misapplication of the principles in Devaseelan v Secretary of State for the Home Department [2002] UKAIT 00702* and a failure to provide reasons. Judge Plumptre's decision to allow the appeal on humanitarian protection grounds, for medical reasons, was upheld, and the Appellant has since been granted such leave.

3. Judge Hanson set the decision of Judge Plumptre to dismiss the Appellant's appeal on refugee grounds aside and ordered that the decision in the appeal be remade in the Upper Tribunal. That is how the matter now comes before me.

Vulnerable Person

4. The Appellant has been diagnosed with significant psychiatric symptoms, including moderate to severe Major Depressive Disorder (MDD) with additional psychotic features and post-traumatic traits. As a result of these conditions Clinical Psychologist Dr Rachel Thomas opines as follows:

> "[SA]'s current cognitive impairment is such that I consider his capacity to give meaningful evidence is severely impacted and that the quality of any evidence he could provide in his current mental state would not warrant the degree of psychiatric distress and probable deterioration that such a requirement would cause. I consider therefore that it would be far preferable for [SA] to be excused from giving any further evidence on psychiatric grounds"

5. In accordance with the Joint Presidential Guidance Note No 2 of 2010: *Child, vulnerable adult and sensitive appellant guidance* and AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 I treat the Appellant as a vulnerable person. I was also asked to do the same for a witness, Mr EG: although I agreed to do so, nothing in his evidence or attendance at court required me to have particular recourse to the guidance I have mentioned.

Protection: the Legal Framework

6. The operative country guidance on gay men in Afghanistan is AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001. The headnote reads:

> 1. *Though homosexuality remains illegal in Afghanistan, the evidence of its prevalence especially in the Pashtun culture, contrasted with the absence of*

> *criminal convictions after the fall of the Taliban, demonstrates a lack of appetite by the Government to prosecute.*
>
> 2. *Some conduct that would be seen in the West as a manifestation of homosexuality is not necessarily interpreted in such a way in Afghan society.*
> 3. *A homosexual returning to Afghanistan would normally seek to keep his homosexuality private and to avoid coming to public attention. He would normally be able to do so, and hence avoid any real risk of persecution by the state, without the need to suppress his sexuality or sexual identity to an extent that he could not reasonably be expected to tolerate.*
> 4. *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.*

7. In respect of that case the parties before me agreed the following matters:

   i) That an existing 'country guidance' case shall be treated as an authoritative finding on the matter in issue and so shall be treated as binding on this Tribunal unless it can show why it does not apply[1];

   ii) I may only depart from the country guidance if I consider that there are very strong grounds supported by cogent evidence, for doing so[2];

   iii) There are today very strong grounds to depart from the guidance in AJ (Afghanistan). Those reasons are:

      a) That the guidance therein is legally incompatible with the decision in HJ (Iran (FC) v Secretary of State for the Home Department [2010] UKSC 31;

      b) There has been a material change in circumstances on the ground in Afghanistan, namely the Taliban have re-taken control of the country. The Respondent accepts that gay men are a particularly vulnerable group within Afghanistan and that if discovered they face a real risk of harm from the Taliban regime: see section 5.6 of the Country Policy and Information Note *Afghanistan: Fear of the Taliban* (Version 1.0 October 2021).

8. I do not therefore follow the decision in AJ (Afghanistan). The parties invite me to instead apply the legal framework set out in HJ (Iran), in particular the tests set out by Lord Rodger [at §82]:

> When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

[1] 12.2-12.4 Practice Direction of the Immigration and Asylum Chamber

[2] Per Stanley Burnton LJ SG (Iraq) v Secretary of State for the Home Department [2012] EWCA Civ 940

> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

9. It is on that basis that I approach the evidence in this case.

The Previous Decisions: *Devaseelan*

10. As I note above, I am not the first judge to consider this case. Findings of fact have already been made by others and in accordance with the *Devaseelan* principles those decisions are to stand as an authoritative assessment of the claim at that time. I am not hearing an appeal against the decisions of Judges Lawrence or Shand. I am entitled to take into account facts arising since those decisions, and any facts arising before those decisions, but not relevant to them. Any matters put before me which were relevant, and could have been before the previous judge but were not, are to be treated with the greatest

circumspection: the force of this principle is greatly reduced where there is some very good reason why those matters were not advanced.

11. Those being the agreed principles, the parties brought the following matters to my attention:

    i) The basis of the claim before Judge Lawrence in 2007 was that the Appellant faced a real risk of harm in Afghanistan because his father was a Taliban/Hizb-e-Islami fighter. The Appellant's sexual orientation was not a feature of that case. The parties agree that this decision is of minimal, if any significance. Whilst Judge Lawrence did make swingeing negative credibility findings, these are confined to the case before him, and were made in the absence of the evidence now relied upon including medical evidence of scarring and the psychiatric sequalae of ill- treatment.

    ii) The 2017 decision of Judge Shand arose from the Respondent's refusal of a 'fresh claim', this based squarely on the Appellant's claim to be a gay man. Judge Shand rejected that factual assertion and the Appellant was refused permission to appeal against her decision. This decision is directly relevant to my own and I treat it as an authoritative conclusion on the issues in the case as they stood in 2017. Ms Cunha understandably placed great emphasis on that decision in her submissions.

    iii) The appeal before me arises from a second 'fresh claim' made by the Appellant in December 2017, and supplemented by further submissions. The principle material relied upon by the Appellant, and not before Judge Shand, consisted of the support of the 'United Kingdom Lesbian and Gay Immigration Group', a report by Clinical Psychologist Dr Rachel Thomas, an Educational Psychology report by Chartered Psychologist Mr Robert Sellwood, and a medico-legal report prepared by Dr Frank Arnold, which itself reflects his 'rule 35' findings, to the effect that the Appellant bears still scars highly consistent with/ consistent with and typical of the ill-treatment he claimed to have endured in Afghanistan (that was rejected by Judge Lawrence in 2007).

The Evidence

The Evidence for the Appellant

12. The Appellant provided a very brief written statement, dated 19th October 2021. That, and his previous statement dated the 25th February 2020 were admitted into evidence without him being called. He explains that he started to become aware of his feelings towards men when he was a teenager in Afghanistan, but because of the strong social taboo against same-sex relationships and sex he did not at first interpret these feelings as homosexuality. He just noticed men more than he noticed women. It was only after he came to the UK in 2006 that the

realisation slowly emerged that he was actually gay. Here he could see that people were free to express themselves, and friends, such as EG, were incredibly supportive and kind.

13. The Appellant states that he met his partner AM at a party in 2009. At that time he felt very alone, but after he met AM, things began to change. Their relationship developed very slowly, and the Appellant is unable to recall the exact point at which it changed from being a friendship into something else. Both of them were struggling with the stigma of being gay, and being Afghans. But they spent a lot of time together and AM offered the Appellant a lot of support when he was feeling down: the Appellant says that as a younger man AM is a "lot more optimistic" than he is. But at some point, they realised that they were in love, and they have been together ever since.

14. Mr EG gave evidence before me. He adopted his witness statement. He explained that he was happy to give his evidence in English. He confirmed that he was taking an anti-anxiety drug as a result of recent family bereavements and that this could sometimes make it difficult to recall things.

15. In answer to Ms Cunha's questions EG told the Tribunal that he had known the Appellant since approximately 2009. He had been working in an Afghan café in Ealing Broadway at the time, and both the Appellant, and his partner Mr AM were customers. He got to know them and they became friends. Soon after they had met the Appellant moved in with EG and his wife at their flat in Ealing.

16. EG told me that he had seen the Appellant kiss his partner on one occasion: that was at a party, and he just saw it. He has never seen them be intimate since. He is of Iranian origin himself and is now a practising Muslim. As such the Appellant and his partner recognise that it would not be appropriate to display intimacy in front of him. He knows that they have stayed together in a bedroom in his house, but this is their business. He is not against them. They are his friends – more than friends, they are like his brothers. They are both very dear to him. Asked by Ms Cunha whether he was not worried, as a Muslim, about this behaviour going on under the same roof as his child, EG explained that this was a factor – he wouldn't necessarily want his daughter to see them kiss, for instance – but that the child was very young when she lived with EG so she would not even have been aware that he and his partner were sleeping in the same room.

17. EG was asked why he believes the Appellant to be gay. He said that many years ago, when EG was still drinking alcohol, the Appellant and he had a conversation when they were drunk and the Appellant confided in him. To EG it made sense. His brother is gay and so he just had a feeling. Also neither the Appellant nor his partner have never, in the many years that he has known them, had a girlfriend. Once, a long time ago, he had tried to give them some girls numbers and they declined. They are both of an age when they should be married but neither have shown any interest in that. They behave like a couple. They go everywhere together – they go for meals together, see friends etc.

When the three of them go fishing the two of them will sometimes go off together. They basically behave like EG and his wife do together.

18. In her submissions Ms Cunha pointed to a discrepancy between the evidence of EG and that latterly given by his wife, who had provided a witness statement in the appeal before Judge Shand. Despite the fact that this discrepancy had weighed heavily in Judge Shand's decision, no one had asked Mr EG about it. The parties therefore agreed to re-open the questioning of the witness. It was put to EG that where he claimed that the Appellant had been living with them, with AM regularly staying over, she had said that the two men had regularly "visited" at weekends. EG said that his wife's statement that had been before Judge Shand had been inaccurate. She had not been asked to attend court to speak to that statement. He maintained that the evidence that he had given to me was the truth. The Appellant lived with him and his wife for approximately ten years, until they decided that they needed more space because they were expecting another child, and moved to another property. He moved out at that point, living first with friends, and latterly, since he was granted humanitarian protection, he has managed to get a small studio flat very close by. It's a five minute walk from EG's home and he has visited it regularly. EG has seen the Appellant and his partner there on a weekly basis ever since they moved in, which was about 6-7 months ago.

19. I then heard evidence from Ms Nina Nasim. Ms Nasim attended court in her capacity as a trustee and volunteer for a registered charity called Rainbow Migration, formerly known as the United Kingdom Lesbian and Gay Immigration Group (UKLGIG). The organisation provides support to LGBTQI+ migrants/asylum seekers, both practical and psychological, but it is also involved in lobbying and policy work. Ms Nasim was formerly employed at UKLGIG as a support worker, and that is how she came to know the Appellant and his partner. She has since left that role and is now employed full time by the Medical Foundation. Rainbow Migration were aware that she was attending court on behalf of the Appellant and they paid her travel expenses. She was not paid for attending. Ms Nasim said that when she had been employed as a support worker she had attended court for clients on many occasions – approximately 30 – and so she was familiar with the procedure.

20. During the course of 2018 the Appellant had regular 'one-to-one' sessions with Ms Nasim. Sometimes these would involve him speaking candidly about his feelings, other times they might address practical matters such as how to get asylum support. The Appellant also attended fortnightly support meetings facilitated by Ms Nasim. These lasted for about 2 hours and were attended by about 12 gay men, who would talk openly about their experiences and the difficulties they faced, for instance in coming to terms with their sexuality. Ms Nasim describes these sessions as "intense" and that the conversation between the men would be deep, "hard-hitting" and difficult. This regular contact with the Appellant is the reason she feels able to come to court and speak to her belief he is telling the truth. In her written evidence Ms Nasim also pointed to

the fact that the Appellant was completely accepted by his peers in the support group, something she regarded as significant. He would not have been welcomed in the way that he was if people in the group did not trust and accept him as gay. In addition to these sessions the Appellant also attended monthly meetings where more general, practical matters such as legal issues were discussed. He and his partner also attended social events organised by UKLGIG, as it then was, and Ms Nasim observed them together. Ms Nasim also knows the Appellant's partner: it was her recollection that she met the two men on the same day. She described him as being more outgoing, whereas the Appellant is more reserved and shy. His partner "looks out for him". When the Appellant spoke with Ms Nasim he was able to be open about his sexuality but it was evident to her that he was struggling and really benefitted from the support.

21. Ms Cunha asked Ms Nasim to explain why a letter written to the Tribunal by a Ms Claire Fletcher, also of UKLGIG, on the 2nd October 2019 described the Appellant as having started sessions there in July 2019. Ms Nasim explained that it was not at all unusual for people to stop coming, only to re-engage at a later date. Sometimes that might be because of the intensity of the work, or because they feel supported and so give way to allow someone else to take their place in the sessions, for which there is a long waiting list. Ms Nasim maintained that the Appellant regularly accessed their support during 2018, but disengaged for a period in late 2018-mid 2019. She points out that she left her role as support worker in September 2018 and perhaps it was something to do with that: she explained that people sometimes find it difficult to continue the work where there has been a change in support worker. The letter from Ms Fletcher did say that the Appellant started in 2019, but it also said that Ms Nasim had written on his behalf in 2018.

22. Ms Cunha asked Ms Nasim whether Rainbow Migration had ever refused to offer support to someone. Ms Nasim said that this was definitely the case, and that she herself had made the decision to do so. As an organisation they are aware that people do "fake" being LGBTQI+ in order to gain, for instance, asylum. She believes that these people are easy to spot. They attend the sessions, but are incapable of engaging. They do not relate to the other men and are reluctant to share; they appear awkward and very often will fail to attend or drop out altogether. Ms Nasim believes that the resources of the organisation – a registered charity – must be used for the LGBTQI+ migrant community so she does not want those resources used for people who do not need it. As for attending court on an individual's behalf, Ms Nasim said that the organisation had a 'minimum engagement' policy whereby they would not attend court for anyone who had been accessing support for less than three months. After that the decision as to whether to come was taken on a case-by-case basis.

23. The Appellant's bundle additionally contained three letters from UKLGIG, all of which I have read, but do not summarise them here as they do not add materially to what was said by Ms Nasim.

24. Ms Griffiths asked me to have regard to the three medical reports in the bundle. I do so in brief, since the conclusions of the medical professionals involved were not challenged by the Secretary of State, and indeed form the basis of the claim to humanitarian protection which has now been granted.

25. The first contact that Dr Frank Arnold had with the Appellant was in 2017 when the Appellant had been detained at Brook House IRC Removal Centre. Upon examining the Appellant Dr Arnold found scars consistent with the Appellant's claim to have been detained and ill-treated in Afghanistan. He considered it likely that the Appellant was a victim of torture. The report before me followed a further consultation which took place in January 2018 once the Appellant had been released from detention. Therein Dr Arnold gives greater detail about the scarring that he found at Brook House. Some of the scars on the Appellant's body were attributed by him to non-malign causes: he has had an appendectomy and there were small scars on his hands caused by accidents such as handling kitchen knives etc. Dr Arnold however identified the following as being of relevance to the claim of ill-treatment:

    - Four scars to the Appellant's head and face that are consistent with blunt trauma caused by the butt of a gun. Collectively the positioning and distribution of these scars is highly consistent with that claimed cause
    - Three scars which are highly consistent with the claimed cause of having been tortured using a heated piece of metal
    - Scarring to the Appellant's wrists which is typical of the claimed cause of having been suspended by ropes from his wrists
    - Difficulties that the Appellant has in walking and flexing his feet are found to be typical of his having been subject to *falaka*

26. Dr Sellwood is a chartered educational psychologist who was asked to assess the Appellant in December 2019 because the Appellant's caseworker at Duncan Lewis was concerned about his cognitive ability. She had found it difficult to take instructions because he was easily confused and vague. He found it difficult to comprehend what he was being asked and had problems with his memory – for instance he had to be accompanied to the office because he would be unable to remember how to get there.

27. Dr Sellwood interviewed the Appellant with the assistance of a Pushto interpreter and administered a series of diagnostic tests under the Weschsler Adult Intelligence Scale (WAIS-IV). He examined the test responses for evidence that the Appellant was deliberately minimising his scores in order to give a false impression of learning difficulties. All of the subtests administered "lend themselves to this kind of examination". Dr Sellwood did not find that the Appellant was feigning. To the contrary, his approach was a positive one. He showed strong interest and persistence in all the tasks. Dr Sellwood's central finding was that Appellant scored 73 on the Perceptual Reasoning index, indicating cognitive deficit, and within the cut-off score used to indicate

intellectual disability. This means that he falls on the borderline of "extremely low" and "low" on the scale of ability. He is in the bottom 4% of the population. Dr Sellwood did account for cultural bias, and the Appellant's own reported history of growing up in rural Afghanistan with no access to education. Taking those matters into account, and upon observation, Dr Sellwood considered that the Appellant was more likely to be suffering from a neurocognitive disorder rather than a learning disability, but whatever the cause, he found clear evidence of cognitive impairment.

28. Dr Rachel Thomas is a Clinical Psychologist of some 20 years standing. She is well known to this Tribunal as an expert witness. I am satisfied that Dr Thomas had sight of all relevant documents, including the refusal letter and the decision of Judge Shand. She interviewed the Appellant for approximately 2 hours and administered the relevant diagnostic tests in accordance with DSM-V. She gave specific consideration to the possibility that the Appellant is faking his symptoms, and placed her findings within the framework set out in the Istanbul Protocol. Her central conclusions are:

    - That the Appellant is suffering from moderate to severe Major Depressive Disorder with post-traumatic traits and psychotic symptoms.
    - His mood was objectively flat and low and he reports symptoms of sleep disturbance, feeling like he has no purpose, bodily pain with no obvious cause, weight loss, impaired concentration, anger, social withdrawal and anxiety. He also experiences auditory hallucinations and feels like someone is touching him in his sleep when in fact he is alone.
    - The most likely cause of these symptoms are cumulative traumatic life events including being detained with a view to removal and the ongoing uncertainty over his immigration status
    - The Appellant's evidence that he did not previously have the emotional or cognitive wherewithal to make a disclosure as to sexuality is consistent with her findings and those that he suffers from cognitive impairment
    - In Dr Thomas' view the Appellant does not have capacity to give evidence (see my §4 above)

The Country Background Evidence

29. The new CPIN contains the following section on LGBTQI+ individuals in Afghanistan:

> 5.6 LBGTIQ+ persons
>
> 5.6.1 On 14 July 2021, before the Taliban took control of Kabul, Pink News, a UK based online newspaper focusing on LGBTIQ+ rights around the world, reported that: 'The Taliban claim they have already taken over 80 per cent of the country; while this is likely an

exaggeration, the BBC Afghan service estimates that around a third of Afghanistan is indeed under Taliban control, with strict Sharia law punishments reimposed throughout these areas. '"That was our goal and always will be," said Gul Rahim, a Taliban judge who spoke frankly about his vision of justice to the German newspaper Bild. 'His face remained impassive as he detailed the shockingly cruel penalties for gay people in Taliban territory. "There are only two penalties for gays: Either stoning or he has to stand behind a wall that falls on him. The wall must be 2.5 to 3 meters high," he said.'

5.6.2 A further article by Pink News, dated 17 August 2021 following the takeover of the Afghan government, stated: 'The Taliban is expected to enforce its extreme interpretation of Sharia law across Afghanistan, which would see many women, LGBT+ people persecuted. Under it, queer people and women could be sentenced to death… Queer people have been forced to keep their identities "under wraps" in an effort to survive. Taliban rule will make it even harder for the LGBT+ community to live their lives in secret.'

5.6.3 Vice News, a current affairs media platform, reporting on 19 August 2021, stated: 'LGBTQ+ people have always lived secret lives in Afghanistan because homosexuality is condemned as immoral and un-Islamic. For young Afghans who already have a bloody conflict to live through, queer identities are rarely discussed. Under the Afghan penal code, "pederasty" – a sexual act between two men – was punishable with long imprisonment. Some Taliban officials previously told the media that gay men would be punished with death under their regime. Sharia laws in other Islamic countries such as Indonesia and Malaysia also ban homosexuality, but their methods of punishment pale in comparison with those of the Taliban, which include stoning, mutilation, and hanging.'

5.6.4 Reuters, reporting on 19 August 2021 stated: 'Gay and lesbian sex is illegal under Afghanistan's 2017 penal code and the death penalty is technically allowed under sharia law by the constitution, but has not been enforced since 2001, according to LGBT+ advocacy group ILGA-World. Under the Taliban's first regime, from 1996 to 2001, there were reports that men accused of having gay sex were sentenced to death and crushed by walls pushed over by tanks. A Taliban judge has said that gay sex should be met with a death sentence of stoning or a toppled wall, according to an interview published last month by German newspaper "Bild".'

15.6.5 On 20 August 2021, India Today reported: 'With homosexuality considered immoral under Sharia law, the LGTBQ+ community in Afghanistan now lives in the constant fear of persecution.' Speaking to the Business Insider after the Taliban took Kabul, 3 gay men living in Afghanistan, who had previously been able to enjoy the 'underground' gay scene or meet with partners, expressed their newfound fear of being identified as gay and put to death.

Discussion and Findings

30. The Respondent accepts that the 2009 country guidance case AJ (Afghanistan) must be departed from. The applicable legal framework is that set out in HJ (Iran) and as to Lord Rodger's questions, Ms Cunha very realistically conceded that I need address only one in order to justly determine this appeal: is the Appellant gay?

31. The Respondent therefore accepts that gay men in Afghanistan would be persecuted if they tried to live openly. But it is further conceded, that in this case at least, that if the individual in question chose to live "discreetly", that at least one motivation for that would be the terror of discovery.

32. The Respondent's case is that the Appellant is not gay. He is faking that claim in order to gain the advantage of asylum. His evidence before Judge Shand was described as "vague" and "evasive" and was in some respects inconsistent. Ms Cunha pointed out that the Appellant has not been called to give evidence before me, and that being so, I am left with those findings made by Judge Shand. Furthermore there was no explanation offered as to why AM, although in attendance at court, was not asked to give evidence. She asked that I draw negative inference from that failure of the central protagonists to give evidence.

33. I must treat the conclusions reached by Judge Shand as the authoritative assessment of the evidence as it stood at the date of that appeal. I do so. But I must also read those conclusions in light of the uncontested medical evidence that is before me today. I note in doing so that Judge Shand repeatedly refers to the Appellant as being vague. She also rejects a contention, made on behalf of his then counsel, that perhaps he had not understood a question. In light of the expert evidence offered by Dr Sellwood and Dr Thomas that reasoning is, in retrospect, unsustainable. For instance, one of the matters highlighted by Judge Shand was the Appellant's inability to explain in greater detail what features of his partner's face he found to be "handsome": I might comment that this was a task that anyone would find difficult, but in view of the Appellant's cognitive impairment it is of little surprise that he could not elaborate further. Similarly when asked why he preferred males to females his evidence that it was "not in his hands" was rejected on the grounds that it was vague and evasive. I am driven to comment that this seems to me to be a perfectly reasonable response consistent with the Appellant's sexual orientation being an innate characteristic, but importantly for the purpose of my *Devaseelan* enquiry, it is again reasoning that it is difficult to imagine Judge Shand would have employed had she had the benefit of the medical evidence now before me. Whilst I do treat the decision of Judge Shand as the authoritative determination of this claim as it stood in 2017, I am satisfied that the medical evidence before me requires me to conduct my own evaluation of the Appellant's evidence.

34. I have read the Appellant's written evidence, and that which he gave to Judge Shand. I have read that evidence in light of the medical reports to which I have referred. Having done so I found nothing particularly vague or evasive about it.

It appears to me to be consistent with the Appellant's claimed personal history. It is of no surprise at all that the Appellant did not feel able to come to terms with his sexuality earlier than he did. He is from rural Afghanistan, one of the most conservative societies on earth, where the notion that a man could have a loving and meaningful relationship with another – as opposed to simply having homosexual intercourse, cf. AJ (Afghanistan) – would be violently rejected by society at large. There is a limit to the weight that I can attach to the Appellant's evidence, as it was untested before me, but to the extent that I am able, I give it some weight in my balancing exercise. That being the case, I must now look to the supporting evidence.

35. Ms Cunha asked me to attach no weight to EG's evidence. By his own admission he regards the Appellant as his "brother" and so it can be expected that he would do anything for him, including lying to this Tribunal. She pointed out that his evidence was markedly different from that given in the witness statement provided by his wife before Judge Shand.

36. It is most unsatisfactory that no attempt was made to address the discrepancy in the evidence identified by Judge Shand. Ms Griffiths objected to the point being taken by Ms Cunha when it did not explicitly feature in the refusal letter, but it should have been quite apparent to those who instruct her that this was a *Devaseelan* assessment and that the 'fresh claim' evidence upon which they relied was of little relevance to why husband said one thing, and wife had said another. It is as a result not something I can say much about. The suggestion in EG's belated evidence was that his wife's statement had not been accurately drafted; I accept that it is possible that when she spoke of the couple visiting her home she was talking only about the Appellant's partner and that has somehow been confused. It is also possible, as Ms Cunha suggests, that it is Mr EG who is inflating the evidence in order to assist his friend. By saying that the Appellant was living in the property it suggests a degree of closeness which might not otherwise be established. In the end it is one matter that I must take into account and assess in the round with the other evidence.

37. I should say that having heard EG myself, and in particular his response to Ms Cunha's detailed cross examination, I was left in very little doubt that he was telling the truth. He gave his evidence in a straightforward and confident manner, and where appropriate supplemented assertions like "they act as a couple" with examples. I attach no weight at all to the fact that EG has not seen these men being intimate, aside from once, by accident, at a party. They are Afghan, he is Iranian. All are, at least ostensibly, Muslims. Anyone familiar with the culture of Asian Muslim societies would be aware that it would be extremely unusual for a heterosexual, even married, couple to exhibit affection for each other in front of other people, for instance by kissing or hugging. That the Appellant and his claimed partner have not done so is therefore of no consequence at all. I do attach significant weight to his evidence that these two men have, to his knowledge, spent a considerable amount of time together over the past ten years, staying in the same bed at his house, and latterly staying

together in a small studio flat where there is only one bed. EG has observed them together and says that they behave towards each other "just like any other couple". I accept that evidence.

38. There was some discussion about the weight to be attached to Ms Nasim's evidence. I had initially suggested that her role was akin to that of a *Dorodian* witness[3]; in response Ms Cunha had relied on the dicta of Lane J in MH (review; slip rule; church witnesses) Iran [2020] UKUT 00125 (IAC), which she characterised as being that there was a limit to be placed on the weight of such subjective opinion. Ms Griffiths challenged the notion that Ms Nasim was a *Dorodian*-style witness, analogous to a fellow congregant in church: she came to court in her capacity as a professional who had observed the Appellant at close quarters in a therapeutic relationship. In response Ms Cunha submitted that if Ms Nasim was being tendered as an expert then more should have been done to set out her expertise, qualifications and adherence to the *Ikarian Reefer* principles.

39. The reality is that Ms Nasim's evidence falls somewhere between the two stools. She was certainly not tendered as an 'expert' since the notion that there is such as a thing as an 'expert' who could determine an individual's true sexuality by means of objective assessment is fallacy. Her evidence was given, as she made clear, as an individual who had known the Appellant in a professional capacity as his support worker. She had, in that role, the frequent opportunity to see him at his most vulnerable, discussing his innermost and most difficult emotions. This is in my view evidence of far greater value than someone who has sat next to an individual in church. That said, it is more analogous to the true *Dorodian* witness – "an ordained minister of a recognised church" – ie someone who is knowledgeable about the area of enquiry, and who has had the opportunity to talk to the individual in great depth about the subject in hand, probing their emotions as they do so. That being the case, I am mindful of what the President says in MH (Iran). What he in fact says is that such witnesses are lay people who seek to give factual and opinion evidence. They are not experts and should not be expected to comply with the obligations we would impose if they were. Their evidence is potentially significant, but not necessarily deserving of particular weight: the weight will always be a matter for the judicial fact-finder in the given case.

40. That guidance in mind, I can say that I found Ms Nasim's evidence to be enormously helpful. She is someone who appears entirely devoted to supporting the LGBTQI+ community, migrant members in particular, and was straightforward, and emphatic, in her statement that she would not want any precious resources, including her time, wasted on someone who was "faking it". To that extent her subjective assessment was of particular value – there was absolutely no motivation for Ms Nasim to support the Appellant if she was not herself convinced as to his honesty in this matter. I have attached very considerable weight to her evidence. She is not simply someone who is

[3] Ali Dorodian v Secretary of State for the Home Department (01/TH/1537)

repeating what she has been told, or reporting having seen the Appellant in the presence of another man at a social event. She is someone who has, over many hours, had difficult and probing conversations with the Appellant about his sexuality. She is very well placed to give the evidence that she did.

41. Ultimately it is always possible that someone from a country like Afghanistan might pretend to be gay in order to get asylum. In this case however, I note that the claim was first made in 2015 when, upon application of the then extant country guidance, it was wholly likely that the claim would be refused, as it indeed was. What I have before me is a strong body of evidence justifying departure from the decision of Judge Shand. The medical evidence strongly supports the submission that if the Appellant was "vague" or found it difficult to recall details this was because of the trauma he has suffered rather than because he was telling an untruth. The evidence of EG appeared to me entirely genuine and whilst it was obviously the evidence of a close friend, I do not accept that this is reason to view it with caution, as urged by Ms Cunha. Like Ms Nasim, EG has not formed the view that he has from simply listening to what the Appellant has said, or from seeing him go for dinner with a male friend. His is an honest opinion formed over 10 years of knowing the Appellant and seeing him in everyday situations with AM. Having considered all of the evidence before me I am satisfied that the Appellant has discharged the burden of proof and shown that he is reasonably likely to be gay. He is therefore at a real risk of persecution in Afghanistan for reasons of his membership of a particular social group and his appeal must be allowed.

Anonymity

42. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

43. The determination of the First-tier Tribunal contains material error of law and it is set aside to the extent identified above.

8. The decision in the appeal is remade: the appeal is allowed on protection (refugee) grounds.

9. There is an order for anonymity.

Upper Tribunal Judge Bruce
21st October 2021

Post-Script

Notwithstanding the criticism that I make at my §36 above, that the Appellant has now been recognised as requiring protection is a testament to the dedication and persistence of his current legal team. With two negative decisions behind him, the Appellant faced a steep uphill struggle. That he has now succeeded is entirely the result of the careful preparation that has gone into this appeal, and underlines the vital importance of the production of good quality evidence.