Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14119/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 June 2019	**On 20 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

RS (IRAQ)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Mohzam, Freedom Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge O'Brien sitting at Priory Courts, Birmingham, on 21 February 2019) dismissing his appeal against the refusal of his protection claim in which he maintained that he had a well-founded fear of persecution on return to Iraq on account of his homosexual orientation. In his decision promulgated on 27 February 2019, Judge O'Brien found that the appellant was not credible in his account of being gay. Alternatively, he was not persuaded that the appellant would live openly as a gay man in Iraq, or that he would keep his sexuality secret because of a fear of persecution.

The Reasons for the Grant of Permission to Appeal

2. Permission to appeal was refused by the First-tier Tribunal, but granted by the Upper Tribunal. On 9 May 2019 Deputy Upper Tribunal Judge Pickup granted the appellant permission to appeal for the following reasons:

> "It is arguable that in going behind a concession of the respondent that failing to mention his sexuality in the screening interview was reasonable, the decision was procedurally unfair. It may also be that the Judge failed to give adequate account of the fact that LGBT applicants may be inhibited in disclosing sexual orientation. Similarly, it is arguable that the Judge erroneously required corroboration of the claimed sexuality."

Relevant Background

3. The appellant is an Iraqi national of Kurdish ethnicity, whose date of birth is 17 February 1993. He is recorded as having arrived in the UK on 19 November 2015 by clandestine means, and as having claimed asylum on the same day. He was given a screening interview on 20 November 2015. He said that he had been born in Kawer Gosik, near Erbil. At Part 4.1 he was asked briefly to explain all the reasons why he could not return to his home country. He said that he was really scared of ISIS (Daesh). He was asked whether anything had happened to him in Iraq. He said that where he was living they had attacked and they had run away. They destroyed their houses and their land. He was asked where this was. He answered that it was at a village called Dusar, near Hawija.

4. It was established through a Eurodac enquiry that the appellant had been fingerprinted by the Bulgarian authorities on 20 September 2015. So his asylum claim was refused on safe third country grounds on 29 March 2016. But his removal from the UK did not go ahead, and his case was returned for review by the Home Office. Eventually, the appellant was given a substantive asylum interview on 8 October 2018.

5. He said that his family was living in Hawler, which was in the IKR. He had last spoken to them five days before he left Hawler, which was on 23 August 2015. Where the family had been living previously, he had done farming. But since they had moved to Hawler, some 6-7 years ago, he had worked in a shop selling smoothies and ice cream. He was asked what he feared on return to Iraq. He said he feared his father because he had threatened to kill him. This was because he had found out that he was gay.

6. Later in his interview, he was asked why he had not mentioned anything about his fear of his father or about his sexuality in his screening interview. He answered that when he had his screening interview, the officer was female and he was embarrassed. It was put to him that he had been asked at the screening interview if he had a preference for a male or female interviewing officer, and he had stated 'no'. He replied that this was wrongly recorded. He had said "yes". He had said that he did have a

problem [with a female interviewing officer]. He added that the female interviewing officer did not ask him why he had left Hawler, and why he had come to this country. He confirmed that he had not encountered any problems from Daesh in Hawler.

7. On 7 December 2018 the Department gave their reasons for refusing the appellant's protection claim. The Department addressed both the appellant's claimed fear of ISIS, and his alternative claim that he feared his father since his father had found out he was gay after he was caught having sexual relations with a male partner at his place of work.

8. At paragraph 23 of the RRFL, the following was stated:

> "It is considered reasonable that you did not feel comfortable discussing your sexuality with a female officer, this is considered to be a reasonable mitigating factor as to why you did not disclose this aspect of your claim during your screening interview."

The RFRL went on to state that the appellant's claim as to his sexual orientation was not accepted because: (a) his account lacked basic detail around his realisation of his sexuality; (b) it lacked consistency around his feelings of being attracted to the same sex in a society where it was not accepted; (c) his account of having openly lived as a gay man in the UK was inconsistent; and (d) his claimed relationships in the UK were lacking in basic detail. His account of the discovery of his sexuality by his father, and his father's subsequent hostility, was also not accepted due to the fact that this aspect of his account lacked detail and was inconsistent.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. Both parties were legally represented before Judge O'Brien. As is recorded by the Judge at paragraph [14] of his subsequent decision, it was agreed at the outset that the appeal would be resolved by the answers to three issues: whether the appellant was gay; whether he was at risk in his home area from his father; and whether he could relocate internally within the IKR or to Baghdad. It was also agreed that the printouts from Facebook and Facebook Messenger contained explicit homosexual images and conversations. The appellant confirmed the truth of his witness statement and he was cross-examined.

10. In his closing submissions, the Presenting Officer relied on the RFRL. He submitted that there was no reliable evidence of the appellant's claimed sexuality. His Facebook posts and messages were self-serving and they all post-dated the refusal. The appellant had not called evidence from [B] (his claimed sexual partner) and there was no trace of [B] in the Facebook posts and messages. The account was completely fabricated. The appellant had not come out in the UK, despite having claimed asylum here. Even if the appellant was gay, there was no reason to believe that he would live openly as such in Iraq.

11. In reply, the appellant's solicitor submitted that it was very difficult for the appellant to prove that he was gay. His experiences as a gay man were almost entirely sexual, and he came from a culture where it would be necessary to hide his sexuality. Therefore, he should be forgiven for finding it difficult to describe his feelings, and he had rightly not been asked intimate questions about his physical relationships. The appellant had been reluctant to offend his interviewer, who appeared to be a Muslim. It was to the appellant's credit that he had described having had sex with female as well as male prostitutes. He had given a credible explanation for using a pseudonym on Facebook, and for why he could not access earlier posts and messages. He had also credibly explained why no evidence had been provided by [B]. The appellant's failure to mention his sexuality in his screening interview had been considered reasonable by the respondent. His account was consistent with the background evidence. The evidence showed that he would be at risk as a gay man wherever he went in Iraq. The IKR was safer than the remainder of Iraq. However, he would not be safe from his family in the IKR.

12. In his subsequent decision, the Judge set out his findings of fact at paragraphs [36] onwards. At paragraphs [40]-[41], the Judge expressed disagreement with the position taken by the respondent in the refusal letter. He was not persuaded that the appellant's explanation for failing to mention his sexual orientation at the screening interview was reasonable. It was reasonable to expect someone fleeing for their life to be candid about the reason they had left. In any event, even assuming that the appellant was embarrassed to disclose his sexuality, it was unreasonable for him to proffer a false basis of claim. It was relevant that ISIS was a clear and present danger in Northern Iraq when the appellant was screened but that this was no longer the case by the time of the substantive interview in October 2018. The appellant's change of account suggested someone who realised their original basis of claim would no longer succeed and who had therefore created another more compelling account.

13. The Judge continued in paragraph [42]:

> "Even at the Appellant's asylum interview, it is now said that he was less than candid. This time, the explanation is that he did not want to offend the caseworker, who appeared to the Appellant to be a Muslim. It is also alleged that the interpreter wrongly interpreted a number of questions, meaning that the Appellant failed to mention his attraction as a young teenager to a neighbour of similar age. However, the Appellant's representatives took the opportunity a few days after the asylum interview to correct the record, and made no mention of these issues or the need for the corrections now detailed in the Appellant's witness statement. The Appellant's credibility if further damaged as a result."

14. At paragraph [44], the Judge said:

> "The Appellant claims not to be able to access the Facebook account he used at the time he met [B] … but has not, in my judgment, given a

> satisfactory explanation for why he needed to create a new account rather than re-activate an old account. The Appellant describes flirting with [B] over Facebook, and they remain in a sexual relationship. I do not accept the Appellant stopped using Facebook after meeting [B], especially given that he claims the couple had and have no emotional attachment to each other."

15. At paragraph [45], the Judge said that what was even more concerning was the appellant's failure to call any witnesses to confirm his account of his life in the UK. The Judge continued in paragraph [46]:

> "He claims to have asked [B] to give evidence, but that [B] has refused. I find it extremely unlikely that one refugee would refuse to help another, especially one with whom he has had an intimate relationship. It is the Appellant's evidence that they continue to visit each other without their relationship having been discovered; there is no reason why [B]'s giving evidence on the appellant's behalf would become public."

16. At paragraph [47], the Judge observed that in any event the appellant claimed to have had other physical relationships in the UK. He rejected entirely the suggestion that the appellant would be unable to find anyone to confirm the secret gay life he was claiming to lead in the UK.

17. At paragraph [48], he concluded that the appellant was not gay, and he was only claiming now to be gay because he realised that his original basis for claim was no longer likely to succeed.

The Hearing in the Upper Tribunal

18. At the hearing before me to determine whether an error of law was made out, Mr Mohzam (who did not appear below) developed the case advanced in the renewed application for permission. In reply, Ms Holmes submitted that the Judge had directed himself appropriately, and that no error of law was made out.

Discussion

19. Ground 1 is that the Judge went behind a concession properly made by the Secretary of State, thereby creating unfairness to the appellant.

20. The general rule is that a Tribunal cannot go behind a concession of fact made by or on behalf of the respondent. But the Tribunal may, and indeed must, go behind a concession of law if that concession is legally erroneous.

21. The concession made in the RFRL was not a concession of fact. It was a concession of opinion as to what was reasonable. Moreover, in expressing disagreement with the Caseworker's opinion as to the reasonableness of the appellant's non-disclosure of the true basis of his claim, the Judge was not breaching the guidance given in the *Home Office Asylum Policy Instructions to Caseworkers, 03.08.2016, "Sexual Orientation in Asylum Claims"*, which had been included in the appellant's bundle at section B.

As pleaded in paragraph 3 of the renewed permission application, the thrust of this policy is that adverse credibility findings should not be drawn "*purely on the basis of late disclosure* (my emphasis)*".*

22. The Judge did not make adverse credibility findings purely on the basis of the appellant's late disclosure of his "real" reason for fleeing Iraq in 2015. This is manifest in the Judge's discussion at paragraph [42], which I have set out *verbatim* above.

23. In addition, it was open to the Judge to place weight on the fact that the non-disclosure in the screening interview extended beyond a suppression of his claimed sexual orientation. He had also not disclosed his claimed fear of his father, who, according to his substantive interview, had threatened to kill him and who had also filed a complaint with the police accusing him of unlawfully entering the family home to retrieve his CSID and passport, which (in the case of his passport) he had used to pass through immigration control before embarking on a flight from Iraq to Turkey.

24. In **YL (Rely on SEF) China [2004] UKIAT 00145**, the Tribunal said at [19]:

> "Whenever a person seeks asylum in the United Kingdom he is usually made the subject of a screening interview … The purpose of that is to establish the general nature of the claimant's case and the Home Office Official can decide how best to process it. This concerns the Country of Origin; means of travel, circumstances of arrival in the United Kingdom, preferred language, and other matters that might help the Secretary of State to understand the case. *Asylum seekers are still expected to tell the truth and answers given in the screening interviews can be compared fairly with answers given later* (my emphasis). However, it has to be remembered that a screening interview is not done to establish in detail the reasons a person gives support to a claim for asylum. It would not normally be appropriate for the Secretary of State to ask supplementary questions or to entertain elaborate answers, and an inaccurate summary by an interviewing officer at that stage would be excusable. Further, the screening interview may well be conducted when the asylum seeker is tired after a long journey. These things have to be considered when any inconsistencies between the screening interview and the later case are evaluated."

25. In line with **YL**, it was open to the Judge to draw an adverse inference from the appellant's failure to intimate in his screening interview his "real" reason for not being able to go back to Iraq, and instead to supply a reason in the screening interview which he later admitted was wholly fictitious.

26. Ground 2 is that the Judge invented his own theory of the case, contrary to the guidance given by Ouseley J in **WN (Surrendran; credibility) DRC [2004] UKIAT 213**.

27. The guidance cited from paragraph [33] of **WN** includes the following: "*The adjudicator must here be especially careful not to invent his own theory of the case and must deal with what are significant problems, not minor points of detail. In this situation, it is much less likely that the appellant would be aware that his credibility is under consideration if it were not raised with him, and is unlikely to be fair for the issue to be raised in the determination for the first time.*"

28. It is apparent from the context that this guideline applies where no matters of credibility have been raised in the refusal letter, and there is no new material before the adjudicator, but the adjudicator wishes to raise issues which concern him. It is in this context that the adjudicator must be especially careful not to invent his own theory of the case.

29. In contrast, the RFRL put in issue both the credibility of the claimed fear of ISIS and the credibility of the alternative claim, which was that the appellant had fled Iraq after he had been discovered by the shop-owner having sex with a male prostitute when the shop-owner unexpectedly returned to the shop one night.

30. Against this background, the Judge did not breach the guidance given in **WN**. It was open to the Judge to draw the inference that the appellant had changed his account because he realised that his original claim was no longer going to succeed, given that ISIS was practically a spent force by the time of the substantive interview in October 2018.

31. Ground 3 is that the Judge erred in law in requiring the appellant to substantiate his claim with extrinsic evidence.

32. The guidance from the API cited in the permission application includes the following:

> "The provision of any extrinsic supporting evidence is not a prerequisite for a genuine claim. The Home Office accepts that most claimants may not be able to provide any extrinsic evidence. The Supreme Court has confirmed in RT (Zimbabwe) that there are no hierarchies amongst the Convention reasons. In such circumstances it would be discriminated to expect claimants of sexuality-based claims to surmount a higher hurdle of providing extrinsic evidence to corroborate their claims. Where a claimant has extrinsic evidence, it will be considered, for example membership of LGBT dating sites or support groups. We do not consider sexually explicit material … is prohibited. Where a claimant has no extrinsic evidence, we will consider the claim based on their own credibility and consistency of statements with what we know. This position is supported by the Qualification Directive."

33. The above guidance to Caseworkers must be set alongside paragraph 339L of the Rules, which provides that it is the duty of a person to substantiate his asylum claim. Where aspects of a person's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

(i) the person has made a genuine effort of substantiate their asylum claim …;

(ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;

(iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;

(iv) the person who has made an asylum claim … at the earliest possible time, unless the person can demonstrate good reason for not having done so;

(v) the general credibility of the person has been established.

34. Having addressed issues of internal inconsistency in paragraphs [39]-[42], the Judge turned at paragraph [43] to address the extrinsic evidence. He observed that the appellant had done nothing to substantiate his claim except provide a few pictures of him in a gay bar, and a small selection of Facebook pages and messages, showing sexual pictures and conversations: "*It is trite to say that someone can attend a gay bar and participate in the exchange of explicit photographs and messages without being gay, but instead to support a false basis for claiming asylum.*"

35. I do not consider that the Judge's line of reasoning discloses any error of law. He was not holding that the appellant's claim could only be proved by the provision of extrinsic evidence. His finding was that the extrinsic evidence which had been provided did not, in his view, enhance the credibility of the core claim. This was a finding that was reasonably open to him for the reasons which he gave in paragraphs [43] and [44].

36. Ground 4 is that the Judge drew an unreasonable adverse inference from the appellant's failure to be asked to be moved to accommodation where he would not be afraid of homophobia from other asylum seekers.

37. In paragraphs [45]-[47], the Judge made adverse credibility findings in respect of the absence of supporting evidence from sources within the jurisdiction. Viewed globally, the Judge in effect found that the appellant had not made a genuine effort to substantiate his asylum claim as required by 339L(i); and that a satisfactory explanation regarding any lack of any relevant material had not been given, contrary to paragraph 399L(ii).

38. As pointed out by Ms Holmes, there is no error of law challenge to the Judge's overall approach in paragraph [45]-[47]. In particular, there is no error of law challenge to the adverse credibility findings arising from the appellant's failure to adduce evidence from [B], or from any other person with whom the appellant claimed to have had a physical relationship through membership of a group called 'All Sex Gay'.

39. The error of law challenge is confined to the finding at paragraph [45] that there was no evidence of the appellant asking to be moved from the house he shared with other Kurdish asylum-seekers, so that he could express his sexuality openly (as he claimed he wanted to do). It is pleaded that asylum seeker accommodation is provided on a no-choice basis, and also that any request to be moved to alternative accommodation with non-Muslims would be unlikely to be entertained by Asylum Support.

40. I accept that the finding made at [45] is a weak one, but the overarching finding made in paragraphs [45] to [47] is not thereby undermined.

41. Ground 5 is that the Judge gave insufficient reasons for finding that internal relocation was a viable option for an openly gay man. I find it unnecessary to explore this issue, as there is no error of law challenge to the following findings made by the Judge at [49]: (a) if the appellant was in fact gay (contrary to his primary finding), the appellant would not live as an openly gay man in Iraq; and (b) he would not keep his sexuality secret in Iraq due to a fear of persecution. So even if the Judge did not give adequate reasons for finding that Paragraph 339O applied, his error would not be material in view of the above unchallenged findings.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity

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 11 June 2019

Deputy Upper Tribunal Judge Monson