



IAC-AH-SAR-V1

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

Appeal Number: RP/00125/2018

THE IMMIGRATION ACTS

**Heard at North Shields
On 13 March 2020**

**Decision & Reasons Promulgated
On 24 March 2020**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HK

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer

For the Respondent: Mr Selway, Brar and Co.

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 was born in 1996 and is a male citizen of Afghanistan. By decision promulgated on 22 October 2019, the First-tier Tribunal allowed the appellant's appeal against a decision of the Secretary of State to refuse him international protection. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. The judge found that the appellant is a homosexual who would conceal his sexual orientation on return to Afghanistan for fear of being persecuted (see *HJ (Iran)* [2010] UKSC 31). The first ground of appeal records that the judge, whilst he had regard to a revocation of deportation decision letter dated 5 June 2018 and reasons for refusal letter dated 7 August 2018, failed properly to have regard to a subsequent supplementary decision letter from the Secretary of State dated 15 November 2018. Accordingly, the judge had proceeded with the hearing on the basis that the appellant's homosexuality was accepted by the Secretary of State as a fact, a concession which the grounds argue had been withdrawn in the November 2018 letter. The grounds assert that the letter of 15 November 2018 clearly indicated that the Secretary of State did not accept the appellant's claimed sexuality.
3. At the initial hearing at the Upper Tribunal, the advocates and I spent some considerable time trying to locate a copy of the letter of 15 November 2018. I am grateful to Mr Diwnycz, who appeared for the Secretary of State, for finding a copy of the letter in his computer records. He sent by email a copy of the letter to myself and to Mr Selway, who appeared for the appellant; extraordinarily, the appellant's representatives had never seen a copy of the letter before today.
4. I find that there has been no procedural impropriety on the part of the First-tier Tribunal. First, Judge Cope, in an exhaustive analysis, clearly states that he came across the November 2018 letter following the hearing and whilst he was preparing his decision for promulgation [102]. Both parties accept that the judge is correct to say that the letter of 15 November 2018 had never been referred to in any previous proceedings (there had been an earlier hearing before the First-tier Tribunal and the decision set aside upon application to the Upper Tribunal). Most significantly, Mr Tuff, who appeared for the Secretary of State before Judge Cope, had explicitly relied upon the earlier decision letters of June and August 2018 and had made no mention of the November letter [113]. It was entirely reasonable for the judge to assume that the presenting officer had been aware of the later letter at the time of the hearing given that it had emanated from his own department and that he chose not to place reliance upon it. Moreover, as the judge recorded at [105], the November 2018 letter 'implicitly accepts that the appellant is gay'; I agree that paragraphs 40 and 101 - 102 implicitly accept the appellant's sexual orientation as claimed. Secondly, at [191], the judge makes the unequivocal finding that, on the basis of the evidence before him, the appellant is gay. Even assuming that the judge had not proceeded on the basis that the Secretary of State had agreed that the appellant is homosexual, it is abundantly clear that the judge, assessing the evidence holistically, reached independently the conclusion that the appellant is gay. Any possible error on the part of the judge, therefore, is, in the light of that finding, immaterial.
5. The second ground of appeal complains that the judge found that the appellant would conceal his sexuality on return to Afghanistan on account

of a fear of persecution or ill-treatment without having heard evidence from the appellant 'expressly saying' that he would change his behaviour for that reason. This ground of appeal is without merit. First, the disputed November 2018 decision letter explicitly states that, if the appellant is found to be gay, then he would not be able to live openly as a gay man in Afghanistan for fear of persecution or ill-treatment. Secondly, the judge's conclusion did not depend upon the appellant explicitly stating that he is homosexual; the judge has reached his finding following his own objective assessment of all the evidence and the application of relevant law. Thirdly, the grounds overlook the fact the appellant had stated an interview (Q18) that, being a gay man, he feared returning to Afghanistan because he believed he would be persecuted there. Contrary to what is asserted in the grounds, the appellant had expressly stated that he feared persecution on return on account of his sexuality.

6. In the light of what I say above, I find that the Secretary of State's appeal is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed.

Signed
2019
Upper Tribunal Judge Lane

Date 13 March

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.