**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/02349/2017**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 7 December 2017** | **On 19 December 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**AA (IRAQ)**
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G Lee, Counsel instructed by Duncan Lewis & Co
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Goodrich sitting at Taylor House on 4 April 2017) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee on account of his claimed homosexual orientation. The First-tier Tribunal made an anonymity direction in favour of the appellant, and I consider that it is appropriate that this anonymity direction is maintained for these proceedings in the Upper Tribunal.

## The Reasons for the Grant of Permission to Appeal

2. On 4 October 2017, Upper Tribunal Judge Flinch granted the appellant permission to appeal to the Upper Tribunal for the following reasons:

> The First-tier Tribunal Judge reminded herself of the difficulties a gay man from Iraq may experience when disclosing his sexuality, but does not apply this factor to any large degree when reaching her findings in relation to his credibility.
>
> In addition, in paragraph 37, she makes assumptions about his feelings about first entering into a gay relationship which was not based on any evidence and was speculative.
>
> As a consequence, it is arguable that First-tier Tribunal Judge Goodrich's decision contained arguable errors of law and it is appropriate to grant permission to appeal.

## Relevant Background

3. The appellant is a national of Iraq, whose date of birth is 6 December 1987. He is of Kurdish ethnicity, and he comes from Erbil in the Iraqi Kurdish region. His account is that he realised that he was gay in 2012. Prior to this, he was attracted to women, and he had a relationship with a girl when he was aged 17. In 2012 D, who he had known for two months, told him that he was gay and that he loved the appellant. A week after this, the appellant entered into a relationship with D, which lasted for four years. He would see D every day and would go to D's house. He and D kept their relationship secret.

4. On 12 July 2016, D's father came into D's bedroom, and discovered the appellant with D. He beat both of them. The appellant managed to get dressed and escape from the house. He went home, collected his money and fled the country.

5. He says that he arrived in the United Kingdom in the back of a lorry, on 24 August 2016. At his screening interview on 27 August 2016 he said that his life was in danger because he had been accused by A, who worked for the Government and who was in the Army, of having sexual relations with his wife. This had happened on 12 July 2016.

6. The appellant subsequently instructed Duncan Lewis & Co Solicitors to act for him, and he told them in January 2017 that there were some answers in his screening interview that were not accurate. In fact, he was caught having sex in bed with A's brother D (not with A's wife). He explained that he was too embarrassed to indicate the real reason for his asylum claim when giving his screening interview.

7. The appellant confirmed his new account at the outset of his substantive asylum interview. The appellant was extensively questioned by the Interviewing Officer about the genesis of his relationship with D. He was asked whether the incident had sparked any feelings of confusion or an internal conflict regarding his sexuality. The appellant answered (Q&A 129): "*Just a little, not much, because I was thinking I liked*

*women before but now I am going to have this relationship. It is OK because I am going to have a comfortable life, an easy life."*

8. In the subsequent refusal decision, the respondent said that the appellant's answers regarding the decision to enter into his first same-sex relationship were vague, evasive and incoherent. In addition, it was unclear why he was unable to remember even the month in which he claimed to have begun a gay relationship with D. With regard to his life in the UK, he had been asked which gay clubs he had attended, and he had not been able to provide any names. He could only state that they were on the Embankment in London. Furthermore, during the whole time he had been in the UK, he had only been to these gay clubs on two or three occasions. With the exception of these infrequent visits to gay clubs, he did not appear to have engaged further with the gay community. He had not joined any LGBT groups while being in the UK, nor had he mentioned any gay partners in the UK. It was unclear why he had not fully embraced his sexuality in a country where it was acceptable to do so. His account of the alleged discovery of his relationship with D and his subsequent escape was both vague and inconsistent. Accordingly, it was not accepted that the appellant was gay, and nor was it accepted that he would be at immediate risk on return to Iraq as the result of his claimed same-sex relationship with D.

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

9. Both parties were legally represented before Judge Goodrich. Ms Revill of Counsel appeared on behalf of the appellant. The Judge received oral evidence from the appellant, who was extensively cross-examined by Ms Weston on behalf of the Home Office.

10. At paragraph [13] of her decision, Judge Goodrich set out in considerable detail the answers which the appellant gave to Ms Weston in cross-examination. In paragraphs [14]-[18], the Judge summarised the answers given by the appellant in response to questions for clarification purposes from her, and in re-examination by Ms Revill.

11. The appellant produced copy photographs of his claimed boyfriend, "NY". He said these photographs had been taken two weeks beforehand in a gay club. He had met NY on 10 March 2017 through Facebook. Since then, they had met face-to-face a couple of times. NY was not here today to give evidence because he was a student. He had family and friends in the UK, and being gay was not sociably acceptable, and that was why he had refused to come to the hearing to give evidence in support of the appeal.

12. In her closing submissions on behalf of the respondent, Ms Weston submitted that there were a number of discrepancies in the appellant's account of his experiences in Iraq. He was vague about his sexuality and how it came about. There were also discrepancies in the evidence regarding the recent relationship on which he relied. She submitted that little weight should be attached to this claimed relationship, given that NY had not attended the hearing.

13. In reply, Ms Revill submitted that to comment on how long it had taken the appellant to realise his sexuality was to impose a stereotype. So far as the evidence

concerning his sexuality was concerned, the appellant had given a reason for NY's non-attendance. The appellant had had contact with other men: his Whatsapp communication at page 46 showed his desire to meet up with other men for sex. This evidence, together with the photographs and his membership of ELOP, were corroborative of his claim to be gay.

14. The Judge's findings are set out in her decision at paragraph [22] onwards. At paragraph [33], she said that she attached no weight to the fact that the appellant did not disclose his sexuality in his screening interview, as she recognised that this could have been due to shyness, fear or difficulty in disclosure.

15. In paragraphs [35] and [36], the Judge rehearsed the evidence which the appellant had given in his substantive asylum interview as to how his relationship with D had developed. The Judge noted, among other things, the appellant's response at Q&A 137 cited above. At paragraph [37], the Judge held that what was missing from the appellant's evidence was any real sense of any turmoil, anxiety or concern, given his existing sexual identity and the implications for a gay relationship in Iraq. At paragraph [38], she said that she recognised that the appellant may have difficulty in expressing his emotions, but in her view his answers in interview and in his oral evidence appeared formulaic. His evidence about the decision that he took that day to flee Iraq, and to leave his family, was also "*devoid of emotional content*." On his case, the appellant had taken the decision to flee even before he received any telephone call or threats, and he did not tell his mother that he was leaving.

16. At paragraph [39], the Judge said that she had also considered the documentary evidence regarding the appellant's expression of his sexuality in the UK. She observed that the screen-shots appeared to be dated after December 2016. (The date of the refusal letter is 17 February 2017). It was not necessary for the appellant to be in a same-sex relationship, or even to have had the experience of one. However, he relied on a recent relationship with NY that he claimed to have formed in March 2017, and so she had to assess this evidence.

17. At paragraphs [40]-[43], the Judge gave her reasons for attaching no material weight to the evidence concerning the appellant's relationship to, or connection with, NY.

18. At paragraph [49] the Judge summarised her conclusions. The appellant's account of his relationship with D and his departure did not "*ring true*". She did not believe that this arose from any reluctance on his part to discuss his sexuality, but rather because he had sought to maintain consistency with the same account as he gave in interview. She did not find him a credible witness. The Judge continued: "*I attach no weight to the evidence he has provided to seek to show that he is gay, because this is self-generating and he is not a credible witness. Applying the lower standard of proof, I do not believe that the appellant is gay or that he holds any genuine fear. I consider the claim made by the appellant had been entirely fabricated in order to provide a basis to stay in the UK.*"

**The Grounds of Appeal to the Upper Tribunal**

19. The grounds of appeal were settled by Ms Revill. The focus of both grounds was on paragraph [49]. Ground 1 was that the Judge had erred in law in rejecting the

documentary evidence concerning the appellant's gay lifestyle in the UK on the sole ground that it was self-generated and that he was not a credible witness. The Judge ought to have considered whether the documentary evidence was in itself worthy of belief. Ground 2 was that the Judge had not given a sufficient reason in paragraph [49] for not finding the appellant to be a credible witness. The assertion that his account "*did not ring true*" was an inadequate basis for making an adverse credibility finding. On the face of it, the fact that his oral testimony was consistent with his account in interview, would support, not undermine, his credibility.

**Discussion**

20. It is convenient to begin with ground 2, as this is the springboard for the observations made by Upper Tribunal Finch when granting permission.

21. In paragraph [49] the Judge was summarising her conclusions, so it is unfair to treat what she said in this paragraph on the topic of past persecution as being representative of her analysis of this issue. It is apparent from a fair reading of the decision as a whole that the Judge had explained earlier why she found the appellant's account of past persecution was not credible.

22. As identified by Judge Finch when granting permission, the real issue is whether the Judge's reasoning in paragraph [37] is flawed.

23. Despite Mr Lee's able advocacy, I am not persuaded that this is the case. As the Judge highlighted in paragraphs [35] and [36], a constant refrain in the substantive interview was that the appellant was comfortable about entering into a gay relationship with D, even though hitherto he only had heterosexual feelings, and even though he was being invited to embark on a gay relationship in a highly homophobic, and hence dangerous, environment. Against this background, it was open to the Judge to find that it was not credible that the appellant would have felt in the way that he claimed to have done when propositioned by D. In short, it was open to her to find that it was not credible that the appellant felt comfortable about it from the outset and that he envisaged a comfortable and easy same-sex relationship with D in Iraq.

24. However, I consider that Ground 1 is made out. As pleaded by Ms Revill, the documentary evidence included 79 pages of screen-shots from mobile phone apps called Hanky and Skout. These showed the appellant meeting men online and discussing casual sexual encounters. The exchanges took place in December 2016 and January 2017, before the respondent made a decision on the asylum claim. The exchanges are objectively supportive of the appellant's claim to be gay as they show him actively seeking to have sex with like-minded men. At times this involves a discussion as to the type of sex which he and/or the other man favours.

25. The Judge gave two reasons for wholly discounting this evidence, neither of which is sufficient. The first was that she has not found the appellant to be credible in his account of past persecution. This is plainly not a sufficient reason for disbelieving his claim to be enjoying a gay lifestyle in the UK. The second reason she gave was that the evidence was "*self-generated*". This is not a fair characterisation of the

evidence, which was generated by the appellant having a dialogue with prospective male partners. Thus, the material was as much generated by third parties as it was generated by the appellant.

26. In **R (on the application of SS) -v- SSHD (Self-serving statements) [2017] UKUT 164 (IAC),** the Tribunal held that the expression "*self-serving*" is uninformative; and that what was needed was a reason, however brief, for that designation. By analogy, the Judge gave no reason for designating the Whatsapp material as "*self-generated*", and she failed to explain why the documentary evidence was in itself not worthy of belief.

27. For the above reason, the decision of the First-tier Tribunal is unsafe, and it must be set aside in its entirety and remade. It was agreed by the representatives that in this event the appeal should be remitted to the First-tier Tribunal for a fresh hearing.

**Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision must be set aside in its entirety and remade.

**Directions**

**This appeal is remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing before any Judge apart from Judge Goodrich. None of the findings of fact made by the previous Tribunal shall be preserved.**

Signed Date 18 December 2017

Judge Monson

Deputy Upper Tribunal Judge