



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/27145/2016

**THE IMMIGRATION ACTS**

Heard at Bradford  
on 18 July 2018

Decision & Reasons promulgated  
on 1 August 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MM  
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Ahmad instructed by Riaz Khan & Co Solicitors  
For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer

**ERROR OF LAW FINDING AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Bashir promulgated on 22 February 2018 in which the Judge dismissed the appellant's appeal against the refusal of an application for leave to remain in the United Kingdom on the basis of his family and private life.
2. The appellant is a citizen of Algeria born on 22 April 1982.

3. The Judge considered the evidence before setting out findings of fact from [27] of the decision under challenge. The Judge notes at [28] that the appellant's sexuality is not disputed and that it was agreed between the parties that the only matter in dispute is in relation to whether the appellant's relationship with [KT] is a genuine and subsisting relationship.
4. The Judge noted an earlier decision of First-tier Tribunal Judge Cope promulgated following a hearing at North Shields on the 27 August 2013 in which Judge Cope accepted that the appellant was in a sexual relationship with [KT]. Judge Cope noted that relationship had only been in existence for a number of weeks and also noted inconsistencies and contradictions in the evidence given on that occasion; which the Judge also notes was present in the evidence given in the decision under appeal.
5. The challenge to the decision arises as a result of the following findings made by the Judge:
  32. The inconsistencies and the contradictions in the appellants and [KT's] evidence were noted in IJ Cope's determination even though it was a very young relationship at that time. I find that their evidence regarding their relationship remains inconsistent to date. The appellant and [KT] have been in a relationship since June 2013, have been living together since July 2013 and could not recall the events of the 3 to 4 days preceding the date of the oral hearing consistently and accurately. They gave an inconsistent account of what they had done together on the Monday and the Tuesday prior to the date of the hearing (Wednesday). They were inconsistent in the relationship interview on 22 November 2016. Consequently, in light of all the evidence before me I find they are not in a genuine or a subsisting relationship. I note that documentary evidence has been produced to show that the appellant and [KT] have been residing at the same address, however this does not show that they are in a genuine and subsisting relationship given the inconsistencies identified. If they had been in a genuine relationship as claimed it is natural to expect them to know regarding each other lives, associations and activities. I find the Appellant and [KT] unreliable and, inconsistent witnesses. Although [KT] claims that he has memory issues, nevertheless these have not been discussed with his medical practitioner and as such I attach little weight to this evidence. I find he has used his memory as a reason to explain his inability to give reliable evidence.
  33. I find the evidence of the two witnesses incidental and as thus facilitating the appellants and [KT's] evidence. I attach no weight to [KT's] sisters evidence that she was aware that the appellant and [KT] had been to the antique centre to purchase Snow White and the Seven Dwarves. I disregard this evidence given that it had been mentioned during the adjournment for lunch by the appellant and [KT]. I accept that the matter was not discussed in detail as Mr Ahmed was able to intervene and prevent further discussion. However, given that the matter had been mentioned and in the interests of fairness, I disregard this part of the witness evidence in its entirety.
  34. In light of my findings above I do not accept that the appellant and [KT] are in a sexual relationship, consequently follows that there is no private or family life within the meaning of article 8 of the ECHR or paragraphs 276 ADE of appendix FM. Accordingly, I find there are no insurmountable obstacles or exceptional circumstances warranting his leave to remain.
6. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 20 March 2018, the operative part of the grant being in the following terms:
  2. I am satisfied there is an arguable error of law in this decision in that the Judge has not made any findings in relation to the evidence of [Mrs S] what weight is attached to this

evidence. Further, the Judge gives no reason as to why she is departing from the findings of a previous Judge. The Judge has also not considered the appellants private life in the United Kingdom and the impact of section 117B.

### **Error of law**

7. At the hearing I announced that I find the Judge has erred in law in a manner material to the decision to dismiss the appeal such that the decision had to be set aside and the matter remitted to the First-tier Tribunal to be heard afresh by a Judge other than Judge Bashir. I now give my reasons.
8. The previous decision of Judge Cope should have been the starting point for the consideration of the issues before the Judge in accordance with the Devaseelan principles. Judge Cope was hearing appeal on asylum, humanitarian protection, and human rights grounds, against a removal direction to Algeria which accompanied the refusal of the appellants claim for asylum or any other form of international protection and/or leave to remain under the Human Rights Act.
9. Judge Cope set out the evidence he was asked to consider in detail, his core findings can be summarised as follows:
  - i. One of the principal issues is the credibility of the Appellant [23].
  - ii. There are aspects of the Appellants case where he has been consistent in what he has had to say about events in Algeria [27].
  - iii. The type of societal rejection the Appellant has described for gay men in Algeria is not wholly inconsistent with the background evidence [28].
  - iv. Consistency between the account with the background evidence is a factor to the Appellant's credit although may not necessarily be determinative [29].
  - v. The Appellant claimed that in Algeria he wore "gay clothes" [35]. Judge Cope stated he will be surprised if every single man in a country like Algeria with a strong links to France and with a pluralist religious tradition, who dressed in western clothes such as a T-shirt, will be regarded as gay especially in a city like Algiers [39].
  - vi. There is no reason not to accept in principle the view of [Ms H] and [KT] that the Appellant is gay and that his relationship with [KT] is sexual [45].
  - vii. The misunderstanding of the interpreter during the course of the SEF interview, as advanced as an explanation for discrepancies in the evidence from other sources, was not complained of or raised as an issue in the grounds of appeal [57].
  - viii. The claim raised in the Appellants witness statement that he knew Muslim extremists were attacking him for being gay and that they had threatened him in Algeria was not mentioned in the SEF interview when he mentioned three incidents he relies upon as showing that he suffered persecution in his home state [58].

- ix. Such discrepancies were stated to be an indication that the Appellant is not being truthful in his account of events in Algeria. Had he been exclusively targeted by Muslim extremists it is not credible that he would not have mentioned this during the SEF interview [59]
- x. In paragraph 7 of his witness statement the Appellant claims there is a 'gay list' held by the authorities in Algeria and claims he has been told that his name is on it by a friend [60]. The existence of such a list or whether or not the Appellant was named on it had not been mentioned by him during the course of the SEF interview despite this being an important factor in showing how he would be at risk of adverse treatment [61].
- xi. The Upper Tribunal in the country guidance case of OO (Algeria) [2013] UKUT 00063, paragraph 47, did not accept that there was such a list or register [62].
- xii. The claim in paragraph 9 of the witness statement that the Appellant feared forced marriage by his family if he returned to Algeria is not mentioned in his SEF. His claim this was a matter he was only made aware of in August 2013 contradicts what he said in his oral evidence from which it could be implied he was aware there had been a possibility of a forced marriage before he left Algeria in 2006 and went to France [66]. It is not credible the Appellant would not have mentioned in his SEF the problem of forced marriage if he had known about it is seven years previously [67].
- xiii. The Appellant was vague in replied to questions put in cross examination in relation to the events at a party which took place around 2000-2002 giving rise to concerns relating to the plausibility of the account [69-72].
- xiv. The alleged event at paragraph 8 of his witness statement when he claims to have been threatened earlier in the day of the party is not mentioned in the SEF interview [73].
- xv. The Appellant has not been consistent regarding the number of scars he allegedly suffered as a result of being attacked with a knife [76]. There is no medical evidence to clarify the number of scars or to provide any suggestion of causation [77].
- xvi. Questions 104-111 of the SEF interview related to this incident which resulted in it being put to the Appellant that the event was consistent with a mugging rather than an attack based upon his sexual orientation. It was only at question 112 he suggested the alternative explanation [78].
- xvii. The Appellant failed to satisfactorily answer the question put to him in cross-examination as to how there were safe areas where he could wear 'gay clothes' if the police and Muslim extremists knew of such areas,

and why such areas were not regularly targeted. He was unable to answer this point [84].

xviii. The letter from [Ms H] states she found the Appellants various stories very consistent and to tie together logically but that is a judgment Judge Cope has to make based upon all the evidence [86].

xix. Section 8 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 is engaged, and the Appellants credibility damaged based upon his admitted possession of a false French identity card used to attempt to obtain a national insurance number to which he was not entitled and a failure to claim asylum in France where he lived for six years [91-96].

xx. Giving the Appellant the maximum credit for the consistency of his accounts [98] and weighing this against the negative factors [99-100] Judge Cope did not accept the Appellant was telling the truth about events in Algeria [101]. Judge Cope did not believe the alleged events actually took place in Algeria [102] or that he has a credible fear of persecution or serious harm from those he alleges.

xxi. It is accepted the Appellant is gay but having considered the findings in OO and HJ (Iran) Judge Cope concluded the Appellant had failed to show that any fear he has is objectively well founded (104-127).

xxii. In relation to the issue of modification of behaviour in his home State, Judge Cope found on the evidence that any modification or concealment was not as a result of a fear of persecution or persecutory treatment but rather as a result of societal pressure or pressure from his family (126).

xxiii. The Appellant was not entitled to a grant of humanitarian protection for the same reason his asylum claim was dismissed (131).

xxiv. The Appellant is unable to satisfy the Immigration Rules relating to his Article 8 rights (135).

xxv. The Appellant is in a sexual relationship with [KT] in the UK (140). Such a relationship can potentially amount to private life but not family life recognised by Article 8 ECHR (141). The issue in relation to Article 8 ECHR is one of proportionality (143). The decision is proportionate (169).

10. Despite the inconsistencies in the evidence Judge Cope made a clear finding the appellant is in a sexual relationship with [KT]. The Judge in the appeal under challenge makes a completely different finding and does not accept they are in a sexual relationship. The core reason relied upon by the Judge appears to be the inconsistencies and contradictions found in the evidence. The Judge dismisses the evidence given by [KT] noting his explanation for an issue that contributed to the unreliable nature of the evidence in that he has memory issues. The Judge attaches little weight to the claim on the basis [KT] has not discussed this matter with his GP, yet the fact it has not been discussed with the GP does not mean that [KT] does not have difficulties with recollection. The finding by the Judge that [KT] used his poor memory as a reason to explain his inability to give

- reliable evidence is factually correct, yet the Judge seems to hold this against the witness as if it was not plausible, without adequate explanation or reason.
11. Other than by reference to the reliability of recollection the Judge fails to set out sufficient or adequate reasons for why she is departing from the findings of Judge Cope.
  12. The Judge also refers to the evidence of two witnesses which is described as 'incidental and thus facilitating the appellants and [KT's] evidence'. The Judge fails to define what she means by the term "incidental". One definition of this term is "happening as a minor accompaniment to something else". If that is the interpretation given by the Judge there is no reasoning to support such a conclusion. The evidence of the appellant's witnesses is not 'incidental to' or a 'minor accompaniment' but should be considered as an important part of the evidence as a whole. Whilst the Judge refers to an incident that occurred due to matters which may have been overheard during the lunch break, the written evidence of [KT's] sister in her witness statement dated 5 July 2017 specifically states:
    2. I confirm that I am the sister of [KT]. I brother and [MM] are in a same-sex relationship which has subsisted for four years. They still live together as a couple in a same-sex relationship and have a very strong loving bond.
  13. The fact the Judge may have felt one part of the evidence of this witness could have little weight attached for the reasons set out at [33] does not arguably entitle the Judge to disregard all the evidence of that witness which has not been shown to be affected by the events that occurred on the day. There is also no mention of whether the witness was called to give evidence in chief and cross examined and what view the Judge took of her evidence as a whole.
  14. There was also a witness statement from the brother-in-law of [KT] who states that he has known [KT] for about 56 years and that he is a very honest and decent man and also confirms that he has known his partner [the appellant] for four years. At [3] of that witness statement, dated 5 July 2017, the witness states "I can confirm that [K] and [M] are in a same-sex relationship which is very strong and a loving one. I can also confirm that my wife and I meet up together with [K] and [M] for regular tea and coffee".
  15. A more serious omission from the decision is the total lack of any reference to a third witness [SS] who also filed a witness statement of 5 July 2017 who states at [3] "I confirm that I have known [KT] for approximately 50 years as a good friend. I can also confirm without any doubt whatsoever that [K] and [MM] have been together in a same-sex relationship for approximately four years. They are in a genuine and loving relationship which is still subsisting. They have gone out with me a few times as a couple for meals and drinks. I have also stayed at their house overnight after being out together".
  16. The grounds of challenge make a very specific point about the evidence of this witness and the fact that [KT's] sister and [SS] attended court and gave evidence in support of the appellant's case that he is in a genuine and subsisting relationship with his partner.
  17. The witness [SS] is not related to the appellant or his partner and is a serving prison officer who gave clear evidence in support of the appeal. The grounds

assert the Judge fails to give any proper reason why she found this evidence incidental and facilitating the appellant and his partners evidence, fails to set out what weight (if any) she attaches to her evidence, and if not why not. The grounds assert there has not been a proper assessment of the evidence of [SS] and that much more is required in this case than the Judge provided.

18. I find arguable merit in the assertion in the grounds that insufficient consideration has been given to the evidence and that in finding the evidence to be 'incidental' and 'facilitating' the Judge fails to provide adequate reasons for the weight given to the evidence of the witnesses.
19. It is also the case that in addition to the oral evidence there is a substantial volume of documentary evidence showing on the balance of probabilities that the appellant and his partner are in a genuine and subsisting relationship. Further material has been provided for the purposes of the hearing before the Upper Tribunal but that before the Judge contains evidence of utility bills in the joint names of both the appellant and [KT].
20. The Judge in the decision under challenge found there was no private or family life within the meaning of article 8 or paragraph 276ADE the Immigration Rules because the appellant and [KT] were not in a sexual relationship. It is not made out on any principle of law that a person has to be in a sexual relationship to enjoy private life. People who are friends with no more than a normal friendship may be properly entitled to claim that that friendship forms part of their private life recognised by article 8. The grounds of appeal raised both family and private life aspects.
21. It may be that the decision of the Judge in dismissing the appeal turns out to be the same once all the evidence has been properly considered in the same way that Judge Cope dismissed the appeal on the earlier occasion despite finding that the appellant and [KT] are in a genuine and subsisting relationship together. The difficulty with this case is that it cannot be certain that that will be the decision or indeed is the only decision that can be made. What is required is a thorough and complete assessment of all the evidence followed by a thorough determination in which the evidence from all sources, both written and oral, is properly identified and clear findings made in relation to the weight that can be given to that evidence, in terms of what it either establishes or does not establish, and the reasons why. It is also necessary for the judge on the next occasion, in addition to revisiting the evidence confirmed the nature of the relationship between the appellant and [KT], to consider how the findings made factor into any assessment of an entitlement for leave to remain under the Immigration Rules or outside the Rules pursuant to article 8 ECHR. It is only when that exercise has been conducted that an arguably sustainable decision can be produced.
22. It is unfortunate, but this matter will have to be remitted to enable consideration of the evidence and detailed fact finding which did not occur in the decision under challenge.

## Decision

23. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-tier Tribunal Hearing Centre Bradford to be heard afresh by a judge nominated by the Resident Judge of that centre, other than Judge Bashir.**

Anonymity.

24. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 24 July 2018.