



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00090/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 9 February 2018

Decision & Reasons Promulgated
On 20 April 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

ZENDJEBIL [R]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jagadeshm, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Zendjebil [R], was born on [] 1987 and is a male citizen of Algeria. By a decision dated 19 May 2017, Upper Tribunal Judge Hemingway found that the

First-tier Tribunal had erred in law such that its decision fell to be set aside. His reasons for making that decision were as follows:

1. This is the appellant's appeal to the Upper Tribunal, brought with the permission of the judge of the Upper Tribunal, from a decision of the First tier Tribunal (Judge LSL Mensah hereinafter "the Judge") made after a hearing of 6 October 2016, to dismiss his appeal against the Secretary of State's decision of 16 December 2015, refusing to grant him international protection.
2. In brief, the appellant, who is a national of Algeria and who was born on [] 1987, had asserted, when claiming asylum, that he is gay, that such is disapproved of in Algeria and that matters having been discovered by his uncle, he was beaten by a number of persons. He says that, in consequence, he fled Algeria fearing for his safety. The Secretary of State, though, did not accept the truthfulness of his claims regarding his sexuality or (as logically follows) the way he had been treated in consequence. So it was concluded that he would not be at risk of persecution or serious harm upon return.
3. Both parties were represented when the Judge heard the appeal. She received oral evidence from the appellant and from one witness on his behalf. She had before her the country guidance decision of the Upper Tribunal in OO (Gay Men) Algeria CG [2016] UKUT 00065 (IAC). She had a skeleton argument prepared by Counsel then representing the appellant. Unlike the Secretary of State she accepted the truth of the account regarding sexuality and past problems in Algeria as a consequence of that, but she thought OO did not assist him and, ultimately, she explained her reasons for dismissing the appeal in this way:

"21. Applying the facts and considering the expert evidence, I am satisfied the appellant faces a real risk of serious harm in his home area at the hands of his family. The issue is whether he can relocate. The expert evidence confirms his family are unlikely to trace him to another part of the Capital or another city and the CG case confirms the same. The first issue is therefore whether he would live discreetly to avoid being ostracised, harassed, insulted and stigmatised. I am satisfied on the lower stand of proof he would as this is exactly what he did when he was in Algeria. Would he be forced to conceal his sexuality as a result of a fear of serious harm? On the evidence before me his case presents no particular characteristics that might unusually or contrary to what is generally expected, attract disapproval at the highest level. In fact his own history supports that proposition as he did not attract any serious adverse attention, other than through his family, which I accept was serious. There is a paucity of evidence that he was robbed and sexually assaulted because of anything particular to him. Further, the expert does not in my view go so far as to say he would attract that high level adverse attention but simply raises the risk in general terms. Therefore, applying the CG case I do not accept he is in the same position as argued by Counsel and considering HJ (Iran) or MSM (journalists; political opinion; risk); OO makes it clear that the general risks fall below the threshold of persecution and therefore do not engage HJ (Iran)."

4. Various challenges to the judge's reasoning were made in what are quite lengthy grounds of appeal. Some of those are quite bold, in particular, a contention that OO is simply wrong because it's reasoning conflicts with that contained within HJ (Iran) and another v SSHD [2010] UKSC 31. The Upper Tribunal Judge who granted permission said this:

"Whilst I find no arguable merit in the grounds insofar as they seek to challenge the country guidance in OO (Gay men) (CG) [2016] UKUT 65, and whilst the judge's decision appears on its face to be consistent with that country guidance, I nevertheless grant permission on the basis that there is arguably some confusion on the judge's part in her understanding of the country guidance at [21] and that there are arguably no clear findings in [21] as to whether it would be unreasonable or unduly harsh to expect the appellant to relocate."

5. Permission having been granted, the matter came before me for a consideration as to whether or not the Judge had erred in law. Representation at that hearing was as stated above and I am grateful to both representatives, in particular, for the sensible, fair and straightforward way in which they approached matters.

6. Mr Duffy frankly acknowledged he saw merit in the contention that the Judge had not properly considered the question of undue harshness with respect to internal flight. Ms Mair, whilst not conceding anything at all, chose to focus more upon that particular issue than the others. Indeed, the "OO point" had not been mentioned in a skeleton argument filed for the purpose of the hearing before the Judge and it did not appear that it had been mentioned in submissions either. So, it seems that it was only taken for the first time when an initial application for permission to appeal was made. As it turned out, in any event, I did not have to form any view as to that ground.

7. I have, though, decided that the Judge's decision did contain an error of law. I accept the submission not seriously opposed by Mr Duffy, to the effect that the Judge, whilst producing a careful and clear written decision, did not actually ask herself about or make findings about whether in his particular circumstances it would be unduly harsh to require the applicant to relocate. On my reading her analysis appears to be that he could relocate simply because there would be no risk of persecution in a part of Algeria where he is not known. That, though, falls short of the sort of analysis required as to internal flight and, in particular, the reasonableness or unduly harsh element of it. I do, therefore, set the decision aside.

8. I have decided that the matter shall remain with the Upper Tribunal. I have also decided that all of the favourable factual findings (that is to say favourable from the appellant's perspective) as are contained within the Judges written decision shall stand. That shall, then, represent the starting point for the reconvened hearing. To be clear, though, the next hearing before the Upper Tribunal will not simply be concerned with the question of internal flight. The decision having been set aside, the parties shall be at liberty to pursue all other issues raised by the appeal. Since little or nothing was said in the reasons for refusal letter regarding internal flight (a matter acknowledged by Mr Duffy) I have issued some directions requiring a degree of clarification as to the Secretary

of State's position. The next hearing before the Upper Tribunal shall, I hope, be assisted by the directions I have set out below.

CASE MANAGEMENT DIRECTIONS

A. The appeal shall be listed for a further hearing before the Upper Tribunal on the next available date. The hearing shall take place before Upper Tribunal Judge Hemingway at the Bradford Hearing Centre. The appellant is to be supplied with an Arabic (North African) speaking interpreter.

B. The Upper Tribunal appears to have all of the documentation which was before the First tier Tribunal. If either party wishes to supply further written material, that must be with the Upper Tribunal at least 10 working days prior to the date fixed for the next hearing. A party filing such material must also, simultaneously, send a copy to that party's opponent.

C. In particular, if it is intended that the appellant shall give any further oral evidence such evidence shall be contained in the form of a witness statement which is to be filed in accordance with direction B.

D. Further, the Secretary of State is specifically directed to indicate whether it is simply argued that the appellant can relocate to any area other than his home area. If, however, it is accepted that he could not relocate to certain areas but could to others, then the respected areas should be identified along with an explanation. Again, this material, which is to be reduced to writing, shall be filed in accordance with direction B.

Decision

The decision of the First tier Tribunal involved the making of an error of law and is set aside.

The decision is to be re-made by the Upper Tribunal in accordance with the above directions.

Anonymity

No anonymity order is made. None was sought before nor made by the First tier Tribunal. None was sought before me.

2. Following the making of a transfer order, the resumed hearing came before me at Bradford on 9 February 2018.
3. I refer to the directions made by Upper Tribunal Judge Hemingway. The Secretary of State wrote to the Upper Tribunal in compliance with those directions on 10 August 2017 to indicate that there were two possible areas of relocation for the appellant in Algeria. First, the appellant could relocate within the city of Algiers to an area which was "not the area of the appellant's family home." The First-tier Tribunal had found (in a finding which was preserved notwithstanding the setting aside of the decision), that the appellant could not live in his home area of Algiers because of a fear of his family. The appellant is a gay man and his family do not approve of his sexuality. Similarly, the Secretary of State considered that the appellant could live in Oran "a city of over 1 million people."

4. The appellant adopted his written evidence as his evidence-in-chief. That evidence includes his most recent statement of 5 February 2018. In that statement, the appellant said that he cannot live in Algiers because his family would be able to locate him easily within that city. The appellant's cousin is in the Algerian police. Secondly, the appellant said he could not live in Oran for the same reason. The appellant also asserts that in Oran there are "gangs that go out and specifically target homosexual men." The appellant also told me that he has been since August 2017 in a relationship with a Lithuanian man in the United Kingdom whom he identified as Marius. Marius lives in London. Both Marius and the appellant are living in the United Kingdom openly as gay men.
5. I also heard evidence from Mr Lotfi [S]. Mr [S] adopted his written statement as his evidence-in-chief. He supports the appellant and would send him money if he lived in Algeria. Mr [S] works as a sales assistant at Next. Mr [S] is also a gay man and his partner is a coach driver.
6. I also heard evidence from Mr [H] who adopted his written statement as his evidence-in-chief. He was not cross-examined. Mr [H] is also a friend of the appellant.
7. The country guidance for gay men in Algeria remains *OO (gay men) Algeria CG [2016] UKUT 65 (IAC)*. The headnote of *OO* reads as follows:
 1. *Although the Algerian Criminal Code makes homosexual behaviour unlawful, the authorities do not seek to prosecute gay men and there is no real risk of prosecution, even when the authorities become aware of such behaviour. In the very few cases where there has been a prosecution for homosexual behaviour, there has been some other feature that has given rise to the prosecution. The state does not actively seek out gay men in order to take any form of action against them, either by means of prosecution or by subjecting gay men to other forms of persecutory ill-treatment.*
 2. *Sharia law is not applied against gay men in Algeria. The criminal law is entirely secular and discloses no manifestation, at all, of Sharia law in its application.*
 3. *The only risk of ill-treatment at a level to become persecution likely to be encountered by a gay man in Algeria is at the hands of his own family, after they have discovered that he is gay. There is no reliable evidence such as to establish that a gay man, identified as such, faces a real risk of persecutory ill-treatment from persons outside his own family.*
 4. *Where a gay man remains living with his family to whom he has disclosed his sexual orientation in circumstances where they are prepared to tolerate that, his decision to live discreetly and to conceal his homosexuality outside the family home is not taken to avoid persecution but to avoid shame or disrespect being brought upon his family. That means that he has chosen to live discreetly, not to avoid persecution but for reasons that do not give rise to a right to international protection.*
 5. *Where a gay man has to flee his family home to avoid persecution from family members, in his place of relocation he will attract no real risk of persecution because, generally, he will not live openly as a gay man. As the evidence does not establish that he will face a real risk of persecution if subsequently suspected to be a*

gay man, his decision to live discreetly and to conceal his sexual orientation is driven by respect for social mores and a desire to avoid attracting disapproval of a type that falls well below the threshold of persecution. Quite apart from that, an Algerian man who has a settled preference for same sex relationships may well continue to entertain doubts as to his sexuality and not to regard himself as a gay man, in any event.

8. I recall that the findings of fact of the First-tier Tribunal in this case have been preserved. Judge Mensah accepted that the appellant was a homosexual man who had been shunned by his family and who had been beaten by his uncle and threatened by his brother. The judge accepted that the “family would not be able to openly accept [the appellant’s] sexuality in the context of Algeria.” Mr Jagadeshm, for the appellant, submitted that the only issue remaining in this appeal is internal relocation. Mr Diwyncz, for the respondent, did not seek to argue (as had his colleagues in the letter referred to above) that the appellant could relocate within Algiers City. Mr Diwyncz did not challenge the assertion of the appellant that his cousin is in the police in Algiers and that it was reasonably likely that he would be able to locate the appellant in that city. The only issue, therefore, is whether the appellant would find it unduly harsh to relocate to Oran, the area identified by the Secretary of State as suitable for internal flight within Algeria.
9. I have no evidence other than that of the appellant (which was not challenged) that there are gangs of men in Oran who seek to target homosexuals. There is no evidence that this particular appellant would be targeted by such gangs, should they exist, but that, in turn, that depends how and for what reasons the appellant would adopt a particular form of behaviour in Algeria as regards the expression of his sexuality. To answer that question, I turn to the guidance offered by *HJ (Iran) [2010] UKSC 31* 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.

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.”

10. Having listened carefully to the evidence of the appellant and his witnesses, I find that he is credible as are the witnesses. I accept that he and his partner and his friends live openly as gay men in the United Kingdom. The Tribunal therefore needs to consider for what reason the appellant might alter that openly gay behaviour upon return to living in Algeria. I do not accept that the appellant’s family would be a threat to him anywhere within in Algeria. I do find, however, that the appellant would wish to live as an openly gay man and that his primary reason for not doing so would be in order to avoid ill-treatment at the hands of individuals in the community who are aggressively homophobic. The test posed in the first part of paragraph [6] of *OO* (see above) in respect of an individual who cannot live in their home area because of threats from the family, is simply the test of undue hardship as set out by the House of Lords in *Januzi [2006] UKHL 5*. Having regard to the particular characteristics of this appellant, I find that (i) he would wish to express his sexuality by living an openly gay life in Algeria; (ii) if he lived as an openly gay man in Oran then he is reasonably likely to be at risk of ill-treatment at the hands of homophobic individuals or groups; (iii) if he altered his behaviour in order to live “discreetly” and not in an openly gay way, he would not do so in order to comply with social mores, still less in order to avoid embarrassment to a family which has already rejected him. His reason for hiding his sexuality and behaving “discreetly” would be in order to avoid ill-treatment. In the light of that finding, the appellant is entitled to remain in the United Kingdom on Article 3 ECHR grounds. I am aware of the country guidance of *OO* and the fact that it is unlikely that he would be prosecuted for being a homosexual but I accept that he has a real fear of being ill-treated on account of his sexuality should he live an openly gay life. In the circumstances, his appeal is allowed.

Notice of Decision

11. This appeal is allowed on human rights grounds (Article 3 ECHR).
12. No anonymity direction is made.

Signed

Date 18 April 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 18 April 2018

Upper Tribunal Judge Lane