



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

Appeal Number: PA/13107/2016
HU/01150/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 27 April 2017**

**Decision & Reasons Promulgated
On 01 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

**AG
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None. The appellant appeared in person.

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. 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 his 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.

Background

2. The appellant is a citizen of Algeria born on [] 1986. He entered the United Kingdom on 29 September 2012 on a six month student visa. On 18 May 2015 the appellant applied for leave to remain in the United Kingdom on Article 8 grounds which included an assertion that he would face discrimination in Algeria because he is homosexual. That application was refused by the respondent on 30 December 2015. On 26 January 2016 the appellant was served with a notice of liability to removal as an overstayer. On 27 April 2016 he made an appointment to claim asylum and on 13 May 2016 he formally claimed asylum based upon his sexuality. On 30 December 2015 the respondent refused his application for asylum. The appellant appealed against those decisions to the First-tier Tribunal.

The appeal to the First-tier Tribunal

3. In a decision dated 2 February 2017, First-tier Tribunal Judge Hodgkinson dismissed the appellant's asylum and Article 8 appeals. The First-tier Tribunal found that the appellant would be able to relocate within Algeria and would not therefore be at risk of persecution. The Tribunal found that the appellant, as accepted, could not meet the requirements of the Immigration Rules and that there were no exceptional or compelling circumstances to justify a grant of leave to remain in the United Kingdom under Article 8 outside the Immigration Rules.
4. On 16 February 2017 the appellant applied for permission to appeal against the First-tier Tribunal's decision. The grounds of appeal are; i) there is an error of law in the First-tier Tribunal's decision in the assessment of the reasonableness of internal relocation, and ii) in the assessment of Article 8 outside the Immigration Rules. It is submitted that the First-tier Tribunal Judge erred by failing to depart from the findings in **OO (Gay Men) CG [2016] UKUT 65 (IAC)**. The decision in **OO** is wrong in law as it is entirely contrary to Lord Hope's findings in **HJ (Iran) [2010] UKSC 31** at [31] and is unsustainable. It is further asserted that the judge failed to give any or adequate reasons to why he considered the background evidence post-**OO** was not sufficiently persuasive to justify a departure from the findings in **OO**. In respect of ground 2 it is asserted that based upon his findings of fact with regard to the appellant's relationship with his partner, a Portuguese national, it was inconsistent for the judge to find that there were no exceptional or compelling circumstances to justify a grant of leave to the appellant under Article 8 outside the Rules. It was asserted that the judge failed to take into account the factors set out at page 9 of the skeleton argument.
5. On 14 March 2017 First-tier Tribunal Judge Chohan granted the appellant permission to appeal. The grant of permission sets out at paragraph [5]

that there is an arguable error of law in respect of Article 8. At paragraph [3] of the grant of permission First-tier Tribunal Judge Chohan indicates that the judge has given satisfactory reasons for arriving at the conclusion that the appellant could relocate in Algeria.

6. The respondent filed a Rule 24 response. The respondent asserts that permission was granted only on ground 2, that is the Article 8 issue. It is submitted that the grounds do not address the acceptance that the appellant's article 8 claim was very much dependant on the facts of his protection claim.

The Hearing before the Upper Tribunal

7. As a preliminary issue I considered the grant of permission and whether or not permission had been restricted specifically to ground 2, namely the Article 8 issue. I consider that the grant of permission was not so restricted. Whilst it is clear that First-tier Tribunal Judge Chohan considered that the judge had given satisfactory reasons for concluding that the appellant could relocate in Algeria, there was no specific refusal of permission to appeal on that ground. I therefore proceeded on the basis that both grounds of appeal were to be pursued at the hearing. As the appellant was not represented Ms Isherwood proceeded to address me first to give him the opportunity to hear in full the respondent's response to the grounds of appeal that had been submitted.
8. Ms Isherwood indicated that there was an error in the First-tier Tribunal's decision at paragraph [63]. However, she indicated this was not a material error of law. At paragraph [63] the First-tier Tribunal Judge set out that there had been no challenge to the fact that S, the appellant's Portuguese partner, was exercising treaty rights in the United Kingdom. She referred to the Reasons for Refusal Letter at paragraphs 30 and 31 where it was set out quite clearly that the Secretary of State had not accepted that the appellant's partner was exercising treaty rights in the United Kingdom.
9. She submitted that the judge assessed this case by applying the appropriate case law and found that the appellant could relocate internally within Algeria. The judge follows the template set by the witness statement and the skeleton argument. The judge at paragraph 54 applies **OO (Algeria)** to the facts of this case. With regard to the appellant's grounds of appeal that **OO (Algeria)** was incorrectly decided she submitted that there is a different emphasis in **HJ (Iran)** where the court was looking at whether a person is living openly as a gay person as a matter of choice. She referred to paragraphs [163] in **OO**, [167] and [168] and submitted that it is clear from the decision that the finding was that gay men can live openly in Algeria. At paragraph [168] it refers to a choice. With regard to the evidence that postdated the decision in **OO** she referred to paragraph [59] of the First-tier Tribunal's decision where the judge acknowledged that evidence and that he had taken it into consideration. With regard to sufficiency of reasons she submitted that it

was sufficient for the judge to set out that he did not find that evidence to be sufficiently persuasive to depart from the case of OO. No further reasons were required to be given. She referred to the report at A59 which the appellant indicated postdated the country guidance decision in OO and indicated that it clearly was compiled before the decision in OO. The document at A81 was the penal code which is referred to in OO. With regard to the ground that the judge did not consider the evidence as to the father's reach in Algeria she submitted that the judge sets out what that evidence was and gives a very clear indication that she has not accepted that evidence as to the extent of the father's reach. The judge was entitled to do so.

10. With regard to Article 8 she submitted that it is not sufficient to say that the appellant was entitled to further reasons. The appellant has not put forward any compelling circumstances that the appeal should be allowed under Article 8. In essence this case is that the appellant simply wants to remain in the United Kingdom with a non UK national. Essentially, this is a question of choice of where to live. She submitted that there was no alternative finding that could be made given the lack of evidence of any compelling reasons in this case.
11. Mr G relied on the grounds of appeal submitted in support of his appeal. He said that he and his partner could not be in a relationship in Algeria because they could not live together as a gay couple as there is discrimination and violence. He indicated that his partner had been granted a residence card now and that he himself had made an EEA application to remain in the United Kingdom for a residence permit as the partner of an EEA national.

Discussion

12. With regard to the first ground of appeal the judge recorded the appellant's submissions that OO had been wrongly decided at paragraph [59]. The judge set out:

"59. ... In her submissions and skeleton argument, Ms Chapman sought to argue that the decision in OO is wrongly decided, in terms of the risk to gay men in Algeria and in terms of the viability of internal relocation, bearing in mind the findings of the Supreme Court in its judgment in **HJ (Iran) [2010] UKSC 31**. Further, in support of such contention, she drew my attention to certain additional, and more up-to-date, country material which, she indicated, was not before the Upper Tribunal when it decided that country guidance decision. I confirm that I have read such material but do not find it to be sufficiently persuasive to justify a departure from the findings made in OO. Consequently, and for the reasons I have indicated, I conclude that it has not been established that the appellant would be at risk of persecution, should he seek to relocate within Algeria, even though I accept that he would like to live his lifestyle as a gay man reasonably

openly. I consider that there exists, based upon the facts of the appellant's case, a sufficiency of protection."

13. A country guidance case is to be treated as an authoritative finding on the country guidance issue identified in the determination. Unless it has been expressly superseded or replaced by any later country guidance decision or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal so far as that appeal relates to the country guidance issue in question and depends upon the same or similar evidence. The starting point for the First-tier Tribunal is that the country guidance in **OO** is binding upon it. The appellant argues that it is inconsistent with the case of **HJ (Iran)** which is also binding upon the First-tier Tribunal. **HJ (Iran)** is a Supreme Court decision and would take precedence. The judge was not persuaded by the appellant's arguments which were set out in the skeleton argument before the First-tier Tribunal. It has not been suggested that the decision in **OO** has been appealed or granted permission to appeal.
14. The Upper Tribunal in **OO** specifically had regard to the case of **HJ (Iran)** when formulating and considering the evidence before it and in coming to the conclusions that it did.

15. In **OO** the Upper Tribunal held (headnote):

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...

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.

16. In **HJ Iran** at paragraph 35 the Supreme Court held:

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared...

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

17. The Upper Tribunal in **OO** came to a different conclusion. The only risk of persecution would be from members of the family. The other findings in **OO**, set out above regarding the manner in which an appellant would choose to live, must be considered in light of that initial finding. There is no conflict between **OO** and **HJ (Iran)**.

18. Although it is incumbent upon a judge to give reasons for the findings, with regard to the evidence that the appellant submitted that it was asserted postdated the decision in **OO**, the judge has given an express and clear indication that he has taken into account all that evidence but was unpersuaded by it. As indicated by Ms Isherwood, some of that evidence did not in any event postdate the decision in **OO**. To give specific reasons as to why that evidence was not persuasive in essence would require the judge to demonstrate a negative. I consider that it was sufficient for the judge to give an indication that that evidence, which would have to be very cogent to depart from such a recently decided country guidance case, did not persuade him.

19. The judge took into account the appellant's claim to fear his father's 'reach' throughout Algeria. The judge found "there is no persuasive evidence before me, first, that his father has the influence throughout Algeria as claimed by the appellant..." There was no evidence before the judge of any specific difficulties that the appellant would face in re-locating to another area of Algeria. The House of Lords in **Januzi v SSHD [2006] UKHL 5** at [67] stated that "It is necessary to stress the rigorous nature of the test for unreasonableness or undue harshness". That threshold was approved at [41] of **SSHD v AH (Sudan) and others [2007] UKHL 49**, elaborated on at [42], thus:

“... the Refugee Convention, as I have sought to explain, is really intended only to protect those threatened with specific forms of persecution. It is not a general humanitarian measure. For these respondents, persecution is no longer a risk. Given that they can now safely be returned home, only proof that their lives on return would be quite simply intolerable compared even to the problems and deprivations of so many of their fellow countrymen would entitle them to refugee status. Compassion alone cannot justify the grant of asylum.”

20. The judge was entitled to conclude, given the high threshold required, that it was reasonable for the appellant to re-locate.
21. With regard to the Article 8 ground of appeal the judge has dealt with this very shortly. However, the judge has set out in considerable detail throughout the decision all the evidence with regard to the appellant's circumstances. The judge has made essentially positive credibility findings with regard to the appellant's evidence. However, the appellant cannot meet the requirements of the Immigration Rules as accepted at the hearing. Following **SS (Congo) v SSHD [2015] EWCA Civ 387**, the settled approach to the proportionality exercise, is that the inability of the appellant to meet the Immigration Rules is the starting point and something which attracts significant weight. When conducting an assessment outside the Immigration Rules the Tribunal must conduct this assessment through the prism of the Immigration Rules. Against the significant weight falling on the public interest side of the balance, the appellant needs to show compelling circumstances. Additionally in this case neither the appellant nor his partner are British Citizens. Although S is exercising treaty rights and is entitled to reside in the UK those rights arise as a result of his EEA citizenship. There was nothing that the judge considered to be compelling to suggest that would justify a grant of leave outside the Rules.
22. There was no material error of law in the First-tier Tribunal decision. The appeals of the appellant are dismissed.

Notice of Decision

The appeals are dismissed. The decisions of the Secretary of State stand.

Signed P M Ramshaw

Date 21 May 2107

Deputy Upper Tribunal Judge Ramshaw