



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

Appeal Number: PA/10242/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House (by remote video
means)
On 25th September 2020**

**Decision & Reasons
Promulgated
On 26 October 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**AK
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Capel of Counsel, instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The documents were available in paper format on the court file.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Khan promulgated on 12 December 2019, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 3 October 2019, in the context of refusal to revoke a deportation order, was dismissed.
3. The Appellant is a national of Morocco, born on 3 April 1980 (although he has previously used different identities) who first came to the United Kingdom in 2004 using a false Belgian passport and claiming asylum as an Algerian national fearing persecution on return from an armed Islamic group. That claim was refused on 26 August 2004 and the Appellant's appeal against refusal was dismissed on 10 November 2004. The Appellant voluntarily departed from the United Kingdom to Morocco on 15 July 2009. The Appellant married a British citizen in Morocco and was subsequently granted entry clearance as a spouse from 26 August 2010 to 26 December 2012.
4. On 29 January 2012, the Appellant was arrested for sexual offences and on 1 October 2012 he was convicted of one count of sexual assault and theft. He was then convicted on 25 January 2013 of attempted rape. The Appellant was released on bail but absconded until he was encountered in Ireland and on 21 December 2016 he was convicted for breaching his conditions of bail. On that date he was sentenced to 10 days for the breach of bail and a consecutive 40 months' imprisonment for the sexual offences, with a concurrent one-month imprisonment for the theft offence. A deportation order was made against the Appellant on 6 June 2017.
5. The Appellant applied for and then withdrew from the facilitated returns scheme and directions for his removal in early 2018 were deferred following further submissions being made. The Respondent refused the Appellant's further submissions on 20 September 2018 and his appeal against the refusal was dismissed on 30 October 2018.
6. In his appeal before the Tribunal in 2018, the focus of the Appellant's claim was that he had elderly and ailing parents in the United Kingdom to whom he provided assistance and that due to his own mental health problems, his removal to Morocco would be in breach of Articles 3 and 8 of the European Convention on Human Rights. First-tier Tribunal Judge Hodgkinson found that although the Appellant's parents had a range of medical problems and that the Appellant had provided some assistance to them prior to absconding in 2012 (following which he went to Ireland until he was encountered there in 2016), they were able to manage adequately without him at the time of the hearing.
7. The Tribunal in 2018 further found in relation to the Appellant's claimed mental health problems, that it had not been established that the Appellant had a specific mental health problem at the time of the hearing, with the hospital records from prison reflecting limited depression and anxiety because of the immigration situation that the Appellant found himself in. It was not accepted that the Appellant was in need of any

medical treatment at the time, but that if it became needed, adequate treatment would be available in Morocco.

8. On 21 February 2019, the Appellant claimed that he feared persecution on return to Morocco as a homosexual man, by way of a letter from his immigration advisers with a request for a screening interview, which subsequently took place on 2 April 2019. In the screening interview the Appellant stated that he was suffering from depression and anxiety, being medicated with mirtazapine. In relation to his protection claim, he stated that he was bisexual and would be at risk on return to Morocco as such.
9. The Appellant underwent a substantive asylum interview on 10 June 2019 (with his immigration advisers in attendance), during which he stated that he feared return to Morocco 2001 because of his sexuality but did not claim asylum when in France at that time because he did not know anything about it. The Appellant stated that there were only two people who knew about his sexuality in Morocco, in secret. The Appellant referred interchangeably to being bisexual and homosexual, until the difference was explained to him, at which point he clarified that he was bisexual. The Appellant stated that he had relationships with both men and women but had no evidence of any relationships or encounters with men, which happened around 14 or 15 years previously and were only one or two night stands. The Appellant was specifically asked why he had not made any reference previously to his sexuality or fear on return to Morocco on this basis, to which he said that he had a right of appeal against the previous decision and that he did not know why he didn't mention his sexuality back then. The Appellant stated that he had been to a few gay bars and clubs in the United Kingdom, a long time ago but was not a member of any gay or bisexual organisations, nor was he aware of any such websites in the United Kingdom.
10. The Respondent issued a certificate under section 72 of the Nationality, Immigration and Asylum Act 2002 and refused the application on the basis that the Appellant's claim was not credible due to the delay in it being made, that it was vague and lacking in detail. In any event, although it was accepted that there was some discrimination against members of the LGBT community in Morocco, there were established communities in some urban areas and treatment did not amount to persecution. The Respondent did not consider that the Appellant would be at real risk of persecution on return to Morocco, he was not entitled to humanitarian protection and there would be no breach of Articles 2 and/or 3 of the European Convention on Human Rights by his removal. In relation to private and family life, and the Appellant's mental health; the Respondent relied on the then recent dismissal of the Appellant's appeal on these grounds by the First-tier Tribunal. In conclusion, the Respondent refused to revoke the deportation order.
11. Judge Khan dismissed the appeal in a decision promulgated on 12 December 2019 on all grounds. First, the First-tier Tribunal found that the Appellant had not established his protection claim on the basis that he

would be at risk on return to Morocco on the basis of his sexuality and that this claim had been fabricated. Secondly, the certificate under section 72 of the Nationality, Immigration and Asylum Act 2002 was maintained on the basis that the Appellant had not provided any rebuttal to the matters set out by the Respondent and it was found that his offending had been particularly serious and that his presence in the United Kingdom constituted a continuing danger to the community in the United Kingdom. Thirdly, in relation to the exceptions to deportation in paragraph 399 and 399A of the Immigration Rules and replicated in section 117C of the Nationality, Immigration and Asylum Act 2002, the First-tier Tribunal relied on the findings made when the Appellant's previous appeal was dismissed noting that there was no new or further evidence to show that he could satisfy either of the exceptions to deportation.

The appeal

12. The Appellant appeals on three grounds as follows. First, that there was procedural unfairness in the First-tier Tribunal in its refusal of the application for an adjournment, which deprived the Appellant of a fair hearing. In particular, the First-tier Tribunal failed to consider why the previous legal representatives had stopped acting, what steps had been taken to secure alternative representation, the Appellant's explanation for failing to obtain representation and failing to consider whether an adjournment would have allowed the Appellant to obtain legal aid. Further, that the First-tier Tribunal failed to consider the Presidential Guidance Note No 2 of 2010: 'Child, vulnerable adult and sensitive appellant guidance' given that there were indications before it of the Appellant's history of mental health problems, which affected the Appellant's ability to prepare for the appeal and represent himself. The Appellant had not prepared a witness statement and was not given a reasonable opportunity to deal with the Respondent's reasons for refusal for the first time at the hearing. Secondly, that the First-tier Tribunal failed to give adequate reasons for refusing the adjournment. Thirdly, that there was unfairness in the proceedings as the majority of reasons for refusal were not expressly put to the Appellant during the hearing, including not being asked why he did not want to talk about his sexuality and no consideration of any reasons for the delay in the claim.
13. In her rule 24 response, the Respondent opposes the appeal and relies in particular on the comments of Upper Tribunal Judge Mandalia that there is little merit in the Appellant's ground of appeal in relation to the refusal of his application for an adjournment. This is on the basis that the Appellant had had copious time to arrange legal representation and at the time of the hearing, there was no reason to conclude that there would be representation available to him in the foreseeable future. The Appellant had also not been legally represented before the previous First-tier Tribunal in his earlier appeal.
14. In relation to the Appellant's claimed vulnerability, on behalf of the Respondent it was submitted that even if it had been concluded that the

Appellant was a vulnerable witness, supported by evidence before the First-tier Tribunal, there would not have been any material difference in the findings of the First-tier Tribunal on the factual matrix of this case. The previous decision of the First-tier Tribunal was, in accordance with the principles in *Devaseelan*, the appropriate starting point, in which all of the Appellant's claims, except one new ground, the Appellant's sexuality, were dismissed; including with findings of deception and adverse credibility findings.

15. Overall, the Respondent submitted that the reasons of the First-tier Tribunal were sufficient on the evidence before it and that independent findings were made on the issue of the Appellant's claimed sexuality. In any event, the Appellant did not claim to have any problems with his sexuality in Morocco, nor did he live openly as a gay or bisexual person in the United Kingdom and there was no basis upon which the First-tier Tribunal could have concluded that he would do otherwise on his return to Morocco, or be at risk on return there. The Respondent's position was therefore that there were no material errors of law in the decision of the First-tier Tribunal.
16. At the hearing, Counsel on behalf of the Appellant made oral submissions pursuant to the grounds of appeal. In relation to the first ground of appeal, it was submitted that the First-tier's tribunals process of assessing the application for an adjournment and its refusal of it were unfair and lacked anxious scrutiny. In particular, it was submitted that the First-tier Tribunal were required to find out the basis of the application for adjournment - that the Appellant had sought a legal representative and made a written application on this basis that was renewed at the oral hearing and that as a litigant in person he would lack specific information about the process. Counsel relied specifically on the 'Adjudicator Guidance Note No.5: Unrepresented Appellants' as requiring the First-tier Tribunal to consider in more detail why there was no legal representation. In the present case, the Appellant was represented but those representatives were not able to continue when he was moved to a different IRC too far away. In his written statement, the appellant set out the efforts made to obtain a new legal representative through the surgery and after he received the Respondent's decision, was assisted by another detainee to lodge his appeal and to find a legal representative. Counsel accepted that the Appellant had not taken any steps to instruct a legal representative prior to the appeal hearing, but the Appellant should have been able to access one and was entitled to at least some advice when in detention.
17. The failure of the First-tier Tribunal to make further enquiries as to the situation regarding representation was further compounded by its failure to make enquiries about whether the Appellant was a vulnerable witness; which was itself relevant to assessing the fairness of proceeding with the hearing without a legal representative and in the absence of any written statement or evidence from the Appellant. In this case, the Appellant may be a vulnerable witness on the basis of his sexuality and/or mental health

and there was information before the First-tier Tribunal as to the Appellant's history of poor mental health.

18. The application for permission to appeal included with it a copy of the Appellant's medical records from prison and detention (albeit none of these were before the First-tier Tribunal); which included details of numerous psychiatric observations of the Appellant experiencing visual and auditory hallucinations, self-harm and suicidal ideation with medication prescribed for mental health problems. Counsel referred to five entries in the medical records between August 2019 and November 2019 showing poor mental health symptoms of varying degrees, albeit there were also entries on 31 October and 1 November 2019 (the last entry prior to the hearing before the First-tier Tribunal on 21 November 2019) which stated that the Appellant was on those dates asymptomatic.
19. Counsel submitted that if enquiries had been made of the Appellant as to his mental health or vulnerability, those matters would have been relevant to the consideration of the application for adjournment as a matter of fairness and also relevant to the assessment of the Appellant's credibility. The relevance of his mental health (both to the request for an adjournment and the hearing itself) was not a matter which the Appellant, as a litigant in person with mental health problems, could have been expected to be aware of.
20. Secondly, the First-tier Tribunal's reasons for refusing the application for an adjournment, set out in paragraph 4 of the decision, were very brief and did not contain any reasons for the conclusion that it was in the interests of justice and fairness to proceed. Further, it is not possible to tell if the First-tier Tribunal applied the relevant test in Nwagwe (adjournment: fairness) [2014] UKUT 00418 (IAC) or not.
21. Thirdly, in relation to the assessment of the Appellant's protection claim, the First-tier Tribunal dismiss this in two short paragraphs, 40-41 for two reasons, the timing of the claim and an unspecified inconsistency in the Appellant's account. There is nothing in the decision to suggest that the reasons in the refusal letter were specifically put to the Appellant to respond to at the hearing and in particular, nothing to suggest that the Appellant was asked why he was unable to name any relationships with men; whether he was aware of the difference between being homosexual and bisexual; and why the Appellant did not want to talk about his claim or why his claim was not made sooner. Counsel again relied on the Adjudicators Guidance Note No. 5 of 2003 that the Judge should identify the reasons for refusal and put them to a litigant in person at the hearing.
22. On behalf of the Respondent, Mr Tan relied on the rule 24 response and made submissions on the first two grounds together. He submitted that the nub of the Appellant's claim was that with the benefit of hindsight and a significant number of new documents, the First-tier Tribunal may have done things differently. Any application for an adjournment should be supported by evidence and from the medical evidence now available, it is

clear that the Appellant was self-reporting in relation to his mental health and seeking assistance with it; such that it is remarkable he did not mention anything about it to the First-tier Tribunal. There was no evidence of the Appellant's current mental health before the First-tier Tribunal, only a historical reference by the Appellant and the previous Tribunal in 2018, who dismissed the appeal on medical grounds and upon which no further evidence was available (save for in relation to a hernia operation). The First-tier Tribunal was not required on these facts to go on a fishing expedition for further information when the Appellant's mental health had not been put in issue.

23. The only basis for the application for adjournment was the lack of legal representation which is what the First-tier Tribunal dealt with. On the facts before it, the Appellant's previous legal representatives had ceased to act some four months previously and gave no indication of his attempts to obtain new representation or the likelihood of doing so given that his evidence was that he would need to pay for a legal representative and could not afford to do so. On these facts, it was entirely open to the First-tier Tribunal to refuse the adjournment. The First-tier Tribunal was of course required to act in the interests of fairness to both parties, not just the Appellant.
24. As to the third ground of appeal, the Respondent noted that there was no challenge to the First-tier Tribunal's decision to uphold the section 72 certificate, such that the appeal on asylum grounds is necessarily limited. Nor has there been any challenge to the dismissal of the appeal on Article 8 grounds.
25. The Respondent had set out clear reasons for the refusal of the Appellant's asylum claim in the reasons for refusal letter, which the Appellant was fully aware of. These included the lateness of the claim, the previous adverse findings including of deception and the Appellant's criminal offending, which was noted was against women and combined with his marriage, undermined his asylum claim. The Appellant had also been asked detailed questions at interview, including about the delay in making his claim. The burden is on the Appellant to establish his claim and he simply had not done so in this case.
26. In reply, Counsel for the Appellant submitted that the lack of available medical evidence was a reason to grant the adjournment, not refuse it and there was enough information before the First-tier Tribunal to establish a potential vulnerability on the grounds of poor mental health such as to need further evidence.
27. Counsel accepted that there was no express challenge to the findings on the section 72 certificate or on Article 8 grounds, but that Article 3 was clearly still relevant and in any event, the arguments on procedural fairness must extend to the section 72 certificate.

Findings and reasons

28. The first ground of appeal concerns the First-tier Tribunal's consideration of the Appellant's request for an adjournment of his appeal, on the grounds of procedural fairness both in relation to a lack of legal representation and potential vulnerability on mental health grounds. The issue is not whether the First-tier Tribunal was unreasonable in refusing the adjournment request, but whether there was any deprivation of the right to a fair hearing for the Appellant. This is set out in Nwaigwe, as follows: *"if a Tribunal refuses to accede to an adjournment request, such decision could, in principle be erroneous in law in several respects; these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? ..."*
29. In the present case however this still needs to be consideration of what was before the First-tier Tribunal in relation to the Appellant's circumstances relevant to consideration of the application for adjournment and in particular whether this identified any matters which should have been taken into account by the First-tier Tribunal or prompted further enquiries before making such a decision.
30. The medical evidence that was before the First-tier Tribunal was in relation to the Appellant's parents and not in relation to the Appellant (save for in relation to a hernia operation). The only reference to the Appellant having any medical problems at all was in the Respondent's reasons for refusal letter dated 20 September 2018 (the one prior to the decision under appeal) referring to the Appellant's claim to suffer from depression, mental health issues and acid reflux for which he was receiving medication and which the Respondent considered could be treated on return to Morocco. In the decision of First-tier Tribunal Judge Hodgkinson, promulgated on 30 October 2018 reference was made to the same matters and to medical notes from the prison healthcare team (not before the most recent First-tier Tribunal) about poor mental health. The findings include reference to the Appellant suffering from mild depression, moderate anxiety and adjustment disorder due to his incarceration in prison and a claim by the Appellant to have been in a Moroccan psychiatric hospital at some point between 2008 and 2010. Overall, First-tier Tribunal Judge Hodgkinson concluded that upon the available medical evidence before him, he was not satisfied that the Appellant had a mental health problem at that time, having previously suffered some limited depression and anxiety as a result of his incarceration and uncertainty about his immigration status. There was an express finding that the Appellant was not in need of any medical treatment at that time.

31. In the representations made on 21 January 2019 on the Appellant's behalf, by his legal representatives, there is no further medical evidence or specific medical claim, under Articles 3 or 8 of the European Convention on Human Rights or otherwise. In the Appellant's initial contact and Asylum registration form completed on 2 April 2019, when asked about whether he had any medical conditions, he stated that he had a hernia, depression and anxiety, in particular that he was worried about his parents. There is no further reference to anything other than the Appellant's hernia in his substantive interview on 10 June 2019, about which he had signed a medical disclaimer form.
32. There is nothing within the record of proceedings at any point to suggest that the Appellant had any current mental health problems or any other reason for which he may be considered to be a vulnerable witness and there was no specific medical or other evidence before the First-tier Tribunal on this point at the date of hearing.
33. I pause to note at this stage that although the Appellant was not legally represented before the First-tier Tribunal, he was represented at the time of his further submissions and during the screening and substantive asylum interview process, during which no specific reliance was placed on any mental health problems and no evidence was provided at any of these three early stages of the process, even with the benefit of professional immigration advice and even though such evidence had been previously submitted and considered by the Tribunal in 2018. The Appellant was also at this time self-reporting to the healthcare team and engaging with health services in detention, known only by virtue of the medical records subsequently relied on before the Upper Tribunal.
34. On the basis of the information that was before the First-tier Tribunal in relation to the Appellant's health, or more accurately, the lack of any such relevant information, I do not find that there was any rational or reasonable basis upon which the Judge should have made any further enquiries with regards to the Appellant's mental health. There was only a historic reference to inpatient treatment in Morocco in the late 2000's and finding the previous year by the Tribunal that the Appellant was not suffering from any mental health problems, a decision made with benefit of medical evidence at that time. There was nothing before the First-tier Tribunal to suggest any current mental health problems, or in fact any formal diagnosis of the same at any time. There was in these circumstances, no reason to suspect any vulnerability of the Appellant on the basis of mental health, nor any reason to apply the guidance on vulnerable witnesses for this reason.
35. The medical evidence now produced and relied upon arguably paints a different picture (albeit with significant variation of symptoms experienced, and at times no symptoms at all, including on the last observation prior to the hearing before the First-tier Tribunal) but only in hindsight and not in any way indicated or even hinted at on the basis of information before the First-tier Tribunal.

36. The Appellant's application for an adjournment was solely on the basis that he was unrepresented and therefore not ready for the hearing. There is both a handwritten and typed record of proceedings available from the First-tier Tribunal, albeit neither set out any detailed application for adjournment by the Appellant, the only possible reference to this being at the very end of proceedings during the course of the Appellant's closing submissions that he did not have anyone to represent him, his family could not pay and he would have to apply for legal aid.
37. The information before the First-tier Tribunal in relation to legal representation was again relatively limited. It would have been known that the Appellant had previously appeared in person before the First-tier Tribunal in 2018 (and could be inferred that he therefore had at least some understanding of the process and procedure) and that at least up until his substantive asylum interview, he was legally represented. The Appellant had expressly stated that neither he nor his family could pay for a legal representative and he would have to apply for legal aid, but gave no information about any efforts to find a new legal representative through whom such an application could be made or whether this was realistic or likely within a reasonable timeframe.
38. For the purposes of this appeal, it is said on the behalf of the Appellant that the First-tier Tribunal was under an obligation to make further enquiries of the Appellant about his situation consider whether he was likely to be able to instruct a legal representative for his appeal. There was however nothing on the basis of the information before the First-tier Tribunal to prompt any such further questions and I do not find that the Adjudicators Guidance Note relied upon takes this matter any further.
39. In any event, it is now known from the Appellant's evidence to the Upper Tribunal, that he had been without legal representation for some four months prior to the hearing before the First-tier Tribunal, with his previous representatives not being able to continue to assist him after he was moved to a different IRC. The Appellant's evidence was that he made initial attempts through the surgery in the IRC to obtain new representation, but that no further steps had been taken to find a new legal representative following receipt of the Respondent's refusal decision, to lodge his notice of appeal or having been notified of his appeal hearing. He did obtain assistance from another detainee to lodge his notice of appeal and request for an adjournment, but not to identify or instruct a new legal representative (even if, latterly, for a practical reason that this particular individual had been moved to a different location). On this basis, it is entirely unclear that even if further questions have been asked by the First-tier Tribunal that the Appellant could have given any indication that he had made any actual attempts to, or been likely to obtain legal representation for his appeal.
40. In all of the circumstances set out above and taking into account the experience of the First-tier Tribunal of hearing from litigants in person, particularly those who have already appeared before a Tribunal recently

and taking into account that the Appellant was in detention, I do not find that the First-tier Tribunal failed to make any further enquiries that it should have done about the Appellant's circumstances, nor is there anything to suggest that there was a failure to take into account any material considerations about those circumstances. There was, on the information before the First-tier Tribunal, nothing to suggest that the Appellant would be denied a fair hearing of his appeal on the basis of a lack of legal representation and/or on the basis of mental health ability.

41. However, whilst for the reasons set out above, I find no error in the approach taken by the First-tier Tribunal at the hearing before it, nor in the decision reached to refuse the application for adjournment, which was entirely appropriate and lawful on the basis of the situation and information presented to it at the time, the medical evidence now available does raise substantial concerns as to whether the hearing was, in hindsight, fair, by reason of the combination of Appellant's mental health (as evidenced by the health records from detention) and lack of legal representation. For these reasons, ultimately it is appropriate to set aside the decision of the First-tier Tribunal on grounds of fairness, even in the absence of any identifiable error of law by the Tribunal in its handling of the application for adjournment and for reasons entirely unknown to it.
42. Whilst there is significant force in the Respondent's submission that none of this could have made any material difference to the outcome of the appeal given the Appellant's immigration and criminal history, including significant adverse credibility findings and previous use of deception, combined with the lack of any detailed evidence in support of the Appellant's claim; as well as the absence of any challenge to the findings in relation to the section 72 certificate and the Appellant's Article 8 claim; it is not appropriate to deny the Appellant the opportunity of a fair hearing on his claim.
43. In circumstances where the decision of the First-tier Tribunal needs to be set aside grounds of fairness, it is not necessary to deal in as much detail with the second and third grounds of appeal. The second ground of appeal concerned the adequacy of reasons given by the First-tier Tribunal for refusing the application for adjournment, on which I find no error of law. Although the decision in relation to the adjournment application is relatively brief, recording that it was refused on the basis that it was in the interests of fairness and justice to proceed with the hearing without any further explanation or reference to the test to be applied, I find that in all of the circumstances this was sufficient and proportionate to the factual situation presented to the First-tier Tribunal in the application made.
44. The final ground of appeal was that the First-tier Tribunal failed to adequately deal with the substance of the Appellant's protection claim, specifically that the reasons for refusal were not individually put to the Appellant for his response at the hearing and that inadequate reasons were given for the refusal on this basis.

45. The Appellant underwent a screening and substantive asylum interview, which included detailed questions, inter alia, about the Appellant's claimed sexuality and reasons for delay in his claim; examples of the questions and responses have already been set out above. The Respondent's reasons for refusal letter sets out clear reasons for refusal of the Appellant's claim of persecution on return to Morocco as a homosexual or bisexual man, including the delay in the claim, the vagueness of the claim and lack of detail about it and that in any event the Appellant did not live openly as a gay or bisexual man either Morocco or the United Kingdom. In addition, the Respondent set out reasons why the Appellant would not be at risk on return even if his claim was credible (which have not been challenged at all).
46. In addition to these matters, from interview and in refusal, which the Appellant was expressly aware of and which were in evidence before the First-tier Tribunal, it is clear from the record of proceedings before the First-tier Tribunal that these matters were in substance put to the Appellant, even if there were not detailed follow-up questions response. In particular, the Appellant was asked about his protection claim in 2004 in a different identity and nationality and why he should now be believed given his history of deception; he was asked why no one in the United Kingdom knew about his claimed sexuality; and about why there was no evidence in relation to his claimed sexuality or about any previous partners. It is trite that the burden is on the Appellant to establish his claim.
47. The First-tier Tribunal sets out its findings of credibility in paragraphs 36 to 41 of the decision, with extensive references to the earlier decision of the First-tier Tribunal promulgated on 30 October 2018 as a starting point on issues relating to the Appellant's parents and his medical conditions. The First-tier Tribunal then find that the Appellant's claim in relation to his sexuality was not credible or consistent and refers to his evidence of being in a relationship with a male in the mid-1990s and claiming asylum as an Algerian national upon entry to the United Kingdom in 2004 despite claiming to be in fear of return to Morocco on the basis of his sexual orientation. No such claim was made on this basis until very recently. Overall, the First-tier Tribunal found that the Appellant had failed to establish his protection claim and had simply fabricated evidence of the last-ditch attempt to remain in the United Kingdom. That was, on the incredibly limited evidence before the First-tier Tribunal and taking into account the Appellant's criminal and immigration history, a conclusion that was entirely open and rational for it to make, with adequate reasons given when reading the decision as a whole. For these reasons I find no error of law on the third ground of appeal, however, for the reasons set out above in relation to fairness the decision must be set aside, there will of course in any event be a full reconsideration of the Appellant's protection appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal was, in hindsight, procedurally unfair and as such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal for a de novo hearing before any Judge except Judge M A Khan.

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

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 their 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.

Signed G Jackson

Date 21st October 2020

Upper Tribunal Judge Jackson