



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12848/2017

THE IMMIGRATION ACTS

Heard at: Bradford
On: 3rd February 2020

Decision & Reasons Promulgated
On: 3rd March 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DL
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Karnik, Whiterose Blackmans Solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Algeria. He was born in 1977.
2. The Respondent seeks to deport the Appellant because he has twice been convicted of using a false instrument (viz using fake documents enabling him to work illegally). On the latter occasion he was sentenced to 12 months imprisonment, a sentence which triggered the 'automatic deportation' provisions in s32 of the United Kingdom Borders Act 2007.

3. Before the First-tier Tribunal (Judge Rose) the Appellant sought to resist deportation on the grounds that two of the 'exceptions' contained in s33 of the Act applied to him. First, he submitted that he has a well-founded fear of persecution in Algeria on grounds of a) his membership of a particular social group (he is a gay man) and b) his religious belief (he has converted from Sunni to Shi'a Islam). Second, he submitted that his deportation would amount to a disproportionate interference with his Article 8 private life, since he has lived in this country since 1997.
4. The First-tier Tribunal dismissed the appeal on all grounds. For the Appellant Mr Holt, who appeared at the initial hearing in December 2019, conceded that he was unable to challenge the decision insofar as it relates to the Appellant's Article 8 rights, since he was unable to show that the Appellant's long residence in this country has been lawful. This appeal is therefore solely concerned with the protection claim.

Risk Arising from Homosexuality

5. The First-tier Tribunal dismissed the protection claim insofar as it relates to the Appellant's sexuality. Although it accepted that the Appellant is gay, it found that the risk to LGBT individuals in Algeria comes principally from "third parties, specifically family members". It concluded:

"While I accept that Algeria is a socially and religiously conservative country, the evidence before me indicates that the threat posed to LGBT individuals by the State or Algerian society at large does not reach the test for persecution"

6. The Tribunal was further satisfied that the Appellant chooses to live a discreet lifestyle for reasons unrelated to a fear of persecution and the appeal was thereby dismissed on HJ (Iran) grounds.
7. I am satisfied that in respect of both of these findings the First-tier Tribunal erred.
8. The operative country guidance is OO (Gay Men) Algeria CG [2016] UKUT 00065 (IAC). The Upper Tribunal there held that in general terms the risk to gay men arises only from their family, in 'honour' based violence. The Tribunal did not consider that the level of hostility from society in general would reach the threshold of persecution. It was presumably this that the First-tier Tribunal was referring to at its §31 when it referred to "third parties, specifically family members". So far so good.
9. Two errors arise thereafter. The first is that the Tribunal manifestly failed to address new evidence relied upon by the Appellant which post dated OO by some three years, namely a report by Professor David Seddon which details

recent instances of gay men being subject to “extreme physical violence” in homophobic attacks. The Appellant had specifically relied on this expert evidence, commissioned for this appeal, and yet no findings are made on it. It is an error of law to fail to take material evidence into account.

10. The second error arises in the failure to even apply the existing country guidance:

“a gay man from Algeria will be entitled to be recognised as a refugee only if he shows that, due to his personal circumstances, it would be unreasonable and unduly harsh to expect him to relocate within Algeria to avoid persecution from family members, or because he has a particular characteristics that might, unusually and contrary to what is generally to be expected, give rise to a risk of attracting disapproval at the highest level of the possible range of adverse responses from those seeking to express their disapproval of the fact of his sexual orientation”.

11. No clear findings are made on whether the Tribunal accepted the Appellant’s account of being subject to severe beatings by his family in Algeria as a young teenager, violence inflicted solely because of his sexual orientation. Although the Tribunal refers to the evidence that the Appellant’s parents had moved to Syria as refugees in the 1990s, the risk assessment is still incomplete as the Appellants remaining family are still in Algiers. No finding is made on whether he would be at risk from those family members today, or whether he could reasonably be expected to internally relocate. I would add that there was here a further discrete error of fact in that for understandable reasons the Appellant’s parents have long since left Syria and returned to Algeria.
12. As to whether the Appellant would avoid any persecution in Algeria by acting “discreetly” here too the Tribunal fell into error. In reaching its conclusion that he would do so it failed to have regard to material evidence in that in this country the Appellant is an active member of the gay community. It was his evidence that he regularly attends gay bars and events and makes no attempt to hide either his identity or sexuality. Further it also failed to notice that it is an entirely moot point since his family already know that he is gay, and have already subjected him to serious harm as a result.
13. I therefore set the decision of the First-tier Tribunal, in respect of the risk arising from the Appellant’s membership of a particular social group, aside.
14. In remaking the decision I direct myself to the questions posed by Lord Rodger at paragraph 82 of HJ (Iran)(FC) v Secretary of State for the Home Department [2010] UKSC 31:

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.

15. The first matter to be determined is whether the Appellant is gay. The First-tier Tribunal found that he was, and having had regard to the totality of the evidence before me, I am in complete agreement.
16. The next question is whether, having regard to the country background material, it could be said that gay people who try to live openly in Algeria would face persecution. The Tribunal in OO found that although homosexuality is prohibited by law in Algeria the chance of an individual facing prosecution is negligible. It further found the evidence of gay men being assaulted by the police, or by a member of the public in a homophobic attack to be "scant" and concluded:

"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".

17. That there is a risk of harm from family members is a proposition supported by the evidence in this case. In the Appellant's own particular experience, the answer to Lord Rodger's second question is clearly yes. As a teenager he had been subjected to a continuous month of severe beatings at the hands of his

father and family; he had thereafter been admitted to a mental hospital in an attempt to 'cure' him. He avoided further harm by leaving home for France. What however, is the answer to Lord Rodger's question more generally?

18. To answer this question the Appellant relies on evidence which post-dates OO. He submits that the situation there is today demonstrably very difficult for gay men, who as well as continuing to face the harassment and discrimination detailed in OO, do face physical abuse at the hands of hostile members of society. He relies on the following evidence:

- i) The report of Dr Seddon dated 26th July 2018. Dr Seddon was the witness in OO. Although the Tribunal in that case did not accept all of his conclusions on the evidence, it did accept that he is a well-placed expert: he has given evidence in a number of country guidance cases and in matters before SIAC. He is a social scientist who has specialised in Africa and the Middle East, with an emphasis on the Maghreb, for over 40 years. He has spent a considerable amount of time in Algeria, and maintains a network of Algerian contacts; he speaks French and Arabic and to prepare his report Dr Seddon has drawn upon his own knowledge, the views of his contacts, contemporary articles and reports including in the local press in Algeria. Dr Seddon expressly states that he is aware of his duties to the court and the application of the *Ikarian Reefer* test.

Dr Seddon accepts that verifiable reports of violence against gay men are hard to find, precisely because of the nature of those attacks, where the perpetrators are unlikely to acknowledge them, and the victims are understandably reluctant to risk further harm by reporting them. He draws however on reporting from a number of sources to conclude that although hard to document, such violence is in fact occurring. His primary source is a report recently compiled by a LGBTQI organisation (TransHomosDZ) alongside an Algerian human rights group (the Arab Foundation for Freedoms and Equality). The central conclusions of this joint report are that gay people in Algeria experience violence on a daily basis. Dr Seddon notes that examples are given of physical and sexual violence occurring in a wide range of contexts: in the family, in public spaces, in universities, the workplace and in prison. Dr Seddon suggests that it is evidence such as this which has resulted in a number of positive first-instance asylum decisions in Algerian gay cases, the guidance in OO notwithstanding (he lists a number of examples including that of Mr AL who was attacked by a group of men in a park in Algiers; he was beaten, called a prostitute and slashed with a razor blade)

- ii) Human Rights Watch World Report 2018 which states *inter alia* that during 2015 several individuals were arrested for same-sex relations and that anti-LGBT rhetoric from politicians has led to an increase in homophobic harassment and violence. Many LGBT leaders have fled the country, and instances of violence have been recorded in universities, on the streets and in prisons as well as within families
- iii) An ILGA report dated 19th March 2019 states that LGBTI people are “repeatedly arrested for engaging in consensual same-sex acts, suffer abuse by police officers, and are discriminated against in health and employment”
- iv) The United States’ State Department report for 2017 states that there were multiple arrests during the year for same-sex activity. (This is of particular significance, points out Dr Seddon, because the US State Department have changed their view on this matter since the publication of the report that was before the Tribunal in OO)
- v) Various news articles from December 2019 detailing how the Interior Minister Salahedine used the epithets “perverts” “queers” and “homosexuals” interchangeably whilst taking about political opponents.
- vi) An article from the Jerusalem Post (and the ‘LGBT Rights in Algeria’ Wikipedia page which cites French news items) concerning the February 2019 murder of bi-sexual university student Asil Balata whose dormitory walls were smeared in blood with the words ‘he is gay’ after his killing by two men

19. I am satisfied, having had regard to this material before me, that homosexual men openly identifying as such in Algeria would face persecution. I appreciate that the careful analysis conducted by the Tribunal in OO led to the conclusion that there are very few verifiable attacks. The evidence before me, some four years later, tends to indicate that there are two reasons for that. First that there are few precisely *because* homosexual men are concealing their sexual orientation from society in fear *inter alia* of such attack, and second because when such violence does occur the victims will very often stay silent because they are fearful of the consequences should they approach the authorities for protection. This leads me to the final question posed by Lord Rodger.

20. The Appellant himself has spent the past twenty-five years living openly as a gay man, first in Paris and then in London. He does not conceal his sexual identity in any way. He has formed relationships here with a number of men, although to his regret none of these have been long-term, something he attributes to his lack of immigration status and the fact that he has had to lead a

'double life' with the assumption of the false identity which led to his convictions.

21. The Appellant was unequivocal in his evidence before me about how he would behave should he be returned to Algeria. He could not contemplate living his life there as he does here, for fear that he would be physically attacked or even killed. Such subjective fear is not fanciful, as the murder of Asil Balata illustrates. Accordingly I find that the tests in HJ, applied to this matter, demonstrate that the Appellant has a well-founded fear of persecution in Algeria for reasons of his membership of a particular social group.
22. If I am wrong and the evidence before me does not justify departure from the country guidance in OO, I am nevertheless satisfied that the Appellant qualifies for refugee status. That is because he has a well-founded fear of persecution by his family. There is no reason to believe that the animus they exhibited towards him as a teenager would have diminished - his family subjected him to a number of extreme serious harms including prolonged and severe beating, false imprisonment and committal to a mental institution. I am satisfied that there is good reason to believe that such harms remain a real risk. I am further satisfied that the Appellant would be unable to turn to the Algerian authorities for assistance and protection in these circumstances: indeed the Respondent expressly accepts that to be so [see paragraph 42 OO]. There remains the matter of internal flight. The Appellant is an individual who has suffered extreme serious harm because of his sexual orientation. In addition to the harms visited upon him by members of his own family, the Appellant was at the age of 16 raped by an older man, an assault for which he received no redress or recovery assistance, and which continues to haunt him today. He is someone who has escaped that traumatic past to rebuild his life in a country where he can be open about who he is. In assessing whether it would be 'unduly harsh' to expect him to relocate within Algeria these are the personal characteristics that I must take into account. In contrast to the 'average' Algerian gay man discussed in OO, who might reasonably be expected to tolerate living 'discreetly' this is a gay man who has suffered direct and serious violence as a result of his sexuality, and knows full well what it is like to be able to live openly without fear of such harm. The personal consequences for him of going to live in a strange town in Algeria, and repressing his identity once more, are likely to be profound. He may be able to work and to find somewhere to live but his life would be far from what he now regards as 'normal'. In all of the circumstances that would be unduly harsh. I therefore re-make the decision in the appeal by allowing the Appellant's appeal on this ground.

Risk Arising from Religious Affiliation

23. It is the Appellant's evidence that he was brought up as a Sunni Muslim, but since he has come to live in the United Kingdom he now regards himself as

Shi'a. Permission to appeal to this Tribunal was granted specifically on the grounds challenging the First-tier Tribunal's approach to this matter. At §34 the First-tier Tribunal accepts that the Appellant has converted to Shi'a Islam; it goes on to find that he "could and would" live discreetly in this capacity in Algeria. At no point does the Tribunal appear to consider why the Appellant might choose to do so. In doing so it fails to ask the second of the questions posed by Lord Rodger in the 'tests' in HJ (Iran): would the claimant face persecution if he chose to live openly? Without undertaking that analysis the Tribunal could not sensibly address the subsequent question of whether the threat of persecution played a material part in the Appellant's choice to conceal his true faith from others around him. Was that error material?

24. There does not appear to be any dispute that the Appellant now regards himself as Shi'a, although by his own estimation this appears to be a cultural affiliation rather than a deeply religious one: in fact he describes himself as "more of an atheist". There is no evidence that he attends mosque or Shi'a prayers regularly. Nor is there any evidence before me that Shi'a Muslims experience persecution in Algeria. Dr Seddon writes that they are socially discriminated against, and that in the case of the Appellant the confluence of his sexual orientation and religious adherence may lead to "particular hostility" towards the latter. Accordingly I find that whilst the Appellant is Shi'a, he has not demonstrated that living openly as a Shi'a in Algeria would give rise to a real risk of serious harm. I accept Dr Seddon's view that Shi'a Muslims face discrimination and harassment, and that this may well contribute towards any internal flight alternative being 'unduly harsh' (see above) but I dismiss the appeal under this discrete head.

Anonymity

25. The Appellant is entitled to refugee status. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

"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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision and Directions

26. The decision of the First-tier Tribunal is flawed for error of law and I set it aside.

27. I remake the decision in the appeal as follows: “the appeal is allowed on protection grounds”.

28. There is an order for anonymity.

Upper Tribunal Judge Bruce
16th February 2020