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Case No: C5/2018/0718

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
LORD BURNS (SITTING AS A JUDGE OF THE UPPER TRIBUNAL) and UPPER TRIBUNAL JUDGE JACKSON
IA/33492/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2020

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LORD JUSTICE LEWIS

- -

Between :

YD (ALGERIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
AND	
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	**Intervener**

- -
- -

Raza Husain QC, **Rebecca Chapman, Louise Hooper and Eleanor Mitchell** (instructed by **Bindmans LLP**) for the **Appellant**
Sarabjit Singh QC (instructed by **the Government Legal Department**) for the **Respondent**

Marie Demetriou QC and Tom Pascoe (instructed by **Baker & McKenzie LLP**) for the **Intervener**

Hearing dates : 25 and 26 November 2020

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APPROVED JUDGMENT

Lord Justice Lewis, with whom Lord Justice Peter Jackson and Lady Justice Asplin agree:

INTRODUCTION

1. This is an appeal against a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 21 November 2017 dismissing an appeal against a decision of the First-tier Tribunal. That tribunal had dismissed the appellant's appeal against a decision of the respondent of 13 October 2015 refusing him leave to remain in the United Kingdom. In essence, the respondent rejected the appellant's claim that, as a gay man, he would be subjected to persecution were he to be returned to Algeria and his claim that return would be incompatible with his right to respect for his private and family life guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

2. In summary, the Upper Tribunal followed an earlier decision of the Upper Tribunal, *OO (Gay men) (Algeria) CG* [2016] UKUT 00065, giving country guidance on the conditions in Algeria for gay men. That earlier decision concluded that, outside the family, gay men would not face treatment amounting to persecution in Algeria. Further, it concluded that very few gay men lived openly as such in Algeria as a consequence of cultural, religious and social pressures.

3. The issues that arise on this appeal are whether the Upper Tribunal in *OO (Algeria)* wrongly equated persecution with a risk of being subjected to physical violence and also failed to consider, cumulatively, the impact of the treatment that gay men would face in Algeria. Further, the appeal raises the issues of whether it would be unduly harsh to require the appellant to relocate within Algeria or whether returning him to Algeria would amount to a disproportionate interference with his rights under Article 8 of the Convention given that he would conceal his sexual orientation if he returned to live in Algeria.

THE FACTS

The Background

4. The appellant, YD, is an Algerian citizen born on 3 January 1997. He entered the United Kingdom illegally in July 2012 when he was 15 years of age. He claimed

asylum on the basis that as a homosexual male he had a well-founded fear of persecution if he were to be returned to Algeria.

5. The background to the claim was as follows. The appellant's parents died in a car crash when he was six and he went to live with his uncle. That relationship became troubled and the appellant was told to leave the home when he was about 12 years old. He became homeless for some months. He met another boy, Anis, and went to stay with him. They formed a sexual relationship. The appellant was 13 and the boy was 14. The boy's mother discovered them having sex. She told the appellant to leave the house and said that she would tell his uncle about the relationship. The appellant returned to living on the streets and subsequently met a person who helped him travel to the United Kingdom.

The asylum claim

6. The basis of the claim for asylum was that the appellant feared that his uncle would kill him because of his homosexuality and that he would be judged and treated badly, and would be in danger, in Algeria. That claim was refused on 8 July 2013 but the appellant was granted discretionary leave to remain for one year. He applied for further leave to remain. That was refused on 13 October 2015. The appellant appealed to the First-tier Tribunal.

The appeal to the First-tier Tribunal

7. The appellant provided a written statement for the First-tier Tribunal together with two other witness statements made earlier. In the witness statement prepared for the tribunal hearing, he said that he believed that his uncle would find him and kill him if he were returned to Algeria. He said that he would not be accepted in Algeria. He had lived for four years in the United Kingdom and he felt good about himself and did not feel ashamed about his sexuality. He said people in the United Kingdom were very open minded and he did not have to worry about his behaviour or how people viewed him. The situation would be very different in Algeria and he did not think he would be able to cope with that. He would be rejected by society, mistreated and abused, and did not believe the police would protect him. He had had one relationship with one male in the United Kingdom. That man made a witness statement and gave evidence before the tribunal confirming that he and the appellant were in a relationship although they did not live together. The appellant gave oral evidence and the decision of the First-tier Tribunal records a summary of his oral evidence.

8. The tribunal first found as a fact that the appellant was gay and was in a relationship with a man. The tribunal was also satisfied that the appellant had had a relationship in Algeria with Anis as he had described and that that relationship had been discovered. Secondly, the First-tier Tribunal summarised the earlier country guidance about the conditions facing gay men in Algeria given in *OO (Algeria).* It noted that the authorities do not seek to prosecute gay men and there was no real risk of prosecution even when authorities became aware of homosexual behaviour. The state did not actively seek out gay men to take any form of action against them either by prosecution or subjecting them to other forms of persecutory ill-treatment. Sharia law was not applied to gay men. It noted that the earlier decision said that:

> "the only risk of ill-treatment at a level to become persecutory likely to be encountered by a gay man in Algeria, is at the hands of his own family after they 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 treatment from persons outside his own family."

9. It noted the earlier decision stated that where a gay man had to flee his family home to avoid persecution from family members, he would attract no real risk of persecution in his place of relocation because, generally, he would not live as a gay man. It would be a question of whether the individual could show that, due to his individual circumstances, it would be unreasonable and unduly harsh to expect him to relocate within Algeria.

10. Against that background, the First-tier Tribunal held so far as material to the present appeal that:

> "23. Firstly, I find in view of the problems that the Appellant had with his uncle and with Anis's mother, that there is a real risk of violent and persecutory ill-treatment of the Appellant from his uncle and from Anis's parents. It therefore follows that the Appellant will not be able to live in the local area, bearing in mind the problems that he had had and the feedback that his uncle has had from his sexual encounters with Anis. However, the Tribunal [in *OO*] went on to state at paragraph 177, that once the gay son has left the family home and re-established himself elsewhere, there is no real risk that family members would pursue him to that place of relocation and so generally that risk of persecution can be avoided by the availability of a safe and reasonable internal relocation alternative. I find bearing in mind that there is no indication that the Appellant' uncle or Anis's parents have influence all over the whole of Algeria would be able to reach the Appellant if he is to relocate. It cannot be said that the Appellant's uncle or Anis's parents would pursue the Appellant to a place of relocation.
>
> 24. The question I have to consider is whether it is reasonable for the Appellant to relocate taking away the issue of his uncle and Anis's parents. Considering that question I have taken into account the submissions made by [counsel for the appellant] with reference to *HJ (Iran).* At paragraph 82, the Supreme Court outlines the approach to be followed by Tribunals. The court stated that the Tribunal must first ask whether it is satisfied on the evidence that the Appellant is gay. I find that in this particular case I have found that the Appellant is gay. The Tribunal must then ask itself whether it is satisfied on the available evidence that gay people who live openly would be liable to persecution in the applicant's country of nationality. In this case the country guidance case is the point of reference and in that case the Tribunal found that 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 persecution, even the authorities become aware of such behaviour.

25. The Tribunal also found that Sharia law is not applied against gay men in Algeria and that the criminal law is entirely secular and discloses no manifestation at all of Sharia law in its application. I therefore find that other than outside the Appellant's family members, the country guidance case decides that there is no reliable evidence to establish that a gay man identified as such faces a real risk of persecutory ill-treatment from person's outside his own family.

26. The question I have to consider is that if the Appellant was to return to Algeria how would he live. The question for consideration is whether he would live discreetly in order to avoid persecution. The Appellant stated in evidence that he feels free to live openly as a gay person in the UK and that he would not be able to do this in Algeria. He said that he would be in danger. However, this is contrary to the evidence which has been considered in the country guidance case and for which the conclusion has been reached that if the Appellant chooses to live discreetly in Algeria he would be driven by respect for social laws and a desirirable (sic) to avoid attracting disapproval of a type that falls well below the threshold of persecution."

…..

"29. Having considered all the evidence before me, I find that if the Appellant was to return to Algeria today he would obviously not live openly as a gay person. I find that the Appellant would not want to express himself as a gay person in Algeria not necessarily because of persecution, but also because of the fact that respect for the social norms and traditions and religion as he himself expressed in evidence. The Appellant stated that his sexual orientation would put him in danger however, the country guidance case states that this is not the case and therefore his subjective evidence does not stand up with the background evidence as analysed in the country guidance case. And that there is no particular characteristics in the Appellant's case that would make relocation for him unreasonable or unduly harsh.

30. The Appellant has been in the UK now for about four years and has a way of life which would enable him to adapt to any place he decides to relocate to. For the reasons I have stated the Appellant does not succeed on his asylum claim, his case would also fail under Article 2 and Article 3 of the Human Rights Convention. With regard to Article 8, I find that the

> Appellant does not have any family life in the United Kingdom. He also does not have any children in the United Kingdom and his case cannot succeed under the family life aspect of Appendix FM of the Immigration Rules. With regards to paragraph 276ADE, I accept that the Appellant has a private life however with regard to the findings that I have made applying the country guidance case, I find that there would be no significant obstacles with the Appellant reintegrating back into Algeria".

11. The First-tier Tribunal therefore dismissed the appellant's asylum claim and his human rights claim.

The Appeal to the Upper Tribunal

12. The appellant appealed to the Upper Tribunal on five grounds of which only three are material for present purposes. The first was that the First-tier Tribunal misapplied the judgment of the Supreme Court in *HJ (Iran)*. As the Upper Tribunal noted, this was in effect a challenge to the country guidance decision in *OO (Algeria)* contending that the Upper Tribunal there had applied too narrow a definition of persecution. The Upper Tribunal held:

> "9. At the heart of the criticism of the Tribunal's decision in *OO (Algeria)* is the contention that the Tribunal applied to narrow a definition of persecution. It is said that self-repression of sexual orientation as a reaction to social stigma, ostracism and discrimination can amount to persecution or a violation of human rights. So, if applicants for asylum require, for their own protection against such reactions, to exercise self-restraint by avoiding behaviour which would identify sexual orientations, that is capable of constituting persecution. Reference is made to what Lord Roger said at paragraph 78 of *HI (Iran)* that what is protected is the right of gay people to be as free as their straight equivalents to live their lives in the ways that is natural to them, without fear of persecution.
>
> 10. We do not consider these criticisms to be well-founded. The Tribunal had full regard to the Supreme Court's decision in *HJ (Iran).* The Supreme Court highlighted a distinction to be made when considering the question whether someone living discreetly as a gay person amounts to persecution. Social pressures do not amount to persecution and the convention does not offer protection against them. However, as stated at paragraph 82, if a material reason for the applicant living discreetly on his return would be a fear of persecution which would follow if he were to live openly as a gay man then the application should be accepted. There is nothing in *OO (Algeria)* that runs contrary to that approach. The Tribunal carefully assessed the evidence and found that it was not established that gay people in Algeria would be subjected to

> any harm of sufficient intensity and duration capable of amounting to persecution….."

13. Ground 4 was a challenge to the finding that it would not be unduly harsh for the appellant to relocate internally within Algeria. In the appellant's skeleton argument for the tribunal this was put on the basis that it was unduly harsh to expect a gay man who wished to live openly free from persecution to relocate to a place where he would continue to experience serious harm and be required to conceal and self-suppress. Further, it was said that the First-tier Tribunal failed to consider whether the appellant could live a relatively normal life without discrimination in the context of the country concerned. The Upper Tribunal dealt with this in the following way:

> "20. Ground 4 contends that the judge erred in finding that it would not be unduly harsh for the appellant to relocate internally within Algeria. The first reason given is that, since the appellant would have to supress or conceal his sexual orientation wherever he lived in Algeria that would necessarily make relocation unreasonable or unduly harsh. However, that is contrary to what the Tribunal found in *OO (Algeria)*. Secondly, it is said that there was no evidential basis for the finding at paragraph 30 that the appellant could adapt to any place he decided to relocate to. The judge states at paragraph 30 that the appellant had now been in the UK for 4 years and had a way of life which would enable him to ... adapt. This is against the background that the appellant had been born and brought up in Algeria and had not left that country until he was 15. Since arriving in Britain 4 years ago, he has completed a hairdressing course and gained experience in hairdressing salons. He has thus not only lived independently in a foreign country for a significant period of time during his formative years but had demonstrated self-reliance and initiative. Upon the evidence before him the judge was entitled to come to the view that there was nothing in the appellant's circumstances which would make relocation in Algeria unduly harsh."

14. Ground 3 concerned a complaint about the way in which the First-tier Tribunal dealt with the evidence relating to the relationship in the United Kingdom. That ground was rejected and there is no appeal against that decision. Ground 5, which the Upper Tribunal dealt with together with ground 3, challenged the finding, amongst other things, that there were no significant obstacles to the appellant's re-integration within Algeria. The Upper Tribunal set out at paragraph 19 of its judgment the findings of the First-tier Tribunal on that matter and said:

> "….Those include the finding that the appellant would not live openly as a gay person for reasons other than a fear of persecution. He had also found that the appellant was capable of adapting to Algeria (See our discussion … on ground of appeal 4)….."

15. In the light of those, and other matters, the Upper Tribunal held that the First-tier Tribunal had not erred in concluding that there were no significant obstacles to the

Appellant's re-integration in Algeria. The Upper Tribunal therefore dismissed the appeal.

The Present Proceedings

16. The appellant appeals against the decision of the Upper Tribunal with permission from Irwin LJ. He was granted permission to amend his grounds of appeal at the hearing. The United Nations High Commissioner for Refugees was given permission to intervene by making written and oral submissions at the hearing. We are grateful to the Commissioner for the assistance provided and to all counsel for their written and oral submissions.

THE GROUNDS OF APPEAL

17. There are three grounds of appeal. Ground 1 alleges that the Upper Tribunal erred in its application of the principles established by the Supreme Court in *HJ (Iran) v Secretary of State* [2011] 2 AC 596 and that it reached its conclusion in light of the country guidance given in *OO (Algeria)* which was itself flawed. In particular, it is said that:

> "[A] The Upper Tribunal (in both *OO (Algeria)* and the present case) failed to consider, adequately or at all, the cumulative impact of the consequences a gay man living openly in Algeria would or may face. Had the Tribunal done so, then, on the basis of the findings of fact made in *OO (Algeria)*, it may well have concluded that a gay man living openly would face a real risk of consequences which, taken together, would be sufficiently serious to amount to persecution. Indeed, in the Appellant's submission, this was the only conclusion reasonably available.
>
> [B] The Upper Tribunal (in both *OO (Algeria)* and the present case) failed to consider, adequately or at all, whether the effects of the long term concealment or suppression of a gay man's sexual orientation, for fear of the consequences of living openly (irrespective of whether these amounted to persecution) and in the context of pervasive societal stigma and shame, could themselves be sufficiently serious to amount to persecution. Had the Tribunal done so, it may well have concluded that the overall impact was capable of reaching this threshold, and that it was reached in the Appellant's case. Indeed, in the Appellant's submission, this was the only conclusion reasonably available."

18. Ground 2 contends that the Upper Tribunal erred in concluding that internal relocation within Algeria would not be unduly harsh and reached the conclusion in the light of the country guidance in *OO (Algeria)* which was itself flawed and:

> "In particular the Appellant contends that the Upper Tribunal (in both *OO (Algeria)* and the present case) failed to consider, adequately or at all, whether the effects of the long term concealment or suppression of a gay man's sexual orientation,

> for fear of the consequences of living openly (irrespective of whether these amounted to persecution) and in the context of pervasive societal stigma and shame, could either render, or contribute to rendering, internal relocation unduly harsh".

19. Ground 3 contended that the Upper Tribunal erred in its approach to Article 8 of the Convention and paragraph 276ADE of the Immigration Rules and:

> "In particular, the Appellant submits that the Tribunal failed to consider, adequately or at all, the full range of circumstances relevant to the extent of the interference with his Article 8 rights and the significance of the obstacles to integration on return. These circumstances necessarily included the fact that the Appellant would be constrained by fear (irrespective of whether this amounted to a fear of persecution) to engage in long-term, active, and comprehensive concealment of a fundamental aspect of his identity. Had the Tribunal given these circumstances proper consideration, it may well have concluded that the appeal on one or both of these grounds was made out. Indeed, in the Appellant's submission, this was the only conclusion reasonably available."

THE FIRST ISSUE – THE PROPER APPROACH TO THE MEANING OF PERSECUTION

20. Mr Husain QC on behalf of the Appellant submitted that the Upper Tribunal erred in *OO (Algeria)* in its approach to the interpretation of persecution within the meaning of the Refugee Convention. In particular, he submitted that the Upper Tribunal in that case failed to consider the cumulative effect of the consequences of the treatment faced by gay men in Algeria. Further, he submitted that the Upper Tribunal in *OO (Algeria)* focussed on the risk of physical violence and failed to consider other types of treatment which, cumulatively, might constitute persecution. It had failed to consider matters such as social stigma, discrimination, and harassment or threats of violence. In addition, the fact that homosexual activity was criminalised was itself a significant violation of a person's dignity. He relied on a series of judgments from this jurisdiction, and other jurisdictions around the world, to demonstrate that such matters were properly to be taken into account when considering what conduct amounted to persecution and the gravity with which the courts considered the violation of a person's dignity and right to live as he or she chooses. He further submitted that the Upper Tribunal also failed to address the question of how men who lived an openly gay life in Algeria would be treated. As the decision in *OO (Algeria)* was flawed, the decision of the Upper Tribunal in the present case, which relied on that decision was equally flawed.

21. In relation to ground 1B, Mr Husain submitted that the fact of having to conceal or supress one's sexual orientation gave rise to harm which amounted to persecution. He submitted that the reason why the state was responsible for the fact of concealment where that arose from cultural, social or religious norms was that in part the state had contributed to that by criminalising homosexual activities. It was wrong to sever one

aspect of the state's activities from other factors giving rise to the need for concealment.

22. Ms Demetriou QC for the Commissioner submitted that the Upper Tribunal in *OO (Algeria)* had erred by concluding that, since the evidence fell short of establishing a real risk of physical attacks on gay men, they faced no real risk of persecution. The Upper Tribunal should have considered cumulatively whether all the consequences of living openly as a gay man in Algeria met the threshold of persecution. She relied upon the UNHCR Handbook, and the UNHCR Guidelines on Claims on Sexual Orientation and/or Gender Identity (issued on 23 October 2012 and annexed to the Handbook) as an aid for interpreting the Refugee Convention. Paragraph 53 of the Handbook stated that various measures not in themselves amounting to persecution could, in combination with other measures or adverse factors, amount to persecution. The Guidelines refer to situations where the cumulative effect of restrictions on the exercise of human rights in a range of fields and of discrimination in matters such as employment could, in certain circumstances, amount to persecution. It was wrong, therefore, to focus solely on the risk of physical violence and wrong not to make a cumulative assessment of the measures affecting those who lived openly gay lives in Algeria. She submitted that the Upper Tribunal had effectively done that and relegated matters relating to stigma, ostracism, discrimination and other matters to questions of merely social mores rather than considering whether they were aspects of treatment capable of constituting persecution.

23. Mr Singh QC for the respondent submitted that the Upper Tribunal in *OO (Algeria)* had not made the errors alleged. It had considered all the evidence and found that, although homosexual activity was criminalised, prosecutions were rare. There was no evidence of abuse or arrest or blackmail or other ill-treatment on the part of the police. There would be a hostile reaction from family members to a gay male member of the family and that may lead to violence from which, it was accepted, the state would not protect the victim. There was however no reliable evidence before the Upper Tribunal of violence or other treatment crossing the threshold of persecutory treatment. The adverse reaction to homosexual behaviour would not be at anything other than a low level and well below the level that constituted persecution. The Upper Tribunal had considered all the evidence. While it had not used the word "cumulative", that was a criticism of form not substance as that was, in essence, what the Upper Tribunal had done. It had not excluded acts falling short of violence. It had considered a wide range of matters albeit that evidence of violence might more easily establish a risk of persecution. Further, given that very few gay men lived openly gay lives in Algeria, it had sought to consider such evidence as was available to the response to demonstrations of public homosexual behaviour and reactions to persons believed to be gay and had considered why gay men did not live openly gay lives and concluded that was not because of a fear of persecution but societal, cultural and religious norms. The fact that a person concealed his sexual orientation in these circumstances did not amount to persecution. That was, in effect, to seek to use a person's sexual orientation as justifying a finding of persecution when the person would not in fact have been a victim of persecution and would not otherwise qualify as a refugee under the Refugee Convention.

Discussion

The Legal Framework

24. In broad terms, the Convention relating to the Status of Refugees ("the Refugee Convention") is intended to provide protection to persons with a well-founded fear of persecution on defined grounds either from the state, or through those acting on its behalf, or from the acts of other non-state actors where the state is unwilling or unable to provide protection against such treatment (see, generally, *Horvath v Secretary of State for the Home Department* [2001] A.C. 489).

25. Article 1A(2) of the Refugee Convention as amended defines, so far as material to this appeal, a refugee as any person who:

> "… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country…"

26. There is ultimately a single question to be asked: does the individual have a well-founded fear of being persecuted if returned to his own country for a reason specified in Article 1A(2) of the Refugee Convention?

27. In answering that single question, one of the matters to be considered is whether the treatment which the individual fears amounts to persecution. There is no definition in the Refugee Convention of what constitutes persecution. Certain actions may be readily identified as amounting to persecution such as killing, serious acts of physical or sexual violence against the individual, or torture on the part of state agents (or a failure to protect against such acts). Other acts can amount to persecution where their nature, intensity and duration give rise to sufficiently serious harm bearing in mind the circumstances and characteristics of the person concerned. Further, even if actions considered individually would not amount to persecution, such actions may in certain cases, when considered cumulatively with other actions, amount to persecution.

28. For present purposes, the parties accept that an appropriate approach to the meaning of persecution is set out in Article 9 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Directive"). It is in the following terms:

> "Article 9 Acts of persecution
>
> 1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
>
> 2. Acts of persecution as qualified in paragraph 1, can, *inter alia,* take the form of:
>
> (a) acts of physical or mental violence, including acts of sexual violence;
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
>
> (c) prosecution or punishment, which is disproportionate or discriminatory;
>
> (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
>
> (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
>
> (f) acts of a gender-specific or child-specific nature.
>
> "3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1."

29. A number of features emerge from Article 9 of the Directive. First the acts must be sufficiently serious in order to amount to acts of persecution. That appears from the reference in Article 9(1)(a) to the acts amounting to "sufficiently serious" breaches constituting a severe violation of basic human rights or in Article 9(1)(b) to an accumulation of measures which is "sufficiently severe" as to affect the individual in the same manner as the acts referred in Article 9(1)(a). Secondly, acts of persecution can take a wide range of forms and are not limited to (but will include) the infliction of death or serious physical or mental violence. A non-exhaustive list of actions capable in appropriate circumstances of constituting persecution is given in Article 9(2) of the Directive. Further, whilst some actions are necessarily ones carried out by, or on behalf of, the state (e.g. legal, administrative, police or judicial measures or prosecution or punishment), others may be carried out by state agents or by other individuals, such as acts of physical or mental violence, including sexual violence, or acts of a gender-specific or child-specific nature. Where the acts are done by non-state agents, the question of whether the state is able and willing to provide sufficient protection against such acts would arise. Thirdly, persecution may arise from individual acts or from an accumulation of different acts.

30. The well-founded fear must be of persecution for a reason specified in Article 1A(2) of the Refugee Convention. That includes persecution for reasons of membership of a

particular social group. It is accepted that homosexuals form a particular social group and if a person had a well-founded fear of persecution by reason of the fact that he or she was homosexual that would fall within the scope of Article 1A(2).

31. The courts have had to consider the question of whether a person could claim to be a refugee if he or she could take action to avoid becoming the victim of persecution if returned. That question was considered in the context of gay men in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 A.C. 596, which concerned a gay man from Iran and a gay man from Cameroon. If they lived as openly gay men in their respective countries, they would face treatment which amounted to persecution. In the case of Iran, a gay man faced the risk of prosecution and hanging. In the case of Cameroon, the appellant, HT, was a gay man who was seen kissing his partner. He had been the subject of a violent attack by persons armed with sticks and a knife who had pulled off his clothes and tried to cut off his penis. Police officers arrived but did not protect him against attack. Instead, they joined in the attack and punched and kicked him.

32. The issue for the Supreme Court in *HJ* was whether the Court of Appeal was correct in *J v Secretary of State of State for the Home Department* [2007] Imm AR 73 in holding that a gay man would not have a well-founded fear of persecution if he could reasonably be expected to tolerate living discreetly in his country of origin, that is, if he could reasonably be expected to conceal the fact that he was gay and thereby avoid the risk of persecution. The Supreme Court held that that approach was not correct: see per Lord Hope at paragraphs 23 to 29 and per Lord Rodger, with whom Lord Walker, Lord Collins and Dyson JSC agreed, at paragraphs 73 to 81. As Lord Rodger expressed it at paragraph 69:

> "… if a person has a well-founded fear that he would suffer persecution on being returned to his country of nationality if he were to live openly as a gay man, then he is to be regarded as a refugee for purposes of the Convention, even though, because of the fear of persecution, he would in fact live discreetly and so avoid suffering any actual harm".

33. The Supreme Court recognised, however, a distinction between a situation where a gay man conceals his sexual orientation because, in part at least, he fears that he will be persecuted if he lives openly as a gay man and a situation where a gay man chooses to live in a way that does not disclose his sexual orientation. That requires the court or tribunal to ask why a gay man would conceal his sexual orientation on his return to his country of origin. If he were to do that in reaction to "family or social pressures" (per Lord Hope at paragraph 22) or "social pressures" (per Lord Rodger at paragraph 82) that would not amount to persecution and the Refugee Convention would not offer protection against return to the country of nationality. In the light of that, Lord Rodger gave the following guidance to tribunals on the approach to be adopted at paragraph 82 of his judgment in *HJ (Iran)*:

> "The approach to be followed by tribunals
>
> 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."

34. Lord Walker (at paragraph 98), Lord Collins (at paragraph 100) and Dyson JSC (at paragraph 132) expressly agreed that the approach to be followed by tribunals should be as set out by Lord Rodger in paragraph 82 of his judgment. Lord Hope set out the test to be adopted by tribunals in materially similar terms in paragraph 35 of his judgment.

The Judgment of the Upper Tribunal in OO (Algeria)

35. In *OO (Algeria)* the Upper Tribunal considered the current situation in Algeria in order, amongst other things, to give country guidance on the risks faced in that country by gay men. The system of country guidance cases is described by Stanley Burnton LJ at paragraphs 45 to 46 of his judgment *R (SG (Iraq)) v Secretary of State*

for the Home Department [2013] 1 W.L.R. 41. In essence, a determination intended to be guidance on the situation in a particular country will be reached after consideration of the representations of the parties, and expert and factual evidence, and is aimed at arriving at reliable, accurate descriptions of the conditions in a country and the risk on return. Decision-makers and tribunals are required to take country guidance determinations into account and to follow them unless there are very strong grounds supported by cogent evidence for not doing so. In view of the criticisms made of the decision in *OO (Algeria),* it is necessary to consider that decision in detail.

36. The appellant in *OO (Algeria)* claimed to be a bisexual man who had a well-founded fear of persecution by reason of his sexual orientation if he were returned to Algeria. The Upper Tribunal heard oral evidence from the appellant, and from one expert witness, and had written evidence from a second expert witness. They also heard evidence from a person who was a gay man from Algeria who lived in France and was well placed to express informed views on the issues in the case.

37. The Upper Tribunal set out the legal framework and the terms of Article 9 of the Directive at paragraph 10 of its judgment. It then set out paragraph 82 of the judgment of Lord Rodger in *HJ (Iran)*. It then proceeded to consider the evidence of Dr Seddon, one of the experts, the written evidence of another expert, Ms Pargeter, and other evidence including that of the person who was a gay Algerian and now lived in France. It considered their evidence under a series of headings, including the risks of prosecutions of gay men, the applicability of Sharia law, the risk of targeted or arbitrary attacks or abusive treatment by the police, the range of adverse responses to homosexual behaviour, attitudes to gay men and discrimination (including in respect of medical treatment and discrimination in the work place), and it considered evidence on living as a gay man in Algeria and the reasons for discretion or concealment of sexual identity. Finally, it dealt with the documentary evidence including reports from the United States State Department, country information from the UK Border Agency, and other reports.

38. The Upper Tribunal then set out its conclusions on the evidence under a series of headings. First, in relation to the prosecution of gay men, it had already noted that the Algerian criminal code criminalised all homosexual acts, although more severe penalties were imposed where the acts were done in public or where one participant was under 18 years of age (see paragraph 19 of its judgment). The Upper Tribunal was satisfied on the evidence that the Algerian authorities did not generally prosecute a person for homosexual behaviour even when that came to the attention of the public or the authorities. The evidence in fact pointed the other way (see paragraphs 141-143 of its judgment). It concluded that the evidence did not establish that Sharia law providing for severe punishment was applied to gay men in Algeria. The Upper Tribunal concluded that there was no reliable evidence to establish a risk of targeted or arbitrary attacks on gay men or abusive treatment by police. Some gay men did experience violence at the hands of family members when they disclosed to them that they were gay or that was discovered. But outside the family, the evidence did not establish that gay men faced a real risk of being subjected to violent attack by the authorities or by members of the public who came to know that a man was gay (see paragraph 153 of its judgment). The Upper Tribunal concluded that there was a range of responses experienced by gay men who were recognised as such although in most, possibly nearly all, cases this would involve expressions of disapproval and fell a long

way short of establishing that responses would involve physical ill-treatment (outside of the family). It referred to the evidence that social responses ranged from mockery and stigmatisation to outright hostility. At paragraph 162, the Upper Tribunal said this:

> "162. Drawing all of this together we are satisfied that the evidence clearly demonstrates that there will be a range of responses to displays of homosexual behaviour outside the family context, but while the risk of a physical attack cannot be excluded, generally the response will be at the lower end of that range. Where the response is at the upper end of the possible range of responses, that is likely to be because open displays of affection in public are simply not tolerated, whether that be by heterosexual couples or homosexual couples."

39. The Upper Tribunal considered whether gay men in Algeria were able to live openly as gay. It noted that few gay men chose to live openly there and that that was the result of a number of considerations including cultural, religious and societal views, the intense and deep rooted and near universal disapproval of homosexuality that prevails in Algeria, and near universal adherence to and respect for social and religious mores. It concluded on the evidence that the choice to live discreetly as a gay man was not generally driven by a need to avoid persecution but by social pressures of the type contemplated in *HJ (Iran)* (see paragraph 168).

40. The Upper Tribunal set out its country guidance at paragraphs at 172 to 190, the material parts of which are in the following terms.

> "172. 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.
>
> "173. 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.
>
> "174. Algeria is an extremely conservative society where behaviour is regulated by reference to the strict Islamic values endorsed by the state. It is not just open displays of affection by gay men that are not tolerated but such behaviour by heterosexual couples also, particularly between unmarried heterosexual couples. Because there is general adherence to strict Islamic doctrine, which includes a similar intolerance to extra-marital sexual relations, young unmarried men do not have access to women and so may have resort to same-sex

liaisons. This is not seen as homosexual conduct but pragmatism in achieving sexual gratification. Indeed, there is some evidence that where one of the same sex partners is perceived to be "dominant" he will be admired as virile and masculine.

"175. There are, undoubtedly, gay men in Algeria and there is no reason to suppose that they do no represent a similar proportion of the population as in other countries. Therefore, it is remarkable that there is little evidence of gay men living openly as such anywhere in Algeria. That much is accepted by the respondent.

"176. It is conceded by the respondent that where a gay man does face a real risk of persecution, which, when such occurs, is likely to be from his own family members, there is no sufficiency of protection available from the police or other state authorities.

"177. There is a real risk of violent and persecutory ill-treatment of gay men from family members, motivated by the deep sense of shame and dishonour perceived to be brought upon the family as a consequence of it becoming known in the neighbourhood that there is within the household a gay son. There is a risk of that being the case throughout Algerian society, but it is clear from the evidence that that is especially the case in the less affluent and densely populate neighbourhoods where, typically, values will be conservative and non-secular and households are under close scrutiny from neighbours. But once the gay son has left the family home and re-established himself elsewhere there is no real risk that family members will pursue him to that place of relocation, and so generally that risk of persecution can be avoided by the availability of a safe and reasonable internal relocation alternative.

"178. Typically, a gay man in Algeria will first encounter problems when his family becomes aware that he is gay, either because he "comes out" to his family, perhaps when resisting pressure to marry, which is something expected of all Algerian men when they reach marriageable age, or because his sexual orientation has come to the attention of family members for other reasons. In such a situation, some, but certainly not all, gay men may face a real risk of persecution. There is some evidence that "caring and concerned" fathers will beat and otherwise "discipline" gay sons in an attempt to "straighten them out" for their own good. Very few families will be prepared to accept and tolerate the fact of a son's homosexuality. Those that do are likely to be educated, secular, middles class families, living in more prosperous lower density area.

"179 Where, exceptionally, a family is prepared to accept the homosexuality of their son that does not enable the son to manifest his sexual orientation outside the family home. He will choose to conceal it, not to avoid persecution, (there being no adequate or sufficient evidence of such taking place) but to protect the reputation of his family within the local neighbourhood and because he is likely to feel ashamed of having the sexual preferences that he does and will wish to avoid damaging relationships with friends, work colleagues and others.

"180 As there is no sufficiency of protection available, the next question is whether the gay son whose family is not prepared to tolerate him living as a gay man, can relocate elsewhere in Algeria to avoid ill-treatment from family members and if so whether it will be reasonable to expect him to do so. If it is not reasonable then having travelled to the UK, he will be entitled to international protection.

"181 That question of whether there is a safe and reasonable internal relocation option, is a difficult and complex one in the Algerian context. Generally, there will be no real difficulty preventing relocation and there is no indication that disapproving family members have the means, inclination or reach to cause difficulties after relocation. But where such a person has established himself elsewhere in Algeria, as marriage is expected of all Algerian men, in pursuance of what is seen as an "Islamic duty to procreate", it may well, sooner or later, become apparent that he has not adhered to the norms expected and that is likely to generate suspicion that he is a gay man.

"182 There is no real risk of gay men being subjected to violence or other persecutory ill-treatment outside the family home, either at the hands of authorities or by members of the public with whom gay men have to engage. There is an absence of reliable evidence of that occurring.

"183 Very few gay men live openly as such in Algeria. Gay Algerian men, as a consequence of cultural, religious and societal views, do not generally identify themselves as gay even if their sexual preferences lead them to prefer same sex relationships. Even Algerian men with settled sexual preferences for same sex relationships may well continue to entertain doubt about their sexuality. Second, gay men recognise the intense and deep rooted near universal disapproval of homosexuality that obtains in Algeria. Thus, Algerian gay men who have moved to France where, plainly, they face no obstacle to living openly as such, generally choose not to because they refuse to categorise themselves as gay, even though there is no persecutory disincentive to doing so.

"184 The fact that there is very little evidence of gay men living openly in Algeria invites the conclusion that must be because the risk of persecutory ill-treatment likely to be attracted is such as to prevent that from happening. But the expert and other country evidence does not establish that, in fact, there is any real risk outside the family context of such persecutory ill-treatment being meted out to persons suspected as being gay. The expert evidence indicates that a gay man recognised as such is very likely to attract an adverse response from those by whom he is encountered as he goes about his daily business. But that adverse reaction is not reasonably likely to be such as to amount to persecution, being on a range of responses from simple expression of disapproval, mockery or name calling up to the possibility of physical attack. But there is simply no reliable evidence of the expression of disapproval being expressed in such circumstances generally being otherwise than at the lower end of that range of responses.

"185. That gives rise to a conundrum. If there is no evidence of persecution of gay men who have escaped ill-treatment from family by relocating elsewhere, why is there no evidence of gay men feeling able to live openly? Alternatively, is the absence of evidence of physical ill-treatment of gay men due to the fact that there are no gay men living openly?

"186. The answer, in our judgment, is as follows:

a. 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.

b. 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.

c. 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 regard himself as a gay man, in any event.

"187. Underpinning these conclusions is recognition that Algerian society is governed by strict Islamic values which all citizens, including gay men, in practice respect, even if only for pragmatic reasons.

"188. This gives rise to a compromise which in some senses in unsatisfactory but, as a matter of law, does not give rise to a right to be recognised as a refugee. Algerian society, including the state authorities, effectively tolerates private manifestations of homosexual conduct, both between young unmarried men and gay men who have established themselves away from the family home, provided there is no public display of it. Gay men choose to live discreetly not to avoid persecution, because there is no evidence that there is any, but because they recognise that the society they live in is a conservative one, subject to strict Islamic values, that is unable to openly embrace the existence of the practice of homosexuality, just as women are expected to submit to Islamic requirements such as being veiled and accepting other limitations upon their ability to act as they may wish to.

"189. The evidence before us indicates that as a result of societal views and conditioning, Algerian men with a preference for same-sex relationships generally do not in fact regard themselves as gay men and so have no reasons to identify themselves as such to others by conducting themselves in a manner that has come to be regarded as "living openly" or discreetly. Therefore, choosing not to live openly as gay men is not due to a fear of persecution but other reasons to do with self-perception and how they wish to be perceived by others.

"190. For these reasons, 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 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."

41. An application for permission to appeal against the decision of the Upper Tribunal was refused at an oral hearing by Elias LJ. It is accepted that the appellant is entitled to challenge the decision of the Upper Tribunal in this case on the ground that it relied upon the decision in *OO (Algeria)* which is said to be legally flawed. Equally it is accepted that this Court must accept the factual findings made the Upper Tribunal in *OO (Algeria).*

The First Part of Ground 1

42. I turn then to the specific criticisms made of the decision in *OO (Algeria)* in written and oral submissions. There are essentially three. First it is said that the Upper Tribunal focussed solely on the question of whether gay men in Algeria would face a risk of physical violence and failed to consider other matters including the effects of stigma, hostility, discrimination, harassment or threats of violence and the fact that homosexual acts were criminalised. In so far as the Upper Tribunal did consider matters such as social stigma, it is submitted that the Upper Tribunal treated those as part of the social pressures that led gay men to conceal their orientation and as matters not capable of amounting to persecution.

43. On any fair reading of the decision in *OO (Algeria)*, it is clear that the Upper Tribunal did not limit its consideration to the risk of physical violence. The review of the evidence covered criminalisation of homosexual acts, the risk of prosecution, the risk of physical attacks from the authorities, discrimination in the provision of services and employment and attitudes to homosexuality. Its conclusion dealt with those matters. It concluded that whilst homosexual acts were criminalised there was no real risk of gay men being prosecuted and Sharia law did not apply. There was a risk of violence within the family, but outside the family there was no real risk of gay men being subjected to violence. In relation to responses to homosexuality, the responses covered a range but would generally fall at the lower end of the range (see paragraphs 162 and 184). For that reason, it concluded at paragraph 182 that there is no real risk of gay men:

> "being subjected to violence or other persecutory ill-treatment outside the family home, either at the hands of the authorities or by members of the public with whom gay men have to engage".

44. Given the structure of the decision, the evidence it considered, and its conclusions, it is clear that the Upper Tribunal considered whether there was reliable evidence of physical violence and other forms of conduct in order to determine whether gay men in Algeria had a well-founded fear of persecution.

45. Secondly, it is clear that in substance the Upper Tribunal did consider the cumulative effect of the treatment that it found occurred. It is correct that the Upper Tribunal dealt with different areas of conduct separately. It is correct that it does not use the word "cumulatively", or set out its findings in the way that the Upper Tribunal has in other cases (such as *TK (Gay man) St Lucia* [2019] UKUT 00092 (IAC)). I would accept that the Upper Tribunal in *OO (Algeria)* could have expressed its conclusions more fully in this respect. But the issue is one of substance rather than form. It is clear that the Upper Tribunal did look at each area of concern. Homosexual acts were criminalised but there no real risk of persecution, outside the family there was no real risk of violence, and other responses to adverse behaviour were at the lower end of the

range. It drew all those matters together in paragraph 162 and, again, in paragraph 182 where it considered that there was no real risk of "violence or other persecutory ill-treatment outside the family". In substance, therefore, the Upper Tribunal did consider all matters cumulatively as well as individually.

46. Thirdly, it is said that the Upper Tribunal in this case erred in law by failing to consider how a gay man living openly as such in Algeria would be treated and considered only how a man suspected or recognised as gay would be treated. I do not consider that there is any substance in this criticism. It expressly said at paragraph 11 of its judgment that any assessment had to be informed by the decision in *HJ (Iran)* and set out paragraph 82 of that judgment, separating out each aspect in turn and making it clear that, if it decided (as it did in this case) that the applicant was gay, 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".

47. It therefore identified the relevant principle and applied that to the evidence before it. It sought to consider how openly gay men would be treated in Algeria. There were difficulties in doing that as the evidence was that most gay men in Algeria did not live as openly gay men and, indeed, many would not have identified themselves as gay for societal, cultural and religious reasons. But there is no doubt that the Upper Tribunal was seeking to determine how gay men who lived openly would be treated. By way of example only, it considered how the authorities would act when a person's homosexual behaviour was drawn to the attention of the authorities or members of the public (see paragraphs 23 and 69). Again, by way of example, it looked at how service providers and employers would react to homosexuals (see for example paragraphs 86 to 87 and 89 to 90). At paragraph 168, it specifically considered how a gay man who did live openly as such in Algeria would be likely to be treated and concluded that he would attract upsetting comments, his relationship with friends and work colleagues would be damaged and he would suffer discriminatory experiences not amounting to persecution. The Upper Tribunal had difficulty in assessing how gay men who lived openly would be treated as there were very few men who did so. But there is no doubt that it identified and asked the correct question, and sought, so far as it was able to do so, to consider how an openly gay man would be treated in Algeria. Furthermore, it also considered if the fact that there was little evidence of gay men living openly in Algeria was itself evidence that that was because of the risk of persecutory ill-treatment if they did so. The Upper Tribunal concluded on the evidence, however, that was not the case. Gay men did not live openly because of the cultural, religious and societal views prevalent in a conservative society subject to strict Islamic values. The Upper Tribunal did not therefore fail to ask the correct question.

48. For completeness, I note that Mr Husain took us to a number of authorities dealing with criminalisation of homosexuality. They included the judgment of Sachs J in the Constitutional Court of South Africa in *National Council for Gay and Lesbian Equality and others v Minister for Justice and others* [1998] ZAAC 15 explaining how laws criminalising homosexual behaviour violated basic concepts of privacy, dignity and equality and were contrary to the South African constitution. Mr Husain referred to the judgments in the Supreme Court of India in *Johar and others v Union*

of India and others (2018) SCC 781 and the inferences and conclusions it reached as to how laws criminalising homosexual behaviour implicitly sanction discrimination and the denial of equal participation in society and criminalised in truth not an act but a specific set of identities. He emphasised, and referred to authorities, in which social stigma, discrimination, and harassment could amount to a denial of human dignity.

49. Any court in this country would readily understand the importance of equality before the law for all, irrespective of factors such as a person's race, religion, gender or sexual orientation. The values underpinning the laws in this country reflect the importance of concepts of dignity, privacy and of personal autonomy. Courts in this country would readily understand and agree with the decisions of superior courts in other countries recognising the importance of such concepts.

50. That, however, is not the issue. Different societies at different times have taken different views as to homosexuality. The Refugee Convention is intended to provide protection in the circumstances agreed by the contracting parties. See the observations of Lord Hope in *HJ (Iran)* [2011] AC 596 at paragraphs 2-3. The question is whether an applicant has a well-founded fear of persecution if returned to his country of nationality for a reason falling within Article 1A(2) of the Refugee Convention. The fact that homosexual acts are criminalised in a particular country is not, of itself, recognised as giving rise to a well-founded fear of persecution as was recognised by the Court of Justice of the European Union in *Joined Cases C-199/12 to C-201/12 Minister voor Immigratie en Asiel v X (United Nations High Commissioner for Refugees (Intervening).* For the reasons given, the Upper Tribunal in this case, and in *OO (Algeria)*, correctly understood the question that it had to consider and reached findings of fact which this Court must respect. On that basis, the Upper Tribunal was entitled to conclude that, outside the family home, a gay man in Algeria would not have a well-founded fear of persecution by reason of his sexual orientation.

Ground 1B

51. Mr Husain submitted that it is possible that the very fact of being forced to conceal or suppress one's sexual orientation will give rise to harm which reaches the threshold of persecution. He referred to paragraph 33 of the UNCHR Guidelines on International Protection which states that being compelled to conceal one's sexual orientation may result in significant psychological and other harm.

52. This submission needs to be set in context. The fact is that the country guidance is that gay men do not live as openly gay men in Algeria because of social, cultural and religious norms in a conservative society subject to strict Islamic values. References to the "suppression" or "concealment" of sexual orientation should be understood in that context. The Upper Tribunal did not err in considering that the fact that a gay man would not live openly in Algeria for social, cultural and religious reasons was not sufficient to amount to persecution.

53. First, that conclusion is consistent with the decision in *HJ (Iran)*. If it were the case that the fact that a gay man concealed his sexual orientation was sufficient to establish persecution, that would have been the basis of the decision of the Supreme Court in *HJ (Iran).* Instead, as Lord Rodger recognises in paragraph 82 of his judgment, there are in essence three questions: is the applicant gay, would a gay man who lived openly be liable to persecution in the country of nationality, and what would the

person do on return? If he would not live openly, a tribunal would have to ask why he did not do so. If that were the result of social pressures, then his application for refugee status would fail. That reasoning is inconsistent with the submission that the simple fact that a gay man in Algeria would conceal his sexual orientation amounts to persecution.

54. Secondly, and separately, the fact of concealment results from societal pressures, not from the actions of the state. It is not realistic to suggest that the state is under a duty to protect an individual from the societal attitudes prevalent in that state. Mr Husain points out that the state is responsible for the enactment of legislation criminalising homosexual behaviour and its conduct cannot be severed from society generally. That is to amalgamate different issues. The state has criminalised homosexual acts but, for the reasons discussed, that does not amount here to persecution. The pressures to conceal one's identity, on the evidence considered by the Upper Tribunal in *OO (Algeria)*, result from a combination of cultural, religious and societal views, and the deep-rooted hostility on the part of the population of Algeria to homosexuality. A state is not under an obligation in the context of the Refugee Convention to take steps within the state to change or alter the religious, cultural or social values prevalent in that state. If those attitudes manifest themselves in action which did amount to persecution – for example, killings, violent attacks, or other ill-treatment amounting to persecution – the state would be under a duty to provide protection. Thus, in Algeria, family members do pose a real risk of violence to a family member whose homosexual orientation they discover and the state is under a duty to protect. That is why the combination of violence by family members, and the lack of protection by the Algerian authorities in those circumstances, leads to the conclusion that there is a well-founded fear of persecution in those circumstances. But that does not indicate that, absent such factors, the state is under a duty to protect a gay man from societal, cultural or religious values which are hostile to homosexuality but do not manifest themselves in ill-treatment of the kind to amount to persecution.

55. Finally, on the facts of this case, it is appropriate to note that there was no evidence, and no suggestion before the First-tier Tribunal, that concealment by the appellant of his sexual orientation would result in psychological harm. His evidence on this matter was that he felt good about himself in the United Kingdom and did not feel ashamed about his sexuality. He considered that he would be judged and treated badly and would not be accepted in Algeria. He said that people in the United Kingdom were very open-minded and he did not worry about his behaviour or how people would view him but the situation would be different in Algeria. The First-tier Tribunal found that if he returned to Algeria he would not live openly as a gay person because of social norms and traditions. The evidence, and the findings, fall far short of any indication that the fact that the appellant would not live openly as a gay man if returned to Algeria gives rise, of itself, to a well-founded fear of persecution.

56. For those reasons, the first ground of appeal fails.

THE SECOND ISSUE – INTERNAL RELOCATION

57. Mr Husain submitted that the Upper Tribunal in this case, and in *OO (Algeria)*, erred in concluding that it would not be unduly harsh for the appellant to relocate within Algeria. It had found in this case that there was a well-founded fear of persecution if he returned to his home area because of the threat from his uncle and Anis' parents.

The Upper Tribunal, he submitted, erred in failing to consider whether the need to conceal his sexual orientation was capable of, or contributed to, rendering relocation unduly harsh. That was a different, and lower, test from whether concealment amounted to persecution. He relied upon the decision in *R (Hysi) v Secretary of State for the Home Department* [2005] INLR 602 where the Court of Appeal held that a tribunal erred by failing to consider the difficulties arising from the fact that a person of mixed Albanian and Roma ethnic origin would have to conceal his mixed-race origins if he were to relocate within Kosovo.

58. Ms Demetriou for the Commissioner submitted that whether relocation would be unduly harsh required an assessment of all the circumstances of the individual. That was a fact-specific question dependent on the particular circumstances of the case. The test was a different and less demanding test than the test for determining whether the applicant had a well-founded fear of persecution.

59. Mr Singh submitted that there was no error here. The First-tier Tribunal was entitled on the facts to conclude that relocation would not be unduly harsh. Further, the fact that the appellant would not live as an openly gay man if he relocated within Algeria because of social, cultural or religious pressures would not render relocation unduly harsh. To make that finding would simply be a means of enlarging the scope of the protection conferred by the Refugee Convention in circumstances where the concealment of one's sexual orientation did not give rise to a well-founded fear of persecution sufficient to attract the obligation of protection.

Discussion

60. An individual may have a well-founded fear of persecution in the place where he lived in his country of nationality. He may not, however, have a well-founded fear of persecution in other places within the country. In such circumstances, if it were reasonable for him to relocate within his country of nationality he would not qualify as a refugee under the Refugee Convention: see *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at paragraph 7.

61. The appropriate test is well-established. It is that:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so … There is… a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls … All must depend on a fair assessment of the relevant facts."

See paragraph 21 of the speech of Lord Bingham in *Januzi*, with which the other members of the House agreed, and paragraph 5 of his speech in *AH (Sudan) v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)* [2008] 1 AC 678, with whom the other members of the House agreed. Further, the test is different from that for determining whether a person has a

well-founded fear of persecution. The issue of internal relocation presupposes that there is some place within the country to which he could be returned without a well-founded fear of persecution. The question then is whether it would be reasonable for him to relocate: see the explanation given by Baroness Hale in *AH (Sudan)* at paragraph 21.

62. In the present case, it is important to bear in mind again the context and the facts. The appellant had a well-founded fear of persecution in relation to his home area in Algeria because he feared that his uncle would kill or harm him because of his homosexuality and the state was unwilling or unable to protect him from that risk. In terms of relocation within Algeria, the appellant's case was that he would be in danger and would be killed wherever he went in Algeria and that his uncle would be able to ill-treat him wherever he was.

63. First, the First-tier Tribunal found that the appellant would not be at risk from his uncle (or Anis' parents) if he were to relocate within Algeria. Secondly, it found that he was not at risk of persecution elsewhere in Algeria and that he would not be in danger if he returned to Algeria. Thirdly, there was no evidence, and no suggestion, that the appellant would suffer any significant psychological harm if he returned to Algeria and concealed his sexuality. Fourthly, the First-tier Tribunal found that he had a way of life which would enable him to adapt to any place he decided to relocate to. As the Upper Tribunal noted at paragraph 20 of its judgment, that was said against a background where the appellant had been born and brought up in Algeria and had not left the country until he was 15. Since arriving in Britain, he had completed a hairdressing course and obtained work experience demonstrating self-reliance and initiative. Those circumstances well indicated how he could adapt back to life in Algeria and why relocation in Algeria would not be unduly harsh.

64. The one other factor is that, as the First-tier Tribunal found, the appellant would not live as an openly gay person in Algeria. That was not because of persecution but because of respect for social norms and tradition and religion: see paragraph 29 of the judgment of the First-tier Tribunal, cited at paragraph 10 above. Care needs to be taken not to take parts of that paragraph out of context. Although it refers to the appellant not expressing himself as a gay person "not necessarily out of persecution, but also [out of respect for] social norms and traditions and religion" it is clear, reading the judgment as a whole, that the First-tier Tribunal was not suggesting or finding that the appellant would not live openly because, in part, of a fear of persecution. It had already found that there would be no real risk of ill-treatment amounting to persecution outside the treatment from his own family.

65. The sole question, therefore, is whether it would be unduly harsh to require the appellant to relocate within Algeria where he would choose not to live openly as a gay man. That question cannot be avoided by saying (as did all the advocates before us) that the issue is fact-specific and dependent on all the circumstances. In the present case (and I would imagine in many cases involving gay men from Algeria seeking asylum), the stage has been reached where that is the only relevant circumstance. The fact is that the appellant would be choosing to conceal his sexual orientation because of social, cultural and religious pressures. Life would clearly be different, and probably immeasurably better, for him if he were able to live in a country where the society, and social, cultural and religious pressures, did not compel him to decide to conceal his sexual orientation. The Refugee Convention is not, however, intended to

guard or protect an individual from such pressures. In those circumstances, I consider that the Upper Tribunal (and the First-tier Tribunal) were entitled to conclude that it would not be unduly harsh for the appellant to relocate within Algeria.

66. Furthermore, I do not consider that the observations of the Upper Tribunal in *OO (Algeria)* on this question were flawed. The Upper Tribunal was dealing with a situation where it found that gay men would not live openly in Algeria not because of a fear of persecution but due to other reasons. As indicated above, the fact that a gay Algerian man would conceal his sexual orientation for those reasons would not alone, and of itself, make it unduly harsh for him to relocate within Algeria. In those circumstances, there would need to be something arising from the individual's personal circumstances which would make it unreasonable and unduly harsh to expect him to relocate within Algeria to avoid the risk of persecution from his family (see paragraph 190 of the judgment in *OO (Algeria).* There is nothing inconsistent in that summary with the test expressed in *Januzi* and *AH (Sudan)* provided that the tribunal bears in mind the need to consider all the relevant circumstances of the applicant and his country of origin.

THE THIRD GROUND OF APPEAL – SIGNIFICANT OBSTACLES TO INTEGRATION

Submissions

67. Mr Husain submitted that the Upper Tribunal erred in its assessment of whether return would be a proportionate means of pursuing a legitimate aim and so compatible with Article 8 of the Convention. In that regard, he submitted that the tribunal erred in considering that there were no significant obstacles in terms of paragraph 276ADE of the Immigration Rules to the Appellant re-integrating into Algeria. He submitted that there is ample authority that the question of significant obstacles under that rule is also relevant to the question of proportionality under Article 8 of the Convention. He submitted that the need for the appellant to conceal his sexual orientation was a significant obstacle to integration. He relied upon the observations of Sales LJ, as he then was, in *Kamara v Secretary of State for the Home Department* [2016] 4 W.L.R. 152 at paragraph 14, where he indicated that the concept of integration required a broad evaluative judgment of whether the individual would be able to participate in society and have a reasonable opportunity to be accepted there and be able to operate and build up human relationships. That opportunity would, Mr Husain submitted, be denied to the appellant who would be forced to conceal a fundamental aspect of his identity, namely his sexual orientation, and would be severely limited as a result in the extent to which he could function in society and build up relationships there.

68. Mr Singh submitted that the Upper Tribunal considered these issues at paragraphs 19 and 20 of its decision and considered, as it was entitled to do on the evidence before it, that there were no very significant obstacles to integration.

Discussion

69. I assume that the existence of very significant obstacles to integration would be relevant to an assessment of the proportionality of the interference to the appellant's right to respect for his private life recognised by Article 8 of the Convention. In substance, however, the position is similar to that already discussed above. As the Upper Tribunal noted, the appellant was born and lived in Algeria until he was 15, he

had acquired skills and experience in the United Kingdom and demonstrated self-reliance and initiative. In those circumstances, it was entitled to conclude that the appellant would be capable of adapting to life in Algeria.

70. In terms of his sexual orientation, the appellant would not live an openly gay life because of the societal, cultural and religious mores of the society. That will be a severely limiting feature on aspects of his life in Algeria but it does not provide a very significant obstacle to his reintegration into Algeria.

71. In relation to the decision in *Kamara*, it is, as always, important to bear in mind the facts of that case which provided the context in which Sales LJ made his observations. There, the appellant, Mr Kamara, was a national of Sierra Leone. He was a foreign national criminal whom the Secretary of State wished to deport. He had come to the United Kingdom at the age of 6 with his sister and half-sister. He had indefinite leave to remain. He was at the time of the judgment aged almost 29. He had no ties with Sierra Leone and did not speak any of the local languages. He was completely integrated into society in the United Kingdom. It was in that context that Sales LJ referred to the question of whether Mr Kamara would be "enough of an insider" in terms of understanding how life in Sierra Leone would be carried on and have a capacity to participate in it and a reasonable opportunity to be accepted, to function on a day-to-day basis and to build up human relationships. The facts are very different from the present case where the appellant is a person who lived in Algeria until the age of 15, speaks the language, and as the tribunals found, is resourceful and able to adapt in Algeria.

CONCLUSION

72 The Upper Tribunal did not err in relying on the earlier country guidance case of *OO (Algeria)*. That case did properly consider whether gay men in Algeria had a well-founded fear of persecution. It addressed itself to the correct question of how an openly gay man would be treated in Algeria; it did not restrict the definition of persecution to acts of violence and did consider all the relevant evidence and circumstances. It was entitled to find on the evidence that, outside the family, a gay man in Algeria would not face a real risk of persecution. The fact that the Appellant would not live openly as a gay man if he returned because of social, cultural and religious norms in Algeria did not amount to persecution. Nor would it be unduly harsh on the facts of this case for the appellant to relocate within Algeria to avoid the risk of ill-treatment at the hands of his family. The Upper Tribunal was entitled to find that there were no significant obstacles to his reintegration into Algeria. For those reasons, this appeal is dismissed.

IN THE COURT OF APPEAL (CIVIL DIVISION) **REF: C5/2018/0718**

ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

BEFORE:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LORD JUSTICE LEWIS

BETWEEN:

YD (ALGERIA)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

ORDER

UPON hearing leading and junior counsel for the Appellant, leading counsel for the Respondent, and leading and junior counsel for the Intervener

IT IS ORDERED THAT:

1. The Appellant's appeal be dismissed.

2. The Appellant do pay the Respondent's reasonable costs of the appeal, to be subject to detailed assessment if not agreed.

3. The amount of legal costs deemed payable by the Appellant to the Respondent once quantified as per paragraph 2 above cannot be enforced by the

Respondent for payment by the Appellant to the Respondent unless the Respondent makes an application to the Court to have the Appellant financially assessed on oath as to his financial means and ability to pay such legal costs.

4. Any request by the Respondent for costs to be paid in the alternative by the Lord Chancellor (Legal Aid Agency) shall be determined in accordance with regulations 10 and 16 of the Civil Legal Aid (Costs) Regulations 2013.

5. The Appellant's legal costs be the subject of detailed assessment in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18.

6. The Appellant's application for permission to appeal be refused.

DATED this 14th day of December 2020