



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

Appeal Number: AA/00657/2014

THE IMMIGRATION ACTS

Heard at North Shields

**Determination
Promulgated**

On 9 July 2014

On 5 November 2014

Before

UPPER TRIBUNAL JUDGE DEANS

Between

F B

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Brakaj, Iris Law Firm (Gateshead)

For the Respondent: Mr P Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This appeal is brought with permission granted by the Upper Tribunal against a decision by Judge of the First-tier Tribunal Bircher dismissing an appeal on asylum, humanitarian protection and human rights grounds.
- 2) The appellant is a national of Algeria born on 9 November 1985. He came to the UK in August 2013 and claimed asylum in September of that year. The appellant claims to fear persecution in Algeria because of his homosexuality.
- 3) The Judge of the First-tier Tribunal accepted that the appellant is a homosexual but did not accept the appellant's account of how he was

detected by his older brother having sex with a male partner in the family home in Algeria. The judge accepted that the appellant had formed a same sex relationship in the UK with a Pakistani national who was without any immigration status in this country.

- 4) In assessing whether the appellant had a well founded fear of persecution in Algeria the Judge of the First-tier Tribunal had regard to the country guideline case of OO (gay men: risk) Algeria CG [2013] UKUT 00063. In that case the Tribunal concluded that criminal prosecutions of gay men in Algeria were rare. The evidence did not suggest that in general societal and familial disapproval of male gay identity in Algeria reached levels that were persecutory under Article 9 of the Qualification Directive or otherwise reached the threshold required for protection under Article 15(b) of this Directive, or under Article 3. A small number of gay men were able to live openly in Algeria and did not in general suffer serious harm amounting to persecution.
- 5) The judge was not satisfied that the appellant had fled Algeria in the circumstances he claimed. The judge was satisfied that the appellant would be able to engage in homosexual activity discreetly in Algeria. He had conducted a discreet sexual relationship in the past and there was no reason why he should not do so again.
- 6) The grant of permission to appeal by the Upper Tribunal was made chiefly on the basis of the judge's treatment of the appellant's relationship with his partner in the UK. At paragraph 65 the judge commented that the appellant's partner had no status to remain in the UK and he could therefore accompany the appellant to Algeria or, alternatively, the couple could relocate to Pakistan, which was the partner's country of origin. In granting permission the Upper Tribunal Judge noted that the partner had been found by another Judge of the First-tier Tribunal not to be gay. Putting that on one side and having regard to the couple's circumstances and the background evidence, it was arguable that more was required in the determination than the brief finding about the countries in which the relationship might be carried on, as made by the judge in the present appeal. In granting permission, however, the grounds were not limited.

Submissions

- 7) At the hearing before me Ms Brakaj stated that she had not had contact with the appellant immediately prior to the hearing. For the respondent Mr Mangion reported that he had no knowledge of the Home Office having lost contact with the appellant. He reported, however, that the appellant's partner in the relationship referred to by the Judge of the First-tier Tribunal was removed from the UK on 13 May 2014.
- 8) Ms Brakaj explained that although she had not had contact with the appellant immediately prior to the hearing she was satisfied that she had instructions to pursue the appeal to the Upper Tribunal on the basis that

there was an error of law in the decision of the First-tier Tribunal Judge. She confirmed that she had also acted for the appellant's partner. If the appellant were to succeed in his appeal this might have a bearing on his partner's prospects of returning to the UK.

- 9) Turning to the substantive issues, Ms Brakaj addressed me first in relation to the credibility findings made by the Judge of the First-tier Tribunal. The judge found it was not credible that the appellant and his partner in Algeria should have engaged in sexual acts in an unlocked bedroom in the family home where there was the possibility that they would be discovered by the appellant's siblings or parents. In the application for permission to appeal it was submitted that this finding failed to have regard to the country information and other evidence available on how a couple could conduct their relationship in the prevailing circumstances in Algeria. It was difficult to envisage an alternative or safer option than meeting in the appellant's private bedroom. As homosexuality was rare in Algeria the appellant being visited by a friend would not cause suspicion.
- 10) Ms Brakaj submitted that there would be a greater risk for the appellant and his partner having sex elsewhere than in a private room in the appellant's own home. An individual engaging in a homosexual relationship had to place himself at a certain level of risk. It was more risky to use a hotel room. The judge's finding did not consider the risks and the possible alternatives. The appellant's account of having sex in his own bedroom was not implausible. The question of whether the appellant was detected having sex in his own room was central to the findings as to the risk to him in Algeria.
- 11) Ms Brakaj further submitted that the issues raised by the case of HJ (Iran) [2010] UKSC 31 were not addressed in the determination. The judge did not consider whether the appellant was deterred from practising his homosexuality by fear of persecution or serious harm. The judge did not address how the appellant would be able to engage in sexual activity in Algeria in the future, particularly where his partner might be subject to immigration control. The judge's findings, at paragraph 65, with regard to the couple carrying on their relationship either in Algeria or Pakistan was not a viable option for partners in a homosexual relationship and gave rise to a potential future risk. If the appellant's behaviour in Algeria was shaped by more than the disapproval of his family then the might be able to establish a need for protection, notwithstanding the case law on the risk of persecution for gay men in Algeria. Very few gay men were able to live openly in Algeria. The evidence before the judge, particularly the US State Department reports, showed harassment of gay men amounting to more than discrimination. This risk was not fully taken into account in the determination, where, at paragraph 56, the judge found that the appellant had conducted a discreet sexual relationship in Algeria in the past and could do so again. The evidence given by the appellant in his witness statement of 20 February 2014 at paragraph 16 was that he would not be able to hide his sexuality or behave differently wherever he went. He would not be able

to live a normal life in Algeria. The appellant did not want to continue living in a country where homosexuality was hated by society. This point was not considered in the determination.

- 12) For the respondent Mr Mangion submitted that the issue was not whether the appellant conducted his sexual relationship in the family home but whether this was specifically conducted in an “unlocked bedroom”. The appellant said at interview that he usually locked the door (Q66) and it was open to the judge to make an obvious inference. The grounds for permission to appeal suggest the bedroom door was not normally locked but this was a speculative point. On this issue it was reasonable for the judge to make the finding she did and at paragraph 56 she found that the appellant had conducted a relationship discreetly in the past. He had lived discreetly for a number of years and would be able to continue to do so. Some family members were still supporting him. His younger brother had not turned against him.
- 13) Mr Mangion continued that the judge had applied the provisions of the relevant case law. If the judge had erred in considering that the couple could live together in Algeria or Pakistan, there was now further evidence.
- 14) Ms Brakaj responded on the issue of whether the appellant conducted his relationship in Algeria in a locked room. She pointed out that the appellant said there was a lock but that the door was not always locked and on this occasion they had forgotten to lock it. It was not a door that would lock automatically on entry. It was not incredible that the couple became careless and it was not incapable of belief. The couple had been attempting to conduct their relationship privately but in shared accommodation. The judge made findings very briefly to the effect that this would not happen. The account given by the appellant was not so incapable of belief that further reasons were not required, particularly having regard to the evidence on societal discrimination and the likely attitude of the appellant’s family.

Discussion

- 15) The principal issue in this appeal is not whether the judge’s credibility findings are sound, or whether her assessment of whether the appellant would be able to carry on his relationship with his partner was properly reasoned, but whether the appellant would face a real risk of persecution or serious harm in Algeria because of his homosexuality. The judge made a clear finding that the appellant is a gay man who had a sexual relationship in Algeria. The judge’s conclusions need to be considered in accordance with this finding.
- 16) The appellant maintains that he fled Algeria because his older brother found out about his relationship. At no point has the appellant claimed that the authorities in Algeria were looking for him because of his involvement in a homosexual relationship. The finding made by the judge was that the

appellant stayed for two months in a town 30 kilometres away from his family home after he left the family home. He helped a fisherman and was given a holiday home in which to live. It appears that he was able to leave Algeria without difficulty. Taking the appellant's case at its highest, it was familial disapproval which caused him to leave the family home and to leave Algeria and not a fear of the authorities.

- 17) In his witness statement the appellant expressed a fear of his brothers and a fear that he would be unable to have a normal life in Algeria. He states that he decided that the best solution was to leave Algeria and go somewhere where "being gay was not a crime and not hated by society". These are indications that it was familial and societal disapproval that led the appellant to conduct his homosexual relationship discreetly in Algeria. It is understandable that he would prefer to live in a country where such discretion was not so necessary. It does not follow from this, however, that he faces a real risk of persecution or serious harm in Algeria.
- 18) Indeed, the case law and much of the country information indicates otherwise. The Judge of the First-tier Tribunal was entitled to find that in general societal and familial disapproval of gay men in Algeria does not reach levels that are persecutory or amount to serious harm. This does not mean that there would be no risk to the appellant from conducting a homosexual relationship in Algeria but it means that the level of risk would be low.
- 19) Reference was made before me to the case of HJ (Iran). It was submitted that there was a failure by the judge to address the terms of HJ (Iran) in considering the appeal. I am satisfied, however, that on the evidence before the judge the test for persecution set out by Lord Rodger at paragraph 82 of HJ (Iran) was not met. The fear expressed by the appellant, as found by the judge, was of societal and familial disapproval and discrimination. It was familial disapproval which caused the appellant to conduct his relationship discreetly. It was not necessary for the judge to give express consideration to the test in HJ (Iran) because the conditions for establishing persecution were not met.
- 20) The remaining question relates to the relationship between the appellant and his partner in the UK, who has now been removed to Pakistan. In granting permission to appeal the Upper Tribunal Judge commented that the judge's reasoning in relation to the future of this relationship was arguably insufficient. The judge said only at paragraph 65 that the appellant's partner could accompany him to Algeria or the couple could relocate to Pakistan. The position now is that the appellant has failed in his claim for international protection in the UK, as it appears his partner did also. The question of whether the appellant and his partner will remain in contact and will endeavour to see each other again is largely a matter for them. They have no entitlement to do so at present in the United Kingdom. It does not follow from this that they cannot pursue their relationship discreetly in another country.

21) For the reasons I have given I do not consider that the Judge of the First-tier Tribunal made an error of law such that her decision should be set aside. The conclusions she reached were open to her upon the evidence. The question of whether the appellant would have forgotten to lock his bedroom door is not material to the judge's finding that the appellant is a gay man who conducted a relationship discreetly in Algeria to avoid societal and familial disapproval.

Conclusions

22) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

23) I do not set aside the decision.

Anonymity

24) The First-tier Tribunal made an order for anonymity. I continue that order for the reasons given by the First-tier Tribunal.

Signed

Date

Judge of the Upper Tribunal

5 November 2014