



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10068/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 26th April 2019

Decision & Reasons Promulgated
On 30th May 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MR A N
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Loughran of Loughran and Co, Solicitors

For the respondent: Mr. M Mathews, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Algeria who, in February 2018 made a claim for protection. He said he realised he was Gay in his mid-teens and had 2 relationships. His father learnt of his sexuality and beat him. A number of years later his father disowned him because he no longer practised Islam. Later his father assaulted him and he complained to the police about this . There was a court hearing in 2010 and his father was convicted. He claimed to fear his family on

return and Algerian society because of how Gays are treated and also because he no longer follows Islam.

2. His claim was rejected by the respondent in August 2018. His account was not accepted. He had produced documents about the court hearing but the respondent attached little weight to these, referring to inconsistencies. Overall, his account of his sexuality had been considered inconsistent and unclear and his claim to be Gay was rejected.
3. It was not accepted he would face any difficulties on account of his religion. In making his claim he had not indicated any problems because of religion and the Algerian Constitution provides for freedom of choice.
4. In considering his credibility reliance was placed upon section 8 of the 2004 Act. He had given different dates as to when he arrived in the United Kingdom, being either 2004 or 2010. He also travelled through various safe countries and when stopped in London had forged French identity documents. He also had been working illegally in the United Kingdom.
5. If the claim were true, the respondent referring to the country guidance case of OO (Gay Men) (CG) [2016] UKUT 65. If a Gay person did not reveal their sexuality because it might attract upsetting comments or result in discrimination but not persecution. Regarding the fear of his family, the respondent took the view it was reasonable to expect him to relocate as he had done before.
6. He did not have a partner and had not been here the necessary time to satisfy paragraph 276 ADE. The respondent saw no reason why he could not reintegrate into his home country. No exceptional circumstances were identified. He referred to having an abscess on the back of his neck but the respondent concluded he could obtain medical treatment in Algeria.

The First tier Tribunal.

7. His appeal was heard by First-tier Tribunal Judge C McManus at Glasgow on 27 November 2018. In a decision promulgated on 11 October 2018 the appeal was dismissed. The appellant was represented by Ms Loughran, as he is now.
8. The judge heard from the appellant. The decision records the appellant's evidence as being that he had no long-term homosexual relationships since arriving in the United Kingdom. He regularly would visit Gay saunas in Glasgow and Edinburgh. A medical report indicated he had been diagnosed with syphilis. He was on a waiting list for the removal of the cyst from his neck.

9. Paragraph 15 records the Presenting Officer's submissions about the treatment of Gays in Algeria. There was reference to the respondent's country policy and the country guidance decision of OO. It was submitted that although there was discrimination this was below the persecution threshold. It was accepted that homosexuality was a criminal offence in Algeria. Paragraph 16 recorded that some members of the LGBT community in Algeria lived openly and there was no evidence of a policy of harassment. It was also argued that the fact the appellant complained to the authorities about his father and who was convicted supported the view that there was sufficiency of protection.
10. The submissions made on behalf of the appellant were recorded at paragraph 21 onwards. There was reference to extreme stigma. The judge was asked to consider the Upper Tribunal decision in OO with the Supreme Court decision in HJ Iran on the significance of how a person would live. It was submitted that the appellant should not be expected to live 'discreetly'. His circumstances were distinct from that in OO in that the appellant would not choose to live discreetly.
11. The judge accepted the appellant's account about his sexuality and placed emphasis upon the court documents. Whilst First tier Judge McManus found he was Gay his general credibility was not established. The judge did not accept he would live as an openly Gay man if returned. The judge referred to his account of limited sexual activity in Algeria and whilst in the United Kingdom. The judge concluded that his lifestyle in the United Kingdom was consistent with the conclusion that he would not live openly as a Gay man in Algeria and this was not by reason of any fear.
12. The judge concluded that there was not at risk of persecution save from his immediate family members. The judge referred to the background information and concluded there was sufficiency of protection. The risk from his family could be avoided by relocation. The judge concluded the appellant could reasonably live elsewhere in Algeria where it was not publicly known he was Gay.

The Upper Tribunal

13. Permission to appeal to the Upper Tribunal was granted on the basis it was arguable the judge did not give clear and sufficient reasons for concluding the appellant would not live openly as a Gay man if he relocated within Algeria. It was also arguable that the judge erred in concluding living discreetly would not be because of fear of persecution.

14. Ms Loughran referred me to the 3 grounds upon which an application for permission was made. The 1st of these related to the judge's comments at paragraph 34 that the appellant could relocate where he would not be known as being Gay. She submitted the appellant would be known as being Gay throughout Algeria. She submitted the court judgement was a public document and that his father would want it to be distributed to cause further difficulties for his son.
15. Her second-ground was that the judge at paragraph 34 found it likely that on return to Algeria the appellant would choose not to live as an openly Gay man and this would be for reasons other than a fear of persecution. She contends that the judge did not provide reasons for this. She referred to what the appellant at question 104 said, namely, he would not keep his sexuality a secret.
16. The final argument was that the judge erred in linking the appellant's lack of general credibility with the rejection of his claim that he would live as an openly Gay man. Because he may have been untruthful about certain aspects of his claim the not mean necessarily other aspects were untrue. She said the appellant's evidence was that he had been going to Gay clubs and saunas whilst here and therefore was leading openly Gay life.
17. In response, Mr Mathews said it was necessary to consider the reason why a person would live in a certain way. He submitted that the judge concluded the appellant would live a lifestyle which would not bring him into conflict. This is based upon his account of how he had lived in Algeria before and also how he had been living in the United Kingdom where there were no restrictions. The judge also had regard to the country guidance decision in relation to the objective risk. He submitted that the 1st ground advanced did not demonstrate any error of law. He described it as a merits ground. The 2nd ground he read as a reasons challenge. He submitted the judge gave adequate reasons for this conclusion at paragraph 33. Again, he submitted the third ground advanced was on the merits rather than any error of law. He submitted the grounds advanced did not engage with the country guidance decision.
18. In reply, Ms Loughran referred to the appellant's evidence at question 90 of the interview where he said he attended nightclubs and discotheques and Gay saunas where he would meet partners. She submitted there was a tension between what was said in HJ Iran and the country guidance decision of OO. She acknowledged that if the appellant would modify his behaviour due to social pressure this would be insufficient. However, she contended that the appellant had already been attacked because of his sexuality and this was a reason for self-imposed restrictions.

Consideration

19. The country guidance decision of OO (Gay Men) (CG) [2016] UKUT 65 is on all fours with the appellant's main claim. The First-tier Judge followed this decision. The country guidance indicates a very limited risk and so presented the appellant with an uphill struggle to establish his claim. Whilst homosexual behaviour is criminalised the country guidance decision found that in Algeria there was no real risk of prosecution. In the few instances where this has occurred there has been some other aggravating factor. The decision also points out that the criminal law is entirely secular and Sharia law is not applied. Case also found that there was a likelihood that a Gay who conceal his sexual orientation in so because of the social mores and that the situation fell below the threshold of persecution. The Upper Tribunal found that an individual would not face a real risk of persecution if he were suspected of being Gay.
20. The main real risk identified in OO (Gay Men) (CG) was from an individual's family. I note the court documents in the appellant's claim clearly record the account that his father assaulted him for being Gay. This is significant evidence of sufficiency of protection. In any event, localised difficulties can be avoided by relocation. The country guidance case sets out that such an individual will attract no real risk of persecution. The position is different if he can demonstrate that due to his personal circumstances it would be unreasonable and unduly harsh to relocate. Particular characteristics might give rise to higher level of disapproval. The country guidance counters the 1st point made by Ms Loughran that publication of the court hearing would place him at risk on relocation.
21. I do not find a conflict between OO (Gay Men) (CG) [2016]UKUT 65 and HJ (Iran) [2010] UKSC 31. The Upper Tribunal at paragraph 11 set out the guidance given by Lord Rodger at paragraph 82. The 1st question to ask was whether the individual was in fact Gay as claimed or perceived to be Gay. In the instant case the judge did find the appellant was Gay.
22. The next question was whether Gay's who lived openly in the particular country involved would be liable to persecution. In OO (Gay Men) (CG) the Upper Tribunal at paragraph 12 pointed out that whilst homosexual behaviour is criminalised in Algeria the jurisprudence establishes that this alone would not constitute persecution. If the offence carries imprisonment there will still need to be evidence that it is actually applied. The Upper Tribunal had the benefit of expert evidence about the criminal sanctions and recorded that prosecutions were extremely rare. The Upper Tribunal concluded that that the evidence indicated the Algerian authorities chose not to prosecute even when there was cogent evidence of

behaviour covered by the criminal code. Consequently the country information is not supportive of the 2nd question raised in HJ Iran.

23. The 3rd question posed in HJ Iran was what the applicant would do if returned. If the situation was they would live openly as a Gay man and as a consequence be exposed to real risk of persecution then the claim succeeded. This was so even if this can be avoided by hiding their sexuality. In the case of someone who does hide their sexuality then it is necessary to consider why. If this is because of fear then they have a well-founded fear of persecution. However, if there are other reasons, such as societal, which had nothing to do with the fear of persecution they would not. OO (Gay Men) (CG) addresses this at paragraph 54 onwards.
24. The Upper Tribunal at paragraph 57 observed that there was evidence of Gay Algerians who had moved to France still did not live openly even though there was no obstacle to doing so. This led the Upper Tribunal to conclude that they had not lived openly in Algeria for reasons such as self-perception rather than fear of persecution.
25. In summary I find no conflict between the decisions as Ms Loughrey has suggested. I find that the Upper Tribunal is applying HJ Iran in the context of Algeria.
26. The findings in the appellant's case mirror OO (Gay Men) (CG) in relation to why the appellant might not live openly. This is encapsulated at paragraph 30 of the decision. I find the comments there are entirely compatible with HJ Iran and OO (Gay Men) (CG).
27. In conclusion, I find the decision indicates a careful analysis of the evidence and case law. The judge made the significant and fundamental finding for the claim that the appellant was Gay as he claimed. The suggestion by the appellant that if returned he would behave in a manner which might increase the risk was rejected by the judge. This was based primarily upon the case law and the content of paragraph 30. In addition, the judge was entitled in assessing this claim to take into account the appellant's overall credibility. I appreciate that a person may tell lies about one aspect but it does not follow the entire claim is untrue. However, the judge did not base the conclusion on this premise. The judge has set out clearly the reasons behind the decision and these are entirely sustainable. I find no material error of law established.

Decision.

No material error of law has been established in the decision of First-tier Tribunal Judge McManus. Consequently, that decision dismissing the appellant's appeal shall stand.

Francis J Farrelly
Deputy Upper Tribunal Judge.
25th May 2019