



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/10392/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 24<sup>th</sup> October 2019

Decision & Reasons Promulgated  
On 07<sup>th</sup> November 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

A H  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr D Chirico, South West London Law Centre  
For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Morocco, born on 24<sup>th</sup> March 1985, who fears return to Morocco owing to a fear of the authorities in Morocco, society in general, and his family, because he is gay.

2. The appellant was issued with a student visa valid from 12<sup>th</sup> March 2010 and he entered the United Kingdom ('the UK') on 25<sup>th</sup> March 2010. He returned to Morocco in April 2011 and returned to the UK within the validity of his student visa, overstayed and was arrested as an illegal entrant on 8<sup>th</sup> August 2012; he claimed asylum. On 18<sup>th</sup> March 2015, the Secretary of State's refused the appellant's protection and human rights claim. I note the three year time lapse between the claim and the Secretary of State's decision but the further delay in the history of this appeal was occasioned because the appellant failed to lodge his appeal in time; it was, however, concluded on application to the First-tier Tribunal that it was in the interests of justice to extend time for his appeal because of the appellant's mental health issues. On 1<sup>st</sup> April 2019, First-tier Tribunal Judge Mace dismissed the appellant's appeal. The appellant appealed.
3. The grounds of appeal identified that the Secretary of State's decision under appeal focused on the appellant's credibility but there was no separate consideration of any evidence about the treatment of LGBT people in Morocco and the judge had failed to make a proper analysis and proper findings. There was a flawed conclusion that the appellant's past sexual experiences had been consensual, for example that the appellant "has been able to express his sexuality in the past as described without encountering adverse attention from society in general or the authorities". The grounds of application for permission to appeal set out that the judge had failed to follow *HJ (Iran) [2010] UKSC 31*. The judge accepted that the appellant was gay but did not clearly reason whether the appellant could return to his small home city of Berber, and even if the judge had concluded that the appellant could not return to his home, the judge had not adequately reasoned whether the appellant could live openly without taking any steps to conceal his sexual identity, elsewhere and thus reasonably relocate. Further, the judge should have considered whether he would commit suicide. Risk in the home area and risk following relocation were not sufficiently demarcated in the decision.
4. The matter came before me on 2<sup>nd</sup> August 2019 because of the challenge to the First-tier Tribunal decision which dismissed his claim to have a well-founded fear of persecution and his claims under Article 3 of the ECHR. I found the grounds of appeal were well founded and constituted a material error of law and set aside the First-tier Tribunal decision, but I preserved the findings that the appellant was credible as to his homosexuality, [paragraphs 29 and 31].
5. The matter was resumed before me and further evidence was admitted, without objection from the Secretary of State, under Rule 15(2)A of The Tribunal Procedure (Upper Tribunal) Rules 2008. This included a letter from South West London Law Centre to the Single Competent Authority dated 7<sup>th</sup> October 2019, an addendum psychiatric report from Professor Cornelius Katona dated 2<sup>nd</sup> September 2019, a letter from Sarah Anderson, Chief Executive of the Listening Place dated 4<sup>th</sup> October 2019 and a chronology.

6. Although not conceding the claim at the hearing before me, Mr Walker acknowledged that the medical reports confirmed that the appellant was a high suicide risk. The appellant had been found to be gay by the First-tier Tribunal, could not return to his hometown and had serious mental health issues. Mr Walker also acknowledged, sensibly in my view the ongoing and serious nature of the appellant's mental health condition. Mr Walker conceded that there needed to be an assessment of whether discrimination and harassment would amount to persecution in the appellant's *particular* case because of his mental health issues which was set out in the reports.
7. Mr Chirico relied on his skeleton argument pointing out that it had taken a long time for the appellant to build trust in healthcare professionals. The appellant would be vulnerable to exploitation and the combination of his sexuality, his mental health problems, and his past experiences of exploitation should lead to a finding that this particular appellant would be at risk on return to Morocco.

Analysis.

8. The approach to be adopted when considering asylum claims by those who are gay was explained in *HJ (Iran)* at paragraph 35 by Lord Hope

*'[35]...It is necessary to proceed in stages.*

*(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.*

*(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.*

*(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.*

*(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.*

*(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum.*

9. The First-tier Tribunal assessed the particular evidence of the appellant, accepted the appellant was gay, and stated as follows

*'Having considered all of these matters I am satisfied that the appellant has given an accurate and truthful account of his sexuality' [29].*

10. That finding was preserved.

11. The acceptance of his sexuality renders the appellant's account that he was attacked by his father, because of his sexuality, credible and thus he remains at risk in his hometown. Although there were some inconsistencies in the account (and in relation to the stabbing of the appellant) it is important to contextualise the evidence in view of the appellant's vulnerabilities; he was loathe to discuss the stabbing as it depressed and overwhelmed him. To support this, Dr Katona produced two recent reports. She is a well-qualified and experienced author and practitioner on psychiatry, Emeritus Professor of Psychiatry with the University of Kent and Honorary Professor at University College London. She identified the impact of his mental health condition on his ability to give a consistent account. The UK Home Office Country Policy and Information; sexual orientation and gender identity (July 2017) ('CPIN') confirms at 2.3.14 that

*'it is difficult for an LGBT person to be accepted by their family as such. Sources point to a lack of acceptance; harassment; intimidation and alienation'.*

12. I accept, on the lower standard of proof that the appellant is at risk from his father and brothers should he return to his hometown.
13. The appellant delayed in his asylum claim from his re-entry to the UK until his was arrested. *JT Cameroon v SSHD [2008] EWCA Civ 878* confirms, however, it is the duty of the judicial decision maker in every instance to reach his own conclusion upon the credibility of the claimant. Section 8 of the Asylum and Immigration Treatment of Claimants) Act 2004 should be taken only as part of a global assessment of credibility and is not the starting point *SM [2005] UKAIT 00116*. Bearing in mind the mental health difficulties of the appellant I find that the delay does not damage his credibility such as to fundamentally damage his claim.
14. Whilst in Morocco the appellant on a number of occasions over a period of years experienced sexual encounters with different men, meeting at bars, restaurants and cafés; and a relationship with his cousin M.
15. His experiences of sex with foreign men in Morocco, began when he was 12 or 13 years old and the majority of occasions were mediated by Moroccan men acting as 'tourist guides'. As set out in the error of law decision past sexual *exploitation* is irrelevant to the question of whether a person will be able to live his or her sexual identity openly; the evidence of tolerated sex tourism in Morocco, particularly when the appellant was said to be exploited, is not helpful to the question of whether a Moroccan gay man can be wholly open about his sexual identity in the manner described by the Supreme Court in *HJ (Iran)*. As the appellant states in his witness statement, he was introduced by Moroccan men acting as 'tourist guides' to European men who used him in Morocco and only later he realised this as exploitation. The information he gave on this aspect of his account was sufficiently detailed to be accepted as part of his past experience, bearing in mind the acceptance of his sexuality.
16. It is notable that his relationship with M, his cousin, whilst in Morocco was, according to the appellant, was conducted with secrecy.
17. I do not find that the appellant had lived an open life as a gay man in Morocco in the manner contemplated by the Supreme Court in *HJ (Iran)*, but I accept that following his experience in the UK he would wish to do so on return. The appellant's experience as a student whilst he was in the UK where he conducted a relationship openly is indicative that he would wish to live an openly gay life in Morocco.
18. I turn to an assessment of the treatment of gay men in Morocco and whether the appellant could relocate as an openly gay man. At page 5 of the Secretary of State's refusal letter she noted "*it is also noted that being gay in Morocco is not accepted and it is not legal to have a gay relationship in Morocco*". This was stated to be objectively verified from a human rights report on societal abuses at section 6. The Secretary of State's observation was, however, that the appellant was not

gay and therefore did not need protection on return. Mere criminalisation of homosexuality, however, does not necessarily mean that persecution will ensue.

19. The CPIN (noted above) at 2.3.5 commented on 'State Treatment' as follows:

*2.3.5 'Same-sex sexual acts are prohibited by article 489 of the Moroccan Penal Code. The penalty on conviction can result in between 6 months and 3 years' imprisonment and a fine. Other articles of the penal code may also be applied – notably articles 490, which criminalises sex between unmarried persons, and 491 which criminalises adultery (see Criminal/Penal Code).*

*2.3.6 Up-to-date official statistics to quantify the number of cases where prosecutions are sought or not; persons convicted or acquitted; sentences handed down etc. are not available (see Official statistics on use of the law).*

*2.3.7 Although cases involving prosecutions appear to be reported across a variety of both national and international media outlets, these are relatively few in number and do not appear to contradict the commonly held view that the law is used rarely (see Use of the law generally and Demography).*

*2.3.8 It also appears as though the law, when used, involves cases of men involved in same-sex sexual acts; it is rarely, if ever, used against women'*

With regards 'Societal Treatment' the CPIN records:

*2.3.16 In general, the level of discrimination faced by LGBT persons in Morocco by society in general and/or their family is not sufficiently serious by its nature and repetition as to amount to persecution or serious harm.*

*2.3.17 However, decision makers must consider whether there are particular factors relevant to the specific person which might make the treatment serious by its nature and repetition. For example, previous physical attacks which are reasonably likely to continue on return; those who have previously been arrested and/or prosecuted under the penal code, including those who report incidents to the police which has exposed them to that risk.*

*2.3.18 Each case must however be considered on its facts with the onus on the person to demonstrate that they would be at real risk on return*

20. The CPIN also cited information with regard the gay 'scene' at 8.2 such that

*'the visibility of gay people in Morocco has increased in the last few years but many still face huge challenges in the country'.*

21. There were references to contradictory reports in the CPIN and to articles which made pejorative references to Tangier, Marrakesh, Essaouira and Agadir as being 'gay nests' and the CPIN refers to "an underground gay community in Morocco" and a description that "gay men whom he sees are prostitutes come out at

night” and that “the situation of the LGBTQ community in Morocco depends on various factors (social class, education level, region in which they live...”

22. The CPIN also recorded that “the Moroccan Association of human rights (Association Maroucaine de Droits Humains -AMDH) informed the Danish immigration service as part of their October 2016 fact-finding mission that

*‘the only safe public space in the society is the University media where intellectuals are known for being rather tolerant’*

and further

*‘First, people who are wealthy and therefore benefit from a certain financial independence or who have power that de facto to protect them against homophobic aggression and contempt all, at least, they benefit by protection in case they are arrested by the police stop secondly people from the middle class and the working class attempting to conceal their sexual orientation and who are victims of contempt and aggression enacted by individuals groups. Within the middle-class, those who express their gender identity the most are also those who are the most exposed to violence’.*

The report also identified that the ‘LGBT ‘scene’ in Morocco is organising itself discreetly’. Although there was reference to the opposition to the gay community as stemming from a small section of the community not the government there were also a citation that ‘no gay person can live freely in Morocco’ [9.1.5]/

At [9.1.7] the CPIN noted the report of the Office of the United Nations High Commissioner for Human Rights as part of the May 2017 Universal Periodic Review process identified that

*“the Human Rights Committee recommended that Morocco... Put an end to the social stigmatisation of homosexuality incitement to hate directed at persons because of their sexual orientation or gender identity’*

23. The Danish Immigration Service Report dated 2017 recorded in its executive summary that

*“LGBT persons in Morocco are exposed to additional risk of social rejection, prejudice and violence compared to heterosexual Moroccans” and further “according to four interviewed sources, it is almost impossible for an LGBT person fearing for his or her safety to obtain efficient protection by the police”.*

It added

*“There have been a number of cases brought to trial in 2015 and 2016 invoking article 489 where men have been found guilty of committing homosexual acts some based on confessions of the defendants obtained at the police station and signed without the presence of a lawyer. The level of convictions range from 4 months to one year of*

*imprisonment with fines of 500 deer arms, however, convictions above 4 months were given for more than one violation of the penal code”.*

It was further recorded that *“the conditions in Moroccan prisons are precarious in general. LGBT people constitute a vulnerable group while imprisoned”.*

24. From the information above, including the reputable source of the Danish Immigration Service as recently as 2017, I conclude that it is possible for certain sections of the community to live an openly gay life in Morocco but homosexuality is outlawed, convictions are recorded as pursued, (albeit the statistics were not available), prison sentences meted out and prison conditions are poor. The overall reports together with the specific evidence for this appellant do not suggest that for this particular appellant it would be possible to relocate even to a large city whether there may be more of a ‘gay scene’. I have considered the evidence holistically.
25. A particular feature of this appeal is that on 22<sup>nd</sup> August 2018 the appellant had been referred to the National Referral Mechanism for Trafficking victims by the Salvation Army. On 29<sup>th</sup> August 2018 he was issued with a Positive Reasonable Grounds decision by the Competent Authority. The appellant suffers from a serious mental illness and has complex needs which are set out in detail in the evidence of his treating medical teams, his support workers and in the expert report of Professor Katona who diagnosed complex PTSD with secondary psychotic features and a major depressive order. The appellant was said in that report to be a victim of trafficking and abusive treatment by older gay men and had reportedly self-harmed on many occasions. For the purposes of the resumed hearing before the Upper Tribunal a second report from Dr Katona was produced dated 2<sup>nd</sup> September 2019. The expert considered that if he were returned to Morocco his PTSD and depressive systems would worsen significantly; the appellant would be unlikely to have sufficient trust in the Moroccan authorities to seek or accept specialist treatment. Dr Katona had already identified the likely significant deterioration in the appellant’s mental health if he were returned to Morocco at [13.1 – 13.5] of her report dated 12<sup>th</sup> February 2019. She also identified the real risk of ‘re-victimisation’ should he return to Morocco and a real risk of a significant attempt at self-harm, possible suicide [13.9-13.11]. She added, in her first report, that even if suicide were not attempted *‘he would be unlikely to have sufficient trust in the Moroccan authorities to accept specialist treatment for his worsening mental symptoms’*; he would remain at significant risk of suicide in the long-term.
26. I accept Dr Katona’s evidence and that of Mo Kempson, outreach worker with victims of trafficking and Miss N Nasim, LGBTQ asylum support worker/volunteer, who confirmed the complex support networks from which the appellant had benefited in the past year including counselling and social support which were inextricably linked. Ms Kempson assists the appellant with taking medication (which includes the anti-psychotic drug Olanzapine) and advised that he was prescribed fortnightly because of the risk of self-harm



and that he remained extremely vulnerable. The reports were objective and detailed, and I accept the evidence therein. Miss Nasim made the point that her trust was reticent about giving letters of support.

27. The CPIN at Section 12.1 on Healthcare highlighted the difficulties with access to healthcare overall

*12.1.1 In an October 2013 Response to Information Request, the Immigration and Refugee Board of Canada ('the Canadian IRB') cited a May 2010 Afrik News article, which in turn referenced the coordinator general of Kifkif as having said that 'sexual minorities are not always well received by healthcare workers and that Kifkif refers them to doctors [and psychologists] with whom the organization collaborates.'*

...

*12.1.4 In an October 2016 interview with the Danish Immigration Service, the Moroccan Association of Human Rights (Association Marocaine de Droits Humains - AMDH) stated that as a consequence of self-censorship '[...] LGBT persons are reluctant to approach existing health care services when they suspect to suffer from a sexual health related problem out of fear of being exposed to prejudices by the health workers when they discover their LGBT identity. According to AMDH, this reluctance has a negative impact on the effective access to HIV/AIDS prevention services, as there are no medical services targeting LGBT persons. Stigmatisation is also a common practice within in the health sector'.*

28. I accept that there are medical facilities available in Morocco but in his medical condition I do not accept the appellant, on the strength of the evidence above, would be able to access those facilities, with his present mental health difficulties as detailed by Dr Katona. It is reasonably likely that would expose him to further risk of re-victimisation and exploitation without protection and this reaches the threshold for persecution and discrimination in Morocco.

29. As set out at paragraph 21 by Lord Bingham in *Januzi v Secretary of State [2006] UKHL 5*

*'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. The source of the persecution giving rise to the claimant's well-founded fear in his place of ordinary domicile may be agents of the state authorised or directed by the state to persecute; or they may be agents of the state whose persecution is connived at or tolerated by the state, or not restrained by the state; or the persecution may be by those who are not agents of the state, but whom the state does not or cannot control.*

30. This is an appellant who has experienced further education although he did not finish his degree at the university of Agdal in Morocco but undertook a 2-year diploma in commerce in Morocco. He then came to the UK to learn English but here he experienced self-harm in the form of drinking and drugs,

and he failed to attend classes. It was from the UK that he was trafficked to Belgium. There is clear evidence that the appellant has now suffered with complex PTSD and secondary psychotic features. As identified in *Januzi* where medical care cannot be provided or is clearly inadequate, the area for relocation may not be a reasonable alternative. In these individual circumstances, when considering the evidence holistically, I find it likely his medical condition, and lack of access to it, would render him more vulnerable. Moreover, I find that this would impede his ability to act discreetly on return to Morocco which in itself would place him at greater risk in the light of the background evidence. I find that on his particular profile in the light of the background evidence he would be at risk of persecution on the lower standard of proof, which must also apply to the findings in relation to the salient background facts. His 'discretion' in Morocco hitherto was only in an exploitative situation, prior to the onset on his mental health difficulties and unlikely to be re-adopted. He would have to be discreet because otherwise he will be persecuted, and, in the light of the individual circumstances of the appellant together with the country background material that fear is well founded.

31. In addition, the appellant as observed by Dr Katona, is likely to be vulnerable to further exploitation following a forced return to Morocco. She also opined, and with which no issue was taken, his symptoms of PTSD and depression would 'prevent him from working to support himself and [...] securing his basic needs such as food and accommodation'. I accept therefore that there is a real risk of serious harm to the appellant from the state authorities and/or from Moroccan society if the appellant lived openly as a gay man in Morocco. He would be unable to avoid such harm by being consistently discreet and any such concealment would be his fear of persecution and thus he is entitled to international protection. The appellant has lived as a homeless person in the United Kingdom, engaged in substance abuse in the UK and in Morocco and there is a finding that he has been trafficked from the UK. I accept that he would be highly vulnerable to further exploitation on return to Morocco particularly bearing in mind the difficulties with access to healthcare with little likelihood of being able to avail himself of state protection.
32. The appellant's persistent and serious mental health condition would elevate the discrimination found in Morocco to levels which would amount to persecution. He is therefore entitled to asylum and Article 3 protection.
33. Turning to Article 3 in relation to suicide the unchallenged medical evidence was that a forced return to Morocco would result in the significant risk that the appellant would harm himself with potentially fatal results. In line with *Y and Z v SSHD [2009] EWCA Civ 362*, the appellant has, owing to the credibility of his sexuality his past experiences and his medical problems (as set out in the expert report) being accepted, substantiated an objective and a well-founded subjective fear such that he is at serious risk of self-harm should he be returned to Morocco.

34. For completeness I find that the appellant can comply with the provisions of Paragraph 276ADE because there would be very significant obstacles to his return to Morocco as highlighted above.

**Order**

I therefore allow the appeal on asylum.

I therefore allow the appeal on human rights grounds (Article 3 and 8).

I therefore allow the appeal under the Immigration Rules.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington*

Date 1<sup>st</sup> November 2019

Upper Tribunal Judge Rimington