Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00658/2020

THE IMMIGRATION ACTS

Heard at Field House
On 14 July 2021

Decision & Reasons Promulgated
On 19 October 2021

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

N A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involved protection issues. It is appropriate to continue the order because this decision also considers welfare issues relating to children. 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.

Representation:
For the appellant: Ms K. Tobin, instructed by Malik & Malik
For the respondent: Mr T. Melvin, Senior Home Office Presenting Officer

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DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 14 January 2020 to refuse a protection and human rights claim.

2. A First-tier Tribunal judge dismissed the appeal on protection grounds but allowed the appeal on human rights grounds with reference to his private and family life in the UK with his sister and her children.

3. Both parties appealed the decision. In a decision dated 13 January 2021 a panel of the Upper Tribunal found that the First-tier Tribunal decision relating to the protection claim did not involve an error of law (annexed). However, the panel found that the decision relating to the human rights claim did involve the making of an error of law and that aspect of the decision was set aside to be remade in the Upper Tribunal.

4. After an adjournment arising from the failure of the appellant's representative to comply with directions made by the Upper Tribunal, the appeal was eventually listed for a face to face hearing on 14 July 2021 at which the appellant and six other witnesses gave evidence. The details of the evidence given, and the oral submissions made by the parties, are a matter of record.

Decision and reasons

Long residence – a 'new matter'?

5. The appellant claimed to have entered the UK illegally on 16 January 2001 and says that he has remained here ever since. The respondent's decision letter considered whether the appellant met the private life long residence requirement. At that stage the respondent noted that the appellant entered the UK in 2001 and stated that he had 'lived in the United Kingdom for approximately 19 years' but it was not accepted that he had lived in the UK for the 20 years as required by paragraph 276ADE(1)(iii) of the immigration rules.

6. The appellant gave evidence before the First-tier Tribunal. Nothing in the First-tier Tribunal judge's summary of the submissions indicate that any issue was taken with his length of residence. The judge proceeded to make findings relating to the private life long residence requirement under paragraph 276ADE(1)(iii) of the immigration rules, but concluded that, even if an application was considered at the date of the hearing, the appellant would not meet the requirement because he had only lived in the UK for a period of 19 years and 1 month.

7. When the Article 8 aspect of the First-tier Tribunal decision was set aside by the Upper Tribunal in January 2021 it was foreseeable that the appellant would rely on 20 years' residence by the time the decision came to be remade. I took the

preliminary view that this was not in fact a new matter because it had been considered by the respondent in the decision letter and by the First-tier Tribunal, and that it was only the factual matrix that was changed by the passage of time. This tribunal had some doubts about the correctness of the decision in *Birch (Precariousness and mistake; new matters)* [2020] UKUT 86 (IAC), so out of an abundance of caution, the appellant was asked to file and serve detailed of any new matters he might rely on in the human rights claim and the respondent was given time to respond by a certain date.

8. The case was listed for a remote hearing on 17 May 2021 but was adjourned to due failure to comply with directions to prepare a proper witness list and accompanying statements in advance of the hearing. By that date it was clear to the respondent that the appellant would rely on paragraph 276ADE(1)(iii) of the immigration rules. A further direction was made for the respondent to file her position on whether this was a new matter or not, and if it was thought to be a new matter, whether she gave consent to it being determined: see section 85 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'). The respondent failed to comply with the direction. In the meantime, the Upper Tribunal published the decision in *Hydar (s 120 response; s 85 "new matter": Birch)* [2021] UKUT 176 (IAC), which confirmed that the *Birch* was decided *per incuriam*.

9. Mr Melvin's skeleton argument argued that in light of *Hydar* section 85 NIAA 2002 applied to the Upper Tribunal. The skeleton argument stated that the respondent refused to give consent for the new matter to be determined because the Upper Tribunal would be the 'primary decision maker' on the 20 year issue. It would be open for the appellant to make an application under paragraph 276ADE(1)(iii) after the hearing. In submissions, Mr Melvin suggested that the respondent might want to interview the appellant in relation to the issue although, as an expert tribunal, I am aware that it is not common practice for the respondent to interview applicants in relation to human rights claims except when applications are considered alongside a protection claim.

10. I referred Mr Melvin to the respondent's policy on Rights of Appeal (Version 10) (18 December 2020). Under the heading 'The difference between a new matter and new evidence' the policy states:

> 'A new matter is a human rights or protection claim that the SSHD has not previously considered in the decision under appeal or a response to a section 120 notice.
>
> This does not mean that there cannot be a new matter when there has been a previous protection or human rights claim. There will be a new matter when the factual matrix has not previously been considered by the SSHD. A new matter is something factually distinct from the claim previously made by the appellant, as opposed to further or better evidence of an existing matter. The question of whether something is a new matter is therefore always a fact sensitive one.'

11. Under the heading 'Handling new matters before the appeal hearing' the policy states:

> 'If a new matter is raised before an appeal hearing, for example in the grounds of appeal, the SSHD should try to consider the matter before the appeal hearing so that consent can be given and the Tribunal can consider all matters relating to that appellant in a single appeal.
>
> Even if the new matter is not identified until shortly before or at the hearing, if it can be considered and a decision reached quickly, that should be done. If the new matter cannot be considered before the appeal hearing, for example because the PO needs to check whether a document is genuine and there is insufficient time to do so, the PO should inform the Tribunal that a new matter has been raised and that the SSHD does not consent to it being considered by the Tribunal.
>
> In order to make the best use of Tribunal resources, an adjournment should be sought for the SSHD to consider the new matter. Where possible, a single appeal should consider all matters that have been raised by the appellant.'

12. Under the heading 'Consent to hear new matters' the policy goes on to say:

> 'Withholding consent can delay the conclusion of the person's claim and consequently delay the grant of leave or efforts to remove the person from the UK. Consent should be given unless it would prejudice the SSHD not to be able to consider the new matter.'

13. Mr Melvin should have been aware of this policy, but his reasons for arguing that it was a new matter and purporting to refuse consent were not consistent with the guidance given to Presenting Officers. The policy emphasises that matters should be considered before a hearing, and where possible, consent should be given for all relevant matters to be considered in the appeal. I gave a copy of the relevant section of the policy to Mr Melvin to consider his position, but he maintained that this was a new matter that should be raised after the appeal.

14. Having considered the arguments put forward by both parties I am satisfied that I can determine the issue of long residence because it is not a 'new matter'. Both the respondent and the First-tier Tribunal considered whether the appellant met the requirements of paragraph 276ADE(1)(iii). At the time the appellant had not been resident long enough to meet the 20 year requirement. The fact that he would have reached 20 years' residence by the time this decision was remade was flagged up to the respondent as long ago as January 2021. The respondent had plenty of time to consider her response to the matter and to produce any evidence that might go to the 'Suitability' requirement. Her own policy indicates that this is an issue where the matter has already been considered and there is simply new evidence to be considered i.e. a longer period of residence. Her own policy urges those representing the Home Office to deal with new matters in a single appeal where possible. The respondent had more than sufficient time to produce further evidence before the hearing on 14 July 2021 if she needed to.

15. It is not arguable that the respondent was prejudiced by the reliance on 20 years residence when it was obvious from the facts of this case, and from the directions made by the tribunal, that the issue would be argued. The reasons given by Mr Melvin for arguing that this is a new matter and purporting to refuse consent for it to

be considered contradicted the respondent's policy. It would be extremely difficult for the Upper Tribunal to remake the decision on Article 8 grounds and artificially ignore the fact that the appellant might now meet the private life requirements of the immigration rules. Article 8 requires a holistic assessment of all the appellant's circumstances including his private and family life connections in the UK. I bear in mind that it is for the tribunal to decide whether an issue is a new matter requiring consent. For the reasons given above I conclude that this is not a 'new matter' within the meaning of section 85 NIAA 2002.

Article 8(1) – private and family life

16. On the face of his evidence the appellant has now lived in the UK for a period of over 20 years. The respondent did not dispute his length of residence when she refused the human rights claim in January 2020. The First-tier Tribunal judge found that he had been resident in the UK for a period of 19 years and 1 month in February 2020. I appreciate that there might not have been the need to question the matter further at the time because even if the evidence was taken at its highest the appellant did not meet the 20 year requirement. Nevertheless, his length of residence would still have some part to play in an Article 8 assessment, but no serious questions were raised at the time about his length of residence. The appellant has not produced formal documentary evidence in the form of payslips or documents relating to his residential address as proof of residence since 2001. I bear in mind that he was remaining in the UK illegally and for this reason may find it difficult to produce such evidence in his own name.

17. However, the appellant does have several close family members in the UK who I was able to speak to and evaluate their evidence. His sister Hassiba and her son 'M' were key witnesses. His relationship with 'M' is also a central issue in this appeal. The appellant lived with his sister for periods of time in the UK. The appellant took me through several family photographs in which he was pictured with his sister and her children at various ages. His sister's evidence relating to the same photos was broadly consistent. In one photo 'M' was clearly a baby. A copy of his passport shows that he was born on 17 August 2003. At the date of the hearing, 'M' was 17 years old.

18. I found 'M' to be a completely honest, open, and compelling witness. He explained the nature of his relationship with his father, stepfather, and uncle. I am satisfied that he has always had a close relationship with the appellant, and certainly since his mother and father divorced, the appellant he has viewed the appellant as the main paternal figure in his life. The combined effect of the evidence given by the appellant, his sister, and her son satisfies me that 'M' has had some difficult issues to deal with during the family separation and has also had some recent traumatic events to absorb, such as the death of a school friend in the Grenfell Tower tragedy. He said that there were some things he was able to discuss with his uncle that he would not talk to his mum about. Although he does have other paternal figures in his life, his description of the number of times he sees his father or stepfather, and the nature

and the strength of those ties, fell short of the strong bond that he appears to have with the appellant. Whilst the appellant does not appear to take full parental responsibility for the child, such as providing financial and other formal support, he does play an important role in supporting 'M' emotionally and helping him to make important decisions about his schooling and future plans. More importantly, 'M' said that he sees the appellant as the main paternal figure in his life. All of this is consistent with the findings made by the First-tier Tribunal judge who was also satisfied that the appellant played a 'paternal role' for his sister's two children from her first marriage.

19. The respondent's chronology indicates that the appellant made an application for leave to remain in 2013 and the course of events thereafter suggests that it is highly unlikely he left the UK after that time. There is less evidence relating to his early years in the UK. I bear in mind that the appellant's close family members, such as his two sisters, may have an interest in assisting him to remain in the UK. Although I found them to be generally credible witnesses, they did appear to be minimising their links with family members in Algeria, who 'M' was honest in saying they visited each year. Given that the appellant was remaining in the UK illegally, it is unlikely that he would have been able to travel on family holidays without a great deal of difficulty. Other witnesses had not known the appellant for the full 20 years, and some only had sporadic contact with him, but were able to confirm to the best of their knowledge that they were not aware of him having spent any time outside the UK since they met.

20. For the reasons given above I am satisfied on the balance of probabilities that the appellant has been continuously resident in the UK for a period of 20 years at the date of the hearing. The evidence shows that during that time he has established strong connections to the UK with friends and family members. In particular, he has a strong bond with his sister and her two children from her first marriage. Unfortunately, her second marriage also failed, and it seems that the appellant is now seen as 'the man of the house' who supports the family in practical and emotional ways. I conclude that it would be in the best interests of the two older children for the appellant to continue to be closely involved in their day to day lives as they navigate their teenage years and transition into adulthood. In the absence of a close relationship with their biological father, the appellant plays a much needed paternal role in their lives. Like the First-tier Tribunal judge I am satisfied that these ties go beyond the normal emotional ties between adult siblings or the usual loving relationship one might find between an uncle and his nephews. I am satisfied that removal of the appellant would interfere with his private and family life in a sufficiently grave way to engage the operation of Article 8(1) of the European Convention.

Article 8(2) – proportionality

21. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain

circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

22. Part 5A of the NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to private or family life and as a result is unlawful under the Human Rights Act 1998. In considering the 'public interest question' a court or tribunal must have regard to the issues outlined in section 117B in non-deportation cases. The 'public interest question' means the question of whether interference with a person's right to respect for their private or family life is justified under Article 8(2) of the European Convention.

23. It is in the public interest to maintain an effective system of immigration control. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position as to where a fair balance is struck for the purpose of Article 8 of the European Convention.

24. I am satisfied that if the appellant made an application for leave to remain at the date of the hearing, he would meet the requirements of paragraph 276ADE(1)(iii) of the immigration rules. He has been continuously resident in the UK for a period of 20 years. Although his long period of unlawful residence would usually be given significant weight as a public interest factor in a balancing exercise under Article 8, the rules make provision for those who have remained in the UK unlawfully for 20 years to regularise their status. The rule recognises that after such a long period of time a person is likely to have established strong private life ties in the UK. Aside from the lengthy period of unlawful residence, and the fact that there is evidence to indicate that the appellant has worked illegally in the UK, there is no evidence of abuses at the more serious end of the scale, such as criminal convictions, that might justify refusal on 'Suitability' grounds. The immigration rules are said to reflect where the respondent considers a fair balance should be struck for the purpose of Article 8. If it is more likely than not that the appellant would meet the requirements of the immigration rules his removal is likely to be disproportionate.

25. Some argument could be made that his 'paternal role' in relation to the children might also engage paragraph EX.1 of Appendix FM or section 117B(vi) NIAA 2002, but those issues were not argued in any detail and are not obvious given that the children have a biological father, albeit their relationship with the appellant is at least equal, if not stronger, than the one they have with their father. Having found that the appellant would meet the requirements of paragraph 276ADE(1)(iii) at the date of the hearing it is not necessary to make any detailed findings on the alternative issues. Nor do the public interest considerations contained in section 117B need to be reviewed in any detail given that the rule itself recognises that weight should be given to a private life that has been established after 20 years continuous residence.

26. When the combined effect of the appellant's long residence and the strength of his family ties are considered together, I conclude that removal of the appellant would amount to a disproportionate breach of his rights with reference to Article 8(2) of the European Convention.

27. I conclude that the appellant's removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is ALLOWED on human rights grounds

Signed *M. Canavan* Date 14 October 2021
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00658/2020

THE IMMIGRATION ACTS

Heard at Field House by video conference on 17 December 2020 (V)

Decision & Reasons Promulgated

Before

THE HON. MR JUSTICE FORDHAM
UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant on the Appeal
Respondent on the Cross-Appeal

and

NA
(ANONYMITY ORDER MADE)

Respondent on the Appeal
Appellant on the Cross-Appeal

Representation:
For the Secretary of State: Tony Melvin, Senior Home Office Presenting Officer
For NA: Kezia Tobin (instructed by Malik and Malik Solicitors)

DECISION AND REASONS

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Introduction

1. This is a case where there is an appeal and a cross-appeal, and where there is an anonymity order, so rather than refer to the parties as "the appellant" and "the respondent" we will use "NA" and "the Secretary of State". NA is 45 and a national of Algeria, which is the country to which the Secretary of State seeks to remove him. He has been in the UK since January 2001. He says that he has a well-founded fear of persecution if removed to Algeria entitling him to asylum, and that his removal there would be incompatible with the Article 8 ECHR rights of himself and others. By a determination issued on 20 February 2020, after an oral hearing conducted on 14 February 2020, First-Tier Tribunal Judge Wylie ("the Judge") refused NA's appeal on asylum grounds but allowed it on Article 8 ECHR grounds. The Secretary of State appeals to this Tribunal against the Article 8 determination, with the permission of the Judge. NA cross-appeals against the asylum determination, with the permission of UTJ Rintoul.

2. The mode of hearing involved us sitting in a hearing room at Field House but hearing submissions from the advocates through Skype. The case and its start time and the hearing room were all identified in the Tribunal's published list. The Tribunal building was open to the public and in any member of the press or public could have come and sat in the hearing room, with appropriate social distancing arrangements. A member of the press or public could also have contacted the Tribunal to ask for permission to observe the hearing through Skype. The advocates were satisfied, as were we, that the mode of hearing involved no prejudice to the interests of the parties. We are satisfied that the mode of hearing was appropriate and proportionate, and that the open justice principle was secured.

3. NA's immigration history was set out by the Judge as follows.

> [NA] entered the United Kingdom clandestinely on 16 January 2001. On 20 February 2013 he made an application for leave to remain under family and private life, this was rejected as invalid as no fee was paid, and he re-submitted the application on 18 March 2013. The application was refused with no right of appeal on 6 June 2013. On 27 January 2014 he was served with form IS131A as an illegal entrant. Reporting conditions were issued. On 20 February 2014 he was served with IS75/76 forms. He made an article 8 application which was refused and certified on 3 September 2014. On 8 April 2015 his Emergency Travel Document was agreed. On 11 May 2015 he last reported as required. On 21 September 2015 absconder action was initiated. On 31 October 2019 he was encountered and arrested by police for using forged documents. On 31 October 2019 he was detained. On 14 November 2019 his bail release request was received, on 15 November 2019 he was served with BAIL.405 due to Invalid Bail request. On 18 November 2019 removal directions were requested, and on 20 November 2019 removal directions was set for 7 December 2019. On 22 November 2019 further submissions were received, these were rejected on 28 November 2019. On 5 December 2019 he claimed asylum. He was released on bail on 10 February 2020.

Asylum

4. The Judge dealt with asylum first, and then Article 8. So will we. We therefore turn first to the cross-appeal. The essence of the case before the Judge, so far as asylum

was concerned, came to this. NA claimed that if returned to Algeria he would face mistreatment due to his membership of a particular social group, being a gay man. His family had learned of his sexual orientation in 2006. His parents and two of his brothers (all of whom live in the city of Meftah in Algeria) had rejected him after learning of his sexual orientation. His father stated that NA was not his son any more: he was dead to him. His brother Ahmed threatened him if he returned to Algeria. NA feared being killed by his family if returned to Algeria; in particular, he feared the threat from Ahmed. He would not be safe elsewhere in Algeria, because Ahmed may be able to find him, and it would not be reasonable in any event to expect him to go to a different area within Algeria and live without revealing his sexual identity: that would be unduly harsh. It would also involve very significant obstacles to reintegration.

5. At the oral hearing on 14 February 2020 the Judge heard oral evidence from NA and from his two sisters, his brother-in-law, and a friend. Documentary material was placed before the Judge and submissions were made on both sides. The Judge rejected the asylum appeal on a dual basis.

    a. In the first place, having considered "the credibility" of NA's claim, the Judge concluded: "I am not satisfied that the [NA] has established, at the lower standard of proof, that he is in fact gay". That conclusion was the Judge's answer to the first question identified by Lord Rodger for the Supreme Court in HJ (Iran) [2011] 1 AC 596 at paragraph 82, which describes the approach to be taken by a tribunal or court in deciding asylum cases based on sexual orientation. In arriving at it, the Judge referred to a number of features of the case, in particular (a) as to the source of the evidence of sexual orientation; and (b) as to NA's delay in having made any claim based on sexual orientation viewed against the immigration history and the other claims made.

    b. The second basis for the Judge's adverse conclusion in relation to the asylum claim concerned internal relocation. Having dealt with the "credibility" point, the Judge went on: "If I am wrong in this conclusion, and his delay in making the claim is because he was unwilling based on his cultural background to disclose his sexuality, I have considered if he would be at risk of persecution as a gay man in Algeria". On that question, the Judge found that NA had "not established that he is entitled to the grant of asylum". The Judge then went on to reject – of the same essential reasons – the contentions that NA was entitled to humanitarian protection or protection under Article 2 or Article 3 ECHR. In this part of her analysis, the Judge referred to three things in particular: (1) the country guidance case of OO (Gay men: risk) Algeria [2016] UKUT 00065 (IAC), from which she quoted the entirety of the headnote; (2) the nature – on his case – of NA's life in the United Kingdom so far as sexual orientation was concerned, which she described as "a very discreet life"; and finally (3) the prospect of 'internal relocation' within Algeria, in the light of NA's stated "fear of persecution from his family, in particular his brother", to live in Algeria "much as he does in the United Kingdom". The Judge went on to deal with

paragraph 276ADE(1)(vi) and rejected the argument that there would be very significant obstacles to integration.

6. In the cross-appeal on the asylum issue, NA advances three grounds of appeal, described as: (1) flawed approach to assessment of evidence regarding sexuality; (2) no reasons given for finding on risk; and (3) flawed assessment of integration prospects under paragraph 276ADE(1)(vi). Although ground (3) and paragraph 276ADE(1)(vi) are an aspect of Article 8, we will deal with it in the context of asylum and the cross-appeal, as the parties did at the hearing before us. That is sensible given that the Judge found against NA on the point, so it is necessarily part of the cross-appeal, and it is closely linked to 'internal relocation'.

Credibility and sexual orientation

7. On ground (1) Ms Tobin criticises the Judge on both aspects: (a) as to the source of the evidence of sexual orientation; and (b) as to NA's delay in having made any claim based on sexual orientation. We take each in turn.

   a. Ms Tobin says the Judge's credibility assessment was fundamentally flawed, in stating that "the only evidence that [NA] is gay comes from [NA] himself", when the evidence before the Judge included witness evidence from the two sisters who had each become aware of NA's sexuality independently of any narrative from NA himself. Their evidence was that his sister's then husband had found text messages on AN's phone between NA and his partner, and had informed the family. The friend (Mrs T) who gave oral evidence is said to have described her own assessment of NA's sexual orientation through several years of friendship.

   b. So far as concerns the Judge's reliance on the delay in making a claim based on sexual orientation, the criticism is that the judge ought to have approached late disclosure in the light of relevant and applicable guidance, together with relevant evidence adduced before her, and erred in her approach to those matters. The Judge referred later to whether NA's "delay in making the claim is because he was unwilling based on his cultural background to disclose his sexuality", which shows that the considerations relating to reasons for late disclosure of sexual orientation were matters properly before the Judge (albeit that the Home Office Guidance referred to by Ms Tobin was not specifically cited to her). The problem is, submits Ms Tobin, that the Judge's reference to reasons for delay to disclosure came only after the Judge had already reached her credibility conclusion, when it ought to have been addressed on the pathway to that conclusion.

   In consequence, says Ms Tobin, the Judge's findings on credibility are fundamentally flawed, and these criticisms – or either of them – are sufficient to set aside the adverse credibility finding.

8. In our judgment, there is force in these submissions and we cannot regard the Judge's "credibility" finding as one for which she gave legally adequate reasons in

the circumstances of this case. The Judge heard relevant oral evidence from NA, from the two sisters, and from the friend. It was for the Judge to decide the question of credibility and Lord Rodger's first question from HJ (Iran): NA's sexual orientation. Having discussed aspects of the evidence, the Judge said this:

> 62. The only evidence that he is gay comes from [NA] himself. He is supported by his two sisters who say that they were told he was gay in 2006.
>
> 63. In all the circumstances it is surprising that he had not taken steps before some weeks into his detention to claim asylum, or at least to seek advice if he were fearful of return to Algeria.
>
> 64. I am not satisfied that he has established, at the lower standard of proof, that he is in fact gay.

9. We agree with Ms Tobin that the Judge's adverse finding on credibility was made without legally adequate reasons and this amounted to an error of law.

10. In the first place, we agree that the Judge's statement that: "the only evidence that he is gay comes from [NA] himself" is, on its face, not an accurate description of the evidence.

    a. The "evidence" – which in the next sentence is recognised by the Judge as having included what was said by the sisters – was that NA's sexual orientation had been revealed by his sister's then husband, based on text messages which he said he had found on NA's phone. The Judge, earlier in the determination, had referred to the written and oral evidence of the sisters; she had then set out "[NA's] case" based on his oral evidence, witness statement and asylum interview. Even in that narrative, she had recorded that his sister's "husband found indecent text messages between [NA] and [his partner] on [NA]'s phone. He told [his sister] [NA] was gay". In the "asylum interview", to which the Judge had also made reference, NA had answered the question about how the "family found out about the sexuality in 2006" when asked "what exactly happened?": "My brother-in-law told them I was gay. He found out because he checked my phone and found texted messages from [his partner], sexual things. My sister asked me if this was true and I told the truth". There was, moreover, evidence before the Judge that the friend who gave oral evidence had come to recognise NA's sexual orientation through her observations of him during those years of friendship.

    b. In our judgment, the Judge needed to deal with the evidence from the witnesses, including as to the text messages, and needed to make clear findings as to whether or not she accepted the evidence that had been put forward, and if not why not. An adverse finding on credibility, and on sexual orientation, which did not do so but which on its face mischaracterised the nature of the evidence was not in our judgment one based on legally adequate reasons.

    c. For these reasons we conclude that the credibility findings involved the making of errors of law.

11. As to the Judge's reliance on delay in raising sexual orientation as part of a human rights claim:

    a. We agree with Mr Melvin that the Judge was right to have regard to the fact that sexual orientation was not put forward at an earlier stage when human rights claims were advanced with legal assistance in order to seek to resist removal. Particularly given that, on NA's case supported by the evidence of the two sisters, sexual orientation was known to family members – and the claimed threat if returned had already arisen – by 2006.

    b. However, in our judgment, there is force in Ms Tobin's submission that the Judge needed to address explicitly in the reasoned pathway to her conclusion, rather than referencing it only afterwards, the suggested reasons for having been unwilling more openly to have disclosed sexual orientation. The Judge referred to whether "his delay in making the claim is because he was unwilling based on his cultural background to disclose his sexuality", but only after recording the adverse conclusion.

12. It was for the Judge to evaluate the relevant considerations and arrive at a credibility conclusion, in the light of hearing all the evidence. But we accept Mr Tobin's submissions that, on this part of the determination, the Judge's reasons were not legally adequate. The question is whether that was a material error which warrants setting aside the Judges conclusion in relation to asylum, and requiring that decision to be retaken, whether by remittal to the First Tier Tribunal or remaking in this tribunal. That question of materiality depends on our assessment of Ms Tobin's grounds (2) and (3) to which we now turn.

Internal relocation and reintegration

13. On grounds (2) and (3), Ms Tobin submits as follows.

    a. Ground (2). Ms Tobin submits that the Judge dealt "perfunctorily" with the "viable internal relocation alternative"; that she failed to acknowledge the finding in OO that "where a gay man does face a real risk of persecution… From his own family members, there is no sufficiency of protection available from the police or the state authorities"; and that the Judge (erred in failing to consider whether the evidence suggests a reasonable degree of likelihood that the brother would be able to locate [NA], and what the consequences of that would be for him", in circumstances where NA's evidence was that his brother "is in the military and has threatened to kill him on return". Ms Tobin makes the submission – she accepts that it was not part of the evidence – that the brother's military position made him "well-connected" so that he would be able to "track NA down anywhere". Ms Tobin submits that the Judge's "consideration about internal relocation is insufficient" or, as she put it in her oral submissions, the "reasoning is entirely lacking". She emphasises that the country guidance case of OO (2016) found (paragraphs 176-177 and 180) that where a gay man faces a real risk of persecution from his own family members, on return to Algeria, "there is no sufficiency of protection available from the

police or the state authorities". She submits that the Judge accepted that there would be a risk if NA returned to Meftah or to Algiers but that, in stating "he could relocate elsewhere in Algeria", the Judge failed to grapple with why he would be safe elsewhere. If, says Ms Tobin, NA would be unsafe in the big city of Algiers, because of the pursuit by the family and in particular Ahmed, why would that same pursuit not make him unsafe in other areas of Algeria?

b. Ground (3). Ms Tobin submits that there are "strong reasons for finding that [NA] would not be able to reintegrate", by reference to the risk from family members and independently of that, for the purposes of paragraph 276ADE(1)(vi). She submits that NA's "subjective" fear of the threat from his family, and in particular his brother, ought to have led the Judge to conclude – in the light of the other evidence and circumstances – that there were insurmountable obstacles or there would be very significant obstacles to NA's integration in Algeria. She says the Judge erred in failing to make such a finding.

14. We cannot accept these submissions. The starting point, in our judgment, is that the Judge plainly approached the question of internal relocation, as a freestanding assessment putting to one side the question of credibility, and taking NA's case at its highest. She prefaced her assessment on internal relocation with this: "If I am wrong in this conclusion [that NA has not established that he is in fact gay] … I have considered if he would be at risk of persecution as a gay man in Algeria". The analysis which followed reflected the case being put forward by NA. At no stage did any adverse view relating to credibility re-enter, or infect, the Judge's assessment.

15. The Judge clearly had in mind the relevant law. She referred to HJ (Iran) and to the country guidance case of OO (the headnote from which, as we have said, she cited in full). The significance of the country guidance in OO, which has been recently analysed and endorsed by the Court of Appeal in YD (Algeria) [2020] EWCA Civ 1683, comes to this. (i) The general answer to Lord Rodgers second question at paragraph 82 of HJ (Iran) – "whether… gay people who lived openly would be liable to persecution" – is: no, they would not be. (ii) A well-founded fear of persecution can, however, arise from the threat from the individual's own family members, from which there is no sufficiency of protection. (iii) The question is then "whether the gay son whose families are 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" (OO paragraph 180). (iv) in the light of point (i), where a gay man does flee the threat from family to a place of relocation and lives discreetly, that "decision to live discreetly and to conceal his sexual orientation" is not so as to avoid "a real risk of persecution if subsequently suspected to be a gay man"; rather it 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" (paragraph 186c).

16. In the present case, the question was whether relocation (a) would be safe from well-founded fear of the threat from family pursuit and (b) could reasonably be expected. The Judge said this:

> 68. [NA] has lived a very discreet life in the United Kingdom, whereby even his brother-in-law and close friends have no knowledge of his sexuality. This is so within a society where homosexuality is accepted. It is likely that he has chosen to live like this under respect for social mores and a desire to avoid attracting disapproval; and to avoid shame or disrespect been brought upon his family, particularly the sister with whom he lives. She had met [his partner], but even after being told of his sexuality, [NA] did not introduce him as his partner.
>
> 69. [NA] has stated a fear of persecution from his family, in particular his brother … who lives with the parent in Meftah. If he chose not to return to Meftah, he could relocate elsewhere in Algeria. He indicated that Algiers was only about 30 km from Meftah, but he could go to another city. If he relocated he would be able to live much as he does in the United Kingdom.
>
> 70. On the lower standard of proof, I do not accept that [NA] is at risk of serious harm on return to Algeria.

17. In her consideration of the Article 8 claim, the Judge returned to the issue of internal relocation and quoted paragraph 276ADE (vi). She then said this:

> 77. [NA] claims that the obstacles to his integration to Algeria are the fear of his family, and the difficulty of living as a gay man in Algeria.
>
> 78. As previously stated, he would be able to live in a different region from his family, and as he said, they would not be able to trace him…

The Judge went on to address other features of the case relevant to integration and concluded that there were no insurmountable obstacles to return.

18. In our judgment, the Judge's reasoning in paragraph 69 expresses a finding on internal relocation which was open to the Judge, involves no legal inadequacy as to reasoning, and no error of approach. Two points are particularly important.

    a. The position so far as the brother was concerned was described in NA's asylum interview, which stated that his brother was "working in the army" in "helicopter maintenance, like an engineer". When asked about "his ranking" NA had said: "He [is] just an engineer. He doesn't have a ranking, he is just an engineer in the army". As we have explained, Mr Tobin accepts that there was no <u>evidence</u> claiming that the brother was "well-connected" and, through those connections, able to "track [NA] down anywhere".

    b. The point which the Judge made about Meftah and Algiers and "another city" needs to be understood in context. She was taking NA's case at its highest and was dealing specifically with the submission that had been made by Ms Tobin at the hearing. The submission was recorded earlier in the determination as follows:

    > [Ms Tobin] submitted that [NA] was at risk from his brother …. His relationship with his parents had broken down because of his refusal to marry. It is unlikely that he could

> safely relocate, the family home is not far from Algiers, his brother may be able to find him.

The Judge, taking NA's case at its highest and dealing with the submission that had been made. That submission had referred specifically to the proximity between Meftah (where the family home is located) and Algiers. The Judge was making the straightforward point that the threat said to arise from the geographical proximity of Meftah and Algiers – and taking NA's case at its highest – did not support the conclusion that he would be at risk from pursuit by the family in another city. Since this was the submission made, on the evidence, it also explains the Judge's reference (paragraph 69) to what NA had "indicated" so far as concerned the threat from his brother and internal relocation; and the Judge's later reference (paragraph 78) to what NA "said".

19. We are entirely satisfied that there is no legal error or error of approach in the Judge's analysis of whether internal relocation would be 'unduly harsh', or involve 'very significant obstacles' to NA's 'integration in Algeria' (by reference to paragraph 276ADE(vi)). The Judge gave legally adequate reasons for her conclusions, which were open to her, on the evidence and in light of the authorities. Those conclusions are entirely in line with what the Court of Appeal has now said in <u>YD (Algeria)</u> in particular at paragraphs 66 and 69 to 72. In the light of the conclusions on the 'objective' questions relating to fear, risk and safety – and in the light of the prominence which such objective considerations properly have in an assessment of a protection case – it is, in our judgment, impossible for Ms Tobin to sustain the contention that "subjective" fear of family pursuit would render internal relocation to an objectively safe part of Algeria, taking NA's case at its highest, unduly harsh or involve very significant obstacles to integration.

20. It follows, for all these reasons, that there is no material error of law in the determination of the Judge in relation to asylum, and the cross-appeal fails.

<u>The appeal: Article 8</u>

21. We turn to the Secretary of State's appeal against the Judges conclusion that removal of NA would be incompatible with Article 8 ECHR. In the material part of the determination. The Judge said this:

> 80. I accept that [NA] has a close relationship with his sister and her three children, particularly her older two sons, now aged sixteen and fourteen. He is close to the youngest child, aged six, but [his sister's] evidence was that the child had regular contact with his own father, and [NA] did not fulfil the paternal role as he did with the older two.
>
> 81. Both boys had written letters stating their happiness that [NA] had been released from detention was now returned to be a part of their lives. [His sister] had described the particular problems suffered by her oldest son, and the importance of [NA] in helping him through difficult times.
>
> 82. Given the length of time that [NA] has lived in family with his sister and her sons, I accept that there is a family life enjoyed between them. I must therefore consider the interests of all the family in particular the older two boys.

83. I have had regard to the test in Razgar [2004] UKHL 27 and to section 117B of the Nationality Immigration and Asylum Act 2002.

84. I must take account of section 55 of the Borders Citizenship and Immigration Act 2009 which requires that the respondent must make arrangements for ensuring that in relation to any immigration, asylum or nationality function, regard must be taken to the need to safeguard and promote the welfare of children who are in the United Kingdom. This is a primary consideration, but is not paramount.

85. Having accepted that there is family life, I am satisfied that removal of [NA] to Algeria would be a breach of the right of respect to that life.

86. In the circumstances, the issue is one of proportionality.

87. The maintenance of effective immigration controls is in the public interest.

88. [NA] speaks English, and has been able to work and support himself whilst unlawful, it is likely that he will be able to find employment be financially independent if he were found entitled to remain in the United Kingdom.

89. He is lived in the United Kingdom for over 19 years. He has established a private life here. This has been established, as indeed has the family life with his sister and her sons, when he has been in the country unlawfully.

90. He has a very poor immigration history, and was an absconder for 4 years, before being arrested and detained.

91. He is an important figure in his nephews' lives. Were he to return to Algeria he would be able to retain contact with them by modern means of communication, but he would not have the same positive influence on their lives as described by [his sister].

92. Taking account of all the circumstances, and the interests of the children, it is proportionate that [NA] be permitted to remain in the United Kingdom.

22. This part of the determination needs to be read in the light of earlier passages. The Judge had said this, in her narrative of NA's "case", based on his evidence:

24. [NA]… lived with his sister between 2003 and 2010, and then went to live with a friend until 2012, when he went back to live with his sister. [His sister] married for the second time in 2013, and [NA] moved out. He returned to live with her in 2016 and lived with her and her sons until he was apprehended and detained [on 31 October 2019]. His bail conditions now require him to live at another address.

25. [NA] has a close relationship with his sister, and has a strong paternal relationship with her sons, particularly the older 2 from her first marriage, [M] and [K], who are now aged sixteen and fourteen. Their father has not lived with them since 2006, and there was no contact until three years ago, since then they have seen their father about five times. [NA] is the main male person and father figure in their lives.

The Judge had said this in her description of the "submissions" made to her by Ms Tobin:

38. [Ms Tobin] submitted that … [NA] has a close relationship with his nephews, their mother, his sister, describes it as a parental role. He has lived with them for most of their lives. They

> were very affected by his detention. They would be seriously affected if he were removed from the United Kingdom.
>
> 39. She submitted that the nephews, particularly the older boy [M], relied on him, he was a constant presence in their lives, he supported [M] in difficult times.
>
> 40. She submitted that it would be disproportionate to remove him from the United Kingdom. It would be a breach of… both his and his nephews' Article 8 rights…

We have also read his sister's witness statements and the boys' letters, which were in evidence before the Judge.

23. It can, in our judgment, be seen from the Judge's reasons that she had well in mind section 117B of the 2002 Act, and Ms Tobin persuasively submits that paragraphs 87 to 91 of the determination can be seen to make points directly referable to parts of that statutory provision. It is also clear that the judge had in mind Razgar and also section 55 of the 2009 Act, to both of which she referred. As to section 55 she correctly directed herself that the safeguarding and promotion of the welfare of children "a primary consideration" but "not paramount". The Judge, rightly, recognised that the Article 8 rights which she had to consider were not only those of NA but also those of the children, in light of her acceptance that there was "a family life". She plainly had well in mind that the children were the nephews of NA, and had in mind their ages. The Judge also clearly had in mind the question of proportionality and concluded that removal would be disproportionate (albeit that she expressed it at paragraph 92 in terms of it being 'proportionate' for NA to be 'permitted to remain').

24. As to the Judge's findings on this part of the case, we would accept that the Judge found (on a fair reading of the determination): (a) that there was a close relationship with the appellant's sister and her 3 children particularly the older 2 sons (paragraph 80); (b) that NA did not fulfil a "paternal role" in relation to the 6 year old nephew (paragraph 80); (c) that NA did fulfil a "paternal role" in relation to the older two nephews (paragraph 80); (d) that the oldest nephew had suffered from particular problems and NA had been important in helping him through difficult times (paragraph 81); (e) that NA had been a positive influence on the lives of the boys and that removing him would mean there would not be that same positive influence (paragraph 91); (f) that NA had been present in the UK unlawfully (paragraph 89); (g) that his immigration history is very poor and he had been an absconder for 4 years (paragraph 90); and (h) that the maintenance of effective immigration control is in the public interest (paragraph 87).

25. We accept the Secretary of State's submission that the Judge failed to give adequate reasons for her findings, on the relevant questions arising, in relation to Article 8.

    a. In our judgment, the Judge's reasons needed to grapple with the impact of removal on the nephews. She needed to explain, clearly and specifically, what she was finding as to the consequences, their nature and degree, to show how weighty that impact in her assessment was.

b. Having done so, she then needed to conduct a balancing exercise which explained how she weighed (i) that impact against (ii) the public interest considerations in support of removal, in arriving at a proportionality assessment.

c. Clarity as to impact and consequences and their seriousness are of particular importance in the context of Article 8. This is reinforced by paragraph GEN 3.2(2) of Appendix FM to the immigration rules, which requires consideration, on the basis of the information provided by the individual seeking to remain on the basis of Article 8, of "whether there are exceptional circumstances" meaning refusal of leave to remain "would result in unjustifiably harsh consequences" for them or for "a relevant child". The Judge did not refer to this provision, nor address the issues in language which reflected it.

d. We have said that we would accept that the Judge can fairly be taken to have found a "paternal role" was fulfilled by NA in relation to the older two nephews (paragraph 80), albeit that this was a description of "[his sister's] evidence". Nevertheless, there is in our judgment force in Mr Melvin's contention that there was a lack of clarity on this aspect of the case. The word used by the Judge is "paternal". That word featured in the Judge's earlier description of NA's own evidence (paragraph 25). In that part of the determination the language was "strong paternal relationship" and "the main male person and father figure in their lives". The submission based on his sister's evidence, recorded by the Judge (paragraph 38) had described the relationship "as a parental role". In her analysis (paragraph 80) the Judge referred to his sister's evidence, but she used the phrase "paternal role". Ms Tobin submits that, in effect, the Judge was finding "a genuine and subsisting parental relationship" in terms used by Parliament in section 117B(6). In our judgment, this illustrates the problem. As Ms Tobin submits, it would have been a significant conclusion for the Judge to have found "a genuine and subsisting parental relationship", given that the children as British citizens are each "a qualifying child" and it is not suggested that it would be "reasonable to expect [them] to leave the United Kingdom". But the Judge did not use the language of "parental relationship". Nor, moreover, did she say that NA was in a role of parental responsibility. An authoritative discussion of section 117B(6) can be found at AB (Jamaica) [2019] EWCA Civ 661 at paragraphs 88-97 and 109-111.

e. These concerns have to be put alongside a point which arises from the way in which the Judge's determination was framed. The Judge explained that she had received at the hearing witness statements from the appellant's sister and handwritten letters from her older two sons. She explained that his sister had given oral evidence and had been cross-examined. She stated that she had made notes of the oral evidence in the record of proceedings, and that she had had regard to all the oral and documentary evidence. Nevertheless, what followed in the determination was a description of NA's case "taken from [NA]'s oral evidence, his witness statement, and the asylum interview". After setting that

out, the Judge turned to the submissions. There was no separate section setting out his sister's evidence, except the reference made in counsel's submission (paragraph 38 and 39) and in the Judge's analysis (paragraph 80, 81 and 91).

26. In our judgment, it was important in this case to have clear findings and reasons as to: (a) the relationship; (b) the impact of removal; and (c) the weighing and balancing of impact of removal for the children against the public interest in removal and immigration history. We cannot accept Ms Tobin's submission that the Judge's reasons in relation to Article 8 and proportionality were legally adequate. We agree with Mr Melvin that they were not.

27. In all the circumstances, and where the Judge had the benefit of relevant oral evidence and cross-examination which we are in no position to reassess for ourselves at this hearing, we are satisfied that the appropriate course is that the Article 8 decision in this case, but excluding the paragraph 276ADE(vi) aspect (paragraphs 75-79 of the determination), needs to be retaken. There will need to be a hearing and the opportunity to adduce again oral evidence with cross-examination. We cannot accept Ms Tobin's submission that the evidence needs to be reassessed by the First Tier Tribunal. This Tribunal has the power to retake the decision rather than remit the case and we are quite satisfied that that course is appropriate in this case. Our directions are set out below.

28. We make clear that the Tribunal on the remaking of the decision may decide that it is appropriate to take, at least as a reference point, the Judge's findings on this part of the case, which we have summarised above as points (a) to (h). But we are not preserving those as provisionally binding findings of fact. It will be for the Tribunal to decide whether they stand as an appropriate reference-point, or starting-point, in light of the evidence and submissions at the hearing. The Tribunal will need to consider the factual position afresh, on the evidence before it, looking at the picture as a whole.

<u>Notice of Decision</u>

(1) The Secretary of State's appeal on the Article 8 determination is allowed.

(2) NA's appeal on the asylum and paragraph 276ADE(vi) determination is dismissed.

<u>Directions</u>

(In these directions, NA is "the appellant"; the Secretary of State is "the respondent")

1. The decision relating to the Article 8 ECHR human rights claim, excluding paragraph 276ADE(vi), will be remade in the Upper Tribunal at a resumed hearing.

2. **The parties** shall have regard to the Amended Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic (19 November 2020) when complying with these directions.

Mode of hearing

3. The Upper Tribunal is of the provisional view that the decision could be made by way of a remote hearing by video conference following the indication given by the appellant's representative at the hearing that neither the appellant nor his sister are likely to need the assistance of an interpreter, and taking into account the continuing need to take precautions to avoid the spread of Covid-19.

4. **The parties** may make written representations, giving reasons, within 14 days of the date this decision is sent if there is an objection to the proposed course of action.

    a. **If there is no objection** to remaking being done by way of a remote hearing the Upper Tribunal will list the case for a remote hearing on a date to be fixed.

    b. **If there is an objection** the Upper Tribunal will consider the representations and make whatever case management decision it deems appropriate taking into account the overriding objective of The Tribunal Procedure (Upper Tribunal) Rules 2008.

General case management

5. **The appellant** shall notify the Upper Tribunal and the respondent in writing within 14 days of the date this decision is sent what witnesses will be called to give evidence, if they require the assistance of an interpreter, and if so, in what language.

6. **The appellant** shall file and serve written details of any new matters he might rely on in the human rights claim within 28 days of the date this decision is sent. It is foreseeable that the appellant may seek to rely on his length of residence by the time the case is relisted given that he claims to have entered the UK illegally on 16 January 2001.

7. **The respondent** may respond to any further submissions made by the appellant in relation to new matters in writing within 35 days of the date this decision is sent.

8. **The parties** shall file and serve any up to date evidence at least 14 days before the hearing.

9. **The parties** shall file and serve any skeleton arguments, if relied upon, at least 7 days before the hearing.

10. **The parties** are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

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

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

Signed: Fordham J Date: 13 January 2021

The Hon. Mr Justice Fordham sitting as an Upper Tribunal Judge.