



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: PA/10242/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 9 August 2022**

**Decision & Reasons Promulgated  
On the 12 October 2022**

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**AK  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms G Capel, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**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 their 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.

## The Issues

1. This is a re-making of the appellant's appeal on Article 3 and Article 8 ECHR grounds brought in the context of deportation.
2. The re-making is required following an error of law decision issued on 17 November 2021 which set aside the decision of First-tier Tribunal Judge Pears issued on 25 May 2021.
3. There was agreement that the issues for the re-making were limited to the appellant's Article 3 ECHR claim on the basis of his sexuality and his health and an Article 8 ECHR claim which fell to be considered within the provisions of Section 117C of the Nationality, Immigration and Asylum Act 2002. That was so where the respondent made a deportation order against the appellant on 6 June 2017. There was agreement that the appellant's refugee claim could no longer be pursued where a Section 72 certificate had been upheld by the First-tier Tribunal and that finding remained extant.
4. It accepted that the appellant is bisexual. The respondent also conceded that openly bisexual men are at risk of persecution or serious harm in Morocco. The finding of the First-tier Tribunal that the appellant had been discreet about his sexuality in the UK remained extant. The respondent accepted also that the applicant would not live "openly" in Morocco but would conceal his sexuality.
5. The appellant's motivation for behaving discreetly on return to Morocco remained in dispute. The appellant maintained that he would live discreetly in Morocco because of his fear of severe mistreatment. He also maintained that his mental illness reached the threshold for there to be a breach of Article 3 and Article 8 ECHR. The respondent considered that the applicant was a highly incredible witness whose evidence about his reasons for being discrete on return and as to having a serious mental illness was not reliable. His case regarding his reasons for behaving discreetly on return and evidence on his mental illness should not be accepted and the Article 3 and Article 8 ECHR claims dismissed.

## Background

6. The appellant is a national of Morocco, born on 3 April 1980. He is currently 42 years old.
7. On 23 April 2004 the appellant entered the UK using a false Belgian passport and made an asylum claim in that false identity. On 10 November 2004 his appeal against the refusal of that asylum claim was dismissed and he became appeal rights exhausted. The appellant went back to Morocco voluntarily in 2008.
8. On return to Morocco the appellant married a British citizen. He applied for entry clearance to come to the UK as a spouse. On 26 August 2009 he

was granted entry clearance as a spouse, valid until 26 November 2012. In 2011 the appellant and his wife divorced.

9. On 1 October 2012 the appellant was convicted of sexual assault and theft. On 23 January 2013 he was convicted of attempted rape. He was released on criminal bail pending sentencing but absconded to Ireland. The appellant remained in Ireland until he was encountered by the authorities there and was returned to the UK in 2016.
10. On 21 December 2016 the appellant was sentenced to 40 months' imprisonment for attempted rape and sexual assault and to one month imprisonment for theft to be served concurrently and to ten days' imprisonment for a breach of bail also to be served concurrently.
11. The respondent commenced deportation proceedings. The appellant applied for Facilitated Return at some point in 2017 but withdrew that application before removal was effected. The respondent made a deportation order against the appellant on 6 June 2017.
12. On 18 June 2018 the appellant made representations on the basis of his family life with his British parents. On 20 September 2018 the respondent refused those representations but granted the appellant an in country right of appeal. On 30 October 2018 First-tier Tribunal Judge Hodgkinson dismissed the appellant's appeal on Article 8 ECHR grounds.
13. On 21 February 2019 the appellant made a protection claim based on his claim to be a bisexual. On 3 October 2019 the respondent refused that claim but again granted the appellant an in country right of appeal. His appeal to the First-tier Tribunal was dismissed by First-tier Tribunal Khan on 12 December 2019. That decision was set aside by Upper Tribunal Judge Jackson on 21 October 2020 and the appeal remitted to the First-tier Tribunal.
14. First-tier Tribunal Judge Pears dismissed the appeal in a decision issued on 25 May 2021. That decision was set aside to be remade by the Upper Tribunal in a decision dated 17 November 2021.

### **Credibility**

15. The appellant is bisexual and maintains that he would behave discreetly on return to Morocco for fear of mistreatment if he was open about his sexuality. He also maintains that he faces a risk of serious harm on return because of his mental illness. The respondent has significant concerns about his credibility in those regards. Those concerns began with his immigration history, as set out above. The appellant clearly behaved with profound dishonesty when he entered the UK illegally and made a claim for asylum using a false Belgian passport. The respondent is correct to submit that this conduct brings the appellant within the provisions of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act

2004. His credibility is significantly damaged by the illegal entry using false documents and asylum claim in a false identity.

16. The respondent also maintained that the appellant's conviction for theft and long period of absconson in Ireland also showed him to be a dishonest person who was prepared to take significant steps to avoid the proper operation of the law. I accepted that was so and that this further undermined the reliance that could be placed on the appellant's evidence.
17. Further, the appellant's claim for protection on the basis of being bisexual was made only in 2019 after the respondent had made a deportation order against him and after his first appeal to the First-tier Tribunal against deportation had been dismissed. I found that those matters also meant that his evidence had to be approached with great circumspection and had to be kept in mind when assessing the credibility of his evidence.
18. The respondent was correct to submit that as a result of these matters no weight or very limited weight should be attached to any assertions made by the appellant unless it was supported by cogent independent evidence. Only evidence of that kind could be sufficient to counteract the "negative pull of the appellant's lies" as identified by the Supreme Court in [31] of MA (Somalia) v SSHD [2010] UKSC 49.
19. It was my conclusion that there was such cogent independent evidence here in the form of three reports from Dr Timothy Green and that this evidence, together with the parts of the appellant's account that were accepted by the respondent, showed that the appellant's evidence on his reasons for behaving discreetly in Morocco were credible. Dr Green is a consultant clinical psychologist with an extensive history of working as a senior practitioner within the mental health system including in forensic services. He has specialised in treating mentally disordered offenders including advising the courts in relation to those patients. The respondent did not question his expertise or experience and took issue with only one, relatively narrow aspect of his opinion. Dr Green's reports were dated 2 March 2020, 29 April 2022 and 26 July 2022.
20. Dr Green made clear findings that it was his professional opinion that the appellant had provided credible evidence concerning his sexuality, his reasons for behaving discreetly on return and as to having a mental illness which included suicidal ideation. He addressed specifically the possibility that the appellant was "faking" or exaggerating his evidence; see paragraph 7.9 and 7.10 of the report dated 29 April 2022. He considered that the appellant's results on the SIRS-2 test showed that he was not "engaging in fabrication during his account in clinical interview examination conditions with me"; see paragraph 7.9 of the 29 April 2022 report.
21. In response to those conclusions, the respondent provided an academic article from 2016 entitled "Differences Between Structured Interview of Reported Symptoms (SIRS) and SIRS-2 Sensitivity Estimates Among

Forensic Inpatients: A Criterion Groups Comparison". This article questioned the validity of the SIRS-2 tool in assessing whether an individual was faking or exaggerating symptoms. Having considered this article, the parties agreed a set of questions on the issue of faking and the SIRS-2 test that were put to Dr Green and which he addressed in his report dated 26 July 2022.

22. I found Dr Green's opinion on the academic article commenting on the SIRS-2 test and on the appellant's credibility regarding both his bisexuality and his mental health was clear and authoritative. He explained in paragraph 4.5 of his July 2022 report that psychometric testing addresses "sensitivity" of what is being measured as well as the "specificity" of the measure. He indicated:

"Broadly speaking, 'sensitivity' describes the ability of a test to correctly identify individuals with a disease/disorder/difficulty. 'Specificity' describes the ability of the test to correctly identify people without the disease/disorder/difficulty. Sensitivity therefore is to identify genuine sufferers. Specificity identifies people who do not suffer. Therefore, when assessing malingering, which is a situation in which the person does not have the disorder/disease/difficulty, specificity is perhaps more important than sensitivity. The balance between sensitivity and specificity is a complex one as too much of one will lead to not enough of the other. If the test is too sensitive (i.e. focuses on sensitivity too much) it will fail to identify people without the disease. If the test is too specific (specificity), it will fail to identify 'true' sufferers. Therefore, a balance must be struck between these two observed characteristics of a test. The article presented to me by the authors of the questions that I am to address focuses on sensitivity. Arguably, therefore, this is not the most relevant article or critique of the SIRS-2 as it pertains to [AK]'s case. Indeed, the authors in this paper discuss how future research would helpfully examine specificity estimates. I note also that they do not dismiss the use of SIRS-2, but rather comment on observations of its 'real life' behaviour in clinical practice and what the behaviour is (i.e. how a measure behaves in ecologically valid clinical practice examples)".

23. Dr Green goes on in paragraph 4.6 of his July 2022 report to express his view that albeit the article from 2016 was a "useful commentary" it did not disqualify SIRS-2 as a "useful and valid means of providing greater information in relation to AK's possible feigning or exaggeration of his symptoms". Dr Green confirmed in the July 2022 report, as he did in his April 2022 report, that was his professional opinion, supported by the tests he administered and the wider materials he considered, that the appellant was not malingering and had not "faked bad".

24. I also noted that of the MCM1-3 and SIRS-2 tests were not the sole bases of Dr Green's assessment as to the appellant's credibility regarding his mental health and fears on return to Morocco. As Dr Green identifies in paragraph 4.9 of his July 2022 report when setting out his view on how to approach the question of faking or malingering:

"An assessor in circumstances such as while testing [AK] would look to consistency of account, consistency between presentation under

examination in clinical interview conditions and collateral information as well as objective (although subject to interpretation) evidence through psychometric testing apparatus that might seek to examine potential malingering or feigning behaviour. These are all helpful methods by which one may seek to identify potential faking and comment usefully in one's report".

In paragraph 4.10 of his July 2022 report Dr Green identifies that the appellant had a consistent presentation across extensive medical records. He identifies that:

"Consistency across time with different assessors and different services of the same difficulties of flashbacks and low mood may be suggestive that these are 'real' difficulties that [AK] genuinely experiences and has sought treatment and assistance for".

In paragraph 4.21 of the July 2022 report he confirmed that the appellant's "symptoms appear consistent across time and assessor". Dr Green's assessment included analysis of the appellant's medical records from a variety of sources. Dr Green identifies that other professional assessors have reached the same view, that the appellant's "reported difficulties are real and worthy of psychological and psychiatric input and treatment".

25. Further, Dr Green identifies that "the appellant had been consistent about his reports of trauma and his reasons for his fear", in particular his bisexuality. Dr Green also identifies in paragraph 7.13 of his July 2022 report that the submission that the appellant was malingering or faking was contradicted by the appellant explaining consistently that he would not self-harm or attempt suicide because of the protective factor of his mother. This was not consistent with someone exaggerating or faking the seriousness of a mental disorder.
26. I also did not find weight detracted from Dr Green's report because of his statements in the July 2022 report as to no professional assessor being infallible and there always being the possibility that someone found to have a genuine diagnosis was faking or malingering. On the contrary, I found that those comments indicated Dr Green's open-mindedness and objectivity as to the concerns put to him about the possibility of the appellant faking or exaggerating.
27. I should also indicate that Dr Green's three reports were, in my view, text book examples of how an expert medical witness should approach writing reports for the Tribunal. They meet every aspect of the guidance provided in the headnote of HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC). They also meet all of the provisions of the Senior President's Practice Directions entitled "Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal" updated on 18 December 2018 at paragraph 10.
28. It was therefore my conclusion I could place weight on that Dr Green's opinion that the appellant provided credible evidence on his fear as to what would happen on return to Morocco and on his mental illness.

### Article 3 ECHR – Protection Claim

29. In HJ Iran v SSHD [2010] UKSC 31, the Supreme Court provided guidance on the correct approach to protection claims brought on the basis of sexuality. The Supreme Court stated in [82]:

“82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him”.

30. I also noted the comment on page 38 of the respondent's "Asylum Policy instruction Sexual orientation in asylum claims" version 6.0 published on 3 August 2016. That page instructs caseworkers as follows:

“The HJ judgment makes it very clear that the point of analysis is how the individual would act on return. How the individual has acted until now in their country of origin or in the UK is immaterial. Caseworkers should not

equate any historic absence on the part of the claimant in openly expressing their sexuality, for any reason, as evidence of voluntary discretion. The mere fact that someone may, in their past, have been discreet, even for non-protection reasons, does not mean that those reasons were either the sole reasons why they were discreet, nor do they indicate how the claimant will continue to behave on return”.

31. The key issue in the assessment to be made here is why the appellant would behave discreetly on return to Morocco regarding his bisexuality. It is my conclusion that he would do so because of his fear of persecution if he were to express his sexuality openly. From the outset of his claim on the basis of his sexuality the appellant has stated that he would not live openly as a bisexual man in Morocco because of a fear of harm from state and non-state agents; see, for example, his statements in response to questions 13 to 17 of his asylum interview conducted on 10 June 2019 where he refers to a fear of being killed or having “something” happen to him and not being accepted. I also found that this evidence was supported by the country evidence, undisputed by the respondent, which showed that the mistreatment the appellant would face as an openly bisexual man was significant. The appellant’s evidence on why he would behave discreetly on return was also supported by the opinion of Dr Green.
32. I did not find that the appellant’s behaviour in Morocco in the past and in the UK undermined his evidence that he would behave discreetly on return because of a fear of serious harm. The evidence as to his behaviour in Morocco and the UK is not disputed. He had a sexual relationship in his early teenage years with a school friend in secret and this stopped because they became too afraid of discovery. He attended a coffee shop that was a meeting place for gay men on a couple of occasions but was very anxious about doing so. In his late teenage years he had a “few” casual sexual encounters. After coming to the UK it is also agreed that he was relatively discreet. He maintained that he had sometimes attended gay clubs in the UK and had casual encounters with men. The First-tier Tribunal accepted that he had a relationship with another man at the time of the hearing in 2021.
33. The appellant has been consistent in stating that he conducted himself in this way is because he wished to conceal his sexuality from his family, in particular his parents, and that he had a fear that he would be disowned by his family both in the UK and Morocco were they to know of his sexuality. As indicated in the respondent’s guidance, however, that is not determinative of how he would behave on return or of his reasons for his conduct on return.
34. For all of these reasons, I found the appellant’s evidence on his reasons for his discreet behaviour on return to Morocco was credible. I found that the appellant’s decision to live discreetly would be based materially on his fear of the persecution which would follow were he to live openly as a bisexual man. I reached that conclusion only after referring back to the significant



matters in his history which the respondent relied upon as showing that his reasons for discreet behaviour on return were should not be accepted.

35. Further, it was also my view that the country material on the risk to a bisexual person in Morocco was likely to arise even were the appellant to continue to live as he did before leaving or as he has in the UK. As above, the appellant had short, casual relationships in Morocco and went to a gay coffee bar. The country material shows that two men merely sitting in a car together were arrested on the basis of suspected homosexuality, that a British national was arrested standing at a bus stop with his Moroccan male partner, and that two men were sentenced to four months in prison after being arrested for standing too close to each other as they posed for a photograph. These incidents are set out in the country expert report of Alison Pargeter dated 5 May 2021 which was not subject to any challenge. She provides other examples of people suspected of being homosexual on limited of evidence being mistreated, for example, paragraph 2.18. Paragraph 3.23 of her report refers to the proactive steps taken by some individuals to identify gay men by tricking them into revealing details about themselves.
36. For all of these reasons, my judgment is that the appellant has a well-founded fear of inhumane and degrading treatment. His appeal under Article 3 ECHR is allowed on this basis.

#### Article 3 ECHR – Medical claim

37. I make the assessment of whether the appellant would face a risk of a breach of his Article 8 ECHR medical grounds on the basis of the medical evidence and independently of my findings on his need for protection on the basis of his sexuality, following the approach taken in the appellant’s written submissions dated 3 August 2022.
38. The appellant maintained that a real risk of self-harm or suicide or deterioration of his mental health on return to Morocco met the standard set out in AM (Zimbabwe) v SSHD [2020] UKSC 17 at paragraph 22 which approved the guidance of the European Court of Human Rights in paragraph 183 of Paposhvilli v Belgium [2017] Imm AR 867:

“183. The Court considers that the ‘other very exceptional cases’ within the meaning of the judgment in *N v The United Kingdom* (para 43) which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.”

39. The appellant relies on his medical records, treatment for mental disorder over recent years and the opinion of Dr Green that he would become “profoundly unwell” were he not able to access the medication which currently controls his mental illness. The appellant’s case was that Morocco did not have effective mechanisms to reduce the risk of self-harm or suicide on return or to prevent a serious deterioration in his health leading to intense suffering. The evidence of the country expert, Ms Pargeter, on the limited treatment available for mental illness appellant was not challenged. She comments in paragraph 5.3 of her report that “mental health services are woefully inadequate and substandard”. In paragraph 5.6 she identifies that the “number of facilities offering mental health services is also limited”. Despite government efforts to build more psychiatric hospitals “there is still not enough supply to meet demand”. Rather, as in paragraph 5.7 “mental health services are severely underdeveloped”. At paragraph 5.10 she describes the reports from a Dutch non-governmental organisation who observed “shocking conditions” in a mental health hospital in Morocco and the hospital director attributing the conditions to significant overcrowding and warning of a “mental health crisis”. Ms Pargeter also describes in paragraph 5.15 of her report a sit-in protest by medical staff at another psychiatric hospital because of the “terrible conditions in the facility, which they claimed put the safety and lives of its patients”. The “RAMED” health care system does not cover treatment for mental illness; see paragraph 6.7. The appellant would therefore have to pay for his medication which can be “very costly”. In paragraph 6.14 Ms Pargeter identifies that a new generation antipsychotic might cost 15% of the monthly income of a lower middle class family. Although her report describes how psychiatric medication, both old and new, is available in Morocco she had concerns that “a large number of medicines are unavailable at public hospitals because of the hospitals’ location or lack of funds, further limiting access”; see paragraph 6.15. She identifies in paragraph 6.16 that there are also concerns that the newer pharmacological treatments were unavailable and that other medication was not stored in accordance with accepted standards.
40. Dr Green identified in his April 2022 report that the appellant would:
- “... experience a great number of panic attacks, a worsening of his avoidance behaviour ... and difficulty sleeping. With regards to his depression, it is my view that AK will experience significantly worse mood and associated behaviours of withdrawal, hopelessness and failure to attend to self-care making integration into a different environment complex”.
41. In paragraph 7.23 of the April 2022 report Dr Green confirmed his view that the appellant currently had a “moderate risk of suicide”. This was not of significant concern as he had been consistent as to his mother being a protective factor. It was Dr Green’s view, however, that:
- “Faced with the reality of removal to Morocco his current risk of suicide would increase such that he would be at ‘high’ risk of suicide. In relation to timescales, I believe this deterioration would occur immediately following confirmation that he would be relocated to Morocco. It would be prudent, in

my view, for the community mental health team to bear this in mind as the outcome of the appeal is decided”.

42. Having noted the views of Ms Pargeter and Dr Green and the submissions made on behalf of the appellant, it is my conclusion, however, that the high threshold for a finding of inhumane and degrading treatment on the basis of a medical condition in the receiving country is not met here. The views of Ms Pargeter and Dr Green were formed without the information provided by the appellant at the hearing that he has at least one relative in Morocco, an uncle, with whom his parents lived for over a year during the Covid-19 pandemic. He also gave evidence on the family having some resources by way of a family property that had belonged to his grandmother being sold by one of the uncles. Dr Green accepts that the appellant will be able to keep in touch with his mother if he returns to Morocco and identified this as a protective factor. It was my view that without more, it could not be said that where the appellant could expect some family support on return with some access to resources that would assist him to obtain treatment at a basic level for his mental health condition, that the evidence did not show that the risk of suicide would reach the level identified by Dr Green or that the appellant would face an irreversible decline in his mental health.
43. I therefore did not find that the appellant’s Article 3 medical claim was made out.

#### Article 8 ECHR

44. Where I have found that the appellant is entitled to protection on Article 3 ECHR grounds on the basis of his sexuality it is not necessary to proceed to make an assessment under Article 8 ECHR.

#### Notice of Decision

45. The decision of the First-tier Tribunal disclosed an error on a point of law and is set aside.
46. The appeal is re-made as allowed under Article 3 ECHR on protection grounds.

Signed S Pitt  
Upper Tribunal Judge Pitt

Date: 2 September 2022