IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI- 2022-003150

First-tier Tribunal No: RP/00134/2016

THE IMMIGRATION ACTS

Directions Issued:

8th January 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Secretary of State for the Home Department

Appellant

and

AG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Harland, Counsel instructed by Government Legal Service
For the Respondent: Ms Radford, Counsel instructed by Turpin & Miller

Heard at Field House on 17 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By my decision dated 17 April 2023, a copy of which is appended below, I set aside the decision of the First-tier Tribunal. I now remake the decision.

Background

2. The appellant is a citizen of Uganda, born in 1997, who has been in the UK since 2007. In March 2015 he was convicted of drugs offences and sentenced to 2 years in a young offenders institution. In September 2019 the appellant was convicted of drugs offences and sentenced to 6 years imprisonment. The respondent accepts that on the balance of probabilities the appellant was a victim of modern slavery when the offending occurred in 2014/2015, due to child criminal exploitation.

3. The scope of this appeal is set out in paragraphs 59 – 61 of my error of law decision, where I stated:

> 59. The remaking of the appeal will only be concerned with articles 3 and 8 ECHR.
>
> 60. With respect to article 3: the remaking of the decision will be concerned only with the appellant's claim to be at risk because he is gay. The following findings (made in paragraphs 46 and 48) are preserved: the appellant is a gay man who has told his family about his sexuality but has lived discreetly and not openly as a gay man in the UK due to social pressures and a desire to not embarrass his friends and community.
>
> 61. With respect to article 8: the judge's findings in respect of Exception 1 are preserved. The judge's finding that the appellant was a victim of trafficking, and that the offending in 2015 was as a result of that trafficking, is preserved. The findings in paragraph 91 about the appellant's ties to the UK and close relationship with his mother are also preserved.

4. Given the limited scope of the appeal, the only ground of appeal before me is that the respondent's decision rejecting the appellant's claims under article 3 and 8 ECHR is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

5. For the reasons given below, I am satisfied that removing the appellant to Uganda would breach article 3 ECHR and therefore is unlawful under section 6 of the Human Rights Act 1998. Accordingly, it is not necessary to determine whether his removal would also breach article 8 ECHR.

The appellant's claim under article 3 ECHR relating to his sexuality

6. The appellant claims that he faces a risk of treatment violating article 3 ECHR in Uganda on account of being gay. He claims that he would conceal his sexuality in Uganda as he would fear for his safety if it became known that he is gay. He claims to fear both non-state actors, given the widespread homophobia in Ugandan society, and the state itself, given the legal position faced by gay men in Uganda.

Evidence and findings of fact relevant to the appellant's sexuality

7. The appellant's evidence, as set out in his witness statement, is that he "came out" to most of his friends in 2018, which felt like a huge relief. He describes

coming from a community where gay people are not approved of and being nervous of expressing himself. He states that he feels happier now that he has revealed the truth to his family, even though his brother and mother said very little to him in response. He also describes meeting a man at a house party, and another at a club, where they kissed in public.

8. I heard oral evidence from the appellant, his mother, his brother, and a friend. The appellant appeared reticent about discussing his sexuality, and his family members had only a scant knowledge of it. His mother was unable to give a consistent account of when she first became aware the appellant is gay, and the evidence of the appellant's brother was that he has not discussed the appellant's sexuality with the appellant as it is none of his business. The appellant's friend who gave evidence at the hearing also had extremely limited knowledge of the appellant's sexuality, stating that it is a sensitive topic that he does not like to bring up. No evidence was given by anyone who had any personal knowledge of the appellant having a relationship or being open, in any way, about his sexuality.

9. The evidence indicates that the appellant is discrete and cautious about revealing he is gay and that he does not make this public. However, it also indicates that he will, from time to time, reveal his sexuality to people he does not know well with a view to having a sexual encounter/relationship with them.

10. Accordingly, I make the following findings of fact:

    a. The appellant is a gay man who has told his family about his sexuality but has lived discreetly and not openly as a gay man in the UK due to social pressures and a desire to not embarrass his friends and community. (This is a finding that was preserved from the First-tier Tribunal).

    b. Although the appellant is cautious about revealing his sexuality, he will do so in an environment where he feels secure, and where his family and friends are not present, in order to meet another gay man (for example at a party or club).

The situation for gay men in Uganda

11. The respondent's Country policy and information note: sexual orientation and gender, Uganda, February 2022 ("the CPIN"), states in paragraph 2.4.27:

> 2.4.27 A person who is open about their sexual orientation and/or gender identity and expression may face arrest, harassment and discrimination from the state and is likely to experience societal ill-treatment which may include discrimination, harassment and violence. The accumulation of such treatment by state and non-state actors is likely to be sufficiently serious by its nature and repetition to amount to persecution or serious harm.

12. The CPIN includes evidence indicating that the authorities (as well as the general public) have a hostile attitude towards gay men. In paragraph 2.4.1 of the CPIN it is noted that same-sexual acts are punishable with up to life imprisonment.

The relevant legal principles

13. In *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31; [2011] 1 AC 592* the Supreme Court set out a four stage test for assessing a claim by an asylum applicant that, if returned to his home country, he will be persecuted on account of being gay. These are:

    (i) Is the applicant gay, or someone who would be treated as gay by potential persecutors in his country of origin? If no, the claim should be refused. If yes:

    (ii) Do openly gay people have a well-founded fear of persecution in the country of origin? If no, the claim should be refused. If yes:

    (iii) In respect of his sexual orientation, on his return, will the applicant be open? If yes, he is a refugee and his claim should be allowed. If no:

    (iv) If he would not be open, but rather live discreetly, is a material reason for living discreetly that he fears persecution? If yes, he is a refugee and his claim should be allowed. If no, then his claim should be refused.

14. Although this is not an asylum appeal, the same principles apply when considering article 3 ECHR.

Application of the *HJ (Iran)* principles in this case

15. The first question to address is whether the appellant is gay. There is a preserved finding of fact that he is gay and therefore this must be answered in the affirmative.

16. The second question is whether openly gay people in Uganda have a well-founded fear of persecution. The answer to this question is clearly yes: see paragraphs 11 – 12 above.

17. The third question is whether the appellant will be open about his sexual orientation in Uganda. It was common ground before me was that he will not.

18. The appeal turns, therefore, on the fourth question, which is whether fear of persecution would be a material reason for the appellant living discreetly in Uganda.

19. Mr Holborn argued that the appellant's discretion about his sexuality in the UK indicates that he would be discrete in Uganda irrespective of societal disapproval and the legal position of gay men. Ms Radford argued that fear of persecution does not need to be the only reason the appellant would be discrete; it is enough that it would be a material reason. She argued that the appellant has not been living a closeted life in the UK and has revealed his sexuality to people at a club and party. She submitted that if the appellant refrains from activity of this nature in Uganda that would indicate a modification of behaviour because of a fear of persecution.

20. In order to answer the fourth question in *HJ (Iran*), I have distinguished two aspects of the appellant's life. The first is his relationships (and interactions) with friends and family, as well as with society at large. In my view, the appellant's behaviour in the UK indicates that he would be discrete in Uganda

about his sexuality in this context because of his social and cultural attitude, and fear of persecution would not be a material reason for the discretion.

21. The second aspect of the appellant's life is where he seeks to meet other gay men with a view to having a sexual encounter or relationship. In this context, the appellant has met people that he did not previously know, for example at a party and at a club, and has been open with them about being gay. In my view, if the appellant does not continue to engage in such activities in Uganda, the primary reason for this will be fear of persecution. It therefore follows that the fourth question in *HJ (Iran*) falls to be answered in the positive, as fear persecution will be a material reason for the appellant being discrete about his sexuality, at least in one aspect of his life. Accordingly, the appeal must be allowed under article 3 ECHR.

Notice of Decision

22. The appeal is allowed on the basis that it would breach article 3 ECHR to remove the appellant to Uganda.

D. Sheridan
Upper Tribunal Judge Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 December 2023

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI- 2020-003150

First-tier Tribunal No: RP/00134/2016

THE IMMIGRATION ACTS

Directions Issued:

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Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Secretary of State for the Home Department

Appellant

and

AG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Harland, Counsel
For the Respondent: Ms Radford, Counsel

Heard at Field House on 27 February 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Secretary of State, with a cross-appeal by the appellant. For convenience, I will refer to the parties as they were designated in the First-tier Tribunal.

Background

2. The appellant is a citizen of Uganda who was born in 1997. His mother came to the UK and was granted refugee status in 2004. In 2007 he joined his mother in the UK and was granted ILR as her dependent.

3. In March 2015 the appellant was convicted of drugs offences and sentenced to 2 years in a young offenders institution.

4. In 2016 the respondent made a decision to deport the appellant and to cease his refugee status.

5. In September 2019 the appellant was convicted of drugs offences and sentenced to 6 years imprisonment.

6. In July 2021 the respondent made a decision that the appellant's deportation would not violate his human rights.

7. Also in July 2021, the respondent accepted that there were reasonable grounds to accept that in 2014 – 2015 the appellant may have been a victim of child criminal exploitation and therefore a victim of modern slavery.

8. The appellant brought an appeal to the First-tier Tribunal, arguing that his removal would be contrary to the Refugee Convention and the ECHR (articles 3 and 8). His appeal came before Judge of the First-tier Tribunal Roger ("the judge"). In a decision promulgated on 23 February 2022, the judge allowed the appeal. It is this decision that is now being appealed (by both parties).

9. I note for completeness that on 9 August 2022 (several months after the judge's decision was promulgated) the respondent issued a decision ("the conclusive grounds decision") accepting that on the balance of probabilities the appellant was a victim of modern slavery in 2014 – 2015 due to child criminal exploitation.

Decision of the First-tier Tribunal

10. At the hearing in the First-tier Tribunal the respondent sought an adjournment pending the conclusive grounds decision. The judge refused on the basis that the parties had previously agreed that the matter should proceed to the substantive hearing and not wait for the conclusive grounds decision.

11. The judge considered whether the respondent had discharged the burden of establishing that the appellant had ceased to be a refugee and concluded that she had not. This aspect of the decision is not challenged.

12. The judge considered whether the presumption in section 72 of the Nationality Immigration and Asylum Act 2002 (that the appellant has been convicted of a particularly serious crime and is a danger to the community) had been rebutted. The judge found that it had not and that consequently the appellant was

excluded from protection from refoulment as a refugee. This aspect of the decision is not challenged.

13. The judge considered the appellant's claim to face a risk of treatment violating article 3 by the authorities in Uganda because of his mother's political activity (which had been the basis for the original grant of refugee status). The judge did not accept that the appellant faced a risk from the authorities. This aspect of the decision has not been challenged.

14. The judge considered the appellant's claim to face a risk of treatment violating article 3 because he is gay. The judge accepted the appellant is gay but found that he has not lived openly as a gay man in the UK due to his background and community and would not face a risk on return as an openly gay man. This aspect of the decision is challenged by the appellant and is discussed below.

15. The judge then considered the appellant's claim to be a victim of trafficking. The judge found that he was forced to transport drugs in 2015 and his conviction in 2015 relates to activities undertaken as a victim of modern slavery. The judge found, however, that the appellant was not at risk of being re-trafficked in Uganda. The finding in respect of risk of re-trafficking is not challenged.

16. The judge then turned to article 8 ECHR. Applying the framework in section 117C of the 2002 Act, the judge found that, because the appellant had been sentenced to 6 years imprisonment in 2019, he needed to establish that there were very compelling circumstances over and above those described in Exceptions 1 and 2.

17. The judge found that Exception 1 was satisfied because the appellant has been living lawfully in the UK for most of his life; is socially and culturally integrated in the UK; and would face very significant obstacles integrating in Uganda.

18. The judge noted that the Exception 2 in section 117C of the 2002 Act was not relevant because the appellant does not have a partner or child.

19. The judge then considered whether there were very compelling circumstances over and above Exception 1. The judge directed herself that she was required to look at all relevant factors in a proportionality balancing exercise.

20. The judge stated that given the seriousness of the appellant's offending there was a substantial public interest in his deportation to which she gave significant weight.

21. The judge weighed against the "substantial public interest" several factors that she identified as relevant to whether there were compelling circumstances. The factors she considered are the following:

    a. The appellant was very young when he came to the UK and had a difficult upbringing.

    b. The appellant's mother has serious mental health issues.

    c. The appellant's offending in 2015 was due to him being trafficked and although the offending in 2019 was not due to trafficking (and was due to

his difficult financial circumstances) there is a connection such that the latter would not have occurred had the appellant been protected from trafficking in 2015. The judge stated in paragraph 86:

> This [the offending in 2105 being due to trafficking] is a factor of significant weight as it reduces the weight that ought to be attributed to the offending and it is relevant to my assessment of proportionality that the police did not take action or seek to protect the appellant, then a minor in local authority care, after he had reported the gang details to the police. On release from the two-year sentence, and following service of the deportation/cessation of refugee status decision, I accept that the appellant was not able to work or study in the UK. Whilst he was not forced into reoffending by a criminal gang, and chose to reoffend and to such a serious extent, I am able to accept that the situation that he found himself in post-release was not conducive to him being able to properly utilise the qualifications/skills that he had obtained during his imprisonment. His being a former victim of trafficking is relevant to his subsequent offending because if he had been offered protection and assistance from the police and authorities following his report of coercion by criminal gangs prior to his arrest in Peterborough in 2015, then he should have and is likely to have been protected from coercion in further more serious offending, namely supplying class a drugs on the county lines in Peterborough and he would not have been in the situation that he subsequently found himself in in 2019, namely subject to a deportation order and cessation of refugee status and unable to work or study in the UK and vulnerable to seeking and continuing a life of crime. I therefore give significant weight to these unique circumstances in the overall balancing test that I have to apply"

d. The appellant has asserted that he is a reformed person who is keen to turn his life around and has undertaken courses whilst in prison. The judge stated that she was satisfied that:

> "some, albeit limited, weight ought to be attached to the appellant's assertions and attempts to get his life on a positive path on release from prison."

e. The appellant has strong ties to the UK.

22. The judge found that these factors, considered together, outweigh the public interest.

The respondent's grounds

23. The respondent advanced five grounds of appeal.

24. Ground 1 concerns the judge's assessment of whether the appellant would face very significant obstacles integrating into Uganda, which is one of the conditions that must be satisfied for Exception 1 in section 117C(4) of the 2002 Act to apply.

25. Grounds 2, 3 and 5, which I will consider together, concern the judge's assessment of whether there were very compelling circumstances over and above those described in Exception 1 such that the appellant met the requirements of section 117C(6) of the 2002 Act.

26. Ground 4 concerns the judge's decision to not adjourn the hearing. This was not pursued by Mr Harland.

The appellant's grounds

27. The appellant's grounds concern the judge's assessment of whether the appellant faces a risk of treatment violating article 3 ECHR on account of being a gay man.

Exception 1 in section 117C(4) the 2002 Act (the Respondent's Ground 1)

28. Exception 1 concerns foreign criminals sentenced to less than four years imprisonment. It provides as follows:

> (4)Exception 1 applies where—
> (a)C has been lawfully resident in the United Kingdom for most of C's life,
> (b)C is socially and culturally integrated in the United Kingdom, and
> (c)there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

29. In cases, such as this, where a foreign criminal has been sentenced to more than four years imprisonment and therefore Exception 1 does not apply, whether or not the conditions of Exception 1 are satisfied is still relevant because it forms part of the overall proportionality assessment under article 8 required by section 117C(6).

30. The judge's finding that the conditions in subparagraphs (a) and (b) of section 117C(4) were met is not challenged. The only challenge is to the judge's finding that the condition of subparagraph (c) was met: i.e. that the appellant would face very significant obstacles integrating into Uganda.

31. Mr Harland argued that the judge failed to take into consideration factors that would reduce the difficulties the appellant would face integrating into Uganda, such as his ability to speak the language (English), the skills and training he has gained whilst in prison, and the support he potentially would receive from his brother and mother in the UK.

32. Ms Radford argued that the judge identified the correct legal test (whether the appellant will be enough of an insider in Uganda to be able to participate in society and build relationships) and gave clear reasons explaining why she concluded that he would not. She submitted that the judge was not obliged to identify and dispose of every point raised by the respondent and it was sufficient that she addressed the main issues in dispute. With respect to support from the appellant's brother and mother, she maintained that the evidence demonstrated that the appellant's mother was not in a position to provide support (on the contrary, she was in need of significant support) and that his brother was on a low income. She submitted that there was no basis to find that they could provide meaningful support to the appellant in Uganda.

33. The reasons given by the judge for concluding that the appellant would face very significant obstacles integrating into Uganda were that (a) he has lived outside of Uganda since the age of 10; (b) he has no family or friends in Uganda who could support him; (c) his upbringing in the UK had not prepared him for life in Uganda; (d) he would not have accommodation in Uganda; and (e) his only work experience has been dealing drugs and he lacked skills transferable to life in Uganda.

34. These reasons clearly demonstrate that the judge engaged with and considered the evidence as a whole in respect of the situation in which the appellant is likely to find himself in Uganda. In these circumstances, as submitted by Ms Radford, it was not necessary for the judge to deal expressly with every point. See paragraph 46 of *Simetra Global Assets Limited v Ikon Finance Ltd & Others* [2019] EWCA Civ 1413 which makes clear that a judge need not deal with every specific point. The authorities are also clear that judicial restraint must be exercised when the reasons that a tribunal gives for its decision are being examined. See paragraph 77 of *KM v Secretary of State for the Home Department* [2021] EWCA Civ 693. In my view, the judge's reasons, as summarised in paragraph 33 above, adequately support the conclusion she reached on whether the appellant would face very significant obstacles integrating in Uganda and the failure to address every point raised by the respondent does not indicate a flaw in the judge's reasoning – or a failure to have regard to material considerations - sufficient to establish an error of law.

Section 117C(6) of the 2002 Act (the Respondent's Grounds 2, 3 and 5)

35. Section 117C(6) stipulates that:

> In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

36. In order to determine if there are very compelling circumstances over and above Exceptions 1 and 2, all relevant circumstances of the case must be considered and weighed against the very strong public interest in deportation. See paragraph 51 of *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22

37. Two of the circumstances considered relevant by the judge, which formed part of her rationale for concluding that in this case the strong public interest in deportation was outweighed, were (i) the appellant being trafficked in 2015; and (ii) the appellant's rehabilitation.

38. Mr Harland argued that it was irrational for the judge to attach significant weight to the trafficking of the appellant in 2015 and irrational to attach any weight to his claim to be rehabilitated.

39. With respect to trafficking in 2015, Mr Harland argued that it was irrational for the judge to place significant weight on this when the offending in 2019 was not a consequence of the trafficking. He argued that the link the judge made between the trafficking in 2015 and the offending 2019, as set out in paragraph 86 of the decision (which is reproduced above in paragraph 21c.), was tenuous. He contended that the judge appears to have treated the appellant as if he did not have personal responsibility and agency when, in 2019, he made a decision to offend. He submitted that if the judge had recognised that the appellant is an individual responsible for his own actions than he would have found that the offending in 2019 broke the chain of causation from the trafficking in 2015. He maintained that, effectively, the judge attached substantial weight to an excuse/explanation for committing an offence in 2015 in circumstances where the appellant committed an even more serious offence in 2019 without there being any such excuse/explanation. Mr Harland did not argue that no weight

could legitimately be given by the judge to the trafficking in 2015 but submitted that it was irrational to treat this as a weighty factor given that the offending in 2019 was not due to trafficking and therefore the causal connection between the 2019 offence and the trafficking in 2015 was broken and at most tenuous.

40. With respect to rehabilitation, Mr Harland argued the weight attached by the judge to the appellant's "rehabilitation" was irrational. He acknowledged that, in accordance with *HA (Iraq)*, it was in principle open to the judge to the judge to attach weight to rehabilitation but argued that the evidence before the judge did not support a finding that in this case there had been any rehabilitation that could weigh in the appellant's favour.

41. Ms Radford argued that both the trafficking in 2015 and the appellant's rehabilitation are factors relevant to the overall article 8 proportionality assessment and therefore the judge (a) was entitled to take them into consideration when assessing if there were compelling circumstances under section 117C(6); and (b) was entitled to attach the weight to them that she considered appropriate. She characterised the respondent's case as being no more than a disagreement with the judge's conclusion.

42. With respect to the trafficking in 2015, Ms Radford argued that the judge was entitled to attach significant weight to the state's failure to protect the appellant from trafficking in 2015. She did not accept Mr Radford's argument that there was not a causal connection between the trafficking in 2015 and 2019 and submitted that the judge had adequately shown how the two were linked. She submitted that the judge did not lose sight of the fact that the appellant has responsibility for the 2019 offending. She also did not accept that the judge treated the trafficking as determinative or as a very weighty factor. She submitted that it was just one of several factors considered by the judge.

43. With respect to rehabilitation, Ms Radford argued that it was for the judge to decide whether to attach weight to the appellant undertaking courses/training and expressing a desire to turn his life around. She submitted that giving this some weight in the overall assessment is consistent with *HA (Iraq)*.

44. I am persuaded by Mr Harland that two errors undermine the judge's finding that there were compelling circumstances over and above Exception 1. The first error concerns the significant weight attached to the trafficking in 2015, which I find was irrational. The second error concerns attaching weight to the appellant's rehabilitation, as I agree with Mr Harland that the evidence before the judge could not, on any legitimate view, support a finding that the appellant had been rehabilitated. My reasons for reaching these conclusions are as follows:

Trafficking in 2015

45. The judge made a clear distinction between the appellant's offending in 2015 and his (more serious) offending in 2019. The judge found that the offending in 2015 was due to the appellant being trafficked. However, she found that in 2019 the appellant offended not because he was forced by traffickers to do so, but because of his financial situation. In paragraph 85 the judge made this very clear, stating that the offending in 2019 was "out of choice and due to his desperate financial situation".

46. Based on the judge's findings of fact, there is a clear causal connection between the trafficking in 2015 and offending in 2015, as the former resulted in the latter. Plainly, the judge was entitled to treat the trafficking as a significant factor when considering the weight to attach to the offending in 2015.

47. On the other hand, the connection between the trafficking in 2015 and the offending in 2019 is far from clear, given that the judge found that the appellant was not forced by traffickers to offend in 2019 and offended because of his desperate financial situation. The judge found that there was a causal connection on the basis that had the trafficking not occurred, the appellant would not have been subject to a deportation order and unable to work or study in the UK and thereby, as stated in paragraph 89, "vulnerable to seeking and continuing a life of crime."

48. I agree with Mr Harland that the link drawn by the judge between the trafficking in 2015 and offending in 2019 is tenuous. According to the judge's unchallenged findings of fact, the offending in 2019 was not the result of trafficking; it was the result of a choice made by the appellant in response to desperate financial circumstances and an inability to work and study. On any view, these circumstances – in contrast to the situation in 2015 when the appellant was forced into criminality as a result of trafficking – do not reduce his culpability for, or in some way mitigate, his decision (for which he alone was responsible) to commit a very serious crime. The trafficking in 2015 and offending in 2019 are not linked: as Mr Harland put it, the offending in 2019 broke the chain of causation from the trafficking in 2015. I therefore agree with Mr Harland that it was not rationally open to the judge to attach significant weight to the trafficking in 2015 in the context of considering the offending 2019.

Rehabilitation

49. The judge's findings of fact in relation to the appellant's "rehabilitation" are set out in paragraphs 87 – 90. They are (i) the appellant has undertaken several courses whilst in prison, (ii) he is keen to utilise the skills he has developed in prison when he is released; and (iii) he has firmly stated that he is keen to turn his life around. The judge considered that these findings were sufficient to support attaching limited weight to the appellant's rehabilitation.

50. In my judgment, the factors identified by the judge are unable, on any view, to justify the attachment of any weight to rehabilitation. The appellant was still in prison at the time of the hearing and therefore there was not (and could not be) any evidence of not offending post-release. Nor, plainly, was this a case where substantial time had elapsed post-release without offending. All that the judge based her finding on was that the appellant has taken some courses in prison and that he says he has reformed. However, *HA (Iraq)* makes it clear that this will normally be insufficient. Paragraph 58 of *HA (Iraq)* cites with approval the following from the Court of Appeal:

> I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or the absence of subsequent offending for what will typically be a relatively short period.

51. It is also stated in paragraph 58 of *HA (Iraq)* that:

> In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance.

52. In this case, the appellant was not even able to point to, as a factor in his favour, no further offences being committed after his release, because he was still in prison. It was not, therefore, in my view, rationally open to the judge to attach weight to the appellant's rehabilitation.

53. In conclusion, for the reasons set out above concerning the judge's findings in respect of trafficking and rehabilitation, I agree with Mr Harland that the judge's assessment of whether there were very compelling circumstances outweighing the very strong public interest in deportation is undermined by legal error and cannot stand.

Risk of treatment violating article 3 ECHR as a result of being gay

54. As recognised by the judge, *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31 provides a framework for evaluating whether a person would be at risk on account of his sexuality. The judge set out key passages from *HJ (Iran)* in paragraph 47 of the decision. The judge's analysis is in paragraph 48, where she stated:

> "Having considered the appellant's evidence I am satisfied that the appellant lived discreetly as a gay man between 2017 and 2019 when he was out of prison. I find that the appellant was not openly gay in front of others save for his mother and that this is how he chose to live rather than embarrass his friends or community that he was living in. I find that the social pressures were such that he chose to live discreetly and I am not persuaded that the appellant would wish to live an openly gay life if he were to Uganda. There are no laws against homosexuality in the UK and his mother was very understanding and accepting of his sexuality and yet he made the choice to remain discreet. I am satisfied that this choice of how to live his life will continue if he were to return to Uganda and I am not able to accept that he would wish to live an openly gay life **or that the only reason preventing him from doing so** is the real risk of persecution in Uganda". [Emphasis added]

55. The framework in *HJ (Iran)* provides that where a person (1) is gay, (2) would be returned to a country where gay people who live openly face persecution, and (3) would live discreetly upon return, the question for a judge to resolve this whether:

> "**a material reason** for [the person] living discreetly on his return would be a fear of persecution which would follow if he were to live openly as a gay man" [Emphasis added]

56. I agree with Ms Radford that the judge fell into error by finding that fear of persecution would not be "the only reason preventing him" from living openly as a gay man in Uganda when the test, as set out in *HJ (Iran)*, is whether it would be a "material reason" for living discreetly.

57. Mr Harland argued that the decision should be read as a whole and that it is tolerably clear that the judge in substance applied the correct test, given the clear finding that the appellant had lived discreetly in the UK where he did not face a risk of persecution. I am not persuaded by this submission. There is a significant difference between persecution being a *material* reason for discretion

and for it being the *only* reason. In my view, given the language used by the judge, it may well be the case that she applied too stringent test. This error, therefore, is material. The judge's finding in respect of risk arising from the appellant being gay cannot stand.

Disposal and preserved findings

58. In accordance with paragraph 7 of the Practice Statement, and having regard to *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC), I have decided that this case should be remade in the Upper Tribunal. This is because the parties have not been deprived of a fair hearing and the extent of further fact finding for the decision to be remade is likely to be limited.

59. The remaking of the appeal will only be concerned with articles 3 and 8 ECHR.

60. With respect to article 3: the remaking of the decision will be concerned only with the appellant's claim to be at risk because he is gay. The following findings (made in paragraphs 46 and 48) are preserved: the appellant is a gay man who has told his family about his sexuality but has lived discreetly and not openly as a gay man in the UK due to social pressures and a desire to not embarrass his friends and community.

61. With respect to article 8: the judge's findings in respect of Exception 1 are preserved. The judge's finding that the appellant was a victim of trafficking, and that the offending in 2015 was as a result of that trafficking, is preserved. The findings in paragraph 91 about the appellant's ties to the UK and close relationship with his mother are also preserved.

Notice of Decision

62. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

63. The appeal will be remade at a resumed hearing in the Upper Tribunal.

Directions

64. The parties have permission to rely on evidence that was not before the First-tier Tribunal. Any such evidence must be filed with the Upper Tribunal and served on the other party at least 14 days before the resumed hearing.

D. Sheridan
Upper Tribunal Judge Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 April 2023