Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02828/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Sent**
On 31 October 2013	**On 4 February 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

HAITHAM NABIL EL RIFAI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Khan, instructed by Parker Rhodes Hickmotts Solicitors
For the Respondent: Mrs C Brewer, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Haitham Nabil El Rifai, was born on 29 January 1988 is a Palestinian from the Occupied Territories. By a decision dated 10 June 2013, I found that the

First-tier Tribunal had erred in law and I set aside its determination. I set out below my reasons for doing so:

REASONS FOR FINDING THAT TRIBUNAL MADE AN ERROR OF LAW, SUCH THAT ITS DECISION FALLS TO BE SET ASIDE

1. The appellant, Haitham Nabil El Rifai, was born on 29 January 1988. His family is from Palestine (the Occupied Territories) but he was born as a refugee in Lebanon. He came to the United Kingdom in March 2010 as a student and claimed asylum on 24 January 2012. He appealed against a decision of the respondent dated 29 February 2012 to remove him from the United Kingdom. The First-tier Tribunal (Judge Reed) in a determination dated 17 April 2012, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Judge Reed's determination is a thorough and careful analysis of the evidence which he had before him. For reasons which I will explain, I have decided that the determination did contain an error of law and that the risk to this appellant, as an openly gay man returning to Lebanon, should be further considered by the Upper Tribunal. However, in doing so I acknowledge that Judge Reed did not have the same time and resources available to him in the First-tier Tribunal such as may now be employed in the Upper Tribunal in order to remake the decision in this appeal and, if appropriate, give country guidance.

3. The first ground asserts that Judge Reed failed to take account of the previous findings of fact made by Immigration Judge Osborne in the appellant's previous appeal. Judge Osborne had considered (without a hearing) an appeal made by the appellant in 2011 concerning the refusal by the respondent to give him further leave to remain as a Tie 4 (General) Student Migrant. Judge Reed noted at [30 (8-9)]:

> If the appellant were to be believed, he found out about his father's reaction to his gay relationship in the middle of 2010. He did not however claim asylum until 24 January 2012. By this time not only had the best part of 18 months elapsed, but the appellant had applied for an extension of his visa as a student and had presented an appeal to the Tribunal albeit that this was dealt with on the papers. He explained the delay by saying that he did not know about claiming asylum, but I do not find this plausible as the appellant is someone who has already been recognised as a refugee, he is reasonably well educated, and was clearly sufficiently aware of immigration matters to pursue a further application as a points-based system migrant and an appeal against the refusal of that decision. I also bear in mind that according to the determination of that appeal which was promulgated on 4 May 2011 the appellant relied in part upon an Arab Bank savings passbook which he claimed was in the name of his father Nabil Ali Al-Rifai. The book had not actually been translated. However what the appellant said about being in possession of his father's passbook runs contrary to the suggestion the appellant makes about them having fallen out and the father threatening to kill him in the summer of 2010. Having carefully considered all of the evidence in the round, I do not accept what the appellant says about the threats made by his father.
>
> The appellant's father may or may not know about his relationship with Mohamad, but I do not accept that he can be completely unaware of the appellant's sexuality. I say this because of what the appellant says about dressing like a girl when he was

> younger and having been beaten by his father because of this. This all indicates that the appellant's father must have known for some time about the appellant being gay. Such knowledge has not however prevented the appellant from succeeding with his education, submitting an application for a visa to the UK. I also take into account that the appellant relied on what he said was his father's savings book in support of his recent points-based appeal, which strongly suggest that he still has his father's support.

4. The grounds note that Judge Osborne had not been satisfied "to the standard that has to be applied in these appeals that the [savings passbook related] to the account of the appellant's father." [12]. It is submitted that the case of **Devaseelan [2004] UKIAT 00282** was binding on Judge Reed and that he should not, therefore, have found, in the light of Judge Osborne's finding, at [30] the appellant had enjoyed his father's support because his father had been prepared to support the appellant financially in his studies.

5. The appellant seeks, in effect, to rely upon a finding by a previous Immigration Judge that the appellant had submitted false or unreliable evidence in support of his application for a student visa. However, it would appear that the author of the grounds of appeal has failed to read Judge Reed's comment regarding the savings book with sufficient care. That Judge Reed should have taken "into account that the appellant relied on what he said was his father's savings book in support of a recent points-based appeal" was open to him on the evidence and did not contradict the findings of the previous Tribunal. Whether or not the savings book did actually belong to the appellant's father, the fact remains that the appellant had sought to rely upon it in the visa appeal. The point being made by Judge Reed was that the fact that the appellant sought to rely on what he claimed to be the savings book of his father indicated that the appellant himself believed at that time that he continued to enjoy his father's support. It is a finding which is not at odds with Judge Osborne's findings of fact.

6. The second ground of appeal relates to Article 1D of the Refugee Convention. At [33-40] Judge Reed set out the position as follows:

> It was submitted by Ms Khan that the appellant is entitled to the benefit of Article1D of the Convention and that because of this he is entitled to recognition as a refugee. Article 1D provides as follows:
>
> > "D This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
> >
> > When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention."
>
> Three questions relevant to this appeal arise out of Article 1D: Is the appellant someone who is "at present" receiving protection or assistance from organs or agency of the UN other than the UNHCR? Has that protection ceased? Does the use of the words *ipso facto* mean that someone who has lost UN protection is automatically to be recognised as a

refugee or must there be some consideration as to the reasons why such protection has ceased?

In **El-Ali [2002] EWCA Civ 1103**, the Court of Appeal held that Article 1D only applied to those Palestinians who were in receipt of the protection of UNRWA at the date of the convention in 1951. The authority of the domestic courts means therefore that Article 1D could not apply to this appellant who although in receipt of the protection of UNRWA was not even born in 1951. Miss Khan however referred me to the decision of the European Court of Justice in **Bolbol**, which came to the opposite conclusion, indicating that it could not be maintained that only those Palestinians who became refugees as a result of the 1948 conflict and who were receiving protection or assistance from UNRWA at the time of the original version of the Geneva Convention in 1951 are covered by Article 1D. It was submitted by Miss Khan that this precedent of the ECJ rather than the decision of the Court of Appeal is binding upon the Tribunal.

Even if I were to accept that I had to follow the decision in **Bolbol** as to the extent of those covered by Article 1D, I still do not see that this would be of any benefit to the appellant. I say this because those who are covered by Article 1D are ordinarily unable to avail themselves of the other protections of the Refugee Convention. Although I was urged to follow the guidance given by the Advocate General, the Grand Chamber itself essentially decided the case of **Bolbol** on a narrow issue only relating to whether or not Article 1D was restricted to those who already had UNRWA protection in 1951. In **El-Ali**, the Court of Appeal considered all the questions about Article 1D to which I have referred and clearly explained why the protection of UNRWA has not ceased. The second sentence in Article 1D would, according to the speech of Laws LJ only:

> "bite on the happening of a particular overall event: the cessation of UNRWA assistance. They did not contemplate that Article 1D would apply piecemeal and haphazardly, its scope marked off by reference to the persons who at any given moment were or were not within the UNRWA's territories receiving assistance, whether or not in any given case an individual might have had a good reason (a "protection related reason") for leaving the territory where he is registered".

The opinion of the Advocate General may well differ from the conclusions of the Court of Appeal on this issue, but the Grand Chamber did not make any specific ruling on this point. I am therefore clearly bound by the decision of the Court of Appeal as to the meaning of the second sentence in Article 1D.

Therefore, even if, according to the European Court of Justice, the Court of Appeal were wrong in relation to the fixed definition of those who are covered by Article 1D, the appellant cannot, as an individual, say that he is not receiving UNRWA protection in Lebanon and is therefore entitled to seek protection as a refugee elsewhere. I say this because UNRWA is still functioning and its protection is still available in Lebanon. This appellant has indeed produced his UNRWA certificate to the respondent. The appellant's appeal by reference to Article 1D must therefore be dismissed.

Indeed, if I were to follow the decision of the Grand Chamber in **Bolbol**, then in my view this would mean that the appellant could not avail himself of the other Articles of the Refugee Convention because he would be a person covered by Article 1D, and yet the protection of UNRWA has not ceased.

> If I were to follow the reasoning of the Court of Appeal, that only those afforded the protection of UNRWA in 1951 are covered by Article 1D, then the protection of the other Articles of the Convention would still be open to the appellant. I have therefore continued to consider the appeal on this basis under Article 1A of the Convention.

I cannot identify any error in the judge's reasoning. I consider that he has analysed the position in respect of Article 1D accurately and would concur with the reasons given.

7. The third ground of appeal asserts that Judge Reed "erred in law in his assessment of the country condition in Lebanon for homosexuals." At [42-44] Judge Reed, applying the test set out by the Supreme Court in **HJ (Iran) [2010] UKSC 31,** wrote:

> I refer to my previous findings of fact. The appellant is gay. I have however considered what the situation would be for him on return to Lebanon and have borne in mind that he is a Palestinian as well as a gay man. I have also taken into account the way the appellant openly conducts himself and bear in mind that he cannot be expected to conceal aspects of his sexual orientation. I have however already given my reasons for finding that the appellant would be able to conduct his lifestyle as he would wish to upon return to what is clearly one of the more liberal countries of the Middle East. He may well not be able to do everything that he can in the UK but that is clearly not the test. I find that he would nevertheless be able to live an openly gay lifestyle without having to conceal his sexual orientation.
>
> I have stated why I considered that the appellant led a relatively successful life as a gay man of Palestinian origin in Lebanon previously. He was able to pursue an education at tertiary level and thereafter was able to work. He had a relationship with a gay partner and visited gay sauna clubs. Indeed, if anything, the evidence suggests that the liberal process in Lebanon has continued since he came to the UK with Lebanon now being referred to as a gay destination.
>
> In all the circumstances I find that the appellant does not have a well founded fear of persecution on account of his sexuality and membership of a particular social group or on account of his race or ethnic background as a Palestinian. His appeal under Article 1A must therefore fail and I dismiss his appeal under the Refugee Convention.

8. Earlier in the determination, at [31] the judge had stated:

> I have carefully considered all of the country background evidence, and what the appellant has said about his sexuality and how this manifests itself. I find that Lebanon is clearly a more diverse and progressive society than many other Middle Eastern countries. The appellant has had a gay relationship in Lebanon, a country which has gained a reputation as a "*gay destination*" and the gay "*party capital of the Middle East*". Helem has been able to hold conferences in Lebanon with the protection of the police for delegates. The evidence before me all points to there being an increasing tolerance towards and acceptance of gays by both the police and by society as a whole. This has even encompassed at least one member of the judiciary making a favourable interpretation of what might otherwise be regarded as anti-gay criminal legislation.

> Whilst the freedoms in Lebanon may not have developed quite to the same extent as they have in the West, I find that attitudes in Lebanon would not prevent the appellant from living the lifestyle as a gay man that he would wish to.

9. The grounds at [14] assert:

> "…Judge Reed was further referred to country evidence in this case on the position of homosexuals in Lebanon, in particular Judge Reed was referred to the respondent's bundle at page F20; appellant's bundle pages 154-155, page 160 (paras 15-17), pages 164-164, page 165 (where parents employ the use of Article 534 against their own children), pages 163-169 and page 180.

10. Miss Khan referred me to a significant volume of background material which appears to indicate that gay men who openly express their sexuality would be at real risk in Lebanon. Judge Reed has (for example at [27]) made reference to the generally liberal environment for gay men in Lebanon *vis-à-vis* other areas of the Middle East although he notes at [32] that "freedoms in Lebanon may not have developed quite to the same extent as they have in the West". Having made that observation, it could be said that Judge Reed should have hesitated before going on to find that "attitudes in Lebanon would not prevent the appellant from leading the lifestyle as a gay man that he would wish to". Judge Reed should have addressed in greater detail and made appropriate findings regarding the "lifestyle as a gay man" that he found that this particular appellant would wish to pursue. He should then have considered, by reference to all the background material relating to gay men in Lebanon, including those which record negative attitudes towards homosexuality, whether the appellant would be able to enjoy such a lifestyle without exposing himself to a real risk of harm or whether he would be required to make significant adjustments to his gay lifestyle in order to avoid the risk of suffering such harm. His failure to do so renders his analysis incomplete.

11. As a consequence, the First-tier Tribunal determination should, in my judgment, be set aside accordingly and the decision remade in the Upper Tribunal. Judge Reed's findings of fact (other than in relation to risk on return) shall stand. The Upper Tribunal may require to hear further oral evidence from the appellant in the light of the comments made at [10] *supra.*

DECISION

12. The First-tier Tribunal erred in law such that its determination falls to be set aside. The Upper Tribunal will re-make the decision at, or following a resumed hearing in Bradford, on a date to be fixed.

2. At the resumed hearing on 31 October 2013, the appellant attended and gave evidence in Arabic with the assistance of an interpreter. I also heard from his witness, Haiyer Jaleel Sozag (Mr Sozog) who is the appellant's boyfriend. The

burden of proof in the appeal rests on the appellant and the standard of proof is whether the appellant would face, respectively, persecution or ill-treatment contrary to Article 3 ECHR if he were to return to Lebanon.

3. Having cross-examined the appellant and the witness, Mrs Brewer, for the respondent, sought to cast doubt on some of the statements made by the appellant. The appellant and Mr Haiyer had both said that they intended to marry. Mrs Brewer submitted that neither the appellant nor the witness "knew much about it". She submitted that the failure of the appellant and Mr Haiyer actively and seriously to investigate the practicalities of civil partnership or marriage cast doubt on their credibility. She also asked me to reject the appellant's claim that cross-dressing (referred to in the appellant's most recent statement) was not a fundamental aspect of the appellant's sexuality but was rather an element of the appellant's behaviour which he had sought to exaggerate for the purposes of the appeal. Mrs Brewer referred to the manner in which the appellant had attended the hearing in the Upper Tribunal. It is fair to say that the appellant (who, although not dressed as a woman, was wearing heavy make-up) had dressed in a manner which was striking even by the standards of urban life in the United Kingdom today. Mrs Brewer submitted that the flamboyance of the appellant's dress was simply an attempt by him to "test the waters" of his sexuality and was not a fundamental aspect of that sexuality.

4. I reject Mrs Brewer's submissions. Judge Reed, in the First-tier Tribunal, had accepted what the appellant had said regarding his sexuality and those findings have not been disturbed. Whether or not the appellant may be "testing the waters" I find that the manner in which he dressed at the hearing in the Upper Tribunal is an accurate reflection of the way in which he wishes to express his gay sexuality. I accept that he generally dresses in that same manner (which, it was pleasing to learn from his oral evidence, appears to attract little adverse comment in Rotherham). I certainly did not find that the appellant was putting on a show or exaggerating his dress or conduct for the purposes of this appeal. Likewise, I find that the appellant and Mr Haiyer have discussed marriage as they have explained and that their failure hitherto to investigate the possibility of civil partnership does not detract from their credibility as witnesses.

5. It would be fair to say that the background evidence relating to Lebanon appears to indicate two distinct strands in the attitude of those in authority and the community generally to gay men and women. On the one hand, there is certainly evidence that there is a lively gay scene in Beirut. There has, however, also been something of a conservative reaction to relaxed standards. For example, I note the contents of an HJT Research news report online dated 30 April 2013 in which the two elements of gay life in modern Beirut (the existence of a gay nightclub and the repressive and at times violent responses of those in authorities) are brought together:

> "Gay Star News quoted the mayor [of Beirut] was telling Lebanese TV:
>
> > 'I saw 25 men outside what looked like boys and men. I went inside... I saw people kissing, touching each other and a man wearing a skirt. These homosexual acts that are happening... are scandalous sexual acts. Of course we

made them take off their clothes. We saw a scandalous situation and we had to know what these people were. Is it a woman or a man? It turned out to be a noss rejel (half-man). I do not accept this in Dekwaneh.'

The raid on the Ghost Night club led to the beating and humiliation and arrest of a number of individuals arrested there by the authorities."

6. The appellant has adduced a report from Dr Alan George dated 15 October 2013 which seeks to draw together the background evidence relating to gay men in Lebanon. Dr George concluded that the appellant, because he is Palestinian rather than Lebanese, starts at a disadvantage in Lebanese society and he concluded that the appellant's openly gay appearance and conduct would expose him to a real risk in all parts of Lebanon. Having considered the report carefully together with the background evidence which it cites, I have concluded that Dr George's conclusions are reliable. There is tolerance of what may be described as low level and discreet gay behaviour in Beirut but tensions which continue to exist regarding gay sexuality in Lebanese society are prone to erupt (as in the incident described above) and gay men and women may suffer as a consequence. There are two factors in the appellant's case which I find would exacerbate that risk. First, he is Palestinian and is likely to be regarded with suspicion outside the refugee camps. Secondly, if he dressed and conducted himself in the way in which he does in Rotherham (and at the Upper Tribunal hearing), then there is a real possibility that he would suffer violence both at the hands of the police and others opposed to the liberalisation of sexual attitudes. In essence, I find that this appellant would encounter real risks of ill-treatment in any part of the Lebanon if he dresses and behaves as he did before the Upper Tribunal.

7. The remaining question is how the appellant will respond to those risks upon return to Lebanon. The proper approach to be adopted is that set out in the judgment of the Supreme Court in **HJ (Iran)** [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.

8. I am satisfied, for the reasons which I have given above, that "gay people who lived openly" would be liable to persecution in Lebanon." If the appellant lives openly as he does in the United Kingdom, I find that he will have a well-founded fear of persecution or ill-treatment. I find that the appellant may well seek to dress and live discreetly thereby avoid persecution or ill-treatment; indeed, the background evidence suggests that he might safely if discreetly pursue relationships with other men and attend gay bars in Beirut. However, I am satisfied that the way in which the appellant now behaves is the way that he would "wish to live" and represents an accurate reflection of his sexual identity. I find that he would not choose to live discreetly for any reason of social pressure but solely in order to avoid persecution or ill-treatment. This may not, of course, be true of all gay men returning to live in Lebanon but I find that it is true of this particular appellant. Following the principles of **HJ**, it follows that the appellant is a refugee and his appeal should be allowed accordingly.

DECISION

9. This appeal is allowed on asylum grounds.

10. This appeal is allowed on human rights grounds (Article 3 ECHR).

Signed Date 21 November 2013

Upper Tribunal Judge Clive Lane