



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: AA/06086/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 3 November 2014**

**Determination
Promulgated
On 20 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**AAT
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: MR S Chevlan of Counsel

For the respondent: Mr Neville Smart, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant appealed against the decision of the respondent to remove him as an illegal entrant after refusing him asylum in the decision dated 7 June 2013. First-tier Tribunal Judge Brenells (hereinafter “the Judge”) dismissed the appellant’s appeal for asylum and humanitarian protection in a determination promulgated on 24 February 2014.
2. Permission to appeal was granted by a judge of the First-tier Tribunal Landes who said that it was arguable that the Judge materially erred

in law in his treatment of the evidence Post **OO (gay men at risk) Algeria [2013] 00063** case and that third party persecution must in itself come within the definition of persecution.

The appellant's case

3. The appellant's case is as follows.
4. The appellant's claim is based on his membership of a particular social group in that he is a homosexual. He claims that he cannot return to Algeria because he will not be able to lead the life he wants and would be forced to conform by the community in Algeria to what is expected of him. He claims that his partner was murdered in Algeria because he was a bisexual. The appellant fears that he will suffer the same fate as his partner if people find out that he is a bisexual.

The respondent's reasons for refusal

5. The respondent in their reasons for refusal letter stated in summary the following.
6. The appellant claims that he is bisexual and in his substantive asylum interview gave consistent and detailed account of his homosexual relationships in Algeria. Although the appellant gave inconsistent evidence it is accepted that the appellant is a bisexual.
7. The appellant claims that he had a relationship with a man called Karim Chelli for a significant period of time. Chelli was killed, in part, because he was a homosexual. The appellant acknowledged that the robbery may have been for money as well. Therefore the appellant's account that his partner's murder is homosexuality motivated is the appellant's own assessment. This is not supported by the appellant's assertion that they stole his car and his telephone at the time of the murder. The people who killed the appellant's partner was convicted which leads to the conclusion that he was not killed because of his sexuality as it goes against the appellant's assertion that killing a homosexual is condoned in Algeria.
8. It is accepted that the appellant is a bisexual Algerian male and his return to that country will be assessed in line with that profile. Taking into account the Country Guidance Case of **OO 00063** which states that on the evidence in general, Algerian gay men do not express their sexual identity openly because of societal disapproval, not because they fear persecution or other serious harm. The appellant did not leave the country for a year after his partner was killed although he claims his murder was the catalyst for him to leave the country. The appellant's fear of persecution due to his sexuality may be subjectively genuine but in the case of **OO** it was held that it is not objectively well-founded.

The First-tier Tribunal Judge's findings

9. First-tier Tribunal Judge gave the following reasons for dismissing the appellant's appeal.
 - i. The respondent accepts that the appellant is bisexual and wants to continue that lifestyle on his return to Algeria. Dr David Seddon's long and detailed report has been considered which is largely irrelevant because the respondent accepts that the appellant is bisexual. Part of the report reviews the stance taken in other jurisdictions with regard to the position of Algerian homosexuals which the Judge has borne in mind when considering whether or not the facts of this particular case are such that the case falls outside the general guidelines in **OO** or there are proper reasons which permit me to depart from these guidelines.
 - ii. The appellant's evidence is that when he was 15 and from 2004 until 2006 he had a clandestine relationship with a man called Chelle who was murdered because he was a homosexual. It is possible that there are other motives for the murder because his car and telephone were also stolen and the police managed to apprehend the killers. The appellant himself has never been attacked or discriminated against in Algeria despite having lived there for two years after Chelle was killed in 2006. The appellant was issued with a family visit visa on 23 April 2008 and overstayed his visit in this country and made no attempts to regularise his status until arrested on 28 February 2013 after which he claimed asylum.
 - iii. There is no evidence which permits the Judge to depart from the Country Guidance Case of **OO**. Following the guidance in that case, there is no evidence which shows that the appellant cannot live openly as a homosexual in Algeria or that his particular facts are such that he falls outside **OO** and can establish a need for international protection. Since the appellant is able to live openly as a homosexual in Algeria, the case of **HJ Iran** does not assist him.
 - iv. The appellant has not discharged the burden of proof of having a well-founded fear of persecution for a Convention reason and his removal would not cause the United Kingdom to be in breach of its obligations under the 1951 Convention.

The appellant's grounds of appeal

10. The grounds of appeal in summary are the following. The respondent has conceded that the appellant is bisexual and therefore he successfully overcomes the first limb of the **HJ Iran** test.

11. The first ground is that the Judge ignored the case as put before the Tribunal. The appellant put his case on the basis that he was at risk on return on the basis of sexual identity pursuant to the Refugee Convention and Article 3 of the European Convention on Human Rights grounds alone. There was no freestanding Article 3 claim in respect of his medical condition or Article 8 claim. The Tribunal ignored this submission and made negative findings in respect of an Article 3 medical treatment claim and the Judge stated at question 29 of the determination “in any event Mr Chevlan conceded the Article 8 claim at the hearing and maintained the Article 3 claim”. The Article 3 claim was maintained only as being connected to his asylum claim and the appellant did not make a medical treatment claim. This is indicative of the lack of care and attention by the Tribunal in these proceedings where it makes negative findings on claims not advanced before it by the appellant.
12. The second ground of appeal states that the Tribunal record states that no application has been made from an anonymity direction. This matter was not raised before the Tribunal as the court listing for the hearing room which was posted in the reception area at Taylor house and outside the hearing room at Taylor House hearing centre, clearly indicated that anonymity direction was made and anonymity had already been granted.
13. The third round of appeal states that the Judge described the appellant’s sexual identity as “a lifestyle”. This displays a level of ignorance about the innate and immutable characteristic of being a bisexual. Furthermore the Judge at paragraph 20 states “whether in fact (the appellant) adopted that lifestyle or heterosexual or celibate lifestyle” is also highly ignorant of what bisexuality entails.
14. The fourth ground is about the treatment of the Country Guidance Case of **OO** by the Judge. The case of **OO** has been challenged as it incorrectly applied the Supreme Court’s guidance in **HJ and HT**. There was evidence before the Tribunal which post-dated **OO**. Practice direction 12.4 supplants the findings of the Tribunal in **OO**. The Court of Appeal granted permission to appeal **OO** and the appellant applied for an adjournment pending the outcome. Even in the case of **OO** it was conceded that there will be certain cases which will be able to show individual risk. The appellant specific narrative was supported by a detail psychiatrist evaluation by Prof Katona who concluded that the appellant has PTSD and depressive disorder which links to his traumatic experiences to his sexual identity which includes the murder of his former lover by Islamists in Algeria.
15. Past persecution can also be the basis of future persecution. Applying paragraph 339K of the Immigration Rules and according to paragraph 85 (e) of **OO**, the appellant is a refugee.

16. The Tribunal ignored the report of Dr Seddon drafted in 2014 which post-dates OO. The Tribunal in OO heard evidence in August 2012 and therefore it does not cover the recent situation in Algeria for homosexuals. The Immigration and Refugee Board of Canada's report of 8 August 2013 and the National Post article on the Algerian national ballet dancers dated 4 September 2013 refers to "some LGBT individuals received violent threats and felt compelled to leave the country". The male ballet dancers were granted refugee status in Canada.

The Rule 24 Response

17. The respondent in her Rule 24 response argued that the Judge directed herself appropriately. Ground 1, 2 and 3 do not reflect a material error of law. It is submitted that there is a public interest that all hearings, insofar as possible, are heard in public so that justice is transparent. There should be good reason for an anonymity direction to be given. There is no good reason for why it should be granted to the appellant who is an asylum seeker.
18. In relation to ground four and the consideration of the case of OO, the grounds provide several reasons why OO should not be followed. The First-tier Tribunal is obliged to follow the country guidance case until such time it is overturned by a superior court, or that there are reasons to depart from OO or there is further background country material which has not been taken into account in the country guidance case which would warrant a different conclusion.
19. The Judge provided reasons why he considered he should not depart from OO. Reliance is placed by the appellant upon the expert's report as a reason for departing from OO. The appellant will have to show that the expert considered properly the country guidance case insofar as for the expert to come to a different conclusion and the reasons for that opinion. The Judge give adequate reasons on the material before him not to depart from the Country Guidance Case.

The hearing

20. At the hearing I heard submissions from both parties as to whether there is an error of law in the determination which I will not set out because the full notes of the hearing are in my Record of Proceedings.

Findings as to whether there is an error of law

21. The issue for me at this stage of the hearing is whether the tribunal erred in law such that his decision should be set aside. When granting permission to appeal the First-tier Tribunal Judge stated that aspects of ground four are arguable, in particular as to the Judge's treatment of the post OO background material namely that the Judge did not

consider under this head, the experts report as to the treatment of those in Algeria who do not fit societal norms. It was also stated by the permission Judge that the Judge erred in his consideration of the Canadian report which was stated **OO**. It also states that there is a good argument that the Judge did not give adequate consideration to the appellant's reasons for believing that the motivation for his ex-partner's murder was his sexual identity. The Judge's finding at paragraph 18 of the determination was inadequately reasoned. The other grounds of appeal do not add to the case and the Judge's use of terminology is not material because the Judge did not make adverse credibility findings against the appellant.

22. There is no dispute between the parties that the appellant is a bisexual. Therefore the Judge correctly found that the appellant met the first hurdle in **HJ (Iran) v SSHD and HT (Cameroon) v SSHD [2010] UKSC 31**. The only issue which remain is whether the appellant would suffer persecution on his return to Algeria on the basis that he is a bisexual.
23. The Judge materially erred in law when he said that "there is no evidence before me which permits me to depart from the Country Guidance Case of **OO**". This was not accurate because the appellant provided background evidence which post-dated **OO**. The Judge failed to take into account the official report of the Immigration and Refugee Board of Canada dated 8 August 2013 and the National Post article on the Algerian national ballet dancers dated 4 September 2013. The Judge also did not take into account Dr Seddon's report drafted in 2014 and the fact that Prof Katona's report was unchallenged by the respondent.
24. Essentially the Judge's findings are in two short paragraphs, 24 and 25 of the determination. The reasoning in these two paragraphs is brief and does not take into account all the evidence in the appeal.
25. I am ultimately satisfied that there is a material error in the determination of First-tier Tribunal Judge, in that he did not give adequate reasons for finding the appellant's can safely return to Algeria given that he is a bisexual.
26. Consequential to my finding that there is a material error of law, I set aside the determination of the Judge in its entirety and remake the decision.

Remaking of the decision

27. Mr Chevlan urged me in the event that I was to find that there is a material error of law in the determination that I should either allow the appeal or that it should be linked to the outcome of the appeal of **OO**. He said that the appeal can remain in the Upper Tribunal.

28. I have considered all the evidence in this appeal. I have looked at the appellant's evidence in its entirety including the objective evidence on Algeria. I have attempted to decide whether the evidence is consistent and coherent and whether it establishes that the appellant's claims is genuine to the low standard of proof required in asylum cases.
29. I have considered the case of **HJ** where it was stated that a judge is required to conduct an individual and fact-specific inquiry. It is stated at paragraph 35 of that case that: "The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case."
30. There is no dispute that the appellant is a bisexual as this has been accepted by the respondent. I therefore treat the appellant as belonging to a particular social group. The appellant therefore meets the first requirement in **HJ Iran**.
31. Having found that the appellant is a bisexual, I go to the next test set out in **HJ Iran** which is that I have to ask myself whether I am satisfied on the available evidence that gay people who live openly in Algeria would be liable to persecution.
32. I have considered the background evidence which postdates the Country Guidance Case of **OO** which was submitted by the appellant. I also take into account the expert report of both Dr Seddon's drafted in 2014. I also take into account Prof Katona's report. What these reports state is that the appellant would be at risk on his return to Algeria on account of him being a homosexual. The Canadian report addresses the arrest and pre-trial detention of an Algerian gay couple in May 2013 and reports that "homophobic violence and rape against LGBT people are not reported for fear of Algerian laws". The Canadian Report refers to the 2012 US State Department report published in the spring of 2013 which states "some LGBT individuals received violent threats and felt compelled to leave the country". I also take into account the Algerian male ballet dancers who were granted refugee status in Canada because they were perceived to be gay due to their profession. The point which I note here is that they were perceived to be gay and not because they are ballet dancers.
33. The next inquiry is whether the appellant would live openly and thereby be exposed to a real risk of persecution. The test for whether gay or lesbian asylum seekers are entitled to refugee status is no longer whether they can reasonably be expected to tolerate being discreet about their sexual identity - or, as Lord Hope puts it,

concealing their sexual identity - in order to avoid persecution. Rather, as Lord Rodger said:

“The underlying rationale of the Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian.”

34. I take into account that the appellant had a homosexual partner in Algeria who was murdered. The appellant believes that he was murdered because he was a homosexual although the respondent suggests that the motivation for murder could have been financial. I take into account in that regard the report of Dr Seddon who states that the appellant suffers from PTSD because of the murder of his partner in Algeria and this has had an effect on him. I put weight on this report to support the appellant's claim that his partner was murdered in Algeria due to his sexuality.
35. I therefore find that if the appellant lives discreetly in Algeria, it would be out of a fear of persecution and if he was to live openly as a bisexual man there is a likelihood that he will be persecuted and come to harm. Therefore his asylum claim based on his bisexuality must be accepted to the low standard of proof required in asylum cases.
36. Under both the Refugee Convention and Human Rights Convention appeals, and with regard to Humanitarian Protection, the onus is on the appellant to prove that the claim is well founded. With regard to asylum claims, I have to assess whether the claim is well founded on the evidence as a whole, in relation to the past, present and future. I have to assess the degree of risk facing the appellant now, at the date of the making of this determination. The test that I have to apply at all stages, including that at which I assess both the appellant's evidence and his fears, is whether there is a reasonable likelihood that he is telling the truth and whether he has established a real risk of persecution.
37. Given my conclusions above, and considering all of the evidence as a whole, I find that the appellant does have a well-founded fear of persecution for a Convention reason in Algeria. I conclude therefore that the appellants' removal would cause the United Kingdom to be in breach of its obligations under the Refugee Convention.

Decision

38. The determination of First-tier Tribunal Judge is set aside. I substitute a decision allowing the appellant's appeal on asylum grounds.

Appeal allowed

Signed by

Mrs S Chana
2014

Date 18th day of November

A Deputy Judge of the Upper Tribunal Judge