Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03276/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 February 2019	**On 28 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

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(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Chelvan, Counsel
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Bart-Stewart dismissing his appeal against a decision of the respondent, dated 15 February 2018, refusing his protection claim.

2. The appellant is an Algerian national. He arrived in the UK on 21 April 2009 with leave to enter in order to study. He claimed asylum on 1 August 2016. He gave an account of fearing serious ill-treatment at the hands of his family, who had been

abusive towards him in the past, because he is gay. The respondent accepted the appellant's account of what had happened to him in the past, even though his delay in claiming asylum was behaviour which undermined his overall credibility. As to the situation on return, the respondent considered the appellant did not risk persecution if he were to live openly as a gay man in Algeria. He could relocate away from his family. Reliance was placed on the country guidance decision in OO (Gay Men) Algeria CG [2016] UKUT 00065 (IAC).

3. It is helpful to set out the summary of country guidance provided by the Upper Tribunal in OO (Algeria):

> "1. Although the Algerian Criminal Code makes homosexual behaviour unlawful, the authorities do not seek to prosecute gay men and there is no real risk of prosecution, even when the authorities become aware of such behaviour. In the very few cases where there has been a prosecution for homosexual behaviour, there has been some other feature that has given rise to the prosecution. The state does not actively seek out gay men in order to take any form of action against them, either by means of prosecution or by subjecting gay men to other forms of persecutory ill-treatment.
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> 2. Sharia law is not applied against gay men in Algeria. The criminal law is entirely secular and discloses no manifestation, at all, of Sharia law in its application.
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> 3. The only risk of ill-treatment at a level to become persecution likely to be encountered by a gay man in Algeria is at the hands of his own family, after they have discovered that he is gay. There is no reliable evidence such as to establish that a gay man, identified as such, faces a real risk of persecutory ill-treatment from persons outside his own family.
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> 4. Where a gay man remains living with his family to whom he has disclosed his sexual orientation in circumstances where they are prepared to tolerate that, his decision to live discreetly and to conceal his homosexuality outside the family home is not taken to avoid persecution but to avoid shame or disrespect being brought upon his family. That means that he has chosen to live discreetly, not to avoid persecution but for reasons that do not give rise to a right to international protection.
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> 5. Where a gay man has to flee his family home to avoid persecution from family members, in his place of relocation he will attract no real risk of persecution because, generally, he will not live openly as a gay man. As the evidence does not establish that he will face a real risk of persecution if subsequently suspected to be a gay man, his decision to live discreetly and to conceal his sexual orientation is driven by respect for social mores and a desire to avoid attracting disapproval of a type that falls well below the threshold of persecution. Quite apart from that, an Algerian man who has a settled preference for same sex relationships may well continue to entertain doubts as to his sexuality and not to regard himself as a gay man, in any event.
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> 6. For these reasons, a gay man from Algeria will be entitled to be recognised as a refugee only if he shows that, due to his personal circumstances, it would be unreasonable and unduly harsh to expect him to relocate within Algeria to avoid persecution from family members, or because he has a particular characteristics that might, unusually and contrary to what

> is generally to be expected, give rise to a risk of attracting disapproval at the highest level of the possible range of adverse responses from those seeking to express their disapproval of the fact of his sexual orientation."

4. The appellant appealed on protection and article 8 grounds. The appeal was heard at Taylor House on 28 September 2018. In a lengthy and detailed decision, the judge gave reasons for coming to similar conclusions to the respondent about the appellant's claim. She found that parts of the evidence suggested the appellant was not at risk from his family because, for example, he had continued to live with them for four years after 'coming out' and they had supported his studies abroad. His evidence about being cut off from his family had not been consistent. In any event, he could reasonably be expected to relocate away from his family, who lived in Algiers, and, whilst there was discrimination against openly gay men in Algeria, this did not amount to persecution. She applied OO (Algeria).

5. Permission to appeal was refused by the First-tier Tribunal on three of the four grounds submitted. Ground 1 argued the judge erred by going behind the concession made by the respondent that the appellant had given an accurate account of past events. Ground 3 argued the judge erred by failing to identify an alternative place of relocation in Algeria. Ground 4 argued the judge erred by dismissing the appeal on private life grounds given the acceptance of discrimination encountered by openly gay men in Algeria.

6. However, permission to appeal was granted by the First-tier Tribunal in respect of one of the four grounds (ground 2). At paragraph 57, the judge had recorded that she did not consider the expert report adduced by the appellant, prepared by Professor Emile George Joffé, provided any reason to depart from the country guidance. She recorded that counsel had not referred to the report. The grounds seeking permission to appeal argued the judge had erred because the report had been referenced in counsel's skeleton argument.

7. The grounds argued this error was material because, had the judge had regard to the report, she would have considered whether the accumulation of discriminatory measures might be considered as persecution in accordance with Article 9(1)(b) of the Qualification Directive[1].

8. The Upper Tribunal subsequently granted permission to argue all the grounds.

9. I heard submissions from the representatives as to whether the judge made a material error of law in her decision. I had the benefit of receiving skeleton arguments from both representatives in advance of the hearing for which I am

[1] "1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

grateful. Mr Chelvan also provided a further skeleton responding to Mr Kotas's skeleton. I shall consider each ground in turn.

Ground 1

10. Mr Chelvan's first ground essentially argues that the judge materially erred in law by going behind certain important concessions of fact made by the respondent in the reasons for refusal letter (see Carcabuk and Bla (00TH01426) unreported, 8 May 2000, IAT, referred to in NR (Jamaica) v SSHD [2009] EWCA Civ 856, [2010] INLR 169).

11. In summarising the respondent's reasons for refusal, the judge stated,

> "14. [The appellant's] account of ill-treatment he had received from his family because of his sexuality is internally consistent as is his account of the process about his realisation of his sexuality and coming out. He had provided copies of emails from his partner and supporting letters from friends and associates with ID consistent with his account and as such given weight in support of his claim. He [had] given evidence of activities in London including attending Gay Pride in 2010 and 2011 and volunteering with Naz, an LGBT group and provided a letter from Naz confirming this. His volunteering, attendance at events and supporting letters are considered consistent with his account of being open about his sexuality in the UK and weight was given to the supporting evidence. The appellant provided a detailed account of his claim to be a gay man which is internally and externally consistent, detailed and plausible and is accepted.
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> 15. The appellant said he fears his family and this is the reason he will act differently if returned to Algeria. It is based on fear of repercussions from his family and their unpredictability given their previous treatment towards him when last in Algeria. Much of what he explains he fears is speculation. People in Algeria are not generally persecuted because of their sexuality. It is more a case of family disapproval. Therefore, the appellant is not considered at risk by relocating away from his family. He also claims to have a fear emanating from the state however as shown in country evidence the authorities do not persecute people in Nigeria (sic) because of their sexuality. Treatment of gay men in Algeria does not generally amount to persecution. Whilst the appellant received threats from his family, it is noted he lived with them for over four years after they discovered his sexuality. It is noted that the risk to gay men in Algeria is only from family members not the wider community.
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> 16. It is noted that the appellant fears returning to the wider Algiers region in Algeria. It is accepted he is a gay man however he had only indicated his fear emanates from his family, their influence and the authorities of Algeria. He had not substantiated their power or influence within Algeria other than that they are rich. There is reference [to] the country guidance case …
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> 17. Taking this in the round, it is considered not unreasonable or unduly harsh for the appellant to relocate to another part of Algeria. People who fear their family may reasonably relocate and not suffer mistreatment that amounts to persecution. The evidence shows the authorities do not routinely persecute people because of their sexuality, perceived or otherwise. The appellant had demonstrated considerable personal fortitude in relocating to

> the UK and attempting to establish a life here. He offered no explanation why he could not demonstrate the same resolve to re-establish his life in Algeria. It is concluded he has skills he could utilise on his return to Algeria including an ability to gain employment. As such he does not qualify for international protection."

12. Mr Chelvan took me through the relevant paragraphs of the reasons for refusal letter which the judge was summarising. It is clear that the respondent accepted the appellant's claim to be a gay man (paragraph 30). It is clear the respondent found the appellant had given a detailed and internally consistent account of the abuse he suffered from his family both because of his "effeminate" nature and because of his sexuality (paragraph 31). The letter referred to background information which confirmed that, within their own family, an LGBT person who came out may face abuse, including physical violence and forced marriage (paragraph 32). The respondent accepted that the appellant suffered mentally and physically at the hands of his family and that they treated him "like a woman" (paragraph 33). The respondent accepted the appellant had demonstrated a genuine subjective fear of returning to Algeria. However, his fear was not objectively well-founded because he could internally relocate (paragraph 38).

13. Mr Chelvan argued that the concessions contained in the refusal letter had not been withdrawn by the presenting officer and therefore the judge erred in going behind them. He highlighted the following passage from the decision in which, he argued, the judge impermissibly went behind the respondent's acceptance that the appellant presents as being effeminate:

> "47. The appellant's case is that because of what he considers an effeminate presentation he cannot live discreetly as a gay man in Algeria and would be subject to persecution. However, there is no suggestion that these features are pronounced or have become more pronounced since [being] in the UK. He made reference in his interview to his looks however I am not at all clear what he meant. He refers to how he stands and how he sits but other than a reference to crossing his legs this too is not clear. I am unaware of any difference in the way a person who is gay or homosexual would open the door as is referred to in the interview. In his presentation at the hearing the most [that may] be discerned is slightly exaggerated hand movements."

14. It is helpful to set out the paragraphs following on from the above in order to get a fuller understanding of the judge's conclusions:

> "48. He is not in a relationship in the UK. This seems to relate to his concerns with regards to his religion rather than society in general. He said that before he left Algeria he presented as effeminate however he was able to seek refuge in the mosque and have conversations with other people. This is contradictory to his claim that such presentation put him at risk. It might be thought that the mosque would be the last place where he could seek refuge when presenting in a manner contrary to his religion and societal norms. Similarly, he said that when he used to play video games friends would come to his house. They noted his interest in boys however it appeared not to be an issue.
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> 49. He refers to being emasculated by his family. His evidence is that his family considered him effeminate from a young age and he came out with his

> family in 2005, 4 years before he left Algeria and when he would have been 19 years old. Although there is no supporting medical evidence he claims to have a condition whereby he had developed breasts and he underwent breast reduction surgery. In relation to the violent treatment he claimed to have suffered at the hands of his father and his brother, his witness statements indicate that all of the siblings were subjected to violence and his own ill-treatment did not relate specifically to his sexuality. The family supported his decision to travel abroad to study and funded him for 2 years when they then requested him to return home. There is an inconsistent claim that the father and brother rejected him when [at] the same time he says his father wanted him to return to Algeria and he had been able to have conversations with his brother. He also said that his father was secular but in contradiction to this that his father beat his sister for wearing the hijab.
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> 50. The evidence of Dr Seddon is that the treatment to be expected by a gay man's family is in some respects dependent on class and education. The appellant's evidence is that his family was wealthy. His father had worked in a government position until made redundant and his brother [had a] restaurant. Despite having such a large family they were able to fund the appellant's travels and studies. This supports the conclusion that the appellant's family even if they disapprove were unlikely to cause him physical harm. If there is any risk, the appellant can relocate to another part of Algeria. On his evidence he has already been cut off from them and there is no reason given why they would seek to track him down.
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> 51. Neither in his oral or written evidence has the appellant given examples of any physical threat or harm experienced outside the confines of his family. He said that [he was] practised in trading insults with people who abuse him and wish to harm him. OO (Algeria) confirms that this is the extent of the adverse treatment that a gay man in Algeria might be expected to endure. Regrettably such treatment is not confined to Algeria and in itself does not amount to persecution."

15. The judge then proceeded to assess the examples given by the appellant of two threats he had received outside the confines of his family. Mr Chelvan pointed out that the examples he gave, one relating to the appellant's employment in an IT company and the other relating to a lecturer at university, both took place in the appellant's home area, Algiers, where the respondent accepted the appellant could not return to. The respondent's conclusion that the appellant could exercise internal flight was consistent with the finding that the appellant was at risk in his home area. The question of internal relocation only arises if the appellant has shown a well-founded fear of persecution in his home area (see R on the application of Altin Vallaj v A Special Adjudicator [2001] INLR 455). The judge had erred in law, argued Mr Chelvan.

16. In his submissions, Mr Kotas argued that the judge's findings did not go behind the two matters which had been accepted by the respondent, namely, that the appellant is gay and that he had suffered ill-treatment at the hands of his family.

17. In my judgement, ground 1 does not disclose a material error of law in the judge's decision. Of course, judges should not go behind concessions of fact which have

not been withdrawn. I readily accept that the respondent accepted certain matters in this case and I regard the judge as having acknowledged this in her summary of the reasons for refusal letter. However, matters are not as clear-cut as Mr Chelvan suggested. The reasons for refusal letter accepted that the appellant had suffered at the hands of his family which the appellant had attributed to his effeminate nature and his sexuality. The letter recorded that the appellant's fear was based on repercussions from his family because of their unpredictability. However, paragraph 47 of the letter stated that the appellant's fear was based in part on speculation and paragraph 48 noted that the appellant had continued to live with his family for four years after they discovered his sexuality.

18. In these circumstances, I consider it was open to the judge to take a more nuanced approach. She was entitled, for example, to explore what was meant by 'effeminate', albeit I recognised this was far from easy. By concluding that, whatever was meant by the appellant having an effeminate presentation, this was not particularly pronounced in this case. She was entitled to reason that the appellant's evidence that he used to seek sanctuary in the mosque did not sit easily with the claim that his presentation as an effeminate person was such that it would place him at risk. She was also entitled to note, as the respondent had done, the length of time the appellant remained living with his family and the fact they continue to support him abroad. His evidence suggested the parents were abusive towards all the children so it was not simply a case of singly out the appellant. Finally, the judge was entitled to note the socio-economic position held by the family and the relatively unremarkable nature of the two incidents outside the home environment described by the appellant in his evidence and considered by the judge at paragraphs 52 and 53 of her decision.

19. Had the judge concluded the appellant was not effeminate and had not been harmed by his family in the past such that there could be no risk from them the future, she would undoubtedly have erred by going behind the concessions made by the respondent. However, all the judge did in this case was to make findings on the relevant matters in order to establish the degree of risk which, she concluded, fell below the relevant threshold. In any event, she considered matters at their highest and went on to give reasons why the appellant could exercise internal flight.

20. The judge drew matters together at paragraph 56 of her decision:

> "56. The skeleton argument refers to paragraph 168[2] of OO (Algeria) asserting that the appellant's case can be distinguished from the country

[2] "The absence of reliable evidence of adverse reactions to gay men living away from their families of a type sufficiently serious to constitute persecutory ill-treatment demonstrates that the choice to live discreetly as a gay man is not generally driven by a need to avoid persecution. In living in a manner that does not require others to be confronted with open displays of the affection a gay couple have for each other such a couple are doing no more than what is demanded of a heterosexual couple. That two gay men do not volunteer the information that they are living together not simply sharing accommodation as friends but living together as sexual partners, gay men are acting discreetly to avoid social pressures of the type contemplated in *HJ (Iran)*

> guidance as the discrimination the appellant is likely to experience is far more grievous than listed at paragraph 168. However, I consider that there is nothing in the appellant's evidence that suggests he had been persecuted even though he claims to have always presented as effeminate in Algeria. [Past] persecution can be considered good evidence of future persecution. Whatever treatment the appellant was subjected to before he left Algeria is likely to be the same [as] he would face on return. He has never suffered physical violence outside the claims he makes against his family. He was 23 when he left Algeria and, in that time, although he claims to have presented as effeminate from an early age, he did not face discriminatory measures such as socio-economic discrimination in school, in work or in accessing social services, unemployment, lack of access to health services or lack of career opportunities. He is educated and he suggests he has had a superior education including his fluency in French. There is no evidence of discrimination other than name-calling which he says he has also experienced in the UK. The claim that the appellant will face the full brunt of discrimination and faces persecution I do not consider to be realistically well-founded."

21. This paragraph makes it abundantly clear that the judge proceeded on the basis the appellant had received abuse at the hands of his family but not outside the home. The two examples he gave of instances away from the family environment were not persecutory. The judge's approach mirrors that of the respondent which was to go on to consider the possibility of the appellant safely relocating away from Algiers.

Ground 2

22. This was the ground on which permission to appeal was granted by the First-tier Tribunal. To understand the ground, it is necessary to set out paragraph 57 of the judge's decision:

> "[Counsel for the appellant[3]] did not refer to the report of Prof Joffé. I do not consider that it takes matters further than the reports that were before the Upper Tribunal in OO (Algeria). Many of the references predate the country guidance and contain a great deal of opinion little of which is sourced. Such background evidence as there is mainly predates the country guidance. In considering the situation facing return for homosexuals he quotes the Algeria country report 2004, an incident in May 2005 and refers to FIS and GIA and suicide bombings in 2006 and 2007. I do not find it of assistance in evidencing the appellant would face persecution in Algeria on account of his sexuality."

23. The first point to make is that the grounds seeking permission to appeal point out that counsel did provide a skeleton argument to the First-tier Tribunal which made reference to the report of Professor Joffé. However, my reading of the decision is that, in paragraph 57, the judge was simply referring to the oral

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v SSHD that does not give rise to a sustainable claim for asylum. Put another way, a gay man who did live openly as such in Algeria may well attract upsetting comments; find his relationships with friends or work colleagues damaged; or suffer other discriminatory repercussions such as experiencing difficulty in dealing with some suppliers or services. But none of that amounts to persecution."

[3] Not Mr Chelvan.

submissions made to her. That is because, at paragraph 37, she specifically refers to the skeleton argument submitted by counsel which argued that the appellant's case was to be distinguished from the country guidance. The basis for that submission was that the appellant did not have the option of living discreetly because of his effeminate presentation.

24. I do not consider it has been shown the judge erred by simply ignoring the report. However, the ground took a further point about the apparent failure of the judge to have regard to Professor Joffé's report. The error was material because the country guidance case of OO (Algeria) did not address the argument that the discrimination towards gay men in Algeria amounts to persecution. This was a lacuna in the law. The argument ran as follows.

25. It was conceded on behalf of the Secretary of State in OO (Sudan) v SSHD [2009] EWCA Civ 1432 that a sufficiently serious violation of Article 8 rights might amount to persecution for the purposes of Article 9(1)(b) of the Qualification Directive. It had been shown in the report of Professor Joffé that the appellant would be subjected to discriminatory measures including a lack of effective legal protection, police hostility and social marginalisation. The skeleton argument which had been before the judge referred to the respondent's API on sexual orientation issues in the asylum claim, of August 2016, in which it was accepted that discrimination may also represent a form of harm. I note that there was a lengthy citation from this document in the skeleton argument, although a full copy is not in the file.

26. Mr Chelvan argued there was a clear error of law on the part of the judge in failing to decide the issue in the light of the materials before her.

27. Mr Kotas argued it was inconceivable that the judge could have reached a conclusion justifying a departure to be made from OO (Algeria). The argument about Article 9(1)(b) of the Qualification Directive was a refined and technical point which had not been taken by counsel at the hearing in the First-tier Tribunal. Furthermore, the Court of Appeal held in LC (Albania) v SSHD & Anor [2017] EWCA Civ 351 that the definition of 'refugee' in the Qualification Directive is materially the same as that in the Geneva Convention on which the Directive is based. On the evidence, it was fanciful to suggest that the appellant could have succeeded on this ground.

28. In reply, Mr Chelvan said that the guidance of the Court of Appeal in LC (Albania) was in the context of consideration of the final conduct limb considered in HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 31[4], not the second limb which was relevant to these proceedings: whether an openly gay man had a well-founded fear of persecution. The report of Professor Joffé addressed discrimination as a matter of persecution and this was relied on in the skeleton argument provided to the judge. The assessment made by the judge was inadequate.

[4] See Lord Rodger, at paragraph 82.

29. In order to assess this ground, it is necessary to look at the skeleton argument which was before the judge and also report of Professor Joffé. It is clear from the skeleton argument, I accept, that a great deal of emphasis was placed on the argument that there was good reason to distinguish this appeal from OO (Algeria). Reference was made to paragraph 168 of that case and the conclusion of the Upper Tribunal that the types of discrimination experienced did not amount to persecution. It was argued that the discrimination which this appellant would experience would be far more grievous. Reference is made to the API and the types of discrimination which may also represent a form of harm, such as, socio-economic discrimination in school, work or in accessing social services, unemployment, lack of access to health services, lack of career opportunities and exclusion from family support such as rights to inherit.

30. The report of Professor Joffé contains three pages devoted to the subject of Islamist attitudes and the skeleton argument highlights two of the paragraphs from those pages (37 and 38). There follows two pages devoted to popular attitudes towards LGBT people and then a section on the situation facing returned LGBT people from which a further paragraph is highlighted in the skeleton argument (52). This refers to a Dutch report issued in January 2003 which stated that people who openly admitted their LGBT nature could experience bullying and intimidation by their social environment or members of the security forces.

31. It is right to say that the judge was not expressly asked to consider the ambit of Article 9(1)(b), which was not referred to in the skeleton argument, but I accept that she was asked to find that the discrimination which the appellant would face would be so serious as to engage the Refugee Convention.

32. In my judgement, the judge did consider the issue fully and made findings she was entitled to make on the evidence available to her. I have already set out paragraph 56 of her decision above (see my paragraph 20). I agree with Mr Kotas that the judge did specifically consider the types of discrimination described in counsel's skeleton argument. Having done so, she found as fact that the appellant would not face what she described as "the full brunt of discrimination" such as to amount to persecution.

33. Moreover, in paragraph 57 of her decision, the judge considered the report of Professor Joffé. With respect to the three paragraphs which were drawn to her specific attention in the skeleton argument, she was right to point out that the sources were somewhat elderly. As such, they predated the country guidance decision from which she was being asked to depart. This evidence could not support a submission seeking to justify a departure from country guidance.

34. I have already pointed out above that the judge was entitled to regard the evidence of the appellant's effeminate appearance was not such as to enhance the risk to him to a serious degree.

35. I find that the judge did not make a material error of law on this ground.

The 'Robinson-obvious' point[5]

36. In opening his submissions, Mr Chelvan sought to rely on a point not previously raised in the grounds seeking permission to appeal to either the First-tier Tribunal or to the Upper Tribunal. It is convenient to deal with this argument at this point because it also relates to the judge's assessment of Professor Joffé's report.

37. In paragraphs 24 and 25 of Professor Joffé's report there are passages from the US State Department report on human rights practices in Algeria for 2017 which referred to reports of LGBTI people being arbitrarily detained and physically and sexually abused by police officers. This was important because it was found in OO (Algeria) that this was not the case. I note that the panel in that case considered that there was no reliable evidence supporting the opinion, for example of Dr Seddon, that there was evidence in the public domain of police brutality towards LGBT people (see paragraph 30). The panel was similarly unimpressed by the evidence of Ms Pargeter concerning the large number of arrests in 2011 (see paragraph 71).

38. The respondent's CPIN Algeria: Sexual orientation and gender identity, of 22 September 2017, was included in the bundle of documents provided to the judge in the First Tier Tribunal. This stated at paragraph 2.3.7 that there have been a few reports of LGBT people being detained for 'immoral behaviour' and experiencing police harassment. However, prosecutions are extremely rare. At paragraph 5.2 the CPIN refers to the 2016 US State Department report under the heading of ill-treatment by the authorities but there is no reference there to arbitrary detention or physical and sexual abuse by police officers. Mr Chelvan provided me with a complete copy of the US State Department report for 2017, although this had not been before the judge in the First-tier Tribunal.

39. Mr Chelvan argued that there was clear and cogent evidence before the judge of state persecution and her failure to consider it was a 'Robinson-obvious' point which should be considered notwithstanding the fact it had not previously been pleaded. It was clear, in his submission, that OO (Algeria) should not have been followed. The evidence of the US State Department report was sufficient to satisfy the objective test elaborated in paragraph 82 of HJ (Iran), namely, whether gay people who live openly would be liable to persecution in the country of nationality.

40. Mr Kotas accepted the evidence came from a reliable source and that it post-dated OO (Algeria). However, he argued that it did not justify a departure from country guidance. He reminded me that the test was whether there were very strong grounds supported by cogent evidence justifying departure from country guidance (see SG (Iraq) v SSHD [2012] EWCA Civ 940, paragraph 47).

41. The judge was bound to follow Practice Direction 12.2 which states:

[5] R v Immigration Appeal Tribunal, ex parte Anthonypillai Francis Robinson [1996] EWCA Civ 706

> "A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal: (a) relates to the country guidance issue in question; and (b) depends upon the same or similar evidence."

42. The passage Mr Kotas referred me to from the judgment of Stanley Burnton LJ in SG (Iraq), with whom Gross and Maurice Kay LJJ agreed, states as follows,

> "It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

43. I do not consider the report of Professor Joffé provided the judge with "very strong grounds" supported by cogent evidence to depart from OO (Algeria). My reasons are as follows.

44. Firstly, the point about the actions of the police in directly persecuting LGBT people was not taken by counsel at the hearing. It is not referred to in his skeleton argument or in the judge's summary of his closing submissions. The case was put in an entirely different way. The particular paragraphs from Professor Joffé's report were not highlighted in the First-tier Tribunal. As already noted, counsel did not refer to the report at all in his closing submissions.

45. Secondly, under such circumstances, I do not consider the judge erred by failing to spot the point herself. It was not a sufficiently obvious point to have found its way into any of the grounds seeking permission to appeal. The US State Department report was not in the bundle of evidence submitted by the appellant's solicitors. It was not provided to the judge. All she had were two brief extracts in the report of Professor Joffé. She was undoubtedly entitled to consider that the report, on the whole, suffered from a lack of up to date references.

46. Thirdly, even if the report had been before the judge and the relevant passages highlighted, it remains very doubtful that it could have materially affected the outcome. As seen, there was evidence before the panel in OO (Algeria) suggesting instances of harassment and ill-treatment of LGBT people by the police. The panel did not find the evidence of the two experts mentioned persuasive because they found no evidence supporting their assertions. It is clear that to displace the findings of the panel in OO (Algeria) will take evidence with a degree of cogency beyond what is found in Professor Joffé's report. He simply quotes from the US State Department report without providing any concrete examples. He adds nothing to it and makes no further reference to the issue in his conclusions about the risks to this appellant.

47. If the reports contained in the US State Department are correct and there is evidence from primary sources to support them, then there might well be a need to revisit the findings in OO (Algeria). However, that evidence was not before the judge in this case and is not apparent now. In my judgement, the judge did not materially err by failing to consider it.

Ground 3

48. This ground argues the judge erred in her approach to the issue of internal flight. She found, in paragraph 64, that the appellant could "relocate to another city away from Algiers". Mr Chelvan argued the judge erred by failing to identify an alternative place of relocation. Article 8(2) of the Qualification Directive states[6]:

> "In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant."

49. I note that this is reflected in paragraph 339O(ii) of the Immigration Rules[7].

50. Mr Chelvan sought to cite an unreported decision of this tribunal to support the argument that the judge should have done more. He has certified that the proposition is not to be found in any reported decision of the tribunal in accordance with Practice Direction 11.2. The case cited is MB v SSHD (PA/04051/20017), promulgated on 23 November 2018. In that case it was accepted that the appellant was a bisexual who had received threats to kill from her father. The judge found the appellant was at risk of serious harm from her father. On the question of internal flight, the judge accepted the appellant could not return to those parts of Albania where her father and other family members lived. The panel found the judge had erred in law in his approach for the reasons set out as follows:

> "8. In considering whether it would be unduly harsh for the appellant to relocate, the judge failed to indicate the destination he had in mind, an aspect candidly acknowledged by [the senior presenting officer] in his submissions. The judge therefore considered this aspect in a vacuum. He did not identify which university the appellant might attend all the city where it might be. No reasons were given why the judge concluded that the discrimination and the disapproval which might lead the appellant to keep her sexuality secret would not be unduly harsh. The question the judge should have asked, once the destination was decided upon, was whether it would be reasonable for her to

[6] The 2004 version of Article 8 of the Directive continues in force for the UK which did not ratify the recast 2011 version.

[7] "339O (i) The Secretary of State will not make:

(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making a decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person."

> live in such a place that might require her to keep her sexuality secret from landlords, employers and friends. This would need to be considered in the context of her mental health in respect of which the judge was satisfied the appellant was depressed. We find this failure to give reasons sufficient for the decision to be set aside and for it to be remade."

51. Answering a point relied on by Mr Kotas in his skeleton argument to the effect that "*the evaluative exercise is intended to be holistic and … no burden and standard of proof arises*"[8], Mr Chelvan argued the position was different following the coming into force of the Qualification Directive. He sought to distinguish WF (Internal Relocation – Christian) India CG [2002] UKIAT 04874 on this basis, although it is not clear to me how the same argument can be made with regard to SC (Jamaica).

52. Mr Kotas pointed out that this was another example of an argument which had not been made to the judge at the hearing in the First-tier Tribunal. The difference of approach demanded, in Mr Chelvan's submissions, by the Qualification Directive was not an argument which had been made to the judge. No authorities had been provided in support.

53. Mr Kotas pointed out that the respondent had, in fact, suggested a place to which the appellant could relocate safely: Constantine[9]. He also argued that, whilst it was clear on the facts of MB why the judge had erred in not identifying a place the appellant could live safely, the current appeal was distinguishable. Albania was a tiny country and the appellant had family in a number of locations. Algeria is a huge, populous country.

54. Mr Chelvan argued that the respondent's suggestion of Constantine was not a "killer point" because it only referred to it being a place of safety and did not consider, as required by Article 8(2), whether it was reasonable for the appellant to relocate there. In any event, the judge had not considered Constantine or anywhere else.

55. I have found it helpful to consider the guidance of the SPT in SC (Jamaica) on the correct approach to the issue of internal flight. This decision was referred to in the case relied on by Mr Chelvan (KS (Iran) v SSHD [2019] EWCA Civ 6).

56. I see no reason to regard this guidance as only appertaining to consideration of the Refugee Convention. It is plainly a post-Directive decision. It was an appeal by the Secretary of State against a decision of the Upper Tribunal upholding the decision of the First-tier Tribunal to allow the appeal. In finding there was an error of law, the SPT said,

> "29. A person is a refugee within the meaning of article 1A(2) of the Refugee Convention if they are unable or unwilling to avail themselves of the protection of their home country owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a

[8] See SSHD v SC (Jamaica) [2017] EWCA Civ 2112, [2018] 1 WLR 4004, per Ryder LJ (at paragraph 36).

[9] See paragraph 61 of the reasons for refusal letter.

particular social group or political opinion. A person is not a refugee if they can reasonably or without undue harshness be expected to live in another part of their home country where they would not have a well-founded fear of persecution. This is the 'internal relocation' or the 'relocation alternative'.

30. The leading House of Lords authority on the issue of internal relocation is *Januzi*. The question in *Januzi* was whether, in judging reasonableness and undue harshness in this context, account should be taken of any disparity between the civil, political and socio-economic human rights which the person would enjoy in the place of relocation and the place of asylum. The House of Lords was of the opinion that it should not. Lord Hope held at [45] that:

> "… I too would hold that the question whether it would be unduly harsh for a claimant to be expected to live in a place of relocation within the country of his nationality is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights."

31. The House of Lords also gave guidance on the approach to reasonableness and undue harshness. Lord Bingham held at [21] that:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so."

32. Accordingly, undue harshness is to be judged by reference to SC's country of nationality and by reference to SC's personal circumstances.

33. The issue of the reasonableness of internal relocation accordingly involves three separate questions:

> 1. What is the location to which it is proposed the person could move?
>
> 2. Are there real risks of serious harm or persecution in this place?
>
> 3. If not, is it reasonable or not unduly harsh to expect the person to relocate to this place?

34. The first question is a factual question and the second question is an evaluation to be resolved on the basis of the evidence accepted by the tribunal. There is no legal complexity to the questions, although the tribunal should seek to express its conclusions in a clear way to show that it has considered the evidence relevant to the questions. The third question involves a further value judgment based on the evidence accepted. On its face, paragraph 339O of the Immigration Rules reflects the test laid down by the House of Lords in *Januzi* and requires the decision maker to consider the general circumstances prevailing in the country concerned and the personal circumstances of the person.

35. I regret to have to conclude that the decision of the FtT on this question whether as set out in its judgment at [38] or taking the judgment as a whole is flawed for the following reasons. There is no consideration of any part of Jamaica other than Kingston and there is no analysis of whether the rest of Jamaica (rural or urban) is homogenous or differentiated in terms of the risk of serious harm or persecution that exists. The FtT relied upon SC's need for

> medical treatment as a relevant relocation factor but without conducting an analysis of any evidence that there might have been about whether his medical treatment could be continued in any particular part of Jamaica or, if it is the case, whether medical facilities there are inadequate. Further, the FtT found that there was a lack of employment opportunities for SC without any evidential foundation.
>
> 36. I accept the submission that the evaluative exercise is intended to be holistic and that no burden or standard of proof arises in relation to the overall issue of whether it is reasonable to internally relocate (see, for example Sedley LJ in *Karanakaran v SSHD* [2000] EWCA Civ 11 at [15] and [20]). That is distinct from the question whether there is any evidence upon which the evaluations could be made. This court cannot know what evidence, if any, was provided on questions (1) and (2) and whether the tribunal accepted or rejected any part of that evidence in coming to a value judgment which is accordingly not supported by evidence. It has not been demonstrated to us that the conclusions of fact are inferences that could properly be drawn from materials that were available. It is accordingly wrong to say that there were clear factual findings to which the test of reasonableness was applied or that the tribunal had sufficient factual material to undertake an holistic assessment for the purpose of the third question."

57. I now turn to the judge's decision in this case. I remind myself that she sought to apply OO (Algeria) and that she was entitled to find the discriminatory matters relied on by the appellant were not particularly significant. In OO (Algeria) the panel found as follows,

> "180. As there is no sufficiency of protection available, the next question is whether the gay son whose family is not prepared to tolerate him living as a gay man, can relocate elsewhere in Algeria to avoid ill-treatment from family members and if so whether it will be reasonable to expect him to do so. If it is not reasonable then, having travelled to the UK, he will be entitled to international protection.
>
> 181. That question, of whether there is a safe and reasonable internal relocation option, is a difficult and complex one in the Algerian context. Generally, there will be no real difficulty preventing relocation and there is no indication that disapproving family members have the means, inclination or reach to cause difficulties after relocation. But where such a person has established himself elsewhere in Algeria, as marriage is expected of all Algerian men, in pursuance of what is seen as an "Islamic duty to procreate", it may well, sooner or later, become apparent that he has not adhered to the norms expected and that is likely to generate suspicion that he is a gay man.
>
> 182. There is no real risk of gay men being subjected to violence or other persecutory ill-treatment outside the family home, either at the hands of the authorities or by members of the public with whom gay men have to engage. There is an absence of reliable evidence of that occurring.
>
> 183. Very few gay men live openly as such in Algeria. Gay Algerian men, as a consequence of cultural, religious and societal views, do not generally identify themselves as gay, even if their sexual preferences lead them to prefer same sex relationships. Even Algerian men with settled sexual preferences for

same sex relationships may well continue to entertain doubt about their sexuality. Second, gay men recognise the intense and deep rooted near universal disapproval of homosexuality that obtains in Algeria. Thus, Algerian gay men who have moved to France where, plainly, they face no obstacle to living openly as such, generally choose not to because they refuse to categorise themselves as gay, even though there is no persecutory disincentive to doing so.

184. The fact that there is very little evidence of gay men living openly in Algeria invites the conclusion that must be because the risk of persecutory ill-treatment likely to be attracted is such as to prevent that from happening. But the expert and other country evidence does not establish that, in fact, there is any real risk outside the family context of such persecutory ill-treatment being meted out to persons suspected as being gay. The expert evidence indicates that a gay man recognised as such is very likely to attract an adverse response from those by whom he is encountered as he goes about his daily business. But that adverse reaction is not reasonably likely be such as to amount to persecution, being on a range of responses from a simple expression of disapproval, mockery or name calling up to the possibility of physical attack. But there is simply no reliable evidence of the expression of disapproval being expressed in such circumstances generally being otherwise than at the lower end of that range of responses.

185. That gives rise to a conundrum. If there is no evidence of persecution of gay men who have escaped ill-treatment from family by relocating elsewhere, why is there no evidence of gay men feeling able to live openly? Alternatively, is the absence of evidence of physical ill-treatment of gay men due to the fact that there are no gay men living openly?

186. The answer, in our judgement, is as follows:

a. The only risk of ill-treatment at a level to become persecution likely to be encountered by a gay man in Algeria is at the hands of his own family, after they have discovered that he is gay. There is no reliable evidence such as to establish that a gay man, identified as such, faces a real risk of persecutory ill-treatment from persons outside his own family.

b. Where a gay man remains living with his family to whom he has disclosed his sexual orientation in circumstances where they are prepared to tolerate that, his decision to live discreetly and to conceal his homosexuality outside the family home is not taken to avoid persecution but to avoid shame or disrespect being brought upon his family. That means that he has chosen to live discreetly, not to avoid persecution but for reasons that do not give rise to a right to international protection.

c. Where a gay man has to flee his family home to avoid persecution from family members, in his place of relocation he will attract no real risk of persecution because, generally, he will not live openly as a gay man. As the evidence does not establish that he will face a real risk of persecution if subsequently suspected to be a gay man, his decision to live discreetly and to conceal his sexual orientation is driven by respect for social *mores* and a desire to avoid attracting

> disapproval of a type that falls well below the threshold of persecution. Quite apart from that, an Algerian man who has a settled preference for same sex relationships may well continue to entertain doubts as to his sexuality and not to regard himself as a gay man, in any event.
>
> 187. Underpinning these conclusions is recognition that Algerian society is governed by strict Islamic values which all citizens, including gay men, in practice respect, even if only for pragmatic reasons.
>
> 188. This gives rise to a compromise which in some senses is unsatisfactory but, as a matter of law, does not give rise to a right to be recognised as a refugee. Algerian society, including the state authorities, effectively tolerates private manifestations of homosexual conduct, both between young unmarried men and gay men who have established themselves away from the family home, provided there is no public display of it. Gay men choose to live discreetly not to avoid persecution, because there is no evidence that there is any, but because they recognise that the society they live in is a conservative one, subject to strict Islamic values, that is unable to openly embrace the existence of the practice of homosexuality, just as women are expected to submit to Islamic requirements such as being veiled and accepting other limitations upon their ability to act as they may wish to.
>
> 189. The evidence before us indicates that as a result of societal views and conditioning, Algerian men with a preference for same-sex relationships generally do not in fact regard themselves as gay men and so have no reason to identify themselves as such to others by conducting themselves in a manner that has come to be regarded as "living openly" or discreetly. Therefore, choosing not to live openly as gay men is not due to a fear of persecution but other reasons to do with self-perception and how they wish to be perceived by others.
>
> 190. For these reasons, a gay man from Algeria will be entitled to be recognised as a refugee only if he shows that, due to his personal circumstances, it would be unreasonable and unduly harsh to expect him to relocate within Algeria to avoid persecution from family members, or because he has particular characteristics that might, unusually and contrary to what is generally to be expected, give rise to a risk of attracting disapproval at the highest level of the possible range of adverse responses from those seeking to express their disapproval of the fact of his sexual orientation."

58. It is correct the judge in this case did not identify a specific place the appellant could relocate to and she did not address the possibility of the appellant living in Constantine. Instead she found the appellant could relocate to any city other than Algiers.

59. I agree with Mr Kotas that the context is extremely important. The appellant had only related his fears of his family to Algiers. There was no cogent evidence that the family would pursue the appellant. Far from it. Nor was there cogent evidence that the appellant had encountered very serious problems away from his family. The judge found the appellant would face societal discrimination but not at a level ("full brunt") to be regarded as persecution. As discussed above, she found that, although effeminate, the appellant was not particularly so.

60. In reaching her conclusions on internal flight, the judge took account of the appellant's personal characteristics. She pointed out he is educated to degree level and has work experience as a lab assistant, in a restaurant and in IT. He has also gained work experience in the UK. He speaks English fluently. As said, she discusses the contradictions in the appellant's evidence about contact with and financial support from his family in any event. There were no significant health issues. The appellant had been able to access healthcare in the past.

61. In my judgement, the judge did not fall into the same error as in MB of making her finding on internal flight "in a vacuum". In the context of the Albanian case, it was clearly vital to show that there would in reality be a place where the appellant would be safe because her family would not find her and where she could reasonably be expected to relocate. In the context of a small country like Albania, the appellant was left in doubt about where it was the judge believed she could return to and where she could study at university level and find shop work. The reasonableness of relocation could not properly be assessed absent such an indication from the judge.

62. No such concerns arise in this case, in which the judge had the benefit of country guidance on the point. In effect, she found that Algeria would be safe anywhere apart from the appellant's home area. The appellant could reasonably be expected to relocate to any urban district which was not in the Algiers area. In the circumstances, the judge did not materially err by not going further and indicating which particular city or cities she had in mind because the conditions were, for the purposes of the particular appeal, the same in all of them.

63. I do not find that ground 3 shows the judge materially erred in law.

Ground 4

64. This ground relates to the judge's consideration of Article 8. In short, it is argued the judge failed to apply the correct approach which was first to consider Article 8 through the prism of the Immigration Rules[10] and then outside the rules. The ground also flags up the overlap with ground 2, the discrimination point, and the "flagrant denial or gross violation" point raised but not decided in Ullah, R (on the Application of) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323[11]. Mr Chelvan said this was an important lacuna in the law waiting to be filled.

65. Mr Kotas argued that there was no material error in the judge's decision and he cited the guidance provided on the meaning of "very significant obstacles" by the Court of Appeal in *SSHD v AK (Sierra Leone)* [2016] EWCA Civ 813. Sales LJ said at paragraph [14] as follows:

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a

[10] In this case, paragraph 276ADE(1)(vi) IR.

[11] See Lord Steyn, paragraph 47.

> job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

66. Mr Kotas also argued the case had not been made in the First-tier Tribunal in the same way now being put forward. I note Article 8 was raised in the notice of appeal to the First-tier Tribunal, albeit without being developed. Article 8 was not mentioned at all in counsel's skeleton argument and there is nothing in the judge's decision to show she received any submissions on it.

67. In that context, the judge dealt with Article 8 as follows in her decision:

> "65. It is claimed that returning the appellant to Algeria would breach his right to respect for private life. I do not accept that is the case either in the context of the Immigration Rules or outside the Immigration Rules under Article 8 ECHR. The appellant entered the UK with a short-term visa as a student and in his interview said that [he] intended to return to Algeria or go to France. He has no family in the UK and says that he is a loner. He lived in Algeria the majority of his life. He worked there and, in the UK, has been helping fellow Algerians. He was visited by his sister in 2015. He therefore can reasonably be expected to have remained familiar with the culture and customs. Whilst the appellant may encounter some discrimination by way of name-calling and insults, there are no very significant obstacles to him returning to Algeria and there is no evidence of any exceptional circumstances why he should not be expected to return there. He should be able to gain employment to support himself.
>
> 66. The appellant said that he suffers from medical conditions however he has not filed any supporting evidence. He was able to obtain treatment in Algeria including surgery and there is no evidence that he would not be able to access healthcare in the future. I also have regard to section 117B of the Immigration, Nationality and Asylum Act 2002, as amended by the Immigration Act 2014. Immigration control is in the public interest. The appellant entered the UK as a student and has overstayed for most of the time he has been in the UK. He delayed applying for asylum though he claims that it was because of the treatment to which he was subject in Algiers that he chose to leave. Any private life established was in the knowledge that his status [in] the UK was precarious it was not unreasonable nor would the Secretary of State be in breach of his obligations to the appellant under Article 8 ECHR are in removing him to his home country."

68. I have to say that I am at a loss to understand how it can be said to be the case that the judge erred by failing to consider the claim both inside and outside the rules. That is plainly what she has done.

69. I see no error in the manner in which the judge assessed the Article 8 claim, such as it was. She expressly considered the sort of factors discussed in AK (Sierra Leone) as being relevant and she reached a sustainable conclusion on the facts found. Going beyond the rules, she found there were no exceptional circumstances to warrant a grant of leave. In doing so she was obliged to apply section 117B when assessing the public interest in removal.

70. The argument which Mr Chelvan is anxious to raise regarding the applicability of Ullah to the circumstances of a gay man in Algeria was simply not argued in the First-tier Tribunal and the judge did not err in failing to consider it. She did revisit her consideration of the discrimination which the appellant would face, albeit only within her consideration of paragraph 276ADE(1)(vi) of the rules. On the facts as found by her, the case could not have succeeded on the basis of the interference with the appellant's ability to enjoy a private life in Algeria. She was entitled to find he would be able to build a private life and that the discrimination he would encounter would not significantly impede his enjoyment of the right.

71. I find no error in relation to ground 4.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeal shall stand.

Signed Date 25 February 2019

Deputy Upper Tribunal Judge Froom