IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005162
First-tier Tribunal No:
PA/54888/2021; IA/14807/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

F A

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Chapman, Counsel instructed by Bindmans LLP
For the Respondents: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 15 February 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge T Lawrence dated 11 August 2022 ("the Decision") dismissing the Appellant's appeal on protection and human rights grounds (Articles 3 and 8 ECHR) against the Respondent's decision dated 27 September 2021 refusing the Appellant's protection and human rights claims.

2. The Appellant is a national of Algeria. He came to the UK in January 2006 as a student. His leave expired on 31 December 2008. Further applications failed. He claimed asylum on 29 October 2019 on the basis of sexual orientation and perceived political opinion. Much of his case turns also on his mental health. A claim is therefore also pursued on Article 3 and Article 8 grounds.

3. The Respondent did not accept that the Appellant's protection claim was credible. Judge Lawrence accepted that the Appellant's claims were credible. He made findings of fact to that effect at [42] of the Decision. Having accepted the claims as made, however, the Judge found that they were not objectively well-founded. He also found that the Appellant would be able to access treatment for his mental health in Algeria, that any risk of suicide could be managed during the removal process and that there were no very significant obstacles to integration.

4. The Appellant appeals on six grounds, many of which overlap. We do not for that reason set them out separately. Permission to appeal was refused by First-tier Tribunal Judge Curtis on 11 October 2022 on the basis that the Judge's findings were open to him, that some of the grounds were no more than a disagreement and that the first ground was not material.

5. Permission to appeal was granted following renewal to this Tribunal by Upper Tribunal Judge Reeds on 17 November 2022 in the following terms:

> "1. In light of the evidence and that of Dr Heke which the FtTJ appeared to accept, it is arguable that the FtTJ provided no evidential basis for finding that the appellant had no subjective fear but rather had a 'subjective anxiety' (G1). Whilst the FtTJ went on to find that he had no objective fear of persecution on account of his sexuality and any perceived political opinion, it is arguable that any error in this analysis affected the consequential analysis and adequacy of reasoning when addressing the appellant's mental health, and his ability to access treatment/support from medical services and also from members of his family, which forms the basis of challenge that is

set out at grounds 2, grounds 3, grounds 4 and ground 5. Ground 6 is reliant upon the establishment of the other grounds of challenge.

2. Permission to appeal is granted on all grounds raised."

6. The matter came before us to consider whether the Decision contains an error of law as asserted and if we so find to decide whether to set aside the Decision and, if set aside, to either remit the appeal to the First-tier Tribunal or re-make the Decision in this Tribunal.

7. We had before us the Appellant's bundle before the First-tier Tribunal ([AB/xx] and the Respondent's bundle also before that Tribunal.

8. Having heard submissions from Ms Chapman, Ms Gilmour conceded that the Decision contains an error of law. We accepted that concession. Although Ms Chapman initially submitted that we should preserve the findings of fact in relation to credibility and retain the appeal for re-making in this Tribunal, she accepted following discussion that because the issues regarding the Appellant's mental health were inextricably linked to his credibility, it might wrongly constrain the Judge dealing with the re-making to seek to separate the two in terms of findings. Moreover, the main ground of challenge was to a finding which related to the Appellant's credibility. It would not be appropriate to seek to excise one factual finding whilst preserving the remainder. It was therefore agreed that, given the extent of the findings required, it would be appropriate to remit the appeal to the First-tier Tribunal for a de novo hearing on all issues with no findings preserved.

9. We indicated that we would explain our reasons in writing for the benefit of the parties and the Judge re-hearing the appeal. We therefore turn to do that.

DISCUSSION

10. In light of the terms of the grant of permission, Ms Chapman began by addressing us on the first ground which concerns the Judge's finding in relation to the Appellant's subjective state of mind.

11. The Appellant asserts that the Judge erred in his finding at [42.9] of the Decision which reads as follows:

> "I find that the Appellant has a subjective anxiety about returning to Algeria, owing to his traumatic experiences in that country, including the suppressive cultural attitudes towards gay sexuality, his harassment by state security and intelligence actors, including his rape, the subsequent interest in him on the part of the security and intelligence services in 2003, and also the length of time that he has been away and the inherent

difficulties arising from that in terms of re-establishing a private life in terms of personal relationships with family and others, and in employment, housing, and healthcare. However, I do not accept that he presently believes that he would be subjected to persecution in that country, given the long passage of time since he was of any known interest to the security and intelligence services, and his failure to claim asylum until 2019 despite being expressly invited to do so in 2015 and 2017. Also, that he never suffered persecution in Algeria for reasons relating to his sexuality."

12. Ms Chapman submitted that the finding which the Judge needed to make was whether the Appellant had subjective fear not whether he had a subjective anxiety. In any event, what was said about the lack of any subjective belief that he would be subject to persecution ignored certain of the evidence not only of the Appellant but also medical professionals who had provided reports on his mental health. In the alternative, the Judge had failed to give adequate reasons for his findings in this regard.

13. In his witness statement at [AB/14], the Appellant said this:

> "41. I left Algeria in 1999 and have not returned since. It will be 23 years since I left this year. If I was not at risk, I would have returned. I would like to see my family, but it is not safe for me there. The authorities have a file on me. I have come to their attention when living there and since I have left and believe I will again on return. I am scared of what the intelligence might do to me. My sexuality will also place me at risk from society and from the police. People are beaten and attacked for being gay or bisexual; it may not always be reported but it happens and I am scared. I could not be open. It would be terrible to go from the freedom in the UK to a place where I must hide myself and my feelings. I also fear for my health, my mental health, and what would happen if I was forced to go. Finally, I have nowhere to go or means to support myself. I cannot turn to my family, as the authorities know where they are and threatened my father in the past and because I have no future as a gay man living with them."

14. The Appellant relies on expert evidence from Dr Sarah Heke, DClinPsy, BA (Consultant Clinical Psychologist) in relation to his mental health. Her report is at [AB/16-57]. At [5.4.7] of her report, Dr Heke says this in response to a question asked about her assessment on the Appellant's views of his ongoing fear of return:

> "In my opinion [FA] has a subjective fear of returning to Algeria which is based in the reality of his past experiences of harassment, beating and being raped. He has no evidence to

> suggest that the culture in Algeria has changed and fears that he will easily be targeted again and cannot put his elderly mother and sisters at risk by seeking their support."

15. The Appellant also relied on a letter dated 9 March 2022 from Dr S Ilyas, who is the Principal at the Appellant's GP surgery (loose document). He has known the Appellant for at least nine years in the capacity "as a GP in the UCC at the Whittington Hospital". He says that the Appellant is "a frequent attender in A&E, sometimes attending every day in relation to physical symptoms relating to chronic anxiety". Dr Ilyas offers the following opinion:

> "Given my observations I have full confidence that he genuinely believes his freedom and safety would be at risk if he returned to Algeria. As I cannot countenance how someone could continue to choose to suffer the degree of mental distress and privations he currently endures if that was not a strongly and honestly held belief."

16. We accept that Judge Lawrence did not make reference to this evidence which supports the Appellant's case that he has a genuine subjective fear of return to Algeria. That is a failure to have regard to relevant evidence and/or a failure to provide adequate reasons for rejecting the evidence.

17. Ms Chapman very fairly accepted that even once this error was established, she still had to show that it was material. She accepted that there was no challenge to the Judge's findings in relation to whether any subjective fear was objectively well-founded based on background evidence. However, she submitted that the error also impacted on the findings in relation to the Appellant's human rights claims based on his mental health, and inability to access treatment and/or integrate in Algeria.

18. The first issue in this regard is suicide risk. Ms Chapman drew our attention to the Court of Appeal's judgment in Y and Z (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362 ("Y and Z") and in particular to the following passage:

> "13. The principal premise on which DIJ Woodcraft was required to proceed was that, as found by DIJ Manuell, neither appellant had a well-founded fear of persecution or ill-treatment by either the state or the LTTE if returned to Sri Lanka. But the terms on which the case had been remitted to the AIT by this court meant that, while it remained a fixed finding that any such fear was not objectively well-founded, what had to be freshly decided was the reality and consequences of such subjective fear as each appellant might nevertheless have.

14. It is necessary, before considering how DIJ Woodcraft dealt with this issue, to situate it in the context set by this court in J. The fifth principle, it will be recalled, is that:

> …in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.
>
> If a fear of ill-treatment on return *is* well-founded, this will ordinarily mean that refoulement (if it is a refugee convention case) or return (if it is a human rights case) cannot take place in any event. In such cases the question whether return will precipitate suicide is academic. But the principle leaves an unfilled space for cases like the present one where fear of ill-treatment on return, albeit held to be objectively without foundation, is subjectively not only real but overwhelming.

15. There is no necessary tension between the two things. The corollary of the final sentence of §30 of *J* is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence has gone.

16. One can accordingly add to the fifth principle in *J* that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."

19. Ms Chapman drew our attention to [49] to [53] of the Decision which she said was relevant not only to risk of suicide but also the impact on the Appellant's mental health of return to Algeria. That part of the Decision starts with a repeated reference to the Appellant having a "subjective anxiety" but not "subjective fear" of return to Algeria. We therefore accept that what follows indicates that the error which we find (and Ms Gilmour accepts exists) also impacts on the findings about the Appellant's mental health and risk of suicide. The findings made thereafter at [50], [51] and [53] are relevant to our consideration:

> "50. The Appellant does not suggest that there would be an absence or lack of affordability of appropriate treatment for his health conditions in Algeria, nor does he suggest that he would not receive support from his mother and sisters, notwithstanding the shame and guilt he feels about his absence from and lack of support for his family. Such support would provide some immediate substitution for the support he receives from Accident and Emergency staff in the UK and the relationships he enjoys at the Regents Park Mosque.
>
> 51. I do not find that that treatment would be unavailable to the Appellant to address his health conditions, including the panic attacks and hopelessness that are apparently symptomatic of those conditions. He has sought out and engaged with treatment where he has found it in the UK, and I do not find that he would lack access to such treatment for reasons relating to his own resourcefulness or for any other reasons.
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> …
>
> 53. The Appellant is a well-educated man who has previously studied to university level and held employment in Algeria. He has been absent from the country for 22 years, but he left as an adult and has retained family ties throughout that time. He has also mixed to some extent with Algerians at the Regents Park Mosque while living in the UK. He is able to speak French, Arabic and English, and has family in Algeria and is likely to have a reasonable understanding how life in the society is carried on in Algeria. Therefore, his prospects for the future are objectively far from hopeless, and any suicide risk can be managed during his return to Algeria and by treatment on his arrival."

20. Whilst Ms Chapman fairly accepted that Dr Heke's report at [5.5.2] does not go so far as to give a formal diagnosis of high risk of suicide, it does state that "[w]hilst his suicide risk is not predictable there are significant concerns that this would escalate to a potentially high risk of [FA] ending his life, if all his hope of having security in the UK is eroded". In essence, the Appellant's ground in this regard is that the Judge erred by either failing to have regard to the evidence in this respect or failed to give adequate reasons for rejecting it (ground 4). Even though Dr Heke did not provide a formal diagnosis, we accept that the Judge erred by failing to take into account subjective fear and whether that in itself would give rise to a risk of suicide which could not be managed (relying on what is said in Y and Z). The finding at [53] is accordingly impacted by the error at [42.9] of the Decision.

21. Following the findings at [50] to [53] of the Decision, the Judge concluded at [54] of the Decision that the test for an Article 3 breach in relation to mental health was not made out. Whilst there may well be background material supporting the Judge's conclusion, Ms Chapman identified errors in the Judge's reasoning in that regard also. At [5.1] of her report, Dr Heke says the following about the Appellant's ability to access adequate mental health treatment in Algeria "whether such treatment exists or not":

> "I believe that I have already covered this, but would like to reiterate that the severity of [FA]'s current medical conditions mean that his current level of functioning is very impaired. He was achieving at a high academic level when working in Brussels and then completing his PhD on arriving in the UK. Since leaving this over 13 years ago he has not engaged in any meaningful employment and has not been able to support himself spending a considerable period of this time homeless. [FA] has not demonstrated the resourcefulness and motivation in the UK to seek out employment prior to seeking asylum and now engages in extremely few pleasurable activities. Hence being returned to Algeria and feeling that he cannot impose on his mother and sister for support due to the potential risks this would bring to him means that he will be highly susceptible to homelessness and destitution. Even in the UK, the response of the A&E staff is highly unusual and there are many initiatives to facilitate repeat attenders at A&E accessing other more appropriate services. If in Algeria, [FA} was unable to receive the equivalent support he does from A&E in the UK, he would find it very difficult. In my opinion [FA] would not be able to readily access appropriate treatment even if this was readily available."

22. Again, the substance of the Appellant's ground in this regard (grounds 3 and 5) is that the Judge has failed to take relevant evidence into account and/or has failed to provide sufficient reasons for rejecting it. As Ms Chapman also pointed out, the Judge's findings at [50] include that the Appellant would be supported by his mother and sister. As Dr Heke's evidence (and the Appellant's own statement) show, the Appellant's case is that he would not be able to look to them for support because he considers that they would be thereby put at risk. The Appellant's second ground challenges the Judge's reasoning in that regard. That is also directly impacted by the Judge's finding in relation to "subjective anxiety" and failure properly to evaluate the evidence about subjective fear. If the Appellant is, as he says, subjectively in fear of the authorities, that might tend to reinforce his case that he could not look to his family members for support.

23. Finally, the Appellant's sixth ground challenges the Judge's findings in relation to whether there would be very significant obstacles to the Appellant's integration in Algeria. Although Ms Chapman

described that ground as "self-standing" we consider it to be equally impacted by the first ground.

24. The Judge sets out his findings in relation to paragraph 276ADE(1)(vi) of the Immigration Rules and Article 8 ECHR at [55] to [59] of the Decision. We do not need to set out the whole of that reasoning. At [59] of the Decision, the Judge said this:

> "I have regard to the potential cumulative impact of the Appellant's severe anxiety and mental health difficulties, which are inherently linked to his past in Algeria and include a subjective anxiety about returning to that country. However, there is also the support that is potentially available from his mother and sisters, and from healthcare services in Algeria, and the Appellant's prospects for the future in Algeria which are far from hopeless."

25. That reasoning also repeats the earlier point about "subjective anxiety" and is therefore impacted by the error identified in the first ground. Further, that reasoning is impacted by the errors we have identified in relation to in particular the second, third and fifth grounds.

26. For the foregoing reasons, we accept as Ms Gilmour conceded that there is an error identified by the Appellant's first ground in particular which impacts on the Judge's reasoning in relation to the Appellant's human rights claims. Whilst there has been no challenge to the findings in relation to the background evidence, the protection and human rights grounds have to be considered based on the position at the date of the re-hearing of the appeal. The background evidence also needs to be considered alongside the other evidence, in particular Dr Heke's report. Accordingly, it is not appropriate to preserve any findings.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge T Lawrence dated 11 August 2022 contains an error of law. We set aside the decision and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge T Lawrence.

Signed: L K Smith Dated: 20 February 2023
Upper Tribunal Judge Smith