IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004496

First-tier Tribunal No: PA/03332/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 May 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

YB
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Karnik, instructed by Paragon Law
For the Respondent: Ms Z Young, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 24 March 2023

Order Regarding Anonymity

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

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

DECISION AND REASONS

1. The appellant appeals with permission against a decision of the First-tier Tribunal (Judges Saffer and M Smith), dismissing his appeal against a

decision of the Secretary of State to deport him as a foreign criminal.

Background

2. The appellant is a citizen of Algeria. He arrived in the United Kingdom in September 2007 and claimed asylum on the basis that he was a national of Western Sahara. His claim was refused and his appeal against that decision was dismissed. The representatives in Western Sahara did not accept him to be Western Saharan and he was released from immigration detention. He applied to make an assisted voluntary return in December 2009 and March 2010 but these were not successful. He maintained his identity and that he was from Western Sahara in an interview on 3 May 2011. In 2017 the appellant made a voluntary departure from the United Kingdom. In April 2017 a formal request was made by Germany under the Dublin III Regulations to return him which was subsequently agreed.

3. On 12 April 2018 the appellant was convicted at Leeds Crown Court of two counts of robbery and one count of failure to comply with community requirements of a suspended sentence imposed on 15 April 2015 to which he was sentenced to six years' and two years' imprisonment for robbery concurrently, and six months consecutive to that for a failure to comply with an earlier sentence.

4. On 22 June 2018 the appellant claimed asylum in his current identity giving his date of birth as 8 January 1987. His case is that he is a gay man, has been living semi-openly on that basis and faces persecution from his family and others on return to Algeria on account of his sexuality.

5. The Secretary of State did not accept the appellant is gay, nor did she accept that he would be at risk on return to Algeria on that basis as a gay man he would be at risk of persecution living in Algeria. She did not accept that he would be at risk of persecution from his family or that it would be unreasonable to expect him to relocate even if that were so.

The First-tier Tribunal's findings

6. The First-tier Tribunal found:-

   (i) the appellant fell to be excluded from protection under the Refugee Convention by operation of Section 72 of the Nationality, Immigration and Asylum Act 2002 on the basis that he is a serious criminal whose exclusion is justified;

   (ii) the appellant's general credibility is significantly damaged by his earlier false asylum claim which he had repeated and maintained during earlier proceedings [26] to [28];

   (iii) it is reasonably likely that the appellant is gay [30];

   (iv) the material put forward, including the expert evidence of Ms Pargeter, did not alter the effect of either OO (Gay Men) Algeria CG

[2016] UKUT 00065 or YD (Algeria) v SSHD [2020] EWCA Civ 1683 and did not alter the guidance [40];

(v) there are no characteristics particular to the appellant that would put him at real risk of persecution in Algeria [42];

(vi) the appellant would not be at risk from his family even if he were returned because it was unlikely they would find out about his sexuality [46] and even if he lived openly as a homosexual there would be no objective risk of persecution;

(vii) the appellant would be reasonably likely to maintain discretion through personal choice rather than any perceived risk of persecution noting what was said in his statement at [19] and [30];

(viii) there would be nothing to stop him from relocating away from family members in Algeria were he to be returned [49]; although the appellant has a genuine and subsisting family relationship with his two children, that relationship is limited in scope and they are not satisfied there were very compelling circumstances over and above the matters set out in paragraph 399 of the Immigration Rules such that his removal would be disproportionate.

7. The appellant sought permission to appeal on the grounds that the Tribunal had erred:-

(i) in failing to address HJ (Iran) [2010] UKSC 31 in assessing that the appellant would not be at risk from his family;

(ii) the Tribunal erred in its approach to the expert and other evidence failing properly to address the new evidence now produced post-OO (Algeria) and YD (Algeria) and failed properly to apply the case law to the appellant's circumstances, the appellant not having experience of life as a gay man there, rather that being in the United Kingdom;

(iii) in failing properly to assess the balancing act required by Article 8.

The hearing before the Upper Tribunal

8. We heard submissions from both representatives. In addition we had before us the bundles provided to the First-tier Tribunal. We reserved our decision which we now give, dealing with the grounds in turn.

Ground 1: Approach to HJ (Iran)

9. Mr Karnik submits it is appropriate to start by consideration of paragraph 82 of **HJ (Iran)** which, materially states:-

> "If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress

his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted".

10. That is a summary of earlier conclusions, and it is necessary to consider what Lord Rodger said earlier at paragraphs [77] to [78]:

> 77. At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.
>
> 78. It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 500-501, para 81:
>
> > "Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human

> relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality"
>
> In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. Mutatis mutandis – and in many cases the adaptations would obviously be great – the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.

11. Viewed in that light there is merit in the observation that at paragraphs 46 to 47 the Tribunal did not consider properly the nature of the risk from the family but we do not consider that is material given the sustainable findings with respect to internal relocation which are not properly impugned in the grounds of appeal.

12. That finding is sustainable in light of the finding that there is no objective risk to the appellant even if he lived openly (see paragraphs 46 and 42). That is a sustainable and adequately reasoned finding in the light of the above, and what we say below.

Ground 2

13. The appellant seeks to impugn the findings that there is no objective risk to him submitting that the approach to OO (Algeria) and YD (Algeria) was incorrect. We bear in mind that OO (Algeria) is extant country guidance. The status of country guidance was considered in R oba (AAR) v SSHD (OLF members and sympathisers) Ethiopia (CG) [2022] UKUT 1 where the Tribunal said in the headnote as follows:

> **General application of country guidance**
>
> *(1) The treatment of country guidance as a presumption of fact means that it will be for the parties seeking to persuade the Tribunal to depart from it to adduce the evidence justifying that departure.*
>
> *(2) An assessment as to whether to depart from a CG decision is to be undertaken as to: (i) whether material circumstances have changed; and (ii) whether such changes are well established*

evidentially and durable.

(3) The law, and the principle, are not affected by the age of the CG decision. It may be that as time goes on, evidence will become available that makes it more likely that departure from the decision will be justified. But the process remains the same, and unless in the individual case the departure is shown to be justified, the guidance contained in the CG decision must, as a matter of law, be adopted.

(4) If the parties fail to abide by their general duty in respect of identifying extant country guidance, it remains for the Tribunal to consider such guidance and to follow it.

(5) Any failure by the Tribunal to apply a CG decision unless there is good reason, explicitly stated, for not doing so might constitute an error of law in that a material consideration has been ignored or legally inadequate reasons for the decision have been given.

(6) A party that before the First-tier Tribunal has failed to address extant country guidance or has failed to demonstrate proper grounds for departure from it is unlikely to have a good ground of appeal against a decision founded on the guidance.

14. Mr Karnik's submissions are, in substance, that the Tribunal should have, in light of the evidence before it, have, departed from the country guidance. We find no merit in that submission. It is sufficiently clear from the decision that the Tribunal had had regard to the additional material and the material considered in particular the evidence adduced by Ms Pargeter in her report which they dealt with in express detail at paragraph 36 to 38. Whilst we accept that YD (Algeria) was considering for the most part the factual matrix in 2016, the Tribunal gave adequate and sustainable reasons and the position of the Court of Appeal in making decisions is not the same as that of the Upper Tribunal in a country guidance decision, we do not consider that any error on this point is material. The Tribunal gave cogent and sustainable reasons for not departing from the guidance set out in OO (Algeria) and accordingly we are not satisfied that they erred in so doing.

15. Mr Karnik submitted also having had regard to what was said in OO at paragraph 171 that the case law was not properly applied given that the identification of the risk in OO was to men who do not identify themselves as gay men. Neither the grounds nor the submissions identify any proper basis on which the outcome would have been different having applied OO (Algeria); nor, for that matter was it identified to us any passage in which that submission had been put to the First-tier Tribunal.

Ground 3: Article 8

16. We remind ourselves in addressing this issue that the appellant had been sentenced to six years' imprisonment for robbery. That was not his only

offence and the First-tier Tribunal found that he had shown no remorse for his offending.. That finding is not challenged. It may have been better for the panel to adopt a more structured approach to the Article 8 issue in line with current case law, and considering first whether Exception 1 and Exception 2 were met and if not to what extent, but we are satisfied that they addressed the relevant issues in sufficient detail. The panel reached the sustainable conclusion, and for adequate reasons, that although the appellant had a genuine relationship with his children, the former partner was a primary carer and assisted by social services, her sisters and brothers. It was open to the panel to find, as they did giving adequate and sustainable reasons, that the relationship was therefore limited.

17. On consideration of the evidence, as Mr Karnik accepted, there is little or no evidence of the effect there would be on the children of the appellant being deported other than from the appellant. We note in passing that he had been found not to be credible. Whilst we accept that this may well be because the children's mother failed to co- operate, nonetheless it would not have been open in the circumstances for the panel to speculate as to the effect on the children.

18. Viewing the findings as a whole, it is sufficiently clear that at [65] and [66] the panel was not satisfied that the effect of deportation was unduly harsh, unlawful or unduly interfering with the best interests of the children. Given the other factors militating against the appellant, including the lack of remorse, the length of sentence and the his poor immigration history, it is difficult to see how the Tribunal could rationally have come to any other conclusion other than that there were not in this case very serious and compelling circumstances such that his deportation would be disproportionate. Further, even taking into account that the appellant not being able to live with his partner would, added to these factors, could not raise this to very serious and compelling circumstances as it is evident from the partner's witness statement that they had not in fact lived together for a significant number of years and they are in contact by telephone, a situation which would continue.

19. Accordingly, for these reasons, we are not satisfied the decision of the First-tier Tribunal involved the making of an error of law and we uphold it.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it

Signed Date 5 April 2023

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul