Appeal No. C5/2018/0718 (B)

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
BETWEEN : -

YD (ALGERIA)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

SKELETON ARGUMENT OF THE INTERVENER

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1. This is the skeleton argument of the **United Nations High Commissioner For Refugees** ("UNHCR"), which intervenes by way of written and oral submissions with the permission of Underhill LJ.[1] UNHCR is grateful for the opportunity to address the Court. It has produced these submissions with sight of the written submissions of the Appellant ("YD") and the Respondent ("SSHD"), and has sought to avoid duplication.

2. UNHCR has supervisory responsibility over the Refugee Convention (including by issuing interpretive guidelines on issues relevant to this appeal),[2] and States Parties have obligations to co-operate with UNHCR in the exercise of its functions.[3] It has intervened in many cases before the Courts in this and other jurisdictions, including in the related cases of *HJ (Iran)* [2011] 1 AC 596, *RT (Zimbabwe)* [2013] 1 AC 152, *WA (Pakistan)*

[1] These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognised principles of international law
[2] The 1951 Convention relating to the Status of Refugees and its 1967 Protocol.
[3] Article 35 of the Refugee Convention and Article II of the Protocol.

[2019] EWCA Civ 302 and *AS (Afghanistan)* [2019] EWCA Civ 873. UNHCR does not make submissions on the facts of individual cases, but rather on the principles of law arising under the Refugee Convention and the Qualification Directive.[4] In summary, UNHCR will submit that:

a. The Upper Tribunal ("UT") in *OO (Algeria)* [2016] UKUT 65 (IAC) erred in concluding that, since the evidence fell short of establishing a real risk of physical attack against gay men, they faced no real risk of persecution.

b. The UT should instead have considered whether all of the consequences of living openly as a gay man in Algeria, considered cumulatively, met the threshold of persecution.

c. The UT should also have considered whether the very fact of concealment, of itself, amounted to persecution.

d. In both this case and *OO (Algeria)*, the UT took the wrong approach to considering the question of internal relocation in relation to the concealment of one's sexual orientation.

THE FACTS AND RELEVANT BACKGROUND

3. The First-Tier Tribunal ("FTT") found that YD is an openly gay man, in a current relationship with another man, who grew up with his uncle in Algeria. When he was a child he was discovered in the course of a sexual encounter with another boy, Anis ([18]). Anis' mother informed YD's uncle about the encounter. Consequently, YD faced a real risk of ill-treatment from his uncle and Anis' parents ([23]). This is the reason why he fled from Algeria ([18]). However, the FTT found that while YD would face a real risk of persecution if he returned to live near his uncle, he would not face such a risk if he relocated to another location in Algeria,

[4] The 1951 Convention relating to the Status of Refugees and its 1967 Protocol and Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.

where he would nevertheless conceal his sexual orientation ([23]-[29]). He would do this "not necessarily because of persecution, but also because of the fact that respect for the social norms and tradition and religion (sic) as he himself expressed in part of his evidence" ([29]).

4. The Upper Tribunal ("UT") dismissed YD's appeal, holding that any concealment of his sexuality upon return would be because of social pressures rather than a risk of persecution ([10]).

OO (Algeria)

5. In reaching their conclusions, the FTT and the UT relied on the UT's previous Country Guidance decision in *OO (Algeria)* concerning the conditions in Algeria for gay men. In that case, the Tribunal found that:

    a. All homosexual acts, public and private, are criminalised in Algeria, although prosecutions are rare in practice ([19]-[20], [141]).

    b. Homosexuals in Algeria practice their sexuality secretly, "fearful of widespread homophobia in Algerian society". They live "an almost underground existence" and face "severe social stigma". This may be why prosecutions are uncommon ([20]).

    c. There is no reliable evidence that gay men in Algeria face a real risk of being subject to violent attacks, except by their family members ([152], [177]). However, as the Home Secretary accepted, there is "deep rooted societal disapproval and entrenched conservative and religious pressures" against gay men, which are likely to result in "mockery, harassment and possibly abuse" ([130]).

    d. Similarly, there is "intense and deep rooted near universal disapproval of homosexuality that obtains in Algeria" ([183]). Although the evidence fell short of establishing that the response to gay men in the country would involve "physical ill-treatment", Algeria is an "extremely conservative society where behaviour is

regulated by reference to strict Islamic values endorsed by the State" ([154]).

6. The Tribunal's main conclusion is set out at [162]:

> "Drawing all of this together we are satisfied that the evidence clearly demonstrates that there will be a range of responses to displays of homosexual behaviour outside the family context, but while the risk of a physical attack cannot be excluded, generally the response will be at the lower end of that range. Where the response is at the upper end of the possible range of responses, that is likely to be because open displays of affection in public are simply not tolerated, whether that be by heterosexual couples or homosexual couples."

7. The Tribunal further held at [186(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."

PERSECUTION AND CONCEALMENT: THE CORRECT APPROACH

8. UNHCR sets out in this section its views on the issues of principle that arise in this appeal.

Persecution

9. As the Court will be aware, Article 1A(2) of the Refugee Convention defines a "refugee" as a third-country national who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country".[5] Lesbian, Gay, Bisexual,

[5] Article 2(d) of the Qualification Directive contains materially the same definition of "refugee".

Transgender and Intersex (LGBTI) individuals are members of a "particular social group" for this purpose.[6]

10. In *HJ (Iran)* Lord Rodger held that "the underlying rationale of the [Refugee] Convention is … that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay" ([53]).[7]

11. "Persecution" is defined in Article 9(1) of the Qualification Directive as:

    a. An act which is "sufficiently severe by its nature or repetition as to constitute a severe violation of basic human rights"; or

    b. "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 at (a) above".

12. Persecution may therefore constitute either the risk of an individual act which is sufficiently severe to meet the threshold under Article 9(1), or an "accumulation" of measures which, taken together, meet that threshold. As set out in UNHCR's *Handbook and Guidelines*:[8]

> "… an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the

[6] Recital (30) and Article 10 of the Qualification Directive, *HJ (Iran)* at [42].
[7] See to the same effect UNHCR Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity (23 October 2009) ("Sexual Orientation Guidance"), paragraph 12.
[8] UNHCR *Handbook and Guidelines on Procedures and Criteria for determining Refugee Status* (February 2019).

particular geographical, historical and ethnological context" ([53], emphasis added).[9]

13. Persecution is not confined to acts of physical violence, as demonstrated by the non-exhaustive list of persecutory acts in Article 9(2) of the Qualification Directive. In *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 the High Court of Australia held that persecution covers "many forms" of harm, ranging "from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment"([40]). UNHCR respectfully agrees.

14. A particular form of harm which may give rise to persecution is the risk of criminal prosecution. As set out in UNHCR's Sexual Orientation Guidance, "even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. […] They can also hinder LGB persons from seeking and obtaining State protection." (paragraph 27). Laws criminalising consensual same-sex relations may also encourage discriminatory behaviour against LGBTI individuals amongst the local community.

15. Discrimination is a common element in persecution against LGBTI individuals.[10] As set out in UNHCR's guidance, persecution may take the form, for example, of "serious discriminatory or other offensive acts … committed by the local populace", [11] or "intimidation, harassment,

[9] See similarly UNHCR *Handbook and Guidelines* at [55], where it is said that multiple discriminatory measure that would not otherwise meet the necessary standard of severity may constitute persecution "where there is thus a cumulative element involved".
[10] Sexual Orientation Guidance, paragraph 17.
[11] UNHCR *Handbook and Guidelines*, paragraph 65.

domestic violence, or other forms of physical, psychological or sexual violence" committed by family members, neighbours or the broader community against which the State is unable or unwilling to provide protection.[12]

16. UNHCR respectfully agrees with, and does not repeat, the Appellant's analysis at paragraph 36 of his skeleton argument of the case-law in which an accumulation of adverse factors has led to a finding of a well-founded fear of persecution.

Concealment of a protected characteristic

17. It is well established that an individual cannot be required to modify or conceal his or her protected characteristic, for example by being "discreet" about his or her sexual orientation, in order to avoid persecution. This has been confirmed by "numerous decisions in multiple jurisdictions".[13]

18. The leading authority on this issue is *HJ (Iran)*, in which the Supreme Court held that, where a gay person faces a real risk of persecution in their country of origin, the decision-maker must, in essence, ask two questions:

    a. First, what would the applicant actually do if returned to his country of origin? If he would not conceal his sexual orientation, he will face a real risk of persecution and is therefore entitled to protection under the Refugee Convention, as a decision-maker cannot expect or require an individual to conceal his sexual orientation upon return.

    b. Secondly, if the applicant would conceal his sexual orientation, why would he do so? If he would do so in order to avoid a well-founded fear of persecution, he is entitled to protection. By contrast, if he

[12] Sexual Orientation Guidance, paragraph 35.
[13] Sexual Orientation Guidance, paragraph 31.

would do so only because of mere "social pressures", he will not be so entitled.[14]

19. *HJ (Iran)* thus requires a decision-maker or tribunal to interrogate the reason for the likely concealment. If a material reason is feared persecution, the individual's claim for asylum will be well-founded. If it is social pressures, it will not. This analysis has been confirmed in many other cases, including *S395/2002* (at [40]), Cases C-199/12-C/201/12 *X, Y and Z* (at [70]), Cases C-71/11 and C-99 *Y and Z* (at [79]), *RT (Zimbabwe)* (at [71]) and, most recently, *WA (Pakistan)* (at [42] and [47]). The correctness of the two-stage analysis in *HJ (Iran)* is not understood to be an issue in this appeal.

20. In determining whether a person would conceal his sexuality because of a well-founded fear of persecution, the same cumulative analysis applies as set out at paragraph 11 above. The decision-maker should therefore consider not only whether he would face a single specific consequence of sufficient severity to meet the definition of persecution in Article 9(1) of the Qualification Directive (such as a specific risk of violence or death), but also whether he would face an accumulation of various measures which, taken together, would meet that threshold.[15] This requires a "fact-specific examination" of the circumstances of the applicant and his country of origin,[16] including "the age, gender, opinions, feelings and psychological make-up of the applicant"[17] and:

    a. The risk of criminalisation (see paragraph 14 above).

    b. The requirement to conform to hetero-normative standards and the possibility of detection: the risk of persecution must be assessed against the possibility that an individual's sexual orientation may be discovered against the person's will, for example, by "accident,

[14] *HJ (Iran)* at [35] per Lord Hope; [61] and [82] per Lord Rodger.
[15] See for example, *TK v SSHD* [2019] UKUT 92, para 53.
[16] Sexual Orientation Guidance, paragraph 32.
[17] Sexual Orientation Guidance, paragraph 16.

rumours or growing suspicion".[18] This is particularly likely to be a problem where, as in Algeria, there is a social expectation, derived from what is seen as an "Islamic duty to procreate", that men will marry. If they do not, this is likely to generate suspicion "sooner or later" that the individual is gay.[19]

c. The degree of social stigma and disapproval: where, as in Algeria, there is near-universal disapproval of homosexuals, this can result in LGBTI individuals having to live an "almost underground existence" in an "extremely conservative society".[20]

21. The SSHD argues that the key to understanding the case-law on concealment is to consider whether the applicant would face a real risk of a breach of "non-derogable rights" under the European Convention on Human Rights, relying on the wording of Article 9(1) of the Qualification Directive.[21] If in advancing this submission the SSHD is arguing that a decision-maker must consider in isolation, rather than cumulatively, whether each of the consequences of living as an openly gay person are sufficiently serious to meet that threshold, that is wrong for the reasons set out at paragraphs 12-13 above. In any event, the interpretation by the Court of Justice of the European Union ("CJEU") of Article 9(1) has been more nuanced than the SSHD suggests. In particular, it has held that breaches of rights which are "equivalent to … an infringement of the basic human rights from which no derogation may be made" may be regarded as persecution.[22] This may include interference with an individual's right to

[18] Sexual Orientation Guidance, paragraph 32; *S395/2002* at [56]-[58].
[19] *OO (Algeria)* at [181]-[182]. See, relatedly, paragraph 15 of the Sexual Orientation Guidance ("Societal disapproval … is often underlined by a reaction to non-compliance with expected cultural, gender and/or social norms and values. The societal norms of who men and women are and how they are supposed to behave are commonly based on hetero-normative standards").
[20] *OO (Algeria)* at [20] and [154].
[21] SSHD skeleton argument, paragraphs 50-53.
[22] Cases C-71/11 and C-99/11 *Y and Z* at [61], emphasis added.

express his or her protected characteristic (in that case religion) publicly, even though this is not technically a non-derogable right.[23]

"Mere social pressure"

22. As set out above, an applicant will not be entitled to protection under the Refugee Convention if, upon his return, he would conceal his sexual orientation due to mere "social pressure", as opposed to a well-founded fear of persecution.

23. Although the Supreme Court did not explain precisely what was meant by the phrase "social pressure" in *HJ (Iran)*, the following passages provide some guidance:

    a. At [22], Lord Hope refers to gay people who are "naturally reticent" and "have no particular desire to establish a sexual relationship with anybody". He goes on to refer to, and contrast this with, concealment due to "family or social pressures".

    b. At [35(d)], Lord Hope then refers to concealment because of "social pressures or for cultural or religious reasons <u>of his [i.e. the applicant's] own choosing</u>" (emphasis added).

    c. Lord Rodger gave the following examples of scenarios where an individual would be deemed to have concealed his sexuality for reasons of social pressure rather than persecution:

> "For example, he might not wish to upset his parents or his straight friends and colleagues by revealing that he is gay; in particular, he might worry that, if the fact that he was gay were known, he would become isolated from his friends and relatives, be the butt of jokes or unkind comments from colleagues or suffer other discrimination" ([61]).[24]

[23] Ibid at [63].
[24] See similarly Lord Rodger's reference at [62] to "casual, social anti-semitism" experienced by some Jews as an example of social pressure.

d. Lord Rodger goes on to explain social pressures as an individual "not wanting to distress his parents or embarrass his friends" ([82]), and refers to the fact that an applicant may choose to act discreetly "to avoid upsetting his parents [and] … avoid trouble with his friends and colleagues" ([62]).

24. The references to mere "social pressures" in *HJ (Iran)* were therefore to situations where an applicant makes a voluntary choice to conduct himself in a certain way because of his own cultural or religious views, or in order to avoid low-level upset or embarrassment. The Supreme Court did <u>not</u> hold that concealment in a country such as Algeria, where homosexuality is criminalized and there is near-universal and deep-rooted stigma against homosexuality, may be classified as mere "social pressures".

25. Although the question will be an individual one to be decided on the facts of each case, there is a spectrum of responses which openly gay people may face in their country of origin, ranging from low-level name-calling or parental disapproval on the one hand, to physical violence and criminal punishment on the other. It is clear from the abovementioned passages in *HJ (Iran)* that "social pressures" are confined to the former end of the spectrum. In all cases, it is important to note that, while concealment due to social pressures will not of itself engage the protection of the Refugee Convention, it may well be a consideration that, when taken together with other features of life as a gay man or woman in the country of origin, may result in harm amounting to persecution as a result of an "accumulation" of factors under Article 9(1)(b) of the Qualification Directive.[25]

26. In UNHCR's submission, the fact that an individual has chosen to live openly as a gay person outside his country of origin may well be an indicator that any concealment of his sexual orientation upon return would not be due to personal religious or cultural mores, but rather because of a genuine fear of adverse consequences. That is especially so where, as in the

[25] Sexual Orientation Guidance, paragraph 23.

present case, the applicant would not return to the location of his family on account of a well-founded fear of persecution by them (and therefore cannot be deemed to wish to conceal his sexuality to avoid embarrassment for his family). This obtains support from the comments of Hickinbottom LJ in *LC (Albania)* [2017] EWCA Civ 351, which concerned the return of a gay man to Albania:

> "Where an individual would behave in the same way wherever he was living and irrespective of the regime so far as protecting his right to a particular social orientation is concerned, it seems to me to be a distortion of language to say that he would 'modify' his behaviour on return … The focus must be on the particular individual himself" ([52(iv)], emphasis added).

27. As the SSHD (correctly) accepts, ill-treatment by non-State actors may constitute persecution where the State fails to afford protection against such acts. [26] In UNHCR's submission, deep-seated and near-universal homophobia of the kind identified by the UT in *OO (Algeria)* would qualify as the sort of harm from which the state owes its nationals protection. This may be contrasted with, for example, one-off unkind remarks in which there is no state involvement. In this respect, the concept of state involvement may assist in distinguishing between persecution and "social pressures", although it is unlikely to be determinative in and of itself.

Mixed motives for concealment

28. An applicant is not disqualified from protection under the Refugee Convention because he would have mixed reasons for concealing his or her sexual orientation upon return. As Lord Rodger says in *HJ (Iran)*, protection is "not confined to cases where fear of persecution is the only reason why the applicant would act discreetly. In practice, the picture is likely to be more complicated" ([60], emphasis added). This is confirmed at [62], where Lord Rodger held:

[26] SSHD skeleton argument, paragraph 68. See *HJ (Iran)* at [13].

> "Having examined the relevant evidence, the Secretary of State or the tribunal may conclude, however, that the applicant would act discreetly partly to avoid upsetting his parents, partly to avoid trouble with his friends and colleagues, and partly due to a well-founded fear of being persecuted by the state authorities. In other words the need to avoid the threat of persecution would be a material reason, among a number of complementary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view it would not. A Jew would not lose the protection of the Convention because, in addition to suffering state persecution, he might also be subject to casual, social anti-semitism. Similarly, a gay man who was not only persecuted by the state, but also made the butt of casual jokes at work, would not lose the protection of the Convention. It follows that the question can be further refined: is an applicant to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, in addition to any other reasons for behaving discreetly, he would have to behave discreetly in order to avoid persecution because of being gay?"

29. Ultimately, Lord Rodger held that the fear of persecution must be *a* "material reason", but need not be the only reason, for the concealment ([82]). See similarly Irwin LJ in *WA (Pakistan) v SSHD* at [60(iii)]:

> "… if a material reason (and not necessarily the only reason) for such [concealing] behaviour will be to avoid persecution, then it is likely that the Claimant will have a valid claim for asylum".

30. In *LC (Albania)*, Hickinbottom LJ said that only those who would keep their homosexuality concealed "for reasons entirely other than the fear of persecution" would fall outside the protection of the Refugee Convention ([53], emphasis added).

31. UNHCR notes that the FTT in the present case appears to have found that the applicant, YD, would have mixed reasons for concealing his sexuality upon return: see paragraph 34 below.

The Tribunal's errors in the present case and OO (Algeria)

32. In light of its submissions on the relevant legal principles above, UNHCR makes the following observations about the conclusions of the Tribunal in the present case and *OO (Algeria)*.

33. The FTT found (and the UT upheld) that YD would conceal his homosexuality upon return to Algeria, but that he would not do so because of a real risk of persecution or at least not solely because of such a risk.[27] The FTT's conclusions were based on the UT's Country Guidance judgment in *OO (Algeria)*, which in turn is based on the UT's finding that there is no well-founded fear of persecution for gay people in Algeria outside the family context, despite the fact that there is "intense and deep rooted near universal disapproval of homosexuality", as well as "severe social stigma" which forces homosexuals to live an "almost underground existence".[28] UNHCR submits that these conclusions were based on a misapplication of the Refugee Convention and of the Qualification Directive, as well as the principles under *HJ (Iran)*.

34. First, the FTT erred in law by finding that YD was not entitled to protection because:

> "Having considered all the evidence before me, I find that if the Appellant was to return to Algeria today … he would not want to express himself as a gay person … not necessarily because of persecution, but also because of the fact that respect for the social norms and tradition and religion as he himself expressed in part of his evidence (sic)" ([29], emphasis added).

35. Insofar as the FTT (and the UT) held that the fact that YD was disqualified from protection under the Refugee Convention because religious and cultural considerations would be a, but not the only, reason for concealing his homosexuality, that is not the correct approach as a matter of law: see paragraphs 28-30 above.

[27] See paragraph 34 below, citing paragraph [29] of the FTT's judgment.
[28] *OO (Algeria)* at [183].

36. Secondly, the UT erred in *OO (Algeria)* (and the FTT and UT therefore also erred in the present case) by focusing on the risk of physical violence to gay men in Algeria, rather than considering the cumulative adverse consequences of living as an openly gay man in the country. In particular:

    a. As set out at paragraph 12 above, a real risk of persecution may be established by an "accumulation" of risks which, considered in isolation, may not meet the threshold of severity under Article 9(1)(a) of the Qualification Directive.

    b. Persecution is not confined to risks of physical violence. It includes a wide range of potential harms, including for example discrimination and psychological harm: paragraph 13 above.

    c. However, the UT appears to have focused on whether there was a risk of physical violence in asking whether the likely responses to an openly gay man in Algeria would not be sufficiently severe to constitute persecution.[29] That was not the correct question.

    d. Rather, the Tribunal should have asked whether the adverse consequences of living as an openly gay man in Algeria were, taken together, severe enough to meet the threshold of being persecutory. This would have involved consideration of the predicament that homosexuals face in living in a country which criminalises same-sex sexual activity, the near-universal social disapproval and stigma surrounding homosexuals in Algeria, the fact that homosexuals live an "almost underground existence",[30] their need to cut ties with their family, and the persistent risk of discovery (including by failing to marry a woman by a certain age).

[29] See e.g. *OO (Algeria)* at [155] ("the evidence falls a very long way short of establishing that the response can generally be expected to be one involving physical ill-treatment"), [162] ("… while the risk of a physical attack cannot be excluded, generally the response will be at the lower end of [that] range").
[30] *OO (Algeria)* at [20].

e. Having considered these factors, the Tribunal should have asked itself whether the applicant would conceal his sexuality solely because of social pressures or, in whole or in part, because of a well-founded fear of persecution. As set out at paragraphs 22-27 above, measures to avoid "social pressures" in this context are to be construed as voluntary choices in response to social or religious views, as well as low-level name-calling and teasing etc. Concealment due to pervasive homophobia in the context of a country which has formally criminalized homosexuality, does not constitute a mere "social pressure".

f. Had the Tribunal considered the issue in this way, it may well have found that openly gay men face a real risk of persecution in Algeria, although it would of course be a matter for the facts of each individual case, upon which UNHCR does not comment, as to whether the particular applicant faced such a risk.

g. A model of the correct approach to considering these issues is the UT's ruling in *TK v SSHD* [2019] UKUT 92, where the UT found, in the context of a "deeply conservative, traditional and religious society in which there is widespread disapproval of homosexuality" that the adverse consequences of living openly as a gay person in St. Lucia amounted to persecution when "considered cumulatively" ([31(iv)] and [53(vii)]).[31]

37. Thirdly, the UT in *OO (Algeria)* erred by framing its question as what risks a person "suspected to be a gay man" would face. However, the correct starting point is what adverse consequences an openly gay man would face in the country of origin, not one merely "suspected" of being gay. As Lord Rodger said in *HJ (Iran)*:

[31] The UT further said "To use the language of Article 9 of the Qualification Directive, the accumulation of various measures against men perceived to be gay in St Lucia, including violations of their human rights is sufficiently severe to affect openly gay men in a manner that constitutes persecution".

> "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".

38. Fourthly, the UT erred in *OO (Algeria)* in finding:

> "That two 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)* 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."

39. This reasoning, which finds that gay men who choose to be discreet about the fact that they are in a relationship with another man are deemed to be doing so for social reasons, is misconceived. As Lord Rodger said in *HJ (Iran)*, the fact that a gay man may be able to express some aspects of his sexuality, short of living a life of complete celibacy, does not remove him from the protection of the Refugee Convention ([63]-[64]). The UT's reasoning is also inconsistent with Lord Hope's recognition at [22] that the way in which individuals choose to manifest their sexuality "occupies a wide spectrum", from naturally private people at one end to people who wish to "proclaim in public their sexual identity" on the other.

40. For the same reason, the Tribunal was wrong to focus on a comparison between the situation of homo- and heterosexual displays of affection in public ([62]). It is wrong to assume that public affection is the only way in which gay men may wish to manifest their sexuality. They may, for example, simply wish to acknowledge the fact of their relationship with another man with friends and colleagues. Yet, on the UT's findings in *OO (Algeria)*, that would be almost inconceivable.

41. Fifthly, the UT in the present case was wrong to place significance on its finding, drawn from *OO (Algeria)*, that gay people in Algeria "generally do not live openly as such" ([10]).[32] If anything, this is suggestive that homophobia in Algeria is so widespread and deep-rooted that there is a very real risk of persecution for individuals who choose to 'break the mould'.

42. Finally, UNHCR takes issue with the UT's finding in *OO (Algeria)* that "an Algerian man who has a settled preference for same-sex relationships may well continue to entertain doubts as to his own sexuality and not to regard himself as a gay man".[33] This should not be assumed as a matter of generality (and UNHCR notes that there is no such finding about YD in the present case). Furthermore, the fact that gay men are forced to repress their own sexual identity may well be a symptom of such widespread discrimination and stigma so as to amount to persecution. To the extent that this was a factor in the UT's conclusion that gay men do not face a real risk of persecution, this was an error of law.

THE VERY FACT OF CONCEALMENT AS PERSECUTION IN ITSELF

43. On the FTT's factual findings, YD will conceal his sexual orientation in the long-term upon return to Algeria. In UNHCR's submission, long-term suppression of one's sexuality may, of itself, amount to persecution. As UNHCR sets out in its Sexual Orientation Guidance:

> "Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response to an inability to be open about one's

[32] See *OO (Algeria)* at [20], finding that homosexuals in Algeria generally practice their homosexuality secretly.
[33] *OO (Algeria)* at [186(c)].

sexuality or gender identity are factors to consider, including over the long-term" (paragraph 33, emphasis added).

44. This finds support in the Supreme Court's analysis in *HJ (Iran)*, where their Lordships recognised the deleterious consequences that long-term concealment of sexual orientation could have on an LGBTI individual:

> "The group is defined by the immutable characteristic of its members' sexual orientation or sexuality. This is a characteristic that may be revealed, to a greater or lesser degree, by the way the members of this group behave. In that sense, because it manifests itself in behaviour, it is less immediately visible than a person's race. But, unlike a person's religion or political opinion, it is incapable of being changed. To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are" ([11], per Lord Hope (emphasis added)).[34]

> "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" ([77] per Lord Rodger).

45. Lord Rodger concluded:

> "Where would the tribunal find the yardstick to measure the level of suffering which a gay man – far less, the particular applicant – would find reasonably tolerable? How would the tribunal measure the equivalent level for a straight man asked to suppress

[34] See similarly *X, Y and Z*, where the CJEU held that sexual orientation is a characteristic "so fundamental to a person's identity" that he or she should not be required to renounce it ([70]).

> his sexual identity indefinitely? The answer surely is that there is no relevant standard since it is something which no one should have to endure" ([80]).

46. It is therefore clear that long-term concealment of sexual orientation could have serious repercussions in terms of an individual's dignity and mental and physical health. While concealment may not, in every case, amount to persecution, the decision-maker should conduct a careful examination of the individual facts of each case to determine whether it does. According to the approach described at paragraph 20 above, the adverse consequences of long-term concealment should be considered cumulatively alongside all of the other consequences of being returned to the country in question, such as pervasive social stigma and shame, the risk of harm for failing to adhere to often hetero-normative social norms, impeded access to employment and the ever-present risk of detection.

47. The SSHD's response to this point is that "th[e] argument is based on an incorrect assumption … that there is some societal conduct 'in between' the social pressures referred to in *HJ (Iran)* and acts of persecution".[35] This misunderstands UNHCR's position. *HJ (Iran)* concerned the <u>reasons</u> for which an individual may choose to conceal his or her sexuality. If the reason for concealment reaches a threshold of sufficient seriousness, that will amount to a risk of persecution even if the individual would, in fact, conceal his or her sexuality upon return. This point is a different one, namely that the <u>very fact</u> of concealment may of itself, in certain circumstances, amount to persecution. The focus of this point is therefore not on the reasons for concealment, but the fact of concealment itself (and, in particular the impact of such concealment on the integrity and dignity of the individual.

48. The SSHD also contends that, if concealment could in itself amount to persecution, the Supreme Court would have said so in *HJ (Iran)*. But this

[35] SSHD skeleton argument at [80].

issue simply was not before the Court, as is clear from Lord Walker's description of the issue to be determined at [96].[36]

49. It will of course be a matter for the tribunal, on the facts of each individual case, to decide whether a requirement for a gay person to conceal their sexuality would amount to persecution. However, the UT's findings in *OO (Algeria)* that the deep-rooted homophobia in Algeria forces gay men to live an "almost underground existence" suggests that there is at least *prima facie* evidence that the circumstances of long-term concealment in Algeria could be so severe so as to amount to persecution.

INTERNAL RELOCATION ALTERNATIVE

50. The FTT and UT in the present case found that YD could relocate to another location in Algeria away from his uncle, where he would not face a well-founded fear of persecution.[37]

51. UNHCR has published what Lord Bingham described in *Januzi v SSHD* [2006] 2 AC 426 as "valuable" guidance on the circumstances in which the possibility of internal flight may lead a decision-maker to conclude that an individual does not meet the test for refugee status under the Refugee Convention and Qualification Directive ("the IFA Guidance"). [38] In summary, the IFA Guidance provides:

    a. There are two stages to the question of whether an applicant may be required to relocate internally. First, whether there is an area to which the applicant can practically, safely and legally relocate without a real risk of persecution ("the Relevance Analysis").

[36] See also *RT (Zimbabwe)* at [19] where, summarising the judgment in *HJ (Iran)*, Lord Dyson explains that the Supreme Court dismissed the Home Secretary's argument that it was necessary to prove that the act of concealment would in itself, amount to persecution. However, the Court did not address the question of whether this would be sufficient.
[37] FTT judgment at [23]-[24],
[38] UNHCR Guidelines on International Protection: "Internal Flight or Relocation Alternative" (23 July 2003); see *Januzi v SSHD* at [20].

Secondly, whether the applicant could lead a relatively normal life without undue hardship there ("the Reasonableness Analysis").[39]

b. A person cannot be expected to relocate to a place in which they would be exposed to a new or existing risk of serious harm, including a risk of "serious discrimination" (irrespective of whether there is a link to one of the protected characteristics).[40]

c. In answering the question of whether an individual could lead a "relatively normal life" in the place of relocation, "it is necessary to assess [their] personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibly for economic survival".[41]

d. "Factors which may not on their own preclude relocation may do so when their cumulative effect is taken into account".[42]

e. While a proposed relocation alternative will not be precluded by potential deprivation of any civil, political or socio-economic human rights, it will be necessary to consider whether certain rights that will not be respected "are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative".[43] An example of this is *Hysi v SSHD* [2005] EWCA Civ 711, where the Court of Appeal held that an immigration tribunal had erred by failing to consider the harshness of requiring a mixed-race man to relocate to Kosovo on the basis that he would engage in a "long-term deliberate concealment about the truth of his ethnicity", while facing the fear that his true ethnicity could be discovered at any time ([37]).

[39] IFA Guidance, paragraph 7.
[40] Ibid, paragraph 20.
[41] Ibid, paragraph 24.
[42] Ibid, paragraph 25.
[43] Ibid, paragraph 28.

52. Internal relocation is not a relevant alternative, and therefore does not meet the first stage of UNHCR's two-stage test, if it would expose the individual to the original or any new forms of persecution.[44]

53. As set out at paragraphs 52-53 of YD's skeleton argument, which UNHCR does not repeat, the test is whether it would be "unduly harsh" to require an individual to relocate to another part of his country of origin (citing *Januzi v SSHD* at [21]).[45] This is a different, and lower, threshold to the question of whether the applicant would face a real risk of persecution there.[46] If the tests were the same, the "undue hardship" question at the second ("Reasonableness") stage of the analysis would serve no obvious purpose.[47]

54. In determining whether a relocation would be unduly harsh, and would permit the applicant to lead a relatively normal life, the decision-maker should consider "all matters relevant to the reasonableness of the relocation, none having inherent priority over the other" (*AS (Afghanistan)* at [61(3)]). It is therefore necessary to consider "the impact of the proposed relocation on the particular individual, having regard to that individual's characteristics and past experiences" ([62]-[63]).

55. UNHCR respectfully agrees with the following approach to considering internal relocation set out by Lady Hale in *AH (Sudan)* [2008] 1 AC 678:

> "… the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the individual's case holistically and with specific reference to the individual's personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the

[44] Sexual Orientation Guidance, paragraph 54.
[45] At [47], Lord Hope put the test as being whether the applicant could relocate "without undue hardship or undue difficulty".
[46] See *AS (Afghanistan)* at [61(1)].
[47] This can also be seen, for example, from the jurisprudence of the European Court of Human Rights, which has held that a decision-maker may not rely on an internal relocation unless the individual is able "to settle" in the proposed place of relocation (which is a lower threshold than persecution): *Salah Sheekh v Netherlands* (Application no. 1948/04), [142].

> conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship."

56. Lady Hale goes on to call for a "holistic consideration of all the relevant factors, looked at cumulatively" ([27]). Again, UNHCR respectfully agrees.

57. One relevant factor to consider as part of the question of whether it would be unduly harsh to expect the applicant to relocate is whether that would require him to conceal a protected characteristic. UNHCR's Sexual Orientation Guidance states that "[internal relocation] should not be relied upon where relocation involves (re-)concealment of one's sexual orientation and/or gender identity to be safe".[48] In support of this proposition, the Guidance refers to the Canadian Federal Court's decision in *Okoli v Canada* 2009 FC 332 (31 March 2009). In that case, the decision-maker refused the applicant's claim for asylum on the basis that, amongst other things, he could relocate to Lagos "if he were discreet about his sexuality" ([18]). The appeal court held, in accordance with existing Canadian case law, that this was a perverse finding as it required the applicant to "repress an immutable characteristic" ([36]).

The Tribunal's analysis in this case

58. The UT dealt with the question of internal relocation at paragraph [20] of its judgment. It found, essentially, that it would not be unduly harsh to require the Appellant to relocate internally and conceal his sexuality because "that is contrary to what the Tribunal found in *OO (Algeria)*". The question, therefore, is whether *OO (Algeria)* was correctly decided on this point.

59. In UNHCR's submission, the UT in *OO (Algeria)* took the wrong approach to considering whether the relocation of gay men to other parts of Algeria

[48] Sexual Orientation Guidance, paragraph 54.

would be unduly harsh. As set out above, the UT focused on the question of whether a gay man would be subject to the risk of physical attack if he moved away from his family. It held that he generally would not be (paragraph 36 above). However, in line with Lady Hale's approach in *AH (Sudan)*, the UT should have considered cumulatively all of the potential adverse consequences for a gay man living away from his family in Algeria, not just the risk of physical violence. This would include the possible need to conceal his sexuality, the ever-present risk of detection, the pervasive disapproval of, and stigma attached to, homosexuality, and the need to live an "underground existence".

60. The SSHD argues that a holistic assessment of the kind envisaged above would allow applicants to achieve by the back door of internal relocation what they cannot by the front i.e. establishing a real risk of persecution.[49] However, once it is understood that the "unduly harsh" test is a different, and less demanding, test to "persecution", this is unproblematic. Indeed, internal relocation need only be considered as a second stage of the analysis where the applicant has already established a real risk of persecution in his original location.

61. Finally, the SSHD argues that the UT in *OO (Algeria)* did not purport to "lay down general guidance on internal relocation", which is a question to be decided on a case-by-case basis.[50] UNHCR agrees. However, Country Guidance cases such as *OO (Algeria)* inevitably impact upon the assessment of internal relocation options in future cases, as demonstrated by the fact that the FTT in this case held that *OO (Algeria)* was the "point of reference" for any decision on internal relocation regarding YD.[51] To the extent that the UT in *OO (Algeria)*, and/or in the present case, made errors of law in its comments on internal relocation options in Algeria, they should therefore be corrected.

[49] SSHD skeleton argument, paragraph 89.
[50] SSHD skeleton argument, paragraph 90.
[51] FTT judgment at [24].

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