



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/05191/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27 November 2014**

**Decision and Reasons
Promulgated
On 12 December 2014**

Before

**THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE
DEPUTY UPPER TRIBUNAL JUDGE MRS D BIRRELL**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR D
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Mr P Mason, Counsel instructed by Appleby Shaw Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State from a determination promulgated on 23 September 2014. That determination was the decision of the First-tier Tribunal on Mr D's appeal from the Secretary of State's refusal of his asylum claim. Mr D is the respondent to this appeal, but we will refer to him throughout as the appellant for convenience. The Secretary of State refused the appellant's asylum on 9 July 2014. The main

basis on which the asylum claim was refused was that the Secretary of State had not accepted that he was a gay man.

2. Permission to appeal was granted by First-tier Judge Shimmin on 22 October 2014. He noted that the grounds of appeal were that the judge had erred in two respects: firstly in seeking to reverse the burden of proof from the appellant to the respondent and, secondly, in failing to apply the findings of the country guidance cases. First-tier Judge Shimmin expressed the view that it was arguable that in paragraph 73 of the determination the judge had imposed the burden of proof on the Secretary of State and First-tier Judge Shimmin also referred to the country guidance cases which he said indicated that generally homosexuals were not at risk in Albania of anything more than discrimination or harassment and for that reason it was arguable that the First-tier Tribunal had erred in finding that the appellant would be persecuted on grounds of his sexuality.
3. We turn to the determination. The structure of the determination is as follows:
 - In paragraphs 3 to 7 the First-tier Tribunal set out the legal framework for its consideration of the appeal and in paragraph 6 clearly stated that the burden of proof was on the appellant;
 - In paragraphs 8 to 14 of the determination the Tribunal set out the nature of the appellant's claim and it was as follows:
 - (i) he claimed to be an Albanian national from Tirana;
 - (ii) he first realised he was gay when he was 18;
 - (iii) in 2011 he met a man called Enhxi and they began a relationship together;
 - (iv) in October 2011 he decided to move in with Enhxi whose home was twenty to thirty minutes away from his family home. He told his family he was moving for work. When he arrived he was greeted by Enhxi and they embraced and kissed. This was witnessed by the appellant's uncle who hit him and caused him to lose consciousness. When he woke up he discovered that Enhxi was in hospital. The appellant had suffered a cut to the back of his head requiring stitches and Enhxi had suffered injuries and was in hospital for two weeks. The appellant did not report the incident to the police for fear of the consequences. After Enhxi was released from hospital they lived together at his address until December 2011 and had no problems during that period but on Christmas day 2011 the appellant tried to contact Enhxi but his calls were not returned. He believed his uncle had threatened Enhxi and he went back to the apartment in 2012 but could find no trace of him.

- (v) In November 2012 he formed a relationship with another man. Again he was attacked, this time by four or five men who were stopped by the arrival of the police. The appellant made a complaint to the police but later withdrew it for fear of reprisals. As a result of the second attack he decided to leave Albania.
- (vi) He arrived, he claimed, in the United Kingdom on 5 March 2013.
- (vii) He was encountered by police on 17 October 2013.
- (viii) Removal directions were made for December 2013.
- (ix) He claimed asylum on 1 November 2013.
- (x) His screening interview took place on 8 November.
- (xi) His asylum interview started on 14 November.
- (xii) He was released from detention for what were described as operational reasons on 15 November and his interview was completed on 14 February 2014.
- (xiii) He had spoken to his parents before he left Albania and they had told him on the phone they wanted nothing to do with him. The rest of his family felt the same way towards him. He had not been in a relationship with anyone in the United Kingdom.
- (xiv) He claimed he suffered from breathing difficulties, heart problems and to have a problem with his liver.
- (xv) He claimed his uncle had promised that if he ever saw him again he would kill him because he is gay and for the same reason he fears everyone in Albania.

4. The First-tier Tribunal then set out the respondent's case and, in summary, the respondent did not accept that the appellant was gay and the respondent did not accept that the appellant had been attacked in Albania because he was a gay man.
5. The respondent also relied on Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the First-tier Tribunal set out in paragraph 18 of the determination in some detail the nature of the respondent's reliance on Section 8.
6. So far as the structure of the determination is concerned the First-tier Tribunal then dealt with the Home Office's case on "risk on return" in paragraphs 19 to 22 with "humanitarian protection" at 23. It considered the Home Office's case on "medical considerations" and "private and family life" at paragraphs 24 to 27.

7. The Tribunal then described the evidence that had been given at the hearing in paragraphs 28 to 48 of the determination. We do not seek to do more than to summarise the main points:
 - At paragraph 8 the structure of the appellant's family was described and the Tribunal referred to the evidence that the appellant's father's brother, his uncle, had openly expressed their disapproval of the appellant's lifestyle and had told him that he would pay for it with his life.
 - At paragraph 29 the Tribunal discussed the first asylum interview which the appellant had had.
 - His evidence about what had happened to Enhxi was then set out at paragraphs 31 and 32.
 - At paragraph 33 the Tribunal recorded the appellant's evidence that his uncle had asked a friend called Kujtim to kill him for money but the appellant had called him to ask him why his family hated him so much.
 - The Tribunal recorded the appellant's evidence at paragraph 37 that the he wanted to be open about who he was, and express his sexuality, but would not be able to do so in Albania, which is a small country. His family is very large and they would be able to find where he was. He has brothers in the army and another brother has his own business and another brother is a security guard for a Swiss company.
8. The material that emerged in cross-examination was set out by the Tribunal at paragraphs 38 and following. The Tribunal then referred to evidence which had been given by Ms Crystal Doka. She is the wife of a cousin of his who owned the car wash at which the appellant was found by the police. Her evidence was that the appellant's family had not accepted that he was gay and were not willing to have him as part of their family. She had become very close to him, more so since he had come to the United Kingdom. She gave evidence that she was scared for him in Albania. Tom had not been happy to discover that the appellant was gay but had come round and learnt to accept him for what he was.
9. She went on to say that she had seen the appellant being abused by his family. He had been smacked on the head by his brothers who called him rude names associated with his sexuality. This had made her uncomfortable and she had seen it get worse over the years. She said that she had seen him with his uncle twice and had heard him tell the appellant that if he is gay he will kill him. The appellant looked terrified, according to her evidence, and she left the house with Tom and her daughter.

10. In cross-examination she accepted that her Albanian was not fluent but she said that she could converse well and she had not misunderstood what the uncle had said.
11. At paragraphs 49 to 50 the Tribunal set out the respondent's submissions. There is again reference to the fact that the submission that the appellant's credibility had been damaged by his delayed claim, his illegal working and his failure to claim asylum in Italy or Holland.
12. The Tribunal then set out the appellant's submissions and other evidence which they had heard and in particular, at paragraph 59, the Tribunal referred to extracts from the Home Office's Country of Origin Information Report which were in the appellant's bundle. It summarised that evidence as follows:
 - There is an anti-discrimination law in Albania. Its implementation is however uncertain;
 - there are several reports of incidents of persecution and evidence of reluctance to report incidents to the police who are perceived as a source of harassment rather than protection;
 - an article on the website "Balkan Insight" dated March 2013 reported a European social survey which described Albania as the most homophobic society of the 30 which had been surveyed.
13. At paragraph 61 and following the Tribunal set out its findings.
14. At paragraph 62 the Tribunal said that the issue of the core of the appeal was whether or not the appellant was homosexual. It was suggested by Mr Tufan for the Home Office that this was a misdirection. We reject that submission. It is clear because the Secretary of State had rejected the appellant's claim to be gay that this was indeed the core issue of the appeal.
15. The Tribunal then dealt with the evaluation of credibility of evidence provided by the appellant in his asylum interviews. We do not need to deal with that in any detail.
16. It then referred at paragraph 64 to the respondent's guidance entitled "Sexual Orientation Issues in the Asylum Claim" dated June 2011 and the Tribunal went on to say "background evidence about Albania satisfies me that it is a country where open homosexual orientation is at best discouraged and at worst punished".
17. The Tribunal then referred to the UNHCR guidelines on gender identity and at paragraph 66 the Tribunal found that the appellant's account had been consistent throughout his claim. The evidence of Crystal Doka who had actually witnessed mistreatment which he received from his family, based on a mere suspicion about his sexuality, was compelling, and not effectively challenged by cross-examination. It was clear, the Tribunal

went on, that the appellant's family do not approve of his lifestyle, and it is therefore credible that his cousin would be reluctant (that is, his cousin Tom) to challenge that attitude publicly.

18. At paragraph 67 the Tribunal expressly considered the adverse credibility issues which the respondent claimed had arisen by virtue of Section 8 of the 2004 Act.
19. At paragraph 68 the Tribunal made this finding: "I am satisfied that the appellant has given a credible account of his lifestyle and his experiences in Albania and accordingly I find that I am satisfied that he is a gay man".
20. The Tribunal went on to say "The background evidence satisfies me that if he returns to Albania he will be at risk from members of his family, his uncle has stated that he will kill him for bringing shame on his family and I find this a credible threat, based upon evidence in the respondent's Country of Origin Information Report".
21. The Tribunal then considered, at paragraphs 70 to 72 the impact on its assessment of the decision of the Supreme Court in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department. We consider that the Tribunal's self-direction in accordance with that authority was perfectly correct and that section of the determination finishes with the Tribunal saying this:

"I am satisfied that the appellant would be treated as gay by potential persecutors in Albania because, as is accepted by the respondent, he has already been treated as such in that country. Past persecution is strong evidence of future risk and I am therefore satisfied that if he returns to Albania he will be treated as gay by potential persecutors there."

22. The Tribunal then referred to the country guidance decision IM (risk - objective evidence - homosexuals) Albania CG [2003] UKIAT 00067. It summarised the effect of that country guidance case and then said:

"This guidance was issued 11 years ago and needs to be considered against the background of more recent evidence summarised in the respondent's Country of Origin Information Report. That evidence shows that although anti-discrimination legislation has been introduced enforcement is still questionable. The respondent accepts, at paragraph 71 of the refusal letter, that there is clearly some societal discrimination against gay people in Albania. Significantly, although there is evidence that LGBT organisations have been established in Albania, the most that can be said for them is that they are able to operate without interference from police or other state actors. There is no evidence to show that they have made any impact on the willingness of the authorities to act positively to protect homosexuals. The suggestion by the respondent that it is possible for a person to live an openly gay lifestyle without being exposed to persecution in Albania is simply not supported by any evidence. It is not generally appropriate to deviate from country guidance, but I am satisfied that, in this case, it is appropriate to do so, and to find that this appellant faces a real risk of persecution based on his homosexuality because of the credibility of his

evidence of past persecution, supported by his witness, and the background evidence on Albania covering the 11 years since the country guidance was issued.”

23. The Tribunal went on to find that:

“It was satisfied on the evidence that if the appellant were returned to Albania he would be forced to conceal his sexuality in order to avoid persecution. This is because when he last lived in Albania his sexual orientation became public despite attempts to conceal it. He therefore knows that if he is again identified or suspected of being homosexual he will be exposed to risk of death or serious injury. That being the case, I am satisfied that he will not attempt to live an openly gay lifestyle in Albania.”

24. The Tribunal went on to find that it was therefore satisfied by the evidence that if he did return to Albania he would attempt to live discreetly and thereby suppress or conceal his sexual orientation and that his reason for doing this would not be his own choice or social pressures from family and friends but because he knew that he would be exposed to the risk of being killed, this knowledge being based on his previous experience shortly before he left the country. He should have the right to live openly and freely as a gay man without fear of persecution. That right does not exist in Albania.

25. The Tribunal then went on to consider internal relocation and expressed its view that it was satisfied that that was not an effective option for the appellant.

26. Turning to the two criticisms that are made of the determination in the grounds of appeal, both of which hinge on the approach of the Tribunal in paragraph 73 of the determination, we consider that the Tribunal did not misdirect itself in that paragraph. The first suggestion which is that the Tribunal reversed the burden of proof in paragraph 71 has to be read in the context of a determination as a whole, in which it directed itself correctly, at paragraph 6, about the burden of proof, and in which the passages to which we have referred show clearly that, at various stages, the Tribunal appreciated that it had to be satisfied of various aspects of the appellant’s case. The passage on which Mr Tufan relies as showing, as he suggests, a reversal of the burden of proof is the sentence that we have already read, which the Tribunal said that there is no evidence to show that they have made, that is the LGBT organisations, any impact on the willingness of the authorities to act positively to protect homosexuals.

27. We reject the argument that this shows that the Tribunal erred by reversing the burden of proof. The sentence has to be read in context. It simply reflects the Tribunal’s assessment of the up-to-date evidence.

28. The second submission, that the Tribunal erred in not following the country guidance case, we also reject. It seems to us from paragraph 73 which we have already read that it is clear that the Tribunal appreciated the importance of following the country guidance case. The Tribunal said

that generally it is not appropriate to deviate from country guidance, but in our judgment gave cogent and satisfactory reasons for departing from it on the facts of the particular case. Those reasons were set out in paragraph 73 of the determination.

29. For those reasons we reject the submission that the Tribunal erred in the way that it dealt with this claim and it follows that the appeal must be dismissed.

Signed

Date 12/12/14

Mrs Justice Elisabeth Laing DBE