Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00273/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 August 2015	**On 29 October 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

BM
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Jafar, Counsel instructed by Lee Valley Solicitors
For the Respondent: Mr R Hopkin, Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We make this order, which continues a similar order made by the First-tier Tribunal, because the appeal concerns a claim for asylum and we want to avoid the

possibility, however remote, of publicity creating a risk for the appellant in the event of his return.

2. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against a decision of the Secretary of State refusing him leave to remain.

3. The appellant says that he is gay, that gay people face a high degree of discrimination in Kosovo and that the level of discrimination is so high that it would be a major difficulty for him to reintegrate into Kosovan society. The First-tier Tribunal's decision is surprising in that it makes no reference whatsoever to these points that were clearly relied upon by the appellant in his witness statement, skeleton argument and background material. He says that he should be allowed to remain if for no other reason on Article 8 grounds or under paragraph 276ADE of HC 395.

4. We do not know how it came about that the First-tier Tribunal has so comprehensively missed these points. We are not entirely unsympathetic because concerns arising from the appellant's sexuality were raised at a late stage. They were certainly not before the Secretary of State when she made the decision. This explains why they were not considered in the refusal letter but they were raised by the appellant and should have been considered. They were not and it follows that the Decision is deficient.

5. We ask ourselves if this is something we should remedy by considering the background material and submissions or further submissions and we have concluded that we should not. If the applicant chooses to give evidence, and it is very hard to see how he can prove his case if he does not, the Secretary of State will want to cross-examine him about the reasons for not stating at an earlier occasion that the points on which he now relies were of such considerable importance to him. There might be an excellent explanation for that. It might be a revealingly deficient one. He may choose not to give evidence. We do not know. It is quite clear to us that there has to be a substantial rehearing and that the appellant has not yet had a fair hearing because his case has not been determined by the First-tier Tribunal. In accordance with the Practice Direction we find it right to order that the case is heard again in the First-tier Tribunal. Neither representative disagreed about this disposal or with any of the above.

6. There is an additional slight area of contention that has to be resolved.

7. At paragraph 19 of the Decision the First-tier Tribunal the judge said "I do not find that [the appellant] has told the truth about the earlier asylum claim and its disposal". Mr Hopkin argues that this adverse finding should remain as part of the overall assessment. Mr Jafar argued to the contrary, pointing out that the finding was challenged, to some extent at least, in the grounds of appeal to the Upper Tribunal.

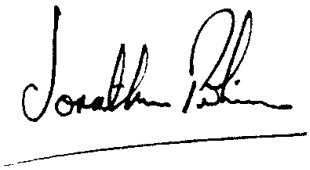
8. However, we are satisfied that this finding is not a finding that various documents were served or not served; rather it is a finding based on an

overall assessment of the evidence that the appellant did know that his former asylum appeal had been unsuccessful. That is as far as it goes. How relevant it will be to the overall disposal remains to be seen. It may not prove to be very important at all but we regard this as a finding that was permissible and stands on **Devaseelan** principles. It is for the First-tier Tribunal when deciding the appeal again to decide how much of that finding remains and how much it illuminates what comes next but it is a finding that stands to the extent that it is relevant which may prove not to be very much at all.

9. Subject to that caveat we set aside the decision of the First-tier Tribunal and order that the appeal be determined again in the First-tier Tribunal.

Notice of Decision

10. The appeal is allowed as indicated above. It has to be heard again.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 5 October 2015