



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/11266/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26<sup>th</sup> April 2018

Decision & Reasons Promulgated  
On 24<sup>th</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR HAMEZ ISTREFI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Miss J Lewis

For the Respondent: Mr P Duffy

**DECISION AND REASONS**

**Introduction**

1. The Appellant, born on 2<sup>nd</sup> April 1986, is a citizen of Albania. The Appellant was represented by Miss Lewis. The Respondent was represented by Mr Duffy, a Presenting Officer.

### **Substantive Issues under Appeal**

2. On 27<sup>th</sup> March 2016 the Appellant had made an asylum claim and that claim had been refused by the Respondent on 21<sup>st</sup> September 2017. The Appellant had appealed that decision and his appeal was heard by First-tier Tribunal Judge Hembrough sitting at Harmondsworth on 4<sup>th</sup> December 2017. The judge had dismissed the Appellant's appeal on all grounds.
3. Application for permission to appeal was made and permission was granted by First-tier Tribunal Judge Baker on 29<sup>th</sup> January 2018. It was said that it was arguable that the judge had erred in relying upon **MK** and arguably not making findings on specific country information.
4. The Respondent opposed the granting of the application by letter dated 8<sup>th</sup> March 2018. Directions were set for the Upper Tribunal to firstly decide whether an error of law had been made and the matter comes before me in accordance with those directions.

### **Submissions on behalf of the Appellant**

5. Miss Lewis said the judge erred in law in relying on **IK** and **MK** as country guidance cases. It was said that reliance upon **IK** as a starting point was a material error of law and that the judge had not looked properly at background material provided in the case. It was submitted it was clear the starting point for the judge was the two country guidance cases which were no longer current and that it was clear he had used those cases as his starting point when reaching conclusions on the risk to the Appellant on return. Further, it was said that there was other material that he had not referred to within the background material and he should have referred to those matters and they were within the skeleton argument.

### **Submissions on behalf of the Respondent**

6. It was accepted the judge should not have relied upon **MK** as a country guidance case but the issue is one of whether that made any material error of law in terms of the decision. It was said that he had looked at the evidence available as to circumstances within Albania and had concluded that there was discriminatory behaviour but it did not cross over to persecutory behaviour and that was a correct decision and was in accordance with the policy summary of 2017.
7. At the conclusion of the hearing I reserved my decision to consider the submissions raised and the evidence.

### **Decision and Reasons**

8. The Appellant had claimed a fear of persecution if returned to Albania as a member of a particular social group, namely a gay man. The judge had set out the evidence and submissions raised at the hearing. He had noted the skeleton argument which he had annexed to the Record of Proceedings (paragraph 51). He had further noted

at paragraph 31 the documents submitted in the case and at paragraph 52 stated that before arriving at his decision he had considered that documentation and oral evidence. There is nothing to suggest that the judge had not done that which he stated at paragraph 52.

9. In his assessment of credibility the judge had noted that the Appellant had made an entirely false asylum claim in 2002 that had in fact led to him being granted asylum as an unaccompanied minor until his removal in 2007 (53). Notwithstanding that not insignificant adverse feature of credibility, the judge had at paragraphs 54 to 64 fairly and clearly assessed the Appellant's claim and found that for reasons given, whilst he did not find a real risk of persecution from the Appellant's own family, he accepted the Appellant was gay and had then considered the risk of societal persecution.
10. He had begun at paragraph 65 by noting that he took account of the definition of acts of persecution in Article 9 of the Qualification Directive (which was quoted at paragraph 21 of **LC (Albania) [2017] EWCA Civ 351**). At paragraph 66 he had referred to **IM Albania CG [2003] UKIAT 00067** and quoted the conclusion reached by the Tribunal in that case. **IM** is no longer a country guidance case and not to be relied upon. However, it is clear the judge was perfectly aware of that fact, stating at paragraph 67 "Whilst **IM** is no longer regarded as a country guidance case it is arguable that it represents persuasive authority as to the situation prevailing in Albania at that time". The judge was criticised by Miss Lewis for this comment suggesting the judge had essentially pre-judged the situation in the country now by reliance upon **IM**. That is not the case. Firstly, it is clear the judge knew **IM** was no longer country guidance and did not rely upon it. His comment that it arguably represented persuasive authority as to the situation prevailing in Albania at that time is no more than a logical point arising out of the concept of country guidance cases. Those cases are generally written following the consideration of evidence available at the time of writing often following the hearing of evidence from experts and witnesses. They are designed to encapsulate the available evidence at the time and to assist Tribunal Judges and others in reaching fair and proper conclusions. Indeed, a failure to follow a current country guidance case without good reason has been said to be an error of law. It is perfectly logical therefore for the judge to have made the point that **IM** arguably was persuasive authority for circumstances in 2003. The judge could have omitted all reference to **IM** and indeed paragraphs 66 to 67 could have been deleted without any loss to the decision as a whole as being unnecessary fact. However, the fact that he included it as an historical point in the development of country evidence does not disclose an error of law.
11. At paragraph 68 the judge referred to **MK Albania CG [2009] UKAIT 00036**, and again quoted the conclusion reached by the Tribunal in that case. On this occasion the judge did not acknowledge that **MK** was no longer a country guidance case. At paragraph 70 he noted "In **MK** it was held that homosexuals were not generally at risk of persecution or serious harm in Albania". If he had said no more and simply relied upon that finding in **MK** in 2009, it is entirely possible if not probable that would have been an error of law. However, it is clear that in that same paragraph he

had immediately looked beyond **MK** and the position in 2009 by the examination of country material available to him and referred to earlier. In continuance of paragraph 70 he said this "I find it to be clear that since **MK** was decided in 2009 ...". Thereafter at paragraphs 69 to 77 he referred to country material. He adopted a fair approach to the analysis of that country material including an acknowledgment of submissions made that he agreed with the point that societal attitudes remain deeply conservative (paragraph 71). He noted wisely at paragraph 73 the fact there is an inevitable time lag between the legislative process and any change in societal attitudes. He appreciated by inference that that situation probably existed in many countries and noted that incidents of discrimination occurred in the UK. However, he found that the level of discrimination did not reach the level of persecution as defined in Article 9 of the Qualification Directive already referred to him at paragraph 65.

12. The judge had examined this case with care and in a fair and open-minded manner. The decision indicates he had focused his mind upon the country material available to analyse the position at the date of hearing, rather than the historical position of either what was disclosed by **IM** in 2003 and what was disclosed by **MK** in 2009. It was an oversight not to acknowledge **MK** was no longer to be regarded as a country guidance case and indeed an error if he believed it still remained on the books as a country guidance case. However, neither position was a material error of law because he had done what was required and that was to examine the current material and position and assess whether that would lead to a real risk of persecution for the Appellant on return, to the required standard. He conducted that exercise. It would be unwieldy and foolish to expect a judge to refer to each and every piece of material placed before him. It is easy perhaps in an application to cherry-pick what might be considered favourable pieces of evidence and to suggest that the judge erred in not considering those specific matters. The judge had indicated he had looked at the documentary evidence provided. He had made specific reference to the skeleton argument and indeed had annexed it to the Record of Proceedings. It is clear from his approach generally that he had given careful consideration to the current situation in Albania and had reached a decision fairly and properly based on his analysis and that did not disclose any material error of law or any unreasonable approach to the manner in which he dealt with the case.

### Notice of Decision

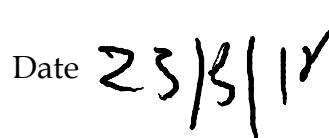
13. There was no material error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

Signed



Deputy Upper Tribunal Judge Lever

Date



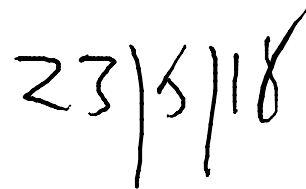
**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

A handwritten signature in black ink, appearing to read "J. Lever". The signature is stylized with a long horizontal stroke at the beginning and a vertical line at the end.

Date

A handwritten date in black ink, "23/5/18". The numbers are written in a simple, slightly slanted style.

Deputy Upper Tribunal Judge Lever