



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

Appeal Number: PA/00185/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27 February 2020**

**Decision & Reasons Promulgated  
On 17 March 2020**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**AA  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr T Lay, Counsel instructed by J D Spicer Zeb Solicitors  
For the Respondent: Mr T Melvin, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Anonymity**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of A A who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.*

***Any failure to comply with this order could give rise to contempt of court proceedings.***

1. The appellant appeals with permission against the decision of First-tier Judge Siddall, who dismissed his appeal against the Secretary of State's refusal to grant him international protection based on his sexual orientation. He is a national of Albania, he is a child, and he is gay. He will reach his majority in June 2020.
2. This appeal was the subject of an earlier decision by First-tier Judge Sweet on 6 February 2019 which was set aside in June 2019 and remitted for rehearing in the First-tier Tribunal. The present appeal is against the remaking of that decision by Judge Siddall in December 2019.
3. It is accepted that during his journey to the United Kingdom, the appellant was under the supervision and control of his mother and then of the agent, such that he was not in a position to make an independent claim for asylum before reaching the United Kingdom. Following his arrival in the United Kingdom, the appellant made an asylum after four days. The appellant has not been returned under the Dublin III Convention to Italy, France or Belgium, through which he passed on his journey here, because he is a child.
4. The undisputed facts are that the appellant recognised early that he was attracted to boys. He lived just outside Tirana with his father, mother and two brothers but when he was still in primary school his father left the family home and his mother brought him up with his two brothers ,with the help of his maternal uncle who appears to have taken on a paternal role in the appellant's family.
5. In primary school the appellant had a good male friend to whom he was very close and at around the age of 14/15 he began to develop feelings towards this friend and told him about the feelings. The friend replied that he felt the same. They spent all of their time together but the relationship never became physical. The appellant says he would not have used the term gay to describe that relationship although he was aware of what it meant.
6. The two boys became noticed at school and name calling began. The other children at his school would "tell us that we were sick and had no right to live there any more" (paragraph 19). The First-tier Tribunal decision continues thus:-
  - "20. The appellant's mother heard about what was happening and sat down to talk with him. He told her that he loved [his friend] and that he was gay. His mother was very upset. She said to him that he would get out of this phase and become 'normal'. He would marry and have children. She called his maternal uncles for assistance. One of them beat the appellant and headbutted him. The appellant says 'I was told that I would be killed if I did not forget about dating boys and I had not [sic] right to give my family a bad name'. He was told he should not leave the house.

21. After a few days the appellant spoke to his mother and explained that he could not change. She told her brother that she would take the appellant to Italy for a while to stay with relatives. They left Albania on 31 May 2018 and flew to Italy where they stayed for four days. His mother left him there and an agent took him first to France, then Belgium and the UK.”
7. Once in the United Kingdom, the appellant was placed with a foster family where he settled well and continued his studies at college. He told his foster parents about his sexual orientation, explaining what had happened when he disclosed that he was gay to his family in Albania. The appellant told his foster family that he was still coming to terms with the separation and rejection from his family in Albania.
8. The appellant said that if he returned to Albania he would not seek to contact his mother because the family had wanted him to leave. He had not asked to trace his family since coming to the United Kingdom.
9. The appellant was very careful whom he told of his sexual orientation outside his foster family: he did not tell his friends in the United Kingdom. As most of them were Albanians he suspected that they would react in the same way as his family had done.
10. The appellant is still very young. In his oral evidence he said that he had reached out to the gay community in the United Kingdom and did not have any gay friends here. He had not begun any relationship with other gay men in the United Kingdom nor did he spend time in the gay community here: he was still struggling to come to terms with his orientation.
11. The First-tier Judge accepted that the appellant had shown that his sexual orientation was gay and he purported to apply the guidance of the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31. The Judge accepted that the appellant had been assaulted by his uncle on hearing the news of his sexual orientation, and at [42], accepted that there was a real risk of violence to the appellant if he were to return to his family home and live as an openly gay man.
12. The judge found as a fact that the appellant would not live as an openly gay man if returned to Albania because he is not living as an openly gay man in the United Kingdom. The judge also accepts that this was “largely due to the harsh response from his family”. At [44] the judge said this:-

“I accept that the appellant is at an age where he is still reflecting on and coming to terms with his sexual orientation, *especially in view of his previous experiences*. It seems to be something the he is still struggling with and feels unable to disclose to friends. However if he has not shared his sexuality with anyone outside his foster family in the UK, it seems very unlikely that he would choose to live openly as a gay man in Albania. In this case I am not able to find that if he returned to Albania the appellant would live discreetly *only in order to avoid ill-treatment by the community*. The fact the he feels societal pressure from the Albanian community here and has not made even

tentative steps to connect with the gay community in the UK, which appears to be due to a strong element of personal conflict, lead me to the conclusion. Therefore I find that the tests set out in *HJ (Iran)* are not met in this case.”

[*Emphasis added*]

13. The First-tier Tribunal Judge had the benefit of expert evidence on the situation of gay men in Albania, in an expert report by Mr Vebi Kosumi, described as an independent expert on the Western Balkans with a focus on Albania, Kosovo, Macedonia and Montenegro, which deals with the history and treatment of the LGBT community in Albania. At paragraph 29 of the report the Judge noted Mr Kosumi’s evidence that:-

“There is unlikely to be a place to return (*Kamez*) for a single 17-year old boy without family support, and his family would not want to accept him back as it would be a financial burden and bring shame to the family. His family would not accept [him] as they would be humiliated that he is gay. Besides [his] family would consider that “they lost their honour as [he] is gay”.”

14. Mr Kosumi’s opinion was that state protection would not be available to the appellant in Albania and he would be unable to relocate outside the Tirana area as he would be subject to abuse and his family could find him. The youth unemployment rate in Albania was just under 25%: the appellant would find it difficult to obtain employment without any family or partner support and might end up being exploited in Albania or trafficked by gangs.

15. The First-tier Tribunal Judge had regard to the country guidance in *BF (Tirana - gay men) Albania CG* [2019] UKUT 93 (IAC) on the risk of violence to gay men and the lack of sufficiency of protection for openly gay men outside Tirana (see paragraph (i) of the country guidance). I bear in mind that the Tribunal in *BF (Albania)* was considering the situation of adult men and that the situation of a minor is inevitably more precarious. Where the judge fell into error was in the application of *HJ (Iran)*, set out at [82] in the judgment of Lord Rodger, with whom Lord Hope, Lord Walker, Lord Collins and Sir John Dyson SCJ agreed, as to how the appellant’s choice to live discreetly should be approached:

“82. ...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. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.”

[*Emphasis added*]

16. It will be seen from that the *HJ (Iran)* test is not whether the appellant would live discreetly *only* in order to avoid ill-treatment, as asserted by the First-tier Tribunal Judge at [44] of his decision, but rather whether a *material* reason (but not necessarily the only reason) for the appellant living discreetly on his return would be a fear of persecution which would follow if he were to live openly as a gay man. The effect of the guidance in *HJ (Iran)* is that where “living discreetly” is at least *partly* the result of a fear of persecution, an appellant must be treated as though he would live openly.
17. In this appeal, that is precisely the situation: the appellant lives discreetly, even in the Albanian community in the United Kingdom, because he fears a repetition of the ill treatment he received at his family’s hands when he came out to them in his home area of Tirana. It is accepted by the First-tier Tribunal Judge that the appellant cannot live in the Tirana area because his family lives there and is hostile to his sexuality. If he lives outside Tirana, the decision in *BF (Albania)* indicates that even for adults there is a risk of violence as a result of sexuality for those who live openly as gay men and a lack of sufficiency of protection.
18. The First-tier Tribunal Judge’s finding at [43] that the appellant’s failure to continue to explore his sexuality in the United Kingdom was “largely due to the harsh response from his family” which included a beating which meets the paragraph 339K test of past persecution, is a finding that a material reason for this appellant living discreetly on return would be a fear of persecution. That taken with his vulnerability as a minor is more than sufficient to meet the *HJ (Iran)* standard.
19. Accordingly, this appeal succeeds. I set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeal.

## **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it.

Signed **Judith AJC Gleeson**  
2020  
Upper Tribunal Judge Gleeson

Date: 6 March