



IAC-FH-NL-V1

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

Appeal Number: AA/02967/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 May 2015**

**Decision & Reasons Promulgated
On 14 September 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**KL
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan, Counsel instructed by Duncan Lewis & Co
Solicitors

For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the final determination in the above appeal following hearings before me on 2 June 2014, 26 November 2014 and 7 May 2015.
2. To summarise, the hearing on 2 June 2014 was when the appeal was subject to the fast track procedure. I set aside the decision of the First-tier Tribunal for the decision to be re-made in the Upper Tribunal. Following the hearing on 26 November 2014 I concluded that the appellant had given a credible account of being gay. I made findings in terms of how the

appellant was likely to behave on his return to Albania. I gave directions for final disposal of the appeal in the light of those findings. Following the hearings on 2 June 2014 and 26 November 2014 I gave written decisions which are annexed to this determination. They are referred to in the annexes as Decision 1 and Decision 2, respectively (now anonymised). Reference should be made to those decisions for the full background to the appeal.

3. Following the hearing on 7 May 2015 I received further submissions from the parties as to the final disposal of the appeal in the light of my credibility findings. In the respondent's submissions there was a request for further time to provide yet further evidence. However, in the light of the respondent's manifest failure to have complied with previous directions this request was refused.
4. As can be seen from Decision 1, the appellant is a citizen of Albania, born on 25 September 1994. His claim for asylum on the grounds of his sexuality was refused by the respondent and dismissed in an appeal before the First-tier Tribunal.
5. The narrow question for resolution is whether, in the light of my positive credibility findings, the appellant would be at risk of persecution on account of the fact of his being gay, on return to Albania. At this point it is necessary to repeat what I said in Decision 2, as follows:

“47. In the light of all the evidence, I am satisfied that the appellant has established that he is gay. I am similarly satisfied that he has given a credible account of having been involved in two relationships in Albania, as described by him. I accept his account of the circumstances in which he left Albania, namely that in his village he was afraid of being discovered as a gay person for fear of breaking the Kanun, as explained in his witness statement. I accept that he was put under pressure, or at least felt under pressure, to marry which eventually led to his disclosure to his grandfather that he was gay. He has given a credible account of his grandfather not initially having understood what the appellant had explained to him but that when he did understand, the appellant was slapped and expelled from the house.

48. The appellant has given an account of having been told by his grandfather that he would shoot him and that the appellant believed him. I also accept that his grandfather said that he would not be able to face their cousins in the village or other people there if it was found out that the appellant was gay. I similarly accept that the appellant sought protection from the local police but that they, in effect, refused to help him.

49. In terms of how the appellant is reasonably likely to behave were he to be returned to Albania, in the light of my positive credibility assessment I accept that he would wish to live as an openly gay person. That conclusion follows from his behaviour in Albania, the circumstances in which he left and his account of his feelings in the UK of a gradual confidence in being open about his sexuality. I accept that

he has a fear of returning to his home area and where he would not be able to be open about his sexuality.

50. Whether or not in an area of internal relocation the appellant would be at risk of persecution, I do accept that he has a subjective fear of such persecution. In his witness statements he makes it clear that he has a fear of being openly gay because of the risk of harm. In the light of my generally positive assessment of his credibility, and the consistency overall of his account, there is no reason not to accept those assertions. I also bear in mind that when asked about this in his interview (question 121) he stated that he could not go back to Albania because of fear and that he would wish to express his sexuality openly but would feel he had to be discreet (question 122)."

6. Further, at [53] I said as follows:

- "53. I do accept that on his return the appellant would feel the need to modify his behaviour out of a fear of persecution, regardless of whether such a fear is objectively well-founded in an area of relocation, and about which there may need yet to be a finding, subject to further submissions. I accept that a material reason for his deciding to live discreetly on his return would be a fear of persecution. It is reasonably likely that social pressures in terms of the way he may be viewed by society in general, even away from his home area, would have a part to play in his behaviour. However, as I have indicated, a material reason for his living discreetly on his return would be a fear of persecution.

54. I am not satisfied that the evidence establishes that the appellant would be at risk from immediate or extended family members from his home area wherever he went in Albania. There is little if anything in the evidence to indicate that such a risk extends to the whole of Albania, and for example that he would not be able to live in Tirana and be free from any risk from them there."

7. As I said at [52] of my decision, the decision of the Supreme Court in *Hj (Iran) & HT (Cameroon)* [2010] UKSC 31 is highly relevant. I again quote from paragraph 82 of that decision as follows:

- "82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

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.”

8. The respondent’s written submissions dated May 2015 rely on the Home Office Country Information and Guidance on Sexual Orientation and Gender Identity in Albania, dated 13 October 2014 (“CIG” report). Paragraph 6 of the respondent’s written submissions evidently refers to [54] of Decision 2, although mistakenly suggests that I had found that the appellant could live in Tirana and be free from any risk from his family. That is not in fact what I said at [54] which is subtly different, although maybe not materially different from the way the respondent has characterised my conclusion.
9. In any event, in summary, it is contended on behalf of the respondent that the appellant would be able to live in Tirana where he would be free from persecution, either from his family or from others.
10. There is reference in those written submissions to a document entitled “Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity” written by one Krenar Loloci, described as an independent researcher. On the first page of the document is the Council of Europe logo with the words “Council of Europe In co-operation with British Embassy, Tirana”. The report is dated 23 May 2014 and contains a disclaimer to the following effect:

“This report was drafted by an independent expert and is published for information purposes only. Any views or opinions expressed in the report are those of the author and do not represent or engage the Council of Europe or the Officer of the Commissioner for Human Rights.”

11. No particular paragraphs are referred to and its effect is not summarised in the respondent's written submissions. At [8] of those submissions however, the following is stated:

"The view of the British Embassy, while Albanian families and communities tend to be at the conservative end of the European spectrum and there is room for more enlightened attitudes, there is little credible evidence that discrimination against or hostility to the LGBT community in Albania is such as to justify an asylum claim in the UK. The background contained in the COE is adequate to reassure asylum assessors and the immigration courts of this."

12. However, as is pointed out in the written submissions on behalf of the appellant, it is not clear where in the report that information is to be found. Furthermore, there is it seems to me merit in the appellant's contention to the effect that there is a failure on the part of the respondent to particularise what aspect of that report supports the respondent's case.

13. I have not derived much assistance from that report. I do note however, what is said in the executive summary at [1] to the effect that same sex relations are no longer illegal in Albania. I also note the summary on page 24 which states that:

"Significant milestones have been attained in the legal protection of the LGBT community in the period 2010 to 2014. Albania has been a parliamentary democracy since 1991 and, with the repealing of Article 137 of the old Criminal Code, same sex relations have been legal since 1995. Since decriminalisation the previous administration was successful in introducing antidiscrimination legislation protecting LGBT individuals as well as making hate crime a criminal offence."

14. The CIG report contains the following relevant paragraphs:

Is the person at real risk from the Albanian authorities or non state actors due to their sexual orientation?

1.3.4 Same sex relations have been legal since 1995 and anti-discrimination laws in Albania expressly protect LGBT persons and make hate crimes a criminal offence. The current Albanian Prime Minister has publicly met with LGBT activists at which he voiced his support for the community.

1.3.5 The State has attained significant milestones in the legal protection of the LGBT community since 2010. Freedom of assembly - in particular regular public LGBT gatherings - and several well funded LGBT NGOs attest to the progress Albanian society is making and these developments enjoy support from relevant ministries and the office of the ombudsman.

1.3.6 Despite the law and the government's formal support for LGBT rights, Albania remains a conservative society in which homophobic attitudes persist - particularly in northern areas of the country. [There] have been incidents of LGBT people in Albania being subject to intolerance, discrimination, physical and psychological violence, job loss, evictions, threats and possible rejection from their families. In addition, transgender people have experienced a denial of healthcare. However in general the

level of discrimination is not such that it will reach the level of being persecutory or otherwise inhuman or degrading treatment.

1.3.7 This was confirmed in the country guidance case of IM (Risk – Objective Evidence – Homosexuals) Albania CG [2003] UKIAT 00067 (8 September 2003) where the Tribunal concluded that “.. there is no country background evidence which supports a reasonable likelihood that homosexuals as such in Albania are subject to any action on the part either of the populace or the authorities which would amount to persecution for the purposes of the Refugee Convention or would be in breach of their protected human rights.”(para 7).

1.3.8 In the more recent country guidance case of MK (Lesbians) Albania CG [2009] UKAIT 00036 (September 2009), the Tribunal concluded that “In our view the evidence supports the proposition that homosexuals known to be members of gay associations and those who visit cruising areas in the centre of Tirana are likely to be harassed and on occasions ill-treated by the police but we are not satisfied that merely being effeminate or butch, being unmarried or living with a person of the same sex who was not a member of the family, would in itself attract the risk of serious harm from the police for reasons of sexual orientation.” (para 339).

Is there effective protection for the LGBT community?

1.3.10 The state police have reportedly coordinated with LGBT organisations and provided effective security/protection for LGBT-related events. However, public officials continue to make derogatory homophobic statements, police violence against the LGBT community is reported and there are cases where the police fail to take protective measures when requested to do so by LGBT complainants, in some instances detaining them instead. There are avenues of redress in such circumstances - for example the police ombudsman who process complaints against police officers mainly on arrest and detention problems.

1.3.11 The Commissioner for Protection from Discrimination (CPD) has also reported having registered complaints from LGBT persons and organizations and has issued sanctions.

1.3.12 Since the country guidance cases of IM and MK, Albania has taken further measures to tackle discrimination against LGBT persons. For example in May 2013, the assembly passed an amendment that added sexual orientation and gender identity to the list of classes protected by the country’s hate crime law. Even though this law is a relatively new one, it has started to be enforced by the Government and the Albanian Commissioner against Discrimination.

1.3.13 Albania’s current government, which came to office in September 2013, has further stepped up efforts to tackle discrimination against LGBT persons with it having reportedly prepared draft laws, such as amendments to the Labour Code and Family Code (to obtain legal recognition of same-sex relationships), which are expected to be introduced in the near future to the Parliament, whereby the rights of the LGBT community are further protected.

1.3.14 There are also non governmental organisations in Albania who advocate for LGBT rights and the LGBT community and can potentially assist the person to avail themselves of the protection of the state.

Are those at risk able to internally relocate within Albania to escape that risk?

1.3.15 It may be possible for an open same-sex oriented person (or someone perceived to be such), who is able to demonstrate a real risk in their home area because of their particular circumstances, to relocate internally to a major city, for example Tirana where Albanian LGBT support organisations are mainly based, but only if the risk is not present there and if it would not be unduly harsh to expect them to do so. Decision makers must however take into account that the Supreme Court in the case of HJ (Iran) made the point that a person cannot be expected to modify their behaviour and that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution.

1.3.16 The onus will be on the person to demonstrate why they would be unable to internally relocate to a part of the country where they would not face difficulties even without concealing their sexual orientation in the proposed new location.

15. On behalf of the respondent there is reference in the written submissions to evidence of a shelter being set up specifically for LGBT persons, in December 2014, although the article from the Home Office in relation to the shelter was not available at the time of the sending of the written submissions.
16. It is contended on behalf of the appellant that the conclusion that he would feel the need to modify his behaviour out of a fear of persecution, even in an area of relocation, is sufficient to mean that the appeal should be allowed.
17. With reference to the proposed LGBT shelter, it is argued that the very fact that such a shelter is necessary reveals that Tirana is not a “safe haven” for the gay community. At [13] of the appellant’s written submissions it is noted, with reference to various news articles appended to the written submissions, that it is the only shelter in Albania and has a maximum of eight places, 4 for self-identified men and 4 for self-identified women, with a maximum of six months’ stay. It is argued that there is no evidence to show that the shelter is an effective resource to address the needs of gay men who will modify their conduct due to a fear of persecution.
18. The most recent country guidance pertinent to the issues is *MK (Lesbians) Albania CG* [2009] UKAIT 00036. Notwithstanding the title of that decision, it is not silent on the situation for gay men in Albania. Thus, at [339] the Tribunal stated that:

“In our view the evidence supports the proposition that homosexuals known to be members of gay associations and those who visit cruising areas in the centre of Tirana are likely to be harassed and on occasions ill-treated by the police but we are not satisfied that merely being effeminate or butch, being unmarried or living with a person of the same sex who was not a member of the family, would in itself attract the risk of serious harm from the police for reasons of sexual orientation.”

19. At 22.12 of the Country of Origin Information report for Albania, dated 30 March 2012 (“COI report”) it states that:

“According to human rights observers, LGBT people in Albania are subject to “intolerance, physical and psychological violence” (Balkan Insight 24 June 2010; Human Rights Brief 3 Mar. 2010; Council of Europe 18 June 2008, No. 96). ... Balkan Insight similarly states that those who are open about their sexual orientation have faced job loss, threats and possible rejection from their families (5 Dec. 2007).”
20. The decision in *MK* and what is said in the COI report is reflected in the CIG report quoted above. It is evident, for example from the CIG report, that progress is being made in Albania in terms of protecting the rights of the LGBT community. It appears that efforts are being made to tackle discrimination and that there are non-governmental organisations in Albania who advocate for LGBT rights.
21. The evidence does not reveal that there is no persecution of gay men in Albania. As I have already indicated, in the appellant’s case he fled Albania in fear of persecution. The most recent country guidance in *MK* and the background evidence does not rule out a real risk of persecution in some cases.
22. However, I do not agree with the broad proposition that appears to be advanced on behalf of the appellant to the effect that *HJ (Iran)* mandates a grant of refugee status in any case where a person would modify their behaviour out of a fear of persecution. The fear of persecution must still be well-founded, that is to say there must be an objective basis for it. A fear of persecution which has no objective basis to support it, cannot justify a grant of refugee status.
23. On the other hand, it could not be said that there is no objective basis for the appellant's fear of persecution from society in general in an area of relocation such as Tirana, as the background evidence and the CIG report reveals. It is unlikely that the appellant would be willing to avail himself of the protection of the police in the light of his fear of persecution and wish to live openly as a gay man, and it could not be said on the evidence before me, that such unwillingness is irrational or unreasonable (see for example, 2.2.3-2.2.8 of the CIG report).
24. That is aside from the question of whether it would be reasonable to expect the appellant to relocate within Albania given the evidence of discrimination against gay people, for example in terms of employment.
25. In all these circumstances, I am satisfied that the appellant has established to the required standard that he has a well-founded fear of persecution for a Convention reason, namely membership of a particular social group. I am not satisfied that he has available to him the option of internal relocation to a place where he would not have such a well founded fear and to which it would be reasonable to expect him to go. Accordingly,

the appeal on asylum grounds is allowed. It follows that the appeal is also allowed with reference to Article 3 of the ECHR.

26. Although I have allowed this appeal, my decision does not establish any point of principle, or provide any specific or general guidance relating to the situation of gay men in Albania, my decision being based on the particular facts of this appeal and the background evidence put before me.

Decision

27. The decision of the First-tier Tribunal involved the making of an error on a point of law. The First-tier Tribunal's decision having been set aside, the decision is re-made, allowing the appeal on asylum grounds and with reference to Article 3 of the ECHR.

Anonymity

I make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) rules 2008. Consequently, this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek

9/09/15

ANNEX-DECISION 1



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

Appeal Number: AA/02967/2014

THE IMMIGRATION ACTS

**Heard at Harmondsworth
On 2 June 2014**

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

KL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Chelvan, Counsel instructed by Duncan Lewis & Co,
Solicitors

For the Respondent: Mr L. Collingridge, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Albania, born on 25 September 1994. He arrived illegally in the UK on 15 October 2013 and claimed asylum on 2 April 2014. His asylum claim having been rejected, a decision was made on 2 May 2014 to remove him to Albania. His appeal against that decision was dismissed by First-tier Tribunal Judge N.M.K. Lawrence after a hearing subject to the fast-track procedure on 16 May 2014.

2. The basis of the appellant's claim, in summary, is that he fears return to Albania on account of his homosexuality. He had lived with his grandparents from the age of 8. He had had two homosexual relationships in Albania. Faced with pressure from his grandparents to marry, the appellant told his grandfather of his sexuality. As a result he was beaten and the appellant left home. He went to stay with a friend who was one of the people he had had a relationship with. His friend was able to help him make arrangements to leave the country. He fears harm from his grandfather, from his cousins and society in general if he returns to Albania. He would not be able to live openly as a gay person.
3. Judge Lawrence concluded that the appellant had not established that he is gay. He also found that even if the appellant was gay and does have a fear of persecution in his local area, he could live elsewhere and be able to practise his sexuality freely. He found that there was a sufficiency of protection for gay people in Albania.
4. The grounds of appeal in relation to the decision of Judge Lawrence argue that in coming to his conclusion about the appellant's sexuality, Judge Lawrence made assumptions about how a gay person would behave. He had referred to the fact that the appellant had not sought any homosexual encounters in the UK when he had the freedom to do so. In addition, it is argued in the grounds that Judge Lawrence had failed to take into account written and oral evidence from witnesses said to support the appellant's claim to be gay. Lastly, he had not given appropriate consideration to the background evidence in relation to the situation for gay people in Albania and had failed properly to apply the decision in HJ (Iran) [2010] UKSC 31.
5. At the hearing before me, Mr Chelvan sought to rely on amended grounds and material that was not brought to the attention of the First-tier Tribunal. However, I indicated that I would first proceed to hear submissions on the original grounds and, if necessary, go on to consider whether permission should be granted for the amended grounds to be relied on. I invited Mr Collingridge to address me first in relation to the appellant's original grounds.
6. Mr Collingridge sought to explain the judge's findings in relation to the appellant's behaviour in the UK in terms of not having sought contact with other homosexual men, putting that into the context of the appellant having come to the UK so that he could be free to practise his sexuality. It was submitted that in the circumstances the judge was entitled to find that it damaged the appellant's credibility that he had not sought contact with other gay men. Judge Lawrence had accepted that the appellant did not need to establish that he had relationships with other gay men on a frequent basis.
7. Although it may have been an error of law for the judge apparently not to have taken into account the evidence of the witnesses relied on in support of the appellant's claim, that is not an error of law that is material

to the outcome of the appeal. The judge had considered the background material and considered the case of HJ (Iran). At [19] he had noted that homosexuality was not illegal in Albania. He had acknowledged that there was homophobia in Albania, just as there is in the UK, but concluded that there was a sufficiency of state protection. He had taken into account evidence of support services in Albania.

8. Judge Lawrence had also been entitled to conclude that even if the appellant is gay, he would be able to live in another part of Albania where he would be free to practise his sexuality and where there would be a sufficiency of protection.
9. I did not consider it necessary to hear submissions from Mr Chelvan and I announced that I was satisfied that there was an error of law in the decision of the First-tier Tribunal requiring the decision to be set aside.

My assessment

10. At [14] Judge Lawrence referred to the appellant not having sought any homosexual relationships in the UK when he has had the opportunity to do so. He concluded that this meant that the appellant had not established that he is gay. This finding was in the context of the appellant's claim that he had had two homosexual relationships in Albania and that in the UK there is freedom to express one's sexuality.
11. I do not accept the interpretation of that paragraph which appears to be advanced in the grounds to the effect that Judge Lawrence was stating that if the appellant was gay he would have had frequent homosexual encounters or relationships in the UK "every other day with many men". He expressly stated that he did not consider that such behaviour needed to be shown. However, it is clear that in that single paragraph was the judge's assessment of the appellant's claim to be gay, and the rejection of that claim solely on the basis of the appellant not having engaged in, or sought to engage in, any homosexual relationships in the UK, or not having visited any place where he might meet other homosexuals.
12. I do consider that those reasons, or more accurately that reason, for rejecting the appellant's claim to be gay is legally unsustainable. In the first place, it does make an assumption about how a gay person would behave, even taking into account the appellant's reasons for coming to the UK. It is an assessment which fails to have regard to what Judge Lawrence referred to in [13] as the appellant being "diffident, soft spoken and not verbose" and that it is possible that he is "not given to talk much", which may all be manifestations of his character which could inform an assessment of how he might behave.
13. In addition, and significantly, that finding fails to take into account what the appellant said at questions 116 and 117 of the asylum interview. At question 116 he was asked whether he had been able to express his sexuality at all in the UK, to which the appellant answered that he had not

been out too much because he feared the police might detain him. Asked in the next question whether he had been to gay bars, clubs or help groups he repeated that he had not been out much.

14. Thus, I am satisfied that there is an error of law in the judge's assessment of the appellant's sexuality for the reasons stated above.
15. Before the First-tier Tribunal there were witness statements from a Ms CL and Mrs TL, and an e-mail in the form of a letter from a Mr BL. The L family took the appellant in when BL found him walking around making enquiries in order to find work on building sites. BL, according to him and his mother Mrs TL, is himself gay. Mrs L and CL gave evidence before the First-tier Tribunal and BL's written evidence was relied on.
16. The First-tier Tribunal's determination does not record what evidence was given by Mrs L and CL, except to state that they adopted their witness statements and were cross-examined. To a greater or lesser extent the evidence of those witnesses supports the appellant's claim to be gay. However, there is no assessment of that evidence in Judge Lawrence's determination. Whilst arguments could be advanced in relation to the weight to be attached to their evidence, it could not be said that the evidence could be dismissed out of hand as patently having no probative value. It is evidence that should have been evaluated when Judge Lawrence made his assessment of whether or not the appellant had established that he is gay. The failure to take that evidence into account is an error of law. That there was an error of law in this respect was accepted by Mr Collingridge.
17. I bear in mind the judge's alternative findings in terms of sufficiency of protection and internal relocation. It was submitted on behalf of the respondent that any error of law in the assessment of whether the appellant is gay is not an error of law that is material.
18. However, it is apparent that Judge Lawrence did not consider the country guidance decision in MK (Lesbians) [2009] UKAIT 36 which is referred to in the reasons for refusal letter. Notwithstanding the title of the decision, there is some assessment of the position of gay men in Albania and guidance on the issue in that decision. Whilst there is reference to country background material in the determination, the failure to consider relevant country guidance is also an error of law. I do not consider that the background evidence put before the First-tier Tribunal necessarily establishes that there is a sufficiency of protection in Albania for gay men.
19. In addition, so far as sufficiency of protection is concerned, in this case an assessment of the extent to which the appellant could be protected by the authorities in Albania must be made in the context of sustainable findings in relation to the factual basis of the claim. There is an inter-relationship between this issue and the decision in HJ (Iran).

20. Similarly, in terms of internal relocation, the reasonableness of internal relocation must be informed by a legally sustainable assessment of the factual basis of a person's claim, in particular when one is considering how a person may behave on return to their own country, and why the person would behave in a particular way. Again, this has obvious resonance in terms of the decision in HJ (Iran).
21. Accordingly, I am satisfied that the First-tier Tribunal erred in law such that the decision is to be set aside. I heard submissions from the parties in relation to whether the appeal should be remitted to the First-tier Tribunal for re-hearing or whether the decision should be re-made in the Upper Tribunal. I do not need to rehearse in detail the submissions on this point made on behalf of the appellant. Suffice to say that it was contended that there were legal issues of significance to be decided, for example in relation to the decision in MK. I was provided with copies of e-mails which indicate that the appellant in that case was granted refugee status, the respondent having apparently conceded the appeal, notwithstanding the guidance in MK.
22. In the circumstances, I decided that the decision should be re-made in the Upper Tribunal.
23. Mr Collingridge submitted that the appeal should remain subject to the fast-track procedure. Mr Chelvan submitted to the contrary. Having regard to rule 5(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I decided that the appeal should no longer be within the fast-track procedure in view of the issues to be determined should it be found that the appellant has given a credible account of being gay.
24. It is as well to deal at this stage with a further submission made on behalf of the appellant, namely that in the absence of challenge to the evidence of what may be described as the Landers' evidence, that evidence should be, if not accepted, then at least found to be unchallenged evidence. As I indicated at the hearing, I do not consider that I should make such a finding. The First-tier Tribunal's assessment of credibility is unsustainable and the appellant's credibility will have to be reassessed with all evidence being at large. It will be a matter for the respondent the extent of any challenge to any of the evidence called on behalf of the appellant.

Decision

25. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside. The decision will be re-made in the Upper Tribunal.

DIRECTIONS

1. The appeal will be on a *de novo* basis, with no findings preserved.
2. The appeal will be listed in the first instance for CMR.

Upper Tribunal Judge Kopieczek

2/06/14

ANNEX-DECISION 2



IAC-FH-NL-V1

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

Appeal Number: AA/02967/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 November 2014**

Promulgated

.....

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

KL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This appeal comes before me following a hearing on 2 June 2014 at Harmondsworth at which I decided that the First-tier Tribunal erred in law in dismissing the appellant's appeal against the decision to remove him to Albania. The appeal before the First-tier Tribunal was in the context of a claim for asylum.

2. The background to the appellant's claim and my reasons for concluding that the First-tier Tribunal erred in law are to be found in the error of law decision promulgated on 3 June 2014. Reference should be made to the error of law decision for a fuller understanding of the background to the appeal.
3. Subsequent to the hearing before me on 2 June 2014 the appeal was listed for Case Management Review following which I issued directions to the parties indicating that the next hearing would in the first instance consider the credibility of the appellant's claim to be gay. In consequence, I directed that at the next hearing issues of sufficiency of protection and internal relocation would not require consideration.
4. At the outset of the hearing on 26 November 2014 I pointed out that the appellant's skeleton argument prepared for this hearing, in its reliance on an attendance note by counsel in relation to the CMR, was incorrect in stating that I had indicated that if I found the appellant to be gay that would determine the outcome of the appeal. I do not suggest that counsel who completed the attendance note and who appeared at the CMR wilfully misrepresented what had been said at that hearing, merely that she misunderstood it. So much is evident at the very least from the Further Directions dated 10 September 2014 which stated that the appeal was to be listed for hearing "in the first instance" for consideration of the credibility of the appellant's claim to be gay. Furthermore, such an understanding of what I had intended is inconsistent with the earlier consideration, of which the parties were aware, of making this a reported country guidance case. It would have been inconsistent with such course of action, i.e. making it a country guidance case, if there was a credibility issue to be determined. The full panoply of preparation for a county guidance case would need to have been unhindered by questions of credibility. In addition, Mr Nath on behalf of the respondent indicated that he was under the impression that the hearing before me on 26 November was indeed in the first instance to consider credibility. There is no need to say anything further on this issue.
5. Not all the witnesses that were potentially expected to give evidence were available for the hearing before me on 26 November 2014. Nevertheless, Mr Chelvan indicated that he was ready to proceed. Given that I had decided that the appeal before the Upper Tribunal was to be a *de novo* hearing, I heard oral evidence from the appellant and other witnesses. Below is a summary of the oral evidence.

The oral evidence

6. In examination-in-chief the appellant adopted his witness statements. In cross-examination he confirmed that he first realised that he was gay when he was about 14 or 15 years of age. As per his witness statement dated 24 November 2014 at para 6 he said that he made friends with a person called E. They used to stay together when they were young and their houses were close to each other. It is true that other boys would say

that they were like a married couple. Nevertheless, it is also true that he did not want to keep the company of male friends because he did not want them to see that he was physically attracted to them.

7. He and E did not have problems with other people when they saw him and E together because they did not know that they were in love with each other and in a relationship. People thought that they were only friends. They used to go by the river together and take herds of animals to villages. The relationship ended the day he left Albania. They had been in a relationship since the appellant was 16, until he left.
8. His relationship with Z was when he was at school in [-]. He and Z were in the same class. With reference to his witness statement at para 12 where he stated that Z told him one day that he loved him, he was asked in cross-examination how Z knew that he was gay. The appellant said that they used to talk together at school, and they would talk about each other's lives. He realised more or less that Z was gay but he was not exactly sure until Z expressed himself as being gay.
9. In his asylum interview, as far as he remembers, he mentioned that Z had said that he loved him. At this point Mr Chelvan referred to question 61 of the interview in which the appellant said that Z had told him that "he fancied me and liked me".
10. He and Z would go to normal nightclubs because he does not know if there are any gay nightclubs in [-]. They would stay together a lot but Z was also very busy after school because he had a job. They did not encounter problems when they were together because it was like it was with E. They did not kiss in public or tell friends that they were gay.
11. Referred to his interview at question 60 where he said that he knew Z was gay because of the way he walked and talked, the appellant was asked whether other people would know that he was gay. The appellant said that they would not and that it was much simpler for a gay person to understand as opposed to people who are not gay.
12. Mr Chelvan in re-examination asked the appellant to explain how, as a gay man, he would be able to recognise another gay man, but the appellant's answers did not illuminate that question.
13. In examination-in-chief BL adopted his witness statement and an email put before the First-tier Tribunal. In cross-examination he said that he met the appellant at the Vauxhall Tavern pub. He went and spoke to the appellant. He did not know straight away that the appellant was gay but he had his suspicions because he was in an area around the back of the Vauxhall Tavern which is known as a gay area. Heterosexual couples do go there but it is an area used by gay people to have a chat and a drink.
14. With reference to his witness statement, he was asked why he needed to know if the appellant was gay. Mr L said that if one was in that area of the

pub you would ask most people if they were gay. People are curious in that respect. At that time he had just split up from his previous partner, T. Although he was not looking for a new relationship as such he thought that the appellant was attractive looking. Now they have become friends.

15. He does not go out with the appellant and other gay friends very often, only for example on special occasions like New Years Eve or birthdays. The appellant is not a recreational party person as he is not able to do that financially.
16. As to whether the appellant is comfortable amongst his gay friends, at first he was in his shell a little but he was told that he could be himself as long as he was not rude to other people. He does not openly express who he is attracted to. As far as he knows the appellant has not gone out with any of his friends. He and the appellant are like brothers.
17. As to whether the appellant had ever mentioned being in any relationships, when he first met the appellant he had explained his situation in terms of what had happened to him in Albania. He had explained to him that in Albania the gay community get attacked. Now he is quite open and has nothing to be ashamed of. The appellant had not mentioned to him that he had had two relationships in Albania. He had said that his family had thrown him out and told him to leave as he was an embarrassment to the family.
18. He could not say for certain whether or not the appellant goes to gay clubs by himself. He has come out with him on a couple of occasions such as birthdays and New Years Eve. He has said that he would like to settle down eventually but that he wanted to get himself sorted out before he had a relationship. He said that he could be walking down the street and get stopped (by the police). He knew he would be bringing trouble to the person he was with.
19. There was no re-examination. I asked the witness whether the appellant had ever spoken about being in a casual relationship in the UK. Mr L said that the appellant had said that he would like to have a relationship but that would not be fair because he was not even able to look after himself. Every time he went to the Home Office and saw people in a van he would be petrified.
20. He had never told him about having had a casual relationship such as a one night stand. When they have been out together he has made comments about other men and how they look but he is not the sort of person who would speak about a relationship that he has had with someone. He has seen him making comments about other men that he is sexually attracted to.
21. In re-examination he said that he had seen him "dirty dancing" with another male, about three or four times.

22. CL adopted her witness statements in examination-in-chief. She said that her mother was not here because her father had had an accident, although it was not too serious.
23. Her brother (BL) is gay and she has two aunts who are lesbians. Asked whether if her mother thought the appellant was lying about being gay she would still support him, the witness said that she believed that she probably would because she is the sort of person for whom the door is always open.
24. In cross-examination she said that the appellant had told her he was gay a few weeks after he had started staying at her mother's house. They have discussed relationships and have a rapport whereby he can speak to her and she can speak to him about things. She explained to him her personal situation of being a single mother with two children.
25. She has been out with him and seen that he is not the most confident person. He is quite reserved and blushes quite easily. He would try to make eye contact (with other males) in a very subtle way. She has been with him when they have danced in a group but he is not really confident to dance directly with another man. She had not seen him dancing with another man. The appellant definitely feels more comfortable around the rest of the family. He is more confident with them. He is in a foreign land where he does not know anyone.
26. GP adopted his witness statement in examination-in-chief. As to how he knows the appellant is gay, his daughter is gay and she is aged 37. He has been around a lot of gay people. He works for a disabled persons' organisation and there are a lot of gay people there. He is quite sure the appellant was gay when he first met him because of his mannerisms. He has also told him that he is gay.
27. As to whether he had known the appellant to have a male partner, he said that he had not seen him act in the same way with another man as he had seen him with BL.
28. There was no re-examination. I asked him to clarify what he meant by not having seen the appellant act in the same way as he has acted with BL. He replied that he and BL act like a couple, in that they share things just like people in a relationship. They talk and go out. He has seen them holding hands but because he is grandfather to BL they have a lot of respect. Maybe therefore, they do not do a lot of things (that they otherwise might).

Submissions

29. Mr Nath relied on the refusal letter in relation to the credibility issues that arise from the appellant's account. As set out in the refusal letter, his account of his relationship with E is vague. He had not mentioned any reprisals that he had suffered as a result of that relationship. Although the

appellant claims that people said that he and E were like a married couple, they nevertheless openly visited places together, without suffering any reprisals. On the one hand he claims that he wanted to keep the relationship private but on the other hand they were quite open.

30. Although he said that their relationship ended when he left Albania, it was not explained why they were not able to keep in contact through correspondence or email. Similarly, no problems were encountered as a result of his relationship with Z.
31. Although the evidence from BL was “coherent”, the appellant apparently said nothing to him about any gay relationships that he had in Albania. That however, is the very foundation of the appellant’s case and the evidence that was given was that they are like brothers and talk to each other and confide in each other.
32. So far as CL is concerned, what she had seen (or observed) was limited in relation to the appellant.
33. GP suggested that the appellant and BL were in a relationship, having seen them holding hands. That however, was not their account.
34. Although the appellant had had two relationships in Albania, he is freer in the UK to pursue such relationships but had not done so. Overall, the evidence did not establish that he is gay.
35. Mr Chelvan adopted his skeleton argument. It was submitted that there was nothing to suggest that the evidence given by the appellant and the witnesses was not credible. None of it was expressly challenged. BL had seen the appellant physically intimate with other men. There was evidence from Counsellor AM to the effect that Mrs L asked her for help on account of the appellant being gay and needing to sort out his immigration status. That was in November 2013 before he made his claim for asylum in April 2014. It was not a case of him having been apprehended (by immigration officials).
36. I was referred to the appellant’s witness statement, for example in terms of the circumstances in which his claim arose, when he told his grandfather that he was gay and that his grandfather did not know what he meant. The appellant’s evidence is completely in line with the “DSSH” model, described as an ‘identity checklist’, and in respect of which again the skeleton argument was relied on.

My assessment

37. At the conclusion of the above hearing I announced that I was satisfied that the appellant had given a credible account of being gay. I now give my reasons for that conclusion.
38. At paras 32-38 of the refusal letter there are credibility issues set out in relation to the appellant’s account of being gay. It is suggested, for

example, that the appellant had failed to provide evidence of an “emotional journey” in terms of discovering his sexuality. It is further suggested that in other respects his account was vague or evasive, for example in terms of the two relationships, with E and Z. Credibility issues are raised in terms of their actions in relation to the appellant.

39. I do not consider it necessary to deal with each and every point on credibility raised in the refusal letter. In his witness statement dated 15 May 2014 the appellant provides responses to the issues raised in the refusal letter. For example, in terms of the appellant having allegedly failed to provide evidence of any “emotional journey”, he refers to his answer to question 32 of the asylum interview, the question asking how did he feel when he realised he was attracted to boys/men. His answer was that at the age of 14 or 15 he did not quite understand what it was and what was happening to him. I note that at question 50 it is recorded that the appellant started crying and was asked if he needed a break. That followed questions about his relationship with E. At para 20 of the witness statement the appellant states that he felt emotional at that point because he was forced to disclose information which he had not disclosed to anyone else and that that was not easy for him.
40. As regards his relationship with E, in my view the appellant did give a satisfactory and credible account of that relationship from question 39 of the asylum interview. Similarly, in considering his answers to questions about his relationship with Z, I am also satisfied that he explained how that relationship started and developed.
41. Having considered for myself the whole of the asylum interview, I do not agree with the criticisms made in the refusal letter in relation to the credibility of the appellant’s claim to be gay.
42. So far as the witnesses’ evidence is concerned, it could not be said that their evidence was wholly consistent. For example, there was some inconsistency between the evidence of CL and BL in relation to the appellant’s behaviour whilst out on social occasions, for example in terms of whether he was confident enough to dance with other men. GP’s evidence suggested an intimate relationship between the appellant and BL, something which BL himself did not refer to, and nor did the appellant or any other witness.
43. Furthermore, it does seem to me that there is some merit in the submission made on behalf of the respondent in terms of the appellant apparently not having told his confidante, BL, about his two relationships in Albania.
44. However, when dealing with issues of sexuality and intimate relationships it does seem to me to be important to avoid a dogmatic insistence on what one might expect of individuals in terms of disclosure or openness. As regards inconsistency in the evidence amongst witnesses, I do not regard

the inconsistencies that have been referred to as being so significant as to undermine the credibility of the appellant's account.

45. Furthermore, there is much more to be said for the consistency amongst the witnesses as to the appellant's sexuality, as opposed to inconsistency. All the witnesses who gave written or oral evidence about the appellant's sexuality were consistent in their view of his being gay. Some witnesses had more experience than others in terms of seeing the appellant on social occasions. There was nothing whatsoever in the evidence to indicate that he had, or has, any attraction at all towards women, and every indication that he is attracted to men. I also bear in mind that the Landers family are attuned and accustomed to same-sex relationships, as is evident from the family background in this respect.
46. Notwithstanding what is said about the ability of the appellant to be freer in the UK to become involved in a same-sex relationship compared to in Albania, the lack of evidence of his having engaged in such a relationship in the UK I consider to be a neutral matter in terms of the assessment of whether he is gay.
47. In the light of all the evidence, I am satisfied that the appellant has established that he is gay. I am similarly satisfied that he has given a credible account of having been involved in two relationships in Albania, as described by him. I accept his account of the circumstances in which he left Albania, namely that in his village he was afraid of being discovered as a gay person for fear of breaking the Kanun, as explained in his witness statement. I accept that he was put under pressure, or at least felt under pressure, to marry which eventually led to his disclosure to his grandfather that he was gay. He has given a credible account of his grandfather not initially having understood what the appellant had explained to him but that when he did understand, the appellant was slapped and expelled from the house.
48. The appellant has given an account of having been told by his grandfather that he would shoot him and that the appellant believed him. I also accept that his grandfather said that he would not be able to face their cousins in the village or other people there if it was found out that the appellant was gay. I similarly accept that the appellant sought protection from the local police but that they, in effect, refused to help him.
49. In terms of how the appellant is reasonably likely to behave were he to be returned to Albania, in the light of my positive credibility assessment I accept that he would wish to live as an openly gay person. That conclusion follows from his behaviour in Albania, the circumstances in which he left and his account of his feelings in the UK of a gradual confidence in being open about his sexuality. I accept that he has a fear of returning to his home area and where he would not be able to be open about his sexuality.

50. Whether or not in an area of internal relocation the appellant would be at risk of persecution, I do accept that he has a subjective fear of such persecution. In his witness statements he makes it clear that he has a fear of being openly gay because of the risk of harm. In the light of my generally positive assessment of his credibility, and the consistency overall of his account, there is no reason not to accept those assertions. I also bear in mind that when asked about this in his interview (question 121) he stated that he could not go back to Albania because of fear and that he would wish to express his sexuality openly but would feel he had to be discreet (question 122).
51. In my assessment of the appellant's credibility I have reflected on what is said in the skeleton argument, and in submissions, in relation to the 'DSSH model' in terms of the assessment of sexuality or sexual identity. Whilst it does appear that the DSSH model has achieved international recognition as a tool for assessment of sexual identity, in the circumstances of this case I have found its application to my judicial assessment of the appellant's credibility of limited value. On a more general note, a judicial assessment of the credibility of a person's account of their sexual orientation or sexual identity must necessarily take into account all the evidence put forward, including evidence from other witnesses and, in appropriate cases, documentary evidence. A whole range of other factors are also relevant to such an assessment, for example the circumstances in which a person makes a claim for asylum.
52. Of course, highly relevant to the assessment of the appellant's asylum claim is the decision in HJ (Iran) & HT (Cameroon) [2010] UKSC 31. At paragraph 82 Lord Hope said as follows:
- "82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.
- If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
- If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
- If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
- If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
- 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.”

53. I do accept that on his return the appellant would feel the need to modify his behaviour out of a fear of persecution, regardless of whether such a fear is objectively well-founded in an area of relocation, and about which there may need yet to be a finding, subject to further submissions. I accept that a material reason for his deciding to live discreetly on his return would be a fear of persecution. It is reasonably likely that social pressures in terms of the way he may be viewed by society in general, even away from his home area, would have a part to play in his behaviour. However, as I have indicated, a material reason for his living discreetly on his return would be a fear of persecution.
54. I am not satisfied that the evidence establishes that the appellant would be at risk from immediate or extended family members from his home area wherever he went in Albania. There is little if anything in the evidence to indicate that such a risk extends to the whole of Albania, and for example that he would not be able to live in Tirana and be free from any risk from them there.
55. I indicated to the parties that I would give further directions as to the future conduct of the appeal once my initial decision on credibility was sent out. I described in outline the likely scope of those directions. The purpose of the directions is to give the parties the opportunity to make written submissions as to whether, in the light of my conclusions and taking into account the Home Office Country Information and Guidance report entitled “Albania: Sexual orientation and gender identity” 13 October 2014, in particular at paragraph 1.3.15, the appellant is, without more, entitled to refugee status. For my part, I do not see it as essential that a further hearing be convened although if either party wishes to make oral submissions in addition to the written submissions consequent upon these directions, then arrangements will be made for such a further hearing.

DIRECTIONS

- (1) No later than 21 days from the date of promulgation of this decision, both parties are to file and serve written submissions as to the final disposal of the appeal on the basis of the facts as found, including with reference to the Country Information and Guidance Report for Albania dated 13 October 2014.
- (2) Both parties have liberty to reply to the initial written submissions of the other party no later than 7 days from receipt of the same.
- (3) If either party wishes a further hearing for oral submissions to be made, the Upper Tribunal is to be notified of that request no later than 28 days from the date of promulgation of this decision.

Upper Tribunal Judge Kopieczek

3/02/15