Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06238/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 16 November 2015	**On 04 January 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ES
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Saleem of Malik & Malik Solicitors
For the Respondent: Ms A. Brocklesby-Weller, Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues and I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The appellant is a 19 year old man who claims that he entered the UK clandestinely on 21 October 2013. He claimed asylum on 21 October 2013 and was subsequently looked after by Croydon Social Services. The respondent refused his asylum application in a decision dated 08 August 2014. First-tier Tribunal Judge Emerton ("the judge") dismissed the appeal in a decision promulgated on 06 May 2015.

2. The judge accepted the core account given by the appellant as likely to be true [28]. He went on to make the following findings:

> "29. I accept that the appellant is gay. He is young (only just 18) and has had no experiences of an openly sexual nature; he came across at the hearing as fairly shy. He wishes to be able to live openly as a gay man, even though he has chosen not to do so, so far, in the UK. I accept that he left Albania after being subjected to insults and minor physical abuse from school colleagues and his father, and possibly from neighbours, once people heard that he was gay. I accept that he did not feel safe in Albania, although he was able to report his concerns to a teacher who plainly took his complaint seriously and promised to deal with the boys she named. He also felt able to report to the police in Tirana, albeit when he did not manage to speak to anybody he appears to have given up, rather than being rebuffed because he was gay. It is not entirely clear to me as to the extent to which he left Albania because he [had] fallen out with his family.
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> 30. He has been in the UK since October 2013, and has been assisted by social workers and with his education and with learning English. He has been able to be educated in the normal education system in Albania and reports no difficulty with his education or with sitting exams, although I accept that he was assessed in the UK (at least for those parts of the test which could be assessed through an interpreter) as having learning difficulties. I attach less weight to the assessment of his being more "vulnerable" – this would not appear to be a logical conclusion from the data. He clearly felt able, at the age of 16, to run away from home and make his own way overland to the UK, to a country where he did not speak the language. He was not prepared to remain in Albania and be subject to abuse, including from his own father. That all indicates a high degree of determination, resourcefulness and self-reliance. His private life in the UK appears to have been rather subdued, and on his own account he has done little socialising and has been concentrating on his studies."

3. The judge directed himself to the correct legal framework as outlined in *HJ (Iran) v SSHD* [2011] 1AC 596 and went on to consider whether the appellant would be at risk of treatment amounting to persecution if he returned to Albania. He recognised that the appellant wished to live openly as a gay man but noted that he had chosen not to be open about his sexuality in the UK. However, he accepted that the appellant was still young and that if he chose not to live openly as a gay man in future "it would be the result of his subjective fears" [31]. The judge then conducted a review of the evidence relating to Albania. He took into account the relatively old country guidance decision in *IM (risk – objective evidence – homosexuals) Albania* [2003] UKIAT as well as up to date background

evidence. The Tribunal in *IM (Albania)* concluded that the evidence showed that, in general, gay men were not at real risk of serious harm in Albania. The judge concluded with the following findings:

> "36. Overall, it does appear that the position is that, within Europe, Albania still has an unenviable reputation as a very unsatisfactory place to live in as a gay man, and there remains discrimination and some risk of violence. However, there is nothing before me suggesting that the situation has deteriorated since *IM* [2003]. Rather, there have been some, if faltering steps, by the authorities to introduce anti-discrimination laws and deal with the situation, even if the reality is that there has been little improvement. Perhaps the time is overdue for another Country Guidance case dealing with the position for homosexuals in Albania. However, on the basis of the material before me, I consider that the proper conclusion to come to is that the situation remains one, as described in *IM*, where the level of discrimination against gays does not generally cross the threshold into persecution.
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> 37. With respect to this appellant, he has not reported a particularly significant level of ill-treatment so far. He has fallen out with his family, and left the family home when aged 16. This is consistent with the background evidence. However, he is now aged 18, has completed his formal education and is at the stage when he might in any event be expected to earn his own living and establish his own life. He plainly has no intention of returning to the family home, having apparently severed connections with his family in their home village. I would not expect him to wish to return to his village, but rather to live in Tirana or another town. I would not characterise this as "internal flight", because he has not established that he is at risk of persecution from his family (or that sufficient protection is not available) but to the extent that he might be at risk, I do not see it as unreasonable, or unduly harsh, for the appellant to live elsewhere and seek work without contact with his family. There is no evidence suggesting that they have any wish to track him down to make his life difficult: rather, they have lost touch.
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> 38. Notwithstanding the appellant's diagnosed learning difficulties, I do not consider that the evidence suggests that he would be unable to find work. He has not himself complained of being disadvantaged in the education system in Albania, or in studying in the UK, and I would expect him to be able to find work within his own capabilities. He is plainly determined, and is described in his assessment as "a very pleasant young man". He suffers, as far as I know, from no medical condition. I accept that if he is open about his homosexuality he would be likely to face discrimination, but I do not consider that he has established, even to the low standard of proof required in asylum cases, that he is someone who needs international protection as a refugee. The asylum appeal is dismissed."

4. The appellant seeks to appeal the decision on the following grounds:

   (i) The First-tier Tribunal failed to consider factors that were material to a proper assessment of the threshold for persecution. There was no bright line in terms of age even though he had turned 18. There was no adequate scrutiny of the fact that he would have no family, community or support network on return that might reduce or eliminate the risks that he would face as a gay man. He should not be required to hide his identity.

   (ii) The First-tier Tribunal failed to give adequate consideration to whether the cumulative effect of discrimination would be sufficient

to amount to persecution in circumstances where the authorities would not offer him any degree of protection.

Decision and reasons

5. After having considered the grounds of appeal and oral arguments I am satisfied that the First-tier Tribunal decision did not involve the making of an error on a point of law.

6. In *HJ (Iran) v SSHD* [2011] 1AC 596 Lord Roger set out the following guidance:

> "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."

7. The judge dealt with the first stage of the assessment and accepted that the appellant is a young gay man who has not yet lived openly as a gay man either in Albania or the UK. He accepted that this might be as a result of the appellant's young age given that his evidence was that he would like to live openly.

8. The judge then turned to the second stage of the assessment, which was to ask whether background evidence relating to Albania showed that gay men who lived openly would be subject to sufficiently severe ill-treatment that would amount to persecution. It was quite proper of the judge to take as his starting point the last known country guidance decision on the issue albeit that it was one that assessed the situation as it was in 2003. He also took into account more recent background evidence, which showed that homophobic attitudes and discrimination continued and that there was a societal stigma to being gay as well as "unhelpful attitudes from public officials" [32-35]. While he noted that new anti-discrimination laws had been passed he concluded that "in reality the position does not appear to have changed much in recent years" [33]. He also referred to other reports that gave examples of homophobic statements made by the police, police violence against LGBT people and cases where the police had failed to take protective measures when asked. He noted that the enforcement of anti-discrimination laws was generally weak [34-35]. His overall conclusion, having weighed the evidence, was that although Albania was still "a very unsatisfactory place to live in as a gay man" because there was discrimination and some risk of violence, there was nothing to suggest that the situation had deteriorated since the decision in *IM (Albania)*.

9. The judge specifically took into account the appellant's age at several places in the decision and it was quite clearly at the forefront of his mind when assessing what risk he might face on return. He found that the appellant had already decided to leave home and was now of an age where he could develop an independent life outside his home area if necessary. It is quite clear that the judge took into account his potential vulnerabilities as a result of the learning difficulties assessment but he went on to give adequate reasons why he considered that those difficulties had not hindered him from showing resourcefulness and resilience in leaving home to travel across Europe on his own. I conclude that those findings were open to the judge to make on the evidence and that he could not be criticised for failing to consider matters that might have related to the appellant's potential vulnerability.

10. While the judge considered that the situation remained difficult for gay men in Albania it was open to him to find, on the evidence before him, that the situation had not changed significantly since the decision in *IM (Albania)*. While there were some reported incidents of violence they were not so frequent or sufficiently severe to give rise to a real risk on return. The threshold for persecution is quite high and the feared ill-treatment must reach a minimum level of severity. Article 9 of the Council Directive 2004/83/EC ("the Qualification Directive") states:

> "1. Acts of persecution within the meaning of article 1A of the Geneva Convention must:
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> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogations cannot be made under Article 15(2) of the

European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

11. The judge quite clearly took into account the fact that the appellant may have a subjective fear of living openly as a gay man in Albania but in order for a person to be recognised as a refugee a subjective fear of persecution also needs to be objectively well-founded. The judge had taken into account the background evidence relating to the situation for gay men in Albania, which included evidence of societal discrimination, but concluded that the situation was not sufficiently severe to amount to persecution. That finding was open to him to make on the evidence. Having concluded that the second limb of the guidance in *HJ (Iran)* had not been made out it was not necessary for the judge to go on to consider whether the appellant would live openly or not or what his reasons were for doing so. Even if the appellant had a subjective fear of living openly the judge had already concluded that what he feared was not sufficiently severe to amount to persecution for the purpose of the Refugee Convention.

12. For these reasons I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 21 December 2015

Upper Tribunal Judge Canavan