

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: PA/03761/2017**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 21 December 2017** | **On 12 June 2018** |
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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

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

Appellant

**and**

**LH**

(anonymity direction made)

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Dr M Persaud, Malik & Malik Solicitors

**DECISION AND REASONS**

1. The First-tier Tribunal ("F*t*T) has made an anonymity order and for the avoidance of any doubt, that order continues. LH is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.
2. The appellant before me is the Secretary of State for the Home Department and the respondent to this appeal, is LH. However, for ease of reference, in the course of this decision I shall adopt the parties’ status as it was before the First-tier Tribunal. I shall in this decision, refer to LH as the appellant, and the Secretary of State as the respondent.
3. This is an appeal against the decision and reasons of F*t*T Judge Shore promulgated on 8th June 2017 in which the Judge allowed the appellant’s appeal against the refusal of asylum by the respondent.
4. At the conclusion of the hearing before me, I announced that in my judgement, the decision of the F*t*T is infected by a material error of law and the decision of the F*t*T is set aside. I informed the parties that as to the disposal of the appeal, it is appropriate to remit this appeal back to the F*t*T. I said that I would give the reasons for my decision in writing. This I now do.

The decision of the F*t*T Judge

1. The appellant is a national of Albania. His immigration history is set out at paragraphs [3] to [5] of the decision of the F*t*T. The FtT Judge sets out at paragraphs [6] to [11] of the decision, a summary of the appellant’s claim for international protection. The Judge’s findings and conclusions are to be found at paragraphs [17] to [42] of the decision.
2. At paragraph [28] of the decision, the F*t*T Judge found that the appellant is a homosexual man who is in a romantic relationship with Mr M. At paragraphs [31] to [36] of the decision, the F*t*T Judge addressed the risk upon return to Albania. The Judge refers, at [31], to the decision of the Upper Tribunal in IM (Risk – Objective Evidence – Homosexuals) Albania CG [2003] UKIAT 00067 that had been referred to in the respondent’s decision letter. At paragraph [33], the Judge refers to the decision of the Court of Appeal in LC (Albania) -v- SSHD [2017] EWCA Civ 351, that was relied upon by the appellant as authority to support the proposition that there is currently no current country guidance as to the risk upon return to Albania, on the grounds of an individual’s sexual orientation.
3. At paragraphs [36] and [37], the F*t*T Judge states:

*“On balance, I prefer Ms Iengar’s submissions on the risk on return. The Respondent did not address the effect of LC (Albania) on the status of country guidance for Albania. I accept that there is no country guidance and that IM is no longer good law. I further accept that the objective evidence in MK (Albania) sets out a real risk of persecution of homosexual people in Albania and an inability for homosexual people to live openly in the country.*

*I therefore allow the Appellant’s appeal for asylum on humanitarian protection grounds.”*

1. The F*t*T Judge went on to consider the appellant’s Article 8 claim and to find, for the reasons set out at paragraphs [38] to [41] of the decision that the removal of the appellant from the UK would not be in breach of Article 8. The appellant does not challenge that finding.

The appeal before me

1. The respondent advances three grounds of appeal. I can take the first two grounds together because they are linked. The respondent contends that the reasons provided by the Judge as to her conclusions as to the risk upon return are cursory at best, and the F*t*T Judge fails to provide reasons as to why the Judge preferred the appellant’s submissions as to the risk upon return, in preference to the background material referred to by the respondent. Secondly, at no point does the Judge engage with the correct approach to such a case, as was set out in the decision of the Supreme Court in HJ (Iran) and HT(Cameroon) -v- SSHD [2010] UKSC 31.
2. Before me, Mr Jarvis confirms that the respondent does not challenge the finding that was made by the F*t*T Judge at paragraph [28] of the decision, that the appellant is a homosexual. He submits that the Judge failed to adequately address the risk upon return by adopting the proper approach to such a claim as set out in the decision of the Supreme Court in HJ (Iran) and HT(Cameroon). Furthermore, the Judge erred in placing any reliance upon country guidance that was set out in MK (Albania) CG [2009] UKIAT 00036 in respect of the return of homosexual men and women to Albania. That decision was appealed, and, by consent, the Court of Appeal set aside the order of the Upper Tribunal, without qualification. Mr Jarvis submits that the F*t*T Judge did not properly engage with any of the background material that was referred to by the respondent in the decision of 4th April 2017, including the material set out in the “Albania Country Policy and Information Note; sexual orientation and gender identity – December 2016”. Mr Jarvis drew my attention, in particular, to the summary that is to be found in that note at section 3.
3. In reply, Dr Persuad relied upon the matters set out in a Rule 24 Response, dated 22nd December 2017 that she handed to me. She submits that it is common ground that there is no relevant country guidance as to the risk upon return to Albania. She submits that the Judge did consider the background material that was available, which demonstrates that the risk to homosexual people in Albania is real, and that homosexuals cannot live openly. She submits that the background evidence establishes that homosexuals are at risk of ill-treatment and arrest. Although legislation does not criminalise homosexuality, she submits, public opinion is still cruel and discriminatory. Dr Persuad submits that the F*t*T Judge considered the risk upon return having carefully considered the oral and written evidence of the appellant, and it was open to the F*t*T Judge to conclude that the appellant would be at risk upon return.
4. Dr Persaud submits that even looking at that background note relied upon by the respondent, at section 2.3.6, there is some support for the matters relied upon by the appellant. She submits that the note supports the proposition that 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 where there have been incidents of LGBT people being subject to intolerance, discrimination, physical and psychological violence, job loss, evictions, threats and possible rejection from their families.
5. In my judgement the decision of the F*t*T Judge fails to properly engage in any way with the background material that was before the F*t*T. The respondent had referred to some of that objective material in the decision of 4th April 2017. The respondent referred to the background material relied upon by the appellant, including an internet report from ein.org.uk. The respondent also referred to the “Albania Country Policy and Information Note; sexual orientation and gender identity – December 2016”. The background material relied upon by the respondent refers to the treatment of homosexuals in Albania by the state and by society, and states that in general, the level of discrimination is not such that it would reach the level of being persecutory or otherwise inhuman or degrading treatment.
6. I accept that it is unnecessary for F*t*T judgments to rehearse every detail or issue raised in a case. Here, it was however necessary for the Judge to address the background material and explain in clear and brief terms the Judge’s reasons for the conclusion that “*On balance, I prefer Ms Iengar’s submissions on the risk on return..”*, so that the parties can understand why the Judge preferred the background material relied upon by the appellant. The difficulty in my judgement, with the FtT Judge’s decision, is that the Judge simply fails to engage with the background material. From a careful reading of paragraphs [31] to [36] of the decision, it is impossible for the respondent to know why the objective evidence relied upon by the appellant, or the submissions made on behalf of the appellant, were preferred to the background material relied upon by the respondent. That in my judgement amounts to a material error of law and the decision of the F*t*T Judge must be set aside.
7. There is however a second strand to the grounds of appeal. The respondent contends that at no point does the Judge engage with the approach suggested by the Supreme Court HJ (Iran) and HT (Cameroon) v Secretary of State [2010] UKSC 31. The decision in HJ (Iran) is important because it provides guidance as to how Judges should consider whether a homosexual who is claiming asylum under the Refugee Convention, has a well-founded fear of persecution in the country of his or her nationality, here Albania. At [35] of its decision, the Supreme Court makes it plain that what is required is an individual and fact specific enquiry. The Supreme Court sets out the five stages of that enquiry. I accept the submission made by Mr Jarvis, that it is clear from a proper reading of the decision of the F*t*T Judge that the Judge did not carry out that fact specific enquiry. The Judge found that the appellant is a homosexual, but that is only the first stage of that enquiry.
8. The next stage is to examine a group of questions which are directed to what the situation will be on return. That part of the enquiry is directed to what will happen in the future and to deal with that part of enquiry, the Judge was required to address the question as to how the appellant, looked at individually, will conduct himself if returned, and how others with react to what he does. Those others will include everyone with whom he will come into contact in private as well as in public, and the way in which he will conduct himself may vary from one situation to another, with varying degrees of risk. None of those factors are considered by the F*t*T Judge in this decision.
9. The next stage of the enquiry is that if it is found that the appellant will in fact conceal aspects of his sexual orientation on return, the Tribunal must consider why he would do so. Again, that is an enquiry that the F*t*T Judge did not carry out.
10. I have no hesitation in the circumstances, in finding that the decision of the F*t*T Judge is infected by a material error of law, and the decision to allow the appeal for the reasons that are set out, must be set aside.
11. The question that then arises is as to the disposal of this appeal. The FtT judge did not carry out the task that was required, both as to the individual and fact sensitive enquiry by reference to the five-stage process set out in **HJ (Iran)**, or any proper analysis of the risk upon return by reference to the background material. Having taken into account paragraph 7.2 of the Senior President’s Practice Statement of 25th September 2012, in my judgement, the most appropriate course in the circumstances, is that the matter should be remitted back to the F*t*T.
12. I find there to be a material error in the decision of the F*t*T Judge. I set aside the decision of F*t*T Judge Shore and remit the matter back to the F*t*T for rehearing. The parties will be notified of a new hearing date in due course.
13. The F*t*T Judge found that the appellant is a homosexual. Mr Jarvis confirmed that the respondent does not challenge the finding that was made by the F*t*T Judge at paragraph [28] of the decision, and the finding that the appellant is a homosexual, is therefore preserved.

**Notice of Decision**

1. The decision of the First-tier Tribunal is set aside.
2. The matter is remitted to the First-tier Tribunal for rehearing.
3. An anonymity direction is made. No report of these proceedings shall directly or indirectly identify the appellant or any member of their family.

Signed Date 10th March 2018

Deputy Upper Tribunal Judge Mandalia