Neutral Citation Number: [2019] EWCA Civ 1781

Case No: C5/2019/1376

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGES DAWSON AND SMITH
[2019] UKUT 93 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/19

Before :

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE LEGGATT

- -

Between :

BF (ALBANIA)

Applicant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -
- -

S Chelvan (instructed by **Jai Stern LLP Solicitors**) for the **Appellant**
Colin Thomann (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 10 October 2019

- -

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. The Applicant is an Albanian national, having been born in Northern Albania in 1994. He is gay.

2. In this application, he seeks permission to appeal the decision of the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") (Upper Tribunal Judges Dawson and Smith) dated 26 March 2019, in which the tribunal gave country guidance in respect of the risk of persecution for gay men removed to Albania; and dismissed his appeal against the Secretary of State's refusal of his asylum claim on grounds of sexual identity. The UT determination is now reported as BF (Tirana – gay men) Albania CG [2019] UKUT 93 (IAC).

3. At a hearing on 10 October 2019, we refused the application for permission to appeal for reasons which we said we would give later. These are my reasons for refusing the application.

Background

4. The Applicant entered the United Kingdom clandestinely in March 2015. In November 2015, he was arrested for and pleaded guilty to sexually assaulting a female, for which he was sentenced to 28 days' imprisonment. It is his account that he was out with Albanian friends who had begun to suspect that he was gay, and he consequently accosted and kissed a young woman to counter that suspicion. He did not then disclose his true sexuality because of the strong prejudice against gay men in Albania and amongst Albanians outside their own country. On 17 December 2015, having served his sentence, the Applicant was removed to Albania, where he continued to live in his home area.

5. However, his family and friends in Albania soon discovered he was gay, when a photo of him kissing another man in the UK was posted on Facebook. Having become aware of the photograph, his friends assaulted him. His father also found out about it, and he beat him, and threatened to kill him, over a prolonged period until the Appellant agreed to marry the daughter of a business acquaintance of his father. However, her family became aware that the Applicant was gay, and they took him to a park where they too attacked him. When he returned home he suffered further violence at the hands of his father and uncle; and in November 2016, apparently following a suicide attempt, he collapsed and woke three days later in hospital having been taken there by his uncle's wife.

6. On release from hospital later that month, the Applicant moved to Tirana where he lived discreetly, living rough and staying with a friend who found him a job and to whom he did not reveal his sexual identity, until April 2017 when the Applicant fled once more to the UK.

7. He again entered the UK unlawfully. He was encountered by the UK immigration authorities, and arrested, on 29 April 2017. Removal directions were set, but the Applicant sought asylum on the basis of his sexual identity. That claim was refused

on 22 June 2017, the Secretary of State not accepting his claim as credible and disputing his sexual identity.

The Tribunal Proceedings

8. The Applicant appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ("the FtT"); and he was released from immigration detention on bail, with his uncle standing as his surety.

9. The appeal came before First-tier Tribunal Judge O'Garro who, in a determination promulgated on 8 September 2017, accepted much of the factual basis of the Applicant's claim including his sexual orientation; but she did not accept that he would be at risk on return to Albania because she found (i) he would in fact conduct himself discreetly so his sexual orientation would not be known, and (ii) he could in any event relocate to Tirana where he would be sufficiently protected by the police and NGOs.

10. The Applicant appealed to the UT. Permission to appeal was granted by Judge Smith; and, on 1 May 2018, before Upper Tribunal Judge Kopiecek, the Secretary of State conceded that the determination of Judge O'Garro was unlawful because she had failed properly to make findings in relation to whether the Applicant had suffered past persecution when assessing his future risk. Having found that error of law, the UT retained the matter for the redetermination of the Applicant's appeal against the Secretary of State's refusal of the asylum claim, on the basis that Judge O'Garro's findings of fact would be retained except insofar as they had been infected by the identified errors of law.

11. For the purposes of the redetermination hearing, the Secretary of State accepted not only that the Applicant was gay, but that, wherever he lived, he would wish to lead an openly gay life, in the sense that he would not conceal his sexual identity except insofar as he wished to do so for reasons other than a fear of persecution.

12. The Applicant accepted that the Albanian state had sought to tackle discrimination against gay men by, e.g., introducing progressive changes including legislation decriminalising homosexuality and providing sanctions against discrimination on grounds of sexual orientation. However, he did not accept that the changes had been adequately implemented, and it was his case that societal attitudes in Albania continued to give rise to a real risk of discrimination including violence in public and within the family towards men who were gay or perceived to be gay. Whilst he accepted that conditions may be easier for gay men in Tirana than elsewhere in Albania, he submitted that, even there, the level of discrimination against gay men was at a level that amounted to persecution; and the authorities, no matter how willing, were in practice unable to prevent an openly gay man in Tirana being at risk of persecution because of his sexual identity.

13. The UT took the opportunity provided by the appeal to reconsider the country guidance relating to the risk posed to gay men in Albania. The then-current country guidance was provided in IM (Risk, objective evidence, homosexuals) Albania CG [2003] UKIAT 67, to the effect that there was no country background evidence which supported a reasonable likelihood that gay men in Albania were as such subject to any

action on the part of either the populace or the authorities which would amount to persecution for the purposes of the Refugee Convention.

14. The UT in this case considered the following question (set out in [3] of its determination):

> "Whether there is a sufficiency of protection from harm by the state for the [Applicant] in his home area in Albania and if not whether there is protection available to him in Tirana or elsewhere. If it is, whether it is reasonably open to the [Applicant] to relocate to Tirana (or elsewhere) in the light of his sexual orientation as a gay man."

However, before the UT, without conceding that gay men would be at risk in all parts of Albania, the Secretary of State did concede that the Applicant would be at risk in his own home area. The focus of the hearing was therefore on the risk to gay men in Tirana, and whether it would be reasonably open to the Applicant to relocate there.

15. After a comprehensive review of the relevant material, authorities and submissions, a panel of the UT (Judges Dawson and Smith) gave the following new country guidance (see [251]):

> "1. Particular care must be exercised when assessing the risk of violence and the lack of sufficiency of protection for openly gay men whose home area is outside Tirana, given the evidence of openly gay men from outside Tirana encountering violence as a result of their sexuality. Such cases will turn on the particular evidence presented.
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> 2. Turning to the position in Tirana, in general, an openly gay man, by virtue of that fact alone, would not have an objectively well-founded fear of serious harm or persecution on return to Tirana.
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> 3. There is only very limited evidence that an individual would be traced to Tirana by operation of either the registration system or criminal checks at the airport. However, it is plausible that a person might be traced via family or other connections being made on enquiry in Tirana. Whether an openly gay man might be traced to Tirana by family members or others who would wish him harm is a question for determination on the evidence in each case depending on the motivation of the family and the extent of the hostility.
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> 4. There exists in Tirana a generally effective system of protection should an openly gay man face a risk of harm in that city or from elsewhere in Albania.
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> 5. An openly gay man may face discrimination in Tirana, particular in the areas of employment and healthcare. However, whether considered individually or cumulatively, in

> general the level of such discrimination is not sufficiently serious to amount to persecution. Discrimination on grounds of sexual orientation is unlawful in Albania and there are avenues to seek redress. Same-sex relationships are not legally recognised in Albania. However, there is no evidence that this causes serious legal difficulties for relationships between openly gay men.
>
> 6. In general, it will not be unduly harsh for an openly gay man to relocate to Tirana, but each case must be assessed on its own facts, taking into account an individual's particular circumstances, including education, health and the reason why relocation is being addressed."

16. Applying that guidance to this case, the tribunal dismissed the Applicant's appeal. Whilst accepting that he would be at risk in his home area, the tribunal found that it would be possible – and not unduly harsh – for him to relocate to Tirana where he would have no objectively well-founded fear of serious harm or persecution; and where, if such risk existed, there was a generally effective system of protection.

17. Mr Chelvan, on behalf of the Applicant, now seeks permission to appeal against that determination on five grounds.

The Correct Approach

18. In response to several of these grounds, Mr Thomann for the Secretary of State submits that they amount to no more than a disagreement with the factual conclusions by the tribunal that were on the evidence open to it to draw.

19. He referred to the well-known passage from Sir John Dyson JSC delivering the judgment of the Supreme Court in MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65 ("MA (Somalia)"):

> "43. Before we examine these two criticisms, we need to make some general points about the proper role of the Court of Appeal in relation to appeals from specialist tribunals to it on the grounds of error of law. Although this is not virgin territory, the present case illustrates the need to reinforce what has been said on other occasions. The court should always bear in mind the remarks of Baroness Hale of Richmond in AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] 1 AC 678 at [30]:
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> > 'This is an expert tribunal charged with administering a complex area of law in challenging circumstances…. [T]he ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right…. They and they alone are judges of the facts… Their decisions should be respected unless it is quite clear that they have misdirected

> themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.'
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> 44. Those general observations were made in a case where the Court of Appeal had allowed an appeal against a decision of the [Asylum and Immigration Tribunal ('the AIT')]. The role of the court is to correct errors of law. Examples of such errors include misinterpreting the [European Convention on Human Rights ("the ECHR")] (or in a refugee case, the Refugee Convention or the Qualification Directive); misdirecting themselves by propounding the wrong test on some legal question such as the burden or standard of proof; procedural impropriety such as a breach of the rules of natural justice; and the familiar errors of omitting a relevant factor or taking into account an irrelevant factor or reaching a conclusion on the facts which is irrational.
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> 45. But the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account."

20. Mr Chelvan submitted that this passage was in some way undermined by the fact that the Supreme Court in that appeal were not referred to the judgment of Lord Rodger JSC in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31; [2011] 1 AC 596 ("HJ (Iran)") at [43] and [47]-[49] which, he submitted, set out a different test. However, leaving aside the unlikelihood of a combination of Counsel for the parties in MA (Somalia) failing to bring to the attention of the court a relevant authority on this issue and the Supreme Court justices not remembering such an authority, the passages in HJ (Iran) go to a different issue, namely the correct test for whether an individual has a well-founded fear of persecution and not the test to be adopted by an appellate court in respect of findings of fact by a tribunal.

21. In my view MA (Somalia) remains good law; and there is force in Mr Thomann's submission that, in a fact-heavy country guidance case in which the evidence submitted is very substantial, the deference to be given to the tribunal's findings is the greater.

22. In any event, Mr Chelvan submitted that his grounds were more than mere disagreements with the tribunal's findings: they were true errors of law. It is those grounds to which I now turn.

Ground 1: No Risk of Persecution in Tirana

23. First, Mr Chelvan submits that the tribunal erred in concluding (at [175] of its determination) that there is in general no risk to openly gay men in Tirana, because (i)

it applied an "incorrect burden of proof", and (ii) its conclusion was against the weight of evidence.

24. Mr Chelvan developed the first limb of this ground in his oral submissions as follows. He referred us to Batayav v Secretary of State for the Home Department [2003] EWCA Civ 1489; [2004] INLR 126 at [37]-[39], where Sedley LJ addressed the issue of the evaluation of conditions which are alleged to create a real risk of inhuman treatment for the purposes of article 3 of the ECHR – in that case, prison conditions in Russia – if the claimant were returned there. Sedley LJ, with whom Mummery LJ (at [41]) and Munby J (at [10]) agreed, said this:

> "37. The authority of this court has been lent, through the decision in [Hariri v Secretary of State for the Home Department [2003] EWCA Civ 607], to the formulation that ill-treatment which is 'frequent' or even 'routine' does not present a real risk to the individual unless it is 'general' or 'systematic' or 'consistently happening'….
>
> 38. Great care needs to be taken with such epithets. They are intended to elucidate the jurisprudential concept of real risk, not to replace it. If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening. The exegetic language in Hariri suggests a higher threshold than the [Immigration and Asylum Tribunal's] more cautious phrase in [Iqbal v Secretary of State for the Home Department] [2002] UKIAT 1325, 'a consistent pattern', which the court in Hariri sought to endorse.
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> 39. There is a danger, if Hariri is taken too literally, of assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability, and it cannot be elevated by lexicographic stages into something more than it is."

25. In R (Kpangni) v Secretary of State for the Home Department [2005] EWHC 881 (Admin) at [8], Munby J (of course a member of the constitution in Batayav), quoted the relevant passages of that judgment, and continued:

> "Those observations of Sedley LJ in Batayav are not mere *obiter dicta*. They were expressly agreed to by both Mummery LJ and me, and represent the unanimous view of the Court of Appeal as to what the law is."

26. Given that, in an asylum claim, the claimant has to show a "real risk" of persecution, on the basis of these authorities Mr Chelvan submitted that, if there is a chance of 10% or more of ill-treatment occurring which might amount to (or, as I understood his argument, even materially contribute to) persecution for the purposes of the Refugee Convention, then that in itself amounts to a risk of persecution sufficient to make the potential victim of harm a refugee. On the basis of Hariri, as confirmed in Kpangni, he submitted that that is a proposition of law binding upon both the UT and this court.

As there was evidence before the tribunal here (e.g.) that, as recorded at [98] of their determination, 32% of LGBT people surveyed had suffered personal violence because of their sexual orientation or gender, the UT erred in law in not concluding that there was a risk to gay men in Albania in general that amounted to a sufficient real risk of persecution.

27. In my view, this submission is misconceived, being based upon a misunderstanding of the comments of Sedley LJ in Batayav; and, indeed, a misunderstanding of the nature of risk to which those comments went. Leaving aside matters such as (i) the fact that the 32% figure relied upon was in respect, not of gay men in Tirana, but of LGBT people in Albania generally, and (ii) the validity of projecting the past rate of violence into the future, it entirely misconstrues the thrust of Sedley LJ's observations in Batayav, where he was simply drawing the distinction, as a matter of language and law, between probability and risk. The civil standard of proof of the balance of probabilities merely requires a more than 50% "chance" that something in the past happened – i.e. it was more probable than not that it occurred – for a finding to be made that it did happen. Risk of something that may happen in the future is an entirely different concept, requiring an assessment of, not only the chances of an event happening, but the nature and severity of the adverse effects of that event if it were to happen. Risk therefore has two elements or functions: chance and the "severity" of the potential adverse outcome.

28. Therefore, whether a road traffic accident happened is determined by a court or tribunal on the basis of whether it is satisfied that it is more probable than not that it did happen. However, whether there is a real risk of harm as a result of a road traffic accident in the future is dependent upon (i) the chances of a road traffic accident occurring and (ii) the potential adverse effects of such an accident on the relevant person if it did in fact happen. As Sedley LJ said, for there to be a real risk to the individual the chances of the crash occurring do not have to be more than 50%. That was the proposition which Munby J in Kpangni expressed to be "what the law is": I agree, although, as Sedley LJ said, it is also the concept of "risk" as a matter of ordinary language. Given the potential harm which may result from a road traffic crash, Sedley LJ was merely pointing out that it is not necessary to show that there is more than a 50% chance of such an accident happening, and that there may well be a "real risk" to anyone driving a vehicle where there is a 10% chance of the vehicle crashing. The one in ten figure in the context of a hypothetical car crash was patently a mere example to illustrate the difference between risk and probability: it clearly did not set as a matter of law that a 10% chance of any potentially adverse outcome would create a real risk to the individual exposed to that chance.

29. Metaphorical examples may be prone to misconstruction. But, in this case, the intention of Sedley LJ's metaphor was obvious, as was explained in the context of real risk of persecution for the purposes of asylum claims by Lord Walker of Gestingthorpe JSC in HJ (Iran) at [89]-[91]. Having emphasised that "risk" is the best word to use in relation to what might occur in the future on return to a national's own country – "because… it factors in both probability of harm and its severity" – and quoted the relevant passage from Batayav, Lord Walker said (at [91]);

> "Getting away from metaphor, I suppose that it may be debatable whether a gay man would be at real risk of persecution (in the Convention sense) if, on returning to his

> own country, he would face a one in ten risk of being prosecuted and made to pay a fine, or sent to prison for a month. But if he would face a one in ten risk of being prosecuted and sentenced to death by pubic hanging from a crane there could only be one answer."

30. Although wrongly attributing the quotation to Sir John Dyson JSC, the tribunal quoted the particularly relevant part of this passage at [21] of its determination, where it correctly set out the approach to future risk; before going on to apply it.

31. The tribunal was thus required to assess both the severity of the potential adverse outcomes to which a gay man in Albania (or, in considering Tirana, just that city) may be exposed, and the chances of such outcomes occurring. That is a complex assessment, because there is a whole spectrum of adverse outcomes (including physical violence, physical harassment, verbal abuse and discrimination by state and non-state bodies) with infinitely variable chances of occurrence. The tribunal was therefore required to take a broad view of all the possible adverse outcomes, and assess whether, taken as a whole, the chances of occurrence are such that there is a real risk of persecution on return. That is the approach the tribunal took.

32. That takes me to the second limb of this first ground of appeal. Mr Chelvan submitted that the tribunal's conclusion, that there is in general no risk to openly gay men in Tirana, was "against the weight of evidence". In particular, he submitted that the tribunal erroneously focused on the lack of specified incidents of violence in the evidence (including the statement of Kristi Pinderi dated 15 April 2018, who refers to only one incident of personal violence against people who are LGBT: Mr Pinderi was an LGBT activist in Albania), when the evidence as a whole supported the proposition that violence against the gay community is still a phenomenon in Albania. For example, he submitted that the tribunal had ignored Mr Pinderi's evidence of hate messages he had received on social media, and the evidence to which I have already referred suggesting that 32% of LGBT people surveyed had suffered violence because of their sexual orientation or gender identity and that violent attacks are underreported in Albania. The evidence taken as a whole, Mr Chelvan submitted, demonstrated a real risk of persecution for gay men in Tirana.

33. However, I do not consider there to be any arguable error of law here. After setting out the relevant law on various aspects of the appeal such as the right to live openly (see [25]-[37]), the tribunal set out at considerable length the available country specific evidence (see [49]), available expert evidence (see [50]-[67] including the evidence of Mr Pinderi at [66]), the relevant Albanian legislative framework in respect of provisions affecting LGBT individuals in Albania and its implementation (see [68]-[88]), police corruption in Albania (see [89]-[95]), societal attitudes in Albania (see [96]-[106]), the work of NGOs supporting LGBT community rights in Albania such as Pink Embassy and including the general evidence of Mr Pinderi (see [107]-[117]), before making relevant general findings (see [118]-[124]) and specific discussion and specific findings in relation to the situation faced by openly gay men in Tirana (see [125]-[186]) concluding that there is no real risk that an openly gay man would face persecution if living in Tirana (at [186]). This was a comprehensive review of all the relevant evidence. The tribunal properly viewed this evidence in the round, giving the various parts of it the weight it considered appropriate, weight of course being quintessentially a matter for the tribunal.

34. The picture of the evidence painted by Mr Chelvan was not, in my view, a fair one: the evidence of Mr Pinderi and the other witnesses relied upon by the Applicant taken as a whole was not suggestive of the gay community in Tirana generally living in fear of violence – the evidence was far more nuanced than that. I accept the passages selected by Mr Chelvan were suggestive of problems – and the tribunal accepted the evidence that there was (e.g.) harassment and hate messages on social media directed towards LGBT individuals, and there was evidence from (e.g.) the United Nations Development Programme Report 2017 referring to very persistent gender norms, with non-conformity provoking abuse including physical violence.

35. However, the tribunal had to weigh that evidence against other evidence such as the October 2018 interview with Altin Hazizaj, the Chairman of Pink Embassy, which indicated that the work of the NGOs had made a substantial difference and "the LGBT community is more accepted and viewed in a more positive light", with government officials understanding that "it is their duty to come here, listen and be active" and that "our relations with the police have also improved". That reflects the steps the Albanian Government has taken, to which I shall shortly return. Although it accepted the evidence concerning hate messages on social media, the tribunal considered on the evidence that there was an absence of examples of individual or public violence towards such individuals in Tirana.

36. The evidence to which I have referred is by way of example only. The tribunal dealt with the evidence comprehensively. In my view, its examination of the evidence in relation to the risks caused by openly gay men in Tirana, including the reports of NGOs and UN sources, was thorough and its assessment of it fair and not arguably unlawful. Whilst clippings from the evidence such as those referred to by Mr Chelvan can be identified which suggest there are problems for gay men even in Tirana, in my view the tribunal cannot arguably be faulted in respect of their approach to the relevant evidence, its assessment of that evidence overall, and the findings it made in relation to the risk posed to gay men in Tirana. Its findings were not arguably unlawful.

37. Therefore, I do not consider that any strand of the Ground 1 stands any real prospect of success.

Ground 2: Sufficiency of Protection

38. Second, Mr Chelvan submitted that, in finding that there was a sufficiency of protection for gay men at risk in Tirana, the tribunal erred in "placing too much emphasis on the progress that has been achieved without examining the impact of that progress". As implicit in that submission, Mr Chelvan accepts that steps have been taken by the Albanian state towards ending discrimination of LGBT individuals including gay men in Albania – and, indeed, he conceded that the Albanian state authorities had made clear their intent to end such discrimination.

39. However, he submitted that, even if the state is willing and well-intentioned, that does not mean that it is able to offer adequate protection. The issue of protection from a risk of persecution is outcome-driven: the question is not whether the receiving state has complied with any particular standards of conduct, but whether the result is such as to reduce the risk below that of real risk (see, e.g., HD (Trafficked women) Nigeria CG [2016] UKUT 454 (IAC) at [73]).

40. In this case, Mr Chelvan submitted, there was nothing to justify a finding that there is effective state protection for gay men at risk of persecution in Tirana. He submitted that evidence that there are changing attitudes in the context of domestic violence (see, e.g., [199]-[200] of the tribunal's determination) is irrelevant to attitudes towards gay men. There is no evidence of any prosecution for discrimination against such men even in Tirana, nor is there evidence of incidents of such discrimination being recorded so there are no reliable statistics of such attacks, even though the evidence was that such incidents were normally reported to the police rather than to the ombudsman. Mr Pinderi had "flown" to Canada, which is again suggestive of a failure to protect gay men even in Tirana. Mr Chelvan relied on a photograph of a Tirana Gay Pride March in which several participants had covered their faces to avoid recognition: such steps would not be necessary, he submitted, if there was adequate protection of LGBT people in Tirana.

41. However, again, I am unable to accept that the tribunal dealt with this factual issue unlawfully as even an arguable proposition. In my respectful view, it again fails to give credit to the tribunal's comprehensive consideration and analysis of the evidence in relation to this issue.

42. The evidence was to the effect that there had been a number of state measures supporting diversity, such as the enactment of anti-discrimination legislation prohibiting discrimination against LGBT persons, the provision of training to police officers and ministries on the prevention of discrimination on the basis of sexual orientation and identity, and the establishment of both a Commissioner for Protection against Discrimination (with a brief not only to report to the Albanian Parliament but also to initiate judicial process) and a People's Advocate/Ombudsman (with the specific remit of receiving and investigating complaints). There was also evidence of four active LGBT NGOs in Tirana (including Pink Embassy), each supporting LGBT community rights in the country.

43. Mr Chelvan accepted that these progressive steps had been taken; but he submitted that the tribunal gave no proper consideration to their effectiveness; but, in my view, this criticism has no force. The tribunal did, in my view unarguably, properly consider the effectiveness of these steps. No doubt more could be done – but the law does not require perfection, only that there is sufficient protection for those at risk of persecution on the basis of, in this case, their sexual identity. There was substantial evidence of the effectiveness of the steps which had been taken, for example evidence that public officials had been investigated and fined for infractions, and of collaboration between the NGOs and the authorities (notably the police, to which Mr Pinderi attested in his statement to which the tribunal referred at [197] of its determination). The tribunal referred to comments of the ombudsman on the impact of charges brought against police officers for failure to investigate reports in the past; and to evidence of "strong police protection" during Tirana Gay Pride events. The tribunal expressly dealt with the covered faces of those attending Gay Pride events (at [106]): it is simply not correct to say that the tribunal did not take that evidence into account. The evidence was that these regular events pass off without violence. The tribunal also referred to the available complaints mechanisms, which the Applicant himself said that he would use if for any reason the police failed to offer him adequate protection.

44. Again, I accept that the evidence was not all one way. But the tribunal balanced these positive reports against evidence of incidents of (e.g.) police officers behaving in an inappropriate manner, and properly assessed all of the evidence in the round before concluding that there was sufficient protection of openly gay men in Tirana.

45. In my view, that analysis and conclusion cannot arguably be faulted as a matter of law.

Ground 3: Relocation to Tirana

46. Third, Mr Chelvan submitted that the tribunal's finding that, in general, it would not be unduly harsh for openly gay Albanian men to relocate to Tirana was legally perverse, because it failed properly to grapple with the evidence concerning the difficulties such men would have in obtaining and maintaining employment. The finding, it is said, appears to have been made on the premise that the men would *not* be open about their sexual identity. The tribunal did not engage with the evidence that in Albania employment is most often obtained through family connections or bribes, which would probably not be open to a man who had suffered persecution in his home area. Whatever complaints procedures may be available – through the Commissioner and/or Ombudsman – they would not assist gay men who could not find jobs because of their sexual identity, as such men, without prompt employment, could not stay in Tirana.

47. Further, Mr Chelvan submitted that the tribunal's finding that the Applicant could relocate to Tirana was flawed, because it took into account his previous employment in Tirana, but he was, at that time, not openly but covertly gay.

48. However, once more the evidence must be considered as a whole. As the tribunal indicated (at [165] of its determination), although the UN evidence was that "LGBTI people face high levels of discrimination by employers", it was also that "[i]n Tirana they can access employment more easily, and can receive support from LGBTI people's organisations" and a high level of employees – about three-quarters – are positive towards employment of LGBT people in public administration. At [163]-[169] and [233]-[237] of the determination, the tribunal set out the evidence before it concerning employment of LGBT people in Tirana; and, on that evidence, concluded that there is no real barrier to a gay man finding employment in Tirana (see [245]). That is clearly a conclusion made on all the evidence, and in respect of an openly gay man. The tribunal used the example of a young man who was able to find a job as a journalist as merely an illustration of the general proposition (see [245]); and it concluded that the complaints procedures about which there was evidence would be concluded and any appropriate redress given within a reasonable time (see [247]) which would not only be an effective remedy but would also act as a disincentive to discrimination in the first place.

49. In respect of the Applicant personally, the tribunal recognised and proceeded on the basis that his employment in Tirana had been at a time when he did not disclose his sexual identity.

50. The tribunal concluded that "the situation in Tirana is far from perfect and that discrimination against gay men does arise, in particular, as regard employment…";

but that, even when considered cumulatively, such discrimination is not at a level that would make it unduly harsh for a gay man to relocate to Tirana.

51. In my view, again, on the evidence, the tribunal's analysis and conclusion are not arguably wrong in law.

Ground 4: No Risk of Persecution in Tirana

52. Fourth, Mr Chelvan submitted that the tribunal erred in rejecting his submission that the absence of legal recognition of same sex relationships in Albania (a contracting state under the ECHR), taken alone or together with the discrimination in the form of (e.g.) limited freedom of association allowed to same sex couples, violence towards LGBT people and discrimination against such people in relation to employment, is sufficiently severe as to amount to persecution towards openly gay men in Tirana.

53. He submitted that SB (India) and CB (India) v Secretary of State for the Home Department [2016] EWCA Civ 451; [2016] 4 WLR 103, which found that to remove a lesbian to India in the absence there of legal recognition for a lesbian couple married in the UK was not a breach of article 8, was distinguishable because India (unlike Albania) is not a ECHR contracted state and therefore the test of flagrancy of breach adopted in that case gave way to ECHR case law as to what amounts to a simple breach of article 8. He referred us to Oliari v Italy [2015] ECHR 716 in which the European Court of Human Rights found Italy to be in breach of article 8 by failing to fulfil its positive obligation to ensure that gay men had available a specific legal framework in Italy providing for the recognition of their same-sex unions. The absence of such a framework in Albania is similarly a breach of article 8, and to remove the Applicant to Albania would therefore be both a breach of article 8 by the UK and would expose the applicant to a risk of persecution.

54. However, I see a number of difficulties with that submission.

55. In this case, the Applicant made no article 8 claim; although the tribunal in fact dealt with the issue to which such a claim would give rise at [44]-[47] of its determination. It found the argument made on the basis of SB (India) to be misconceived, as this case is in fact materially indistinguishable because both cases were "foreign cases" as defined by Lord Bingham in R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323 at [9], i.e. a case:

> "… in which it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory, but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory."

In each case, the responsibilities of the returning state are the same. Indeed, as the tribunal observed, where the state to which an individual is being returned is a Convention state it is strongly arguable that the responsibility of the return state is the less because the individual will have the right to petition both the courts of the state to

which he is being returned and the ECtHR on the basis that his own state is failing in its ECHR obligations.

56. That analysis appears to me to be compelling. But it is not necessary to make any finding on that issue in this application, and I decline to do so. The Applicant made no article 8 claim, but only a claim for asylum, in which he claimed that the failure of Albania to recognise marriage or other legal relationship between same-sex couples was either in itself discrimination sufficient to amount to persecution or, with other forms of discrimination in Albania (e.g. being the victim of violence and abuse, and discrimination in employment and healthcare) amounted to persecution.

57. It is well-recognised that the risk of a violation of article 8 rights in an individual's home country, if he is removed there, is capable of amounting to persecution for the purposes of asylum; but not that it will inevitably do so. It will amount to persecution only where the potential violation is sufficiently serious (see, e.g., OO (Sudan) and JM (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 1432 at [21] to which Mr Chelvan referred us).

58. However, in this case, at [249]-[251] of its determination, the tribunal noted that there was no legal recognition of same-sex relationships in Albania, although they concluded that there was no evidence that this caused serious legal difficulties for relationships; and that, although gay men even in Tirana faced some discrimination, considered cumulatively it was not at a level that amounted to persecution or made it unduly harsh for a gay man to relocate to Tirana. It is clear that, in coming to the conclusion that the potential discrimination in Tirana overall did not amount to a risk of persecution, the tribunal took into account the lack of any legal framework or recognition of same-sex relationships in Albania. That finding is in my view not arguably challengeable on appeal.

59. I find no force in this ground.

Ground 5: Individual Finding of No Risk in Tirana from Family

60. Fifth and finally, Mr Chelvan submits that the tribunal erred in finding that the Applicant would not be at risk of persecution by his family in Tirana because it improperly took into account the fact that he had lived for several months in Tirana before moving to the UK. He was, then, living discreetly; and the tribunal had failed to engage with the question of whether he would be at risk from his family if he lived as an openly gay man in Tirana as he would wish to do.

61. However, the tribunal did engage with this issue. At [257] of its determination, it found that the Applicant had been ostracised by his family and his family would likely ignore him if they knew where he was. There was no evidence that the Applicant's family had any interest in finding him; and the tribunal was undoubtedly entitled to find, as they did at [257], that if he relocated to Tirana and lived there as openly gay they would not seek him out to harm him; and, in any event, if they did, there was sufficiency of protection by the police in Tirana (see [258]). Those were findings of fact which would be unimpeachable on appeal.

Conclusion

62. It was for those reasons that I was unpersuaded that any of the grounds of appeal stood any real prospect of success on appeal, and refused the application. In my judgment, the tribunal considered the evidence before it and the issues with which it had to deal comprehensively and with patent and commendable care, and made no error of law.

Lord Justice Leggatt :

63. I agree with everything that Hickinbottom LJ has said.