Neutral Citation Number: [2016] EWCA Civ 1312
Case No: C5/2014/2641

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION & ASYLUM CHAMBER)

Royal Courts of Justice
Strand
London, WC2A 2LL
Thursday, 20 October 2016

B e f o r e :

LORD JUSTICE LINDBLOM

LC (ALBANIA) **Applicant**

- and -

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

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Mr S Chelvan (instructed by Duncan Lewis Solicitors) appeared on behalf of the Applicant
Mr R Dunlop (instructed by Government Legal Department) appeared on behalf of the Respondent

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HTML VERSION OF JUDGMENT APPROVED

LORD JUSTICE LINDBLOM:

1. This is a renewed application for permission to appeal against the decision of the Upper Tribunal (Immigration and Asylum Chamber), dated 30 April 2014, dismissing the appeal of the applicant, LC, against the decision of the First-tier Tribunal, dated 5 January 2014, by which it dismissed his appeal against the decision of the respondent, the Secretary of State for the Home Department, on 12 November 2013, to refuse him asylum in the

United Kingdom and to remove him to Albania. Permission to appeal was refused by the Upper Tribunal on 30 April 2014 and subsequently on paper by Elias L.J. on 31 October 2014.

2. The application for permission was renewed and came before me at a hearing on 26 November 2015. I adjourned the application to a hearing on the first available date after 11 December 2015, on notice to the Secretary of State. It came before King L.J. on 16 February 2016. She ordered that it be adjourned to await the judgment of this court in MSM (Somalia) v Secretary of State for the Home Department (C5/2015/3380)(now reported at [2016] EWCA Civ 715). She invited the parties to make submissions in the light of that decision. This was duly done, on behalf of LC by Mr Chelvan on 28 July 2016, and on behalf of the Secretary of State by Mr Dunlop on 8 August 2016.

3. LC is a national of Albania. He was born on [a date in] 1995. He entered the United Kingdom as a child aged 16 on [a date in] 2012. He claimed asylum on [a date in] 2012, contending that he had a well-founded fear of persecution in Albania. In the light of an age assessment report prepared by Newport Social Services in October 2012, the Secretary of State accepted that he was 16 years old. He was granted discretionary leave to remain until he was 17 years and six months old. In his asylum claim he said he was a homosexual man who had been in a relationship with another man in Albania, that when his father had discovered that relationship he had hit him and thrown him out of the house, and that after this he had lived on the streets. His application for asylum was refused by the Secretary of State in a letter dated 7 April 2013. The Secretary of State rejected his contention that he was gay and his account of the homosexual relationship. In a subsequent decision, dated 12 November 2013, the Secretary of State refused his application for further leave to remain in the United Kingdom.

4. The main issues in LC's appeal to the First-tier Tribunal were, first, whether he had established a well-founded fear of persecution, namely his membership of a particular social group (homosexuals) in Albania; secondly, whether homosexual people who live openly as homosexuals in Albania are liable to persecution; and thirdly, whether he would live openly as a homosexual in Albania, or discreetly, and, critically, what his reasons for living discreetly would have been (see the Supreme Court's decision in HJ (Iran) [2010] UKSC 31).

5. In its decision the First-tier Tribunal concluded that "[looking] at all the evidence in the round", LC was "gay" (paragraph 30). It found that there was "compelling evidence" that the police in Albania still "routinely harass homosexuals", but that "homosexuality has ... been legal since 1994 in Albania and gays cannot be imprisoned for their sexual orientation" (paragraph 31). It referred to the country guidance in IM (Risk -- Objective Evidence -- Homosexuals) Albania CG [2003] UKIAT 00067 and in MK (Lesbians) Albania CG [2009] UKAIT 00036, and it concluded that, while some homosexuals in Albania may be at risk, others would "not be at risk of persecution", even though there may be some "societal disapproval" (paragraph 34). It did not accept that LC fell within any the classes of homosexual identified in MK (Albania) as being at risk in Albania (paragraph 40). It next considered how he would live in Albania, in the light of the decision of the Supreme Court in HJ (Iran), and having regard to "all of the evidence both in respect of his life in Albania as well as in the United Kingdom" (paragraph 41). It found that "in whatever country he is ... he will live discreetly" (paragraph 42).

6. The First-tier Tribunal next considered "[the] reason for the [LC's] choice of discretion". Having reminded itself of the relevant jurisprudence in HJ (Iran), it said this (at paragraph 44):

> "I have found above that the appellant would live discreetly on his return to Albania. I find that the reason he would do so is that is how he himself would choose to live, rather than to live discreetly because of a fear of persecution. I make this finding from a consideration of the totality of his behaviour both in Albania and in the United Kingdom. In Albania he did not choose to reveal his homosexuality because of a fear of offending his community and his parents. In the United Kingdom, where more societal freedom would allow him to live openly as a gay man, he has chosen again to live discretely as a gay man. He has not sought any further relationship even though he is free to do so. If the appellant has conducted himself in this way in the United Kingdom, where he is free to express himself openly as a gay man, I find that he will conduct himself in the same way on return to Albania. As Lord Hope has stated in the extract from [HJ (Iran)] which I have quoted above, the reason of societal pressure is not one that amounts to persecution and the Convention

does not offer protection against it. The whole pattern of his life while in the United Kingdom is a strong and indeed conclusive indicator that he would wish to live discretely in Albania as a matter of voluntary choice motivated by social pressure. I find from the country guidance cases that many gays in Albania do the same without risk of persecution."

7. It was essentially for those reasons that LC's appeal against the refusal of his asylum application failed.

8. In its decision on the subsequent appeal the Upper Tribunal accepted that the First-tier Tribunal had properly directed itself under the relevant jurisprudence, including HJ (Iran) and MK (Albania). It concluded that the First-tier Tribunal had been entitled to find that LC would have lived discreetly in Albania as a matter of personal preference. That finding, it concluded, displayed no misapplication of the relevant case law (paragraph 9).

9. There are three proposed grounds of appeal to this court, now much refined in subsequent submissions made on behalf of the applicant.

10. Permission has also been sought to adduce further evidence in a witness statement of LC dated 19 May 2014, in which he asserts that he had not been asked either by the Secretary of State or by the First-tier Tribunal how he would conduct himself on his return to Albania, and that, if he had been asked, he would have said he wished to live openly as a homosexual, but would do so because of his fear of persecution. In my view it would not be right to allow LC to adduce such evidence at this stage. The evidence could have been presented to the First-tier Tribunal, but was not. And it is clear from the First-tier Tribunal's decision that LC had the opportunity to explain how he would behave on his return to Albania. At the hearing before the Upper Tribunal he was represented by counsel, and at that stage too it could have been made plain what he would say about how he would behave on return. To attempt to introduce such evidence now, through a second appeal to this court, seems to me to be wholly inappropriate.

11. In the first ground of appeal it is contended that the First-tier Tribunal failed to have any regard to the "Merton-compliant" age assessment report of October 2012. Mr Chelvan argues that this was a significant error. He submits that the First-tier Tribunal did not have regard to the findings in the report which were relevant to LC's credibility, and that this was a significant shortcoming in the First-tier Tribunal's decision because LC was not represented at that hearing. Those findings, says Mr Chelvan, at least could have influenced the First-tier Tribunal's own assessment of LC's credibility (see the judgment of Carnwath L.J., as he then was, in this court in R. (YH) v Secretary of State for the Home Department [2010] EWCA Civ 116).

12. I do not see any force in this argument. The First-tier Tribunal made detailed findings in the light of the evidence it heard directly from LC about his sexuality and his experiences in Albania, including evidence about the relationship he claimed to have had with a man in Albania, and his father's allegedly violent reaction to it. It was for the First-tier Tribunal to assess that evidence, bearing in mind, as it did, LC's age and his vulnerability. In doing so, it was able to gauge the extent to which his account was credible. It also made detailed findings, in the light of the country guidance, on the extent to which homosexuality is tolerated in Albania. But in any event I do not accept that its decision is arguably vitiated by a failure to have regard to the age assessment report in the way Mr Chelvan contends it should. The age assessment report was concerned with LC's age, not with his general credibility. It was for the First-tier Tribunal to assess his credibility, and it did that on the basis of the evidence he gave.

13. The second ground relates to the assessment of risk made by the First-tier Tribunal. It is contended here that the assessment of risk was based on "the general position of gay people in Albania", and that it ought to have been undertaken in the light of the fact that in October 2011 the Court of Appeal set aside the decision in MK (Albania). That submission is the centrepiece of Mr Chelvan's argument on this ground. He submits that it was not possible now to extract from MK (Albania) the factual content of that decision and rely upon it. The Secretary of State had submitted to judgment in that case, and, in doing so, accepted that "the Tribunal erred in law in not following the approach later approved in [HJ (Iran)] ..." (paragraph 9 of the Secretary of State's reasons). The memorandum of the Specialist Appeals Team, dated 2 March 2012, indicated that further country

guidance was to be promulgated, but that, says Mr Chelvan, had not been done. He submits that both the First-tier Tribunal and the Upper Tribunal misled themselves as to the status of MK (Albania) (see PO (Nigeria) v Secretary of State for the Home Department [2011] EWCA Civ 132, in particular the judgment of Carnwath L.J. at paragraph 58, and SG (Iraq) v Secretary of State for the Home Department [2013] 1 W.L.R. 41, in particular the judgment of Maurice Kay L.J. at paragraphs 76 to 78).

14. Mr Dunlop, on behalf of the Secretary of State, resists that argument on the basis that the factual findings in MK (Albania) have never been impugned. That decision failed, he says, because of an admitted error of law, and the decision of this court to set it aside does not undermine the factual findings within it.

15. I acknowledge that this response to Mr Chelvan's argument may ultimately be found to have compelling force. However, I accept that this is a properly arguable ground in a second appeal to this court. I acknowledge that the approach adopted by the First-tier Tribunal may arguably be said to rely only on the factual content of the decision in MK (Albania), which, it is said, was not disturbed by the decision of this court to set the decision aside as unlawful. But, as I say, it seems to me that this is a proper ground of appeal which ought to be permitted to proceed to full argument. I propose therefore to grant permission on this ground.

16. The third ground has been much modified. The main argument now put forward relates to the decision of this court in MSM. Mr Chelvan argues that the Upper Tribunal was wrong to conclude that the First-tier Tribunal had followed the correct approach to LC's conduct on return, having regard to his vulnerability. He relies in particular on paragraphs 42 to 48 of the judgment of Beatson L.J. in MSM. He submits that the Supreme Court's decision in HJ (Iran) is inconsistent with the decision of the Court of Justice of the European Union in C-199 to 201/12 X, Y, Z, reported as Minister voor Immigratie en Asiel v X, Y, Z [2014] QB 1111. He points to paragraph 71 of the court's decision in X, Y, Z, which states that "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution". In view of that proposition and the surrounding reasoning, he submits, the approach taken by the Supreme Court in HJ (Iran), including Lord Rodger's observations in paragraph 82 of his judgment in that case, cannot be regarded as secure.

17. Mr Dunlop submits that this argument lacks any real force. It is clear from the First-tier Tribunal's decision, he says, that it took account of the applicant's evidence about his conduct on return and did so consistently with the decision of the Supreme Court in HJ (Iran). And there is, he submits, no question of any dissonance between the decisions in MSM and HJ (Iran).

18. Again, it seems to me that the argument put forward by Mr Chelvan may in the end be found to lack any real force. I am, however, satisfied that here too there is a properly arguable ground of appeal on a second appeal to this court. I recognize that the circumstances in MSM might be said to be materially different from the circumstances here, but I do not think it would be right to shut out this ground at this stage. I shall therefore grant permission on ground 3 as well as on ground 2.

19. To that extent, and for those reasons, this renewed application for permission to appeal succeeds.