

KH  
Heard at: Field House  
On: 30 November 2004  
Dictated: 2 December 2004

YK and RL ( Kosovo – Risk to  
homosexuals) Serbia and  
Montenegro CG [2005] UKIAT  
00005

## **IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

19/01/2005

### **Before:**

Mr P R Moulden, Vice President  
Mr Richard Chalkley, Vice President  
Mr R Baines JP

### **Between**

**Secretary of State for the Home Department**

**APPELLANT**

**and**

**RESPONDENTS**

*Mr G Saunders, a Senior Home Office Presenting Officer, appeared on behalf of the appellant and Mr J Hannah, Counsel instructed by Raja & Co, appeared on behalf of the respondents.*

### **DETERMINATION AND REASONS**

1. The appellant is the Secretary of State for the Home Department.
2. The first named respondent, YK, is a citizen of the Federal Republic of Yugoslavia from Kosovo who was born on 18 April 1982 and who arrived in the United Kingdom on 26 September 1998, when he applied for asylum.
3. He appeals against the decision of an Adjudicator, Mr R A Miller, who in a determination promulgated on 12 January 2004, following a hearing on 6 January 2004, (not 2003 as erroneously appears on the front page of the determination) allowed an appeal by the first named respondent against the decision of the appellant, taken on 25 October 2002, to direct the respondent's removal after refusing asylum.

4. The second named appellant, RL, was born on 7 May 1978 and arrived in the United Kingdom on 26 April 2000, when he applied for asylum on the same day.
5. He appeals against the decision of an Adjudicator, Mr R A Miller, who in a determination promulgated on 12 January 2004, following a hearing on 6 January 2004, (and again, not 2003 as erroneously stated on the front page of the determination) allowed an appeal by the second named respondent against the decision of the appellant, taken on 2 May 2001, to direct his removal after refusal of asylum.
6. The first named appellant's claim is that he was born in Prizren in Kosovo and at the beginning of 1998, his father who had been a leader in the Kosovo Liberation Army, was killed by the Serbian authorities. Following his father's death, the first named respondent and his mother were persecuted by the Serbian authorities who had requested information from them concerning the KLA. A month prior to his departure from Kosovo, his mother discovered that the first named respondent was a homosexual. He expressed fear if returned to Kosovo as a homosexual, claiming that he would be subjected to ill-treatment and abuse which would amount to persecution and additionally, or alternatively, to a breach of his Article 3 rights.
7. The second named respondent had claimed that his father had been a member of the KLA and that the respondent had been a supporter and attended a demonstration in October 1999. He was arrested by the police, detained for a few hours and then released, but during that time he had been beaten. In October 1999 the second named respondent was attacked by KLA members, beaten up and stabbed in the left hand with a knife. He claimed that his mother and father had been killed by members of the KLA. He left his home area of Peja and travelled to Prishtina, where he remained for two and half months, before travelling to the United Kingdom.
8. Mr Hannah had appeared on behalf of both of the respondents before the Adjudicator, as he did before the Tribunal. At the hearing before the Adjudicator, Mr Hannah conceded on behalf of both the appellants that there was insufficient evidence for the appeal to succeed against the refusal of refugee status on asylum grounds. By consent, both the respondent's appeals on asylum grounds were dismissed. For the first time, both respondents claimed that they were now in a homosexual relationship with each other, seeing each other sometimes five times a week and asserted that if they were required to return to Kosovo their rights under Article 3 would be breached.
9. The Adjudicator allowed both appeals on the basis that their removal would breach their rights under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).
10. The appellants' grounds of appeal were the same in both appeals. They asserted that the Adjudicator had erred in law in allowing the appeals

under Article 3, since the Adjudicator failed to give any reason why he found that to return each of the respondents and his partner would involve a breach of Article 3 rights. They asserted that the Adjudicator had placed undue weight on the expert report. The report itself conceded that there was little "*concrete or statistical evidence*" of attacks on homosexuals in Kosovo and in the absence of such evidence, there was no reasonable likelihood that either of the respondents would suffer ill-treatment which would reach the high threshold required under Article 3. The grounds also assert that the decision of the Adjudicator was unsustainable in the light of the evidence before him and that the Adjudicator had even accepted the absence of and difficulty in finding concrete examples of attacks on homosexuals in Kosovo. The Adjudicator erred in failing to adopt the approach set out in the starred decision of **Omar Slimani 01/TH/00092**.

11. Insofar as this determination deals with the general position of homosexuals in Kosovo, it is intended that this should be a Country Guideline decision, to be followed unless there is a material change of circumstances in Kosovo. In reaching our conclusions, we have taken account of past Tribunals' decisions in relation to Kosovo, **Alfred Bima [2002] UKIAT 08216**, **Bekim Krasniqi 01/TH/02140** and **DM (Serbia and Montenegro) [2004] UKIAT 00288**. We have also considered a copy of the Amnesty International Report of April 2003 entitled "*Prisoners in Our Own Homes*": Amnesty International's Concerns for the Human Rights of Minorities of Kosovo/Kosova, the Amnesty International Report entitled "*Former Yugoslavia Republic of Macedonia Police Allegedly Ill-treat Members of Ethnic Minorities*", the Amnesty International Report "*Former Yugoslav Republic of Macedonia Continuing Failure by the Macedonian Authorities to Confront Police Ill-treatment and Torture*", the Amnesty International Press Release entitled "*Former Yugoslav Republic of Macedonia: Police Ill-treatment and Torture of Detainees Continues*", an Amnesty International Report headed: "*World Wide Appeal for: July 2003 Serbia and Montenegro: Member of a Minority Community Abducted and Killed*", a report from Institute for War and Peace Reporting dated 30 May 2003 by Tanja Matic entitled "*Gay Kosovars Flirt with Danger*", a client answer template entitled "*UK 74*" dated 13 March 2001 issued by ICMPD-IOM Kosovo Information Project, the Serbia and Montenegro (including Kosovo) Country Report April 2004, a UNHCR Report entitled "*UNHCR Position on Continued International Protection Needs of Individuals in Kosovo*", August 2004, a letter from UNHCR, London Office, dated 25<sup>th</sup> October, 2004 and an expert report produced by Dr. Stephanie Schwanvner-Sievers (undated) and a covering letter from her, dated 16 November 2003.
12. Counsel agreed that this appeal was governed by the Immigration and Asylum Act, 1999, not by the Nationality, Immigration and Asylum Act, 2002 and the approach suggested by the Court of Appeal in **Subesh et al [2004] EWCA Civ 56**, is the correct approach to adopt in this appeal.
13. Mr Saunders told us that he relied on the grounds of appeal and he indicated that he was aware that it was intended that this should be a

Country Guidance case. Mr Hanna expressed some surprise, but it appeared that the parties had been written to by letter dated 7 October 2004 and advised by the Tribunal. Mr Hannah told us that he had not discovered any other cases which might be of assistance to us, although he was aware of the Tribunal's decision in **Bekim Krasniqi** and the decision in **BM (Kosovo – Lesbians – Sufficiency of Protection)** and the Tribunal's decision in **Alfred Bima**. He placed before us a copy of the Institute for War and Peace Reporting article entitled "*Gay Kosovars Flirt with Danger*". Mr Saunders told us that the relevant parts of the October 2004 Country Information and Policy Assessment were identical to the April 2004 assessment and that he had no additional evidence.

14. Mr Saunders asserted that the Adjudicator fell into error in giving no real weight to the complete absence of any reports of attacks on homosexuals in Kosovo and setting this against the views expressed in the report of Dr Schwanvner-Sievers. The expert based her conclusions on what *would* happen. As far as her report has any factual basis, it is based on a Netherlands report, "*Kosovo Fact Finding Mission (on the situation of homosexuals in Kosovo)*" Amsterdam: COC Netherlands. Mr Saunders drew our attention to the footnote on page 4 of the expert report, where it was reported that COC is described as being "*the umbrella association for the main gay and lesbian associations in the Netherlands, known for its work carried out on homosexual rights in the Balkans.*" Mr Saunders said that he relied on the caveat set out by the former President in **Omar Slimani 01/TH/00092**, in respect of the treatment of experts' reports. This Adjudicator, submitted Mr Saunders, bases her conclusions on what COC says in the Kosovo Fact Finding Mission Report, but it appeared that this organisation was a gay and lesbian campaigning organisation. Mr Saunders suggested that even that organisation was not able to point to any instances of what had actually happened, beyond undoubted social pressures and disapproval by society generally of homosexuals. Despite the background of disapproval and prejudice described at pages 27 and 28 of the expert's report, against that background it is, suggested Mr Saunders, all the more surprising that there is no evidence of actual harm suffered by homosexuals in Kosovo. In the second paragraph of Dr Schwanvner-Sievers report she says:

*"In the light of the information gathered for this report it will emerge that these socio-cultural reasons explain why assaults and discriminations against homosexuals are neither reported nor known in Kosovo despite the fact that homophobia and attacks against homosexuals exist where such sexual orientation becomes know."*

Mr Saunders said it was certainly one thing for attacks not to be reported, but to say they are not known is an entirely different matter; if attacks were not known, then they could hardly be reported. Homosexuality is not illegal in Kosovo. The only attacks referred to in any of the objective material before us is the reference in the expert's report at page 6, where she refers to:-

*"In an article published last September [2002] the daily newspaper Epoka e Re spoke of the 'dangerous ways and behaviour brought by the foreigners', before naming a restaurant near the university in Prishtina as a popular meeting place for homosexuals. According to the OSCE's media adviser in Kosovo, Willem Houeem, three members of Kosovo's Gay and Lesbian Association were beaten up immediately after the article was published."*

15. There was no other reference in any of the objective material to any other attacks on homosexuals. Given that there is a homosexual community within Kosovo and given what UNHCR have said in their letter of 25 October 2004:

*"Kosovan society is characterised by its patriarchal and traditional nature: therefore homosexuality is widely considered to be a taboo subject. Individuals in Kosovo freely express their homosexuality, with those who do being concentrated in urban Prishtina. In rural areas, homosexuality is considered to be 'non-existent' and is apparently kept hidden by individuals and within family structures. It is likely that homosexual individuals may be exposed to psychological and physical abuse and harassment by individuals and/or groups, should their sexuality be discovered or openly practised in Kosovo."*

This was said by UNHCR to derive from the information provided by UNHCR in Prishtina. Given what the UNHCR say, Mr Saunders suggested that one might expect to see some evidence of actual anti-homosexual behaviour.

16. Within the report, Dr Schwanvner-Sievers says:-

*"Taking cultural stigmatisation in general and culture equalisation of homosexuality and same sex relations with minors in particular into account (through naming any homosexual as a 'pederast'), there is little hope that Albanian judges would interpret a homosexual relationship as anything but illegal."*

This is because, the given Albanian cultural understanding, homosexuality is said to be widely associated with same sex relationship with minors. The common majority name for homosexuals is, confusingly, *Peder* (from *Pederast*), independent of whether a relationship with a minor actually exists. However, Mr Saunders pointed out that homosexuality was not illegal in Kosovo. There was no question of anybody being brought before a judge charged with homosexual offences. The report appeared to ignore this fact. There was no evidence before the Tribunal of the law being applied in the way suggested by the expert in her report. The report emphasises the discriminatory and prejudicial nature of societal attitudes, but offered no evidence of it manifesting itself. Mr. Saunders

referred us to the Country Information and Policy Unit Assessment (paragraph K6.100) and reminded us that UNMIK regulations prohibit discrimination the basis of sexual orientation. According to a request made by the Kosovo Information Project to UNMIK, until September 2002, there were no recorded incidents of violence directed against homosexuals during the time since UNMIK had been the authority in the province. The only incidents of violence was the report published in the newspaper *Epoka e Re* referred to by the expert. He submitted that since there was no evidence of any harm the Secretary of State's appeal should be allowed.

17. We then heard submissions from Mr Hannah. He suggested that the first ground was a “reasons” challenge. However, this Adjudicator had given his reasons for his finding. Insofar as the respondent RL was concerned, the reasons were contained in paragraph 14 of the determination. Counsel pointed out that paragraph 14 of the determination in RL was the same as paragraph 15 of the determination in YK. The Adjudicator had previously analysed the expert's report. The appellant knew very well why he had lost the appeal. The lack of any evidence of persecution as mistreatment of homosexuals had been explained by the expert in her report. There was simply a lack of reporting and homosexuality is an underground activity. There is some evidence of violence and this, coupled with the explanation of a lack of reporting is sufficient, Counsel submitted, to satisfy the lower standard of proof. That was sufficient reasoning. As to the second ground, there need not be any concrete evidence or statistical evidence and the expert has explained why there is none, namely the manner in which such attacks are reported. The absence of such evidence does not, however, mean that there is no reasonable likelihood that such reports occur. The third ground seems to repeat the second ground. So far as ground four is concerned, it addresses the approach to expert evidence recommended by the Tribunal in **Slimani**. This Adjudicator followed the guidance in **Slimani** the nature of the expert report explained why there was no objective material showing attacks on homosexuals. It was the essence of what the expert was saying that the Adjudicator did not deviate from the guidance given by **Slimani**. The expert explains why there is a lack of supporting material. He asked the Tribunal to find that the Adjudicator did not err. The report from the Institute of Peace and War Reporting says that gay rights activists receive regular reports of men being beaten up or intimidated on suspicion of being gay, while homophobic views are routinely published in Kosovo's papers. The second page of this report also spoke of the newspaper report of three Kosovan Gay and Lesbian Association members being beaten up immediately after the article was published, as reported by the expert in her report.
18. Mr Hanna submitted that the evidence from UNHCR quoted above was the starting point and that the rest of the evidence needs to be considered in light of what UNHCR said. An absence of specific evidence would not doom the appeal to failure. The expert report points out quite clearly why there is a lack of evidence.

19. Mr Hannah drew our attention to the conclusions set out in the expert's report. There is simply a lack of interest amongst authorities. It is for this reason attacks on gays and lesbians would simply not be reported. Additionally, the victims of such attacks fear further attacks.
20. UNHCR cannot produce a comprehensive list of all at risk categories in Kosovo and simply because homosexuals are not listed as a vulnerable group, does not mean that they are not one. Kosovo is no longer the centre of media attention and that, Mr. Hannah suggested, explains why the press generally have not reported the problems faced by gays and lesbians. He submitted that the Tribunal could draw an inference from the evidence. It could infer what is reasonably likely to occur to these individuals which, he submitted, is likely to cause a breach of their Article 3 rights.
21. Responding briefly on behalf of the appellant, Mr Saunders suggested that there were a number of groups who were vulnerable in Kosovo and all had experienced problems and troubles which had been reported. It was, he suggested, extraordinary that attacks were claimed to have taken place, which had not appeared in the media. It was not sufficient, he submitted, to say simply that because attacks were not reported to the authorities, they are not reported in the media. He invited us to allow the appeal.
22. We reserved our determination.
23. We have decided that we must **allow** the appellant's appeal.
24. In paragraph 14 of the determination of the appeal of RL (paragraph 15 in the determination of the appeal of YK), the Adjudicator said this:-

*"The starting-point must be from Dyli that UMIK and KFOR offer a sufficiency of protection to young returning Kosovans in most general circumstances. UMIK seeks to outlaw discriminating, including discrimination against homosexuals. Against that background the findings and the report of the expert presented by the appellant has to be assessed. She [finds] finds that homophobic attitudes are so ingrained in society from stand-points of religion, virility and likely to go unreported. Even if reported, they would be met by a hostile police and judiciary. While accepting the absence of, and difficulty in finding, concrete examples, the report is well reasoned and persuasive. For there to be a sufficiency of protection, it is necessary not only that UMIK be willing to support them, but that there be a tolerance in the community and a willingness and sufficiency of protection amongst the police, the judiciary and the religious communities. Outside of UMIK there are substantial reasons for considering that there would be an insufficiency of protection in the community and the danger is of such a severity that Article 3 rights would be abused. In the case of this appellant and his partner, I find that return would involve a breach of Article 3 rights."*

25. After having reported on the expert's report in paragraph 7 of the determination, the Adjudicator said in paragraph 8:-

*"The judicial tradition is such that Albanian judges will interpret a homosexual relationship as illegal. The conclusion of the report is that the appellants' fears of severe discrimination, injury or death if returned to Kosovo and if their sexuality became known and their lack of trust in Kosovan institutions and the police are consistent with the researchers understanding of the current situation and treatment of homosexuals in Kosovo. The appellant's would not be likely to be able to live openly and continue their relationship if returned to Kosovo."*

26. The Adjudicator appears to have accepted submissions made to him, that the lack of objective evidence is because open homosexuality in such a society as that prevailing in Kosovo was likely to provoke violence and no protection would be offered.
27. We noted, however, that one respondent lived in the United Kingdom in London and the other in East Kent. Whilst they may have been seeing each other regularly, they were not living together in the United Kingdom.
28. We very carefully have read and considered Dr Schwanvner-Sievers' report. In paragraph 2, she explains that it is for socio-cultural reasons that assaults and discriminations are neither reported, nor known in Kosovo, despite the fact that homophobia and attacks exist. We have some difficulty in understanding quite how, if such attacks are not known, it can be said that they take place. However, the only reported attack was that drawn to our attention by Mr Saunders, following the publication of an article in *Epoka e Re*. We are aware, of course, that the United Nations High Commissioner for Refugees has responsibility for identifying and protecting vulnerable minority groups in society. According to the UN position paper of August 2004, it was intended to be an update on the continued international protection needs of individuals from Kosovo and issued in the light of renewed inter ethnic confrontations. Its primary focus was on the continued need of international protection of minority groups emanating from Kosovo. It said that despite five years of NATO intervention, the situation in Kosovo continues to be complex and the security of the minority communities remains a serious concern. The latter part of 2003 saw an increase in serious crimes committed against the Serb minority community compared to the year 2002. It also spoke of the eruption in March 2004 of mass demonstrations, leading to inter-ethnic violence and civil unrest on a scale not witnessed since 1999. While reporting on Serb, Roma, Ashkaelia Egyptian and Albanian minority community members and despite having referred to Bosniak and Gorani communities and the difficulties caused by Kosovo Albanians in ethnically mixed marriages, persons of mixed ethnicity and Kosovo Albanians perceived to be associated with the Serb regime after 1990, it made no mention at all of gays and lesbians. Neither did the UNHCR Position Paper of 30 March 2004.



29. We do not believe that as a Tribunal we should necessarily accept, without challenge, the assertion that simply because there is no objective evidence, it is because of the lack of reporting of such incidents, rather than that they do not take place.
30. According to COC, gay rights activists receive regular reports of men being beaten up or intimidated on suspicion of being gay, but they say that the problem has failed to attract the attention of human rights groups in the area, because of fear of being "outed" stops most gays from reporting hate crime to the authorities. Whilst one might very well understand a natural reluctance to report crime to the authorities for fear of being "outed", that did not explain why there appeared to be so very little objective evidence of such attacks being reported in the media. In her very thorough and detailed report, Dr Schwanvner-Sievers refers to the setting up of Kosovo's first association for homosexual men which, apparently, launched its own website in February 2003. That association recently joined forces with Kosovo's Association of Lesbians and has enabled Kosovo homosexuals with access to computers to communicate. No evidence was adduced to us to suggest that there are reports of attacks reported on this website. If attacks were a regular occurrence then we should have expected them to have been reported on Kosovo's gay website and for copies to have been provided to us.
31. We believe that the Adjudicator had misunderstood what was reported by Dr Schwanvner-Sievers in relation to the attitude of the judiciary. He did, in any event, overlook the fact that homosexuality is not illegal for males over the age of eighteen and that there would, therefore, be no risk of someone being charged with homosexuality being taken before a judge.
32. We have borne very much in mind that Albanian Kosovars are predominantly Muslim and that particularly conservative Islamic views dominate that society in conjunction with cultural, customary, hetero-patriarchal values shared by all Albanians. We have appreciated that these customary values emphasise notions of masculinity and of the family, of "honour" and "shame" and subsequently include discriminatory attitudes towards homosexuality. We have no doubt that such a society would breed intolerance of homosexuality and encourage discrimination against gays and lesbians, but there is simply insufficient objective material to support the contention that, on return to Kosovo, either of these respondents will face harm which would breach their Article 3 rights. We do not accept the contention that, simply because victims of homophobic violence are reluctant to report attacks, there is no objective evidence. We believe that an organisation such as UNHCR would have identified homosexuals as a vulnerable group if there was widespread and indiscriminate attacks on homosexuals. The advice given by UNHCR in London does not help us, because that is not supported by any objective material. We believe that if attacks on lesbians and gays were such a widespread problem, such that there was a real risk of either of these respondents facing persecutory harm on return, then there would have been some

objective evidence to support that contention, if only from lesbian and gay campaigning groups. As it was, the only evidence we have is that quoted in the expert's report taken from the Dutch Fact Finding Mission, which referred to only one incident.

33. We find that the Adjudicator did make a material error of law by failing to give adequate reasons why he found that to return each of the respondents would involve a breach of their Article 3 rights and on the evidence before us we find there to be no risk that either respondent will suffer a breach of their Article 3 rights on return to Kosovo.

Richard Chalkley  
Vice President