



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11875/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25th August 2015**

**Decision & Reasons
Promulgated
On 6th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**EU
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Benitez, Counsel

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the Decision and Reasons promulgated on 24th April 2015 by First-tier Tribunal Judge Freer (“the Judge”). The appeal was heard by the Judge on 10th April 2015 at Taylor House. The decision under appeal before the First-tier Tribunal was the decision of the respondent on 19th December 2014, that the appellant had not

established a well founded fear of persecution and so did not qualify for asylum. The respondent refused the claim for asylum under paragraphs 336 and 339M of HC395 (as amended).

2. Broadly stated, the appellant's asylum claim is advanced on the basis that the appellant fears her father because fathers in Albania have a right to kill their daughters. The appellant's father wanted her to marry a rich man (B) who she describes as old, being then some 45 years of age. Her father told her this when she was aged about 16 years. The appellant's father and B, worked in the same business, selling livestock. The appellant left home without permission and she believes her father will force her to marry B, on return to Albania. The appellant claims that when she refused to marry B, her father used to beat her up and shout at her. He would inflict bruises on the appellant from occasional beatings.
3. The appellant claims that B also had a bad attitude towards the appellant. B slapped her on two occasions and when she told her father, she was told B was entitled to do that, as he is her husband to be.
4. The claim for asylum was refused by the respondent and in the reasons for refusal, the respondent stated that the Appellant is able to look to the police for protection in Albania and that the appellant has not provided evidence to show that her father has the means to locate her, on return.
5. The appeal was dismissed by the First-tier Tribunal. Permission to appeal was granted by First-tier Tribunal Judge McDade. In granting permission First-tier Tribunal Judge McDade stated:

“the grounds of application for permission to appeal that, inter alia, the judge made adverse credibility findings when the respondent had not, and when the appellant had not been given an opportunity to respond. This is an arguable error of law.”

6. The appellant's first ground of appeal is that there was "procedural impropriety". The appellant contends that the factual account advanced by the appellant was accepted by the respondent and the appeal proceeded by way of legal submissions on the issues of sufficiency of protection and internal relocation. The appellant claims that no issue or objection was made either by the respondent's representative or the Judge and the Judge observed at the outset that he had expected the appeal to be "submissions only". It is said in the grounds of appeal that the "first reference to credibility came during the respondent's submissions.". At the hearing before the First-tier Tribunal, the appellant, in reply, appears to have submitted that credibility could not be an issue as the historical account was accepted by the respondent, and the issues raised in the refusal were ones of law.
7. The background to the appeal is set out at paragraphs [2] to [6] of the decision and reasons promulgated on 24th April 2015.
8. It is to be noted that at paragraph [5] of the decision, the Judge records:

"I heard no oral evidence from the appellant, who attended the hearing, as the issues were of law rather than fact. I record that the appellant attended despite her health problems which were evidently troubling her on the day and that an interpreter was provided who explained to the appellant what was being said in her own language. I heard submissions on behalf of the Home Office and the appellant."
9. There was at the hearing before me, no evidence as to why the appellant had not given evidence. In her submissions to me, Ms Benitez submitted that when counsel, James Collins, who represented the appellant at the hearing before the First-tier Tribunal had entered the hearing the Judge had indicated that this was a "submissions only case", and based upon that indication, a decision was reached that the appellant would not give evidence. That appears to be the account set

out in paragraph 8 of the appellant's grounds of appeal. There is neither any evidence before me from counsel that had represented the appellant before the First-tier Tribunal in the form of a witness statement, nor any record of such an indication, in the record of proceedings.

10. In an appeal before the First-tier Tribunal, as set out at paragraph [8] of the decision, the burden of proof is on the appellant. In refusing the claim for asylum on 19th December 2014, the respondent set out at Annex A, attached to the decision letter, the detailed reasons for refusal of the claim. The respondent was not satisfied that the reason given by the appellant for claiming a well founded fear of persecution, was one that engages the UK's obligations under the Refugee Convention. However the respondent went on to consider the claim in light of the appellant's claim for humanitarian protection. The respondent accepted the appellant's nationality and then stated:

"12. Your claim has been taken at its highest and has been considered as though the events you have described occurred as claimed. However, even when taking your claim at its highest, it is considered that you have not demonstrated that you face a real risk of suffering serious harm in Albania because there is a sufficiency of protection available to you and internal relocation options are available."

The respondent then went on to consider the issues of "Sufficiency of Protection" and "Internal Relocation" at some length, and concluded:

"30. Therefore, it is not considered to be unreasonable to expect you to return to Albania and as such you do not qualify for International protection."

11. Insofar as the Article 8 claim is concerned, the respondent stated;

“44. You state that you met your partner in Albania and have stayed with him since your arrival in the UK in November 2012. However, you have not provided any evidence to substantiate your relationship. When asked whether you have any documents to confirm that you are living together, you made mention only of a utility bill (AIR q46). However, this letter only confirms that you reside at the address and does not state your partner’s name. It is not considered that you have provided enough evidence to show that you are in a genuine and subsisting relationship with your partner. Therefore you fail to fulfil the requirements of E-LTRP.1.2 - 1.12 and E-LTRP.2.1.”

12. In preparation for the appeal, the appellant had filed a witness statement signed by her and dated 13th February 2015. That witness statement had been read to the appellant in the Albanian language before it had been signed, and there was a declaration to that effect upon the statement. At paragraphs 5 to 7 of that statement, the appellant responded to the respondent’s conclusions as to sufficiency of protection, and at paragraphs 8 to 12, the appellant responded to the respondent’s conclusions as to internal relocation. At paragraph 13, the appellant deals with the respondent’s decision that she was not satisfied that the appellant and her partner are in a genuine and subsisting relationship.
13. It must have been plain to the appellant that in considering the issues before the Tribunal, including issues of sufficiency of protection, internal relocation and the Article 8 claim, the First-tier Tribunal would be required to consider the appellant’s particular circumstances. It could only properly do so by reference to the evidence given by the appellant, but whether or not the appellant and her partner gave evidence, was ultimately a matter for the appellant and her representatives. It must have been plain that any failure on the part of the appellant and or her partner to give evidence, might mean that the Judge rejected the evidence served in reply to the reasons for refusal and that there

remained unexplained gaps in their evidence, that might result in adverse findings being made by the Judge.

14. However, the grounds of appeal do not end there. At paragraph [31] of the decision, the Judge refers to the chronology and notes;

“...However it is not explained why she did not claim asylum for a long time. This must damage her credibility. The history is more consistent on its face with economic migration. A great number of Albanians have migrated to other countries for economic reasons, which is consistent with the overall trend of a steady fall in that country’s population over some decades to the present date.”

The appellant submits that this was an issue that was neither raised in the interview, nor in the respondent’s refusal letter. That appears to be correct.

15. The appellant’s grounds of appeal proceed upon the basis that there are a series of material errors within the decision of the Judge, on the basis of which, individually and collectively, the Judge’s decision is unsustainable. The appellant submits that the reasoning provided by the judge is littered with speculation, conjecture, generalisation and in places, with bizarre comments. In paragraph 11 of the appellant’s grounds of appeal, the appellant identifies no less than 14 such matters.
16. The principles relating to the impact upon proceedings of unfairness arising from error of fact were reconsidered by the Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**. The Court of Appeal held that before the Tribunal can set aside a decision of a Judge on the grounds of error of law, it has to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

17. I have carefully read through the decision of First-tier Tribunal Judge Freer and noted the many criticisms cited at paragraph 11 of the appellant's grounds of appeal. Although I am not satisfied that all of the criticisms that are referred to in paragraph 11 of the appellant's grounds of appeal are made out, I am satisfied that some of the findings made by the Judge are unreasonable in the *Wednesbury* sense, or wholly unsupported by the evidence. Similarly, I am satisfied that in many places, the Judge appears to have made adverse findings against the appellant upon matters that were not raised in the reasons for refusal letter, or at the hearing of the appeal before the First-tier Tribunal. They are matters therefore, that the appellant had no opportunity of properly addressing either in her witness statement or in reaching a decision as to whether or not she should give evidence. I do not therefore deal with each of the criticisms that are made by the appellant, but propose give examples of those criticisms that I reject, and those that I find amount to an error.

18. At the hearing of the appeal before the First-tier Tribunal, the appellant relied upon an expert report prepared by Miranda Vickers and dated 2nd April 2015. Insofar as that report is concerned, the Judge notes at paragraph 24 of his decision:

"The expert report is very specific. In the Kukes area, where the entire extended family of the Appellant lives, Kanun law predominates. A girl may not disobey her father under any circumstances. People are easily traced and once registered, so it is not viable to relocate. The Gorani community is very small; at the size of some 60,000 it makes her easy to trace. The only protector the Appellant has is her partner and being Serbian he cannot go there himself."

19. I reject the criticism that is made at paragraph 11(i) of the grounds of appeal, of the comment by the Judge at paragraph [31] of the decision that "A great number of Albanians have migrated to other countries for

economic reasons...". Ms Benitez submitted on behalf of the appellant that the Judge's comment is pure speculation on the part of the Judge and without any evidential foundation at all. I disagree. The expert report of Miranda Vickers that was relied upon by the Appellant states [at page 2]:

"The Gorani are a Slavic Muslim people who traditionally inhabit the Gora region.....They number around 60,000 people and speak a distinct South Slavic dialect.....Livestock farming has been their only form of livelihood and whenever possible le, Gorani men have left the region in search of work elsewhere. The Gorani region, including Kukes, has always been economically depressed, undeveloped and its inhabitants are amongst the poorest people in the Balkans"

20. Criticism is made at paragraph 11(ii) of the grounds of appeal, of paragraph [33] of the decision and in particular the speculation by the Judge as to what the Applicant may or may not decide in the future. On behalf of the Respondent, Mr Clarke submitted that the criticism made is not one that that is material, and capable of affecting the outcome of the appeal. I agree. At paragraph 33 of the decision, the Judge deals with "Victims of Human Trafficking", but it is uncontroversial that it has never been any part of the appellant's claim that she is the victim of trafficking.
21. Criticism is made at paragraph 11(iii) of the grounds of appeal, of paragraph [36] of the decision in which the Judge states "I find that as there are only 60,000 Gorani people it should be easy to avoid them..". Ms Benitez submits that this finding is irrational. First, the appellant does not fear the Gorani people generally and to expect the appellant to avoid the Gorani people would be to expect her to disassociate herself with her Gorani ethnicity. Secondly, the finding is contrary to the expert evidence that was before the First-tier Tribunal. The expert evidence of Miranda Vickers that was relied upon by the Appellant states that insofar as internal relocation is concerned:

“...Over the past twenty-odd years the largest concentration of internal migrants, including Gorani people from Kukes have settled in the cities of Tirana and Durres.....Despite having been brought up in Fier, the Appellant’s northern Gorani background would make it difficult for her to settle anywhere in the south, with its different dialect, and few job opportunities in Socialist Party strongholds such as Gjirokaster, Vlore and Saranda, with many of their inhabitants belonging to the Christian Orthodox faith and ethnic Greek minority population. But also, if she was to try and settle in the Tirana Durres conurbation, she would find it difficult to avoid people from her family’s district of Kukes.

If her father wanted to find the Appellant, were she to relocate to the capital or other surrounding towns, it would be relatively easy for him to do so. If the Appellant relocated to any town or city in Albania, she would be officially obliged to register herself as a resident under the Civil Registration system (as every Albanian citizen must)..... The Appellant would not be able to obtain a compulsory Identity card without registering. Also, she would need to register under this system in order to gain employment, further her education, or access any social funding. As soon as she is registered she will be easily traced by anyone wishing to find her. The Civil Register is kept in all local municipality and community offices and can be accessed by anyone, much like the electoral register in the UK.”

22. On behalf of the respondent, Mr Clarke submitted that at paragraph 36, the Judge was in effect, stating the obvious. That is, Albania is a country where the appellant should be capable of relocating without coming to the attention of her family. That submission is at odds with the expert report that was before the Tribunal that states “Albania is, however, a very small country with a surface area of just 11,100 square miles and a population (in 2013) of 2,773,620”.

23. It seems to me that the finding of the Judge at paragraph [36] is based upon a mistake as to fact, and appears to be contrary to the matters set out in the expert evidence and thus has no evidential basis. The Judge appears to proceed upon the mistaken belief that the appellant fears the Gorani people and wishes to avoid them, or should reasonably be expected to do so, upon return to Albania. The appellant does not seek to disassociate herself with the Gorani people, but her fear is that she is at risk of serious harm and possible honour killing by reason of her refusal to enter into a forced marriage.
24. There are also various passages in the decision that were not relied upon in the decision of the respondent or raised at the hearing of the appeal and thus appear to have no evidential basis, and are based upon speculation or conjecture;
- a. The comment at paragraph [39] that “the reality of life is that around the world “blue-collar” jobs are often taken by people who do not speak much or any of the main language of the host country”, and at paragraph [40] that “It is, arguably reasonable, to expect the partner to learn a smattering of commonly used Albanian expressions and to seek employment in a “blue-collar” job is so as to support the appellant which may be hindered by ethnic and religious tensions but this is by no means an insuperable problem.”
 - b. The finding at paragraph [64] that the appellant’s partner, if still with her could protect her, or alternatively, the appellant may find a new partner who will protect her.
 - c. The finding at paragraph [66] that the option for internal relocation is open to the appellant if she is accompanied by the partner whose details are given in her own interviews, or alternatively, if she arranges a marriage with an as yet unknown Albanian gentleman,

using modern means of communication or a religious advisor of her faith.

- d. The finding at paragraph [67] that the appellant is already free to take a new name and it is not shown by any evidence that she would be recognisable in the register, if she did that. Similarly, the finding at paragraph [68] that there is no legal requirement for the appellant to keep her birth name on return to Albania and that in patriarchal societies, it is very common for women to take a man's name. These are material to the conclusions of the Judge in light of what is said at paragraph [77] of the decision that there is no evidence she is traceable by her father, provided she uses the name of a partner or husband, which is legally permissible.

25. It seems to me that reading the decision as a whole, many of the criticisms that are made in paragraph 11 of the grounds of appeal and that I have referred to in paragraph [24] above, can be traced back to the underlying criticism that the Judge has made adverse findings against the appellant, in respect of matters that were neither raised in the reasons for refusal letter, nor at the hearing before the First-tier Tribunal. They were therefore plainly matters that the appellant could not have contemplated as being in issue, and had no opportunity to address or respond to.
26. In **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** the Upper Tribunal held that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal (the "FtT") to be set aside. The authorities referred to by the Upper Tribunal in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** make it clear that upon an appeal such as this, the criterion to be applied is fairness and not reasonableness. The Judge's conduct of the hearing and his decision is not to be evaluated by reference to a test of reasonableness or fault. The judge cannot in any way be criticised for

the appellant's failure to give evidence before him. Whether or not evidence is called in an appeal before the First-tier Tribunal is entirely a matter for the appellant and his or her representatives.

27. The judge considered the evidence that was before him, but had to do so acknowledging that there were a number of gaps in the evidence. If those gaps had been limited to matters raised in the reasons for refusal letter, and that had not adequately been addressed by the appellant in her statement or by calling evidence, the judge could not be criticised for reaching adverse findings. However when the decision is read as a whole, it is clear that in a number of respects the Judge made findings and reached conclusions upon matters that had neither been raised in the reasons for refusal letter, nor it appears, were raised at the hearing of the appeal before the First-tier Tribunal. To that end, they were adverse findings made in circumstances where the appellant was afforded no opportunity to respond to any concerns that the Judge had. The resulting unfairness to the appellant is apparent from the findings made by the Judge and the conclusions reached.
28. I am satisfied that the decision of the First-tier Tribunal involved in the making of an error on a point of law and the decision of the First-tier Tribunal is set aside.
29. I must then consider whether to remit the case to the First-tier Tribunal, or to re-make the decision myself. As the Upper Tribunal did in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)**, I consider that where a first instance decision is set aside on the basis of an error of law involving the deprivation of the appellants right to a fair hearing, the appropriate course will be to remit the matter to a newly constituted First-tier Tribunal for a fresh hearing.

Notice of Decision

30. The appeal is allowed and the appeal is remitted to a newly constituted First-tier Tribunal for a fresh hearing of the appeal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

31. An anonymity direction was made by the First-tier Tribunal and is continued by me. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Mandalia