



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05188/2017

THE IMMIGRATION ACTS

At: Field House, London
On: 17th January 2020

Decision & Reasons Promulgated
19th March 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**DL + 2
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr Benitez, Counsel instructed by Kilby Jones Solicitors LPP
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Albania born in 1990. Her dependents are her two sons, born in 2007 and 2012. She appeals with permission the decision of the First-tier Tribunal (Judge Mark Davies) to dismiss her protection appeal.

Error of Law

2. At a hearing on the 7th June 2019 at Manchester Civil Justice Centre the Respondent conceded that the decision of Judge Mark Davies was flawed for material errors of

law and that it had to be set aside in its entirety. Since the appeal was settled by consent my reasons for setting the First-tier Tribunal aside can be stated briefly:

i) The First-tier Tribunal erred in failing to make a finding on whether the Appellant was a vulnerable witness, as required by the *Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance* (“the Guidance”) and the decision of the Court of Appeal in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123. The determination records, at §59, Counsel Mr Greer’s submission that she was; this submission does not appear to have been contested by the Respondent’s representative on the day, and I am told that it was in fact agreed at the outset of the hearing that the Tribunal should recognise her as vulnerable. It did not do so. That was not simply a procedural issue. As AM makes clear, the point of the Guidance is that decision-makers take into account any vulnerabilities in their assessment of credibility. That has not been done in this instance.

ii) The First-tier Tribunal erred in treating as accepted fact a matter in issue between the parties, and unproven by evidence. In its assessment of whether the Appellant is a victim of trafficking the Competent Authority said this:

“you stated you lived with your husband and other relatives however information from the Albanian authorities notes that only you, your husband and your children were registered as living in a property in Durrës”.

That inconsistency was relied upon first by the Competent Authority, then by the Secretary of State, then by Judge Davies, in rejecting the credibility of the Appellant’s trafficking narrative. The source of the ‘information’ from the Albanian authorities has never been explained. Nor has the evidence underpinning that assertion ever been made available to the Appellant, who vehemently disputes its accuracy. Given that this was a central matter in issue between the parties it was incumbent on the First-tier Tribunal to make reasoned findings of fact to resolve it. No such findings are found in the determination, which simply proceeds on the basis that the matter asserted in the ‘conclusive grounds’ decision is fact. This is an error of law. That the Tribunal erred in this way is particularly unfortunate given its indication, at §23, that it had read the decision of Deputy Upper Tribunal Judge Mailer, dated the 23rd March 2018, in which the decision of an earlier First-tier Tribunal (Judge Tobin) had been set aside for precisely the same error.

iii) The First-tier Tribunal erred in making credibility findings, and conducting its risk assessment, in the complete absence of any reference to the country background information before it, including the extant country guidance case of TD and AD (trafficked women) CG [2016] UKUT 00092. Elements of the Appellant’s account are found to be “incredible” and “wholly unbelievable” without any attempt to set the evidence in context. Again, this was also an error made by the First-tier Tribunal the first time around. As Judge Mailer observed, had such country background material been taken into account it would have been apparent that there are elements of the Appellant’s account which are

entirely consistent with the evidence in TD and AD and the known *modus operandi* of Albanian trafficking gangs.

The Re-Made Decision

3. The decision in the appeal could not be remade at the hearing in June because no interpreter was available. The Appellant was subsequently moved from her accommodation in Stoke-on-Trent to Oxford, necessitating the case's transfer to London. It appears that this caused some delay in listing, and in its final determination, which is to be regretted.
4. The matter in issue before me is whether the Appellant has a well-founded fear of persecution in Albania for reasons of her membership of a particular social group, viz women who have been trafficked (paragraph 20 of the Respondent's refusal letter accepts that the Appellant is a member of this group). The burden lies on the Appellant and the standard of proof, in respect of all matters, is one of 'reasonable likelihood': DC (trafficking: protection/human rights appeals) Albania [2019] UKUT 00351 (IAC). The applicable country guidance remains TD and AD (*supra*). I am also asked to consider whether the refusal to grant her leave is an unlawful decision per s6 of the Human Rights Act 1998. It is for the Appellant to prove, on a balance of probabilities, that she has Article 8 rights in this country capable of engaging the Convention; after that it is for the Respondent to demonstrate that the interference with those rights is proportionate and lawful.
5. I find that the Appellant is a vulnerable witness. I so find because she has been diagnosed with chronic daily headache syndrome, depression and anxiety, all of which could impact upon her court experience and her ability to give clear evidence. I have taken those matters into account in my assessment of all of the evidence.

The Evidence

6. The Appellant's case is as follows.
7. In 2006 she was married, upon the arrangement of the two families, to a man I shall refer to here as H. He is the father of the Appellant's two eldest children. It was not a happy marriage. H was abusive towards the Appellant and was frequently away abroad, leaving her with his family members in Durres. She lived with H's parents and four brothers. The family were supported by state subsidy; they had two cows and some land. She describes her in-laws as "fanatics" who subjected her and her children to abuse.
8. The Appellant last saw H in January 2013 when he left Albania for Greece, where he travelled frequently to work in construction. The Appellant was very unhappy being left with her in-laws. They did not treat her well and would undermine her by saying bad things about her to her sons. Sometimes one of them would tell her that her husband had another family in Greece and that he would leave her. One day after H had left Albania a friend in the neighbourhood told the Appellant that a man she knew had been asking about her. He had seen her in a local shop and said that he liked her. He would have a coffee in this shop so that he could see her when she was

doing her shopping. The Appellant and her friend were in this shop with this man, whom I shall refer to as T, approached. He spoke with the Appellant and told her that the rumours about her husband having another family in Greece were true. He said that he liked her, and that she shouldn't stay with her husband. He said that he would get the Appellant and her sons somewhere safe. The Appellant was upset and started crying. When she returned home she was still crying. An argument erupted – her friend told the Appellant's in-laws what they had heard about H and H's father ended up punching the Appellant in the face, demanding to know why she had been out for so long.

9. One week later the Appellant took her children and their belongings and left her family home. They met with T who took them in a car somewhere outside of Durres. It was night when they arrived at a detached house in a run-down area. The property had 4 rooms. There were a lot of young girls in one. T introduced one of these girls as Merita. He said that she was his sister, and that she would help look after the Appellant's children. That night the Appellant and her sons stayed on their own in one of the bedrooms in that house. After a couple of nights T told the Appellant that he and she would go out to celebrate the start of summer – it's a festival in Albania on the 14th March. They went to another house with lots of young people drinking. T gave the Appellant alcoholic drinks which she wasn't used to. They were there 'til about 3am. T said that a friend of his was coming back to stay at the house and that they would give this guy a lift. The Appellant saw nothing unusual in that. When she got back to the place that they were staying she was tired out. T said that he was going out to buy some cigarettes. She went to her room and lay down on a bed but then she saw the door open. She went to get up thinking that it was T, but it was his friend. This man came in, put his hand over her mouth, and raped her.
10. The Appellant said that she cried all night and all the next day. She thought that her world had ended. The next evening T came back and she told him what happened. Instead of being angry with his friend T became angry with the Appellant. He said that it was her fault and that she would have to "pay" for what she had done. He said that she would have to do work for him – by work he meant prostitution. The Appellant begged T – she said that she would do anything else but not that. She refused to eat. For about a week this went on – the Appellant crying and begging T but he was ruthless in his response. At one point he hit her in the face causing her nose and mouth to bleed. During this time the children were being kept in another house with Merita. I note that when giving this part of her account to the officer at her asylum interview the Appellant was crying; she was given a break for a few minutes before continuing.
11. Eventually the torture broke the Appellant down, who seeing no alternative to T's demands, agreed. Her first client arrived about two weeks later. During the day she would be with her children, and then at night they would go with Merita and the Appellant would be put to work. She cannot remember how many men came and went. Sometimes they paid her and sometimes they paid T directly. If the money was handed to her she would give it to T. If they paid her a tip she would keep this and hide it in her clothes. In her asylum interview the Appellant said that sometimes

T would go out and that it would just be her and the girls in the house but she never tried to run because they had her children – she could not go without them. The girls in the house told her that T had connections with the police and that it was no good trying to seek help. T told her that if she tried to run he would kill her children. It was this threat that stopped the Appellant from taking her own life, which she thought about on a number of occasions. The Appellant estimates that she was kept in that house working for T between sometime at the end of March 2013 and October/November 2015.

12. In the early winter of 2015 T told the Appellant that they would be going to France. She refused to go without her children so she, the children, Merita and T all flew to France. She does not know the exact dates but she thinks that she was in France for about one month. During that time she was again forced to work as a prostitute. She overheard a conversation between T and Merita where he said that things were not going as well as he had hoped. The Appellant was not making enough money so T decided that they should all return to Albania.
13. Although there have been some inconsistencies in the evidence about how the Appellant got to France (for which see below) she has consistently described being taken *back* to Albania with her children in a car with Merita and T. She believes that that journey took place at the end of November 2015. She said that it was cold and raining. The children had temperatures so she asked if they could stop at a pharmacy. The Appellant states that normally Merita would follow her into a shop, but just as they reached the pharmacy Merita's phone rang. The Appellant was therefore permitted to enter the pharmacy with her children on their own. T and Merita remained in the car outside. The Appellant describes how the pharmacy had two doors, one on each side of the shop. The car was parked outside one; having entered through it, the Appellant and the children ran out of the other. Outside there was a taxi rank. The Appellant and the children got in the taxi and told the driver to take them to the university. The Appellant's hope was that she would there be able to find her sister there.
14. The Appellant did find her sister, who was a student. The Appellant told her sister what had happened and her sister was in shock: "she felt bad. How could you end up like this she said". Her sister said that the best thing she could do would be to leave the country. Her sister had a friend who made the arrangements. The children and the Appellant left Albania, and travelled across Europe, in a lorry.
15. Since the Appellant arrived in this country she has had another child. She describes the circumstances in which she came to be pregnant in an additional witness statement. She states that in February 2019 she was feeling very isolated and depressed. Some of the other women she lived with in her NASS accommodation were going out and they invited her. She decided to go along: it was to a nightclub in Stoke-on-Trent. She got very drunk and lost control. She met a man and ended up having sex with him in the toilets of the club. She found out that she was pregnant about two months later – she had no further contact with the father and he has no idea that he has a child.

16. Two additional witnesses attended the hearing. Both are Albanian women who met the Appellant in NASS accommodation over the years. They have both been recognised as refugees. Witness 1 lived with the Appellant for about a month in south London in 2016. After that they stayed in regular contact by telephone. Witness 1 avers that she has never known the Appellant to be in touch with her husband; she has never heard a man's voice in the background and she knows how stressed the Appellant was after she became pregnant. She has not spoken to the Appellant about the detail of her claim, she believes the Appellant had problems with her family and husband. Witness 2 also lived with the Appellant for about a month in 2016. She has stayed in regular telephone contact with the Appellant and also visited her when she lived in Stoke. She did not tell the Appellant she was coming and saw no sign of any man in the accommodation. She knows the Appellant's children well and has never heard them mention their father. Witness 2 confirmed that it is her belief that the Appellant has suffered a similar trauma to her: asked to clarify what that trauma was she said that it was trafficking related.
17. Finally, the Appellant avers that since her arrival in this country she has been 'disowned' by her family, including her sister. Asked in oral evidence to expand on this evidence the Appellant confirmed that she has had no contact with her sister since the day that she left Albania in 2015. She has made no attempt to contact her, or to try and repay the money spent by her sister's friend in getting her and the children out of Albania. Her sister has not tried to contact her to ask for the money. The Appellant did not try to let her sister know that they had arrived safely. She said that when she was in Albania her family were not particularly interested in her life so there is no reason to suppose they would be now. The Appellant states that she feels she must look forward for her children's sake.

Discussion and Findings

18. My first task is to assess whether it is reasonably likely that the Appellant's account of past persecution is true. Mr Melvin points to a number of difficulties with her evidence to submit that even on the lower standard of proof, the Appellant should not be believed. I have had regard to his submissions, and to those of Ms Benitez. I have also taken into account the guidance in TD and AD and the general country background material about the way that traffickers operate in Albania.
19. I remind myself that the standard of proof is relatively low. I confirm that I have considered all of the evidence in the round, and that I have borne in mind at all times that the Appellant is a vulnerable witness. I have given due weight to the negative Competent Authority 'conclusive grounds' decision.
20. In the respective submissions of the parties I find two competing case theories. Ms Benitez asks me to find that the Appellant is a victim of trafficking whose confusion in respect of some elements of her account arises from her trauma. Mr Melvin by contrast asks me to find that the entire account is a fabrication designed to facilitate the family's migration to the United Kingdom. He asks that I place particular weight on the UKBA records showing H's attempt to enter the country. The inference I am

asked to draw is that the Appellant and her husband are still together and that he too is in this country.

21. I begin by considering whether the account is generally plausible. Having had regard to the country background material I am satisfied that in large part, it is. In particular I do not agree with Competent Authority analysis that there was anything odd in the delay between the passports being obtained and the flight to France. Nor do I consider it implausible that T also took charge of the Appellant's children. Although it is somewhat unusual, it fits with the pattern of traffickers using threats against family to control women. That the account is largely plausible adds weight to the Appellant's claim.
22. I next consider the level of detail that the Appellant has given. I found much of her evidence to be compelling and persuasive. For instance, in her description of how she argued with her in-laws and was punched by her father-in-law her evidence was specific, and clear. Much of the evidence recorded in her asylum interview, and subsequent witness statements, has the 'ring of truth' about it.
23. I accept as credible the evidence of the two witnesses who spoke on the Appellant's behalf. I have no reason to reject their evidence that they believe the Appellant to be single, and that neither have any reason to believe that she is in contact with her husband. I accept their evidence that as friends they are worried about the Appellant, in respect of her mental wellbeing and in respect of her fear of returning to Albania.
24. I have further given some weight to the Appellant's demeanour. I note that the asylum interview had to be stopped because in giving her account of rape, the Appellant became too distressed to continue. In her evidence before me she also became tearful. That the Appellant became upset in this way is consistent with her account; it is further consistent with the medical evidence that she has successfully sought psychological support in the form of counselling.
25. Some of the discrepancies identified by the Respondent take nothing away from the Appellant's claim. For instance, I attach absolutely no weight to the fact that the Appellant has not been able to give clear dates: there is no material inconsistency in her saying that she flew to France in November 2013 when in fact the date of departure was 27th October. Nor am I persuaded that her evidence about who she lives with is materially undermined by the Albanian records obtained by the Respondent. The Appellant says that she lived with her husband and his family; the 'family book' eventually produced by the Respondent (at the hearing before me) says that she, the children and H lived together in their own house. In the absence of evidence about how accurate that record is I am not prepared to rely upon it. It may be, for instance, that the family book simply reflects the nuclear unit. The Appellant's evidence that she moved to live - in the apartment above - her in-laws after marriage is also consistent with societal norms in northern Albania. The Respondent and the Competent Authority both held against the Appellant the fact that her husband mentioned working for the betterment of his 'family' when he was encountered trying to enter the United Kingdom illegally in 2014. I attach no weight to this matter.

As the Appellant points out, he has family other than her (his parents etc in Durres; possibly another partner and children in Greece). Finally I am not prepared to reject the Appellant's account that she was driven back into Albania because there are no official records of that journey: it is quite likely that traffickers would use routes which they knew they could pass without a trace.

26. Before drawing negative conclusions on the evidence I have once again reminded myself that for the purpose of this appeal the Appellant is a vulnerable witness and that all of her evidence must be assessed in light of her mental health issues, and her assertion that she is a victim of trafficking. Specifically I have considered whether trauma or depression might impact upon her ability to clearly recall the matter in question. Even taking those matters into account I am satisfied that there are some material discrepancies in the Appellant's account which must detract from her overall credibility.
27. There is a material inconsistency in the evidence about how the Appellant and her children got to France in late 2015. We now know, from checks conducted by the Respondent, that the Appellant flew with her children direct from Tirana to Paris. At Q179 of her asylum interview she was asked "How did you leave ALB to go to FRA?" to which she replied "we left the house and we went by car all the way to France". Ms Benitez asked me to accept the evidence in the Appellant's witness statement that this was a misunderstanding and that in that reply the Appellant was in fact describing her journey *back* to Albania. I have considered that explanation, but am unable to accept it. That is because it is clear from the context, and the questions that follow, which journey she is being asked about. For instance the question that immediately follows was "did you use documents to travel to FRA"; at Q190 the Appellant was asked how long the journey "to FRA" took; at Q192 she is asked "where in FRA" she arrived; at Q199 she was asked what happened when she arrived "in FRA". Having been repeatedly alerted to the fact that she was being asked about the journey *to* France I am unable to accept that the Appellant misunderstood. I further note that at Q238 she is asked "how did you travel from FRA to ALB?" to which she replied "by car **again**" (my emphasis). Taking a flight out of your country of origin for the first time, and getting through immigration control at a French airport, is not likely something that the Appellant could have forgotten. I am satisfied that in her responses to the officer the Appellant deliberately sought to conceal the fact that she flew with her children to France in October 2015.
28. This leads me to the next issue arising in respect of this part of the account. The Appellant has consistently stated that T obtained the passports for her and her children. At Q181-188 of her asylum interview record she states that she and the children were taken to the passport office on one occasion, to make the application. She did not try and alert anyone in the office because she could tell by the way that T was talking to the passport office staff that they were working with T. She is clear that it was only on one occasion: "one day I went there" [Q182] and "only this day he took us" [Q186]. In her oral evidence before me the Appellant equivocated on this point:

Q. Were kids with you at passport office in Tirana

A. When I applied or picked them up?

Q. Either time

A. When we applied yes they were with me – we needed to take photos. **When we picked them up** they were not with me.

Q. So you went to the passport office twice?

A. No the person picked me up not me. The first time when the application was made me the children Merita and [T] went. Photos were to be taken. Mine and childrens. When the passport was released nor me or the children were present.

29. Although the Appellant eventually reverted to the account that she had given at her asylum interview, I cannot overlook the clear inconsistency in the Appellant twice indicating that she attended the passport office on two occasions. Her evidence about how the passports were obtained, and how she and the children travelled on them, has been less than clear. No satisfactory explanation has been offered as to how T would have obtained the documents necessary from the Appellant's husband and/or the proxy enabling them to travel. The Appellant has stated that she did not know where she was staying whilst being trafficked in Albania, but under cross-examination, however, it became clear that she must have known that she was in Tirana. Not only did she hear that mentioned, but was on her account taken from the house to the passport office in a car during the day, when it would have been quite evident that she was in the capital.
30. There are also elements of the Appellant's account which I have not found to be plausible.
31. The Appellant states that she decided to run away with T after having only met him once, in a shop whilst she was buying vegetables. I appreciate that a woman in an unhappy marriage, subject to domestic abuse and humiliation, is more likely to throw caution to the wind when planning her escape, but I find it very hard to believe, even applying the lower standard of proof, that she would have put her children under the control of a man she had met once before and knew virtually nothing about.
32. The Appellant states that her family have disowned her and that she would receive no support from them should she return to Albania. I have considered the general background evidence on social convention in Albania (see for instance in TD and AD) and I accept that for very conservative, uneducated families in Northern Albania it is the norm for women to become the 'property' of their husband and his family upon marriage. As such I would be prepared to accept that the Appellant's parents might reject her if they became aware that she had left her husband or that she had become 'kurva', that is to say 'tainted' by her trafficking experience. Although the Appellant has offered next to no detail about her relationship with her parents, in

light of this country background information I am prepared to accept that it is possible that this relationship could now be severed or strained. What I am unable to understand is the Appellant's evidence about her sister. First, no credible explanation is given about how the Appellant knew where to find her sister when she jumped in that cab in November 2015. On her evidence she had been in the hands of traffickers since March 2013, during which time she had no contact with anyone, and yet she was able to find her sister, without any difficulty, somewhere on campus. Second, it is the Appellant's evidence that a man she had never met before, her sister's friend, arranged her illegal departure from Albania and paid smugglers the not unsubstantial 'fare' for her and the children to cross Europe and get to the United Kingdom. No credible explanation is offered as to why this man would do this, with no arrangement for the Appellant to stay in touch, or ever repay this large sum of money. Third, the Appellant states that after all of that, she and her sister made no arrangement to stay in touch. It is simply not plausible that a woman would load her sister and young nephews into the back of a lorry and not want to know that they arrived at their destination safely. I do not accept, even on the lower standard of proof, that the Appellant has lost contact with her sister or has in some way become estranged from her. If her sister was going to cut the Appellant off because she had been trafficked, she would not have asked her friend to pay (what is generally) a substantial sum of money to people smugglers in order to keep her safe.

33. Pulling all of this together I suspect that some elements of the Appellant's claim may be true: her emotional response, her depression and anxiety, the evidence of her friends and her own detailed testimony are indicators of that. Something has plainly happened to this woman to make her fearful and upset. She has not however demonstrated that *this* account is true. This account contains significant discrepancies which go to the core claim of trafficking. For the reasons set out above I do not accept as reasonably likely her account of running away with T, being transported by him to France, or any aspect of her sister's involvement. It follows that I do not accept that the Appellant has demonstrated that she left her husband in the circumstances described, was a victim of trafficking by T, or that she has lost contact with her sister. Her sister has assisted her once, and there is no reason why, upon the Appellant's return to Tirana, she would not do so again.
34. What then of the significance of the Appellant's new baby? Mr Melvin asked me to find that the father is likely the Appellant's husband, whom the Home Office last encountered trying to enter this country in 2014. Mr Melvin postulated that he could be living in this country illegally, waiting for his wife and children to be granted some form of leave then using that to regularise his position. That is certainly a possibility, and I note that no DNA evidence has been submitted to establish that the children have different fathers. As to the Appellant's account of her night out in a Stoke club this seems highly implausible, particularly when set in the context of the overall claim. Would the Appellant, on NASS support with two children, spend money on going to a nightclub? Would the Appellant, who narrates a recent personal history of sexual abuse, have sex with a stranger in a toilet? Both of these questions have particular resonance given the Appellant's upbringing in conservative Northern Albania, and I further note the absence of any supporting evidence from the women

whom the Appellant claims to have gone out with. She has called evidence from women that she lived with four years ago, but none from the women with whom she most recently lived, and who could easily corroborate this significant element of the claim. I have given weight to the evidence of Witness 1 and Witness 2, both of whom gave perfectly credible evidence to the effect that as far as they are concerned the Appellant is a single mum. I have considered their evidence in the round, but standing back and viewing the evidence as a whole I am not satisfied that the Appellant has demonstrated that her third child was conceived in the manner she has described. I do not have the evidence before me to make a positive finding one way or the other about the paternity of that child, but I am not satisfied that the father is a stranger.

35. For the foregoing reasons I find that the Appellant has failed to discharge the burden of proof and show that she has a well-founded fear of persecution in Albania from T or any other traffickers. If she returns to Albania today she will have, at the very least, the support of her sister, who is apparently living independently in Tirana. As Ms Benitez acknowledged in her submissions, any discrete claim under paragraph 276ADE(1)(vi) of the Rules would stand and fall on the same factual matrix, a factual matrix I have rejected.
36. Finally, I would note that the Appellant's third child, whose date of birth is known to the Home Office, should also now be treated as her dependant.

Decisions

37. The decision of the First-tier Tribunal has been set aside. I remake the decision in the appeal by dismissing it on asylum and human rights grounds.
38. This is a protection appeal involving three minors. Having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders* and Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* I consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”



Upper Tribunal Judge Bruce
7th March 2020