



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

**Appeal Number: PA/12763/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 11<sup>th</sup> November 2021**

**Decision & Reasons  
Promulgated**

**On 25<sup>th</sup> November 2021**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

**MA  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Toal, Counsel, instructed by Kilby Jones Solicitors LLP

For the Respondent: Ms A Everett, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Albania. Her date of birth is 24 March 1987.
2. The matter came before me on 11 November 2021 in order to determine whether the First-tier Tribunal (Judge Karbani) made an error of law when dismissing the Appellant's appeal (in a decision promulgated on 29 April 2021 following a hearing at Hatton Cross on 14 April 2021) against the

decision of the Secretary of State on 16 December 2020 to refuse her claim on protection grounds and Article 3 health grounds, the Appellant having been granted permission to appeal by Upper Tribunal Judge Lindsley on 9 August 2021.

3. The Appellant entered the UK on 15 February 2016 with her daughter (AA) whose date of birth is 2 September 2007. She claimed asylum on arrival. The Appellant's claim is that she was forced into prostitution in order to repay her husband's debts and that having escaped from her captors is now at risk of persecution (of being re-trafficked) on return to Albania. The Appellant claimed that returning her and AA to Albania would breach UK's obligations under Article 3 ECHR as a result of AA's health. She suffers from cystic fibrosis
4. The National Referral Mechanism (NRM) conclusive grounds decision was that the Appellant was not a victim of trafficking (VOT).
5. The Appellant gave oral evidence at the hearing before the First-tier Tribunal. She relied on a report from Dr Sarah Whittaker-Howe of 16 June 2020. The judge noted that the expert found that the Appellant does not meet the full criteria of PTSD, however the expert said that this was not to be taken as an indication that reported events did not happen. The judge noted that the expert found that there was a great degree of similarity being triggered by the type of sexual abuse reported and the Appellant's reports appeared genuine. The judge stated that the expert notes that the impact of the Appellant's daughter's illness and considered the Appellant to have unreported the extent of her worry and sadness and that this was exacerbated by the uncertainty of her asylum claim. The judge recorded that the Appellant is not in receipt of any psychological treatment but considered at high risk of developing delayed onset PTSD. The judge said at paragraph 41 that she attached "some" weight to the expert's report. The judge stated as follows at paragraph 42:-

"42. I find that the Appellant is not currently diagnosed with a mental health condition, given the above indications. There is no evidence that she has been in receipt of any medication or counselling for mental health issues from a referral by her GP and no treatment is proffered as a result of this report. I find that her current mental health could be taken as an indication of events preceding her arrival in the UK, but that she has also been affected by her daughter's illness and her immigration status which must have been stressful. I find the risk of her developing delayed onset PTSD is speculative, as there is no prognosis or timescale set for this possibility. I find this report is not supportive of her having experienced trafficking in Albania or being at risk of a decline in her mental health if returned".
6. Before the judge there was also a report from Mr Gravett. Mr Gravett is an expert in human trafficking. His evidence was that the Appellant in his view had given a credible account. The Appellant's position was that Mr

Gravett is a criminal investigator and pioneer in human trafficking. The judge stated in respect of Mr Gravett's evidence:-

"38. I have considered the report provided by Mr Gravett, whose expertise on trafficking is not in dispute. Mr Gravett comments at para 224 that there are a number of trafficking indicators present in her account, referring to the core aspects of her claim to have been forced into prostitution for repayment of a debt.

39. I have noted that the expert comments takes general points of credibility about the asylum interview process, for example, whether the interpreter has read the interview preamble to the Appellant verbatim via an interpreter, is not specifically signed. Equally, it is not for this expert to comment on the psychological impact of warning in interview that false statements may constitute a criminal offence will make them fear self-incrimination (para 218-222). He continues at para 227-229 to comment on the types of questions she ought to have been asked. I have also noted comments such as 'it is unlikely [the Appellant's] husband has repaid the debt' is not based on any evidence from the Appellant herself. He also made comments such as the 'interviewers have consistently failed to prove crucial elements that would the case that she is a victim of trafficking' (para 279) which fundamentally understands the burden of proof for asylum claims.

40. I have read through this report carefully, bearing in mind his remit and expertise. At paras 277-279 he notes that the Appellant's account has been consistent and the core details of the claim are the same and that all accounts have elements which may be slightly different for a variety of reasons. He has not identified what those 'slightly different elements are' and has not produced his note of her account acquired using his 'best practice investigative interview techniques'. Accordingly, I attach little weight to his conclusion that she has provided a consistent account throughout".

7. The judge at paragraph 57 said that he was not satisfied that "[the Appellant] faces any real risk of serious harm due to her previous experiences in Albania ...". The judge went on to consider the Appellant's appeal under Article 3 in relation to her daughter having been diagnosed with cystic fibrosis. At the date of the hearing AA was aged 13.

8. The judge had before him the evidence of Ms B Carr, a paediatric respiratory consultant from the Royal Brompton Hospital. In relation to the medical evidence the judge stated as follows:-

"59. The Appellant relies on the evidence of Miss Siobhan B Carr, paediatric respiratory consultant, Royal Brompton Hospital. In her letter dated 29 September 2020, she indicates that the

medium survival for infants born with cystic fibrosis is 49 years. The equivalent statistics were reported by Albania for the first time in 2017, and Miss Carr considers that the patient numbers reported (123 patients), means survival predictions would not be accurate. Survival is linked with age, and the average of age of people with cystic fibrosis in Albania is 8.8 years compared with 22 years in the UK. Miss Carr refers to the state funded health service but a report compiled in 2012 indicated many deficiencies and areas for improvement (<http://childhealthinternational.org/projects/Albania/>).

60. Miss Carr indicates that new disease modifying medicines have been approved for funding and use by the NHS in the UK. [AA], has been eligible to receive this, starting with Symkevi and is currently on Kaftrio. The medications have slowed down disease progression. There is no authorisation for these medications in the Balkans, although the pharmaceutical company has started working on seeking authorisation. As at the date of the report, this medication would not be available in Albania. The Appellant has also produced a copy of European Cystic Fibrosis Society Patient Registry, Annual Data Report 2017, which notes that Albania has one individual centre (Mother Thereza Hospital Centre, Tirana).
62. The Appellant also relies on a letter from Michele Puckey, consultant paediatric clinical psychologist, dated 19 June 2020, reporting on [AA's] mental/psychological needs and the support she and her mother are receiving. [AA] reports that she is bullied, and it is recommended that she applies to the local authority for an educational health care plan to support her education moving forward. The Appellant does not access any formal care, and was talked through why she is seeking to remain in the UK and what information to share with [AA]. She reports 'with confidence' that [AA] and the Appellant's repatriation would be likely to add trauma for both. This has not been discussed with [AA] as she is not fully aware returning to Albania is a possibility. The report cannot answer impact of withdrawal of psychological support. It concludes that [AA's] best interests are with her mother, where they can live and thrive, which is not possible in Albania. She refers to the report of Dr Carr, about shorter life expectancy in Albania.
63. Having considered the source material referred to by Dr Carr, I am not satisfied that the average age of cystic fibrosis patients being 8.8 years old is an indication that this is the average life expectancy of those affected with cystic fibrosis in Albania. As Dr Carr indicates herself, Albania has only started reporting figures from 2017 from which survival predictions would not be accurate. There is no further reference to any other specific aspects of the report as to how that information should be

translated or extrapolated, such that I can reach a conclusion even to the lower standard of proof about the difference in life expectancy for those living with cystic fibrosis in the UK compared with Albania. Therefore I am not satisfied that it is a real risk that the Appellant's life expectancy will be shortened on the basis of that information alone.

64. I have considered that the Appellant is currently on medication which was recently approved in the UK, called Kaftrio. The Appellant reported that [AA's] hospitalisation used to occur every month or every two months, and she would be admitted for three weeks or even a month on occasion. Since taking this medication, she has been hospitalised at the beginning of April 2021 and this is her first hospitalisation for six months. Her lung capacity has improved from 70% to 107% even when she is at home. It is apparent that the effect of this medication on [AA's] health has been positive.
65. However it is for the Appellant to show that she will not be able to acquire this medication, or a reasonable alternative in Albania. The Appellant relies on the evidence of Dr Carr who suggests that at the time of writing in September 2020, authorisation had been sought in the Balkans. The Respondent relies on a report from the European Medicines Agency, indicating that Kaftrio medication has been approved in Europe since 21 August 2020. This indicates that the authorisation of medications can be fast changing and has become widely available in Europe. Therefore although I am satisfied it was not available at the date of Dr Carr's report in Albania, which of course is not in Europe, I am not satisfied that remains the case as at the date of this appeal. I therefore find that the Appellant has not demonstrated that [AA] will not be able to procure this medication in Albania.
66. The Appellant did not make any other specific submissions about treatment that [AA] is currently receiving that she will not be able to continue to receive or access in Albania. She was treated for her illness in Albania prior to coming to the UK, and there has been no suggestion that the hospital treatment she receives on a regular basis, aside from the medication, is not available in there. I accept that [AA] and the Appellant currently receive a holistic set of services in the UK, but according to the letter of Dr Puckey, it is not obvious that they are regularly accessing the psychological service such that its removal will have any notable impact on their mental health. Although I attach some weight to her opinion that she is confident that their removal will add to their 'trauma' but in the context of this appeal, I find that this is too vague a description as to the practical effects it will have on either [AA] or the Appellant. There is no consideration of their ability to cope with the change or the facilities that may be available in Albania to assist them. Overall, I am not therefore

satisfied that the psychological impact of removal from [AA's] current medical regime on her or her mother, will lead to any discernible impact on their mental health.

67. I find that the Appellant has not discharged her burden to raise a prima facie case that [AA] will not be able to access the treatment and care that she requires via specialist services at Mother Thereza Hospital, Tirana. I find that the Appellant, as an educated woman and a competent mother who has always done her best to secure medications and treatment, will continue to do so on their return. I am not satisfied that [AA] will suffer a serious, rapid or irreversible decline in her health resulting in intense suffering or a significant reduction in life expectancy to meet the threshold set out in AM (Zimbabwe)".

9. The judge went on to dismiss the appeal on Article 3 grounds.

### **The Grounds of Appeal**

10. The grant of permission is on all grounds. The grounds comprise five grounds of appeal.
11. Ground 1 asserts that the judge's approach to the psychologist's evidence is erroneous. The expert diagnosed the Appellant as presenting with some symptoms of PTSD. The expert at paragraphs 95-97 of her report stated as follows:-
  - "95. In my opinion [MA's] PTSD symptoms share a great deal of similarity to being triggered by the type of sexual abuse that she reported to me.
  96. My opinion is based on the content and presentation of the intrusive and distressing memories that cause stress and acute physical reactions, which are to her reported experience of being raped and forced into sex worker.
  97. I have considered that I only have [MA's] self-report of intrusive memories to go on, however, I have considered that her reporting of these memories was spontaneous, rather than in response to direct questions, and she made no attempts to exaggerate the nature of these memories; for example, I directly asked if these memories ever took on the form of flashbacks or nightmares, but she denied this. I also observed her experience distress when she recounted memories of being raped and forced into sex work, which based on my clinical experience, gave every impression of being genuine".
12. The ground refers to the finding of the judge at paragraph 42; "I find this report is not supportive of her having experienced trafficking in Albania".

13. It is asserted that the expert's opinion is prima facie strongly supportive of the Appellant's account of having been trafficked for forced prostitution. In order to treat the opinion as "not supportive" of the Appellant's account the judge was obliged to give a carefully reasoned explanation, however the judge provided no reasons capable of supporting that conclusion. In the absence of reasons the conclusion that the report did not support the Appellant's account is unreasonable.
14. Ground 2 asserts that the judge's approach to the trafficking expert's evidence is erroneous.
15. Bernard Gravett is a retired superintendent in the Metropolitan Police. He had specialised in the investigation of human trafficking and since retiring from the police in 2011 has been an independent consultant on human trafficking. He interviewed the Appellant for the purpose of preparing his report. The judge said at paragraph 38 that the expert's "expertise on trafficking is not in dispute", however the assessment of the evidence is legally inadequate because the judge's reasoning fails to show that "every factor which tells in favour of the applicant has been properly taken into account; Carnwath LJ in R (YH) v Secretary of State for the Home Department [2010] EWCA Civ 116, para. 24".
16. In particular, Mr Gravett said at paragraph 312 of his report "I believe that her accounts present an honest outline of events". He based his opinion on, inter alia:-
  - (i) his evaluation of the Secretary of State's interviews with the Appellant (of which he said "it is clear that she was communicating freely and there is evidence that she was giving accurate information" and "a great of detail";
  - (ii) his long experience as a criminal investigator and his use of "clear best practice guidance when we are investigating and interviewing victims of trafficking";
  - (iii) his own interview with the Appellant using "the UK best practice 'investigative interview techniques' as recommended by the College of Policing";
  - (iv) the presence in her account of "many of the indicators of a victim of sexual exploitation";
  - (v) the consistency of the Appellant's account as between all the occasions on which it was given.
17. The judge at paragraph 40 said "I attach little weight to his conclusion that she has provided a consistent account throughout". However, the judge failed to acknowledge let alone give reasoned consideration to his distinct and more significant conclusion that she had given an honest account. Whilst the finding of the material facts is a matter for the judge, the opinion of an expert criminal investigator that the Appellant's account was

honest was plainly a consideration that she was bound to take into account and the judge was bound to explain what she made of it (see MN and IXU v Secretary of State for the Home Department [2020] EWCA Civ 1746: “decision makers should in each case assess whether and to what extent any particular expert evidence relied on by an applicant supports their case as a matter of rational analysis”).

18. Ground 3 asserts that the judge applied the wrong standard of proof. It is asserted that there is clear evidence in the judge’s reasoning that she applied the wrong standard of proof including in respect of key elements of the Appellant’s account of being persecuted. In particular as follows:-

(i) Rejecting the Appellant’s account that she is not in contact with her in-laws, the judge said “I find it is reasonably likely that she [is] in contact with her in-laws, that they were supportive and that they will continue to support the Appellant and her child on return” (see paragraph 51).

(ii) The Secretary of State in her reasons for refusal rejected the Appellant’s account, in part because she was unable to find evidence that the hotel in which she claimed to have been exploited existed. At paragraph 52 the judge said:-

“I accept that there may well be a Hotel or Bar Colombo, providing ‘adult services’ and Ben Haxia is a known individual. However, the Appellant was from Durres and living in Kabaje, so I find there is a real possibility that she gleaned this information from living in those areas, and that adds little corroboration to her account”.

(iii) “I find that her captors are reasonably likely to have kept a close eye on her actions and belongings. I find it implausible that she was able to hide her tips, in the room and on her person, before being taken to the hospital, if she was being held against her will”.

19. It is well established that factual matters are to be taken into account in favour of the Appellant if there is a “real possibility” or a “reasonable likelihood” that those factors occurred: see Karanakaran v Secretary of State Home Department [2000] Imm AR 272. Instead of doing that the Tribunal relied against the Appellant on findings that there is a “real possibility” or “reasonable likelihood” that the facts were not as claimed by the Appellant. The standard applied by the judge was the “antithesis” of that she was required to apply.

20. Ground 4 asserts that the judge made unreasonable assumptions about how the Appellant’s persecutors could not have behaved in the way that the Appellant claimed. The judge said “I do not find it credible that she was taken to hospital for vomiting and headache, if they did not provide her with medical attention for a broken finger”. That is unreasonable. The



broken finger was treated as trivial by her exploiters (“they said it was just something little, nothing serious and it would be OK by the time”, see IAR Q238).

21. The judge found that it was implausible that the Appellant could have hidden tips in her room. There is no reasonable basis upon which the Tribunal could conclude that there was no real possibility of the Appellant having been able to do that.
22. Ground 5 asserts that the judge unlawfully rejected the claim in relation to the Appellant’s daughter. In Albania the current figures relating to the average age of death for those with cystic fibrosis suggest that life expectancy is not beyond childhood. In Albania only 6.5% of cystic fibrosis patients were adults while in the UK the figure was 56%. The judge when referring to Dr Carr’s evidence said that it was that “the average age of cystic fibrosis patients (in Albania) being 8.8 years old is an indication that this is the average life expectancy of those affected with cystic fibrosis in Albania”, however this was not Dr Carr’s evidence. Her evidence was that 8.8 years was the average age of the population of those with cystic fibrosis in Albania and not the average life expectancy. It was her further evidence that only 6.5% of patients in Albania were adults compared with 56% in the UK. The Tribunal misunderstood the evidence and had regard to irrelevant considerations.
23. The Tribunal said:-

“There is no further reference to any specific aspects of the report [the ECFS Patient Registry Annual Data Report: 2017] as to how that information should be translated or extrapolated, such that I can reach a conclusion even to the lower standard of proof about the difference in life expectancy for those living with cystic fibrosis in the UK compared with Albania”.

The Tribunal erred by ignoring Dr Carr’s explanation that as well as using national registry data to calculate predictions of survival “models exist that link predicting survival to other chronic health status models, such as lung function, infection status, age and others”. Dr Carr provided the citation from the relevant academic literature dealing with such models. Dr Carr expressly acknowledged that the patient numbers reported in the ECFS – PR for Albania (123 patients) mean that any statistical calculation for survival predictions would not be accurate. She went on to explain:-

“1. Therefore I needed to use the proxy data known to be associated with better health and survival in other countries known to have more advanced cystic fibrosis care”.

She cited the relevant academic work which explains that methodology. The Tribunal failed to have regard to this.

24. It is unreasonable for the Tribunal to have treated Dr Carr's evidence given her international eminence as an epidemiologist of cystic fibrosis as unreliable for showing a real risk that life expectancy in Albania is not beyond childhood but is significantly longer in the UK.
25. The Tribunal accepted Dr Carr's evidence that Kaftrio, a drug being taken by AA which ameliorates her condition, was not available in Albania at the time Dr Carr wrote her letter on 20 September 2020. However, the judge found that she was not satisfied that that remained the case at the time of the appeal. The judge erred by making that finding because she was mistaken as to the effect of the report relied on by the Secretary of State. She said that "a report from the European Medicines Agency, indicating that Kaftrio medication had been approved in Europe since 21 August 2020", however the report relied on by the Secretary of State was dated 26 June 2020 and said "EMA's Human Medicines Committee (CMHP) have recommended granting a marketing authorisation in the European Union for Kaftrio".
26. Evidence that the drug had been or was to be approved in the European Union does not constitute evidence that it has been approved and that it is available in Albania which is not in the European Union. It was unreasonable for the Tribunal to treat that evidence as if it did establish that the drug was no longer unavailable in Albania.
27. Where the Appellant has established the existence in the recent past of a fact which, ex hypothesi, gives right to substantial grounds for believing there is a real risk of Article 3 being breached (here, the unavailability of Kaftrio in Albania), it is not for the Appellant to prove that that fact continues to exist at the date of the hearing. The Tribunal should decide the appeal on the basis that that fact continues to exist unless evidence is produced to satisfy the Tribunal that it has ceased to exist. That approach is consistent with the procedural requirement described in Paposhvili at paragraph 187 that where evidence capable of establishing a real risk was adduced, it was for the returning state to "dispel any doubt raised by it": see AM (Zimbabwe) v Secretary of State Home Department [2020] UKSC 17.

### **Error of law**

28. Ms Everett conceded grounds 1 and 4. She accepted that the judge made an error of law in respect of the evidence of the psychologist. Similarly she conceded that the judge erred in respect of the assessment of the evidence and the application of the legal test in respect of Article 3 and the Appellant's daughter.
29. Following the concession, I set aside the decision of the First-tier Tribunal. It is not necessary for me to determine grounds 2,3 or 4. None of the findings of the judge are preserved because the errors as conceded by Ms

Everett infect the whole decision. The matter is remitted to the First-tier Tribunal for a de novo hearing.

**Notice of Decision**

The decision of the First-tier Tribunal is set aside.  
The appeal is remitted to the First-tier Tribunal for a re-hearing.

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

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 their 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            Joanna McWilliam

Date 17 November 2021

Upper Tribunal Judge McWilliam