



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

Appeal Number: PA/00044/2019

THE IMMIGRATION ACTS

Heard at Field House

On 21 August 2019

**Decision & Reasons
Promulgated
On 18 February 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**M.B.
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Gilbert of Counsel instructed by Duncan Lewis & Co.
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Norris, promulgated on 24 April 2019, dismissing the Appellant's appeal against a decision of the Respondent dated 19 December 2018 on protection grounds and human rights grounds.
2. The Appellant is a citizen of Albania. Her personal details are a matter of record on file and are not stated here in keeping with the anonymity direction that has been made in these proceedings and is hereby continued. Suffice to say for present purposes: when she claimed asylum

on 25 February 2015 she had just turned 20; she has two sons who are dependents in these proceedings born in April 2015 and October 2018.

3. The Appellant claims: that she was kidnapped in Albania in 2013 and raped; she was trafficked to Italy in June 2013 and forced to work as a prostitute; in June 2014 she was moved to Belgium and then to the UK; she was able to escape whilst in the UK. On 25 February 2015 she claimed asylum. The Appellant fears that if returned to Albania she would be located by her kidnappers and traffickers who would harm her or her children. She has also expressed concerns about the circumstance of each of her sons, conceived by different fathers, having been born out of wedlock.
4. The Appellant's asylum claim was initially refused by the Respondent on 11 August 2015, and certified as clearly unfounded. It appears that there then followed a protracted process of representations and reconsiderations - seemingly running in parallel with a referral under the National Referral Mechanism ('NRM') in respect of the Appellant's claim to have been trafficked - including a judicial review application: ultimately the Appellant's claim for protection was refused on 19 December 2018 for reasons set out in a reasons for refusal letter of that date. Although under the NRM a positive reasonable grounds decision was made, the Appellant also received a negative NRM Conclusive Grounds decision on 4 April 2018. (Something of the procedural history is set out in the RFRL at paragraphs 22-30; a more detailed history is set out in a chronology prepared by the Appellant's representatives that was before the First-tier Tribunal.)
5. The Appellant appealed to the IAC.
6. The First-tier Tribunal dismissed the appeal for reasons set out in the decision of Judge Norris promulgated on 24 April 2019.
7. The Appellant applied for permission to appeal to the Upper Tribunal. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald on 28 May 2019. In material part the grant of permission is in these terms:

"The first ground of appeal is that the Judge by her conduct and comments and determination displayed an appearance of bias. The second ground is that the Judge took account of material not available to the parties before reaching a decision. Other grounds are put forward including that the Judge acted unfairly embarking upon cross-examination of the appellant. The witness statement of the

barrister [who appeared on behalf of the Appellant before the First-tier Tribunal] is attached [to the Notice of Appeal].

The Judge's decision extends to 33 pages and numerous reasons are given for dismissing the appeal. Nevertheless, given the allegations of bias etc it seems appropriate to grant permission to appeal on all grounds."

8. The appeal was listed before the Upper Tribunal on 20 June 2019. On that day the presiding Judge adjourned the appeal on the basis that it was considered appropriate to obtain a response from the First-tier Tribunal Judge in respect of the allegation touching on her conduct and possible bias. A 'Memorandum' has since been prepared by Upper Tribunal Judge O'Connor, dated 2 July 2019, and disseminated to the parties, in which the Judge's response to the Grounds is set out.

Consideration of Error of Law

9. The Grounds of appeal in support of the application for permission to appeal comprise 6 grounds, drafted by Ms Griffiths of Counsel who had appeared before the First-tier Tribunal. Ms Griffiths attended the hearing before the Upper Tribunal not as a representative, but prepared to give evidence in support of her statement (which had been appended to the Notice of Appeal in support of the Grounds). In the event Ms Pal did not seek to cross-examine Ms Griffiths, and accordingly she was not called.
10. Before me, Mr Gilbert sought to introduce a seventh ground of appeal drafted by him. Ms Pal did not object to the grounds being amended to include this additional ground, and accordingly I permitted such amendment.
11. In summary, and utilising the headings of the Grounds themselves, the grounds of challenge are:
 - (i) Ground 1: *"The FtTJ by her conduct/comments and determination displayed an appearance of bias thereby depriving the Appellant of a fair hearing"*. This challenge is focused on the Judge's observations in respect of a country expert report relied upon by the Appellant, and the Judge's engagement with a report by the same expert in an earlier appeal.
 - (ii) Ground 2: *"The FtTJ took account of material not made available to the parties before reaching her decision, giving rise to unfairness"*. This ground is closely linked to Ground 1: the 'material not made available' is the decision of the Judge in the previous case involving

the same expert, a passage from which the Judge quoted in the Decision and Reasons herein.

(iii) Ground 3: *“The FtJ failed to deal with and/or give reasons for rejecting relevant material, and in so doing, erred in law”*. Having aired her concerns in respect of the expert report at the hearing, the Judge had afforded the Appellant an opportunity to make written representations after the hearing. The Appellant’s counsel sent an email on 12 March 2019 seeking to address the issue raised by the Judge. No reference was made to this communication in the Decision.

(iv) Ground 4: *“The FTT acted unfairly in embarking upon cross-examination of the Appellant”*. Complaint is made that the Judge asked *“a large number of questions of the Appellant (approximately 90) on matters relating to the credibility... [Which] effectively amounted to cross examination”*. It is said that the questions exceeded in number those of the Respondent’s Presenting Officer, and that such questioning *“was excessive, inappropriate, leading and contained within it the risk of apparent bias to an informed observer”*.

(v) Ground 5: *“The FTT materially erred in failing to properly apply the ‘Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance’ given the Appellant’s vulnerable mental health”*. This basis of challenge substantially overlaps with Ground 4 in that it is the Judge’s questioning that is said to illustrate the claimed error of approach.

(vi) Ground 6: *“The FtJ failed to have regard to material evidence relied on by the Appellant”*. It is pleaded that beyond mentioning the existence of a report by an independent trafficking consultant, there was no further reference to the report or its contents. It is also pleaded that the Judge disregarded other country evidence.

(vii) Ground 7: *“The Tribunal erred with respect to its treatment of MB’s medical evidence and the approach to be taken towards a vulnerable witness”*. It is submitted that the Judge had in her approach to a expert medical report, and that such error of approach impacted upon consideration of the report of another medical practitioner, and also the requirement to evaluate the Appellant’s evidence with regard to the nature and extent of her vulnerability.

12. Mr Gilbert commenced his submissions by addressing Ground 6 which he characterised as a ‘cleaner point’, different in nature from the other Grounds. I also consider it convenient and appropriate to address this Ground first, because I have reached the conclusion that it is of sufficient merit to justify setting aside the Decision of the First-tier Tribunal for error of law.

13. In support of her case the Appellant had relied on, amongst other things, a report dated 26 August 2016 by Dr Abigail Stepnitz (Respondent's bundle before the First-tier Tribunal at I8-I16). Dr Stepnitz professed expertise *"based on my own experience identifying and supporting trafficked people for more than eight years, as well as my familiarity with a wide range of expert reports, publications, government, NGO and intergovernmental guidance and other relevant sources"* (I8). Dr Stepnitz stated: *"there are indicators in [the Appellant's] case that she was indeed trafficked from Albania to Italy and the UK"* (report at paragraph 25); that the Appellant's *"early childhood and young adult experiences... are highly consistent with the narratives of other women who have been trafficked from Northern Albania"* (paragraph 26); *"I find her account of sexual exploitation to be consistent, plausible and similar to the accounts of other women trafficked from Northern Albania to both Italy and the UK"* (paragraph 28); and *"I find her account of sexual exploitation highly credible"* (paragraph 29). Dr Stepnitz nonetheless acknowledged that there were elements in the Appellant's memory of her abduction, transfer, harbouring and escape which were either absent or inconsistent (paragraph 29), but noted in this regard the available medical evidence and considered that gaps in memory *"are undoubtedly influenced by her experiences, and in particular by her mental health at this time"* (paragraph 30). Dr Stepnitz ultimately expressed the opinion that *"gaps in her memory and expressions of confusion or uncertainty... make it difficult to conclude that [the Appellant] experienced trafficking **specifically**, as opposed to meeting the legal definition of forced labour (prostitution) or sexual assault"* (paragraph 31), and *"her account of forced sexual labour and rape/sexual assault are both credible"* (paragraph 32).
14. In addition to these particular observations in respect of the Appellant's case, Dr Stepnitz also made comments as to the manner of presentation of narrative accounts: *"In my experience the narratives of people have experienced of trafficking or forced labour are frequently disjointed, fragmented and disclosed in a non-chronological order"* (paragraph 10).
15. The Appellant's reliance on the report of Dr Stepnitz was expressly raised before the First-tier Tribunal in the Skeleton Argument drafted by Counsel as being a matter that *"significantly supported"* the Appellant's account: see Appellant's Skeleton Argument at paragraph 22(iv).
16. The Decision of the First-tier Tribunal references *"report of A Stepnitz dated 26 August 2016"* in listing the documents included in the Respondent's bundle (Decision at paragraph 3.1). At paragraph 5.1 of the Decision the Judge makes a general statement that she has *"considered thoroughly"* each of the bundles in the appeal, and further comments to

the effect that the absence of mention of “*a detail specifically*” is not an indication that it has not been read and/or its significance noted.

17. Beyond noting the existence of the report at paragraph 3.1 – a reference that does not in itself acknowledge the author’s title or otherwise indicate any consideration as to her level of expertise – there is no further reference to the report or its contents. Ms Pal is frank in acknowledging as much.
18. In addressing Ground 6 Ms Pal drew my attention to the fact that the Judge had had regard to the reports of other experts, and had made findings in the appeal pursuant to the consideration of such reports. I was invited to conclude that overall the Judge had demonstrated due consideration to the evidence, and had otherwise adequately explained her findings.
19. Even allowing for the premise of Ms Pal’s submission – that the Judge had had due regard to the medical report of Dr Abigail Selzer, the psychiatric report of Dr Krishna Balasubramaniam, and the country information report of Ms Antonia Young - I do not accept that the complete failure to engage with the report of a professed trafficking expert was not a material error of law. The evidence of Dr Stepnitz was relevant and significant; it was expressly relied upon; the Appellant was entitled to know what the decision-maker made of such evidence. Whilst I acknowledge that it is not incumbent upon a First-tier Tribunal Judge to deal with every single detail of evidence, the potential importance of Dr Stepnitz’s evidence to the Appellant’s overall case was such that a fair and just decision required not only the Tribunal to take the report into account, but to make findings on it and explain those findings in the written Decision. I do not accept that the Judge’s ‘protective’ observations at paragraph 5.1 suffice in this particular instance.
20. In my judgement the error in this regard is of such gravity and materiality that it requires the decision of the First-tier Tribunal to be set aside. Given that the error impacts on the credibility of the account, the case will require to be reheard with all issues at large; the appropriate forum is the First-tier Tribunal.
21. Given my conclusion in respect of Ground 6 it is not strictly necessary for me to engage with the other grounds of challenge. However, because of the very particular nature of the challenge under Grounds 1 and 2, I consider it appropriate that I make some further observations.

22. As indicated above, the Appellant placed reliance in part upon the evidence of a country expert Ms Antonia Young. During preliminary discussions the Judge raised some concerns in respect of Ms Young's reports. She did so with reference to a report by Ms Young that she had seen in another appeal. The Judge makes the following comments in the Decision:

"... I also raised my concerns with the report (and supplemental report) of Ms Antonia Young that had been handed up for the Appellant. I had previously had a report before me from Ms Young in another case some four months previously, in which she had been similarly instructed by [the Appellant's solicitors]. I have noted that Ms Young sought to validate her credentials on that occasion by including congratulatory emails from the representatives of successful appellants. I had raised it on that occasion with the appellant's Counsel (who was not Ms Griffiths), who had agreed with me and indeed stated that she had noted it herself. I had said that Ms Young appeared to overlook her neutral duty to the Court by including emails where she had successfully assisted the appellants, losing the appropriate balance." (paragraph 3.8).

23. The Judge then went on to quote from her Decision in the other appeal in respect of the use of *"testimonials from different cases"* (paragraph 3.8). At paragraph 3.9 the Judge set out a further critical quotation from her earlier decision, and at paragraph 3.10 commented *"Most regrettably, these defects appear in the report... in this case too"*. The Judge continued:

"These defects once more undermined Ms Young's credibility because they mean she not only exaggerates but also strays again into being an advocate for Appellant rather than an unbiased expert - the very issues for which she was criticised by the Court of Appeal in MF. I emphasised that this means I will place limited weight on her report; however, those instructing Ms Griffiths had chosen to rely on this report and I did not consider it appropriate to adjourn so that a different one could be prepared." (paragraph 3.10).

24. It is pleaded in Ground 1 that the Judge's conduct in this regard was *"indicative of a pre-existing hostility and/or predisposition towards the Appellant's country expert which arose long before the appeal had begun, which impacted on her decision in the case"*, such that there was *"a clear appearance of bias"* (Grounds at paragraph 9 and 10).

25. I do not accept this submission.

26. It is not at all uncommon for Judges in this jurisdiction to see reports in different cases from the same expert. In principle it seems to me entirely appropriate that if a Judge had concerns about a report, or an expert, in relation to one case, then if the same expert is relied upon in another case and produces a report containing the same features that had given rise to the earlier concerns, that such a matter be raised with the Appellant's advocate. This does not hint at bias, but at consistency. It is also an essentially fair procedure, because it draws to the attention of the advocate a matter that is troubling the Judge and thereby affords an opportunity for it to be addressed.
27. Nor do I consider the fact that the Judge then quoted from her earlier decision is indicative of bias. If anything, this is a point about procedural fairness and natural justice: however, in so far as the passages quoted from the earlier decision may have been directly pertinent to the Judge's concerns in the instant decision, I can see nothing in this point. Had the Judge pasted the same words into the present Decision without setting them out as quotations from her earlier decision there could be no complaint in this regard. I do not see how the fact that they are set out as quotations from an earlier case, or the fact that the Appellant's advocate had not had sight of the Judge's decision in the earlier case, makes any material difference.
28. Whether or not the Judge's criticisms of Ms Young are well founded is a different issue. The criticisms in themselves do not, in my judgement, indicate bias.
29. The Appellant's counsel before the First-tier Tribunal made observations in respect of the Judge's concerns about Ms Young's report in an email dated 12 March 2019 sent to the Tribunal further to the leave given by the Judge to make further written submissions in respect of the medical evidence. The email actually notes that no additional submissions are to be made in respect of the medical evidence, and as such it would appear the only purpose in sending it was to communicate the comments in respect of Ms Young's report - notwithstanding that on its face it is stated that counsel does "*not seek to make further formal submissions on it*". The relevant parts of the email are in these terms:

"I have noted two matters which I would respectfully draw to your attention. In respect of the emails accompanying the report, I noted that there is one which related to an unsuccessful outcome and on a fair reading it does seem that what the expert is seeking to do is simply show her reports have being useful to the court, not necessarily leading to success. On the use of the words 'literally' at page 42 of the report, having re-read the sentence in which it has been used, it does not appear that the expert is saying literally every

individual in Albania but rather it is the networks of kin and clans in which everyone knows each other, and that that Albania is formed of those networks.”

30. Ground 3 is based on the Judge’s failure to engage with the contents of this email. In the premises, it seems to me that that is a bold submission when the email is drafted in terms where it declines to make submissions in respect of the matter upon which leave had been given to provide written submissions after the hearing, and in respect of the issue upon which it does make comment, such comments are preceded with the indication that counsel was not seeking to make further formal submissions.
31. In the event, the Judge in her comments invited pursuant to the adjournment on 20 June 2019 states that she did not receive the email. I see no reason not to accept that the email may not have been passed on to the Judge.
32. As indicated above it is not necessary for me to reach any firm conclusion in respect of this basis of challenge. I merely note that there does seem to be some considerable weight to counsel’s observations in respect of the use of the word ‘literally’ as being intended to indicate that ‘literally everyone knows everyone within a network of kin and neighbours’, and not intended to indicate that ‘everyone knows everyone in Albania’.
33. I do not propose to make any findings or reach any conclusion in respect of the Grounds pleading that the Judge breached the Joint Presidential Guidance in respect of vulnerable witnesses, or otherwise inappropriately cross-examined the Appellant. For the record, I observe that the Judge has denied such allegations: in essence she states that the number of her questions, and the concomitant time taken, arose for the very reason that the Appellant was vulnerable and the Judge was seeking to ‘set the scene’ with short questions in a lead-up to the particular matters upon which clarification was sought. The Judge states that otherwise she sought to accommodate the Appellant’s vulnerability, including prompting the Appellant to take a break when she appeared distressed during cross-examination.
34. Similarly I do not propose to make any findings in respect of the amended Ground 7. It will be for the next judicial decision-maker to determine anew what weight is to be given to the available medical evidence, and to determine how such evidence corroborates the Appellant’s account, and/or offers some explanation for any gaps, discrepancies, or fragmentation of the narrative account, and the extent to which the

Appellant's evidence is to be evaluated through the prism of any vulnerabilities.

Notice of Decision

35. The decision of the First-tier Tribunal contained a material error of law and is set aside.

36. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Norris with all issues at large.

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 her or any member of her 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: **13 February 2020**

Deputy Upper Tribunal Judge I A Lewis