Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11093/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 10 June 2015	**On 22 June 2015**
Prepared on 15 June 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

V. N.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Warren, Counsel instructed by Switalski's Solicitors
For the Respondent: Mr Mangion, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant says that she is a citizen of Albania. She claimed to have entered the United Kingdom illegally with her two children on 7 August 2014, and claimed asylum that day on the basis of a fear of violence from her husband.

2. The Respondent refused the asylum claim on 28 November 2014 and in consequence she made a decision of the same date to remove the Appellant (with her children) from the UK as one who had entered illegally.

3. An appeal against that removal decision was heard and dismissed by First Tier Tribunal Judge Fisher in a Decision promulgated on 7 April 2015. The majority of the Appellant's account was conceded by the Respondent but the Respondent was not satisfied that the Albanian authorities were unwilling or unable to provide adequate protection to citizens, and the Respondent also argued that the Appellant could avoid the risk of harm relied upon by relocating within Albania.

4. The Appellant applied to the First Tier Tribunal for permission to appeal, and permission was granted by Judge Frankish on 29 April 2015, apparently on the basis that he understood the Judge to have given no consideration to the best interests of the Appellant's two children.

5. The Respondent filed a Rule 24 Notice on 11 May 2015. She argued that the grounds were misconceived.

6. Thus the matter comes before me.

Sufficiency of protection

7. The second ground, which was argued first, asserts that the Judge fell into error in his consideration of the issue of the sufficiency of state protection. The third ground is tied up with the second, because it is an assertion that the Judge fell into error in his approach to the weight to be given to the evidence of Dr Antonia Young, relied upon by the Appellant as an expert upon Albania.

8. Ms Warren argued before me, as set out in the grounds, that the Judge, wrongly, failed to attach any weight to the evidence of Dr Antonia Young. That is not however a fair representation of what the Judge said was his approach to the evidence of Dr Young [20-21]. His concluding words on the subject were *"I accept that each report must be considered on its own merits, but the lack of objectivity exhibited in Dr Young's report in this appeal leads me to conclude that I cannot attach any substantial weight to it as an impartial guide to the risk to this Appellant on return to Albania".* I do not accept the proposition, which was central to Ms Warren's argument, that the phrase "*I cannot attach any substantial weight*" is to be read as if it were "*I attach no weight"*. The Judge is entitled to have his decision read as a whole, and to have his words given their ordinary meaning. There is simply no foundation within his decision for the proposition that he declined to give any weight at all to the evidence of Dr Young. Indeed it is plain that he accepted only some of the criticisms levelled against her by the Respondent.

9. As Ms Warren accepted, Dr Young's approach to the presentation of expert evidence in an earlier appeal concerning a woman facing return to Albania, had been the subject of significant criticism by the Court of Appeal in MF v SSHD [2014] EWCA Civ 902, and by the Upper Tribunal in their decision that was the subject of that appeal. It was accepted by the Court of Appeal that Dr Young was obviously familiar with the current situation in Albania, and was therefore entitled to express an expert opinion, and that she was entitled to have considerable weight given to her evidence insofar as it was based upon her experience. It was said however to be unfortunate that she had allowed herself to be drawn into expressing views on the very issues that the Tribunal had to determine, and had done so on the basis of her general knowledge rather than on any specific information she had about the circumstances of the claimant. She had also allowed herself to be put in the position of an advocate, which inevitably had undermined her objectivity. In offering her opinions on the issue of internal relocation she had ceased to act as an expert and had taken on the role of an advocate. In those circumstances it was said to be unsurprising that the Upper Tribunal should have declined to place much weight on that part of her report, and whilst its criticisms may have been couched in harsh terms, they were well founded.

10. In this appeal the Respondent had not sought to dispute the Appellant's account of what had occurred. The only issues upon which Dr Young's evidence was relied upon by the Appellant were in relation to the Appellant's ability to avoid the risk of harm posed by her ex-husband by internal relocation, and the sufficiency of the state protection available to her. The Judge considered the approach that was taken to Dr Young's evidence within MF [20], and concluded that Dr Young had once again engaged in the same conduct which had drawn the criticism of both the Upper Tribunal, and the Court of Appeal. In his judgement he gave adequate reasons for his conclusion that in the context of this appeal her evidence had been expressed in terms that had demonstrated her lack of objectivity [21].

11. It was not argued before me that the Judge was incorrect to analyse Dr Young's evidence in the way that he did. Nor was it argued that on a fair reading of her evidence she had not fallen into the same conduct as had been criticised in MF.

12. In all the circumstances I am satisfied that the decision discloses no error of law in the Judge's approach to the weight to be given to the evidence of Dr Young. Ground three is thus exposed as merely a disagreement with the Judge's conclusion on the appropriate degree of weight to give her evidence on the issues he had to resolve. I am satisfied that there is simply no merit in the bald assertion that the Judge gave Dr Young's

evidence no weight. That is simply inconsistent with the terms of his decision.

13. Before the Judge the Appellant's advocate had expressly accepted the findings of the Upper Tribunal made in the course of AM & BM (Trafficked women) Albania CG [2010] UKUT 80 concerning the general availability of protection from the Albanian authorities against the criminal acts of non state agents. Ms Warren said that she did not seek to depart from that position.

14. It was the Appellant's case that she had been able to bring divorce proceedings against her husband on the basis of his behaviour, and although he had not consented to her application for a divorce, she believed that those proceedings were now complete and that they were divorced.

15. It was the Appellant's case that she had also been able to bring evidence to the Albanian courts with the support of the police and prosecutors against her ex-husband, with the result that not only had he been successfully prosecuted, but upon conviction, imprisoned. He had then been released from prison subject to a suspended sentence. (The claim made on the Appellant's behalf that the Albanian authorities were unwilling to prosecute her ex-husband fell away in the face of her own admission that they had in fact done so.)

16. It was the Appellant's case that in recent years she had obtained not one, but two, Protection Orders from the Albanian courts against her husband, arising out of his violence during the course of the marriage, and in reaction to her initiation of divorce proceedings. The second had been issued in her favour upon the expiry of the first, and this second order would not expire until 16 June 2015 (well after the date of the hearing). There was no obvious reason why she would be unable to obtain a third order upon the expiry of the second.

17. The Appellant accepted that she was able to bring a complaint to the Albanian police of allegations of breaches of the protection order, by him, which would then be pursued through the Albanian courts. She accepted that if breaches of that order were proven against him that he would be punished by the Albanian courts. Again, her ability to obtain not just one, but two protection orders, showed that the Albanian authorities were willing to assist her, and were willing to try to deter her ex-husband from pursuing his past behaviour.

18. It was however the Appellant's case that when she last went to the police to make a complaint about breaches of the second order she was pressured into being dissuaded from pursuing the

matter, whilst at the police station, by the godfather of her children. It was not suggested by her that on this occasion the police had refused to assist her, or to process the complaint she was trying to make. The Albanian authorities cannot be held responsible either for the actions of the children's godfather, or, for her own decision not to pursue that complaint.

19. It was the Appellant's case that the last, and apparently most serious incident of violence occurred after the occasion at the police station upon which she had decided not to report the Appellant for breaches of the protection order, but to go to live in Durres temporarily with her children and a male friend instead. Thus she accepts that this last incident of violence was never reported to the police. Given the history of past willingness to prosecute her ex-husband, convict, and ultimately imprison him, it is difficult to see any basis upon which she could properly argue that she genuinely and reasonably believed the Albanian authorities would have no interest in doing so once again in relation to this more serious incident. This last and more serious incident was said to be when she said that she and the children were showered with diesel, and then threatened with death by her ex-husband. This incident occurred the night before she had arranged to leave the matrimonial home to stay with a friend in Durres, where she says she stayed for about a month before leaving Albania. She accepts that her ex-husband did not follow her to Durres, and she accepts that there were therefore no further incidents during this period.

20. The Appellant's case was therefore that there had been a number of breaches of criminal law before she obtained the first Protection Order. The Protection Order(s) granted to her by the Albanian courts did not result in him ceasing to breach the criminal law. Thus it was argued both before the Judge, and again before me by Ms Warren that the criminal law, and the Protection Orders, were no deterrent to the Appellant's ex-husband. That may have been so. Sadly some individuals do display criminal behaviours despite the sanctions provided for in the criminal law, and continue their behaviour in the face of orders made by the courts, even in the UK. However the mere fact that this man was not deterred from his criminal conduct did not of itself establish a failure of the test set out in Horvath [2001] AC 489; the risk of harm by a non state agent, no matter how severe, or how well founded, does not of itself establish the status of a refugee. To the extent that either Ms Warren, or the grounds (which she did not draft) argue otherwise, that argument is misconceived.

21. The test posed in Horvath was whether there is in force a criminal law which makes violent attacks by persecutors punishable by sentences commensurate with the gravity of their crimes. Victims as a class must not be exempt from the

protection of the law, and there must be a reasonable willingness by the police and the courts, as the relevant law enforcement agencies, to detect prosecute and punish offenders. Incompetence and inefficiency are not however the same as unwillingness to do so on the part of the state. Nor is the failure to do so in an individual case, for it was recognised that there might be sound reasons why a criminal is not brought to justice. Nor did corruption or weakness on the part of some individuals within the law enforcement system mean that the state was unwilling to afford protection. It was said to require cogent evidence that a state which is able to afford protection is unwilling to do so, especially in the case of a democracy.

22. This was the test that the Judge clearly had well in mind, and which he rehearsed [23], before deciding for the reasons that he gave that the Appellant had failed to establish her case on the Horvath test. He did not, as Ms Warren argued, ignore the undisputed evidence of the past assaults upon the Appellant and the children. That evidence was plainly well in his mind, and it was rehearsed at some length in the course of the decision. Nor did he reject the suggestion that the Appellant's ex-husband continued to pose a risk of harm to her and the children. His finding, which he was entitled upon the evidence before him to reach, was that the Appellant and her children would have the benefit of adequate state protection from her ex-husband [25]. The evidence when viewed as a whole did not establish that the authorities would be unwilling to prosecute such a crime, or, that upon conviction of such a serious crime there would be no punishment commensurate with its seriousness.

The children - s55 of the 2009 Act

23. The Appellant has two children. They were not born out of wedlock, but during the currency of a lengthy marriage only recently terminated by divorce. They were aged 13 and 15 at the date of the hearing, and they had travelled to the UK illegally in their mother's company. They were born, and brought up in Albania, and at the date of the hearing of the appeal they had lived in the UK for a mere six months. It is plain from the decision that the Judge's view of the evidence before him was that their best interests required them to live with, and to be brought up by, their mother, and he said as much [25]. Since he was not satisfied that she had made out her case on the claim to refugee status, or Article 3 protection, he said "*On the facts of the Appellant's case, I conclude that state protection would be available to the required standard for her and her children, so that their best interests would be met".*

24. Thus although the draftsman saw fit to commence ground one with the assertion that the Judge failed to give any consideration

to the s55 duty, I am satisfied that there is no merit in this assertion. Thus the basis upon which permission to appeal was granted, that he did not do so, is misconceived.

25. Although his reasons for doing so are not recorded, Ms Warren accepts before me that the Appellant's former Counsel chose not to pursue before the First Tier Tribunal the Article 8 appeal that had been raised in the original grounds of appeal [28].

26. In these circumstances it is extremely difficult to see any merit in the remaining arguments that are raised as part of ground one, and which do not appear to engage with the guidance to be found in EV (Philippines) [2014] EWCA Civ 874. As set out above, the finding was properly made that the Albanian authorities had offered adequate protection to the Appellant, and it is plain that this finding included the provision of adequate protection to her school age children. In the circumstances the finding that there was no real risk that the authorities would fail to continue to do so was bound to follow. Thus whilst there are of course circumstances in which the Article 3 threshold for a child will be reached, when they would not be reached for an adult (SQ (Pakistan) [2013] EWCA Civ 1251), the evidence did not establish that this was one of those cases. There was no suggestion that either of the children had any medical issue. The lack of financial or practical support for the Appellant and her children from either the Appellant's own extended family, or, from the members of her ex-husband's extended family would not alter the findings on the adequacy of state protection.

27. Ms Warren argued that the inability of the Albanian authorities to eliminate all risk of harm to the Appellant and her children from her ex-husband meant that their best interests could not be served by a return to Albania, and thus the appeal should have been allowed on that basis alone. Since Ms Warren accepted that having abandoned Article 8 as a ground of appeal the Appellant could not now argue that her removal from the UK was disproportionate to the public interest in her removal, she put this argument on the basis that the risk of harm resulted in a breach of the Article 3 rights of the Appellant's children in the event of return to Albania which the Judge had not dealt with. I am satisfied that there is no merit in such an approach, and that when the decision is read as a whole, the Article 3 appeal was clearly and properly dealt with by the Judge. This was not a case of a mother facing removal from the UK with an infant child to support and care for, whose existence and needs meant that she was unable to find employment because she was a full time carer. These were teenage, albeit school age, children who could reasonably be expected to cope with a lifestyle centred upon their schooling and coping with a working single mother's lifestyle; especially one employed as a teacher.

28. Since there was adequate state protection available it was not necessary for the Judge to consider the reasonableness of any expectation that the Appellant internally relocate to avoid the risk of harm relied upon. Had he done so however he would have had to consider the fact that the Appellant was able to live in Durres without being traced for over a month. Moreover he would have had to consider that if the Appellant did not wish to return to live in the same area within Tirana that she previously lived, or to the area in which her parents live, then she did not need to do so. She had the option of living in other areas of Tirana, or other urban centres within Albania. She was not forced to make the simplistic choice between life in her old area, and life in a rural area. She had a University education, and from 2001 until her departure from Albania she had worked as a French teacher at a secondary school in Tirana, and no doubt had good references available to her as a result. A return to employment was therefore a very realistic prospect for her, and it would not mean a real risk of poverty or destitution, or the inability to provide for her children. Moreover at the date of the decision she would have had available to her the financial support offered by the IOM to those who agreed to return voluntarily; it was not open to say that it could not be taken into account because she refused to do so.

29. Whilst there was no express consideration given to the medical evidence relied upon in relation to the Appellant, beyond the Judge noting Counsel's acknowledgement that it did not go so far as to mean that the Appellant's return to Albania engaged her Article 3 rights [28], that medical evidence was extremely limited. It did not consist of any formal psychiatric diagnosis by any consultant apparently qualified to offer one, but it did consist of;

(i) a letter from a GP's practice nurse dated 10 September 2014 to say that the Appellant had reported being unable to sleep and having nightmares, being weepy and depressed, feeling that her world had fallen apart [A50].

(ii) a letter from a Primary Care Heath Practitioner dated 19 December 2014 to say that the Appellant had been referred with symptoms suggestive of depression and anxiety. She had reported occasional suicidal ideation with no intent or planning. She reported being unable to sleep and having nightmares. She was offered weekly sessions to build trust prior to a referral for more specific therapy regarding her abusive past, and a prescription for anti-depressant medication. She was ready to access Talking Therapy, and failure to do so as a result of a return to Albania was considered to be detrimental to her mental health [A52].

(iii) a letter from a Primary Care Heath Practitioner dated 12 February 2015 to say that the Appellant had reported being unable to sleep and having nightmares. Her mental health was said to have been severely affected by the Respondent's refusal of her asylum application. The opinion was expressed that if returned to Albania her mental health would deteriorate to crisis point; she was however making good progress with coping with her experiences prior to the Respondent's decision [A51].

30. As was conceded before the First Tier Tribunal this evidence falls a very long way short of establishing that the Appellant's return to Albania would lead to a breach of her Article 3 rights. Nor in my judgement did its existence and content mean that the Appellant had demonstrated such unique features that she could reasonably argue that there was inadequate state protection available to her, or that she did not have the mental strength to be able to relocate within Albania.

Conclusions

31. In the circumstances I am not satisfied that the Appellant has demonstrated any error of law in the Judge's approach to the evidence before him, sufficient to require his decision to be set aside, and the appeal reheard.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 7 April 2015 contained no error of law in the dismissal of the Appellant's appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 15 June 2015

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 15 June 2015