Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07991/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Sent**
On 20 May 2014	**On 9 June 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

LD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M McGarvey of McGarvey Immigration and Asylum Practitioners Limited
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

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Background

2. The appellant is a citizen of Albania who was born on 9 February 1988. She arrived in the United Kingdom on 16 July 2013 and claimed asylum. On 9 August 2013, the Secretary of State refused the appellant's claim for asylum and humanitarian protection and under Article 8 of the ECHR. On that date the Secretary of State also made a decision to remove the appellant by way of directions to Albania.

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 22 November 2013, Judge Whiting dismissed the appellant's appeal on all grounds. First, he did not accept the appellant's account that she had been the subject of domestic violence by her husband in Albania to be credible. Secondly, in any event, in the course of making that finding, Judge Whiting found that the Albanian State provided a sufficiency of protection to the victims of domestic violence. Thirdly, the Judge found that the appellant's removal (together with her two children) to Albania would not breach Article 8 of the ECHR.

4. The appellant's application for permission to appeal to the Upper Tribunal was initially refused by the First-tier Tribunal (Judge Warren L Grant) on 13 December 2013. The appellant renewed her application to the Upper Tribunal and on 16 January 2014 the Upper Tribunal (UTJ Grubb) granted the appellant permission to appeal. The grant of appeal identified the following arguable errors of law in Judge Whiting's determination:

> "The Grounds identify arguable errors of law. First, although the Judge gives a number of reasons for rejecting the appellant's account of leaving Albania because of domestic violence, some of those reasons are arguably inadequate. In particular, the alleged inconsistency in the appellant's evidence referred to in para 30 of the determination about whether her aunt paid only for her flight to France or also her journey from France to the UK, arguably does not exist. Further, the Judge arguably was wrong to expect the appellant to obtain supporting evidence from her family in Albania of domestic violence. Even if these errors are established, the extent to which they were material to the Judge's adverse credibility finding will need exploration. Secondly, in finding that the Albanian state provides a sufficiency of protection, the Judge arguably failed to consider the totality of the background evidence about the situation of victims of domestic violence. Finally, it was arguably speculation whether the appellant's child could obtain the necessary Hep B vaccination in Albania. It does not appear that the evidence relied upon, even if sufficient, was raised at the hearing."

5. Thus, the appeal came before me.

6. At the outset of the hearing, I raised with Mr Richards and Mr McGarvey who respectively represented the Secretary of State and the appellant whether there was any objection to my dealing with the substantive hearing as I was the Upper Tribunal Judge who had granted permission

to appeal. Both indicated that they had no objection to my dealing with the appeal.

The Appellant's Claim

7. The appellant married her husband in Albania on 13 August 2009. Their first child was born in August 2010. In February/March, her husband lost his job and started drinking heavily. As a result, he became violent towards the appellant, including throwing objects at her, kicking and punching her and committing incidents of rape. The appellant attempted to leave her husband by going to stay with her elderly relatives but was followed there by her husband and she returned to her home when he threatened her and their child. The same thing occurred in September 2012.

8. In December 2012, the appellant became pregnant with their second child. The appellant's husband discovered she was pregnant in March/April 2013. He did not believe that the child was his and he did not want her to keep it. He beat her and kicked her in the stomach and she suffered cuts and bruises but he would not allow her to go to hospital for medical attention. The appellant's evidence was that her husband would lock her in the bathroom for hours at a time and would not allow her to leave the house. However, she would sneak out in order to obtain the medicine she needed for her pregnancy and on one occasion when her husband found out he dragged her by the hair the length of the hallway. As a result of that event, the appellant decided that she had to leave Albania.

9. She left on 14 July 2013 and came to the UK. Their second son was born in the UK on 4 October 2013. The appellant's evidence was that she did not feel able to report these matters to the police because her husband was an acquaintance of the local police chief and was a cousin of the member of the Albanian Parliament.

The Submissions

10. Mr McGarvey relied upon the grounds of appeal. He challenged the Judge's adverse credibility finding. First, he submitted that the Judge had wrongly identified an inconsistency in the appellant's evidence at para 30 of his determination in relation to whether the appellant's aunt had organised and paid for her trip to the UK or had only given the appellant money to leave Albania. Mr McGarvey referred me to the appellant's asylum interview at B11 of the bundle and her answers at questions 51-56 and to her witness statement at para 21 at page 5 of the appeal bundle. He submitted that there was no inconsistency in what the appellant had said: she had simply said that her aunt had helped her to leave Albania. Mr McGarvey submitted that, in any event, this inconsistency did not go to the core of the appellant's account; it was a peripheral matter and, therefore, it was insufficient to doubt the appellant's credibility.

11. Secondly, Mr McGarvey submitted that the Judge had wrongly required, in effect, corroborative evidence to support the appellant's claim. In para 43, the Judge took into account that the appellant's family in Albania had not provided any "independent supporting evidence" and in para 46 had taken into account that the appellant's brother (who was in the UK) had not given evidence. Mr McGarvey submitted that the Judge's reliance upon TK Burundi v SSHD [2009] EWCA Civ 40 was an error. There, Mr McGarvey submitted that Thomas LJ (as he then was) was concerned in [21] of his judgment with the absence of "independent supporting evidence" which was "available from persons subject to this jurisdiction. Mr McGarvey submitted that could not apply to the appellant's family in Albania. As regards the appellant's brother, Mr McGarvey initially submitted that his evidence could not be of any assistance as he had left Albania to come to the UK in 2001 before the relevant event that gave rise to the appellant's claim. However, in his reply Mr McGarvey accepted that the appellant's brother's evidence might have been relevant to the appellant's account that she and her family had fallen out with her brother over her marriage to her husband.

12. Thirdly, Mr McGarvey submitted that the Judge had been wrong to take into account that the background evidence demonstrated that a sufficiency of protection was available to the victims of domestic violence in Albania. Mr McGarvey submitted that the Judge had failed to take into account, in reaching that finding, all the background evidence which had been submitted by the appellant at the First-tier Tribunal's hearing. He referred me to a bundle of objective evidence and, in particular, at page 60 a "Schedule of Essential Pages" and the UKBA's *Operational Guidance Note* (May 2013) which, he submitted, demonstrated that domestic violence was widespread and the Albania authorities did little to prevent it or prosecute those who committed it.

13. Fourthly, in relation to the appellant's Article 8 claim, Mr McGarvey submitted that the Judge had speculated at para 78 that the appellant's second child would be able to receive in Albania the final Hepatitis B vaccination when 12 months old which was necessary as the appellant is Hepatitis B positive. He submitted that the evidence referred to by the Judge in para 25.35 of the *Country of Information Report* on Albania (March 2012) was not sufficient to find that the vaccination would be available. Mr McGarvey suggested that, in any event, that finding was inconsistent with the Judge's view expressed at para 65 that the appellant had come to the UK for the sole purpose of accessing the NHS. That was also a finding, Mr McGarvey submitted, the Judge was not entitled to make on the evidence.

14. On behalf of the Secretary of State, Mr Richards submitted that the Judge's factual findings were sound.

15. First, Mr Richards submitted that the evidence did support the Judge's finding of an inconsistency in paragraph 30 in relation to the role that the appellant's aunt played in her departure from Albania.

16. Secondly, Mr Richards submitted that the Judge was entitled to take into account at paragraph 43 and at paragraph 46 that the appellant had provided no supporting evidence from her family in Albania and her brother had not given evidence at her appeal hearing. In any event, he submitted that the Judge had not rejected the appellant's account principally on the basis of the absence of corroborative evidence even if it was possibly a factor. There were a number of factors taken into account by the Judge and even if an error could be identified, it was not material to his decision.

17. Thirdly, in any event, Mr Richards submitted that any error was not material. At paragraph 64 the Judge noted that there were a number of inconsistencies in the appellant's evidence and, in his determination, gave a number of reasons for rejecting her credibility including reliance upon s.8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 because the appellant had not claimed asylum in France; that the appellant had said that she and her family had fallen out with her brother in 2006/7 as a result of his disagreement with her marrying her husband when she had not married until 2009; and that she had said that her husband's violence began after he lost his job which she had inconsistently said to have occurred in February/March 2012 and September/October 2012. Further, Mr Richards submitted that the Judge was entitled to take into account both in assessing the appellant's credibility and in dismissing the appeal (even if she were believed) that the Albanian authorities would provide a sufficiency of protection. Mr Richards submitted that was the conclusion in the country guidance case of DM (Sufficiency of Protection – PSG – Women – Domestic Violence) Albania CG [2004] UKIAT 0059 which the Judge referred to in paragraph 32. Mr Richards submitted that the Judge was entitled to find that there was not "cogent" evidence to depart from the country guidance case. Mr Richards submitted that that finding was sufficient in itself to dismiss the appellant's appeal. In addition, he submitted that the Judge was entitled to take that into account in assessing the plausibility of the appellant's claim that she was in need of protection from domestic abuse and violence (at para 40).

18. Fourthly, in relation to the Judge's finding that the appellant's second child would be able to access the final vaccination for Hepatitis B in Albania, Mr Richards pointed out that this issue had not been raised by the Secretary of State nor in the appellant's skeleton argument before the First-tier Tribunal. As a consequence, no evidence had been produced that the required vaccination was not available. The Judge had considered the *COI Report* which was before him, and Mr Richards submitted that it was not an error of law for the Judge to rely on the only evidence that was before him and to conclude that it had not been established that the vaccination would not be available.

19. Mr Richards invited me, therefore, to dismiss the appellant's appeal.

Discussion

20. In my judgement there is substance in a number of Mr McGarvey's submissions.

21. First, the Judge wrongly identified an inconsistency in the appellant's evidence at para 30 of his determination. There, the Judge said this:

> "The appellant's written statement records that her aunt helped her to get the money to leave Albania. The appellant's travel by air from Albania to Italy and on to France is elsewhere recorded. During her asylum interview the appellant recorded that her maternal aunt and uncle organised everything for her, and even paid for the ticket. There is a clear inconsistency in the appellant's record that the appellant's travel from Vlore to Tirana and on to France via Rome and on to the UK with the assistance of unknown people whom she met in France and who took her from the airport by minivan to a location where she stayed overnight before being taken to London the following day, which had been organised without her knowledge and paid for by her aunt and the record that her aunt only helped her to get money to leave Albania. I note that inconsistency."

22. In her asylum interview, at questions 51-56 (at B11 of the respondent's bundle) the appellant dealt with the circumstances of her leaving Albania. At question 56 she said this:

> "I didn't organise this trip, it was my mother's sister and her husband that organised everything. They even paid for my ticket. I didn't know the people were going to bring me here, hence why they had a piece of paper with my name on it at the airport."

23. That passage follows the appellant's explanation that she travelled by coach to Tirana where she boarded an aircraft for France travelling via Rome. In France she met up with people who put her in a lorry and took her to the UK.

24. In her witness statement (at para 21) the appellant said:

> "I decided to escape from [my husband] and I knew that I had to leave Albania because it was not possible to live in another part of the country. My aunt helped me to get the money to leave Albania."

25. The appellant then described her journey by coach to Tirana and her aeroplane flight to France via Rome before boarding a lorry to the UK.

26. In my judgement, there is no inconsistency in the appellant's evidence. In truth, her account at interview is simply a little more detailed than her account in her witness statement. She did not say in her witness statement, as the Judge states in para 30 of his determination, that "her aunt *only* helped her to get money to leave Albania." (my emphasis) She simply stated that her aunt helped her to get money to leave Albania. She does not say in her witness statement who organised the trip. Whilst that is an omission, it is not inconsistent with what is said in her asylum interview which, on its face, is plainly more detailed. The Judge was wrong, in my view, to treat the appellant's evidence as inconsistent on this issue and to take it into account when assessing her

credibility. I do not accept Mr McGarvey's submission that it was wrong to take this into account as a matter peripheral to the core of the appellant's claim, if it had been an inconsistency it remained relevant as to the appellant's credibility on all matters. The point is however well made that it is not in fact properly seen as an inconsistency.

27. Secondly, the Judge fell into error by calling into question the credibility of the appellant's evidence because of the absence of "independent supporting evidence from the appellant's family in Albania". In doing so, the Judge relied upon [21] of the judgment of Thomas LJ in TK (Burundi). At [21], Thomas LJ said this:

> "The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant."

28. In TK (Burundi), the appellant had relied upon Article 8 of the ECHR and his relationship with a partner who was the mother of his child who was in the UK. The appellant did not produce any evidence from his partner. The Judge took that into account in assessing whether there was any family life established between the appellant and his partner and child. It was in that context that Thomas LJ concluded that, absent a credible explanation, the failure to produce that supporting evidence was "a very strong pointer that the account being given is not credible" (see [20]). In other words, the failure to call (or rely upon) independent supporting evidence which should be available to an appellant is a factor which a Judge is entitled to take into account in assessing an appellant's credibility.

29. In this appeal, the evidence of the appellant's brother in all probability fell into that category. I do not accept Mr McGarvey's initial submission that the evidence of the appellant's brother was of little relevance as he had left Albania in 2001 before the events of domestic violence upon which the appellant relied. That, as Mr McGarvey recognised in his reply, would not be true in relation to the appellant's evidence that she and her family had fallen out with her brother over her marriage. The appellant's brother could, of course, have given first hand evidence of that. Nevertheless, in relation to "independent supporting evidence" from the appellant's parents and family in Albania, there are greater difficulties. First, it is difficult to see how that could be described as "independent" evidence. It is not suggested, for example, by the Judge that there were supporting documents which the appellant's family could have produced on her behalf to corroborate her account. It was, of course, always part of the appellant's case that she had not reported

the incidents of domestic violence to the police because of her husband's connection with a local police chief and an Albanian MP. It was also not evidence which was available from within this jurisdiction. It is difficult to see, therefore, what the Judge had in mind in paragraph 43 as "independent" supporting evidence falling within Thomas LJ's category in TK (Burundi) available "from persons subject to this jurisdiction".

30. To that extent, I accept Mr McGarvey's submission that the Judge in paragraph 43 was wrong to take into account when assessing the appellant's credibility that she had failed to provide supporting evidence from her family in Albania.

31. Thirdly, there is the issue of sufficiency of protection. Mr Richards relied upon the country guidance case of DM. In that case, the IAT in 2004 concluded that an individual would be provided a "sufficiency of protection" by the Albania state from her previously violent boyfriend. Country guidance cases must be followed by Judges of the First-tier Tribunal unless there are "very strong grounds supported by cogent evidence" to justify a different conclusion (see SG (Iraq) v SSHD [2012] EWCA Civ 940 at [47] *per* Stanley Burnton LJ). Simply because a decision is 10 years old does not mean that it loses its jurisprudential status. However, as a matter of practicality, the passage of time may result in more (or more significant) changes in a country's circumstances and certainly a greater weight of subsequent background than in a case where a CG decision is of recent origin. The need to scrutinise anxiously and carefully the subsequent background material is of heightened importance in such cases.

32. At paras 34-35, the Judge referred to the well-known case of Horvath [2001] 1 AC 489 and passages cited in the *COI Report* to which he was referred as follows:

> 34. "The respondent recorded in the refusal letter that there existed in Albania a sufficiency of protection for individuals suffering domestic violence, noting the availability of a system of protection of citizens and a reasonable willingness by the state to operate it, citing that test to be found in **Horvath [2000] UKHL 37** and further noting attempts made to combat the problem of domestic violence by the Domestic Violence Law of 2007, resulting in a significant increase in reports of domestic violence being made to the authorities in Albania. The Amnesty International report cited in the Albanian COI records that: *This civil law represented significant progress towards the prevention of family violence in Albania, in particular through the introduction of protection orders….*
>
> 35. The USSD Report 2010 cited within the Albanian COI records: *NGOs operated four shelters for battered women in Tirana, Vlora, Elbasan, and Gjirokaster. During the year NGOs and police noted a substantial increase in reports of domestic violence, primarily due to increased awareness of services and more trust in the police."*

33. At para 38 the Judge also noted, again from the refusal letter, evidence concerning support for victims of domestic violence as follows:

> "Further noted in the refusal letter was the provision of assistance to victims of domestic violence in Albania operated by non-profit organisations, as recorded in the Albanian COI 2012. That the appellant had failed to engage the authorities or non-government organisations in Albania who may have provided assistance and the presence of a system of protection with a reasonable willingness by the state to operate was said to further undermine her claim in accordance with **Horvath [2000] UKHL 37**."

34. At paragraph 40 the Judge concluded:

> "There is demonstrated by the background evidence to be protection available to victims of domestic violence. I do not find the reasons advanced by the appellant for failing to seek such protection plausible away from her home area plausible. That finding undermines the credibility of her claim to have suffered from domestic abuse and violence from which she needed protection."

35. There is no doubt that the appellant relied upon, and in the essential reading document referred the Judge to, a substantial body of objective evidence contained within the 66 page "Objective Bundle". The Judge made no reference to any of this material in reaching his finding on sufficiency of protection. Although he referred to a *US State Department Report on Human Rights Practices in Albania* (at para 35 of his determination) that is to the report for the year 2010 whilst the more recent report for 2012 was extracted at pages 1-4 of the bundle. That report provided support to the appellant's case that the Albanian authorities would not be willing or able to provide her with a sufficiency of protection from the domestic violence which she claimed her husband caused her. At pages 3-4 of the bundle the *USSD Report* for 2012 is in the following terms:

> "**Women**
>
> Rape and Domestic Violence: The criminal code penalizes rape, including spousal rape. However, victims rarely reported spousal abuse, and officials did not prosecute spousal rape in practice. The concept of spousal rape was not well-established, and authorities and the public often did not consider it a crime. The law imposes penalties for rape and assault depending on the age of the victim. For rape of an adult, the prison term is three to 10 years; for rape of an adolescent between the ages of 14 and 18, the term is five to 15 years; and, for rape of a child under the age of 14, the term is seven to 15 years.
>
> Domestic violence against women, including spousal abuse, remained a serious problem. During the year police reported cases of domestic violence and the government pressed charges in some cases. The Department of Equal Opportunities at the Ministry of Labor, Social Affairs, and Equal Opportunity covers women's issues, including domestic violence.
>
> The government shelter for domestic violence victims in Tirana assisted 35 women and 37 children from April 2011 to May 2012. However, the

> shelter could not accept victims without a court order. After inspecting the shelter in April, the ombudsman found cases of repeated abuse by shelter director Dodona Kalopshi, who had reportedly verbally degraded victims and forced some children to sleep on the floor. Police routinely denied protection to women housed at the shelter when they travelled to court appearances or to take their children to school, leaving some to be assaulted by their husbands while they were away from the shelter. After growing criticism and a television expose, the government removed Kaloshi from the position several weeks after the ombudsman's findings.
>
> At the end of 2011, NGOs operated 15 shelters to protect victims from domestic violence, six in Tirana and nine outside the capital. Police reported they received 2,349 domestic violence-related complaints through their emergency hotline. According to government figures in 2011, there were 2,526 cases of domestic violence reported during the year, compared with 2,181 in 2011. Police often did not have the training or capacity to deal with domestic violence cases."

36. There is evidence here that domestic violence including spousal abuse remained a "serious problem"; of an inadequacy of government shelters for victims of domestic violence and of a lack of training and capacity in the police to deal with domestic violence cases.

37. The *OGN* for May 2013 also notes at para 3.13.2 that:

> "Domestic violence against women, including spousal abuse, remained a serious problem in 2012."

38. The *OGN* goes on to deal with the availability of government shelters for victims of domestic violence and notes that a shelter "could not accept victims without a court order" (see para 3.13.13). The *OGN*, borrowing from the *USSD Report* for 2012, repeats the statement that:

> "The police often do not have the training or capacity to deal with domestic violence cases".

39. Further, at para 3.13.4, referring to the *Amnesty International Report 2012*, it is stated that:

> "Domestic violence remained widespread and shelters for women survivors were insufficient to meet the demand."

40. At para 3.13.6, the *OGN* continues:

> "The physical integrity of Albanian women was inadequately protected. The Albanian constitution does not contain any specific provisions regarding domestic abuse, spousal rape, sexual harassment or female genital mutilation, although Albania law does condemn these practices. Violence against women is very prevalent in Albania as many men, especially in the north east, still adhere to a traditional code known as *Kanun* that establishes the authority of men over women."

41. At para 3.13.7, quoting a March 2011 report of the *UN Special Rapporteur*, the *OGN* continues that:

> "Domestic violence was widespread in Albania and sudden deaths have resulted."

42. At para 3.13.8, the *OGN* continues:

> The criminal code penalizes rape, including spousal rape. However, victims rarely reported spousal abuse, and officials do not prosecute spousal rape in practice. The concept of spousal rape was not well-established, and authorities and the public often do not consider it a crime."

43. Mr McGarvey also relies upon the *COI Report on Albania* (30 March 2012), the relevant passages of which are set out in the appellant's objective bundle at pages 9-18.

44. At para 24.27, quoting a *Freedom in the World 2011 Report*, the *COI* states that:

> "Domestic violence, which it is believed to be widespread, is rarely punished by the authorities."

45. At para 24.29, the *COI Report* deals with the Domestic Violence Law passed in 2006 – which was referred to by the Judge in para 34 of his determination set out above. This law introduced measures "for the prevention of violence within families". It defines the public institutions which are competent to deal with domestic violence and also grants the magistracy the power to put "protective and restrictive measures" into action in favour of the victims and against the perpetrators of domestic violence. However, citing the *OBC Report*, the *COI Report* states:

> "An effective application of this law remains a difficult hurdle to get over. Starting from completing and drawing up the relevant laws and setting up a budget sufficient enough to put them into practice. It is a matter of fact that since the beginning of 2011 there have been more cases of women killed yet no guilty person in prison. This clearly shows that the law is not working. The system and network of help finds obstacles in its way when trying to apply the law, plus there are no shelters for victims where they can start to rebuild their lives."

46. It then continues that:

> "As shown by both official statistics as well as data gathered by independent world associations, cases of violence are in fact on the increase."

47. It was incumbent upon the Judge, in my judgement, to take this background material into account in assessing whether the Albanian State provided a "sufficiency of protection" to the appellant. Given that DM was decided (now) 10 years ago, it was particularly important to assess the evidence in order to determine whether there were very strong grounds supported by "cogent evidence" for reaching a different conclusion. In failing to do so, the Judge fell into error. I do not say that the Judge was bound to reach a finding in the appellant's favour on 'sufficiency of protection'. It is his error of approach that I have

identified. That has two consequences. First, the Judge's error undermined his reasoning in para 40 of the determination that the credibility of the appellant's claim that she had been subject to domestic abuse and violence was not plausible given that protection was available to victims of domestic violence. Further, it is a complete answer to Mr Richards' submission that any error made by the Judge in assessing credibility could not be material to the Judge's decision as the appeal was bound to be dismissed on the basis that the appellant had failed to establish that there was not a 'sufficiency of protection' in Albania.

48. In relation to materiality, Mr Richards also submitted that any errors relied upon by the appellant were not material as the Judge had given a number of reasons for rejecting the appellant's credibility, including reliance on s.8 of the 2004 Act and other inconsistencies in her evidence (see above at para 17). Mr Richards invited me to read the determination as a whole and conclude that overall it was sound and should stand.

49. Whilst I accept that the errors I have identified were not the only reasons given for the Judge's adverse credibility finding, I am not confident reading the Judge's determination overall that without these errors he would necessarily have reached the same conclusion on the appellant's credibility. In those circumstances, I am satisfied that the errors were material to the Judge's adverse credibility finding and his decision to dismiss the appeal on asylum and humanitarian protection grounds and under Article 3 of the ECHR.

50. For these reasons, therefore, that decision cannot stand and I set it aside. It was accepted by both representatives that, if that was my conclusion, the appropriate disposal was that the appeal should be remitted to the First-tier Tribunal for a fresh hearing *de novo*.

51. That then leaves Mr McGarvey's submission in relation to the Judge's finding under Article 8 that it had not been established that the Hepatitis B vaccination would not be available to the appellant's second child if she returned to Albania. That vaccination is due when the appellant's child is 12 months old which will be in October of this year. It is likely, therefore, given that the appeal is being remitted to the First-tier Tribunal that this matter will become academic as the appellant will, most likely, remain in the UK until that time.

52. Nevertheless, the issue remains in relation to the Judge determination and whether his decision in respect of Article 8 should stand. At para 78, the Judge relied upon the Albanian *COI Report* as follows:

> "…At the date of the hearing only one vaccination will remain outstanding. The Albanian COI report records that Viral Hepatitis is still a problem for the country and records that: - There *has been good progress regarding communicable diseases….Paediatricians, epidemiologists and other doctors throughout the country have been trained on new vaccines. The programme and database of web based national electronic vaccination*

registry has been prepared, including vaccination coverage; stock management and adverse reactions. There is no evidence before me that demonstrates appropriate vaccine will not be available for [A] as he reaches the age of 12 months."

53. It was for the appellant to establish that the vaccination would not be available in Albania. The grounds, and Mr McGarvey in his oral submissions, argue that the Judge's finding is inconsistent with the background material he cites at paragraphs 54-59 of his determination which shows that the healthcare system in Albania is generally very poor. The grounds also argue that the evidence was not provided to the appellant's representative at the hearing. Mr McGarvey accepted, however, that the Judge had the *COI Report* before him at the hearing. From that report, the Judge cited a passage at para 25.35 at para 78 of his determination. The Judge was undoubtedly correct that there was no evidence that the vaccine was not available. The Judge cited the only relevant material before him on the availability of vaccines. In my judgment, it was open to the Judge to find that the appellant had failed to establish that the required vaccine for the appellant's second child would not be available in Albania. It was not raised in the appellant's skeleton argument before the First-tier Tribunal dated 13 November 2103. In other words, the appellant does not seem to have asserted (and introduced any evidence) that the position was other than that found by the Judge in para 78. No other aspect of the Judge's reasons leading him to dismiss the appeal under Article 8 has been challenged and, as a consequence, his decision in respect of Article 8 stands.

<u>Decision</u>

54. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal on asylum, humanitarian protection grounds and under Article 3 of the ECHR involved the making of an error of law. That decision cannot stand and is set aside.

55. The First-tier Tribunal's decision to dismiss the appeal under Article 8 stands.

56. The appeal is remitted to the First-tier Tribunal to remake the decision in respect of the asylum and humanitarian protection grounds and under Article 3. None of the Judge's findings relevant to those matters shall stand. In that regard, the appeal should be reheard *de novo* by a Judge other than Judge Whiting.

Signed

A Grubb
Judge of the Upper Tribunal

Date: