Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09953/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 26 June 2014	**On 7 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MR G B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M. Bradshaw, Counsel.
For the Respondent: Mr L. Tarlow.

DETERMINATION AND REASONS

1. The appellant is a citizen of Albania and a minor having been born on 5 April 1998.

2. He claims to have left Albania for France on a lorry; he was arrested by French police and released, and then travelled by lorry to the United Kingdom where he arrived on 31 July 2013 and went to a police station to claim asylum. On 17 October 2013 the appellant's application for asylum was refused by the respondent and on the

following day the respondent issued a letter to the appellant stating that although the asylum claim had been rejected the appellant was granted limited leave to remain in the United Kingdom until 30 September 2015. That leave was on the basis that the appellant was an unaccompanied minor for whom adequate reception arrangements in Albania had not yet been established.

3. The appellant appealed the respondent's decision pursuant to Section 83 of the Nationality, Immigration and Asylum Act 2002.

4. The basis of the appellant's claim was by reason of his membership of a particular social group based on his age and his resulting entitlement to asylum.

5. The appellant's credibility was not disputed by the respondent. It was not challenged within the respondent's refusal letter or at a Case Management Review hearing held on 3 December 2013 where the appellant's historic account was agreed between the parties. The only issue for the appeal was said to be the sufficiency of protection available for the appellant and the issue of internal relocation was agreed between the parties to not be available.

6. The appellant's witness statement of 19 August 2013 indicated that he grew up and lived in Peshkopi all his life. He attended local school until he was 15 years of age but his attendance was not good due to his circumstances. His mother was a housewife and his father had no proper stable job. He did odd jobs for other people. Normally he would work for construction companies. The family was a poor one and lived in a small house with one room with a separate kitchen and bathroom. They struggled to get by and barely survived due to the appellant's father's unstable work. His father had mental health issues. The appellant is unaware of the exact nature of them but he was mentally unstable. He was also a "heavy alcoholic". This is why the family's problems got worse. From being 13 years of age the appellant's father beat him. This included being grabbed and punched in the face, slapped and kicked. He would do this as he had no money and would then force the appellant to steal. The appellant was forced to steal from shops and to take money. When he refused he was beaten badly. As he got older the abuse got worse. The appellant's mother would be present at the time but was helpless and stood by and cried. Increasingly the appellant became so afraid of his father that he began to live away from home. There was another close village and the appellant found there an abandoned house where he lived for some two months. He returned home only when he knew his father was not around. It was as a consequence of this abuse that the appellant left Albania. He considers internal relocation is unavailable to him. He has tried telling the police about the abuse but no notice is taken of him because he is a child. He maintains that wherever he relocated he would be found by his father who will kill him. He has no family members in Albania to care for him and protect him. His own mother is the victim of his father's abuse as is his younger brother. Neither are able to live alone or move away from the appellant's father. It was only by fleeing that the appellant managed to escape him.

7. It was because he had no one to look after him and protect him that the appellant fled Albania. He did so hidden in a lorry. Eventually he was apprehended in France but on telling the police that he was only 15 years of age he was released. He was not fingerprinted there. He managed to board another lorry and travelled to the United Kingdom. He immediately attended at a police station and was taken to Social Services.

8. The appellant's asylum claim was brought by virtue of his membership of a particular social group based on his age.

9. The appellant's appeal was heard by Judge of the First-tier Tribunal P J Clarke who in a determination promulgated on 5 March 2014 dismissed the appellant's appeal on asylum grounds but allowed it on Humanitarian Protection grounds. The judge found that the appellant qualified under Article 15(c) of the Qualification Directive.

10. Both parties sought permission to appeal the judge's decision. Those applications were considered by Judge of the First-tier Tribunal Cruthers on 20 March 2014. He gave permission to the respondent to appeal and he refused permission to the appellant to appeal. His reasons were as follows:-

> "1. By a determination promulgated on 5 March 2014, First-tier Tribunal Judge P J Clarke addressed the 15-year-old appellant's 'upgrade appeal' pursuant to section 83 of the Nationality, Immigration and Asylum Act 2002 (paragraph 1 of the determination). Having assessed the evidence, the judge concluded that the appeal did not succeed on asylum law principles but did succeed on humanitarian protection principles.
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> 2. Both parties seek to appeal against the conclusions referred to above.
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> 3. The crux of the grounds on which the respondent seeks permission to appeal are that the judge did not deal adequately with the possibilities of sufficiency of protection and internal relocation (paragraphs 2(a) – (c) of the grounds). And, in any event, any harm that the appellant faces on return to Albania would not fall within the definitions in Article 15 of the relevant qualification directive and, therefore, the judge should not have allowed the appeal on humanitarian protection grounds (paragraphs 1(a) – (d) of the grounds).
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> 4. The respondent's grounds are arguable."
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> "1. By a determination promulgated on 5 March 2014, First-tier Tribunal Judge P J Clarke addressed the 15-year-old appellant's 'upgrade appeal' pursuant to section 83 of the Nationality, Immigration and Asylum Act 2002 (paragraph 1 of the determination). Having assessed the evidence, the judge concluded that the appeal did not succeed on asylum law principles but did succeed on humanitarian protection principles.
>
> 2. Both parties seek to appeal against the conclusions referred to above.

3. As far as the appellant's appeal is concerned, it is argued that the asylum appeal should have been allowed on the basis that the appellant is a member of a particular social group 'a child' (paragraph 14 of the grounds). But even if there is such a particular social group as 'children', in my assessment the judge was right to hold that any harm faced by the appellant in Albania did not in any sense arise on account of his membership of a particular social group. It is noteworthy that the author of the grounds was asked at the hearing what particular social group he contended for but he was unable to advance one (paragraph 64 of the determination).

4. The grounds do not identify any arguable error of law that might have acted to the detriment of the appellant's case."

11. The appellant renewed his application for permission to appeal to the Upper Tribunal which was subsequently granted on 8 April 2014 by Upper Tribunal Judge Freeman.

12. Thus the appeal came before me today.

13. Mr Tarlow resisted the appellant's argument that the judge's error in allowing the appeal under Article 15(c) of the Qualification Directive was not material and that in essence the material error of the judge was to provide inadequate reasoning as to why the expert evidence was preferred to that of the respondent's own Country of Origin Information Service Report. He summarised his submissions by describing the respondent's position as a "reasons challenge".

14. Mr Bradshaw resisted the arguments of Mr Tarlow in relation to the judge's reasoning. He submitted that proper account had been taken not only of the background material and expert report submitted by the appellant but also that too of the respondent which is detailed within the determination. There is clear reasoning to be gleaned from, for example, paragraphs 69 and 71 of the judge's determination where the judge describes being impressed by the expert report of Ms Vickers which he finds to show knowledge not only of the legal and political situation in Albania but also information gleaned from comparatively recent discussions with local officials. The judge accepts Ms Vickers' report and finds her "reasoning convincing" as to any expectation that the appellant can relocate and also, given that the appellant would be expected to return to northern Albania the absence of a sufficiency of protection consequent upon an unwillingness to provide there protection against domestic violence.

15. As to the Humanitarian Protection aspect of the appeal being allowed under Article 15(c) of the Qualification Directive Mr Bradshaw submits that this is an error but not a material one. The judge should have allowed it under Article 15(b) of the Qualification Directive. It is though clear from the determination and the judge's findings that the appellant would succeed under this Article. The reference therefore to Article 15(c) is an error but not one I find to be material.

16. Mr Bradshaw submitted that the judge made a material error in not finding the appellant a member of a particular social group whereby he would be entitled to the grant of asylum. He submitted that being a child is not "far too wide a class" and is indeed the correct definition of a particular social group in this appeal. To seek to narrow it further carries the risk of defining a social group by reference to the persecution which was one of the submissions made on behalf of the appellant at the hearing before Judge of the First-tier Tribunal Clarke. The judge finds at paragraph 71 of his determination that although matters are improving to a degree "There is unlikely to be a satisfactory response" in a rural area in the north of Albania, where the appellant is from, despite the existence of a legal duty on the police. As the failure of state protection is due (at least in part) to attitudes towards children who report such matters, it is submitted by Mr Bradshaw that the judge fell into material error and that the appellant is entitled to succeed in his asylum claim as a member of a particular social group – a child.

17. I do not find that the judge erred as submitted by the respondent by an absence of reasoning. There is plainly an error in relation to the reliance upon Article 15(c) of the Qualification Directive but when looking at the totality of the findings made by the judge, and particularly in light of the agreed factual matrix, I find that such error is not a material one in all the circumstances. As to the issue of the judge's reasoning, or lack of it, I find that not to be the case. The judge has given cogent and sustainable reasons which were fully open to him on the evidence for preferring the analysis of the current background situation in Albania provided by Ms Vickers to that within the Country of Origin Information Service Report. He has taken proper account of the background material and provided relevant case law. He has set the appellant's circumstances and the agreed factual matrix into the background material and has taken into account and given reasons as to why he prefers the evidence of Ms Vickers to that provided by the respondent. It includes an acceptance of material from her of a comparatively recent nature.

18. That leaves the appellant's contention that the judge erred in not granting him asylum.

19. "Membership of a particular social group" is the Refugee Convention reason whose constitution is the most opaque and is often subject to debate and argument. Various groups have been recognised under this category including, for example, women as a particular social group, homosexuals as a particular social group and family as a particular social group.

20. In **SSHD v K and Fornah [2006] UKHL 46** Lord Bingham derived the following principles from the legal authorities including the Qualification Directive. Firstly, the Refugee Convention was not concerned with all cases of discrimination, only with persecution based on discrimination, the making of distinctions which principles of fundamental human rights regarded as inconsistent with the right of every human being. Secondly, to identify a social group the society of which it formed part had to be first identified; a particular social group might be recognisable as such in one country but not in another. Thirdly, a social group need not be cohesive to be

recognised as such. Fourthly, there could only be a particular social group if it existed independently of the persecution to which it was subject.

21. Lord Bingham indicated that a particular social group may be formed either because its members share a characteristic which cannot or should not be changed (the protected characteristics approach) or because they are perceived as having a distinct identity by the surrounding society (the social perception approach). Lord Bingham noted EU Council Directive 2004/83/EC Article 10(d)(i) and (ii) which were effectively reproduced at Regulation 6(d)(i) and (ii) of the Qualification Regulations but said that if (i) and (ii) had to be satisfied then the test in the Regulations was more stringent than was warranted by international authority. He said that the Qualification Directive should not be read as requiring both features to be present in order for there to be a social group for the purposes of the Refugee Convention. Either will do. It would appear, therefore, that the decision goes beyond what the House of Lords said in **Shah and Islam and Others v SSHD HL [1999] INLR 144**. Lord Bingham also noted that the UNHCR's view that, whilst social group could not be defined by the persecution, persecutory action towards a group might be a relevant factor in determining the visibility of the group in a particular society. Lord Rodger of Earlsferry in the same case felt that it is not necessary that all the members of a social group be persecuted before one could say that people are being persecuted for reasons of their membership of that group but it is generally necessary that all members of the group should be susceptible to persecution.

22. In **Shah and Islam** (above) Steyn LJ said:

> "A particular social group consisted of a group of persons who share a common immutable characteristic that either was beyond the power of an individual to change or was so fundamental to an individual's identity or conscience that it ought not to be required to be changed."

The group must exist independently of the persecution.

23. Mr Bradshaw has assisted me in reminding me of the authority of **ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292 (IAC)** where at paragraph 22 the Tribunal stated:

> "22. We have no doubt that if a real risk of harm to S on return is made out in this case, either because of risk arising from the conduct of his parents or because S, or any child without family or friends to turn to, was highly vulnerable to sexual abuse in one form or another, an asylum claim or a claim to humanitarian protection could be made out. We accept that children can be a social group and face a real risk of persecution as such: children under one year old in King Herod's Bethlehem being an obvious case in point. That does not mean that any risk of serious harm that might happen to a child in his or her country of origin necessarily makes that child a refugee."

24. Also paragraph 68 where the Tribunal continues:

> "68. In assessing social group persecution, we remind ourselves of Lord Hoffman's observations in Shah and Islam that questions of particular social group and persecution for a convention reason need to be assessed against the particular social context and the question of discriminatory denial of protection:
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> > 'To what social group, if any, did the appellants belong? To identify a social group, one must first identify the society of which it forms a part. In this case, the society is plainly that of Pakistan. Within that society, it seems to me that women form a social group of the kind contemplated by the Convention. Discrimination against women in matters of fundamental human rights on the ground that they are women is plainly in pari materiae with discrimination on grounds of race. It offends against their rights as human beings to equal treatment and respect'
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> and
>
> > 'What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention. As the *Gender Guidelines for the Determination of Asylum Claims in the UK* (published by the Refugee Women's Legal Group in July 1988) succinctly puts it (at p. 5): 'Persecution = Serious Harm + The Failure of State Protection.'"

25. The question which therefore arises is whether Judge Clarke erred in defining the class to which this particular appellant belonged as a child alone cannot constitute a particular social group because it is "far too wide" a class of persons. Is it an error? I find that it is.

26. This is an appellant whose persecution comprises not only of the violence and threat of violence from his father (which is a personal matter) but also the inability or unwillingness of the Albanian state to do anything to protect him (which is not a personal matter). The judge found as a fact that the appellant had approached the police and they failed to respond to his plight because he was a child. This was

accepted by the judge. The inactivity of the police in such circumstances was supported by the background material and in particular the expert evidence of Ms Vickers which is recorded by the judge at paragraph 45 of his determination where he accepted the expert evidence that it was doubtful if the police would have helped the appellant. In poor, remote areas such as Peshkopi, domestic violence was still a taboo subject

> "something which remains strictly within the family walls and is considered a very private matter. Indeed in a community where sons and often mothers and daughters are regularly beaten by their fathers/husbands, the appellant's appeal to the local police for help would almost certainly have fallen on deaf ears. The Peshkopi police are very provincial and would have not have thought the matter of a son being beaten by his father as something that concerned them."

27. As the judge found that although matters may be improving to a degree within the appellant's home country there is unlikely to be a satisfactory response in the rural area of the north of Albania to his plight despite the legal duty on the police coupled with the failure of state protection being due to attitudes towards children who report such matters, I find that the judge has erred and that the appellant is a member of a particular social group (children) entitled to the grant of asylum.

Summary

28. For the reasons detailed above the judge did not err either materially or otherwise as asserted by the respondent.

29. For the reasons detailed above the judge did err as asserted by the appellant.

30. I set aside the First-tier Tribunal's decision.

31. I remake the decision in the appeal by allowing it on asylum grounds.

32. As the appellant is granted asylum he is not entitled to Humanitarian Protection.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

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 his 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 2 July 2014.

Deputy Upper Tribunal Judge Appleyard