



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05401/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 19th July 2019

Decision & Reasons Promulgated
On 24th July 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

SH
(anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Imamovic, instructed by Braitch Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as SH. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. Permission to appeal the decision of First-tier Tribunal Judge Row dismissing the appellant's appeal against the respondent's decision to refuse international protection was granted by UTJ Eshun on 27th November 2018 on the grounds:
 - (i) It was arguable the judge had reached findings on the basis of the appellant's return to Albania as an adult aged 18 rather than on the date of hearing;
 - (ii) It was arguable the judge had failed to consider the respondent's concession that there were no adequate reception arrangement in place for the appellant on return to Albania and failed to give consideration to the care order made by the local authority and the oral evidence of the social worker that his family had not been able to be contacted, and that in the absence of contact with his family at the date of hearing he would be at risk of serious harm on return;
 - (iii) It was arguable the judge gave no consideration to the background country information concerning risks to children in Albania on account of age, ethnicity, culture that would be likely to result in destitution and exploitation;
 - (iv) It was arguable that the appellant's evidence regarding whether or not he lived with his father was not inconsistent such as to adversely impact upon the appellant's credibility;
 - (v) It was arguable that having found the appellant had submitted all material factors at his disposal and his claim was plausible, there was a contradiction in the finding that he could have contacted the Albanian embassy to obtain further evidence about his passport;
 - (vi) It was arguable that the late disclosure of having been attacked by his stepmother with an axe was due to his vulnerability as a minor and inability to manifest his fears at the relevant time rather than a fabrication of the claimed attack;
 - (vii) It was arguable that the judge had failed to have adequate regard to or consideration of the evidence of the social worker and/or the foster carer;
 - (viii) It was arguable that the judge had failed to have adequate regard to or consideration of the submission that there was no evidential link to the appellant of his passport being used to leave Albania in a car in September 2014 rather than a lorry and the respondent had failed to provide adequate evidence thereof.

Background

2. The appellant, an Albanian national date of birth 27th February 2003, arrived in the UK on 6th November 2014 and was taken to Social Services. He was referred to the National Referral Mechanism as a potential victim of trafficking who decided, on 20th February 2015, that he had not been trafficked to the UK and was not a victim of trafficking. He then claimed asylum and was screened on 23rd July 2015. He submitted, through solicitors, a witness statement and in March 2016 his solicitors informed the respondent that he wished to rely upon his witness statement in support of his asylum claim.

3. The basis of the appellant's claim was that he feared that if he was returned to Albania he would face mistreatment from his father.
4. The respondent accepted the appellant was who he said he was, was an Albanian national with a date of birth as claimed. His asylum claim was however rejected for reasons set out in a decision letter dated 10th May 2016.
5. The appellant appealed the decision. First-tier Tribunal judge A J Parker dismissed his appeal for reasons set out in a decision promulgated on 16th June 2017. Deputy Upper Tribunal Judge Renton found an error of law in that decision and remitted it to be heard afresh by the First-tier Tribunal on 30th April 2018. It is the First-tier Tribunal decision of Judge Row, promulgated on 7th August 2018, that followed that remittal that is the subject of this appeal.

Evidence before the First-tier Tribunal.

6. The appellant relied upon a consolidated bundle of evidence of 135 pages. Also, before the First-tier Tribunal judge was a copy of a 'tracing report', skeleton argument of Ms Imamovic and the respondent's bundle of documents. Neither bundle included the NRM trafficking decision.
7. In his witness statement signed 27th October 2015, the appellant said
" ...
4. I confirm that I lived with my father, my mother, my brother (...) and my sister (...) in Albania.
...
6. I confirm that I fear going back home because of my father.
7. He was violent towards me, my mother, my brother and sister.
...
10. My father treated me very badly.
...
12. I was playing with my friend R when we saw a big lorry. We hid in the lorry...
...
23. I do not want to go back to Albania because I am afraid of my father and what may happen to me if I go back.
..."
8. In his witness statement signed 26th October 2016, the appellant said
"3. I would also like to add the following as I can remember more about what happened to me than I could before.
4. Before I left Albania I was playing with R when my father's second wife came running towards us with an axe.
...
7. One of my relatives called my mum and she came that same day.

8. When I saw her she had a mark/scar on her face and I asked her what happened. She said she was fine and she left.

10. I cannot remember how long I stayed at my relative's house.

11. Then one day I was playing outside with R and a lorry came.

12. There were some men who came and wanted to take us.

13. Me and R also wanted to leave and so we got into the lorry by ourselves and hid in the lorry.

...

24. He [father] also had a second wife who would also hit me for no reason.

...

30. I would also like to state that I have held an Albanian passport. I previously said that I had not ever been issue with a passport because I believed I was being asked if I used a passport to travel.

31. I do not know when my passport was issued but I remember holding one because my mother showed it to me when I was very young, however, when my mother showed it to me I remember my father taking it from her and I never saw my passport after this. I cannot recall how old I was when this happened.

32. I wish to confirm that I did not leave Albania with my passport as it was my father who kept it. I had not planned my departure from Albania and simply got into the lorry and hid. I did not have my passport or anyone else's passport with me and I did not leave Albania on my passport.

33. I believe that if there are any records of someone using a passport to leave Albania that it was not me and although I cannot be sure, I think my father may have sold the passport to make money."

9. In a 'Best Interests input' prepared by his social worker Rochelle Blake, dated 1st December 2015, she said, inter alia,

Family and social relationships

...states that in Albania he lives with his mother, father, younger sister and younger brother. At present [] has no contact with his parents or any members of his birth family. [] stated that he does not want to return home or have contact with his parents...

...

Other vulnerabilities

[] is sure that he does not want to return to Albania as he is scared what may happen if reconnected with his family. [] was a victim of violence from his birth father who was physically abusive towards him, his mother and his siblings; ...'

10. In a letter dated 2nd May 2017 from Rochelle Blake addressed 'To Whom it May Concern' she states, inter alia,

'...

During statutory visits to see [] in his foster placement he continuously expresses he does not wish to return to Albania and maintains this. When spoken to about

home life [] is very reserved and his presence becomes low as he expresses to have suffered some traumatic experiences when living in Albania...

...

... [] fears having to return to Albania and be at risk of harm due to fearing his father will locate him.

...'

11. In a letter dated 26th October 2016, B., the appellant's foster carer since 7th November 2014, said, inter alia,

"...He was very distraught, a very frightened child and it took us some months to settle him in. He would flinch when we walked past him ...

... he seems reluctant to talk about them [his birth family]. He says he misses them and I have explained that if he did want to go back to his birth country it could be arranged. His reaction to this was quite upsetting as he was vehement in his statement of not going back to his birth father and step mother as they were both cruel to him.

...

I do not find anything about [] that is untruthful. I believe everything he has told me.

...

He was very upset because he had never travelled on the passport. He thinks his father may have sold it to someone in the club that father owns.

..."

12. In a letter dated 29th March 2017 addressed 'To Whom it May Concern' Gail Hardy, the Independent Reviewing Officer said, inter alia,

"... I am writing in support of the above young person being afforded permanent Leave to remain in the United Kingdom.

...

He does not wish to return to Albania ... It is unclear of all the facts in how [] came to reside in the UK. Nevertheless, what is certain at his young age is he made a decision he could no longer reside with his biological family in Albania. He appears to have suffered some traumatic experiences at the hands of his family.

..."

13. Also before the First-tier Tribunal was a copy of a care order made on 23rd January 2018. There is no record on the face of that order or separately, that the family court gave permission for the content of that order to be disclosed to the IAC. Ms Imamovic stated that she had requested her instructing solicitors seek permission for its disclosure but she was not aware whether that had in fact been done. In any event she said that the oral evidence was that the Local Authority had attempted to find out the whereabouts of the appellant's family through the Albanian Embassy but had had no response, hence the order had been made.

14. The tracing document provided information obtained from the Albanian authorities:

‘ ...

The family is registered as living in an unspecified address in Shishtavec, Kukes, Albania. The current family composition consists of the subject himself, his mother (single) and two siblings.’

The document goes on to set out information on border checks which indicate that the appellant left Albania on 15 September 2014 to Kosovo by car and has not returned; and that his mother left Albania to Kosovo by car on 14th June 2013 and there was no ‘registration’ of her coming in.

Scanned copies of the appellant’s personal and family certificates were attached together with details of the appellant’s passport number, validity (01/09/2014 to 31/08/2019).

Error of law

15. In her submissions before me Ms Imamovic very properly condensed the grounds relied upon as much of what she submitted were errors of law relied upon the same underlying matters and should be viewed cumulatively rather than in isolation. There was no suggestion by Ms Imamovic, and it has not been pleaded, that the judge did not, in reaching his decision, have adequate regard to the appellant’s age either at the time of his screening interview, when he made his witness statements, when he gave oral evidence or in reaching his findings.

Alleged inconsistencies:

16. Ms Imamovic submitted that in §26 through to §29¹, the First-tier Tribunal Judge accepts the appellant’s evidence and that he had made a genuine effort to support his claim and this was inconsistent with the judge’s findings that further evidence could have been obtained and that the discrepancies damage his account. It is correct that the judge confirms the appellant has submitted the evidence that he had. That does not however mean that the appellant has obtained all the evidence he could have obtained or that the judge is in some way prevented from reaching findings on the evidence, and lack of evidence, that is before him. The statements by the judge in §26 to §30 are an acceptance by the judge of the manner in which the appellant has made his claim and approached the process and that he has not sought to hide or in some way manipulate such evidence as there was. It may be that his solicitors should have endeavoured to make other enquiries for example obtaining the consent to

¹ “26. I am satisfied that the appellant has made a genuine effort to substantiate his claim. He claimed asylum. He gave an account to his solicitors. He cooperated in the screening interview ... he has cooperated in the appeal.

27. I am satisfied that so far as is relevant all material factors at his disposal have been submitted.

28. I am satisfied that the appellant’s account is plausible ...

29. I am satisfied that the appellant has made an asylum claim at the earliest possible time.

30. There are matters about the appellant’s claim which however are not coherent and which do run counter to available specific and general information relevant to his case. There are matters which affect his general credibility.

...”

the release of the family court order or the evidence that was before the judge when the order was made or should have made enquires of the Albanian authorities regarding the use of the passport or the whereabouts of the appellant's father or whether there was a record of his father having married someone else. That evidence, if it exists, was not before the First-tier Tribunal judge who is required to make findings on the evidence before him. That is what he did. Throughout his findings, the judge has scrupulously factored in the appellant's vulnerability as disclosed to him.

17. The judge finds that the discrepancy in the appellant's evidence as to whether he had ever held a passport² a significant discrepancy but that he may have misunderstood the question and it did not damage his credibility.
18. The judge found the appellant's evidence as regards his family living arrangements in Albania to be a significant discrepancy³. Ms Imamovic submitted that there was no inconsistency: the appellant was not stating that he had never lived with his father but that he had lived with his father but not at the time of the incident when his stepmother attacked him with the axe. She submitted that no timeline had been set out in the first witness statement. The judge refers to the evidence the appellant has given in witness statements, prepared with solicitors and the evidence given to social workers. Before the judge Ms Imamovic submitted that the Tracing Document lent support to the appellant's claim that he was not living with his father at the time he left Albania. With respect to Ms Imamovic, this rather misses the point. The appellant has provided different information at different times, only claiming not to be living with his father when evidence comes to light that shows he was not. The judge finds this impacts on the credibility of his account.
19. The judge considers the very late disclosure of the claimed attack on him by his stepmother with an axe. Although Ms Imamovic submits that, of course children disclose information in different ways to adults. She did not submit (I note contrary to what he says in his witness statement) that he had not remembered the axe incident, but that it was not until October 2016 that he felt safe enough to recount the incident; that was not his evidence. The judge notes that the appellant has had the assistance of solicitors throughout, that there is no mention of the axe incident in any of the written evidence relied upon by the appellant until October 2016 and that the first statement was made some 11 months after he had arrived in the UK. The written evidence from the foster carer refers to it being several months before he settled in but there is no explanation why some 11 months later he was unable to remember the incident or unable to recount it.

² In his screening interview he said he had not, but in his October 2016 interview, made after disclosure of the tracing record, he said he had but was very young at the time

³ §33: "The appellant has given significantly different accounts of his family arrangements. On October 2015 he had prepared a statement with the help of solicitors ... At paragraph 4 he said that he lived with his father, mother, brother, and sister. By the time of the refusal letter evidence had come to the attention of the respondent from the Albanian authorities that the appellant did not live with his father. The appellant's response to that, in his statement dated 26th October 2016 prepared for the appeal, and repeated in evidence today, is that he did not live with his father. His father lived elsewhere but used to come around to his house and mistreat him.

20. The judge considers the two differing accounts given in respect of when he left Albania – when he was playing outside and saw a lorry which he climbed into or the day after his stepmother attacked him with the axe or some other unspecified time later.
21. The judge considers the evidence of the Tracing document (as to which see also below) that the appellant left Albania, using his own passport, in September 2014 and the appellant's evidence of when and how he left Albania.
22. The judge was entitled to reach the findings he reached that there were significant inconsistencies in the appellant's evidence. Nevertheless, the judge did not reach his conclusions solely on those inconsistencies. He took them into account in his final assessment.

The tracing document

23. Ms Imamovic submitted that there had been a lack of disclosure by the respondent of the appellant's biometrics. I found her submissions difficult to understand. The respondent had made enquiries with the Albanian authorities who had provided information about the appellant, his family composition and his passport. I did not understand what she meant by 'biometrics'. It seems that the appellant's evidence was that although it seemed that the information on the passport related to him, he did not recall ever having had a passport issued in 2014 and he had not travelled out of Albania on a passport in a car. There was no evidence before the First-tier Tribunal that an enquiry had been made of the respondent or the Albanian authorities as to how the information as to exit had been obtained or how and when that particular passport had been obtained. If the appellant sought to challenge the evidence on the tracing document which, on its face was credible and relevant, then more has to be done than simply assert that the 'biometrics' had not been disclosed.
24. The judge was fully entitled to consider the content of the tracing document in the context of the appellant's evidence and identify this as a discrepancy in the appellant's evidence. He was fully entitled to express the opinion that a challenge to the document had to be more than a submission. As Mr Mills submitted, the respondent had satisfied the burden of proof that the documents was such that it could be relied upon absent some other evidence; the appellant had not sought evidence to rebut the validity of the information on the face of the document; the judge was entitled to rely upon it.

Evidence of the foster carer and social worker

25. Ms Imamovic submitted that the judge had failed to take account of their evidence that he was a fragile and disturbed child who had clearly suffered trauma and that this supported the submission that it took time before he felt safe enough to disclose his account. As Mr Mills submitted, there was little the judge could say other than record what they said. Their evidence did not deal with the discrepancies; they said they believed his account – although it is not said which account it is they believe - that he was upset when elements of his account were not believed but their evidence was not such as rendered the discrepancies in the appellant's account of no or insignificant relevance.

26. The judge fully appreciated the vulnerability of the appellant and gave considerable leeway to elements of the account that were not otherwise explainable. But the evidence of the foster carer and social worker did not and could not enable the judge to ignore those discrepancies.

Did the judge reach a decision on the basis that he would return to Albania when aged 18 rather than take a decision on risk as of the date of hearing?

27. This ground of appeal is misconceived. The judge plainly considered, in §45⁴, the circumstances as of the date of hearing. Although the judge has inserted the word “Even” it cannot be successfully submitted that the judge did not consider risk as of the date of hearing. The conclusions as a whole drawn by the judge were that the appellant was in contact with his family, had not been abused as claimed and would be able to reunite with his family in Albania.

Did the judge fail to take account of the views of the family court and the respondent that he had no family member?

28. The first point to make is that there was no evidence available that the family court had granted leave for the order to be disclosed. The evidence of the social worker that the Albanian Embassy had been contacted and there had been no response is insufficient to enable a conclusion to be drawn that the appellant did not and does not have family in Albania. That the family court made a care order is an order relevant to the appellant’s status in the UK, not whether he would or could be adequately cared for in Albania.
29. There does not appear to have been any attempt made by the appellant’s solicitors to establish from the solicitors who were acting for him in the care proceedings, what attempts were made to contact his family in Albania if any and if not why not. It is not apparent what evidence was provided to the family court which led to the making of the care order. At most the judge was aware an order had been made and the Albanian Embassy had failed to respond to an enquiry made.
30. The respondent granted the appellant DL as an unaccompanied asylum seeking minor for whom satisfactory reception arrangement could not be made. That is not a concession by the respondent that the appellant cannot be returned to Albania but that at that time and on the evidence before him, that was the view taken by the respondent.
31. It is misconceived to submit that such a decision by the respondent is a concession that the appellant has no family in Albania or that his family are unable to care for him. The respondent cannot force the appellant to disclose the true whereabouts of his parents and the respondent cannot simply deposit a child at a distant airport without making adequate arrangements for his reception. But that is not the issue here. The judge is required to make a finding on the evidence before him whether the appellant is in need of international protection. The judge in this case considered the evidence as a whole, gave

⁴ §45 ... Even if he were to return today I do not find that he would be left alone with no-one to support him ...

detailed and sustainable reasons why he did not accept, to the lower standard of proof taking account of the vulnerability of the appellant and giving considerable leeway and benefit of the doubt to the appellant, that the appellant had been abused by his father and/or stepmother.

32. It follows that the judge was entitled to find that the appellant had a family he could return to in Albania without being at risk of serious harm. That the appellant chooses not to have contact with his family cannot result in a finding that the appellant is at risk of serious harm if removed. Of course, in practical terms, the appellant will not be removed because he has been granted DL because the respondent has not been able to make satisfactory arrangements. But that does not mean he is in need of international protection – see *ZH* [2009] EWCA Civ 470

Was it arguable the judge gave no consideration to the background country information concerning risks to children in Albania on account of age, ethnicity, culture that would be likely to result in the appellant suffering destitution and exploitation?

33. Very properly, this was not pursued by Ms Imamovic before me. The appellant had been found not to be a victim of trafficking and the background material relied upon in the bundle was generic. The findings of the judge regarding the appellant's family were such as to render otiose concerns of lack of safety on return in terms of international protection. Although Ms Imamovic referred to the risk of travel between arrival and his home it is difficult to understand how that can result in a finding of risk of serious harm: the appellant would be returning to family who could be expected to enable his safe passage.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The decision of the First-tier Tribunal stands.

Anonymity

The First-tier Tribunal made /did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 19th July 2019



Upper Tribunal Judge Coker