Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2022-004423**
UI-2022-004431
First-tier Tribunal Numbers: PA/01457/2016
PA/04138/2020

THE IMMIGRATION ACTS

Heard at Field House IAC
On 23 November 2022

Decision & Reasons Promulgated
On the 25 January 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

IM (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes, Counsel, instructed by the Anti Trafficking and Labour Exploitation Unit (ATLEU)
For the Respondent: Ms A Nolan, Senior Presenting Officer

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. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. The appellant appeals against a decision of Judge of the First-tier Tribunal Manuell ('the Judge') dismissing his appeal. The Judge's decision was sent to the parties on 20 June 2022.

2. Judge of the First-tier Tribunal Dixon granted the appellant permission to appeal by a decision dated 14 September 2022.

Anonymity

3. The Judge did not issue an anonymity order, though no explanation was provided as to why such an order was not made in circumstances where the National Referral Mechanism (NRM) had accepted the appellant to be a victim of modern slavery and trafficking.

4. As confirmed by the Upper Tribunal's Guidance Note 2022 No 2: 'Anonymity Orders and Hearings in Private' the law requires anonymity to be respected in certain circumstances, including where allegations of trafficking are made.

5. Under section 2(1)(db) of the Sexual Offences (Amendment) Act 1992, a person who has made an allegation that he has been trafficked contrary to section 2 of the Modern Slavery Act 2015 is entitled to the same lifelong anonymity as an alleged victim of a sexual offence.

6. In the circumstances I issue an anonymity order as required by statute, such order being detailed above.

Brief Facts

7. The appellant is an Albanian national who is presently aged 23. He asserts that his father was politically active and was imprisoned for 25 years prior to the fall of the communist regime in the early 1990s. His father remained politically active following his release and was critical of various senior politicians.

8. The appellant asserts that his father's activities led to threats being directed towards the family, including to himself. He also asserts that he was targeted by the police because of his father's actions, being taken from school to the local police station on several occasions, being accused of crimes, being held for five or six hours and being released without charge.

9. The appellant also asserts that his family are involved in a blood feud arising from events that occurred in the 1990s, prior to his death. He states that in September 2014, due to the blood feud, his father was approached in their village and beaten up. He required stitches to his lips.

10. The appellant states that a decision was taken by his father that he should leave Albania and seek safety elsewhere in Europe. He travelled across Europe and arrived in the United Kingdom in August 2015, subsequently claiming asylum. The respondent refused the asylum claim by means of a decision letter dated 27 January 2016, concluding that the appellant's contention as to an existing blood feud was not well-founded. The decision letter observed, 'furthermore evidence gathered from our colleagues at the British Embassy in Tirana has confirmed that your family are not currently confined due to any conflicts, revenge or blood feuds and have not reported any threats to the authorities.'

11. At the same time the respondent accepted that the appellant qualified for leave to remain as an unaccompanied asylum seeking child and so granted him leave to remain in this country until 1 September 2016.

12. The appellant was placed in the care of social services as an unaccompanied minor and whilst in local authority care he engaged with a criminal gang. His engagement increased to the point that he was participating in the sale of drugs on a county lines basis. He was caught in a police raid in January 2018 and then subsequently arrested by the police in April 2018. He pleaded guilty at Maidstone Crown Court on 25 March 2019 to two counts of conspiracy to supply class A drugs. The first related to the supply of crack cocaine and the second to the supply of heroin.

13. The appellant was sentenced in the company of a co-defendant, 'HA', by HHJ Huseyin at Maidstone Crown Court on 25 October 2019. In considering the appellant's role in the criminal enterprise, it is appropriate to observe the role played by HA, who was identified on conviction as being a very important and significant player in two county lines drug operations, one in the West Country and the other in Kent. HA was sentenced to six and a half years' imprisonment at Exeter Crown Court and subsequently sentenced to four and a half years' imprisonment concurrent at Maidstone Crown Court.

14. When sentencing the appellant HHJ Huseyin observed as follows:

> "Now, [the appellant], you stand up. Your case, it seems, has not been an easy one for me to decide on the appropriate sentence. There are a number of competing factors. You were young, just turning 19, having been 18 at the beginning of the conspiracy. You have a very sad history and a very difficult – have had a very difficult life in your earlier years. And you were at a stage of your life where not only had you had terrible experiences, but you were vulnerable to exploitation from others in a serious way; and did not have an adequate support network to guide you not to become involved in this sort of thing. So, I take that very much into account. ...
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> I take your role as one of being an important assistant to your co-defendant. Albeit, acting largely under direction. So it is a significant role but with – because of the way you became involved – elements of exploitation of elements of a lesser role. And I think Mr Fitzgerald

> probably puts you on the – in the overlap between 'significant' and 'lesser' role."

15. The appellant was sentenced to two years' imprisonment, to be served initially at a young offender institution. He was released from prison on 20 January 2020.

16. Subsequently, the NRM issued a conclusive grounds decision on 16 October 2020 accepting to the requisite standard that the appellant had been the victim of trafficking, having been coerced into a drug supply network. The respondent did not grant the appellant leave to remain following the NRN decision. I observe that a copy of the NRM decision was not placed before the First-tier Tribunal, nor was it placed before the Upper Tribunal. However, both representatives confirmed that a copy had been secured in the run-up to the hearing before the Upper Tribunal and agreed as to the positive nature of the conclusion reached by the NRM. I am content for the purpose of the error of law hearing to proceed on the information provided by the representatives.

17. The respondent issued a deportation order on 14 July 2020. Two days later the respondent issued reasons as to her decision to refuse a protection and human rights claim noting the appellant's conviction for a serious crime and concluding that his deportation was conducive to the public good. The respondent concluded that there would be no disproportionate interference in the appellant's protected article 8 rights if he were to be deported to Albania.

First-tier Tribunal Hearing

18. The appeal was heard by the Judge sitting at Taylor House by means of CVP on 8 June 2022. The appellant was unrepresented, his previous legal representatives having ceased to act on his behalf on 24 September 2021. The Judge concluded that the appellant was sufficiently prepared to be able to fairly present his case. The appellant gave evidence before the Judge and was cross-examined.

19. The Judge noted that the respondent had accepted the appellant's nationality and further observed the NRM's decision. However, the Judge concluded that the appellant was incredible as to his fear of persecution arising from imputed political opinion, and through the existence of a blood feud. In respect of the appellant's fear of the criminal gang that had subjected him to modern slavery it was concluded that there was no credible evidence that members of the gang were interested in him.

Grounds of Appeal

20. The appellant relies on grounds of appeal drafted by Mr Symes dated 1 August 2022. Four grounds are advanced. It is appropriate to detail grounds 1 and 2 in their entirety;

"*The First Ground – Criminal retribution/re-trafficking*

9. The FTT failed to take account of material evidence/considerations in concluding that A was not at risk from the criminal gang in the UK (the FTT identified '*the essential issue*' as being that A was not trafficked from Albania to the UK but identified by the NRM here as having suffered forced involvement in a drugs gang §56):

    (a) The expert's opinion that given Albania was arguably the main player in the UK cocaine supply there was a possibility that [G] as a participant in that operation would be connected to criminals in Albania (Harvey report §143-144) – '*based on my knowledge of Albanian organised crime, it is likely that if [G] or his associates identify an opportunity to locate IM they will make very effort to do so'* §145 and '*all overseas Albanian crime groups have connections with associates in Albania and logically, any family members still residing in Albania ... the UK's NCA and EUROPOL identify that Albanian organised crime poses a significant threat to Europe and this is in part due to its establishment in many of Europe's main cities which provides 'coverage' for the region*' (§153).

    (b) Contrary to the FTT's reasoning, the expert had in fact opined that '*The persons who have most motivation for tracing the victim are the crime gang or the criminals that he/she escaped from'* (Harvey report §62).

    (c) Contrary to the FTT's finding, if A is not identified as a victim of trafficking in Albania, the expert opined '*in my professional opinion there is a very high risk that he will be re-trafficked due to his vulnerability and ultimate dependence on others and the likelihood that he will 'reach out' to family members and friends and expose himself to being identified and traced by [G] and/or his associates as explained in para 145*' (§151)

The Second Ground – Re-trafficking risks

10. The FTT erred in law in finding that A had exhibited conduct inconsistent with naïveté, failing to take account of

    (a) The plight of a recognised trafficking victim. As per the expert's opinion '*the fundamental control methodology is the abuse of a position of vulnerability reinforced by force and threats*' (Harvey report §134). And the FTT's finding that A had previously taken advantage of criminal networks to traverse Europe ignores A's evidence that his journey from Albania to the UK had been arranged by his parents (witness statement §51).

    (b) The highly material expert's opinion that if returned as a failed asylum seeker A would be extremely vulnerable, and his access to state benefits problematic given his lack of any

> adult history in Albania – and his illegal exit would have to be reported to the authorities, creating vulnerability (Harvey report §140) particularly bearing in mind the difficulties for someone who had not previously lived independently there (Harvey report §64) and the challenge posed by seeking to live anonymously (§65) and (citing Professor Dr Haxhiymeri for the proposition that especially vulnerable were '*young men that need to find a job or to make some money in order to support all the other members of the family that depend on them that have no support system*' (§50)".

21. Ground 3 is a narrow challenge to the Judge's conclusions as to the existence of a blood feud.

22. The fourth ground is directed towards the Judge's consideration of section 72 of the Nationality, Immigration and Asylum Act 2002, asserting a failure to adequately consider the observations of the sentencing judge as to the appellant having been vulnerable to exploitation and having acted under direction. It is contended that the sentencing observations suggest that the appellant's crime was less serious than the description suggested by the Judge in his decision.

Decision and Reasons

23. Mr Symes relied upon all four grounds of appeal but accepted before me that there was little that he could add to ground 3. He was right to adopt this approach. The ground as advanced relies on no more than the implied acceptance by the Judge that the appellant's father had at some point been punched in the face. However, that fact alone is not determinative as to the existence of a blood feud and I am satisfied that the Judge gave cogent and lawful reasons for concluding in succinct terms that the appellant was unable to establish to the requisite standard that his family were involved in a blood feud:

> "38. The Appellant's primary claim was that he was a potential victim of a blood feud. In support of that claim he produced evidence showing that [SM] had been convicted by a court in Albania of the murder of [AM]. The tribunal sees no reason to doubt that evidence, but there was nothing deserving of any weight to support the Appellant's claim that a blood feud involving the Appellant and his family had resulted. Home Office enquiries found that there was no such feud. There had plainly been ample opportunity for the Appellant's father to be killed if he were the next in line. Equally there had been ample opportunity for the Appellant to be killed. An attack on his father which merely required stitches to his lips is hardly to be equated to a life for a life, under the Canon of Lek. The tribunal finds that the Appellant's claim of a blood feud in which he is a potential target is not credible".

24. I am satisfied that there is no merit to ground 3, which is properly to be dismissed.

25. After hearing helpful submissions by both Mr Symes and Ms Nolan, I allowed the appeal at the hearing on grounds 1, 2 and 4, to the extent that the decision of the First-tier Tribunal be set aside, and I now give my reasons.

26. I am satisfied that the Judge materially erred in law when considering the appellant's role in the criminal gang. It is always important in a deportation appeal to note with care sentencing observations made by a Crown Court judge who has the entirety of the prosecution and defence case before them. They have significant understanding as to relevant events and roles. In a careful judgment HHJ Huseyin explicitly addressed the different roles adopted by the appellant and his co-accused, HA, identifying their roles within the criminal gang. HHJ Huseyin concluded that the appellant was an "important assistant" to HA, "albeit, acting largely under direction". The appellant was expressly identified as having held a "significant" role. However, HHJ Huseyin was acutely aware that elements of exploitation arose and that it permitted him to place the appellant on the boundary of holding a role between "significant" and "lesser". In reaching this conclusion HHJ Huseyin was very clear that the appellant was vulnerable to exploitation, and as someone in social services care without a family around him did not have an adequate support network to guide him out of the difficulties he had found himself in with the criminal gang. It was further acknowledged that as somebody entering the conspiracy at the age of 18 the appellant was at a stage of life where through his own lived experiences he was unable to secure a means out of criminal life without the support of others.

27. It is unfortunate that the Judge in this matter did not consider the appellant's criminal acts through the prism of his vulnerability, nor make any finding as to whether the appellant had been 'groomed', a mechanism of power often utilised by criminal gangs engaged in county lines drugs supply towards vulnerable and exploitable children and young adults. Though not determinative of the proportionality assessment, adequate consideration should have been given to these matters which lay on the appellant's side of the balancing exercise.

28. I am satisfied that the Judge erred in law by adopting a negative view at [43] as to the appellant's no comment interview with the police and his late change of plea to guilty, without providing adequate reasoning. The appellant, who was unrepresented before the Judge, did seek to explain why he gave a no comment interview, observing that he did not know what to do at that time. No reasoning is given by the Judge as to why such evidence was not a satisfactory explanation in circumstances where the appellant may have a history of being groomed and, in addition, have been physically concerned for his safety in respect of other, older members of an organised criminal gang. A further material error, particularly directed to the negative approach adopted to the late change of plea, is that the Judge's decision is entirely silent as to whether the appellant, who was unrepresented, was ever asked at the hearing as to

why he changed his plea at a late stage. It is a clear requirement of procedural fairness that an appellant be asked to explain behaviour before an adverse finding of fact is made upon it in circumstances where he or she has no notice that such behaviour may be taken adversely against him or her.

29. The Judge then proceeded over several paragraphs to make adverse findings against the appellant in respect of his engagement with the organised criminal gang on issues that were not put to him. The appellant was not asked as to why he did not secure medical attention when he was beaten up by gang members after his first arrest. He was not asked as to why he was unaware that the gang were involved in dealing drugs, when he was aware that they were smoking cannabis. I take this opportunity to observe that the mere smoking of cannabis, without more, does not equate to engagement with large-scale supply of class A drugs. Of particular concern is the approach adopted at [46] where it was found that the appellant was nowhere near as inexperienced and naïve as he claimed in respect of criminal activity. It was noted that he had arranged his own transport across Europe with 'criminals' and was smuggled into the United Kingdom 'again almost certainly using criminals'. It was identified that he must have known that these acts were illegal. No adequate reasoning is given as to why the utilisation of agents and traffickers to secure entry into this country establishes that the appellant was an experienced criminal. I observe that the Crown Court judge had detailed evidence before him as to the criminal conspiracy, and it is that experienced Judge's sentencing conclusions which should properly have been at the forefront of the Judge's mind when considering the appellant's role in the criminal enterprise

30. A further concern, noted by Mr Symes in ground 1, is that the Judge gave scant attention to the expert report concerned with trafficking. I observe that the Judge did not take the preliminary step of identifying as to whether Mr. Harvey is properly to be considered an expert, for example by application of the guidance in *Kennedy v Cordia (Services) Ltd* [2016] UKSC 6; [2016] 1 WLR 597. Having failed to undertake this preliminary step, the Judge then failed to properly assess the weight that should be given to the report. His consideration of the report was limited:

> "47. According to Mr Harvey in his report, there are no obstacles to the physical reach of Albanian gangs in the United Kingdom (see [153] of the report). The ease with which the Appellant as a first-time illegal clandestine entered the United Kingdom underlines the point. It is further illustrated by the disproportionately large number of Albanian nationals held in United Kingdom prisons, reported to be around 1,500 persons.
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> ...
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> 50. Mr Harvey considered that the question of whether [the] gang could find the Appellant in Albania was speculative (see [156] of

> his report) and would depend on their level of interest. The tribunal has found that the evidence shows that the Appellant is of no interest".

31. Whilst it may reasonably have been open to the Judge to have accepted the contents of Mr. Harvey's report but to find that in the circumstances arising the appellant had no real fear of the organised criminal gang, it cannot be said in this matter that the Judge gave adequate and lawful consideration to the report capable of sustaining the conclusion reached. In the circumstances I am satisfied for the reasons set out in ground 1 that the decision of the First-tier Tribunal in respect of the appellant's fear of persecution by an organised criminal gang must properly be set aside. In respect of the second ground, I need add no more as it is reliant upon the failure of the Judge to adequately consider Mr. Harvey's report. I am satisfied that ground 2 establishes a material error of law.

32. Turning to ground 4, the first submission advanced by Mr. Symes lacks merit, seeking as it does to rely upon mitigating factors to lessen the impact of the sentence imposed in respect of the consideration of seriousness, whilst not engaging with the fact that such mitigation resulted in the sentence imposed.

33. However, I accept the Judge erred by failing to have regard to the appellant's lack of reoffending and the lack of any professional evidence suggesting that he presented any significant reoffending risk. It may be that ultimately these factors are of limited aid to the appellant, because the conviction is recent and the appellant has been out of prison for little over two years. However, I am satisfied that the failure by the Judge to at least consider the appellant's asserted pro-social behaviour following his release from prison in respect of seriousness is an error of law. Having allowed the appeal on grounds 1 and 2, I am satisfied that it is appropriate to also allow the appeal on ground 4 to permit the re-making of the decision to encompass all possible arguments that may be advanced in respect of the appellant's fear of an organised criminal gang.

34. In the circumstances I set aside the decision of the First-tier Tribunal with respect to its conclusions as to section 72 of the 2002 Act and in respect of the appellant's asylum and article 3 claim in relation to his fear of an organised criminal gang operating in the United Kingdom and, as he asserts, in Albania.

35. I do not set aside the decision of the First-tier Tribunal in respect of the appellant's case that he possesses a well-founded fear of persecution based on (1) imputed political opinion, and (2) the existence of a blood feud. The findings at [38]-[41] are preserved.

Resumed Hearing

36. Though it will often be appropriate for the Upper Tribunal to conduct the resumed hearing of an appeal in which preserved findings have been

made, I accept the observations of both representatives that extensive fact-finding is to be undertaken as to the remaining elements of the appellant's appeal in respect of international protection. Consequently I am satisfied that the most appropriate course of action is for the resumed hearing to be undertaken by the First-tier Tribunal sitting at Taylor House.

37. I was asked by Mr. Symes to issue a direction that a case management hearing should be undertaken by the First-tier Tribunal. I do not consider it appropriate that this Tribunal should direct steps that are properly to be taken by the First-tier Tribunal. However, it may aid the Resident Judge at Taylor House to be aware that the papers in this matter are disorganised, in part because the appellant represented himself for a time. It may therefore be of benefit to the First-tier Tribunal that a case management hearing is conducted to ensure that all relevant documents are placed before the Judge who conducts the resumed hearing. I observe from the papers before me that I am missing the conclusive grounds decision of the NRM dated 16 October 2020 and I am missing pages of the expert report prepared by Mr Harvey. It may well be that a new bundle should be prepared to benefit the parties and the First-tier Tribunal.

Decision and Reasons

38. The decision of the First-tier Tribunal sent to the parties on 20 June 2022 is set aside for material error of law.

39. The findings of the First-tier Tribunal at [38]–[41] are preserved.

40. The resumed hearing will take place in the First-tier Tribunal sitting at Taylor House, to be heard by any Judge other than First-tier Tribunal Judge Manuell.

41. An anonymity order is made.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 11 January 2023