In the Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2024-001003
(PA/55739/20222)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Issued:**
On 26th April 2024	**On 10th June 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

ES
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Representation:

For the Appellant: Miss J Lanigan of counsel
For the Respondent: Mr Wain, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals to the Upper Tribunal (UT) by permission given by the First-tier Tribunal (FTT). On 8.3.24 permission to appeal to the UT was given by FTTJ Stuart PJ Buchanan on two grounds only, namely:

   (i) "There is no further elaboration about why the account was not thought plausible (rather than, for arguments sake, not detailed enough).
   (ii) It is arguable that the date in October 2023 when the appellant formally produced his mother's statement dated March 2023, is not a material factor in assessing the appellant's account."

2. I grant permission to appeal on Grounds (1) and (2) only.

Background

3. The appellant is a citizen of Albania who was born 1 February 2005. He claims that he was subject to threats as a result of his father's gambling debts so that, on October 27th 2019, he decided to leave Albania for the UK. Following his departure his mother's moved to live with her sister and he did not know where his father had gone to live. He claims to have entered the UK clandestine 27th of January 2020 and submitted an asylum claim on 15 March 2020. On 17 May 2020 he signed a witness statement setting out the basis for his claim. On the 3rd of March 2023 the appellant's further statement was prepared.

4. The respondent decided to reject his claim on 29 November 2022 (at PDF page 727, numbered pages in bottom right-hand corner 725). The reasons set out therein focus on the appellant' s lack of risk on return. The full decision contained in the bundle of documents prepared for hearing continues until PDF page 754, numbered page 752. References to page numbers hereafter will be to documents within the electronic bundle unless otherwise stated.

5. On 12th of February 2024 FTTJ Judge Ferguson (the judge) dismissed the appellant's appeal against the respondent's refusal. The current appeal is therefore by the appellant against that dismissal.

The hearing

6. I heard submissions by Ms Lanigan of counsel on behalf of the appellant and Mr Wain a Home Office presenting officer on behalf of the respondent.

7. Ms Lanigan criticised the Judge, who had to decide whether the appellant was a refugee within the Refugee Convention or not. The appellant's age was accepted and he was therefore treated as vulnerable witness. He had attended the hearing with a member of the local authority despite having become an adult.

8. The respondent's position was that he would not receive adverse attention from his father's pursuers. The appellant's case was that his father, at his past or current level of debt, would continue to receive visits from money lenders. The refusal, at paragraph 3 of grounds, was criticised. It was accepted by the judge that the appellant's father was in debt in Albania but not at risk because of that problem. Paragraph 83 of the refusal (at page 739/pdf 741) made the point that it was not considered that the adverse interest would continue as his family had continued to reside in Shkoder. The question the FTT had to answer therefore was: whether the appellant and his family would be of ongoing interest?

9. Treatment of other items in the witness statements, it was conceded, left something to be desired but permission had only been granted on 1 and 2 and it was only necessary to deal with those points, therefore.

10. In relation to paragraph 14 of the decision, it was submitted that there had been a failure to provide adequate reasons. There had been several visits from the gang in 2016. There was then a gap until 2019 but in that year another visit. The respondent's position had been that the appellant's father was of past interest but not of continuing interest.

11. The tribunal was referred to the witness statement (WS) of Araniya Kogulathas signed on 26 February 2024. Paragraphs 7 and 8 of counsel's WS (at pdf 23) shows the respondent's representative at FTT (Mr. Eaton) had abandoned much of the reasoning in the refusal letter and proceeded on the basis that the issue was: whether A was of

ongoing risk from the gang who were pursuing his father's alleged debt? This contrasted with the respondent's case contained in the refusal letter.

12. The hearing from the before the FTT proceeded on basis that the 2019 incident had occurred. The extent of the respondent's case was: what were the intentions of the gang who kidnapped the appellant? Were they really going to do anything to him in the future?

13. In subsequent submissions on behalf of the respondent by Mr Eaton, it was said that the alleged kidnappers had been responsible for mere scare tactics and did not otherwise have a nefarious intent. They had threatened the appellant a few times. He assumed he would be kidnapped, therefore. Reference was then made to an incident in December 2019. No questions were put at the appeal hearing about any other incidents in 2019.

14. The appellant then referred to counsel's witness statement (WS) again, which records (at paragraph 12 (22/pdf 24) the questions that were put relating to the journey to UK with no questions raised about an incident earlier in 2019. There had been a concession in the refusal but not as to ongoing risk. The reasoning needed to be rescued.

15. Paragraphs 18 -19 of the decision contained a summary of the respondent's submissions and were to the effect that threats were not credible and that the intention to kidnap could not be established on the evidence.

16. Next I was referred to paragraph 29 at pdf 9 where the judge concludes that incidents did not occur. Procedural unfairness was argued in that there had been the concession referred to above by the respondent's representative at the hearing that the incident had occurred . The appellant had addressed these points at para 5 J of his second WS at pdf 32. Therefore, the reasoning in refusal was flawed and incoherent, as had been rightly recognised by Mr Eaton. Secondly, the appellant had responded to the issues. As to procedural fairness if it were that the judge was concerned that the events described had not occurred the appellant and/or his representatives ought to have been given an opportunity to expand on his points/respondent.

17. Next I was referred to the appellant's witness statement beginning at PDF page 680 at 21 (on pitch 682) which sets out A's version of eversion of events). He states there that he: "kept on

attending school until the beginning of December 2019. I was on my way home from school and was approached by the same two men in a car. As I was walking the car pulled up right alongside my feet. I knew what was going to happen to me, so I began to run back towards my school”

18. I was also referred to the interview at Q101 (page 708) where in the appellant was asked to explain what had happened in December 2019. His only explanation of that occasion is set out there and there was no further interrogation of this.

19. Next at PDF page 739 (numbered page 737 paragraph 76 is R’s response to A’s version. At that paragraph on PDF page 739 the respondent is critical of the appellant’s description of the incident, believing not to be credible that the appellant would be able to “outrun a vehicle”, nor is it considered consistent that the gang wanted to kidnap the appellant if the appellant was on foot at the time.

20. Next I was referred to PDF page 32 (para 5 j) numbered page 30 for the appellant’ s commentary of reasons for refusal. He says there that he never said, “I outran the car”.

21. It was submitted that the appellant had properly responded to the issues but the judge rejected the appellant’s account. However, no reasons, or no adequate reasons, were given for his view, including not taking account of the supplementary witness statement. The reasoning was very flawed, Miss Lanigan submitted. The appellant was entitled is entitled to know what account was accepted and, if his account was not accepted, why that was so.

22. If judge was concerned about whether the incident had occurred, he should have put that to the appellant or his representatives.

23. Next I was referred to paragraph 29 of the FTT’s decision at numbered pages 7 at pdf 9 where the judge recorded that the respondent accepted that these incidents had taken place.

24. The judge found lack of detail based on credibility etc but given the issues raised in the refusal, some of these matters should have been raised with the appellant and if they continued to be of concern the judge ought to have asked whether he applied too high a standards of proof to the appeal. Provided the appellant’s case withstands anxious scrutiny it should have been accepted? The judge

should have applied **AM Afghanistan [2017] EWCA Civ 1123** (see para 10 of grounds). Miss Lanigan repeated that the appellant had been treated as a vulnerable witness but argued that he had not been given a procedurally fair hearing.

Mr Wain's response

25. Mr Wain opposed the appeal. He said that if errors occurred they were not material because the judge has fully dealt with risk on return. This was conclusive and meant that there was no material error of law. The challenge to risk on return will not be sufficient to amount to an error of law.

26. There does not seem a dispute about extent of concessions but extent to which the judge followed them is another matter. I was referred to paragraphs 11 and 18 of decision at PDF page 5 – 6. Paragraphs 11 and 18 of decision helped to answer the primary attack on the FTT's decision about credibility findings. The judge's findings in that regard related not to disputed, but disputed events occurring. It was not the fact of the events occurring but what was disputed was the intentions of those involved to repeat such an incident.

27. The evidence was that the appellant should not fear any further risk as those involved had no intention to repeat such incidents.

28. The judge's decision needs to be read as a whole including in the light of light of paragraph 29. It is also necessary to look at paragraph 19, where the respondent's position was set out. He had, in that paragraph, accepted that the threat had occurred but pointed out that the threat had not been repeated (see paragraph 30 on PDF page 10). The appellant would not be treated as being at a real risk because of the length of time which are passed between threats and the appellant's departure from Albania as well as the events having now been several years ago. Furthermore, it had not been accepted that threats in 2016 and 2019 were necessarily connected. It was not accepted they (the gang of mobsters) had tried to kidnap the appellant in 2019.

29. Clearly the judge come down in favour of the respondent having analysed all the evidence. The witness statement by the appellant's barrister in relation to the hearing dealt with this at paragraph 11 (see PDF page 24). Clearly the judge considered all the evidence when assessing the risk on return (at paragraph 25 of his decision (PDF page

number 9) the judge considered risk of trafficking. The judge had also taken account of the vulnerable nature of the appellant's evidence. The First indication that the vulnerability guidance had been considered was at paragraph 12, page 5 of the PDF.

30. The judge referred to the appellant as a "vulnerable witness" and took a count of the appellant's young age. It was difficult to see, therefore, how he can be criticised for failing to consider the appellant's vulnerability but that did not mean he had to accept the appellant's account. He had gone through all the relevant guidance but nevertheless came to appropriate conclusions.

31. If paragraph 29 is read carefully it is clear that the judge dealt properly with the issue as to the lack of interest on the part of the gangs in kidnapping the appellant. The appellant's claim did not satisfy the low standard of proof required. Going into the credibility of the appellant's claim to being a future risk of kidnapping was put as an area of cross-examination that had been agreed between the parties (see paragraph 8 of the counsel's WS).

32. Paragraph 29 was also referred to as indicating the judge' s careful approach to the appellant's vulnerability. It was submitted that the judge was entitled to conclude the incidents did not occur.

33. No procedural unfairness had been established and I was invited to dismiss the appeal. There was nothing inherently wrong with the decision. It was not, in any event, material because judge's assessment of the safety of the appellant's return to Tirana has not been challenged. Paragraph 37 of the judge's decision recorded that he could safely return to Tirana. Even if the judge had accepted the appellant's account in full he went on to find that there was an accept an acceptable internal relocation option available to the appellant. In particular it was not unduly harsh for him to live in Tirana. Background evidence of adequate state protection there was referred to at paragraph 37 of the decision.

<u>Reply by Ms Lanigan</u>

34. Even if the judge that the threats of kidnapping did occur, but not with appropriate intent, the lack of reasoning renders the decision unsustainable. It was not clear what the judge treated as implausible as the appellant had not been required to provide further details or given an opportunity to respond to the allegation. If incident did occur

there were still inadequate reasons and/or inadequate consideration given to the issue.

35. As to materiality, the appellant would emphasise the significance of a procedurally unfair hearing. Having been denied a procedurally fair hearing an appeal tribunal should be inclined to interfere with the decision. In the circumstances the argument that this was a “belt and braces” approach is tainted.

36. As to Ground 2, which raised the issue vulnerability, an overarching error was the lack assessment of the appellant’s vulnerability. Paragraphs 15-18 of grounds (17 PDF) raised the issue of a letter received from the appellant’s mother. At paragraph 33 of his decision the judge appeared to accept that the letter might be relevant but took a rigid approach to its filing and assume the appellant to be treated like an adult and this is inappropriate. Whether the appellant had produced a genuine document was the real issue.

37. The most compelling of grounds were contained in paragraphs 20-23 of the grounds of appeal (Page 17 et seq/page 19 et seq of the PDF). There it refers to the judge repeatedly referring to the gang being unable to locate the appellant’s father but this was not necessarily the case.

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38. The judge also refers to the gang at paragraphs 30 and 35 (c pdf 10 onwards). He concluded that the gang consisted of only two men. The appellant’s account had been assessed in the light of this finding. That finding affects the viability of internal relocation as an option for the appellant. Even if there was a risk it was only from those two men. It was said that they would harm the appellant but this was insufficient to give rise to a risk to the appellant, given the lack of evidence of them being members of a “significant organised crime gang”. It was argued that they would go looking for the appellant when they were unable to find the man they were looking for and once they had located him the appellant would be at risk.

39. The judge rejected the suggestion that the gang were a serious threat. According to his statement, the gang would be able to locate him but the judge found that the gang would not have been able to locate the appellant’s father. They had not been to the appellant’s home for many years. So the judge had assumed that there was no risk on return.

40. The appellant never stated the gang were unable to locate his father. The Judge has either made an error of fact or not made appropriate allowance for the appellant's young age – he would not been privy to all that was going on at the time.

41. At no point did A say that the gang had not been able to find his father and therefore the judges conclusions at paragraphs 37 -38 of the decision were incorrect. The judge had proceeded on the basis that a two-man gang had been involved but this was erroneous. The judge ought to have concluded in effect that the appellant had not been able to find his father. The judge should have concluded that the appellant was a child or that he did not have all the facts. Alternatively, it was erroneous for the judge to conclude that the appellant could safely relocate without adequately grappling with the issue of the gang members who were previously pursuing him. There was, it appears, a risk to the appellant in relocation which was not adequately addressed by the judge.

42. Ground 2 related to the fact that the judge established that there was a letter dated March 2023 (handed in). At paragraph 33 of decision (11 of pdf) the judge expressed significant scepticism about the letter, saying that he was not sure when the appellant had received it. No cross-examination had been conducted as to when the letter was served on the appellant, however. It was unfair to take this approach and the judge should have taken the letter into account when reaching his decision all. In any event, the A had raised ongoing threats. Neither the judge' s reasoning nor the way he dealt with the nature of ongoing threats should be considered adequate it was submitted.

43. The appellant's representative then dealt with the appellant's Costs of the appellant's journey to UK.

44. Ms Lanigan said that it was accepted that the appellant's mother had been able to access the resources to pay an agent to smuggle the appellant into the country (see paragraph 17 -18 of the decision at PDF page 6 as well as paragraphs 17 et seq of the grounds at pdf 18). Paragraphs 12 -13 of counsel's witness statement were then referred to for counsel's account of what had transpired at the hearing. They suggested that the appellant did not know the source of the funds which paid for his transport to the UK.

45. Paragraph 17 of decision was then referred to where it refers to the evidence on this point but, Miss Lanigan said, it was inaccurate.

46. Paragraph 35 and the judge's conclusions was then referred to. It was submitted that the conclusions as to size of debt owed were unsafe because of lack of knowledge displayed by the judge.

47. The judge's decision was also characterised as unfair given the appellant's status as a vulnerable witness having regard to the guidance or fact of his age.

48. Paragraph 24 of grounds of appeal (at page numbered page 17 PDF page 19) points out why the judge's conclusions in relation to the debt were contentious. In particular, the respondent's refusal had accepted to the low "burden of proof" (referring to the standard of proof) that the appellant's father had monetary debts and owed money to an unknown gang in Albania. The grounds go onto assert that the fact that the appellant did not know the size of the debt was never an issue prior to the hearing. The size of debt not being an issue, the judge was wrong to say there was no evidence as to the size of debt. Furthermore, ignorance of level of debt was not raised in refusal (see para 69 of refusal-pdf738)

49. The appellant was able to provide further details in oral evidence (see pdf 24 of counsel's further evidence). It was not reasonable to identify or expect the appellant to identify a specify monetary value. The judge should have given reasons for rejecting that submission.

Mr Wain's further submissions

50. The additional points raised do not identify material errors. It was incumbent on the judge to consider all points.

51. Paragraph 33 of decision assesses the appellant's mother's letter saying it was vague etc explaining the lack of detail. It was a matter for the judge to decide what weight to attach to it.

52. Findings were within those the judge was entitled to make. He had to make an assessment and did so.

53. Paragraph 35 of decision makes point about the size the of debt being unknown and until the debt is ascertained it could not be assumed to be large. The Final point is that the two men can identify

the appellant's father but did not do so. The high cost of smuggling to UK was not proportionate to the threats which had occurred.

54. There were therefore no material errors -vulnerability had been fully assessed by the judge. If not with the respondent as to the above submissions-credibility findings having been made – the judge fully considered the appellant's risk on return. There could be, he said, no assumption that the gang would be larger than two people referred to (see paragraphs 37-39 at numbered page 9 PDF page 11).

55. At the end of the hearing I reserved my decision.

Discussion

56. The grounds of appeal on which the appellant has been given permission to appeal relate, first, to the alleged procedural unfairness arising from the apparent concession by Mr Eaton at the hearing that the past actions of non-state actors in relation to the appellant's father were not disputed but the risk of their future repetition was.

57. The second ground on which permission to appeal was granted relates to the statement from the appellant's mother dated March 2023 and the extent to which this was a material factor in judging the appellant's credibility.

58. The first ground requires consideration of the extent to which the judge went beyond the apparent concession by Mr Eaton, by rejecting the credibility of the appellant's claim and dismissing the appeal. To what extent was that a course open to him?

59. It is first necessary to establish the extent of the concession. This is recorded in counsel's witness statement as follows:

> "….the issue was whether ongoing interest and risk were credible"

60. Ms Kogulathas also records in her witness statement that the basis on which the appeal proceeded before the judge. This followed a recognition that the cross examination would be defined by the concession and would not be more general or wide ranging in character. I heard extensive argument but the key question is: whether this error, if established, was material?

61. The law on procedural unfairness is set out in the case of **Abdi v ECO** [**2023] EWCA Civ 1455** (see for example the case of especially

at paragraph 25, 29 – 33 and 38). As Ms Lanigan pointed out, for the UT to find an error is immaterial, it would need to be satisfied that the remission of this case to the FTT would make no difference to the outcome. This would be on the basis that it would, inevitably, have come to the same conclusion as the tribunal below. It seems that the burden would be on the respondent to show this.

62. I find the high test for concluding that the procedural irregularity is immaterial not to be met in this case, having regard to the legal test summarised above. Having regard to the appellant's young age and vulnerability, it was sensible to define the issues for cross examination and the judge's departure from the issues as defined between the parties went beyond that which had been agreed. The judge's error was contributed to by the inconsistent position, at least in writing, of the respondent. It is highly desirable for the respondent to set out clearly in writing what points he concedes and what points he contests.

63. The second criticism of the judge, on which permission to appeal has been given, relates to the judge's treatment of the evidence from the appellant's mother to the effect that the appellant was still the subject of interest from the criminal gangs which had previously been responsible for intimidating her husband. The motivation for the gangs was the need for a debt to be repaid. The judge is criticised for rejecting the letter from the appellant's mother. The judge appears to have regarded it as incredible that such a letter would not be served on the appellant's representatives until October 2023 – the notarised statement having been prepared on 8th of March 2023. The criticism is said to be that the judge was unfair in expecting excessively high procedural standards of compliance from the appellant, given his young age. Even if the appellant had turned 18 by the time of the hearing significant leeway should have been allowed for the fact that he had been below 18 until shortly before the hearing.

64. The position is that the judge reached clear conclusions over the manner in which the appellant had been intercepted by gang members, the size of the debt accrued by his father in Albania and in relation to his mother's fears for his safe return. The respondent contends that the appellant could not be treated as a person at risk on return given that only two incidents were referred to, that they were spread out over a number of years and a number of years have passed since those threats were uttered. The judge was entitled to reject the letter from mother not only because of its timing but because of its content. It is clear that the judge took account of the appellant's age and vulnerability in considering the evidence overall. Therefore, the judge came to an apparently sound conclusion in relation to the appellant's risk on return and furthermore found the appellant could

safely return to Tirana where acceptable reception arrangements would be in place and where he could not be found by such gang members. Those conclusions would have been open to the judge on the evidence. There was found to be no risk on return because, insofar as the incidents occurred, there was no credible evidence that they would be repeated and the appellant could safely relocate.

65. Therefore, in the event I had found no material errors in relation to the procedure adopted at the hearing, the claim would not have crossed the threshold of risk and I would have found the decision to be sustainable.

Conclusions

66. I have concluded that the judge went beyond the concession that had been reached between Mr Eaton and Ms Kogulathas in making fresh adverse findings of credibility against the appellant. Had he desired to do so he ought to have given the appellant an opportunity to answer each of the credibility points that concerned him. Had he done that I doubt his decision could have been successfully appealed as credibility is for the judge to decide. It is unfortunate that he erred, given the appellant's young age and relative vulnerability. This error does amount to material error of law, however.

67. I have concluded that the error of law cannot sufficiently be addressed by characterising it as immaterial as the adverse credibility finding may undermine the proper assessment of risk on return/internal relocation. Therefore, I conclude that the decision will have to be set aside and the appeal considered afresh by another judge, whether in the light of the findings in relation to risk on return the appellant could safely relocate.

68. For these reasons I see no alternative but to set aside the decision of the FTT and direct that a *de novo* hearing before a different judge other than FTT Judge Ferguson, following which the FTT can remake the decision.

Notice of Decision

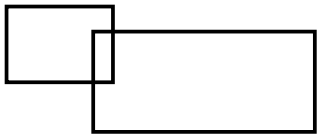
The appeal against the FTT's decision is allowed.

The decision of the FTT is set aside

The appeal is remitted to the FTT to be re-made by a judge other than Judge of FTT Ferguson.

All further directions are to be issued by the FTT.

An anonymity direction has been made.

Signed  Date 30 May 2024

Deputy Upper Tribunal Judge Hanbury