Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA 12842 2015

THE IMMIGRATION ACTS

Heard at Field House
On 12 September 2016

Decision & Reasons Promulgated
12 DEC 2016

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

D--- D---
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan, Counsel, instructed by AT Legal Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

REASONS FOR FINDING ERROR OF LAW AND DIRECTIONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent. Breach of this order can be punished as a contempt of court. I make this order because the appellant is the victim of domestic violence and the decision requires some consideration of her child. I see no legitimate public interest in knowing the identities of the people concerned and people whose cases require them to give very personal details about their histories should not expect their identities to be broadcast unnecessarily.

2. The appellant is a citizen of Albania who appeals with permission a decision of the First-tier Tribunal dismissing her appeal against a decision of the respondent that she is not entitled to international protection.

3. It is a feature of this case that the respondent accepted expressly that the appellant was a victim of domestic violence at the hands of her estranged husband. This is clear beyond all doubt at paragraph 18 of the "Detailed Reasons for Refusal".

4. The same document summarised the appellant's case.

5. It said that the appellant is an Albanian national who was born in 1984 and who married in 2001 but the relationship has ended and she wanted to divorce her husband. They had a son, L--- and he was with her in the United Kingdom. The child was born in 2003 and so is now 13 years old.

6. According to the summary she had described her marriage as an arranged marriage and said that her husband became violent towards her soon after the wedding. She remembered the date when she first suffered violence at her husband's hands. He hit her on 10 November 2001. He slapped her face and told her to obey him when she objected to rising at 6 o'clock in the morning. She was asked if she was injured in the attack and she said: "The injury was that I was quite surprised that he was hitting me, I was only 17 at the time." (Question 22 of interview). She accepted that the pain was more mental than physical but said that the incidents of violence continued. She came to realise that he was a violent man and although she intended to obey him "he would always find something, a word or anything, he didn't want the women to talk". She said that initially violent episodes occurred every two months and were limited to a slap in the face. Her husband started to incur gambling debts and he became more violent. She said "he was no longer just slapping me, he was punching me and hard." She complained of bruises and pain. She eventually found the courage to leave in August 2014. Asked how often he would beat her during the twelve years that they were together she said "I could say every month because he then continued to drink alcohol".

7. She complained that she sometimes has suffered nosebleeds and bruises on the body and pain to the point that she could hardly move. On one occasion he slapped their son because the boy protested about his father hitting the appellant.

8. She supported her case with a statement dated 22 September 2015. There she explained that there was a celebration on 12 April 2001 to mark their betrothal and on 19 July 2001 their marriage was registered at the local authority and she was "forced" to move into her husband's family home. She gave more details of her experiences of violence at her husband's hands. She repeated her account of the first incident on 10 November 2001. She said the second incident was on 4 March 2002 when he slapped her because she complained of the time he had spent out of the home. She said "I began to learn that I was going to be controlled by G---".

9. She then recalled how on 10 October 2002 which had been their first week in their home away from his parents he came home drunk and slapped her because dinner was not ready for him. She described the incident as "different" and I understand that to mean more threatening.

10. Their son was born in June 2003. In July 2003 she found him hunting out her gold necklace and he punched her in the stomach so that she fell to the floor. She said that was the first time he "hit me properly". This was to distinguish this attack from other occasions when she had been slapped. She then explained how he was gambling too much and then drinking too much and hitting her. She gave accounts of other occasions when he slapped her. At paragraph 40 she said:

> "He would carry on his normal ways: work, gamble, drink and come home. He was a mess. He would come home and cause arguments and treat me like a slave. He would continue to hit me – I don't even know why he left me if he did this to me. He told me once that 'he hit me because he loved me'."

11. She then explained how she decided enough was enough and she had to flee to the United Kingdom with their son. It was her case that in the eyes of her mother and father she was given to her husband's family and it would be shameful conduct for her to complain about domestic violence. She has compounded the sense of shame by leaving her husband's family. She also explained that she considered the police to be so corrupt that they would offer her no help. She could have no dealings with the authorities without paperwork which would identify her and her son to the authorities so that news of their whereabouts might reach her husband. She then supplemented that statement in the statement relied upon at the hearing of her appeal. She corrected some mistakes which it considered. The appellant also gave oral evidence but was stopped by the Tribunal from introducing points that had not been raised in the papers.

12. The Tribunal accepted that the appellant had been the victim of violence and ill-treatment. It noted the detailed accounts given but concluded from considering the evidence that the aggressive acts:

> "appear to occur as flashpoints every few months, rather than frequent or commonplace incidents. There was no mention or hint of sexual violence. Nor, as noted above, was there any suggestion that the marriage was forced. It appears to have been arranged and celebrated in the traditional way, which suggests that the appellant at least acquiesced in it."

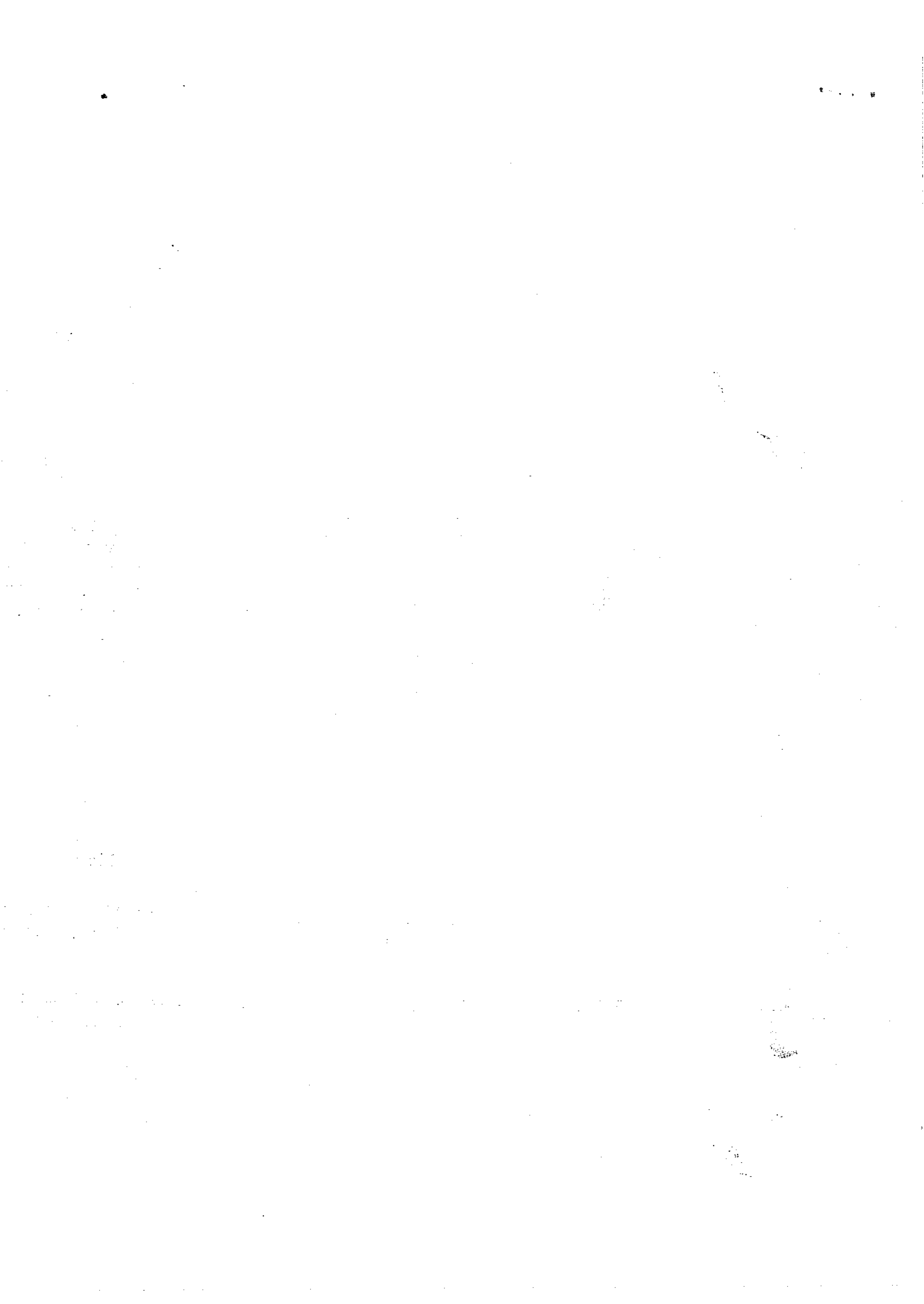
13. At paragraph 51 the Tribunal rejected the suggestion that the marriage was forced or that every act of intercourse in the marriage was an act of rape. The Tribunal said at paragraph 51:

> "There was certainly physical violence, and we accept the incidents described by the appellant, but we do not accept that they reached such a pitch as suggested at the hearing".

14. The Tribunal then rejected the contention that the appellant's husband had a cousin who was "high up" in the police force in Albania. It accepted that there was a cousin who was a police officer but no more. The Tribunal did not accept that there was any real prospect of the appellant's return coming to the attention of her husband or family by reason of gossip. The Tribunal were satisfied that Albania was just too big for that to be a realistic possibility.

15. The Tribunal did not accept that the appellant's husband, if he still lived in Albania, would have any interest in the appellant now.

16. The Tribunal did not accept that the appellant was a member of a particular social group.



17. Paragraph 60 of the determination has been criticised and I set it out below:

> "In any event, the degree of ill-treatment required to amount to persecution is also a high one. It is defined in Article 9 of the Qualification Directive, which refers to acts which are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights and can include acts of physical or mental violence, including sexual violence. In the appellant's case the psychological effect of living for a prolonged period with a man given to occasional violent outbursts, together with a concern for her son, may have been more telling than the immediate physical effects. Making every allowance for that mental toll, however, given our findings about the nature and extent of these adverse and the fact that it did not include sexual violence, we cannot accept that it involved such to violation of basic human rights as to amount to persecution." [The grammar was adrift in paragraph 60].

18. The Tribunal accepted that the appellant could not return to live with her parents in Burrel but found that she was not afraid of the authorities in Albania. At paragraph 71 of its decision the Tribunal found that internal relocation would be unduly harsh.

19. The Tribunal decided that the ill-treatment was not sufficiently severe to amount to persecution. The Tribunal did not accept that the attacks amounted to a "violation of basic human rights as to amount to persecution".

20. In any event the Tribunal decided that there was sufficiency of protection in Albania. It had never been her case that she was frightened of approaching the authorities.

21. The Tribunal then said that even if it was wrong on that point she could return to Tirana without risk. The Tribunal accepted evidence, particularly summarised in <u>**DM**</u> **(Sufficiency of Protection – PSG – Women - Domestic Violence) Albania CG [2004] UKIAT 00059**, followed in <u>**MK**</u> **(Lesbians) Albania CG [2009] UKAIT 00036**, and concluded that, save for some traditional families in the North, which was not a consideration in this case, societal attitudes in Albania were changing. Additionally there was no evidence that the police would not react appropriately if they were involved.

22. The Tribunal were satisfied that the test in <u>**Horvath v SSHD**</u> **[2000] 3 All ER 577** was met and there was effective protection available in this case.

23. For the sake of completeness, in case an alternative remedy was needed, the Tribunal then directed itself to the possibility of internal relocation. It was Mr Chelvan's case before the First-tier Tribunal that the respondent had accepted that there was an insufficiency of protection in Tirana (see paragraph 59 of the respondent's Detailed Reasons for Refusal). The Secretary of State did not argue against this submission (see paragraph 69 of the Decision). However it clearly is not the case that the respondent accepted that effective protection was not available in Tirana. The respondent was considering how internal relocation might work, not deciding that it was necessary.

24. The Tribunal looked for other places the appellant might go. Having considered the evidence, and particularly the guidance given in MK the Tribunal was satisfied that internal relocation away from Tirana would be unduly harsh but that the Appellant could reasonably be expected to live as a single woman with a son in Tirana.

25. The reality is that there was no place where she could establish herself outside Tirana.

26. The appellant did not need humanitarian protection. In summary, the Tribunal did not accept there was a real risk of harm from the appellant's estranged husband but even if there were it would not be persecutory or sufficient to warrant humanitarian protection and in any event there was a sufficiency of protection available.

27. In short, the appeal was dismissed.

28. Permission to appeal was granted by First-tier Tribunal Judge Ransley on all grounds. In outline, it was the appellant's case that the First-tier Tribunal was wrong in law to say that the appellant was not a member of a particular social group, that the Tribunal was wrong in law to find that the appellant had not been persecuted when she had been the victim of domestic violence throughout her fourteen-year marriage and the Tribunal was wrong in law to find there was effective protection in Albania. It was also wrong to rely on the decision in **MK (Lesbians) Albania** because it had been set aside by the Court of Appeal.

29. I agree that the Tribunal erred when it said the appellant does not belong to a particular social group. The appellant's grounds refer to the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and particularly Regulation 6(d) which says that:

> "a group shall be considered to form a particular social group where, for example: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."

30. There are two ways in which the appellant could form a social group. Possibly because she is a woman and women can be perceived as weaker or somehow less worthy than men and but more appropriately in this case she could be seen as a woman who has been the victim of domestic violence and, according to the evidence, at risk of ostracisation because of her broken relationship if she lives outside it and more violence if she remains within it. At the risk of being trite, a person is not entitled to international protection by reason of being a member of a particular social group. Rather, if a person needs international protection then the kind of protection to which she is entitled depends on whether or not she is a member of a particular social group. If she is, and if that is the reason for her persecution, then she is a refugee. If she is not then she is (probably) entitled to some other kind of protection.

31. I have read the respondent's reply. It is not helpful on this point. Paragraph 5 is bizarre. I mention it only to say that Ms Isherwood disavowed it hastily. It was settled by an experienced Presenting Officer who I think on this occasion must have been distracted when he settled the grounds. Being a refugee and being a victim of domestic violence are not mutually exclusive.

32. Similarly there is nothing in the objection to the appellant relying on an unreported decision. In any event the grounds do not really "rely" on such a decision. That is overstating the position. All the grounds do is refer to a properly identified unreported decision that is helpful. It is not suggested that it amounts to a novel proposition of law. It may have been better not to have been mentioned it but this is a peripheral point.

33. I have read DM (Sufficiency of Protection-PAG-Women-Domestic Violence) Albania CG [2004] UKIAT 00059. Mr Chelvan, rightly, points out that the definition of PSG is now set out in Regulation 6(1)(d) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Regulation 6(1)(d)(ii) prescribes that "the group has a distinct identity because it is perceived as different by the surrounding society". I accept the evidence of Dr Antonia Young that such victims who left would be "branded for life" as someone who has dishonoured her community. The extent of that branding will no doubt vary in each case and not all victims of domestic violence will need international protection but I am satisfied that the group is distinctive enough to amount to a particular social group.

34. I find that the First-tier Tribunal was wrong to conclude that the appellant had not been the victim of persecution. I do not find it necessary to decide if every sexual act in the course of the marriage was consensual or whether the appellant was in fact raped on any occasion during the marriage. Even if, as the First-tier found, the appellant had exaggerated the violence in the course of her marriage it was accepted that she had been repeatedly beaten in different ways on different occasions. In my judgment the severity of violence in a marriage is only one of the factors that has to be considered in determining if it is described properly as persecutory. Any violence between partners is to be taken seriously although some violence is plainly even much serious than others. A horrible element of domestic violence is not just the fact of the violence but the fact that it is inflicted in a relationship where the victim, usually but not always a woman, should be entitled to support and affection. When that is replaced by violent bullying and controlling behaviour it is horrible for her and there is clear evidence here of repeated nasty acts of violence intended to humiliate and overbear the victim. This is clearly sufficiently severe to amount to persecution. Again, I disagree with the First-tier Tribunal's findings to the contrary.

35. None of this is of any use to the appellant's claim to be a refugee if in fact there is effective protection available to her in Tirana. As is explained above, the First-tier Tribunal found that she could *not* be expected to remove. However, the Tribunal found that effective protection was available in Tirana. There were two objections to this in the grounds. The first is that the appellant could not afford state protection because she relied on her brother, who said he could not pay, and secondly because she has a relative who is a police officer who, it was said, would frustrate the ordinary operation of the law.

36. There is nothing irrational in the conclusion that the brother would help. He is not a rich man but he is in regular work. He said his income was at the order of £30,000 plus bonuses. He has supported his sister in the United Kingdom and it is a reasonable inference that he would continue to assist. I cannot agree that it is an error of law to decide in these circumstances that he would help.

37. The Tribunal considered carefully the evidence about the effectiveness of protection in Albania and noted the change in societal attitudes. At paragraph 64 of its decision it noted how in most cases there is effective protection. Importantly at paragraph 58 of its decision the Tribunal concluded that there was no risk to the appellant from her husband. They had been apart for nearly two years and there was no suggestion of any kind of contact or

enquiry. I appreciate that does not address the possibility of the appellant eventually coming to the attention of her former husband and he feeling pressurised to react. However, the only objection to police protection was the appellant's contention that her husband had a relative in the police force who had sufficient rank to frustrate protection. This was not made out to the Tribunal. The Tribunal noted inconsistencies about the status of the relative and no attempt to find corroborative evidence. The appellant's brother's evidence was only recycling the appellant's own evidence and added nothing. The Tribunal did not accept any real chance of the appellant's husband's relative finding out about her. The appellant and her brother may genuinely believe that the relative would frustrate protection but there was no evidence to make that persuasive.

38. I have read Dr Antonia Young's report. It may be that the Tribunal underestimated the possibility of the appellant being identified to her former husband. The point being made in that report is that even in Tirana a lone women or a lone woman with a child are unusual and therefore attract attention. They attract attention from the authorities when they arrive and their arrival is reported to their municipality. However, the Tribunal was very aware of the deficiencies of the security forces in Albania. It reminded itself of the **Horvath** test and considered other evidence before concluding that there is a sufficiency of protection and there is nothing in this case that would put it in a different category.

39. Criticism was made in the grounds of relying on the case of **MK** because, it is said, it can no longer be country guidance because it was remitted to the Upper Tribunal by the Court of Appeal but in fact not redetermined because the appellant was allowed to remain. That assertion is right in part. The decision in **MK** was overturned by the Court of Appeal and, following Mr Chelvan's submissions being brought to the attention of the responsible judges, I expect it to be removed from the list of Country Guidance cases.

40. The Respondent and the First-tier Tribunal relied on **MK (Lesbians)** to support the argument that a woman *could* live on her own in Tirana. At the risk of oversimplification, the First-tier Tribunal preferred the guidance in **MK** to the evidence of Dr Young. I cannot rectify that without giving the Respondent notice that MK is not good guidance.

41. It follows that I set aside the decision of the First-tier Tribunal.

42. I find that women who have been victims of domestic violence do constitute a particular social group in Albania. I accept the finding that there is effective protection available against violence by the appellant's former husband and the finding that this appellant cannot be expected to relocate outside Tirana.

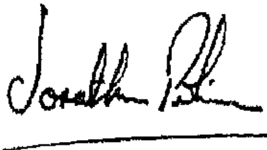
43. I am not able to complete this Decision because the neither party, and particularly not the Respondent, could be confident that MK should not have been followed and so I adjourn the hearing for final determination. I set out below Directions for the next hearing.

Directions

No later than 5 days before the date fixed for next hearing this appeal each party shall serve on the other bundled copies (ideally secured with a treasury tag) of all documentary evidence on which the party seeks to rely, full witness statements drawn to stand as evidence in chief from any witness the party wants to call and an outline skeleton argument limited to deciding if the appellant risk persecution or other serious ill-

treatment in the event of her return to Tirana as a victim of domestic violence. The submissions should concentrate on where she can live with her son and how they can support themselves.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 9 December 2016