IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001857
First-tier Tribunal No: PA/52340/2023
LP/03245/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 September 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE LOUGHRAN

Between

KR (Albania)
(ANONYMITY DIRECTION IN FORCE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr J. Collins, Counsel instructed by Sentinel Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 6 August 2024

DECISION AND REASONS

1. By a decision dated 2 April 2024, First-tier Tribunal Judge Hussain ("the judge") dismissed an appeal brought by the appellant, a citizen of Albania born in May 2001, against a decision of the Secretary of State dated 24 March 2023 to refuse his claim for asylum and humanitarian protection. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Saffer.

3. We informed the parties at the hearing that this appeal would be allowed, that the decision of the judge would be set aside, and that the appeal against the refusal of the appellant's asylum claim would be remitted to the First-tier Tribunal with no findings preserved, to be heard afresh by a different judge. We reserved our reasons, which we now give.

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Anonymity

4. The judge made an order for the appellant's anonymity. We maintain that order. The appellant has an outstanding claim for asylum and has also been recognised as a victim of modern slavery, pursuant to a decision of the Single Competent Authority dated 19 January 2023. Pursuant to the Sexual Offences (Amendment) Act 1992, the appellant enjoys lifelong anonymity on account of the allegation that he is a victim of modern slavery.

Factual background

5. The appellant's case is that when he was 12 years old he was made by his father to sell cigarettes to customers in bars and cafés in Tirana, his home town. In due course, the appellant accepted an invitation from two men who had befriended him to earn more money doing different work. That, on the appellant's case (and as accepted by the Single Competent Authority) led to the appellant being forced to engage in cannabis farming in Albania.

6. As a result of being subjected to forced labour, the appellant claims to have fled Albania in July 2018, when he would have been 17. He travelled through Europe, eventually arriving in the United Kingdom clandestinely on 9 October 2018. He claimed asylum the same day, on the basis that he had been trafficked in Albania for the purposes of forced criminality, and that he would be at a real risk of being re-trafficked upon his return to Albania. He claims that, since his father exploited him and failed to protect him in the past, he cannot look to his family for assistance, still less return to the family home.

7. In refusing the claim, the Secretary of State accepted that the appellant was a victim of trafficking, but concluded that he did not have a well-founded fear of being persecuted. He was not at a real risk of being re-trafficked; he was well educated and no longer minor. There was no evidence that the criminal gang responsible for his trafficking had any connections with or influence over the Albanian law enforcement authorities. The gang had not attempted to engage in any reprisals. The appellant was in contact with his family. The Secretary of State also concluded that the appellant was not a member of a "particular social group" for the purposes of the 1951 Refugee Convention. He would enjoy a sufficiency of protection in Albania and the ability internally to relocate in any event.

8. On 23 May 2023, the appellant was granted discretionary leave to remain until 11 May 2024. That was on the basis that he had received a positive conclusive grounds decision and that further submissions relating to the risk of re-trafficking had not been determined.

Decision of the judge

9. The judge heard the case on 24 January 2024. Having set out the procedural and factual background, and summarising the evidence and the submissions, the judge's operative conclusions were at paragraphs 31 to 42 of the decision. The judge concluded that the general principle that past persecution is a serious indication of a future risk of being persecuted did not apply in the appellant's case (para. 33). Applying the factors contained in *TD and AD (Trafficked women) CG* [2016] UKUT 00092 (IAC) by analogy, the appellant would not be at a real risk of being re-trafficked.

10. The judge said at para. 38 that the appellant:

> "… has not explained why his family would not have been concerned by his forced recruitment or disappearance and have not reported it to the police. It is difficult to understand how the appellant would have had the opportunity to observe his traffickers associating with the police."

11. The judge found (para. 39) that it was significant that the appellant had been recruited as a young person "with all the vulnerabilities that came with his age". He was now an adult. There was no information as to whether his previous traffickers were "still around". The appellant's evidence that the gang had come looking for him in Albania was "entirely unsubstantiated". There was no indication that the gang was still interested in him, nor even that it was still a going concern. Since the appellant was from Tirana, he would be less vulnerable to being re-trafficked than people from other areas.

12. The judge noted that the appellant's mental health was potentially relevant. He concluded that a medical report provided on the appellant's behalf, which concluded that he experienced post-traumatic stress disorder, lacked weight. The appellant had not sought any treatment for that condition from his GP, suggesting that PTSD was not an ongoing concern.

13. The judge also held that the Secretary of State had dealt adequately with the appellant's human rights claim in the refusal letter; he did not have a "meritorious" claim on human rights grounds.

14. The judge dismissed the appeal on asylum, humanitarian protection and human rights grounds.

Issues on appeal to the Upper Tribunal

15. There are three grounds of appeal.

    a. Ground 1: the judge failed adequately to apply the guidance contained in *TD and AD (Trafficked women) CG*, with the appropriate modifications to reflect the appellant's gender and personal circumstances.

    b. Ground 2: the judge failed to reach findings concerning sufficiency of protection and internal relocation.

    c. Ground 3: the judge incorrectly stated at para. 32 that the appellant had not made submissions concerning whether he was a member of a particular social group. He had. The judge failed to make an issue on this core finding.

16. We are grateful to Mr Melvin and Mr Collins for their skeleton arguments dated 2 and 6 August 2024 respectively.

Preliminary jurisdictional issue: statutory abandonment of the appeal

17. The appellant's appeal was lodged with the First-tier Tribunal on 14 April 2023. As Mr Collins identified in his skeleton argument, pursuant to section 104(4A) of the 2002 Act, the appellant's appeal against the refusal of his protection claim was treated as statutorily abandoned upon the grant to him of discretionary leave to remain on 23 May 2023. That being so, in order to continue the proceedings, it was necessary for the appellant to give a notice to the First-tier Tribunal under section 104(4B) of the 2002 Act stating that he wished to continue the appeal insofar as it was brought in reliance upon a ground of appeal contained in section

84(1)(a) of the Act (removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention).

18. Mr Collins accepts that no such notice appears to have been given by the appellant. That means the proceedings before the First-tier Tribunal were treated as abandoned on 23 May 2023. All proceedings after that date were without jurisdiction: see *MSU (S.104(4b) notices) Bangladesh* [2019] UKUT 412 (IAC) at para. 38.

19. The statutory abandonment of proceedings should be understood as provisional. If notice is given pursuant to section 104(4B) then, subject to an extension of time, the proceedings will retrospectively acquire validity: *MSU*, para. 39.

20. A section 104(4B) notice should have been provided to the First-tier Tribunal, under rule 16(3) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. It is that tribunal which was – and remains – competent to extend time.

21. As judges of the Upper Tribunal, we are also judges of the First-tier Tribunal. We therefore sit as judges of the First-tier Tribunal in order to determine whether to grant a retrospective extension of time.

22. We will adopt the conventional three-stage relief from sanctions test, addressing the following criteria:

    a. First, the significance of the breach. This was a significant breach. Notice should have been given to the First-tier Tribunal within 28 days of the grant of leave, that is by 20 June 2023. Notice was eventually given to the Upper Tribunal almost 14 months later. That is a significant breach which meant that the proceedings for which there was no jurisdiction continued for a considerable period.

    b. Secondly, whether there is a good reason for the breach. No reasons have been provided. The issue was only identified very recently by Mr Collins. He had been unable to take instructions concerning the explanation. We can only assume that the reason for the breach is due to oversight and human error. That is not a good reason. We directed at the hearing that those representing the appellant must provide a written explanation for this default within 14 days (that is, by 20 August 2024).

    c. Thirdly, considering all the circumstances of the case, whether we can determine the application justly by refusing it. Ordinarily, a significant breach for which there is no good reason would be unlikely to lead to relief from sanctions. However, bearing in mind the overriding objective of the First-tier Tribunal to decide cases fairly and justly, we take the following factors into account. It is significant that all parties, including two other judges of the First-tier Tribunal (Judges Hussain and Grey), did not identify this as an issue. In our experience, many representatives fall into this error. There has been no prejudice to either party on account of the proceedings continuing in the manner that they did, namely on the footing that they were valid. The Secretary of State would have been aware of the grant of leave since she granted it. The appellant is a recognised victim of modern slavery who has claimed asylum on the basis that he is at real risk of being subjected to treatment similar to that which he has been subjected previously. That is a strong factor militating in favour of granting an extension. The merits of the appellant's

underlying appeal to the Upper Tribunal are strong. Drawing this analysis together, we conclude that we can decide the application fairly by granting it.

23. We therefore grant the extension of time for a notice under section 104(4B) to be provided, sitting as judges of the First-tier Tribunal for the purposes of determining this issue. We accept Mr Collins' oral notification under section 104(4B), noting that, as held in *MSU*, there is no prescribed form or other procedure that is to be followed.

24. As a consequence of this ruling, the statutory abandonment has been reversed retrospectively, insofar as the appeal was brought on a ground contained in section 84(3).

25. To the extent that the judge purported to address the appellant's human rights-based appeal, that was, and remains, without jurisdiction. A section 104(4B) notice is only capable of reviving proceedings concerning asylum or humanitarian protection. The grant of leave on 23 May 2023 conclusively brought the proceedings to an end insofar as they challenged any parallel refusal of a human rights claim by the Secretary of State. We do not consider the fact that the leave only lasted until 24 May 2024 to affect this conclusion. It is only a notice under section 104(4B) that is capable of reviving previously abandoned proceedings, not the expiration of leave that caused the proceedings to be abandoned under section 104(4A) in the first place.

Relevant legal principles

26. The applicable ground of appeal to the First-tier Tribunal is contained in section 84(1)(a) of the 2002 Act: "that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention…"

27. This has the effect of incorporating the Refugee Convention into domestic law, permitting recourse to be had directly to the terms of the Convention itself. Article 1A(2) of the Convention applies to those who:

> "… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion…"

28. It is well-established that an error of law includes failing to take into account or resolve conflicts of fact or opinion on material matters. An error of law also includes a failure to give reasons, or any adequate reasons, for findings on material matters, and making a material misdirection of law on any material matter. See, for example, *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at para. 9.

29. There is no country guidance concerning trafficked men in Albania. The guidance given by *TD and AD* concerning the risk of retrafficking for trafficked women is capable of being applied to trafficked men, with the appropriate modifications. See para. (h) of the headnote:

> "Trafficked women from Albania may well be members of a particular social group on that account alone. Whether they are at risk of persecution on account of such membership and whether they will be able to access sufficiency of protection from the authorities will depend upon their individual circumstances including but not limited to the following:

1) The social status and economic standing of her family

2) The level of education of the victim of trafficking or her family

3) The victim of trafficking's state of health, particularly her mental health

4) The presence of an illegitimate child

5) The area of origin

6) Age

7) What support network will be available.”

Ground 1: failure adequately to assess the appellant’s individual circumstances

30. Mr Melvin submitted that the judge applied *TD and AD* in a manner that was open to him. It was not, he submitted, necessary expressly to address each of the individual risk factors. The evidence before the judge indicated that the appellant was in contact with his mother, and that he has a married sister and other family members there. As a well-educated young man, the appellant was well placed to avoid being trafficked, in contrast the position when he was a young child. There is no evidence that the gang continued to have any interest in him, and his vulnerability then was far, far greater than it is now.

31. We accept that the judge directed himself in accordance with *TD and AD*: see paras 35 and 36. However, we respectfully disagree with Mr Melvin’s submission that the judge was not required to address each applicable risk factor. He was.

32. Central to the *TD and AD* risk factors is an assessment of the appellant’s family situation and any support network that will be available to him in Albania. Since the judge only addressed the ability of the appellant to return to the family home, rather than any prospects of relocating internally or seeking protection from the authorities, the judge must have conducted his analysis on the footing that the appellant would not be at any real risk from being re-trafficked were he to return to his family, or at least his home town, namely Tirana.

33. The difficulty with that aspect of the judge’s analysis is that a significant part of the appellant’s claim for asylum was that he had been required, or even forced, to work by his abusive father at a young age. The appellant’s case (see his witness statement dated 31 July 2023, para. 9) was that his father had beaten him, made him to work as a child, and that he missed school as a result. At para. 5 of his asylum statement he said that his father would regularly get angry and attack his mother, that he forced his sister into a marriage she did not want to enter, and that he would regularly beat the appellant if he did not do what he, his father, required. Accordingly, in order for the judge’s findings concerning the appellant’s prospective ability to avoid being re-trafficked when returning to the home from which he was trafficked previously, it was incumbent upon the judge to reach findings of fact concerning these issues. These issues went directly to the support network, and family environment, to which the appellant would return – and to which, on the findings reached by the judge, the appellant could look for support to avoid being re-trafficked.

34. It is not clear whether the judge accepted the above aspects of the appellant's case, whether he rejected those aspects (and if so, for what reasons) or whether he did not consider those parts of his case at all.

35. It is also difficult to understand how the appellant's prospective return to Tirana, the location from which he was previously trafficked, would now be a *protective factor* in the appellant's favour.

36. Finally in relation to this issue, we consider that there is force to the remaining submissions advanced by Mr Collins. Bearing in mind the appellant was a child at the time the events which he claims took place occurred, and recalling the fact he has been recognised as a victim of modern slavery, we consider that the judge erred by expecting corroborative evidence of some key features of the appellant's case. For example, it is difficult to see (para. 39) how the appellant could reasonably have been expected to obtain evidence that the gang in question was still in operation. Moreover, the evidential basis for the judge's conclusion at the end of paragraph 39 ("…there is no reason to assume that members of the gang have not dispersed and moved onto other trades…") is not clear. We respectfully consider that that finding is somewhat speculative, and imposes on the appellant an expectation that is inconsistent with the lower standard of proof applicable to these proceedings.

37. The appeal is allowed under ground 1.

Ground 2: the judge erred by not considering sufficiency of protection and internal relocation

38. We consider that the judge also erred by not addressing whether the appellant would enjoy a sufficiency of protection in Albania, or whether it would be open to him to relocate internally within the country. Had the judge adequately addressed those issues, any error in relation to ground 1 may well have been immaterial (and vice versa).

39. However, the errors inherent to the judge's analysis of the primary issue of the appellant's risk on return throw his failure to address sufficiency of protection and internal relocation into sharp relief.

Ground 3: not necessary to address

40. It is not necessary us to address whether the judge erred in his approach to whether the appellant is a member of a particular social group, in light of our findings concerning grounds 1 and 2.

Conclusion

41. The appeal is allowed. We set the decision of the judge aside, with no findings of fact preserved. In light of the extent of the fact-finding required, it is appropriate to remit this matter to the First-tier Tribunal for the appeal against the refusal of the appellant's asylum claim be decided afresh, by a different judge.

<u>Notice of Decision</u>

Sitting as judges of the First-tier Tribunal, we retrospectively extend the time within which a notice under section 104(4B) of the 2002 Act may be given for the purposes of rule 16(3) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. We accept the appellant's section 104(4B) notification given at the hearing.

Sitting as Judges of the Upper Tribunal:

1. The appeal to the Upper Tribunal is allowed.
2. The decision of Judge Hussain involved the making of an error of law and is set aside with no findings of fact preserved.
3. We remit the appeal against the refusal of the appellant's asylum claim to the First-tier Tribunal, to be heard afresh by a different judge.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 August 2024