



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/07791/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 16 February 2015

**Decision & Reasons
Promulgated**

On 27 February 2015

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**DK
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan, instructed by Duncan Lewis (Birmingham)

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, DK, is a citizen of Turkmenistan and has been granted refugee status in Bulgaria. She was born in 1988. She appealed to the First-tier Tribunal (Judge Shimmin) against the decision of the respondent dated 30 July 2013 to refuse her further leave to remain in the United Kingdom and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal dismissed her appeal. She now appeals, with permission, to the Upper Tribunal.

2. There has been a substantial delay in this appeal in the Upper Tribunal following an adjournment of the hearing on 14 May 2014. That adjournment was necessary in order that further evidence could be obtained from the Supreme Administrative Court of Bulgaria concerning a case which the appellant had before that court. Documents relating to the Supreme Administrative Court's judgment have now been made available to the respondent and to the Tribunal. It had been hoped that the litigation in Bulgaria would have been terminated by that judgment but that is not the case; the Supreme Administrative Court has remitted the matter to a lower court for a further decision.
3. I was assisted by Ms Khan, counsel for the appellant, at the hearing on 16 February 2015 and also by Mr Diwnycz, who appeared for the respondent. Ms Khan submitted that Judge Shimmin's determination could not stand in any event because he had misunderstood the nature of the appellant's appeal on Article 3 ECHR grounds. The judge had found [100] that the appellant was suffering from post-traumatic stress disorder (PTSD). He also accepted Counsel's submission [101] that "because of her precarious mental health, the appellant would be more susceptible to serious harm such that the discriminatory measures taken by the Bulgarian Authorities are more likely to pass the threshold into persecution discrimination." Notwithstanding that finding, the judge went on to conclude that "because of the absence of current medical evidence, I find the appellant has failed to provide evidence of where that threshold [of] lies (*sic*)." Ms Khan explained that the appellant's case is that, because she suffers from PTSD, any detention or questioning of her by the Bulgarian Authorities would be likely to render her treatment persecutory. However, although it is clear from the papers that that was the basis upon which the appellant's case was put before the First-tier Tribunal, Judge Shimmin at [102] wrote:

The appellant's condition comes nowhere near the very high threshold set in *N* [2005] UKHL 31. That case found that Article 3 is not breached by the return of an AIDS sufferer unless in the extreme circumstances and suffering the critical illness as in the case of *D v UK* [1997] EHRR 45. The appellant has not provided any medical evidence to indicate that her condition is at a stage where she is critically ill nor has she provided evidence that her condition would deteriorate significantly such that there would be a significant effect on her physical and moral integrity as set out in the case of *Bensaid 44599/98* (6 February 2001) ECHR. Therefore I find that she has not come within the extreme circumstances required to constitute a breach of Articles 3 and 8.

4. Whilst Judge Shimmin's statement of the law relating to Article 3/8 ECHR in "medical" cases is probably accurate, it appears that he has misunderstood the basis of the appellant's submissions; this is not a "medical" Article 3/8 case; rather, the appellant claims that Article 3 is engaged in the manner which I have outlined above. Mr Diwnycz, for the respondent, accepted that the First-tier Tribunal had erred in law and that the determination should be set aside. I direct that none of the findings of fact shall stand. Given the need for a new fact finding exercise, I consider

that it is appropriate that the appeal should be returned to the First-tier Tribunal (not Judge Shimmin) for that Tribunal to remake the decision.

NOTICE OF DECISION

5. The determination of the First-tier Tribunal dated 28 November 2013 is set aside. None of the findings of fact shall stand. The appeal shall be considered *de novo* by the First-tier Tribunal (not Judge Shimmin) and that Tribunal shall remake the decision.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 26 February 2015

Upper Tribunal Judge Clive Lane