



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01063/2019

THE IMMIGRATION ACTS

Heard at Field House
On 27 August 2019

Decision & Reasons Promulgated
On 17 September 2019

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

BS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Sardar, Counsel, instructed by Fountain Solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Albania, born on 9 April 1986, appeals against a decision of Judge Sullivan of the First-tier Tribunal promulgated on 11 June 2019 dismissing her appeal against the respondent's decision to refuse her claim for asylum and humanitarian protection, submitted on the basis that she was a trafficked woman at risk of being re-trafficked in Albania. Judge Sullivan allowed the appellant's appeal on Article 8 grounds.

Has the appeal been abandoned?

2. As the Article 8 limb of the appellant's case was successful before Judge Sullivan, I queried with the parties whether she had already been granted leave in that capacity. I was informed that she had. I therefore indicated to the parties that this may be a case to which section 104 (pending appeal) of the Nationality, Immigration and Asylum Act 2002 applied.
3. Section 104(4A) provides that an appeal is to be treated as abandoned if an appellant is granted leave to enter or remain in the United Kingdom. A potential exception is contained in subsection (4B). That subsection provides that subsection (4A) shall not apply to an appeal in so far as it is brought on grounds which include section 84(1)(a) (removal of the appellant from the United Kingdom would breach Refugee Convention), provided the appellant gives notice to the Tribunal in accordance with the Tribunal Procedure (Upper Tribunal) Rules 2008.
4. Rule 17A of the Tribunal Procedure (Upper Tribunal) Rules 2008 makes provision for the purposes of section 104(4B)(b). It provides, where relevant:
 - (1) *A party to an asylum case or an immigration case before the Upper Tribunal must notify the Upper Tribunal if they are aware that –*
 [...]
 - (b) *the appellant has been granted leave to enter or remain in the United Kingdom;*
 [...]
 - (3) *Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002, but the appellant wishes to pursue their appeal, the appellant must send or deliver a notice, which must comply with any relevant practice directions, to the Upper Tribunal and the respondent so that it is received within thirty days of the date on which the notice of the grant of leave to enter or remain in the United Kingdom was sent to the appellant.*
 [...]
 - (5) *Notwithstanding rule 5(3)(a) (case management powers) and rule 7(2) (failure to comply with rules etc.), the Upper Tribunal must not extend the time limits in paragraph (3) and (4).*
5. As is clear from rule 17A(3), an appellant has thirty days in which to notify the Tribunal, in accordance with the relevant practice directions, that she intends to pursue an appeal on, in this context, asylum grounds. The Upper Tribunal's normal case management powers to vary or amend rules do not apply to the time limit contained in paragraph (3). As such, the thirty day limit is a hard deadline; unless notice is provided in that period, the appeal "shall be treated as abandoned".
6. After taking instructions, Ms Sardar confirmed that her instructing solicitors had no record of having provided notice under rule 17A(3). She indicated that the appellant wanted to proceed with her appeal.

7. I was not presented with any documentary evidence, or otherwise informed by either party, that the appellant's grant of Article 8 leave had taken place in excess of the thirty day period permitted under rule 17A(3). Although rule 17A(5) does not permit the Tribunal to use its case management powers to extend the time for compliance with a rule under rule 5(3)(a) or otherwise waive a requirement of the rules under rule 7(2)(a) in relation to the thirty day period, that restriction does not apply in relation to the form in which such notice is to be given. Accordingly, in exercise of my case management powers under rules 5(3)(a) and 7(2)(a), to the extent it was necessary for the appellant's notice under section 104(4B) of the 2002 Act to take a particular form, I waive that requirement and substitute for it the appellant's notification, through Ms Sardar, that the appellant sought to continue with her appeal on asylum grounds.
8. Mr Tarlow was content to proceed in this way and made no submissions contending that the appeal fell to be treated as abandoned.
9. Accordingly, I find that the appeal had not been treated as abandoned.

Background

10. The following factual summary is taken from [2] to [4] of Judge Sullivan's decision.
11. The appellant claims to have left Albania in or about October 2014. From there she travelled to Italy, ostensibly to meet up with her boyfriend. However, on arrival she was forced into prostitution following which she was trafficked via Belgium to the United Kingdom where she was again forced into prostitution. She was able to escape in February 2017 and claimed asylum that month. She was later referred to the competent authority for an assessment as to whether she was a victim of trafficking. On 21 September 2018 the competent authority found that there were conclusive grounds to conclude that the appellant was and is a victim of trafficking.
12. The appeal brought by the appellant is on the sole ground that Judge Sullivan failed to apply the country guidance case applicable to the risk of re-trafficking in Albania, namely TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC). Permission to appeal was granted by First-tier Tribunal Judge Boyes on that basis.

Legal framework

13. The burden is on the appellant to establish that, applying the lower standard of proof, she meets the requirements of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ("the Qualification Regulations"). Specifically, the appellant must establish to the above standard that he falls within the definition of "refugee" contained in Article 1(A) of the 1951 Refugee Convention ("the Geneva Convention"), as incorporated into domestic law by regulation 2(1) of the Qualification Regulations. Alternatively, she must demonstrate that she meets the criteria in paragraph 339C of the Immigration Rules, and/or that returning her to

Albania would breach the United Kingdom's obligations under Articles 2 and 3 of the European Convention on Human Rights ("ECHR").

Discussion

14. Ms Sardar submits that the judge made no reference to TD and AD in her operative analysis of the appellant's case and did not appear to consider or apply the substantive requirements of the Headnote in her analysis.
15. Mr Tarlow submits that the appellant's challenge is nothing more than a disagreement with valid and well-reasoned findings of the First-tier Tribunal. The judge properly applied the relevant country guidance, before reaching conclusions that were open to her on the evidence.
16. It is necessary to recall the findings of fact which were reached by Judge Sullivan. There has been no challenge by either party to those findings. Mr Tarlow confirmed that the respondent has not challenged the finding that the appeal should be allowed on Article 8 grounds.
17. At [17], the judge set out why she considered the appellant to be a vulnerable person by reference to the experiences she had undertaken and her medical conditions. At [21], Judge Sullivan found the appellant to be a credible witness, referring to her general credibility.
18. At [22] the judge quoted and endorsed the psychological report of Dr Parsonage. She stated:

"Based on the medical report and the appellant's evidence I am satisfied as follows:

 - (a) *The appellant suffers from severe PTSD;*
 - (b) *she takes mirtazapine to treat the condition;*
 - (c) *she has in the past twice taken an overdose to harm herself (on both occasions she was in captivity and on one occasion she had been forced to abort a pregnancy);*
 - (d) *the symptoms she now suffers include depressed mood, nightmares, avoidance of social contact, hypervigilance, poor concentration and finding public places (including public transport) difficult;*
 - (e) *she suffers the symptoms listed in full in the medical report notwithstanding that she was receiving counselling and taking medication;*
 - (f) *she is very anxious about the prospect of returning to Albania;*
 - (g) *the thought of return to Albania makes her feel suicidal;*
 - (h) *she is not as resilient as she was before she was trafficked..."*
19. The judge did refer to TD and AD at [11] of her decision, and appeared to refer, albeit briefly, to the impact that mental health conditions can have on the viability of return to Albania or the risk arising from re-trafficking.
20. For the reasons set out below, I accept Ms Sardar's submissions that the judge did not follow the requirements of the Headnote or the operative analysis within TD and

AD. The oblique reference at [11], when viewed alongside the judge's analysis of the trafficking elements of the appellant's case, does not demonstrate that the judge had applied the relevant country guidance.

21. The relevant paragraphs of the Headnote to TD and AD include:

"a) It is not possible to set out a typical profile of trafficked women from Albania: trafficked women come from all areas of the country and from varied social backgrounds.

...

d) In the past few years the Albanian government has made significant efforts to improve its response to trafficking. This includes widening the scope of legislation, publishing the Standard Operating Procedures, implementing an effective National Referral Mechanism, appointing a new Anti-trafficking Co-ordinator, and providing training to law enforcement officials. There is in general a Horvath-standard sufficiency of protection, but it will not be effective in every case. When considering whether or not there is a sufficiency of protection for a victim of trafficking her particular circumstances must be considered.

e) There is now in place a reception and reintegration programme for victims of trafficking. Returning victims of trafficking are able to stay in a shelter on arrival, and in 'heavy cases' may be able to stay there for up to 2 years. During this initial period after return victims of trafficking are supported and protected. Unless the individual has particular vulnerabilities such as physical or mental health issues, this option cannot generally be said to be unreasonable; whether it is must be determined on a case by case basis.

f) Once asked to leave the shelter a victim of trafficking can live on her own. In doing so she will face significant challenges including, but not limited to, stigma, isolation, financial hardship and uncertainty, a sense of physical insecurity and the subjective fear of being found either by their families or former traffickers. Some women will have the capacity to negotiate these challenges without undue hardship. There will however be victims of trafficking with characteristics, such as mental illness or psychological scarring, for whom living alone in these circumstances would not be reasonable. Whether a particular appellant falls into that category will call for a careful assessment of all the circumstances.

g) Re-trafficking is a reality. Whether that risk exists for an individual claimant will turn in part on the factors that led to the initial trafficking, and on her personal circumstances, including her background, age, and her willingness and ability to seek help from the authorities. For a proportion of victims of trafficking, their situations may mean that they are especially vulnerable to re-trafficking, or being forced into other exploitative situations.

h) 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"*

22. Turning to the submissions, the first objection to Judge Sullivan's decision raised by Ms Sardar is that the judge misapplied or misread the respondent's own Country Policy and Information Note, *Albania: People trafficking*, version 7.0 December 2018 ("the CPIN"). Paragraph 2.3.6 of the CPIN outlines the respondent's reasons why she considers trafficking to be less common in Albania. That was a factor highlighted by the judge at [25(c)] of her decision. However, submits Ms Sardar, at paragraph 2.3.7 of the CPIN, the respondent herself acknowledges that that analysis does not permit departure from the terms of the existing country guidance contained in TD and AD. The judge does not appear to have engaged with paragraph 2.3.7, nor with the risks outlined in the Headnote to TD and AD, which states at sub-paragraph (g) that re-trafficking is a "reality".
23. Accordingly, whereas the judge found that re-trafficking is something which is less common, the respondent's CPIN maintained the position in TD and AD that re-trafficking is a reality. The judge did not purport to be able to depart from the terms of TD and AD, and nor was there evidence before her permitting her to. It appears that the reality of re-trafficking is something that the judge did not engage with in accordance with the terms of the country guidance.
24. In addition, TD and AD calls for a personalised rather than a generalised approach to the risk upon return. It is clear, for example, from sub-paragraphs (d) and (e) to the Headnote that the risk of whether an individual will face re-trafficking is a case specific question, which must be addressed by reference to the facts of the individual case.
25. Against that background, I turn to the specific criteria set out at sub-paragraph (g) of TD and AD's Headnote concerning the risk of re-trafficking.
26. One of the factors highlighted in that paragraph is the willingness and ability of a previously trafficked woman to seek help from the authorities. Ms Sardar submits that due to her experiences, her vulnerabilities and the findings that the judge made concerning the appellant's own difficulties upon her return which ultimately merited a finding that she was entitled to leave to remain on Article 8 grounds, the appellant is neither willing nor able to engage with the protection available to many women in Albania. In support of this contention Ms Sardar highlights [23] of Dr Parsonage's report where Dr Parsonage records the appellant as having said to him that she did not want to live in hiding or under protection in Albania.
27. Secondly, the judge's findings in relation to the presence of very significant obstacles to the appellant's integration in Albania featured considerations which go directly to the heart of this issue. Even though those factors led to the judge allowing the appeal on Article 8 grounds, those factors did not form part of her operative analysis concerning the risk of re-trafficking. For example, at [29(a)] the judge noted that the

appellant genuinely fears returning to Albania. She is likely to be suspicious of others and will be inhibited in establishing relationships of any sort with other people. The judge did not address the factors in paragraph (g) of the Headnote to TD and AD in light of these findings of fact.

28. Thirdly, the judge found in [29(b)] that the PTSD suffered by the appellant means that she finds it difficult to go out in public, to use public transport and to socialise. That will make it impossible in practical terms for her to look for employment or go to work or obtain work experience or educational qualifications, the judge found. Significantly for present purposes, the appellant's conditions are likely to prevent her from engaging with others in Albanian society or forming friendships. The judge also found there would be very little prospects of her reintegrating into society in Albania.
29. The judge also noted at [29] that the appellant's medical conditions persist, despite the medication and treatment she is receiving in this country, and they are likely to worsen in Albania. Taken together, these factors lead to considerations which the judge should have taken into account, but did not appear to have addressed, in the context of assessing whether the appellant would be willing or able to seek help from the authorities in the form of sheltered accommodation or other forms of protection upon her return to Albania.
30. Secondly, Ms Sardar submits that even if the appellant did enter a shelter in Albania, doing so would only provide a time-limited temporary solution which would not provide any prospects of lasting protection. Ms Sardar relies on the evidence this Tribunal recorded that it heard in TD and AD. At [105] of TD and AD, the time-limited nature of the protection available to victims of trafficking was highlighted. At [112], the panel noted that there is a "critical phase" of reintegration which all victims of trafficking face following the conclusion of their time in Government or sheltered accommodation, prior to their reintegration into society. The judge did not consider the impact of the findings that she made in relation to the presence of very significant obstacles to the appellant's reintegration in Albania on this time limited and "critical phase" of her reintegration. The judge did not address the factors outlined at (f) of the Headnote, which require consideration of whether the particular vulnerabilities of a victim of trafficking, for example mental illness, would render the process of leaving the shelter unduly harsh. I consider this aspect of the judge's analysis to feature an error of law.
31. Thirdly, in addition to having failed to consider the phased return to society from Government accommodation to private or other accommodation, and the ensuing difficulties, the judge did not incorporate into her assessment the earlier findings that she had made that the appellant is no longer in contact with her family. Ms Sardar submits that the judge could have gone on to consider the expert report that was before her, concerning the appellant's estrangement from her family on account of the shame they are likely to feel as a result of the experiences the appellant has been subjected to by her traffickers. Paragraph (b) of the Headnote to TD and AD is also relevant in this regard:

“(b) Much of Albanian society is governed by a strict code of honour which not only means that trafficked women would have very considerable difficulty in reintegrating into their home areas on return but also will affect their ability to relocate internally”

Also relevant to the issue of post-shelter integration are the factors that the judge outlined at [29]: the appellant’s inability to work and the impossibility, to adopt the judge’s terminology, of her integrating into society.

32. I accept the submissions of Ms Sardar that, in combination, these factors mean that the judge failed properly to follow and apply the relevant country guidance case of TD and AD, and the errors of law which beset the judge’s analysis are such that the decision needs to be set aside.
33. At the hearing I sought submissions from both parties as to the appropriate course of action. Both parties submitted that I could base my own assessment of the applicability of TD and AD to the appellant’s case on the unimpugned findings of fact reached by Judge Sullivan: I agree. I set Judge Sullivan’s decision aside, preserving its findings of fact save those in relation to the risk of re-trafficking.

Remaking decision

34. I turn therefore to remaking this decision. The essential issues for my consideration are those outlined at sub-paragraph (g) of the Headnote to TD and AD, viewed through the lens of Judge Sullivan’s findings of fact.
35. I must bear in mind the extreme vulnerability of this appellant, as evidenced by the report of Dr Parsonage, the natural consequences that are likely to flow as a result of the Competent Authority’s conclusive grounds decision, and Judge Sullivan’s separate findings in relation to the presence of very significant obstacles to the appellant’s integration.
36. The risk factors relevant under sub-paragraph (g) are the appellant’s personal circumstances, background, age, willingness and ability to seek help from the authorities. The personal circumstances of this appellant, as I have already outlined, are that she is estranged from her family and is likely to be unable to seek any assistance from them.
37. She has a good education, but that is not determinative of the absence or presence of a risk of re-trafficking. She is 33, and although Judge Sullivan said that at that age she is older than a typical age of those likely to be trafficked in Albania, I consider that it is necessary to have regard to sub-paragraph (a) of the Headnote to TD and AD:

“It is not possible to set out a typical profile of trafficked women from Albania: trafficked women come from all areas of the country and from varied social backgrounds.”

Accordingly, although the appellant may be older than some current victims of trafficking, that is not a factor which mitigates against the risk of re-trafficking upon her return to any significant extent.

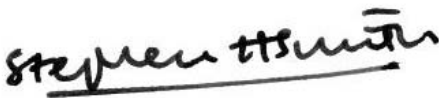
38. Returning to the personal circumstances of the appellant, she is not willing, and understandably nor is she able in light of her medical conditions, to seek the assistance of the authorities, either in the form of protection upon her return from the police or through some form of accommodation in a shelter for trafficked women. I accept that her unwillingness to countenance the possibility of such accommodation is a factor which is relevant for me to take into account, pursuant to sub-paragraph (g) of the Headnote in TD and AD.
39. Accordingly, although the findings of Judge Sullivan in relation to very significant obstacles related primarily to the likelihood of the appellant being able to integrate in Albania upon her return, those findings of fact are highly relevant to this assessment of whether the appellant will be able to avail herself of the protection of the authorities. These are all considerations which are highly relevant to my consideration of whether the appellant has a well-founded fear of persecution on the basis of being a member of a particular social group, namely trafficked women in Albania, and I find that for the reasons I have outlined that she is. Past persecution is a serious indication of likely future risk, unless there are good reasons to the contrary. The appellant is unable to avail herself of the protection of the authorities for the reasons outlined above and, accordingly, she satisfies the definition of a refugee in the Qualification Regulations.

Notice of Decision

The decision of Judge Sullivan is set aside and remade to allow the appellant's appeal on asylum grounds.

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 her or any member of her 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 5 September 2019

Upper Tribunal Judge Stephen Smith