IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000934

First-tier Tribunal No: PA/50904/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 June 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ES
(Anonymity Order made)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman, instructed by Morgan Pearse Solicitors

Heard at Field House on 2 June 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing ES's appeal against the respondent's decision to refuse his protection and human rights claim further to a decision to deport him on conducive grounds under section 5(1) of the Immigration Act 1971 pursuant to section 3(5) of the Immigration Act 1971.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and ES as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Albania, born on 26 May 1985. He was encountered on 23 June 2020 having been arrested by police on suspicion of cultivating cannabis. At that time he stated that he had arrived in the UK a year before, concealed in a lorry. He claimed to have been trafficked to the UK to work, working initially on a construction site but then subsequently being sent to work in a cannabis factory, in order to pay off a debt which resulted from borrowing money from the criminal gang in Albania to pay for his autistic son's healthcare. He had accumulated a debit of £15,000 which also included the fee for his journey to the UK. The appellant was referred into the National Referral Mechanism (NRM) by the police on 24 June 2020 and, on 30 June 2020, a positive Reasonable Grounds decision was made in his trafficking claim, followed by a positive Conclusive Grounds decision on 26 November 2020 by the Single Competent Authority (SCA). In the meantime, the appellant was convicted on 10 November 2020 of production of a class B controlled drug, cannabis and was sentenced to 9 months' imprisonment with 12 months' licence upon release. He was also served with a deportation decision dated 13 November 2020.

4. The appellant responded to the deportation decision and made an asylum claim on the grounds that he was at risk in Albania from the people who had trafficked him to the UK, as he still owed them most of his original debt and in addition he claimed that the traffickers would be antagonised by their significant loss of investment in the cannabis farm and would blame him for the loss. He claimed that threatening letters had been sent to his home in Albania because he had not repaid the money and his wife and child had since moved to a new area in Durres. The appellant's claim was recorded as having been made on 9 December 2020 and was refused in a decision of 1 September 2021.

5. In the refusal decision, the respondent accepted the appellant's account of being a victim of trafficking and forced labour, in light of the decision of the Competent Authority, but considered that people trafficked for criminal activity or forced labour would not have a distinct identity within Albanian society and therefore did not form a particular social group (PSG). The respondent considered further that any subjective fear the appellant had of being persecuted was not well-founded as there was a sufficiency of protection available to him from the Albanian authorities and he was also able to relocate to another part of Albania aside from Durres, such as Kukes. The respondent accordingly considered that the appellant did not qualify for international protection and that he was at no risk on return to Albania for the purposes of Article 3 of the ECHR. The respondent concluded that the appellant's removal to Albania would not breach his human rights under Articles 3 or 8. It was considered that he did not fall within the exceptions to deportation on family and private life grounds, as he did not have family life in the UK, he had not been lawfully resident in the UK for most of his life, he was not socially and culturally integrated in the UK and there were no very significant obstacles to his integration in Albania nor very compelling circumstances outweighing the public interest in his deportation.

6. The appellant appealed against that decision and his appeal was heard on 14 October 2022 in the First-tier Tribunal by Judge Mills. Judge Mills noted that the respondent was content to proceed on the basis that the appellant's entire account was true and that there were no credibility issues to be determined but was maintaining that the claim did not engage the Refugee Convention, that it was unlikely that the appellant would be pursued by his former traffickers, that he could obtain protection from the state and that he could relocate elsewhere in Albania to avoid the traffickers if necessary. The judge noted further that the appellant was not a 'foreign criminal' for the purposes of the UK Borders Act 2007 because his convictions had not led to a sentence of 12 months or more, and that this was a deportation case made on

‘conducive grounds’ under the 1971 Act. The judge accepted that the appellant’s claim engaged the Refugee Convention on the basis that he was a member of particular social group.

7. On the basis of the accepted facts, the judge found that the people who had trafficked the appellant to the UK and then forced him into labour in the cannabis farm were part of a significant cross-border criminal network and that it was reasonably likely that they would have the ability to trace the appellant anywhere in Albania were he to try and relocate to a new area. The judge found that the appellant and his wife would have to live in or very near to one of the larger cities in order to access healthcare for their son and that it would be unduly harsh to expect the family to live in a remote area and deprive their son of the support he required. The judge found that the traffickers would have the inclination to seek out the appellant as he had not paid back the original loan and it was also reasonably likely that they would hold him responsible for the financial loss they incurred when the cannabis farm was lost to the police raid. The judge considered that the gang would seek revenge from the appellant, either by re-trafficking him into further forced labour or by harming him and his family, and that that would amount to persecution for a Refugee Convention reason. The judge found that there would not be adequate and effective state protection for the appellant and his family and that he was therefore at risk on return to Albania such that his appeal succeeded on asylum grounds. For the same reasons the judge found that the appellant succeeded on Articles 3 and 8 grounds. He also made the point that the appellant was not a foreign criminal as his offending had not caused ‘serious harm’, and therefore the tests in section 117C of the Nationality, Immigration and Asylum Act 202 did not apply to him and he only had to meet the ‘very significant obstacles’ test in paragraph 276ADE(1) of the immigration rules and the ‘unduly harsh consequences’ test outside the rules, which he found could be met in any event. The judge accordingly allowed the appeal on protection and human rights grounds.

8. Permission to appeal against that decision was sought, out of time, by the respondent on two grounds. Firstly, that the judge had erred by failing to give adequate reasons for findings on a material matter: he failed to give adequate reasons for finding that the appellant was a member of a particular social group and he erred by finding that there would no sufficiency of protection and no internal flight option available to the appellant, having based his decision on assumptions about the traffickers’ ability to trace him and failed to give proper reasons why the appellant would have difficulty supporting his family and what treatment was required by his son to require them to live in a big city. Secondly, that the judge had erred by finding that the appellant’s offence did not cause serious harm and that he was not a foreign criminal, and had therefore erred by not considering section 117C of the 2002 Act.

9. Permission was granted in the First-tier Tribunal, time having been extended and the application admitted. The appellant did not file a Rule 24 response.

10. The matter then came before me and I heard submissions from both parties.

11. Mr Tufan submitted that the judge’s finding, that there was a cross-border network of traffickers who could find the appellant in Albania, was contrary to the Country Policy and Information Note (CPIN) on Albania, according to which there was a sufficiency of protection available for male victims of trafficking. The judge wrongly criticised the CPIN as not being impartial. Further, the judge was wrong to consider that the appellant could not be considered as a foreign criminal when he had been involved in the production of cannabis. The judge’s finding, that such activities did not

cause serious harm, was lacking in reasoning and was irrational. The judge ought to have undertaken a full analysis under section 117C.

12.Mr Coleman commented that he was surprised that time had been extended for the out of time application for permission, but he was not instructed specifically to challenge that. He submitted that the judge undertook a lengthy and detailed analysis of the CPIN report. The judge did not say that the report was not objective but just that it was not completely objective and, in any event, he was entitled to take account of the references in the report to the significant corruption in the police and the judiciary. As for the appellant's offending, the judge was entitled to take account of the fact that he was convicted before the final decision of the SCA, and it was relevant to note that both the Crown Court Judge sentencing him and the SCA accepted that the appellant had been trafficked and that his family had been threatened. The judge's finding about the traffickers being able to trace the appellant was not based on mere assumptions but was based upon the appellant's evidence. It was open to the judge to find that this was a sophisticated criminal network and that he was forced to come to the UK and break the law in order to pay off his debt. The judge's finding, that the appellant would have to live in or near a big city in order to access medical treatment for his son, was consistent with the CPIN report.

13.Mr Coleman accepted that he may be in some difficulty in opposing the challenge to the judge's finding that the appellant was a member of a particular social group and that his case therefore fell within the Refugee Convention, but he submitted that that was not material as it did not pollute the findings on Article 3. However the judge was otherwise entitled to make the findings that he did. He was also entitled to conclude that the appellant was not a foreign criminal and that section 117C therefore did not apply. Mr Coleman asked me to uphold the judge's decision and to find that the Secretary of State's grounds were simply a disagreement with his decision. He agreed that if I found an error of law in the judge's decision to allow the appeal on asylum grounds, I could re-make the decision without there being any need for a further hearing.

14.Mr Tufan did not have any further submissions in reply.

Discussion

15.Mr Coleman properly acknowledged the force of the challenge to the judge's finding that the appellant was a member of a particular social group within the Refugee Convention and it seems to me that that ground of challenge is made out by the respondent. The judge gave consideration to the matter at [45] to [48] and noted at [45] that the Home Office CPIN for September 2022 did not accept that trafficked men from Albania formed a particular social group. As discussed at the hearing, the current CPIN was the February 2023 version which updated the one considered by the judge, but there was no suggestion that the more recent policy said anything materially different to the previous one. The judge decided to reach a different conclusion on the basis of another reference in the CPIN to 'stigma' suffered by returning victims of trafficking, but it seems to me that that was not a proper basis to depart from the conclusions reached in the same document, that the available evidence did not indicate that society generally perceived male victims to be a distinct group. Having provided no further reasons based on any other country information to conclude that trafficked men from Albania formed a particular social group I find that the judge erred in law in that respect. Accordingly the judge erred by finding that the appellant was a member of a particular social group and that he was entitled to

benefit from the Refugee Convention for that reason, and his decision to allow the appellant's appeal on asylum grounds was therefore legally erroneous.

16.However the respondent's grounds of appeal challenging the judge's decision on risk on return are otherwise no more than disagreements with his findings on the evidence before him. The respondent challenges the judge's finding that there was a cross-border network of traffickers who could find the appellant in Albania. However that was a finding made on the specific accepted facts of the appellant's case as set out at [50] which included the fact that it was the same criminal gang who had loaned the appellant money in Albania which then trafficked him to the UK to work and repay the debt and who then threatened his wife and child in Albania. The respondent's grounds also challenge the judge's finding that the appellant's family would be easily located by the criminal gang owing to the need to live in or near a large city in order to access medical treatment for their son, and the finding that the gang would hold the appellant responsible for the financial loss incurred from the seizure of the cannabis farm in the UK. However those were findings made by the judge on the evidence before him, including the appellant's own accepted evidence and the background country evidence. As Mr Coleman submitted, the findings were also consistent with the country evidence in the CPIN in regard to the accessibility of medical treatment.

17.The respondent asserts in her grounds that the judge's findings as to a lack of protection from the Albanian authorities was contrary to the CPIN, according to which there was a sufficiency of protection available for male victims of trafficking. However the judge had full regard to the country evidence and the country guidance in TD and AD (Trafficked women)(CG) [2016] UKUT 92 when reaching his conclusions. Mr Tufan criticised the judge for finding the CPIN not to be impartial, but as Mr Coleman submitted that was not what the judge did. The judge, at [59], said that the report was not necessarily an entirely impartial document, but he nevertheless went on to take it into account, saying that he looked to the report for evidence of the current position. The judge then assessed the risks to the appellant in the context of that report, and on the basis of his own personal circumstances, as the guidance in TD and AD required him to do, and provided cogent reasons for concluding that in his particular case he would not be able to hide from the criminal gangs and could not access the higher level of protection that was required. Accordingly it is not the case that the judge rejected or disregarded the CPIN, and neither did he reject the respondent's view that male victims of trafficking did not, in general, suffer from a lack of state protection. What he did was to find that a male victim of trafficking in the appellant's particular circumstances was at risk on the basis of his specific profile. He was fully and properly entitled to do that.

18.The respondent's second ground challenges the judge's finding that the appellant was not a person who had been convicted of an offence that caused serious harm and was thus not a 'foreign criminal' for the purposes of section 117D of the Nationality, Immigration and Asylum Act 2002. However the respondent's challenge fails to acknowledge that the judge's finding in that regard was made in a specific context, following the guidance in Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 350, and bearing in mind a range of factors including the reasons for the appellant's offending and the decisions made by the SCA. As Mr Coleman pointed out, the appellant was convicted of the offences prior to the conclusive grounds decision being made by the SCA and it was accepted by the SCA, and indeed by the Crown Court Judge who sentenced him, that he was forced into the work in the cannabis farm by his traffickers who had made threats against his family in Albania. In such circumstances it seems to me that the judge was entitled to find that section 117C did not apply to him and that his Article 8 claim was to be assessed on the basis set out at [76]. Again,

I find that the respondent's challenge is little more than a disagreement with the judge's findings and conclusions and does not identify an error of law in his decision.

19.For all these reasons I find no merit in the grounds, other than the ground challenging the decision under the Refugee Convention. In assessing the question of risk on return, the judge undertook a careful and detailed assessment of the background country evidence and reached his conclusions against that country evidence and the country guidance, on the basis of the appellant's particular circumstances. He provided cogent reasons for reaching the conclusions that he did and was entitled to allow the appeal on the basis that he did on Article 3 and 8 human rights grounds. The grounds do not identify any errors of law in the judge's decision in that respect.

20.Accordingly I set aside the judge's decision allowing the appeal on asylum grounds but uphold the decision to allow the appeal on Article 3 and 8 human rights grounds. As Mr Coleman agreed, in such circumstances the proper outcome would be that the appellant's appeal is dismissed on asylum grounds but allowed on human rights grounds. Given that the only reason for dismissing the appeal on asylum grounds was that the appellant did not engage the Refugee Convention as a member of a particular social group or otherwise, and given that the judge's decision on risk on return is upheld, the appeal should also be allowed on humanitarian protection grounds.

Notice of Decision

21.The making of the decision of the First-tier Tribunal involved a material error on a point of law in relation to the appellant's asylum claim under the Refugee Convention. The Secretary of State's appeal is therefore allowed to that limited extent. The decision to allow ES's appeal on asylum grounds is accordingly set aside. The decision is re-made by dismissing ES's appeal on asylum grounds, but allowing it on grounds of humanitarian protection.

22.The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside in relation to ES's human rights claim. The Secretary of State's appeal is therefore dismissed to that extent. The decision to allow ES's appeal under Articles 3 and 8 stands.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 June 2023