IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001194
FTT No: PA/53155/2023
LP/03344/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 September 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
UPPER TRIBUNAL JUDGE MAHMOOD

Between

NM
(ANONYMITY ORDER MADE)

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: Ms S Mackenzie, Senior Presenting Officer

Heard at Field House on 5 August 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.
No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant is a national of Albania who appeals with permission against the decision of First-tier Tribunal Judge Le Grys ("the judge"), promulgated on 23 February 2024 following a hearing on 26 January. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of a protection claim. For reasons set out in due course, the judge declined to consider the appellant's case as it related to Article 8 ECHR ("Article 8").

2. The appellant arrived in United Kingdom on 30 November 2021 at the age of 17 . He made his protection and human rights claims on 7 December 2021. The claims can be summarised as follows. The appellant asserted that he had been the victim of trafficking, both whilst in Albania and after he arrived in the United Kingdom. As a result of this history, together with his family background and poor mental health, he claimed to be at risk of re-trafficking by the same criminal gang or others, would not receive sufficient to state protection, and could not internally relocate. The distinct Article 8 claim was essentially predicated on the same factual assertions, albeit within a different legal framework.

3. The respondent refused the claims on 18 May 2023 and the appellant appealed to the First-tier Tribunal. By a decision which we have not had sight of, but is undisputed, on or around 24 January 2024 the respondent granted the appellant temporary permission to stay as a victim of human trafficking or slavery ("VTS") for a period of 18 months. That decision was based on the appellant's accepted significant mental health problems, specifically complex PTSD. The VTS was said to provide the opportunity for the appellant to continue receiving appropriate treatment in this country. However, the appellant's appeal to the First-tier Tribunal remained opposed.

The judge's decision in summary

4. It is to be noted that, despite the fact that the case concerned a protection claim, the respondent did not provide a Presenting Officer at the hearing. In our view, that is both surprising and, to say the least, unfortunate. That is particularly so given the jurisdictional matter which arose.

5. The judge recorded that the appellant's representative had only just received the VTS letter referred to previously: [10]. Following the

conclusion of the hearing, the judge appreciated that the VTS letter was of some legal consequence: the grant of leave to remain to an individual during the course of a pending appeal normally result in that appeal being treated as abandoned under section 104(4A) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). The judge therefore directed the parties to provide written submissions. The appellant complied, whilst the respondent did not.

6. The judge referred himself to section 65(2) of the Nationality and Borders Act 2002 ("the 2022 Act"), which enabled the respondent to grant individuals "limited leave to remain" for the purposes of, amongst other things, assisting them to recover from harm arising from the trafficking. The judge concluded that the VTS was equivalent to a grant of leave to remain and thus the appellant's appeal was to be treated as abandoned insofar as the human rights claim was concerned: [16]-[21].

7. However, with reference to section 104(4B) of the 2002 Act, the judge concluded that the remaining aspect of the appellant's appeal relating to the protection claim, was not to be treated as abandoned and thus the judge proceeded to consider that claim: [11]-[12].

8. The judge accepted that the appellant was a member of a particular social group, namely male victims of trafficking in Albania: [29]. The judge concluded that the appellant was not at risk of being re-trafficked by those who had trafficked him in the past. Whilst the existence of complex PTSD was accepted, the judge proceeded on the "reasonable assumption" that the appellant would not be required to leave the United Kingdom until progress with relevant treatment had been made. Thus, in the judge's view, it was "by no means certain" that the mental health condition would continue to play a material part in the appellant's overall circumstances by the time of any return to Albania and there would be the support of friends and family: [30]-[33].

9. The judge concluded that there was sufficient state protection. The Albanian authorities operated "an effective legal system" and the police functioned "effectively", with efforts been made to tackle corruption. The judge referred to the country guidance decision in TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC). As regards a submission made by the appellant that there was an "implementation gap" in terms of state protection, the judge concluded that "individual or local problems" which might exist did not mean that there were "sustained and systemic

failures" such that state protection would not be sufficient. Addressing the appellant's evidence that he had witnessed apparent collusion between the police and the traffickers, the judge took the view that the latter might have been "fraudulently using uniforms and vehicles", or that this had simply been an example of rogue officers. Overall, the judge decided that there was sufficient state protection: [34]-[39].

10. The judge concluded that internal relocation was a viable option for the appellant. There was no evidence to show that the traffickers held influence on either a local or national level, or that they had any ongoing interest in the appellant. Whilst relocation would "not be easy", the judge took note of the appellant's apparent ability to "adapt to life in entirely foreign country, where he does not speak the language and was unfamiliar with the country." There was nothing "particularly unusual or exceptional" in respect of the issues which the appellant would have to deal with on return to Albania: [40]-[41].

11. As mentioned previously, the judge did not address the Article 8 claim. Accordingly, the appeal was dismissed.

The grounds of appeal

12. Four grounds of appeal were put forward in which can be summarised as follows. *First*, it was said that the judge erred in his assessment of risk by: (a) failing to consider whether the appellant would be re-trafficked by other groups; (b) failing to have any or any adequate regard to certain risk factors such as low social and economic status and the appellant's poor mental health; (c) failing to consider the appellant's mental health as it was at the date of hearing, as opposed to a future unspecified date. *Secondly*, it was said that the judge erred in his assessment of state protection with reference to the CPIN evidence and the appellant's own evidence. *Thirdly*, it is said that the judge erred in his assessment of internal relocation by failing to take any or any adequate account of the appellant's mental health problems. *Fourthly*, albeit in brief terms, it was said that the judge erred in concluding that the VTS constituted leave to remain. As a result, the judge was wrong to have precluded consideration of the appellant's Article 8 claim.

13. Permission was granted by the First-tier Tribunal without restriction.

Rule 24 response

14. There was no rule 24 response from the respondent.

Procedural matters: the appellant's error of law bundle

15. The appellant's error of law bundle appeared to have been uploaded late to the portal, but it is possible that this was due to a technical issue rather than an oversight of the appellant's solicitors. We have considered the bundle.

Discussion and conclusions: the abandonment issue and the Article 8 claim

16. As ground 4 goes to the question of the jurisdiction of the First-tier Tribunal and, in turn, the Upper Tribunal, it is appropriate to deal with this first.

17. Section 104(4A) and (4B) of the 2002 Act provide as follows:

> "(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)
>
> (4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant–
>
> (a)…
>
> (b) gives notice, in accordance with Tribunal Procedure Rules, that he wishes to
>
> pursue the appeal in so far as it is brought on that ground."

18. Section 65(2) of the 2022 Act provides as follows:

> "65 Leave to remain for victims of slavery or human trafficking
>
> (1) …
>
> (2) The Secretary of State must grant the person limited leave to remain in the United Kingdom if the Secretary of State considers it is necessary for the purpose of—
>
> (a) assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation,

(b) enabling the person to seek compensation in respect of the relevant exploitation, or

(c) enabling the person to co-operate with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation."

19. The central question for us is whether section 104(4A) was engaged at all; in other words, did the VTS amount to leave to remain? If it did, two consequences follow. First, the judge was correct to have concluded that the appeal was to be treated as abandoned in so far as the human rights ground was concerned. Secondly, the judge was jurisdictionally precluded from considering the protection ground because it is common ground that the appellant had not given notice of his wish to pursue that ground, pursuant to section 104(4B)(b).

20. The contention that the grant of temporary permission to stay did not amount to a grant of leave to remain and did not engage section 104(4A) was properly raised in ground 4 of the grounds of appeal, albeit in brief terms. We have had regard to the appellant's written submissions provided in compliance with the judge's directions. In summary, these contended that the grant of temporary permission to stay was made in the context of the appellant being a victim of trafficking and pursuant to the respondent's policy entitled "Temporary permission to stay: considerations for victims of human trafficking and slavery". The policy referred to "temporary permission", as opposed to "leave to remain". The appellant contended that the temporary permission to stay was NRM process and was "distinct" from a grant of leave to remain, which would be obtained following a consideration of a protection and/or human rights claim and/or appeal.

21. At the hearing, Mr Collins elaborated on the submissions previously made. He referred us to version 3.1 of the respondent's policy, published on 30 May 2024 and updated on 11 July 2024 (Guidance template.docx (publishing.service.gov.uk)). He highlighted passages at pages 4, 7-8, and 9 of the policy:

Page 4 "This guidance tells caseworkers about temporary permission to stay for confirmed victims of human trafficking or slavery (VTS). This guidance explains the circumstances in which it is appropriate to grant VTS to those confirmed as victims of human trafficking or slavery by the National Referral Mechanism (NRM), and what must be considered before making that

decision. This guidance also covers extensions of stay and when it may be necessary to cancel permission to stay. The term ‘modern slavery’ includes human trafficking, slavery, servitude and forced or compulsory labour and is used in this context throughout this document.

All new considerations made after commencement of Appendix: Temporary Permission to Stay for Victims of Human Trafficking or Slavery (VTS) in the Immigration Rules on 30 January 2023 will be made under this policy, and any reconsideration of those decisions. Reconsiderations of decisions made under the previous policy of Discretionary Leave for Victims of Modern Slavery will still be reconsidered under that policy.

Pages 7-8 The policy objective is to deliver a fair and effective permission to stay process in relation to confirmed victims of modern slavery:

…

As discussed in the section below on The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) this guidance represents a shift in our policy intention as regards how the Secretary of State complies with obligations regarding grants of renewable residence permits to victims of modern slavery under ECAT. Page 8 of 29 Published for Home Office staff on May 2024 As set out below, ECAT is clear that under Article 14 signatory states can elect whether to grant a residence permit in the circumstances described in 14(1)(a) or 14(1)(b) or in both. As of 30 January 2023 the Secretary of State will grant VTS in the circumstances described in Article 14(1)(b) as mirrored in s65(2)(c) of the Nationality and Borders Act 2022 (NAB Act). The Secretary of State will also grant VTS in compliance with section 65 of the NAB Act. This is not because the Secretary of State considers that, other than s65(2)(c) as discussed above, this is required by ECAT (or any other international obligations), but because the Secretary of State has been bound to do so by Parliament as a matter of domestic law.

Page 9 Historically the Secretary of State’s policy intention was to grant leave in both situations (14(1)(a) and 14(1)(b)). However, the Secretary of State decided to change the policy approach as follows with effect from 30 January 2023. From this date the UK will fulfil its obligations regarding grants of renewable residence permits to victims of modern slavery through the grant of temporary permission to stay (VTS) as follows: •the Secretary of State will grant VTS in the circumstances described in Article 14(1)(b) and accordingly s65(2)(c) of the Nationality and Borders Act (NAB Act) mirrors ECAT Article 14(1)(b) • the Secretary of State will also grant VTS in compliance with section 65 of the NAB Act - this is not because the Secretary of State considers that, other than s65(2)(c) as discussed above, this is required by ECAT [or any other international obligations], but because

> the Secretary of State has been bound to do so by Parliament as a matter of domestic law. References in this guidance to when VTS leave may be granted for reasons beyond those in 65(2)(c) of the NAB Act are not intended to fulfil A14(1)(a) but is a matter of domestic policy only as set out in s65 of the NAB Act."

22. Mr Collins submitted that these passages indicated that there had been a policy shift on the respondent's part; whereas in the past victims of trafficking might have been granted discretionary leave to remain, as of 30 January 2023, relevant individuals would be granted temporary permission to stay. This, he submitted, was what might be described as a different species of status the result of which was that section 104(4A) and (4B) of the 2002 Act did not apply.

23. What follows is important. Having heard Mr Collins and considered this aspect of the appellant's challenge, we specifically asked Ms Mackenzie what the respondent's position was in respect of VTS and its relationship with section 104 of the 2002 Act. Without equivocation, she expressly accepted that VTS was not a grant of leave to remain and that the VTS given to the appellant in this case did not have the effect of engaging section 104(4A) and (4B) of the 2002 Act.

24. We accept that we are not bound to accept a concession of law made by a party. However, in our judgment it is highly significant that the respondent's representative has clearly stated the position of the party who published the policy in question and granted the appellant VTS in light of that policy. The concession before us is not simply one party's view of, for example, the effect of the authorities or the construction of legislation. Rather, it is, we reasonably presume, a considered statement of the way in which certain individuals (victims of trafficking) are to be provided with a status in this country and the nature of that status.

25. We acknowledge that section 65(2) of the 2022 Act refers to "leave to remain". Having said that, the passages within the policy quoted previously refer to a "shift" and a "change" in approach. It must therefore again be reasonably presumed that the respondent is well-aware of the relevant legislative provisions, specifically section 65(2), and has made the conscious policy decision to treat VTS as something different from leave to remain. Absent a legal obstacle to which neither party has referred us, we do not see any compelling reason why the respondent's concession before us must obviously be wrong.

26. In view of the above, we conclude that the respondent's concession as to the effect of the VTS should be accepted. We therefore conclude that the judge was wrong to have found that section 104(4A) and (4B) of the 2002 Act applied to the appellant's case. Accordingly, (a) the judge was wrong to have precluded consideration of the Article 8 claim and (b) the absence of any notice under section 104(4B)(2) was of no consequence in relation to the protection claim.

27. We are persuaded that the failure to have considered the Article 8 claim was a material error. It is possible for a victim of trafficking to succeed in such a claim even where there is no risk of re-trafficking: DC (trafficking: protection/human rights appeals) Albania [2019] UKUT 00351 (IAC).

Discussion and conclusions: the protection claim

28. Whilst the judge was wrong in his approach to the question of abandonment under section 104(4A) of the 2002 Act, he was nonetheless legally entitled (indeed, obliged) to go on and consider their protection claim. Thus, it is appropriate for us to address the challenge to that aspect of the decision, with reference to grounds 1-3.

29. As we announced to the parties at the conclusion of the hearing, the judge did materially err in his assessment of the three core aspects of the protection claim: risk, state protection, and internal relocation.

30. In respect of ground 1, we are satisfied that the judge failed to consider the argument put forward on the appellant's behalf that he would be at risk not simply from those who trafficked him in the past, but also other groups and/or individuals who might seek to exploit him on return. On a fair reading of [32] and [33] of the judge's decision, it is clear enough to us that the assessment of future risk was focused on the previous traffickers only: see line 4 of [32] and line 8 of [33].

31. Further, whilst certain risk factors were considered by the judge, we are satisfied that the overall analysis is flawed. Having accepted the nature and severity of the appellant's mental health condition, it was wrong for the judge to have then assessed that risk factor on the basis that it would have been reduced in significance through of treatment received in this country by the time the appellant was returned to Albania at some unspecified time in the future. The judge was obliged to assess risk on return as at the date of hearing and on the evidence

relating to that point in time. As regards the appellant's family circumstances, we are also satisfied that no regard was had to the low economic standing of the parents.

32. In respect of ground 2, we conclude that the judge failed to assess the question of state protection with proper regard to aspects of the country information and also what the appellant himself had stated. Whilst the first question is whether in general terms there is a proper system of law enforcement in place, a further question then needs be asked, namely whether, in light of the evidence in the particular case, such protection would be sufficient for the individual concerned.

33. In the present case, it is not apparent to us that the judge took account of numerous aspects of the evidence contained within the CPIN to the effect that there were significant problems with, for example, police corruption. This "implementation gap" argument (as described by the appellant) had some substance to it and needed to be addressed: it was not. In addition, we conclude that the judge's reference to the traffickers "fraudulently using uniforms and vehicles" at [38] was unduly speculative and not based on any evidence. Beyond that, the conclusion that there might have been rogue police officers does not seem to have been considered in the context of the CPIN evidence relating to police corruption. In other words, the direct evidence of police collusion (at least on the appellant's evidence), combined with the CPIN evidence and the appellant's past experiences and vulnerabilities, was relevant to whether he could obtain sufficient protection. The conclusion on state protection is, in our judgment, materially flawed.

34. In respect of ground 3, we are satisfied that the judge failed to take adequate account of the appellant's significant mental health problems when assessing internal relocation. Nothing is said at [40] and [41] about this particular factor. Further, we note that the appellant's home area was on the outskirts of Tirana. Thus, relocation would have been to a place away from his family and their support. There does not seem to have been any proper consideration of this consequence. The judge's conclusion on internal relocation is materially flawed.

35. Whilst not necessary for our conclusions on the error of law issue, we express some concerns as to whether the judge's reliance on the appellant's ability to "adapt to life" in United Kingdom was entirely appropriate when it came to assessing internal relocation. The

appellant's time in this country has included being trafficked, experiencing significant mental health problems, and then receiving specialist treatment and support in what is now a relatively stable environment. It is somewhat difficult to see that a return to Albania would be made less difficult (i.e. reasonable or not unduly harsh) by the appellant being deprived of the support currently being received and instead placed into an unfamiliar setting away from his home area.

36. It follows from the above that the judge's decision on the protection claim must be set aside.

Disposal

37. Given our conclusions that the judge was wrong to have precluded consideration of the appellant's Article 8 claim and that the assessment of the protection claim was also flawed, it is in our view appropriate to remit this case to the First-tier Tribunal. Whilst certain aspects of the appellant's claim have not been the subject of adverse credibility findings, and indeed a number of matters are undisputed, there will need to be a thorough reconsideration of the case as a whole. For example, the question of risk of re-trafficking from other groups/persons has not yet been addressed and will need to be. Similarly, there has been no consideration of Article 8 at all. This is not a case involving a relatively narrow fact-finding exercise and/or questions appear law, which might have made retention in the Upper Tribunal appropriate.

38. In our judgment, the hearing of the remitted appeal will not be entirely at large. On any view, it is quite clear that the appellant suffers from significant mental health problems, as evidenced by an expert report, accepted by the judge, and recognised by the respondent through the grant of the temporary permission to stay. In addition, the appellant is an acknowledged victim of trafficking, both in Albania and this country. These two factual matters are expressly preserved. Finally, we see no reason why the judge's conclusion that the appellant falls within a particular social group (male victims of trafficking in Albania) should be disturbed: there is nothing wrong with the analysis at [29] and that conclusion is preserved.

Anonymity

39. The appellant is an acknowledged victim of trafficking and these proceedings involve a claim for international protection. An anonymity direction is required.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

The case is remitted to the First-tier Tribunal.

Directions to the First-tier Tribunal

(1) This case is remitted to the First-tier Tribunal (Hatton Cross hearing centre) for a hearing which shall be conducted in line with the conclusions set out in this error of law decision;

(2) The remitted hearing shall not be listed before First-tier Tribunal Judge Le Grys;

(3) The appellant shall be treated as a vulnerable witness at the remitted hearing;

(4) The First-tier Tribunal shall issue any further case management directions it deems appropriate.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 21 August 2024