IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002216

First-tier Tribunal No:
PA/50180/2023
LP/02146/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 8 October 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

A V
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Wilford, instructed by KBP Law
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 19 September 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.

NOTICE OF ABANDONMENT UNDER RULE 17A AND REASONS

1. The appellant was granted permission to appeal against the decision of First-tier Tribunal Judge Khosla, promulgated on 11 April 2024, dismissing his appeal against the decision of the Secretary of State made on 1 December 2022 to refuse his asylum, protection and human rights claim. It now transpires that on 16 May 2023 the appellant was granted leave to remain for 12 months.

2. As a consequence, by operation of section 104 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") the appeal fell to be treated as abandoned, unless a notice had been given under section 104 (4B) of that Act.

3. The appellant is a citizen of Albania born on 30 December 2003. He arrived in the United Kingdom clandestinely on 15 October 2019 having travelled through a number of countries to reach the United Kingdom. Having claimed asylum on 6 November 2019 he was also referred under the National Referral Mechanism for a determination as to whether he fell within the definition of modern slavery. Reasonable grounds was made in respect of that referral.

4. The appellant's case is that having left home at 14 he went to live with his paternal aunt in Tirana and whilst there, while working as a waiter in a bar and café for a few weeks, he was approached by two men who induced him to travel to France to work for them. He was given a job to deliver packages which he discovered were drugs. He was compelled to work for them: he was beaten by them on a number of occasions; told he had no choice but to work for them; and, was initially locked in his room although was later able to work.

5. The appellant's fear is that if returned to Albania, his traffickers would find him through the registration system and he would face persecution at their hands.

6. The Secretary of State accepted that the appellant is a national of Albania. She refused his application for asylum, concluding that there was sufficient protection available to him and that if required he could reasonably relocate to another part of Albania. It was not accepted that he was at risk of being re-trafficked nor was it accepted he was a member of a particular social group on account of being the victim of trafficking.

7. The judge heard oral evidence from the appellant and heard submissions from both representatives. He also had before him a bundle of evidence including in particular, a report from ASYLOS entitled "Albania: Trafficked boys and young men 2019" and a report from Mr Steve Harvey and a report from Dr Galappathie.

8. The judge found that:-

(i) the appellant was not a member of a particular social group neither as a male victim of modern slavery nor was there evidence that boys or men forced to undertake labour of the kind described by the appellant have a distinct identity within Albanian society;

(ii) there was insufficient evidence to show that the stigma attached to male victims of trafficking who have been exploited sexually would apply to those who had been duped into working for a drugs gang;

(iii) the gang's interest in the appellant had waned over the years and he would no longer be of interest to them;

(iv) the possibility of the appellant's identity and location becoming known to the gang was remote in the extreme [70];

(v) the appellant would not be at risk on account of his particular vulnerabilities of being trafficked again and limited weight could be attached to Dr Galappathie's conclusions;

(vi) the appellant would have little difficulty in reintegrating into Albanian society [89] and would not be destitute on return; that there was a sufficiency of protection for him in Albania and there was no reason why, if he chose to do so, he would not be identified as a victim of trafficking [102] and he was unlikely to be trafficked again;

(vii) it would be reasonable to expect him to relocate in Albania and that he could do so.

9. The appellant sought permission to appeal on the grounds that the judge had erred;

(i) in failing to consider whether there was a real risk of the gang still having an interest in the appellant, improperly speculating as to the gang's motives in their attitude towards an escaped child exploitee and in failing to have regard to the report of the expert on this issue;

(ii) in failing properly to assess the risk of re-trafficking, improperly considering only whether there was a risk of that simply by the appellant being an Albanian man; and failing to take into account the risk that he might face, that he might be targeted for exploitation by others as set out in the ASYLOS Report;

(iii) in failing to take into account the expert's report in relation to the sufficiency of protection;

(iv) in failing to direct himself properly as to whether the appellant, as a male victim of trafficking, was a member of a particular social group.

10. On 15 May 2024 First-tier Tribunal Judge McMahon granted permission on all grounds.

Preliminary Issue – Has the Appeal been Abandoned?

11. Mr Wilford explained that the appellant had been granted twelve months' leave to remain from 16 May 2023, a fact not drawn to the attention of the First-tier Tribunal. He accepted that as a consequence, by operation of section 104 of the 2002 Act that the appeal fell to be treated as abandoned, unless a notice had been given under section 104 (4B) of that Act. He accepted that no such notice had been given and that the time limit for doing so had long expired.

12. Mr Wilford submitted that, following the principles set out in MSU (S.104(4b) notices) Bangladesh [2019] UKUT 412, the Upper Tribunal had the power to extend the time permitted in which such a notice could be served and that it was in the interests of justice to permit this, given that this was a protection case and that there were sufficient merits in the grounds of appeal.

13. Mr Wilford explained the reason that nothing had been done is that the appellant's representatives had been aware of the grant but had not been aware of their duty to inform the Tribunal about this or of the effect of Section 104.

14. Mr Wilford explained that this had come to light only recently and that a witness statement had been served setting out why and what had happened. This had not reached CE File.

15. In the circumstances I considered it appropriate, as Mr Wilford explained that the witness statement did not contain anything more than he had said, to proceed to hear submissions on the substantive appeal, reserve my decision on the preliminary issue and, if appropriate, the substantive appeal.

16. Ms Nolan submitted that, given the excessive length of time, that time should not be extended in this case, despite the fact it is a protection claim, given that the notice was now some fifteen months out of time and no proper explanation had been given.

The law

17. The relevant legislation is set out in section 104 of the 2002 Act. There is no need to set it out in full. Guidance on its operation is set out in MSU, the headnote of which, provides as follows:

> *1. Where s.104(4A) applies to an appeal, neither the First-tier Tribunal nor the Upper Tribunal has any jurisdiction unless and until a notice is given in accordance with s.104(4B).*
>
> *2. If such a notice is given, it has the effect of retrospectively causing the appeal to have been pending throughout, and validating any act by either Tribunal that was done without jurisdiction for the reason in (1) above.*

3. As the matter stands at present, there are no 'relevant practice directions' governing the s.104(4B) notice in either Tribunal.

4. The Upper Tribunal has power to extend time for a s.104(4B) notice. Despite the provisions of Upper Tribunal rule 17A(4), such a power can be derived from s.25 of the Tribunals, Courts and Enforcement Act 2007.

18. As in that case, the abandonment would have taken effect in 2023 whilst the matter was before the First-tier Tribunal and thus it can only be for the First-tier Tribunal to determine the validity of the notice, only now served, including deciding whether to extend time for it to be given. It is therefore necessary for me to constitute myself as a Judge of the First-tier Tribunal nor to decide this matter.

19. As required by MSU, I apply the usual criteria set out in in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, Denton v T H White Ltd [2014] EWCA Civ 906 and Hysaj v SSHD [2014] EWCA Civ 1633 .In addition, I have had regard to the fact their procedural rigour is necessary even where, as here, this is a protection case (see Maleci (Non-admission of late evidence) [2024] UKUT 28 and TC (PS compliance -"issues-based" reasoning) Zimbabwe [2023] UKUT 164). The extent of the default in this case is significant. The period of 28 days limited by the First-tier Tribunal's rules was exceeded by over a year. On any view it is a serious and significant failure.

20. Mr Wilford accepted that the reason for the default was entirely attributable to the appellant's solicitors and it would appear to be due to an ignorance of the law and as in MSU at no stage was it mentioned or indeed apparently appreciated that the appellant had been granted leave.

21. In dealing with all the circumstances of this case I bear in mind that it is a protection claim. I have assumed also that the fault was that of the appellant's solicitors, and I have attached weight to that in his favour. The position was, that at the date of the decision before the First-tier Tribunal the appellant did have leave. He could have made an application for further leave to remain but I am told that he did not. Again, no proper explanation for this is given. The situation now is that the appellant is without leave. Why that is and why there was no application for further leave I do not know.

22. I bear in mind the overriding objective and equally, I do bear in mind the United Kingdom's obligations pursuant to the Refugee Convention. But that is not a dispensing power; there must be a limit to how far a time limit can be extended, otherwise what is the point of it? Procedural rigour is important. There comes a point at which, absent a manifest risk of injustice, time should not be extended. The interests of justice are not just those of one or other of the parties, but in the maintenance of proper rules based system which requires compliance with time limits and, as here, primary legislation expressing the will of parliament. Parliament has laid down the consequences of a grant of leave which is to bring an appeal to an end. The exception to that rule is where the appellant seeks to

maintain his appeal to demonstrate that he is a refugee, and a time limit for doing so is laid down.

23. It is implicit in R(Robinson) v SSHD [1997] EWCA Civ 3090 that even in cases where protection under the Refugee Convention is in issue, the usual strictures of procedural rigour apply. In that case, it was only where an obvious point mearing a point which has a strong prospect of success, permitted departure from the rules.

24. Taking all of the circumstances of this case into account, and the lack of obvious merit in the case (see the analysis of the grounds below), balancing the extraordinary delay and the fact that this is a case involving trafficking and the refugee convention, I am not satisfied that time should be extended to permit the appellant to serve notice pursuant to Section 104(4B) and it therefore follows that the appeal, and indeed the appeal in the First-tier Tribunal, was abandoned. It therefore follows that the decision of Judge Khosla was, unknown to the judge, a nullity and as there was no decision to be appealed of the First-tier Tribunal, to the Upper Tribunal, again those proceedings were a nullity and of no effect.

25. Further, and in any event, I would have dismissed the appeal as, for the reason set out below, I am not satisfied that the decision of the First-tier Tribunal, had it been valid, involved the making of an error of law.

26. In addressing the grounds I bear in mind the following in Ullah v SSHD [2024] EWCA Civ 201 at [26]:

> 26. Sections 11 and 12 TCEA 2007 Act restricts the UT's jurisdiction to errors of law. It is settled that:
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> (i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [2008] 1 AC 678 at paragraph [30];
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> (ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at paragraph [45];
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> (iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 at paragraph [25];
>
> (iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph [27];

> (v) judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at paragraph [34];
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> (vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at paragraph [107].

27. I also apply what was said in Volpi v Volpi [2022] EWCA Civ 464 at [2]. and in HA (Iraq)[2022] UKSC 22 at [72]. The decision must be read sensibly and holistically and that it is not necessary for every aspect of the evidence to have been addressed, nor that there be reasons for reasons. I also bear in mind that the judge had all the evidence before him and that there is a danger of grounds "island- hopping" the evidence.

28. Justice requires that the reasons for a decision enable it to be apparent to the parties why one has won and the other has lost. When reading the decision, I am entitled to assume that the reader is familiar with the issues involved and arguments advanced. Reasons for a judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

Ground 1.

29. In effect, the submission is that the judge improperly speculated as to how an Albanian drug gang would react to the fact that the appellant had escaped their clutches. The judge said this:

> 68. I find it striking that having escaped the gang, on the Appellant's account, they telephoned him just the once before he left France and arrived in the UK, and they have not attempted to contact him since, whether that is a telephone call or a text message. I find that this alone strongly indicates that whatever their interest in the Appellant may have been, their interest has waned. Moreover, the Appellant himself accepts that he does not know what the value of the drugs he disposed of was. I do not doubt that the gang will have been displeased by the Appellant 's departure and by the loss of some of their drugs. On the other hand, the Appellant's evidence is that he worked for the gang for approximately five months, without pay. It is reasonable to assume that given the very many deliveries of drugs the Appellant had made during this period, the gang would have netted a considerable profit, and likely well in excess of the costs to them of trafficking the Appellant and the loss of one consignment of drugs. I find therefore that the gang has simply taken the pragmatic decision not to pursue the Appellant, his debt to them having long been paid off, even if they did not admit this to the Appellant.

> 69. It follows that the Appellant's concern that the gang would track him down is misplaced. If, as I have found, the gang has decided to 'cut its losses' as it were, there is no reason why they should seek him out if he returned to Albania.

30. On a proper reading of the decision the context is set out at paragraph 67. The appellant's subjective fear is that he fled with what he believes was a quantity of drugs belonging to the gang and for which they would wish to be recompensed because the gangs may fear that they would report activities to the authorities. But, what the judge recorded at [68] is also that the gang simply telephoned him once before he left France, had made no attempt to contact him since and that this alone indicated strongly that whatever their interest in the appellant may have been their interest had waned. That was a conclusion open to him. Further the judge noted [70] there was no reason to believe that any leaking of the appellant's identity would ever reach the gang, there being very many criminal gangs operating in Albania, there is the possibility his identity and location becoming known to the gang to be remote in the extreme whilst there being no real risk of him coming to the notice of the gang.

31. In reaching that decision the judge clearly had regard to Mr Harvey's report and can be taken to have considered it in detail given the numerous references to it in the decision. Mr Harvey refers to the likelihood that if he returned to Albania that there would have been an interest in establishing the appellant's whereabouts with drugs and the places he could be connected to even though it was four and a half years since he was last there and it was likely that the traffickers would hold him responsible for a loss of face and financial loss and it was unlikely that he would be forgotten about but, that presupposes that they would learn that he has returned. And whilst it cannot be argued that the judge reached this conclusion without having had regard to their background evidence. Also of note is the conclusion that:

> "It is my expert opinion that if A V returns to Albania as an unsupported failed asylum seeker his traffickers will become aware of this and the risk of him being traced and re-trafficked are high. Additionally, A V may also be targeted for exploitation by others if his vulnerability as a lone unsupported young man, living in an unknown location is identified. The risk of re-trafficking will be reduced if A V is identified by the Albanian NRM as a victim of trafficking on his return. He will be provided with the support and assistance necessary for him to re-integrate into Albanian society, and a limited amount of protection for the duration of the 'NRM package'. Thereafter, A V may have 'the tools' necessary to live in Albania independently with a reduced level of vulnerability to being exploited again due to his engagement with a victim support entity and a raised level of awareness."

32. This conclusion is nuanced and it is predicated on a number of contingencies. It is sufficiently clear from this that the risk of the appellant falling into the hands of those who trafficked him before is dependent on them becoming aware of him and that that risk is likely to be triggered if

he is returned as an unsupported failed asylum seeker. The judge addressed that in detail, concluding that this would not be the case.

Ground 2

33. The judge did not misconstrue the basis on which the risk of re-trafficking was put. It was correct that, as he recorded at [75], it was not the appellant's case that there was a risk of being trafficked simply by being a Albanian man, but this passaged, cited in the grounds at [17] has been taken out of context. The judge clearly addressed the issue of re-trafficking properly either by those who trafficked him which, for the reasons set out above, he rejected and also the risk of being re-trafficked because of factors specific to him which put him at greater risk.

34. This is manifestly not a Mibanga case. The judge had proper regard to Mr Harvey's opinion as to the risk of re-trafficking by those other than those who had trafficked him in the first place. Even if the judge did not state this expressly, it is sufficiently clear from his decision that he had had regard to the risks of the appellant being re-trafficked as set out in Mr Harvey's report. It is of note that the passage from his report quoted above at [29] states the risks of being re-trafficked by a group different from those who had trafficked him previously may well be reduced if the appellant gets support. The judge found [89] that the appellant would have little difficulty in reintegrating into Albanian society and would have the support of family; and, would be able to earn his own living. At [93] he found, having considered the evidence, that the appellant would not be at risk of exploitation. These findings are adequately reasoned and sustainable. Moreover, the level of support he would have is such as to diminish the risks of retrafficking identified by Mr Harvey.

Ground 3.

35. Given that grounds 1 and 2 do not demonstrate that, were the decision valid, it involved the making of an error of law, it follows that the finding that the appellant would not be at risk would have been sustained. On that basis, absent risk, the need to consider sufficiency of protection is of limited relevance. There is no proper basis for the assertion in the grounds [25] that the judge had not taken into account the background evidence; it is sufficiently clear from his decision that he had done so. What is submitted here is in reality little more than a disagreement with properly reasoned findings of fact.

Ground 4.

36. Given the findings set out above, as Mr Wilford accepted, this ground is parasitic on there being a risk. The finding that the appellant would not be at risk would have been sustainable, and so whether the judge had erred in finding that the appellant's fear did would not have been on account of membership of a particular social group is immaterial.

37. Accordingly, for these reasons, had the appeal not being deemed abandoned, I would not have found there to be vitiated by an error of law and would have upheld it.

Notice of Decision

(1) The appeal is abandoned.

(2) The application to extend time to serve a notice pursuant to Section 104 is rejected.

Signed Date: 3 October 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal