Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07124/2012

THE IMMIGRATION ACTS

Heard at Field House	**Date sent**
On 9 July 2013	**On 15 July 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

S H

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Rudd, instructed by Howe & Co, Solicitors
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited us to rescind the order and we continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Albania who was born on 1 May 1990. On 18 March 2012, she left Albania travelling by lorry to the UK where she arrived three days later. On 22 May 2012 she claimed asylum. The basis of her claim was that she had been trafficked for sexual exploitation and forced to work as a prostitute in Italy. Her trafficker regularly beat and raped her. When her trafficker was arrested, with the help of another prostitute (referred to below as "L"), she escaped and returned to Albania travelling by ferry with "L". She stayed with her grandmother but her grandmother did not want the appellant to live with her when she discovered she had worked as a prostitute and her grandmother made arrangements for her to travel to the UK. At that time, she was eight months pregnant and gave birth to a daughter in the UK shortly after arriving.

3. On 13 July 2012, the Secretary of State refused the appellant's application for asylum, humanitarian protection, and under Art 8 of the ECHR. The Secretary of State did not accept that the appellant had been trafficked to Italy in order to work as a prostitute and, in any event, there would be a sufficiency of protection by the authorities in Albania from the appellant's claimed traffickers. Further, internal relocation within Albania was open to the appellant.

4. The appellant appealed to the First-tier Tribunal. In a determination dated 5 March 2013, Judge Buckwell dismissed the appellant's appeal on all grounds. In relation to the appellant's asylum and humanitarian protection grounds, the judge made an adverse credibility finding and rejected the appellant's account that she had been trafficked from Albania to Italy to work as a prostitute.

5. On 21 May 2013, the First-tier Tribunal (Judge Hemingway) granted the appellant permission to appeal to the Upper Tribunal on the following basis:

> "5. The determination is a full and in many respects thoughtful document which does not suffer from the lack of clarity suggested. However, it is arguable the Judge failed to adequately explain why he attached little weight to the psychiatric report of Dr Hajioff and the expert country report of Antonia Young. It is further arguable that he failed to adequately explain his view that people traffickers would not ill-treat the appellant. It is also arguable that he fell into speculation when dealing with the question of whether the appellant could not have undertaken a boat journey with a claimed trafficker from Albania to Italy."

6. Thus, the appeal came before us.

7. On behalf of the appellant, Mr Rudd adopted the grounds of appeal which he elaborated upon in his submissions. In essence, he relied upon the matters upon which Judge Hemingway had granted permission.

8. First, he submitted that the judge had failed to give adequate reasons in para 68 of his determination for not giving "significant weight" to the

psychiatric report of Dr Hajioff who had diagnosed the appellant as suffering from chronic PTSD.

9. Paragraph 68 of the judge's determination is in the following terms:

> "68. With respect to the psychiatric report prepared by Dr Hajioff, although I note his diagnosis that the Appellant has chronic PTSD and symptoms of depression, together with his view that scarring evidence is consistent with the account of an injury caused by a knife to the foot of the Appellant, I note also that Dr Hajioff in his diagnosis of the conditions of the Appellant does not appear to take into account that the Appellant was capable, notwithstanding her stated condition, to make a lengthy journey, whilst eight months pregnant, from Albania to the United Kingdom on a lorry. Notwithstanding the issues considered and the views expressed by him in paras 33 to 43 of his report, I do not find that the ability of the Appellant to make decisions and undertake a particularly challenging journey have been taken into account in assessing the overall condition of the Appellant. For such reasons I do not give significant weight to the report."

10. As regards the appellant's scarring, Judge Buckwell returned to this issue in para 75 of his determination where he said:

> "[Dr Hajioff] found the scar on her foot to be consistent with her account as to how an injury had previously been inflicted. Of course such an injury could have been caused for reasons other than those which the appellant claimed to have taken place. Little weight is given to her account of scarring."

11. Ms Martin submitted that the judge was entitled to treat Dr Hajioff's report in the way that he did in para 68. Dr Hajioff had, Ms Martin submitted, not considered the fact of the appellant's journey to the UK whilst she was eight months pregnant. The finding in relation to the scarring on her foot was also, Ms Martin submitted, properly open to the judge.

12. Whilst Ms Martin's submission may well be correct in relation to the issue of scarring, we do not accept it in relation to the findings of Dr Hajioff in relation to the appellant's psychiatric condition. We see no rational basis upon which Dr Hajioff's opinion that the appellant suffered from chronic PTSD – which would support her having experienced the traumatic events that she claimed – on the basis that Dr Hajioff had not considered the appellant was capable of undergoing a lengthy journey (she claims some three days) whilst eight months pregnant, travelling in a lorry from Albania to the United Kingdom. We simply do not see the relevance of that issue to Dr Hajioff's diagnosis and that her PTSD was, at least, consistent with the appellant's claim to have undergone the ordeal of trafficking and ill-treatment whilst being forced to work as a prostitute in Italy. In our judgment, the judge's reasons do not justify his view that Dr Hajioff's report should not be given "significant weight" by which it is clear the judge meant no weight at all.

13. Secondly, Mr Rudd submitted that the judge had failed properly to take into account the expert report of Antonia Young. She is a recognised

expert in cases of this sort. The judge dealt with that report at paras 69-70 as follows:

> "69. With respect to the report of Ms Young, I note that she did not interview the Appellant and I understand that her report is produced on the basis of her consideration of documentation. Ms Young is not in a position to express a definitive view on the credibility of the Appellant but of course she was in a position to express her own assessment of credibility based on the documentation before her and in consideration of objective evidence and caselaw. Ms Young of course considered the account as set out by the Appellant, in terms of the records from the application process and the Appellant's statement of evidence, together with the representatives' letter of instruction. Those are the documents specific to the Appellant which Ms Young viewed (listed at page 2 to her report).
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> 70. Specifically Ms Young refers to clarifications made by the Appellant, at section 7 of her report. The manner of the Appellant's travel to Albania is remarked upon in the second paragraph at page 30 of the Report. The general ban on speedboats crossing from Vlora to Italy was said by Ms Young to have 'enormously impacted' that manner of trafficking people to Italy. However, she found it entirely plausible that an occasional speedboat, taking extreme care in complete darkness, would be able to make the crossing with the passengers being kept in complete darkness and silence. Specific evidence was not given in that regard by the Appellant but it is understood that her claimed crossing was not easy (paragraphs 17 to 19 of her appeal statement). The Appellant described there being high waves on the sea. The Appellant indicated that it had been a really small boat. In such circumstances, and taking into account the very nature of a speedboat, it was likely that a relatively powerful engine would have been required. That would create noise in itself, even if passengers were silent. In rough waters it is highly likely that a boat would have needed a powerful engine, either inboard or outboard."

14. It is not entirely clear to us what weight the judge gave to Ms Young's report. The bulk of the report is concerned with the background situation in Albania and in relation to, in particular, trafficking. Ms Young turns to the specifics of the appellant's case at pages 29-33 of her report. Quite properly, Ms Young did not seek to usurp the judicial function of determining whether the appellant's account was true. In her conclusion, she did state that the appellant's fears were "credible" concerning the threats from her family as well as from her boyfriend's network. That future assessment of risk was, of course, based upon a premise that the appellant's account was true. Ms Young did not take a view on the appellant's credibility but, accepting her account, assessed the risk to her on return. It is not entirely clear to us, therefore, why in para 69 – effectively as part of a preamble to para 70 – the judge appears to remind himself that Ms Young was not in a position to express a "definitive view on the credibility of the appellant": she had not interviewed the appellant and she had only produced her report based on the documentation and objective evidence.

15. Perhaps, however, the crucial point concerning Ms Young's report is in para 70 of the judge's determination. There, he considered the appellant's evidence that when she had been trafficked from Albania to

Italy she had been taken to Italy in a boat. The evidence before the judge, and this was accepted before us, was that the Albanian authorities had banned speedboats (it appears owned by Albanian nationals) from its coastal waters in order to tackle drugs and people smuggling. In relation to that Ms Young expressed the following view at page 30 of her report:

> "It is true that the ban on speedboats from crossing the coastal waters from Vlora to Italy has enormously impacted on that mode of trafficking. I find it completely plausible that an occasional one, taking extreme care to travel on a dark night, keeping passengers in complete darkness and silence, may still achieve their aim to make the illegal crossing (just as several have managed to enter the UK despite stringent policing of the UK borders)."

16. That was an opinion which Ms Young was entitled to put forward. In rejecting that, in para 70 the judge doubted whether that could be achieved because, in effect, a speedboat would require a powerful engine to negotiate the rough waters and would therefore create noise. With respect to the judge, there was no evidence before him that could justify that reasoning. The evidence was only concerned with a ban by the Albanian authorities on speedboats, presumably within their territorial waters. Although the appellant described in her statement that the waves were "coming up very high" even though it was a calm day, there was no evidential basis for the judge to question the view of Antonia Young (which might well be thought to reflect common sense) that an occasional speedboat could, despite the ban, slip through undetected in darkness. The judge's comment that it is highly likely that a boat would need a powerful engine which would create noise in itself was pure speculation and did not justify, if this be the case, his rejection of Ms Young's opinion.

17. Thirdly, Mr Rudd submitted that a number of the judge's findings, particularly in paras 71-75 were irrational. We do not consider it necessary to consider all of Mr Rudd's submissions in this regard. We consider it sufficient to identify two aspects of the judge's reasoning which in our view cannot stand.

18. In para 71, the judge doubted the appellant's claim that she had been forced to work as a prostitute but at the same time had been mistreated by her trafficker. She claimed that she had been beaten and raped. At para 71 the judge said this:

> "71. The Appellant claims that she was handed over by boyfriend Artur in Rome to a man named Toni. Her account is that he was effectively running a brothel service by providing women who were detained in a four bedroom property and transporting them to a hotel where sexual services could be purchased. If so then the Appellant would in effect have been considered as a commodity under the control of that individual and would have been a valuable commodity in the eyes of a person so mis-treating the individual. For the account of the Appellant to be credible, the Tribunal finds that those would be the circumstances which would have applied to the regime within which the Appellant was forced to live."

19. Initially, Ms Martin sought to defend the judge's reasoning in this paragraph on the basis that it was open to him to find that, in effect, it was unlikely that the appellant's claimed trafficker would mistreat her as she was a "valuable commodity". However, during the course of Ms Martin's submissions, we drew her attention to the Upper Tribunal's country guidance decision in AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) at [148]-[150]. Those paragraphs set out the surrounding circumstances to trafficking in Albania.

20. We begin, however, with [142] where it is said that the: "Relationships between the women and the traffickers .... is often violent ....".

21. At [148] the Upper Tribunal noted that at the "most violent end" of the trafficking spectrum:

> "The initial period involves 'breaking in' of the victims of trafficking by their abductors including multiple rapes, extreme violence and imprisonment. It is likely that many of these women are from poorer backgrounds and may well be virgins who have had little contact with men other than fathers and brothers before they were trafficked. Their abduction is likely to have been violent. Once trafficked the victims of trafficking are likely to be denied freedom of any sort and are forced to have sexual relations with men with whom they would not willingly have entered into any form of relationship. There is a likelihood that such treatment will go on for some considerable time."

22. Then at [149] the Upper Tribunal continued:

> "It is therefore not difficult to see that such treatment would make those victims of trafficking feel dehumanised and it is little wonder therefore that, as found by Dr Agnew-Davis in these cases, that they are likely to suffer complex post-traumatic stress disorder and psychological damage."

23. We note in passing the reference there to PTSD and therefore the potential relevance of Dr Hajioff's report in this appeal. As a consequence of considering this material from a country guidance case, Ms Martin accepted that the judge had erred in para 71 in concluding that it was not credible that the appellant would be mistreated if she had indeed been trafficked for prostitution.

24. The final matter we identify in the judge's reasoning is in para 72. There, he considered the appellant's account that she escaped from her trafficker, crossing from Italy to Albania, by ferry. As part of his reasoning for doubting that the appellant had travelled as she claimed, the judge said this at para 72:

> "72. .... The appellant claimed that [L] assisted her to deal with, or perhaps avoid immigration procedures when the ferry arrived in Albania. Although there have been certain changes in the immigration requirements of Schengen countries for Albanian nationals who possess a biometric passport, those changes were not in force when the Appellant entered Italy in August 2010. There was also no indication that the Appellant was in possession of appropriate Albanian documentation when she returned to Albania one year later with [L].

> The Tribunal does not find there to be a credible explanation as to how the Appellant could have re-entered Albania when she had claimed to travel on a ferry which was covering an international route from Italy to Albania."

25. As regards the first part of the Judge's reasoning, Mr Rudd submitted that the immigration arrangements for Albanian nationals travelling to Schengen countries had no relevance when the appellant entered Italy in August 2010 as they were not then in force. That, is of course, what the judge said in his determination. However, Mr Rudd also submitted that the judge had no basis for doubting the appellant's claim that she entered Albania from Italy on a ferry with the aid of "L". Ms Martin submitted that the judge was entitled to make the finding that he did because there was no evidence that the appellant, as an Albanian national, had any travel documents such as a passport, which would have allowed her to enter Albania. Even if the judge did not confuse the Schengen country arrangements for entry into those countries by Albanian nationals when considering the appellant's entry to Albania from one of those countries, in finding that there was no "credible explanation" as to how the appellant could re-enter Albania, the judge did not deal with the appellant's evidence that "L" dealt with the officials and she does not know what documents (if any) she had and also the background evidence concerning the widespread nature of corruption in Albania set out for example in the *COI Report* for Albania (30 March 2012) at section 19.

26. As we have indicated, we do not consider it necessary to deal with the totality of Mr Rudd's submissions concerning the remainder of the judge's findings in paras 73-76 of his determination. In our judgment, the failure properly to consider the psychiatric report of Dr Hajioff and the expert report of Antonia Young in themselves undermined the judge's adverse credibility finding such that it could not stand. Added to that, there is the accepted error in para 71 where the judge wrongly doubts the core of the appellant's claim – namely that she was trafficked to be a prostitute in Italy – on the basis that it was not credible that she would be mistreated as she claimed. Further, the Judge's reasoning in para 72 cannot stand. These errors sufficiently undermine the judge's adverse credibility finding such that, in our judgment, it cannot stand.

Decision

27. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal on asylum and human rights grounds involved the making of an error of law. That decision cannot stand and is set aside.

28. Both representatives indicated that, in that eventually, the appropriate course was to remit the appeal to the First-tier Tribunal for a *de novo* hearing. Bearing in mind para 7.2 of the Senior President's Practice Statement, and having regard to the nature and extent of the fact-finding required on a rehearing, in our judgment, this is the proper course. The appeal is remitted to the First-tier Tribunal to be reheard by a judge other than Judge Buckwell.

Signed

A Grubb
Judge of the Upper Tribunal