Upper Tribunal
(Immigration and Asylum Chamber)

EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania [2013] UKUT 00313 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 March 2013	

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Before

LORD TURNBULL

UPPER TRIBUNAL JUDGE ALLEN

Between

EK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms K Cronin & Mr A Slatter, instructed by Islington Law Centre

For the Respondent: Ms E O'Bryan, Senior Home Office Presenting Officer

(1) Trafficking, as defined in Article 3(a) of the Palermo Protocol of 2000, falls within the ambit of Article 4 of the ECHR (prohibition of slavery and forced labour), as held in Rantsev v Cyprus and Russia [2010] ECHR 22.

(2) There is no distinction, for the purposes of Article 4, between a domestic worker who was trafficked by way of forced labour and one who arrived voluntarily and was then subjected to forced labour.

(3) Quite apart from the duties arising under Article 4, which in particular are set out in IDIs, the Secretary of State's duty to provide assistance under the Anti-Trafficking Convention is engaged no later than the point at which a decision is made that there are conclusive grounds to believe a particular appellant to be a victim of trafficking.

(4) The duties arising under the Convention include an obligation to adopt such measures as may be necessary to assist victims in their physical, psychological and social recovery (Article 12 paragraph 1) and to issue a renewable residence permit to victims if their stay is necessary owing to their personal situation (Article 14), which must include consideration of his or her medical needs.

(5) The immigration decision in the present case was made without taking account of (i) the link between the appellant's precarious state of health and the breach of the respondent's protective obligations, in terms of her policy regarding foreign domestic workers and Article 4 of the ECHR; and (ii) the duties engaged under Articles 12, 14 and 16 of the Anti-Trafficking Convention. As a result, that decision was not in accordance with the law.

(6) Where there is no error of law in a First-tier judge's conclusions on a discrete issue or issues, the conclusion that there is an error in respect of another issue or issues does not require a re-visiting of the issue(s) where no error was found, when the decision is re-made. Kizhakudan [2012] EWCA Civ 566 distinguished.

DETERMINATION AND REASONS

1.
The appellant is a national of Tanzania born on 15 November 1982. She appealed to a judge of the First-tier Tribunal against the Secretary of State's decision of 16 July 2010 to remove her from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999.

2.
The appellant's history and the subsequent findings of the First-tier Judge are set out in the error of law determination which is annexed to this determination.

3.
Before moving to the main issues in the appeal we mention one point which arises from the error of law determination, in that the Secretary of State was directed to produce any guidance she had established in respect of Article 14.1 of the Council of Europe Convention on Action against Trafficking in Human Beings.

4.
Ms O'Bryan was unaware of this direction, not having seen the error of law determination. This must be a matter of concern, first on the basis that the Secretary of State had been directed to produce relevant evidence which has not been done, and secondly that Ms O'Bryan did not have the previous determination, although we can see that it was sent to Angel Square on 16 May 2012, and clearly the appellant had received it. We express the hope that in future the Secretary of State will take note of directions that are issued and do her best to comply with them, with reasons being given for an inability to comply, if such is the case.

Preliminary Issue

5.
The first issue on which Ms Cronin addressed us was the matter adumbrated in her skeleton argument, comprising a preliminary application to vary the direction given at the error of law hearing so that not just Article 4 of the European Convention on Human Rights was for consideration by the Tribunal today but also Articles 3 and 8. It was not sought to re-argue the asylum issue and the appellant reserved her position on that.

6.
Ms Cronin argued that the error of law findings were wholly premised on the evidence before the First-tier Tribunal and not on the new evidence before the Upper Tribunal at the earlier hearing. She argued that the new evidence was relevant to show that the First-tier Tribunal had made mistakes of fact concerning risk and the appellant's circumstances and medical condition which gave rise to unfairness and error. She argued that the direction could be corrected under Rule 5(2) of the Tribunal

Procedure (Upper Tribunal) Rules 2008 (the UT Rules). She argued that the existing directions ran contrary to section 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007, unlawfully fettered the Upper Tribunal's jurisdiction, referring to section 12(4) of the TCEA, and the Upper Tribunal's obligation to allow the appeal if the decision against which the appeal was brought was not in accordance with the law, referring to the Nationality, Immigration and Asylum Act 2002, section 86(3), and unlawfully fettered the Upper Tribunal's capacity to consider evidence about any matter which it thought relevant to the substance of the decision, referring to the Nationality, Immigration and Asylum Act 2002, section 85(4). Ms Cronin referred in particular to Kizhakudan [2012] EWCA Civ 566 and subsequent guidance by the Tribunal in Ferrer [2012] UKUT 304 (IAC), in particular at paragraph 31.

7.
Ms Cronin also argued that the direction was erroneously premised on the assumption that the Article 4 issues were properly severable from the Article 3 and Article 8 claims. She argued that the UK's obligations under the Anti-Trafficking Convention and Article 4 concerned issues and responsibilities which engaged such matters as private life, risk and need for protection which also engaged the United Kingdom's obligations under Articles 3 and 8 of the Human Rights Convention. It would therefore be contrary to law and the principles of fairness to make a direction purporting to decide in advance of the consideration of all the evidence and all the submissions of the parties that the Upper Tribunal had concluded that a re-hearing would only concern Article 4.

8.
On this issue Ms O'Bryan argued that the directions made by the Upper Tribunal after the earlier hearing were very clear. If the appellant sought to provide further evidence from Kalayaan [1] then it needed to do so before the First-tier Judge. The issues had been properly gone into at the earlier hearing and there had been the concluding decision that the Tribunal would only be concerned with Article 4 today. Article 8 issues could be argued in the context of Article 4 but the Article 3 and Article 8 arguments could not be re-instigated as a discrete argument in an attempt to get a second bite at the cherry.

9.
By way of reply Ms Cronin argued that most of the evidence had been produced at the error of law hearing and it had been unclear then whether it would be only an error of law hearing or a rolled-up hearing. At that stage two witnesses had provided oral evidence. It was unclear what view had been taken of their evidence. The evidence produced had included evidence from a psychologist. The purpose of a One-Stop Procedure was to have all matters dealt with in this Tribunal. This approach was invited in the decision of the Court of Appeal in Kizhakudan . Compliance with the Rules had to be done in order to have fresh evidence allowed in and the premise for its availability was the grant of leave and this had been set down as a potential guidance case on Article 4 and on that basis additional funding from the Legal Services Commission had been provided for a report and it was unlikely that that would have been provided for a hearing before the First-tier Judge. That evidence had not been considered by the First-tier Judge or the Secretary of State. There was a failure in the refusal letter to consider the United Kingdom's obligations under Article 4 and the Anti-Trafficking Convention. Further, if this was a case designed to give guidance the Tribunal might well wish to have regard to, and deliberate on the relationship between Article 4 and other Articles of the European Convention on Human Rights in order to assist.

Discussion

10.
Section 12 of the Tribunals, Courts and Enforcement Act 2007 states as follows:

“12. **Proceedings on appeal to Upper Tribunal**

(1)
Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2)
The Upper Tribunal –

(a)
may (but need not) set aside the decision of the First-tier Tribunal, and

(b)
if it does, must either –

(i)
remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii)
re-make the decision.

(3)
In acting under subsection (2)(b)(i), the Upper Tribunal may also –

(a)
direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(b)
give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4)
In acting under subsection (2)(b)(ii), the Upper Tribunal –

(a)
may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b)
may make such findings of fact as it considers appropriate.”

11.
Ms Cronin argues that the direction made by the Upper Tribunal following the hearing on 27 February 2012 is contrary to section 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act). However, it can be seen that section 12(3) relates to the Upper Tribunal acting under subsection (2)(b)(i), which is where the Upper Tribunal remits the case to the First-tier Tribunal. That was not the case here, and therefore section 12(3)(b) is not relevant to these proceedings.

12.

Section 12(4) is, as can be seen, relevant to a case where the Tribunal acts under subsection (2)(b)(ii) where, as in this case the Upper Tribunal is re-making the decision. The argument that a direction made by the Upper Tribunal in the instant case unlawfully fetters its discretion fails however to take account of the power that the Upper Tribunal has to limit the ambit of a further hearing on the basis of error of law decisions that are made. Consequently it is equally open to the Upper Tribunal to remit to the First-tier or re-make the decision on the basis of limiting the issues before itself or the First-tier Tribunal. The argument made is at best a circular one.

13.
As regards the argument in respect of section 86(3) of the 2002 Act, if the point in question did not amount to an error of law within the First-tier Judge's decision, then there can be no quarrel with the limiting of the ambit of the further hearing. The same point essentially applies in relation to the section 85(4) point.

14.
We turn to the case law, in particular Kizhakudan . We start from the premise that where the Upper Tribunal finds an error of law in the determination of a First-tier Judge, and when it concludes in respect of matters that are argued to be errors of law in the grounds of appeal that they are not in fact errors of law, that in re-making the decision it is open to the Upper Tribunal or incumbent upon it, to re-determine only the matters in respect of which errors of law were committed by the First-tier Judge. We understand that Ms Cronin's argument takes issue with the above propositions, and therefore it is necessary to consider Kizhakudan in order to see whether the assumption we have made is wrong.

15.
That case concerned an appeal by a student who succeeded before the First-tier Judge on the basis of an argument which was subsequently found to be wrong. The argument that found favour with the First-tier Judge was that the effect of relevant policy guidance emanating from the Secretary of State was to allow an appellant 60 days to find new student sponsorship. As this argument found favour with the judge, other arguments that the appellant's representative would have made, including an Article 8 argument, went unmentioned.

16.
By the time the Secretary of State's challenge to this decision reached the Upper Tribunal, it was common ground that the First-tier Judge had erred. The Upper Tribunal Judge was asked to consider the Article 8 point on the basis that it was a de novo hearing and he was therefore required to consider the appeal under the Immigration Rules and under Article 8 whether or not any human rights arguments had been made before the First-tier Judge. The Upper Tribunal Judge did not accept this submission and declined to consider Article 8.

17.
The Court of Appeal considered that the Upper Tribunal Judge was wrong to look for an error of law committed by the First-tier Judge with respect to the Article 8 point. It said as follows:

"28. …He, SIJ Waumsley, had no need for any further error of law to give him jurisdiction to deal anew with Mr Kizhakudan's appeal. He already had the common ground error of law in relation to the proper interpretation of the Secretary of State's policy guidance (paragraph 1 of his determination). He therefore was in the position where he had either to re-make the decision for himself, or to remit the matter back to the First-tier Tribunal: see section 12(2)(b) of the 2007 Act. What he was not required to do was to look at the matter solely through the lens of the argument before IJ Widdup, as

though he needed to find a second error of law, this time with respect to Article 8, before he could be permitted to consider that issue for himself."

18.
The Court of Appeal went on to say as follows:

"30. However, SIJ Waumsley considered that he could not consider article 8 unless IJ Widdup had erred in law in failing to consider it. He therefore put it out of his hands to consider whether he ought to look at the matter in terms of article 8. In my judgment, however, SIJ Waumsley had a discretion to consider the article 8 point, even if, as he was entitled to think, the point had not been properly raised in the First-tier Tribunal, nor by any respondent's notice. It is plain, however, that SIJ Waumsley refused to consider his discretion. Whether or not any of the thoughts which led to the way he expressed the matter in his permission to appeal decision entered sub silentio into his thinking does not matter; but it is of course a matter of concern that they may have done so. In any event, he never reached a consideration of his discretion."

19.
We do not think that the situation before the court in Kizhakudan is the same as that before us. We are concerned with a case where the First-tier Judge's conclusions on Article 3, Article 8 and the Refugee Convention did not contain any error of law. We do not read Kizhakudan as requiring us in the circumstances where the conclusion was reached that the judge did err in respect of Article 4, to treat that as a gateway to opening up all the matters in respect of which errors of law were found not to exist in the judge's determination. In Kizhakudan the Upper Tribunal Judge erred in refusing to consider a point that had not been considered, because it had not been put before, the First-tier Judge. That in our view is materially different from the situation in the instant case where the First-tier Judge did consider Articles 3 and 8 of the Refugee Convention and did not err in law in his assessment of those matters.

20.
If we are wrong in distinguishing Kizhakudan as we do, it is clear from paragraph 30 of that decision that an Upper Tribunal Judge in that situation has a discretion to consider the relevant issue. We consider that it is sufficiently clear that the discretion was properly considered in this case, and as we hope we made clear when we conveyed our conclusions on this point to the representatives at the hearing today, we have again exercised discretion as to whether or not to re-visit the Articles 3 and 8 arguments but have concluded that it is not necessary for us to do so and that the appeal will proceed on the basis of argument in respect of Article 4 of the Human Rights Convention and the Anti-Trafficking Convention.

The Main Issues

21. The substantive part of the hearing before the Upper Tribunal concerned the re-making of the decision on the appellant's appeal in light of the submission that both Article 4 of the European Convention on Human Rights ("the Convention") and the Council of Europe's Convention against Trafficking in Human Beings ("the Anti-Trafficking Convention") were engaged in the circumstances which had befallen her. The foundation stone for the argument was the finding made by the First-tier Tribunal Judge at paragraph 24(i) of her determination, recorded as follows:

" the Appellant is a citizen of Tanzania who was trafficked into domestic servitude to the UK by Mrs Zainab Alibhai so that she could work for her parents, Mr and Mrs Dhanji. She was then later trafficked internally by Mrs Miriam Kilumanga ;"

These findings were amply justified by the evidence before the First-tier Tribunal and are not the subject of any challenge by the respondent.

The Background to the Respondent's Immigration Policy Concerning Foreign Domestic Workers

22. The appellant first came to the United Kingdom in July of 2006. The European Convention on Human Rights was incorporated into domestic law by the Human Rights Act of 1998, whereas the Anti-Trafficking Convention was not ratified by the United Kingdom government until December 2008. In these circumstances Ms Cronin set out a history of the United Kingdom government's awareness of the issue of abuse of foreign domestic workers brought to this country, and of the measures taken to combat it. She drew our attention to the House of Lords debate on 28 November 1990, when the government explained its new policy initiative in the following terms:

"In all cases the domestic worker will be required to obtain entry clearance before setting out and the entry clearance officer will interview the domestic worker to satisfy himself about the arrangement. The entry clearance officer will also ensure that the domestic worker receives and understands an information leaflet explaining his or her rights. This leaflet will be available in a number of languages and its contents will also be explained orally to those domestic workers who cannot read. A copy of the leaflet will also go to the employer, together with a covering letter explaining its purpose and emphasising the serious view that the Government take of the need to abide by the laws of this country. The leaflet should be printed in a way which emphasises that domestic workers should keep their passports themselves in a safe place and that they may be entitled to at least one week's notice of dismissal. Secondly, the leaflet should explain how to obtain treatment from the National Health Service."

23. By 1994 further safeguards were introduced. With the intention of ensuring that there was no misunderstanding by the employers about their obligations to their employees, the government of the day required that domestic workers were to be given a copy of a statement of the main terms and conditions of their employment at the entry clearance interview and were to be asked to confirm that they agreed to those terms and conditions. By 2002 a right was available to domestic workers to change their employer whilst in the United Kingdom during the currency of their visa. This right was again introduced in recognition of the evidenced vulnerability of foreign domestic workers to abuse and exploitation.

24. By the date of the appellant's application for leave to enter the United Kingdom the relevant Immigration Directorate Instructions ("IDI") (Chapter 5 Section 12 Domestic Workers in Private Households) included the following:

"3.2 Information Leaflet

Applications for entry clearance from domestic workers are subject to a set procedure. They will be interviewed on their own, at least on their first application, to establish that they understand the terms and conditions of the employment and that they are willing to go to the United Kingdom. If their application is successful, they will be given an **information leaflet** explaining their rights under the United Kingdom's criminal and employment laws – further information about the leaflets is available below."

The copy leaflet produced by Ms Cronin for illustrative purposes showed that information was provided concerning, how to contact the United Kingdom immigration authorities, the employment

rights which domestic workers would have in the UK and how to contact Trade Union organisations, the entitlement to the protection of the criminal law, the entitlement to free medical care, and information on the services provided by Kalayaan, an organisation providing independent advice and support on immigration and employment problems, along with contact details. Furthermore, the instructions to the Entry Clearance Officer included at paragraph 2.6 the following:

"2.6 Maintenance and accommodation

The entry clearance officer will require **the employer** to sign a written undertaking that the employee will be able to maintain and accommodate themselves without recourse to public funds and that the domestic worker will be provided with a separate bedroom if living in."

The Appellant's Circumstances

25. The appellant's history and circumstances were summarised by the First-tier Tribunal Judge in her determination and were again referred to in the Upper Tribunal error of law determination. In addition to the other new material provided to the Upper Tribunal in advance of that hearing there was an updated statement from the appellant dated 22 February 2012. A further short statement was available to us dated 4 March 2013.

26. To put the submissions made on the appellant's behalf in context it may be helpful to summarise the salient features of her history. The appellant came from an impoverished background in Tanzania and had little by way of education. As a young woman in her early twenties she came to work as a domestic assistant for a woman by the name of Zainab Alibhai in Dar-es –Salaam. In July 2006, after working for around two years for this lady, the appellant accompanied her to the United Kingdom, having acquired a domestic worker visa permitting her to stay until 5 November 2006. The appellant was tricked into accompanying Mrs Alibhai on a false pretence and was left in the United Kingdom with Mrs Alibhai's parents, Mr and Mrs Dhanji. She was required to work for them attending to all domestic duties and cooking all meals. She worked from 7am until around 10.30 at night. She was fed only stale food, scraps or leftovers and was required to sleep on a thin mattress on the kitchen floor, although there was an unused spare bedroom in the house. The mattress had to be rolled up each night and kept outside in a garage. The appellant received no wages from the Dhanji family and was only allowed out of their house to attend church on Sundays. The appellant's passport was kept by the Dhanji family. Although she asked to be allowed to return to Tanzania on a number of occasions she was told that she could not do so until at least July 2007. The appellant was on occasions unwell whilst living in the Dhanji household but was required to work nevertheless. She was told that there was no one she could complain to about her conditions and that if she went to the police to complain they would not help her.

27. In the summer of 2007, with the assistance of a lady she had met at church, the appellant ran away from the Dhanjis leaving all of her possessions behind. She was given accommodation at the house of a Mrs Miriam Kilumanga. After some time, and with the assistance of the Tanzanian Embassy, she recovered her passport from the Dhanjis. She then realised that her original visa had only been for a duration of 6 months and had now expired. Conditions at the Kilumanga household were little better than before. The appellant was manipulated by Mrs Kilumanga and required to work as a domestic worker for her. Again she was often required to sleep on a mattress on the floor. By early 2008 the appellant was aware that the poor health she had suffered from at the Dhanji household was worsening. She asked Mrs Kilumanga for help and was told that it was difficult for her to get medical attention without paying for it, as she did not have a visa. The appellant had no money. By the latter half of 2008 the appellant was aware of having real difficulties in breathing and sleeping

on her left side. Her breathing was noticeably noisy. In September of 2008 she was taken by Mrs Kilumanga to see a solicitor in connection with her claim against the Dhanjis. Mrs Kilumanga interpreted for the appellant as she could speak very little English. The appellant understood the solicitor to have observed that she needed to go to a hospital or see a doctor. On her return home Mrs Kilumanga again insisted that it was very difficult for the appellant to obtain medical assistance as she did not have the correct paperwork. By early October 2008 the appellant was so ill that she was eventually taken to hospital as an emergency by Mrs Kilumanga and was admitted for a two week period. On her return to the Kilumanga household she was again put to work, despite her physically weak condition. She continued to attend for hospital appointments until July 2009. In March 2010, with the assistance of the organisation known as Kalayaan, the appellant was able to leave the Kilumanga household and was given accommodation by the Poppy Project. By this time her health was very poor and this aspect of the appellant's circumstances will be returned to below.

28. Given the appellant's experiences in the United Kingdom, and to lay a foundation for the argument which came to be presented, evidence was put before us concerning the circumstances in which the appellant came to be granted a visa in 2006. The appellant's account was that all of the arrangements were instigated by Mrs Alibhai and that she simply did as she was instructed. She explained that when she attended for interview at the High Commission in Dar-es-Salaam she was accompanied by Mrs Alibhai. She was interviewed in English by a gentleman who sat behind a glass screen. An interpreter translated. The interview was not in private and Mrs Alibhai was sitting behind her in the waiting area. The appellant was not told anything about a contract of employment, how she should be treated, or how much she should be paid in the United Kingdom. She was not told what to do if she needed any help or advice and was not given any form of written information. The appellant had never left Tanzania previously.

The Appellant's Submissions

Article 4 of the Convention

29. The submissions presented on the appellant's behalf can be summarised at this stage and expanded upon later. Ms Cronin submitted that the appellant's rights in terms of Article 4 of the Convention had been breached on account both of her being trafficked into the United Kingdom and then subsequently trafficked within the country. What Article 4 covered in its prohibition against "forced or compulsory labour" could be seen from the terms of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("the Palermo Protocol") and the case of Rantsev v Cyprus and Russia (2010) 51 EHHR 1. Article 4 required states to take operational measures to protect both victims and potential victims of trafficking. The United Kingdom government had recognised the need to do so and had put in place the plainly proportionate arrangements concerning interview of a domestic worker by an Entry Clearance Officer and the provision of relevant information in writing, in a language which could be understood. The respondent was in breach of her own policy, and was in breach of the protective duty owed under Article 4 of the Convention to potential victims of trafficking, by failing to provide the appellant with information which would have minimised the risk of her being subjected to exploitative labour and being re-trafficked in the United Kingdom. The submission was that this breach led to the appellant being denied assistance, benefits and rights and to her being exposed to harm and danger. In these circumstances it was argued that the rights conferred by Article 4 having been engaged and having been violated, an obligation on the part of the State to provide reparation had become crystallised. That obligation encompassed the right to recovery.

The Anti-Trafficking Convention

30. Separately, it was submitted that in ratifying and implementing the Anti- Trafficking Convention, the United Kingdom assumed protective and remedial obligations to trafficking victims which extended to the provision of medical treatment and assistance with the victim's recovery. Articles 12, 14 and 16 were relied upon and it was contended that it would not be consistent with the obligations undertaken in this convention to return the appellant to Tanzania in her present precarious state of health.

The Respondent's Submissions

31. The respondent's submissions can also be summarised at this stage. Ms O'Bryan pointed out that the Anti-Trafficking Convention was not ratified by the United Kingdom government until December 2008 and submitted that the IDI which were in place in 2006 were not designed with the obligations undertaken in terms of this convention in mind. She submitted that neither the IDI nor the leaflet were designed to prevent trafficking, they were designed to prevent abuse of legal employees. She went on to explain that following on from signing the Anti-Trafficking Convention a range of other measures had been introduced with the intention of combating trafficking. These included the setting up of the National Referral Mechanism as the framework for identifying victims of human trafficking and ensuring that they received the appropriate protection and support.

32. Ms O'Bryan's submission was that there had been no breach of Article 4 of the Convention. Even if any breach of the procedures which were in place could be established, there was no link between such a breach and the harm caused to the appellant, although she accepted that the appellant had suffered greatly at the hands of her first employer. Ms O'Bryan submitted that the sort of information contained within the leaflet would have been of no value to the appellant anyway. She went on to draw attention to the fact that Kalayaan had been involved with the appellant since around March 2009, when they arranged for the appellant to attend English classes. Despite this they did not place her with the National Referral Mechanism for victims of trafficking until May 2010, around the same time as she made a claim for asylum. Had they taken this step earlier, for example when they arranged the English classes, it was said that responses appropriate to the appellant's needs would have been put in place. These would have included accommodation support and medical advice and treatment. In so far as the appellant's health and personal circumstances were concerned, and whether these had any impact on the question of refusal to grant a resident's permit, Ms O'Bryan contended that all such matters had been fully ventilated before the First-tier Tribunal Judge. In her submission the same applied to the question of return with dignity as envisaged by Article 16 of the Anti-Trafficking Convention.

Discussion

Article 4 of the Convention

33. Article 4 of the Convention provides, in so far as relevant, that:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour"

In the case of Rantsev v Cyprus and Russia [2010] ECHR 22 **,** the European Court of Human Rights considered the relationship between trafficking in human beings and Article 4 of the Convention. It

took as the meaning of trafficking the definition given in Article 3(a) of the Palermo Protocol, which definition was in turn adopted by the Anti-Trafficking Convention:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The Court noted that trafficking by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It described trafficking as conduct which treated human beings as commodities to be bought and sold and put to forced labour, often for little or no payment. It concluded that trafficking itself, within the meaning of the Palermo Protocol, fell within the scope of Article 4 of the Convention.

34. The facts in the case of Rantsev concerned a young Russian woman by the name of Rantseva, who voluntarily travelled to Cyprus in 2001 to take up employment in a cabaret in terms of a contract of employment which she had concluded. She was permitted to enter Cyprus as the beneficiary of a Cypriot visa scheme to facilitate the employment of “artistes”. Only a few weeks after her arrival Ms Rantseva died in circumstances which were never properly explained. Concern had been widespread in Cyprus for many years prior to Ms Rantseva’s entry regarding the extent to which young women had legally entered Cyprus to work as “artistes”, but had in fact worked as prostitutes. In a report later prepared by the Cypriot Ombudsman the visa scheme came to be blamed for the entry of thousands of young foreign women into Cyprus where they were exploited by their employers under cruel living and working conditions.

35. The Court pointed out that Article 4 of the Convention imposed a positive obligation on Member States to put in place an appropriate legislative and administrative framework to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. It explained that a Member State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking. Although it acknowledged that adequate Cypriot legislation was in place prohibiting trafficking and sexual exploitation, the court concluded that weaknesses in the Cypriot general legal and administrative framework and in the adequacy of the immigration policy applied, had the result that the regime of artistes’ visas in Cyprus did not afford practical and effective protection against trafficking and exploitation. In these circumstances it held that a violation of Article 4 of the Convention had occurred.

United Kingdom Immigration Policy

36. Having noted the European Court of Human Rights decision that trafficking itself falls within the scope of Article 4 of the Convention and looked at the facts in Rantsev , we turn to the respondent’s submission that the IDI in place in 2006 were not designed to provide protection to someone in the appellant’s circumstances. We recognise of course that the immigration policy in place in 2006 was not intended to reflect the subsequent duties undertaken through ratification of the Anti-Trafficking Convention. However, the State’s obligation to ensure practical and effective protection of the rights of potential victims of trafficking was not created by this convention, and nor did it come into being in 2010 with the issuing of the judgement in Rantsev . The Court explained what Article 4 of the Convention had always required. It is also clear that the United Kingdom government had been

aware, since at least 1990, of the need to provide appropriate protection, through its immigration policy and rules, to domestic workers who were at risk of being brought into this country and then being subjected to exploitation in the form of forced labour. That conclusion is clear from the terms of the parliamentary debate held on 28 November 1990 to which we were referred. The debate is peppered with references to attempts to avoid “exploitation” of foreign domestic workers. Examples of what was meant by that term can be seen in the references to; being compelled to work excessive hours; sexual abuse; being virtually treated as slaves and being kept prisoner. The contribution made by various agencies was acknowledged, with Kalayaan and the Anti-Slavery Society being singled out for specific mention. What Parliament was seeking to provide in the course of this debate was the very protection afforded by Article 4 of the Convention, whether viewed through this lens or not.

37. It was in this debate that the benefits of the leaflet to be issued to domestic workers were canvassed. It was noted that the leaflet would set out the legal rights of domestic workers and the other rights available to them. Particular attention was drawn by the Government Minister to the fact that the leaflet would explain how to obtain treatment from the National Health Service.

38. It is true that there are three components to trafficking for the purposes of this discussion:

i.
the action of recruitment, transportation etc. of persons;

ii.
by means of threat, force, deception etc;

iii.
for the purpose of exploitation forced labour etc.

Could there possibly though be a distinction to be made for the purposes of Article 4 of the Convention, between a domestic worker who was trafficked for exploitation by way of forced labour and one who arrived voluntarily and was then subjected to forced labour? Plainly the answer is there could not be. The protection afforded in terms of Article 4 of the Convention is against being required to perform forced labour. It is a right which all domestic workers possess, regardless of whether the other components of trafficking apply or not. The fact that the appellant had been trafficked in terms of the Palermo Protocol definition cannot mean that she was somehow to be denied the genuine protection which the IDI sought to provide in 2006. It was the right in terms of Article 4 of the Convention which the victims of trafficking possessed which the Court in Rantsev was addressing. It was this same concern to prevent exploitation by way of forced labour which Parliament addressed in 1990. That concern was then addressed by the respondent’s policy and the IDI.

39. We accordingly conclude that the IDI in force at the time of the appellant’s interview in Tanzania were issued as part of the efforts made by the United Kingdom government to combat the exploitation, including exploitation by forced labour, of foreign domestic workers brought into the United Kingdom. These efforts were put in place in light of the concern which had been raised both publicly and in Parliament about the extent to which abuse of this nature was prevalent. To this extent these arrangements were of the sort which the Court in Rantsev explained each State must have in place in order to comply with Article 4 of the Convention.

40. In her statement as put before us, the appellant explained how the interview which she had with the Entry Clearance Officer was conducted. On her account no information was given to her concerning her rights in the United Kingdom and no leaflet was given to her. In the report from

Kalayaan presented to us reference was made to the research which they had conducted concerning the implementation of the protective provisions provided for in the IDI. They noted that, as reported to them by domestic workers interviewed in the United Kingdom, the majority had not been interviewed at the entry clearance stage and had not received the leaflet. Their findings were given in evidence to the "Home Affairs Select Committee Inquiry into The Trade in Human Beings: Human Trafficking in the UK", which reported in 2009.

41. On the basis of the information placed before us, we accept that the appellant was given no information at her entry clearance interview concerning her rights in the United Kingdom and was not given a copy of the leaflet referred to in the relevant IDI. We also note that we have been provided with a copy of the undertaking apparently accepted from Mrs Alibhai by the Entry Clearance Officer in purported compliance with the requirement of paragraph 2.6 of the IDI. It does not conform to the requirements of that paragraph, as the Entry Clearance Officer has not, as directed to do, caused the employer to sign an undertaking which includes an acknowledgement that the domestic worker will be provided with a separate bedroom. As submitted to us by Ms Cronin, we see this as further evidence of the inadequate attention which was given to the implementation of the respondent's protective measures by the Entry Clearance Officer.

42. In the circumstances which we have set out it is clear that the appellant was the victim of trafficking, as defined by the Palermo Protocol. The respondent accepts this. For the reasons explained above, we agree with Ms Cronin, that in the appellant's case, the failure to comply with the protective arrangements set out in the IDI constituted a breach of the respondent's policy designed to provide protection to individuals in her circumstances. We have not been adjudicating upon the extent to which the visa arrangements concerning foreign domestic workers, as were in place in 2006, would have provided practical and effective protection against the known risk of trafficking and exploitation. In **Rantsev** the finding of a violation of Article 4 of the Convention arose out of the inadequacy of the immigration policy which was in place. In the appellant's case the same finding arises out of the failure to comply with the arrangements which were put in place to provide the protection which Article 4 of the Convention guarantees.

The Consequences of the Respondent's Breach of Policy and Article 4

43. The submission made on the respondent's behalf was that any breach of policy or obligation was of no moment, as the information contained in the leaflet discussed would have been of no value to the appellant. We reject this submission. In the first place it flies in the face of the very purpose for which the leaflet was designed, as explained in the Parliamentary debate to which we were referred. An examination of the leaflet also assists. At the very beginning of the leaflet (or booklet as it describes itself) contact details for Kalayaan are given. It explains that the organisation provides free, confidential, independent advice and support on immigration and employment problems. The leaflet then proceeds with information provided under various headings. The following headings are of particular relevance:

i.
"Will the law protect me if a crime is committed against me?"

Under this heading it is pointed out that everyone has the full protection of the law, whatever their nationality or conditions of stay. It points out that it is against the law to keep a domestic worker locked in the house against their will.

ii.

“Can my employer keep my passport?”

Under this heading it is emphasised that the domestic worker’s passport is an important document which their employer is not permitted to keep against their will.

iii.
“What employment rights do I have?”

Under this heading the domestic worker is informed that he or she has the right to be paid the agreed rate, which must be at least the national Minimum Wage, and cannot be forced to work excessive hours.

iv.
“What if I need medical attention?”

Under this heading the domestic worker is informed that he or she is entitled to free medical care and the need to register with a doctor to obtain it is explained. It gives information on how to contact a doctor and explains what to do in an emergency.

44. The appellant was not permitted to leave the Dhanji’s house for long periods, her passport was kept from her, she received no payment and was required to work excessive hours. She was required to work excessive hours at the Kilumanga household. She received no payment and was dependent on Mrs Kilumanga for all of her food and clothing. She was told by Mrs Kilumanga that she could not receive medical treatment without payment. Each of the four parts of the leaflet mentioned would have provided important information to the appellant which she could have used to address her circumstances. In our view, Ms Cronin was correct to submit that in these circumstances a sufficient link has been established between the respondent’s failure to abide by the protective obligations required of her by Article 4 of the Convention and the harm which the appellant came to suffer in the United Kingdom. We reject the contention that this link, flowing from breach of a duty imposed on the State, was somehow broken by the fact that Kalayaan did not direct the appellant towards suitable medical care. The question is what consequence does the breach of Article 4 of the Convention, with these results, have in the current process?

45. The First-tier Tribunal Judge rejected the suggestion that the appellant would be at risk of being re-trafficked in Tanzania. We are not persuaded that this finding is open to review by us and in any event we see no reason to think that any risk of this sort which the appellant might be subject to would be such as to re-engage the United Kingdom’s obligations in terms of Article 4 of the Convention. We therefore find it difficult to agree with Ms Cronin that the removal of the appellant would constitute a further breach of the protective obligations inherent in Article 4 of the Convention. However, it was argued that the principle of reparation was engaged in light of the violation of the appellant’s rights which had already occurred and that this impacted on the question of whether the appellant should be removed.

The Duty to Provide Reparation

46. Ms Cronin’s submission was that the State has an obligation to make reparation for the consequence of its breaches of international law, including human rights violations for which it is responsible. She cited Oppenheim’s International Law, 9 th Edition at page 528. She also drew attention to the general principles identified in the Study concerning the rights to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental

freedoms by the Special Rapporteur to the United Nations Commission on Human Rights, published in 1993. The 4 th principle identified was:

“4. Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”

We would not consider these propositions to be controversial, nor were they challenged by the respondent. In developing this argument Ms Cronin went on to refer to the report by the United Nations Special Rapporteur on trafficking in persons, especially women and children, submitted to the seventeenth session of the United Nations Human Rights Council in June 2011. That report included draft recommendations on the basic principles on the right to an effective remedy for victims of trafficking. Paragraph 24 was in the following terms:

“24. Recovery is a crucial form of reparation for trafficked persons, which includes medical and psychological care, as well as legal and social services. By definition, trafficking often involves physical and sexual violence, physical and emotional coercion, threats and intimidation, which has severe physical and psychological consequences on the victims. The Recommended Principles and Guidelines on Human Rights and Human Trafficking are thus explicit in acknowledging that the right to fair and adequate remedies includes the means for as full a rehabilitation as possible.”

The 2011 report was followed up in August of the same year by the Special Rapporteur’s report to the sixty-sixth session of the General Assembly of the United Nations, in which she again drew attention to the fact that whilst discussions on the right to an effective remedy for victims of trafficking tended to focus on compensation, this was just one aspect of the right, which also encompassed recovery. In paragraph 17 of her report she stated the following:

“ 17. Recovery includes medical and psychological care, as well as legal and social services. As trafficking often causes severe physical and psychological consequences for the victims, recovery is a crucial form of remedy.”

The Appellant’s Health

47. In order to understand the import of these propositions for the case brought by the appellant it is necessary to revisit the evidence concerning her health. Some evidence concerning the appellant’s state of health was led before the First-tier Tribunal Judge. She set out her findings on this topic at paragraph 37 of her determination. These included the finding that although the appellant suffered from tuberculosis and some of the after-effects of this condition, the disease had been “successfully treated”. She also held that there was no evidence to show that the appellant would not have access in Tanzania to the medicinal and on-going treatment she receives in the United Kingdom. It was argued that the Judge had misunderstood the medical evidence before her but in any event had not considered it in the context of the obligation of reparation arising out of a breach of Article 4 of the Convention.

48. Substantial additional evidence was tendered on the appellant’s behalf in advance of the error of law hearing held in February 2012. That evidence included the following medical reports:

i.
a report dated 10 August 2011, from Dr Roxanne Agnew-Davies, a Clinical Psychologist specialising in the field of the impact of violence or trauma on women’s mental health,

ii.
a report dated 20 January 2012, from Dr Robert Davidson, a Consultant Physician at the Lister Unit for Infectious Diseases and Tropical medicine at the Northpark Hospital in Harrow,

iii.
a report dated 27 February 2012, from Ms Shelly Lees, an anthropologist whose work has included an examination of Tanzanian culture and gender issues, as well as refugee health in the United Kingdom,

The additional evidence was tendered in terms of Rule 15(2)(a) of the Upper Tribunal Rules of Procedure, an adjournment for the purpose of obtaining additional evidence having been granted on 27 July 2011. No objection was taken to the appellant relying on any of the additional evidence adduced and Ms Cronin relied heavily on the additional medical evidence.

49. The evidence now available gives a much fuller picture of the appellant's health than was before the First-tier Tribunal Judge. Dr Davidson was responsible for the appellant's care from the time of her first admission in October 2008, when she presented as very unwell and thin. X-ray examination demonstrated the presence of extensive tuberculosis throughout her left lung, with changes which must have been present for several months and which were described as very severe. She required inpatient treatment for a period of two weeks and thereafter attended for regular outpatient treatment throughout the rest of 2008 and until the middle of 2009, by which stage her condition was confirmed as irreversible. In March 2010 the appellant again required hospital admission, when the left upper lobe of her lung was found to be extremely abnormal and completely collapsed. A bronchoscopy identified that the left upper lobe and lingula airways had completely disappeared. There was no possibility of re-expansion of the destroyed upper lobe. Subsequent outpatient re-assessment led to the conclusion that she has a persistent and permanent left upper lobe lung collapse, due to obliteration of her airways. This has led to a troublesome cough, intractable pain and breathlessness. Dr Davidson reported that the appellant's case was unusually severe in its progression, having caused more permanent lung damage than he would see in 95% of his cases. In such severe cases he observed that he would usually see some other aggravating factor, such as the patient sleeping rough. He expressed the view that had treatment been started, perhaps as little as three months earlier, it would have been likely that a considerable function of the left lung would have been saved.

50. Dr Davidson also provided evidence as to the prognosis for the appellant. He explained that she will be susceptible to repeated chest infections in the years ahead. He noted that in the event of such infections being contracted they would need to be carefully controlled and monitored so as to reduce any risk of associated complications. The medical attention necessary would need to be highly specialised because of the complexity of the appellant's case. She will be restricted in the physical tasks she can perform because of the breathlessness which results from exertion. His view was that it was very unlikely that the appellant will live a normal and productive life given her respiratory symptoms and her chest pains. He estimated that she will need two to five courses of antibiotics each year to prevent severe infection and is likely to have one hospital admission each year for life threatening infection. In Dr Davidson's opinion, there is a 50% probability of the appellant requiring to have either the left upper lobe removed or the entire left lung removed within the next five years. Even in the absence of thoracic surgery, the appellant will require very frequent attendances at a thoracic centre for assessment in order to monitor whether she has developed pulmonary hypertension due to chronic lung disease and to treat intercurrent infections. He explained that pulmonary hypertension leads to a form of heart failure which results from chronic lung disease, but can be avoided if the lung disease is carefully monitored and treated on a specialist basis.

51. In her report Dr Agnew-Davies explained that she conducted a number of lengthy interviews with the appellant, during which she applied a range of standardised psychological tests. Her conclusion was that the appellant is suffering from a severe, complex and chronic form of post-traumatic distress disorder, which is further complicated by a severe, chronic, major depressive disorder with an unspecified time of onset. Dr Agnew-Davies concluded that the conditions which the appellant suffers from render her at enduring risk of exploitation, that she should be regarded as a vulnerable adult and that she will remain so indefinitely, such that at present in the United Kingdom she is entitled to support according to the safe-guarding procedures of the local authority. Dr Agnew-Davies expressed the opinion that in light of the appellant's mental health problems and consequent psychosocial vulnerability, she will need an enduring period of safety without risk of disruption in order to maximise her rehabilitative potential. Her opinion was that the appellant would require long term treatment including, at some point in the future, a referral to a specialist trauma focused service such as is provided by various specialist centres in the United Kingdom.

52. Dr Davidson is head of the largest tuberculosis service in the United Kingdom. In addition he has substantial experience of working in various different African countries, to the extent that he considered himself to be very aware of the extent to which medical facilities are available in East Africa. He explained that thoracotomy and lobectomy are hazardous, major operations even in the United Kingdom. He did not expect these operations to be available to be safely carried out in most parts of Tanzania. Were surgery to be required, it would have to be done urgently if not as an emergency. He observed that operations done in these circumstances carry higher risk. He noted that if urgent surgery was required, it would be necessary very speedily to refer the appellant to a centre where such surgery could be safely carried out. In light of these features Dr Davison concluded that it was unlikely that the appellant will have a normal life expectancy if she is not looked after in a city where thoracic medical and surgery expertise is at hand. Without expert thoracic and infectious diseases care she would have a 50% chance of dying before the age of 50. With expert care, including thoracic surgery such as would be available in the United Kingdom, he estimated a 90% chance that the appellant would live into her seventies.

53. In the report from Ms Shelly Lees, she explained that in addition to publishing on Tanzanian culture and gender issues, she is a trained nurse and has worked as a nurse tutor in Tanzania. She is familiar with the services provided by hospitals in Tanzania. She reported that mental health services in Tanzania are of extremely poor quality, that there is a severe shortage of health workers with mental health experience and no expertise is available in trauma care in the public health service. Mental health problems are highly stigmatised in Tanzania. In relation to the treatment of tuberculosis, Ms Lees acknowledged that there is good treatment available in relation to basic levels of the disease but expressed the view that there is a complete lack of the more specialised treatment which the appellant now requires. She drew attention to recent information concerning the poor availability of essential drugs at government hospitals and reported that there is only one cardiothoracic centre in Tanzania and that it only has the expertise to conduct uncomplicated thoracic surgery. The centre does not have the expertise to conduct a complicated anaesthetic procedure. For these reasons she expressed the opinion that the appellant would not be able to have the thoracic surgery contemplated by Dr Davidson in Tanzania.

54. An up to date report, dated 6 March 2013, noted that the appellant had required hospital admissions to treat respiratory infection in both January and February 2013, on the later occasion being admitted to the critical care unit.

55. In the light of the fuller information available to us concerning the appellant's health it seems clear that the findings made by the First-tier Tribunal Judge, to which we referred in paragraph 47, are incorrect.

56. Ms Cronin's submission on behalf of the appellant was that her medical conditions were attributable to her mistreatment by her traffickers. The severity of her condition being similar to that found in persons who had been sleeping rough struck a chord with the manner in which she had lived in the Dhanji household. There was no challenge to these submissions on the part of the respondent, and it seems clear, that at the very least, the appellant's lung condition grew much worse during the time she lived with her traffickers.

57. In our view, one of the most significant aspects of the appellant's medical history was her late presentation. The appellant had been complaining of being unwell since she was living in the Dhanji household. It was only in October 2008, when she was plainly severely ill, that she was taken to an accident and emergency department by Mrs Kilumanga. It is obvious, both from the appellant's own statements and from Dr Davidson's report on her condition, that she must have been very unwell and weak for a considerable period of time. The appellant claims that she asked Mrs Kilumanga on many occasions about medical assistance but was always told that she could not get help without paying for it.

58. Given the obvious and serious condition which was developing, we accept without hesitation that the appellant did wish medical assistance. In his report Dr Davidson commented that the appellant was a model patient who was adherent and co-operative at every stage. She gave no indication of a tendency to self-neglect, such as he would expect in the case of a person who presented at such a late stage of their illness. In our view, the only comprehensible explanation for the appellant never obtaining any form of medical help is the one which she gives herself. This brings into very sharp focus the effect of the failure on the part of the Entry Clearance Officer to inform the appellant that she had the right to free medical treatment in the United Kingdom. The tragedy, as Dr Davidson expressed it, is that had she been able to seek treatment a few months earlier her lung function could probably have been saved and the very worrying future consequences avoided.

59. In these circumstances the submission made was that there was an obligation to facilitate recovery encompassed within the duty of reparation, and that this should lead to the appellant being able to remain in the United Kingdom. If she did so she could access medical facilities suitable for her needs which, if not capable of remedying her health, would at least permit it to remain stable. Given the extent to which the appellant's health has deteriorated and the danger to her life which is present, there is a clear underlying sense of justice in the propositions advanced by Ms Cronin. In addition, the concept of rehabilitation, or recovery, as part of an effective remedy for victims of trafficking is supported by the various references to the reports of the United Nations Special Rapporteurs to which our attention was drawn. These reports provide helpful guidance on the ways in which States should be expected to respond to human rights violations. The reference in the report to the sixty-sixth session of the General Assembly to the severe physical and psychological harm caused to victims, resulting in recovery being seen as a crucial form of remedy, seems particularly apposite in the appellant's case. The more difficult question is what remedy is the Upper Tribunal, as a body governed by statute, empowered to provide? This question can be returned to having considered the remaining branch of the appellant's submissions.

The Anti-Trafficking Convention

60. The respondent's submission was that the Anti-Trafficking Convention had no part to play in the appellant's case, since it was not ratified by the United Kingdom until 2008, at a point after the appellant's entry into the United Kingdom. In our view this submission fails to engage with the terms and purpose of the Anti-Trafficking Convention. In ratifying this convention the United Kingdom government bound itself not only to take steps to prevent trafficking but also to take various steps to provide assistance to victims of trafficking within this country. It is also important to recognise two further points. Firstly, after the appellant was referred to the National Referral Mechanism for Potential Victims of Trafficking, a decision was made on 25 November 2010 that there were conclusive grounds to believe that she was a victim of trafficking. Secondly, in terms of the unchallenged determination of the First-tier Tribunal Judge, the appellant was also trafficked internally by Mrs Kilumanga (paragraph 24(i)). The respondent's duty to provide assistance under the Anti-Trafficking Convention was engaged no later than the point at which a decision was made that there were conclusive grounds to believe that the appellant was a victim of trafficking.

61. The purposes of the Anti-Trafficking Convention include, to protect the human rights of the victims of trafficking and to design a framework for the protection and assistance of victims (Article 1 Paragraph 1b). It applies to all forms of trafficking, whether national or transnational (Article 2). It requires all Parties to adopt such measures as may be necessary to assist victims in their physical, psychological and social recovery (Article 12 Paragraph 1). It requires all Parties to issue a renewable residence permit to victims if their stay is necessary owing to their personal situation (Article 14). It provides that when a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person (Article 16 Paragraph 2).

62. As a victim of trafficking the appellant is owed certain duties by the respondent under the Anti-Trafficking Convention. She has been provided with medical care to assist with her recovery but it is clear that she will continue to require on-going care, in relation to both her physical health and her mental health. Article 14 of the Anti-Trafficking Convention obliges the respondent to provide the appellant with a residence permit if she considers that the appellant's stay is necessary owing to her personal situation. Ms Cronin submitted that a victim's personal situation must include consideration of his or her medical needs. This submission is consistent with what is said at paragraph 184 of the Explanatory Report to the Anti-Trafficking Convention, where it is stated that:

"184. The personal situation requirement takes in a range of situations, depending on whether it is the victim's safety, **state of health** , family situation or some other factor which has to be taken into account."

We accordingly accept Ms Cronin's submission on this point. It is also helpful to take account of what is said in paragraph 183 of the Explanatory Report concerning what it is about the victim's personal circumstances that should engage the Party's obligation to grant a residence permit. It is in these terms:

"183. Thus, for the victim to be granted a residence permit, and depending on the approach the Party adopts, either the victim's personal circumstances must be such that it would be **unreasonable** to compel them to leave the national territory, or there has to be an investigation or prosecution with the victim co-operating with the authorities. Parties likewise have the possibility of issuing residence permits in both situations."

63. We heard submissions in relation to the severity of harm or anticipated harm which would be necessary show a breach of Article 3 of the Convention, and the considerations which need to be taken into account if such a claim is based on a lack of medical facilities in a receiving country, under

reference to the cases of Sufi and Elmi v The United Kingdom (2012) E.H.R.R. 209, MSS v Belgium [2011] ECHR 108 and N v The United Kingdom (2008) 47 E.H.R.R. 39. We saw force in Ms Cronin's submission that the questions in the present case, which arise out of the finding that Article 4 of the Convention has been engaged and the finding that the duties of assistance under the Anti-Trafficking Convention are engaged, do not fall to be determined by the approach taken in the case of N v The United Kingdom . For one thing, the guidance given in paragraph 183 of the Explanatory Report seems to contemplate a quite different standard from the very high one described in N v The United Kingdom . In addition, the appellant's circumstances and the basis of her claims are quite different from those in the cases mentioned. We are dealing with an admitted victim of trafficking in relation to whom we have held there has been a breach of the obligations imposed on the United Kingdom government by Article 4 of the Convention, which breach we are satisfied has exposed the victim to harm in this country. The appellant's entitlement to reparation and the respondent's obligations under the Anti-Trafficking Convention are considerations which had no counterpart in the other cases under discussion.

64. It seems to us that the duty owed under Article 14 of the Anti-Trafficking Convention may overlap with the duty owed under Article 16 of that convention. Ms Cronin submitted that the duty to return with due regard to "dignity" involved the consideration of a right in which other protective rights, such as safety and health, were subsumed. She therefore submitted that consideration of matters such as these would inform what it meant to return a person with due regard for their dignity. Although no authority was available to assist in understanding what dignity meant in these circumstances, it seemed to us that the analysis provided by Ms Cronin was helpful. In our view, it is appropriate to start from the appreciation that the appellant's medical condition is linked to the breach of her rights under Article 4 of the Convention, in other words that the State should recognise a degree of responsibility for it. From this starting point it is difficult to see that to remove the appellant at this stage, when she suffers from such serious physical and mental health problems, from the care of the medical regime which she presently benefits from, and to return her to a country where facilities for the proper care of her present and likely needs are absent, to the extent that her life expectancy will be greatly reduced, can be seen as a return with due regard for her dignity. The reality of the appellant's situation is that she is a very ill woman who will require on-going care of a specialised nature and is likely to have to undergo major surgery of a dangerous sort. It is now clear, from the combined evidence of Dr Davidson and Ms Lees, that the sort of specialist care which the appellant will definitely require on an on-going basis, as well as the specialist care which she is likely to need on an emergency basis to combat life threatening infection and the specialist care which she is likely to need in the context of the anticipated major surgery, is unlikely to be available to her in Tanzania. For the same reasons, it is equally difficult to resist the conclusion that, having regard to the appellant's personal situation, it would be unreasonable to compel her to leave the United Kingdom at this time.

Conclusions

65. The considerations which arise in the appellant's case out of an examination of Articles 12, 14 and 16 of the Anti-Trafficking Convention can be taken along with the considerations which arise out of her case brought under Article 4 of the Convention. The respondent's reasons for refusal letter was dated 26 November 2010, one day after it had been decided that she was to be treated as a victim of trafficking. That question of course had been live with the National Referral Mechanism for the previous six months. Although these facts are all referred to in the respondent's letter of refusal, there is no reference at all to any suggestion of an obligation on the respondent's part, either under

Article 4 of the Convention or under the Anti-Trafficking Convention. The only context in which Article 4 of the Convention was considered was in connection with a risk of re-trafficking in Tanzania. Although it was pointed out that there were non-governmental agencies working in Tanzania to provide assistance to victims of trafficking, no mention was made of the obligations which the United Kingdom had undertaken in terms of Article 12, 14 or 16 of the Anti-Trafficking Convention. Indeed, this convention was not mentioned in any capacity, despite it being stated that the question of whether the appellant should be granted discretionary leave to remain in the United Kingdom had been considered.

66. The respondent's decisions to refuse to grant the appellant leave and to decline to accept that she was in need of humanitarian protection were made without taking account of the history of events as we have held them to be. In particular, the decisions were taken without taking account of the link between the appellant's precarious state of health and the breach of the respondent's own protective obligations in terms of policy and Article 4 of the Convention. They were taken without consideration of the duties which were engaged under Articles 12, 14 and 16 of the Anti-Trafficking Convention. We therefore hold, in terms of section 86(3) of the Nationality, Immigration and Asylum Act 2002, that the decision appealed against was not in accordance with the law.

67. In these circumstances we find the comments by Lord Justice Carnwath in R(S) v Secretary of State for the Home Department [2007] INLR 450, as approved by the court in KA (Afghanistan) v Home Secretary (CA) [2013] 1 WLR 615 at paragraphs 12 and 13 to be of value and application. Whilst it is not open to this Tribunal to declare that the respondent must grant the appellant leave to remain indefinitely or for any particular period, it is open to us to determine that a legally material factor in the exercise of the respondent's discretion on that matter is the correction of injustice. It seems to us that injustice would be done if the appellant were to be returned without having the benefit of the recovery aspect of the reparation to which she is entitled arising from the breach of Article 4 of the Convention. Separately, it seems to us that to return the appellant to Tanzania in her present state of health would, having regard to her personal situation, be unreasonable, just as to do so would not be in conformity with the obligation to return with due regard for her dignity.

68. We will therefore allow the appeal by re-making the decision of the First-tier Tribunal Judge to the extent that we hold there has been a breach of the appellant's rights under Article 4 of the Convention and to the extent that we hold her removal would engage the respondent's duties under Articles 12, 14 and 16 of the Anti-Trafficking Convention. In these circumstances, drawing on the approach taken in the case of AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ. 12, we will make a direction under section 87 of the Nationality, Immigration and Asylum Act 2002, directing the Secretary of State to grant a period of leave to the appellant, the length of which should be decided upon in light of the determination by this Tribunal, and of any further representations made by the appellant within a period of 21 days.

69. We would like to conclude by thanking both Ms Cronin and Ms O'Bryan for the considerable assistance and guidance given to us during the course of the hearing in this case.

Signed Date: 13 June 2013

Lord Turnbull

IAC-FH-KH-V1

Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: AA/16743/2010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 February 2012	
	.....

Before

UPPER TRIBUNAL JUDGE ALLEN

DEPUTY UPPER TRIBUNAL JUDGE REEDS

Between

EK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms K Cronin and Mr A Slatter, instructed by North Kensington Law Centre

For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

DETERMINATION AND DIRECTIONS

1. The appellant is a national of Tanzania. She appealed to an Immigration Judge against the Secretary of State's decision of 16 July 2010 to remove her from the United Kingdom by way of directions. The appellant claimed to be a victim of trafficking and to be at risk on return to Tanzania. The judge dismissed her appeal in all regards. An initial application for permission to appeal was refused, but on renewal permission was granted, reference being made specifically to arguable issues in respect of the judge's findings in the context of the Convention against Trafficking in Human Beings and Article 4 of the European Convention on Human Rights. He was grateful to those instructing Ms Cronin and Mr Slatter for reconstituting the Home Office bundle, and he had been able to read that. He did not seek an adjournment on the issue of whether or not there was an error of law in the determination.

2. After consideration we stated that we found there to be errors of law with respect to grounds 1 and 2, the two issues adumbrated in the grant of permission, but said that we wished to hear submissions in relation to the other matters.

3. Ms Cronin argued first that the judge had erred on the issue of whether or not the appellant was a member of a particular social group. The judge had dealt with this point at paragraph 24 of her determination. She had concluded that the group in question must have a distinct identity in the society in question and found that that was not the case here. Earlier on she had accepted that Tanzania had legislation expressly defining certain protections for trafficking victims, so it was argued that her identity was established as a matter of law in Tanzania. There was a legal definition and legal undertakings by the Tanzanian Government and reference was made also to the US Watch List Reports and the states' responses to trafficking. They had a visibility and an identity and they were a cohort people who were owed responsibilities and obligations by their respective states.

4. Ms Cronin also argued that the conclusions of the Tribunal in SB were inconsistent with what had been said by the Supreme Court in Fornah and K in that the former appeared to suggest that the Qualification Directive was to be read as providing two sets of criteria to be met whereas the House of Lords said there was only one. It was, however, less relevant in this case, as on the appellant's argument either subdivision in the Qualification Directive would be met.

5. Ms Cronin relied on what was set out in the skeleton argument as well. It was clear from the grant of leave that the Tribunal was of the view that this was essentially a human rights claim and there was an easy fit of this case into the human rights jurisprudence, so she had not emphasised the asylum claim which was a less easy fit, although she did not concede it.

6. Ms Cronin went on to make submissions with regard to the issue of harm as dealt with at paragraphs 25 and 26 of the judge's determination. There she had considered effective protection and relocation. The errors here were essentially material Wednesbury errors. The judge had accepted that the appellant had been mistreated by the two families involved in the trafficking. It was necessary then to see if there was any material change in circumstances on return, according to the test set out in the Qualification Directive. The judge had not approached the issue of future harm by reference to the proven existence of past harm. If that had been done, she would probably have found, in respect of the two families, that they remained in a position to do harm to the appellant as they had done in the United Kingdom. She had less capacity to deal with that risk in future than she had had before she left for the United Kingdom, as her decline in health made her more open to exploitation. This was a real difference from the context of the facts of the case. The Dhanji family would have a real interest in exacting some retribution from the appellant. She feared violence. The Tribunal could find it was a real fear but not objectively well-founded, but there was other harm they could do. The judge had erred in limiting her consideration to a risk of violence and not addressing, for example, harm by the potential they had to charge the appellant with dishonesty which would redress the public shame to them and turn the tables. There was evidence of police corruption and that had been accepted and that was a working basis for the effecting of those harms. The reasoning as to why there was no incentive to harm her was marred by Wednesbury error, in that it failed to consider the enormity of what she had done to the Dhanji family. There was a huge gulf between her and them. They had both been arrested and interviewed by the police and adverse findings in respect of them had been made by the Employment Tribunal, and this had been publicised in Tanzania. The Dhanjis were elderly and had had to move back to Tanzania and lost their carers allowance in the United Kingdom and other advantages of living here so they had lost a lot and these losses were continuing. The sting of the events would continue to be felt by them.

7. As regards the question of any risk of further loss to the Dhanjis in Tanzania, it was argued that the judge on the evidence could not rule out their desire to rectify the image created. Newspaper articles went up to 2010. Their shame had a currency therefore. There had been no deliberation on that point in the determination. There would be likely to be an ongoing desire for retribution. The Employment Tribunal had found that they had a relative, their solicitor, using underhand methods to secure the appellant's removal from the United Kingdom before she could claim against them, and they therefore could be regarded as a manipulative family.

8. As regards the appellant's claimed fear of Mrs Kilumanga, Ms Cronin accepted on the evidence before the judge that there was no basis for a challenge, although she had more recent evidence.

9. It was also argued that there was an error in paragraph 25 of the judge's determination in dealing with the potential risk of the appellant being exploited or harmed or attacked on account of her assumed wealth. The judge seemed to assume there would be no problem although not all newspapers said that she had not received the award. They assumed that she would get it. The Tribunal was referred to pages 114 and 116 of the bundle referring to the Dhanjis being "yet to pay up", and the judge had also failed to consider page 112 and the compounding of the initial trafficking by the second trafficker. The appellant was a person who would be easy pickings and would not be able to take care of the money and would be easily relieved of it. She therefore had a potential damages award and a publicity campaign by the second exploitative employer making the award a liability and a future risk on return. The judge had failed to evaluate the evidence properly.

10. Paragraphs 26 and 27 contained clear Wednesbury errors. There was no consideration of the appellant's vulnerability and powerlessness and the power of the two families and no consideration of her serious medical condition which was relevant to her ability to relocate. There was no consideration of the availability of medical treatment in the areas of proposed relocation. The judge failed to revisit the background evidence set out at paragraphs 18 to 21 concerning the effectiveness of state protection and relocation. The judge referred to the fact that the appellant suffered from tuberculosis, but did not deal with her illness. At paragraph 20 she failed to consider that the evidence there was not a commendation for effective protection but a rebuke. Tanzania had demonstrated a failure over a period to show any proper indication of seeking to improve and set out minimum standards.

11. In his submissions Mr Saunders argued, with respect to particular social group, that if the appellant was in a social group it was formed by the harm she had suffered. The judge was right to deal with the matter as she had done. The appellant's group did not have a distinct identity. It was necessary to consider how she was trafficked. It was accepted that she had been trafficked, but it was not by the usual way of gangs and commercial gain but a series of unfortunate circumstances and a gradual process which is far different when one considered risk as a consequence of her identity then and a gang situation. She was not identifiable as a person who had previously been trafficked. Her capacities were now much diminished due to health problems and this would impact on her ability to resist what might befall her, but that did not make her a likely trafficking target.

12. As regards the feared danger from the family, the evidence was still very much as it had been at interview. The appellant had said "they would wouldn't they". In the bundle at page 342, paragraph 3.2, this was an assumption too far. It was perhaps the case that they would but there was no real indication. There was, as the judge had said at paragraph 25(i)(c), no evidence of the dismissal of the appellant's aunt from Mrs Alibhai, her employment being a direct consequence of the appellant's departure from employment with Mr and Mrs Dhanji. There was therefore no general risk of re-

trafficking shown or risk from the family beyond an assumption. As regards the issue of the appellant being perceived to be wealthy, she would return to poverty as her parents were subsistence farmers. If she lived like them on return then that is what she would be, a poor person with diminished capacities, shy, humble and forlorn, it was accepted. She would not be returning in triumph with a lot of money nor would she be perceived as such. As regards the authorities in Tanzania and their duties to trafficked women, the judge's findings on that were sound. The picture was mixed and the appellant would have potentially or probably recourse to her family albeit in some difficulty materially. She would therefore have access to some medical facilities. An Article 3 claim on the basis of human rights breaches was her best claim but there was sufficient medical care and the test of whether the standards in Tanzania were those of the United Kingdom was not the legal test. The test set out in **D** was not met.

13. By way of reply Ms Cronin argued that in their very nature Wednesbury errors would not address outcomes but it was rather a question of the process than the conclusion. It was argued that in order for the determination to be sustainable and lawful, it was necessary to see evidence of deliberation on the matters on the part of the judge. Relevant matters had not been considered so it was essentially a matter of emissions and an evaluation by the judge which were all highly material.

14. The issue of particular social group was relevant in the context of the Qualification Directive. The people in that group had a common background of being trafficked and this could not be changed. They also had a distinct identity. They were defined in the legislation so they were defined as being different.

15. Asylum was not at foreground, but there were matters of moment and a consistent argument and it was a simple issue in law. There was a lot of case law. Particular social group is not a ground for creating artificial barriers within it. It was a failsafe ground. This was not a gang type case but was typical of domestic worker trafficking, so it was consistent with the type of trafficking and typical of the risk to domestic workers. Publicity identified her as a person who had been trafficked and she had a clear public profile.

16. Ms Cronin referred to Ms Lea's report which had not been before the judge. This showed that there were friends in Tanzania who were well aware of the case and it had been publicised by Tanzania women's organisations and the appellant perceived as returning well off. There were therefore material errors of law in the determination.

17. At that point Ms Cronin realised that she had in fact been working from the wrong set of grounds and it was agreed that she could deal with the other matters after evidence was taken from the witnesses. The reason why we decided to take the evidence was that although we had not yet concluded on the issue of error of law, they had attended today on the basis that it was proposed to be a rolled up hearing, and money and time would be wasted if their evidence was not taken. For reasons which we shall set out subsequently, we do not set out their evidence here.

18. With regard to the other grounds, Ms Cronin noted the distinction between domestic and foreign cases as regards evaluating whether return is lawful. She referred to the lack of jurisprudence in the proceedings established from 15 February 2010 with regard to preserving findings from an earlier determination. The appellant wished to have free range to argue the Article 3, 4 and 8 points. The issues of risk were varied potentially there was a direct list of harm from the traffickers and their associates and also on the basis of her return as a trafficking victim in respect of whom there might be others with ill intent. There were clear medical risks, both physical and mental, including a suicide

risk and there was also a re-trafficking risk. It was common ground that she had been trafficked on two occasions and was credible.

19. Mr Saunders confirmed this in general but questioned whether it had been found that the appellant was trafficked by the second person.

20. Ms Cronin emphasised the errors that she said existed in the findings of risk and argued that it will be wrong to preserve the findings in circumstances where the Tribunal had had misgivings as to the instrument by reference to which risk was to be evaluated. Risk in relation to Articles 3, 4 and 8 had to be assessed. There was a different evaluative exercise in respect of each. It was argued that it was very difficult to preserve a credibility finding as opposed to an holistic finding with regard to all the protection issues. The two could not be severed. The judge had erred, as had been found by the Tribunal in respect of the trafficking Convention and Article 4 of the Human Rights Convention and that meant the evaluation of medical harm was tainted, for example Article 16 of the Convention allowed for return with due regard to the person's safety and dignity and this led to a need for a different evaluation of risk, not just safety but a sense of personal integrity also. The judge had erred in respect of trafficking and all the issues attached to that and as such a victim the appellant was a person invested with rights and attached to that status was a change in how one should look at risk. There had been no consideration or proper understanding of what in a sense was the United Kingdom's complicity in some of the harm done to the appellant. Only after the hearing had there been acceptance of a "technical" breach of Article 4 in the failure to investigate and prosecute. If the risk findings were preserved, it would be in the context of a significant concession about risk and it would not have been properly evaluated with reference to risk. There was a comparison which was returned to between foreign and domestic cases concerning Articles 3, 4 and 8 and these were core issues.

21. The Tribunal was therefore asked to start the case again except for the agreed facts. Otherwise it should be a de novo hearing. Further evaluation was needed based on the fresh evidence and the important concession. It needed a proper legal analysis and holistic analysis of risk. There were issues of law and fact where the law had been misapplied it would be unsafe to carry the findings of fact forward.

22. With regard to Article 8 and Article 3 there was a risk to physical integrity and mental and psychological harm. The appellant was at risk from the traffickers and there was the issue of available medical treatment also. The judge had assumed that the case was only about the appellant suffering from tuberculosis and having recovered. That was clearly wrong and it was not open to the judge to find this on all the evidence. The documentation from 2008 to 2010 concerned the progress the appellant had made after the initial tuberculosis treatment. She had lost her lung in 2010. The judge had not taken this into account. There was new evidence about the implications of this. The finding about medical risk was unsafe.

23. It was a very different balancing exercise under Article 4 which did not assume people would be refused. As regards the resident permit issues, these did not have to relate to private life risk or medical circumstances. It was a matter of personal circumstances. It was a question of the weight to be given to particular factors. There was some medical evidence before the Immigration Judge, and it was argued there was enough to show that she had erred. She had failed to look at whether there was medical treatment for the appellant's particular condition. Paragraph 38 contained an error in respect of Article 4 and it was argued that the errors elsewhere affected the Article 8 assessment. It could be said the decision was not in accordance with the law if there was a breach of Article 4. The Article 4

finding would affect the Article 8 finding as the issue had not been in accordance to the law was relevant to both. The issues and evaluations were intentionally linked so they could not properly be severed.

24. Mr Saunders argued that if the judge erred on Article 4 and the decision was not in accordance with the law then the appellant had got as much as she could get out of Article 8.

25. We reserved our determination.

26. As we have noted above, we have found that the judge erred firstly in failing to determine the appellant's ground of appeal relating to the Council of Europe Convention against Trafficking in Human Beings of 1 April 2004 (Council of Europe Treaty series number 197)(The Convention against Trafficking) and also erred in respect of her findings in connection with Article 4 of the European Convention on Human Rights in respect of her findings in that regard.

27. Ms Cronin argues that the judge also erred with respect to the other issues raised in the grounds of appeal, particularly concerned with risk on return, protection, particular social group and Article 8 of the Human Rights Convention, and argued that in any event the nature of the errors in respect of the Convention against Trafficking and Article 4 was such as to mean that the entire appeal would have to be reheard.

28. The judge made it clear at paragraph 23 of her determination that she found the appellant to be a credible witness. Earlier she had summarised the appellant's claim, at paragraph 14 of the determination. The appellant had been offered full time employment as a cleaner by Mrs Zainab Alibhai and her husband in Tanzania, and worked for them for two years together with other staff in their household. Mrs Alibhai told the appellant that she was to accompany her to the United Kingdom and she was told she would be paid 100,000 Tanzanian shillings a month. When she arrived in London she was taken by Mrs Alibhai to her parents, Mr and Mrs Dhanji, and then taken to another house where there was to be a wedding and she worked there for a week. Mrs Alibhai left a week after the wedding and did not have the surgery which she had mentioned to the appellant she was going to have, either before she left Tanzania or after she came to the United Kingdom, but in respect of which she had wanted the appellant's assistance with her mobility. The appellant was told that she would now be working for Mr and Mrs Dhanji, and after Mrs Alibhai left Mrs Dhanji told her that she would be working from 7 o'clock in the morning until 10.30 in the evening and she was expected to clean the house thoroughly every day, massage Mrs Dhanji twice a day, deal with the households laundry, cook, garden and prepare Mr and Mrs Dhanji for bed. She only had three breaks for food in the day when she ate leftovers and stale bread. Her living conditions were extremely poor and she did not receive any wages nor was she given any leave or time off work. Initially she was not allowed to attend church but was later permitted to do so.

29. After two and a half months she told Mr and Mrs Dhanji that she wanted to return to Tanzania but she was told she would not be allowed to do so until July 2007 when her visa expired. She was not allowed contact with her parents by telephone as they said it was too expensive. She wrote letters to her father telling him about her unhappiness and these were posted by Mr and Mrs Dhanji's daughter-in-law who felt sorry for her.

30. She was also required to work on demand at the homes of the Dhanji relatives, and when Mrs Alibhai returned to the United Kingdom for a few months she told the appellant she would not be allowed to return to Tanzania until July 2007.

31. The appellant worked for Mr and Mrs Dhanji between July 2006 and May 2007. One day she was approached at church by a member of the congregation who took her to see Mrs Marion Kilumanga, the Chairperson of the Tanzanian Women's Association (TAWA), and Mrs Kilumanga informed the Tanzanian Embassy about the appellant's situation. It was agreed that the appellant would leave the Dhanji's employment and she did so and went to stay with Mrs Kilumanga at her home. The Tanzanian Embassy contacted Mr and Mrs Dhanji to tell them that the appellant would not be returning to their employment, and she stayed with Kalayeen and her family until she was returned to the Poppy Project.

32. The Acting High Commissioner of the Tanzanian Embassy arranged a meeting in June 2007, which was attended by Mr Dhanji. He offered to pay the appellant a total of £380, but she asked to be paid £125 per week for the period she had worked, and no agreement was reached on this point. The Dhanjis initially refused to return her passport but this was eventually given to her along with her flight ticket, with the help of the embassy and TAWA. She was keen to return to Tanzania at this time but was unable to use the flight ticket because of her outstanding problems, and she became aware at this time that her visa had expired.

33. The Dhanjis did not respond to a letter of grievance which the appellant sent to them in July 2008, and she attended an Employment Tribunal hearing on 8 August of that year which resulted in a ruling in her favour and the award of £58,585.80 in recognition of the injury she had suffered and also for her unpaid wages together with interest. This award had not been enforced because Mr and Mrs Dhanji were in receipt of state benefits. The appellant's case was reported to the Harrow Police on 17 March 2009 but the investigation was now closed. This had led the appellant to make an application to the European Court of Human Rights against the United Kingdom Government.

34. Mrs Kilumanga arranged for the appellant to give several interviews about her situation which were reported on the internet. She stayed with Mrs Kilumanga for three years between My 2007 and May 2010 and was expected to carry out domestic duties for her. She was eventually referred to the Poppy Project by Kalayaan which is a charity which gives advice and support to migrants who enter the United Kingdom on a domestic worker visa.

35. The judge made it clear that she had read detailed reports from Kalayaan and the Poppy Project. There was mention of what Kalayaan does, and the Poppy Project is the leading service provider for victims of trafficking providing support and housing to women trafficked into the United Kingdom for sexual exploitation or domestic servitude. The judge also heard evidence from Miss Camille Kumar, the appellant's senior support worker. The judge accepted their assessment taken together with the appellant's own evidence that she had been exploited in the United Kingdom and was trafficked here by Mrs Alibhai as a domestic worker for her parents Mr and Mrs Dhanji. This had also been accepted by the respondent at paragraph 15 of the refusal letter. The judge said it was less certain whether the Secretary of State accepted that the appellant had been similarly mistreated by Mrs Marion Kilumanga, but based on the evidence the appellant provided at the hearing and in the statements and also evidence from Kilumanga and/or the Poppy Project, the judge was satisfied that there was a real likelihood that the appellant was also internally trafficked by Mrs Kilumanga.

36. The judge went on to find that the appellant was not a member of a particular social group. She took account of the decision of the Tribunal in **SD** that whilst former victims of trafficking and former victims of trafficking for sexual exploitation were capable of being members of a particular social group, according to the Tribunal's findings former victims of trafficking and/or former victims of trafficking for sexual exploitation could be members of a particular social group the group in question

was required to have a distinct identity in the society in question. The judge did not accept that there was a distinct identity which would distinguish these workers from other domestic workers or even from other domestic workers in households of the wealthy who might or might not be victims of trafficking and therefore found that the appellant's fear was not based on a Convention reason.

37. She went on to consider whether the appellant's subjective fears, if she had them, were objectively well-founded and concluded they were not. With regard to a claimed fear from Mrs Alibhai and the Dhanjis, the judge found first that it was to be noted that the appellant left their employment in 2007 and whilst it was reasonable to assume Mrs Alibhai and the Dhanjis would have been angry with the appellant, she found that there was no evidence before her to show that there was a real risk that their anger persisted to this day to the extent they would still wish to harm the appellant. She noted that in this regard it was significant that they had not suffered an financial harm arising from her revelations because to date they had not paid the fine imposed on them by the Employment Tribunal.

38. The judge went on to note that there was some second or even third hand evidence that Mrs Alibhai and the Dhanjis were angry with the appellant in the past, but that there was limited evidence to show that this meant they intended to cause her serious harm. Her fear, it seemed to the judge, was partly based on information given by the appellant's brother in October 2010 when he allegedly told the appellant that Mrs Alibhai had said that "she would see what is going to happen to her when she comes back to Tanzania". There was no indication as to when that conversation allegedly took place and the appellant's brother was only reporting a conversation he had with another of Mrs Alibhai's employees at an unknown date. The judge considered the date of the conversation was a material consideration because, for example, had it taken place nearer to the time of the appellant's departure from the Dhanjis or nearer the date of the litigation before the Employment Tribunal it would show the extent of her anger at that time but not necessarily four years later.

39. As regard the further issue of the dismissal of the appellant's aunt from Mrs Alibhai's employment, there is no evidence to demonstrate this was as a direct consequence of the appellant's departure from Mr and Mrs Dhanjis employment. The appellant's evidence was that Mrs Alibhai terminated the aunt's employment within weeks of the appellant fleeing the Dhanji's home and the judge therefore thought that though it was possible that the dismissal had been in retaliation for the appellant's departure, again it was shortly after she had left the Dhanjis and therefore several years ago and consequently of limited value as to an indication of Mrs Alibhai's present anger and adverse intentions, if any, against the appellant.

40. The judge went on to consider claimed fear of Mrs Kilumanga, and concluded the appellant was not at real risk from her partly because Mrs Kilumanga remained in the United Kingdom and the appellant would be returned to Tanzania, and also is based on reliance on alleged phone calls made by Mrs Kilumanga's mother to the appellant's brother asking about her whereabouts and it was not known why this was done and there was nothing to suggest it was in order to harm the appellant.

41. The further issue of claimed risk was the appellant's fear of society in general on account of the successful outcome of the case she made against the Dhanjis at the Employment Tribunal. This was based on the fact there had been publication of the outcome of her case against the Dhanjis and the large amount of monetary award made to her. She feared that she could be attacked or otherwise harmed in order for other people to have access to this money. The judge noted there were a number of newspaper, internet and other public reports referring to her case and the award she received, but commented that it was also true that a number of these reports made it clear that to date the

appellant had not yet received the financial award. Although the paragraph is slightly inconclusive, it is proper to surmise from it that the judge found there was not a risk in this regard essentially because of what was said in a number of the newspapers.

42. The judge went on to consider other factors relevant to risk on return. He made the point that the appellant's fear in Tanzania was dependent on it being known that she had returned there, and the appellant claimed that Mrs Alibhai had friends who worked at the airport and who would be able to recognise her on return. The judge found that this was not reasonably likely given the lapse of time since she left Tanzania, and with regard to a reference by the appellant to recent photographs of her in the press, recognition of her would be dependent on those at the airport having seen those photographs in the first place and then relating them to the appellant. In any event, the only evidence that Mrs Alibhai knew anybody at the airport was based on her own claim that people she had invited to her house worked there and that might not have been true. It was in any event unclear whether those people were still working at the airport, if they ever did, or that they would be aware the appellant was intending to return to Tanzania so they could look out for her. In any event, further, she could return via land or sea if she feared return via the airport.

43. As regards the risk of being re-trafficked, the objective evidence showed that internal trafficking did exist in Tanzania, but this was usually for women from rural areas who were considerably younger than the appellant and when she left Tanzania she was no longer living in a rural community and was herself working and could therefore not be seen as an economic burden on her parents.

44. In the alternative if she were at risk the judge found there was a sufficiency of protection. She noted what was said in the refusal letter about the role of the police force in Tanzania, and the fact that the objective evidence indicated that sections of the Tanzanian Police Force were corrupt and as a force it was not as efficient and as proactive as the police forces in the United Kingdom, for example. The judge concluded that the circumstances were not such that it could be said that the authorities in Tanzania were unwilling to afford protection to the appellant. It was relevant to note that Mrs Kilumanga had successfully returned to the Tanzanian Embassy in order to assist the appellant when she escaped from the Dhanjis.

45. The appellant had given oral evidence that it was common for a disgruntled person to seek revenge in Tanzania. She gave the example of a case involving a dispute between her father and his cousin. The judge considered that the evidence in that case which involved a potential killer being stopped and beaten by villagers until he disclosed the name of the person who had employed him, it was an indication that apart from the official sources of protection by the police and law enforcement agencies, practical protection was available from other sources.

46. As regards relocation, if the appellant were at risk, it would be reasonable for her to relocate to Iringa, where her parents still lived.

47. With regard to the challenge to the judge's findings in respect of risk, it is argued first of all in the grounds and by Ms Cronin that the judge in assessing risk failed to take proper account of paragraph 339K of HC 395 which was of relevance in light of her finding that the appellant had been ill-treated by Mrs Alibhai and the Dhanjis. Paragraph 339K states the fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

48. It is also argued that the judge failed to take into account the damage to the reputation of Mrs Alibhai and the Dhanjis by the media interest in the case and the impact on them of being named and shamed in the media. The further point is made that the words “she would see what was going to happen to her when she comes back to Tanzania” was a material consideration taken as a threat, as stated in paragraph 32 of the appellant’s appeal statement. The judge is criticised for not having clarified with the appellant whether she knew when her brother was given that information. Issue was also taken with regard to the judge’s reasoning in respect of risk of the appellant being identified at the airport.

49. We see these as being matters of disagreement only. It was open to the judge to find that there was no evidence to show a real risk that the Dhanjis and Mrs Alibhai remained angry with the appellant to the extent that she faced a real risk of harm from them. It was the case that they had not suffered the financial penalty imposed by the Employment Tribunal since they did not have the money. The judge was clearly aware of the fact that there had been adverse publicity in respect of the Dhanjis concerning this case, but the only manifestations of any anger appear to be the remark made by Mrs Alibhai to the appellant’s brother, at an unknown date. We do not consider it was a duty incumbent on the judge to find out when that was. It was a matter for the appellant’s representatives to adduce evidence in that regard, and that was not done, and the judge’s findings at paragraph 25(i)(b) were open to her. Likewise, it would appear that if the appellant’s aunt were dismissed from Mrs Alibhai’s employment this seems to be shortly after she left the Dhanjis and again, as the judge said, was of limited value as an indication of Mrs Alibhai’s present adverse intentions in respect of the appellant. It is the case that the judge did not factor into this or into the issue to be considered next, risk from society in general, the increased vulnerability, as it is now said to be, of the appellant. In this regard it is appropriate to look at the medical evidence that was before the judge as this is of significance both with regard to this point and also in respect of Article 8 and Article 3. In the medical evidence in 2008 and 2009 there was a letter from Dr Dhasmana, Specialist Registrar, The Imperial College Healthcare NHS Trust TP Service, St Mary’s Hospital, Chest and Allergy Department, which refers to the appellant’s background of pulmonary tuberculosis treated without complication between October 2008 and July 2009. He refers to the collapse of what is in fact an obsolete segment of the left upper lobe and to persistence of pain. The indications for lobectomy were not there. It would seem that the pain would remain a chronic problem. Medication was diagnosed. That was the most recent medical letter on the file before the Immigration Judge. Earlier letters in 2010 refer to the persistent collapse of the left upper lobe and that the factors referred to in a letter of 21 April 2010 that the appellant had not lost weight and various follow up appointments. In the Poppy Project report of 23 September 2010 there is reference to the appellant disclosing experiencing severe pains in her chest, shoulder and upper back, general exhaustion and lack of motivation, nightmares, panic attacks, irregular heartbeat, congestion in her throat, insomnia, isolation and detachment, frequent crying, high uncontrollable levels of anger, headaches, dizziness, significant weight loss and loss of appetite. We consider that it is clear from her presentation that she also suffers from persistent low mood and anxiety and is in constant chronic pain that has become so severe that it impacts on her ability to attend classes and appointments. Reference is made to the diagnosis of advanced tuberculosis in 2008 and ongoing complications from that. There is reference to her awaiting a further operation to remove parts of the collapsed lung which might be attributing to the pain she experienced. It is said that Mrs Kilumanga acted as the interpreter for all her appointments, she said hospitals did not provide interpreters, Mrs Kilumanga neglected to relay all information accurately to the appellant, leaving her unclear about her health status. Dr Dhasmana refers to reviewing the appellant via an interpreter, but does not say whether that was Mrs Kilumanga or not.

50. However, in the absence of evidence to show a real risk from Mrs Alibhai or the Dhanjis, we do not consider that the state of the appellant's health at the time of the hearing was such as to show an increased vulnerability in that regard. As regards Ms Cronin's further argument of risk to the appellant from the Dhanjis on account of possible charges of dishonesty, we have found no reference to that in the skeleton argument before the judge and it seems to us, in any event, to be essentially based on surmise. The fact that the employment Tribunal found that the Dhanjis had used underhand methods to secure the appellant's removal from the United Kingdom with the assistance of a solicitor, although it is demonstrative of a degree of manipulativeness, in no sense in our view goes to show that the judge could or should have considered risk in this regard as there was no evidence to sustain it. It is relevant also to note the fact that as referred to in the Poppy Project report, the appellant's brother told her that domestic workers from Mrs Alibhai's house had told him the Dhanjis had recently purchased a house in Tanzania and were often travelling between the UK and Tanzania, which hardly points to a settled presence there. As regards the claimed mental fragility of the appellant, we have set out what was said in the Poppy Project report in this regard, we note that it was written by a senior support worker who does not claim to have any professional qualification or expertise in psychological, psychiatric or medical issues of any kind and that is of further relevance to the issue of the claimed vulnerability of the appellant.

51. In this regard we consider also the argument that the appellant is at risk from society in general on account of the successful outcome of the case made against the Dhanjis. It is the case, as Ms Cronin pointed out, that not all the newspaper articles referring to this made the point the appellant had not been paid by the Dhanjis, we regard the claimed risk in this regard again as properly having been concluded to be essentially conjectural. We are not aware of any evidence before the judge to show risk in this regard other than speculation as to the way in which people in Tanzania might react towards a person known to have money. This falls well short of amounting to a real risk, and we consider the judge properly found an absence of risk in this regard.

52. Likewise, we consider that the claimed risk on account of being identified at the airport was properly dealt with by the judge at paragraph 26(i). As the judge pointed out, there has been a five year lapse of time since the appellant left Tanzania, recognition of her at the airport would depend on people at the airport having seen the photographs and relating them to the appellant, it is unclear whether those people, if they ever did work at the airport, were still doing so or they would be aware that she would be returning to Tanzania so as to look out for her.

53. We also consider the findings on risk of internal trafficking to be open to the judge for the reasons set out at paragraph 26(iii). The judge noted that internal trafficking in Tanzania normally occurs to women from rural areas who are considerably younger than the appellant and this it seems was based on what was said in the US State Department Report. This was a proper source for the judge to take evidence from, and the grounds in this regard amount to disagreement only in our view.

54. In the circumstances, therefore, we consider it has not been shown that the judge erred in her findings on risk on return to Tanzania. As a consequence it does not seem to us there is any point to our revisiting her findings on particular social group and protection or relocation. If there is no risk then there is no need for protection or relocation, and it is academic whether or not the appellant is a member of a particular social group.

55. We turn to the Article 8 findings. The judge concluded that the appellant had established a private life through the friendships she had made and through her contact with Kalayeen and the Poppy Project. As regards the proportionality of removal, the judge took into account firstly the fact that the

appellant would be in a position to re-establish a private life, albeit it a different one, on return to Tanzania, where her parents, brother and various other relatives live, albeit that she said that her parents would only be able to give her moral and not financial support; secondly, that she had kept in touch with her family during her time of difficulty and had begun to study English which would assist her in gaining employment; thirdly, that although she had suffered from tuberculosis and suffered from some of the after effects of this disease it had been successfully treated and she was undergoing continuing treatment such as physiotherapy and it was the case that there was available medical treatment in Tanzania. The judge noted that both Kalayaan and the Poppy Project referred to her poor emotional state but that was not backed up by any medical evidence saying she would not be able to work; fifthly, that she was receiving treatment for the pain she had resulting from her tuberculosis and there was no evidence adduced to show that she was not have access in Tanzania to medicine or other ongoing treatment she had in the United Kingdom. The objective evidence showed that tuberculosis was recognised as a serious illness in Tanzania and it was being addressed by the Tanzanian authorities and also by international organisations and NGOs. It had been asserted by Mr Noorali of the IOM that no help would be available to the appellant, but the judge considered this information had to be weighed against information from other sources which have attested to the existence of such facilities, albeit in a limited form. The judge had earlier, at paragraph 18, subparagraph iii, noted background evidence stating that the IOM and its NGO partners assisted 304 victims of trafficking during the period reported by the US State Department Report of 2009 and during the year 96 victims were provided with counselling, medical screenings and educational opportunities.

56. It seems to us that while dealing first of all with the issue of support, the judge dealt properly with this issue. She noted the evidence from the State Department Report which contrasted to an extent with that of Mr Noorali. She noted the medical evidence, which is summarised at paragraph 37(iii)(iv) and we consider that summary is in accordance with the medical evidence we have set out above. We do not consider the claimed errors with respect to Article 8 are made out.

57 We turn to the two matters in relation to which we have accepted that there are errors of law and Ms Cronin’s argument as to whether these errors infect the rest of the determination such that there must be a full rehearing.

58. As regards the Convention against Trafficking, the contention in the grounds is that the judge failed to determine the appellant’s ground of appeal relating to the Convention against Trafficking and this was relevant to the issue of whether or not the respondent’s decision was in accordance with the law. Reference is made in the grounds to Article 14 of the Convention which provides for the grant of a renewable residence permit for twelve months where (a) the competent authority considers that their stay is necessary owing to their personal situation; and (b) the competent authorities considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings. Article 16 provides that when a party returns a victim to another state, such return shall be with due regard to the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim and shall preferably be voluntary. It is argued that the judge should have considered these rights consequent upon identification as a victim of trafficking by the Secretary of State and the judge. The judge did not refer to the Convention or determine any arguments related to it.

59. As regards Article 4 of the European Convention against Human Rights, the argument is that the judge misdirected herself when concluding that there had to be a real likelihood that the appellant remained a potential victim of trafficking before Article 4 could be engaged. It is argued that the

judge seemingly considered that the positive obligations owed by the UK to the appellant as a victim of trafficking were not a matter that she needed to consider because of the existence of an outstanding application before the European Court of Human Rights. The point is made that the whole purpose of Article 4 is to require public authorities, including courts, to give effect to this Article. It is also argued the judge failed to consider the remedial and protective duties arising under Article 4 and that these relate not solely to prevention but include consideration of the specific needs of the appellant as a victim of domestic servitude and trafficking and consequent protection.

60. With regard to these issues we consider, contrary to the submissions of Ms Cronin, that they are properly severable from the other matters assessed in the determination. It seems to us that the issues set out in the Convention against Trafficking and Article 4 are matters which can be considered quite separately from the other issues considered by the judge in the appeal. Accordingly we conclude that the errors by the judge in respect of those two matters will be the subject of a rehearing without there needing to be a revisiting of the other matters in respect of which we have found no errors of law. There will, therefore, be a rehearing of those issues with a time estimate of half a day.

Signed Date

Upper Tribunal Judge Allen

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[1] See [43].