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Heard at Field House

DM (Sufficiency of Protection
_ PSG _ Women _Domestic
Violence) Albania CG [2004]
UKIAT 00059

On 15 March 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

1 April 2004

Given orally in court

Before:

**Mr J Barnes (Chairman)
Mrs C J Lloyd**

Between

The Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

Representation

For the appellant: Miss R Brown, Home Office Presenting Officer
For the respondent: Mrs C Charlton-Little, Counsel, instructed by S
Osman Solicitors

DETERMINATION AND REASONS

1. The respondent is a citizen of Albania born on 3 April 1980 who entered the United Kingdom clandestinely on 8 June 2002, according to her account. She was at all events here on 10 June 2002 when she made an asylum application.
2. Following submission of a statement of evidence form and interview the Secretary of State refused that application for the reasons set out in a letter dated 29 July 2002. On 6 August 2002 he issued directions for her removal to Albania as an illegal entrant after refusal of her asylum application.

3. It is perhaps appropriate to note at this point that the respondent had married in Albania a Mr Sami Mema who is a Kosovan Albanian and enjoys indefinite leave to remain in the United Kingdom having been granted refugee status here on 5 June 1999. There was a previous application for entry clearance so that she might join him as his spouse here but that was unsuccessful and was not appealed. We are not currently concerned today with any issues arising out of the marital relationship to someone permanently settled in this country. We are concerned only with the issues of whether as the Adjudicator, Miss C M Glenn, who heard the appeal on 17 January 2003 found that the respondent succeeded both under her asylum and Article 3 human rights claims.

4. The basis of the respondent's claim is aptly recorded in the reasons for refusal letter at paragraph 4 as follows:

"You claim to have ended a relationship with your former boyfriend in August 1999 but he refused to accept the relationship was over and began to harass you and your family. You state you reported these incidents of harassments to the police but the police would not take any action because they considered it a personal matter. You claim your former boyfriend became worse after you met your current husband, ordering you to leave him or he would kill you and your family. You state that in March 2002 you were knocked off your bike by a car driven by your former boyfriend and while you were lying on the floor he approached you and threatened to kill you next time. You claim that you reported the incident to the police and he was arrested but was released the following day. You state that following this incident you went to your uncle's home in Tirana but your former boyfriend followed you and continued to threaten you. You claim that fearing for your life you fled Albania."

5. The respondent had in fact submitted a full statement to the Secretary of State in support of her asylum application which is contained within the statutory bundle before us and this deals in somewhat greater detail with the various incidents to which she refers and in particular the incident of 13 March 2002 when she says she was knocked off her bicycle by a car driven by her ex-boyfriend, resulting in her sustaining bruising to her left arm and right shoulder and other smaller bruises on her elbow. She says in relation to the treatment of the boyfriend by the police:

"I was taken to hospital by my father and immediately thereafter we reported the incident to the local police station. Apparently my ex-boyfriend was arrested that same evening but we learned on the following week the police would not take any action against him because, according to them, my ex-boyfriend was with a passenger at the time and both of them had given statements to the effect that I fell over because I had lost control of my bicycle and that his car did not hit me or my bicycle."

6. The Adjudicator found that the respondent was credible in her claims and it was submitted to her on behalf of the respondent that she was a member of a particular social group in Albania, namely women, and that her Convention reason for fear of persecution arose from her membership of that particular social group. It was also submitted on her behalf that to return her to Albania would be in breach of her protected human rights under Article 3 of the European Convention.
7. The Secretary of State appeals, with leave, against the Adjudicator's findings and the sustainability of those findings is challenged. Insofar as they are challenges to the findings in relation to the factual history, we see no basis on which to say that the Adjudicator's findings in that respect are unsustainable. He had the advantage of seeing and hearing the respondent give evidence before him and there was also produced to him a document which he accepted, presumably against the background evidence from the respondent as to her history in Albania, which purported to be a certificate from the Chief of Police in the Department of Shkoda, a city in Northern Albania where she lived. recording that she had made over ten formal complaints to the police against her former boyfriend, Freddy Ndoja who was alleged "to have continually horse and menace for including threats to kill due to various severe shortages". That clearly cannot be an accurate translation, or if it is the certificate is meaningless. We suspect and are prepared to approach the matter on the basis that it reveals a series of complaints made by the respondent to the police department about the conduct of her former boyfriend who would not accept that the relationship had ended and was acting in the nature of what is now commonly referred to as stalking. The reference to various severe shortages we are equally sure is in fact intended to refer to the continuation of that certificate so that it should read "due to various severe shortages it is a matter of policy of this Department not to refer any of these complaints for further action". At all events it is clear that the police, beyond the prompt action which they had taken on 13 March 2002, did not

take any further formal steps and are on record as saying in that certificate that

“the complainant's allegations are mainly non-serious and are considered personal in nature which do not warrant the police intervention. The citizen Desara Shpuza is protected under the law like all citizens and the police cannot provide her any additional protection which exceeded the ability or resource of the police department to so provide.”

8. The position is therefore to be considered against that factual background. It is the Secretary of State's case that the Adjudicator's findings as to the law are unsustainable and we are in agreement with that challenge. We have carefully listened to what Mrs Charlton-Little had to say as to the issue of whether or not this respondent can be said to form a member of a particular social group for the purposes of the Refugee Convention. In this respect it was a broad submission that women generally were so disadvantaged under the system applying in Albania that they formed a particular social group and that this particular respondent was entitled to be so regarded for the purposes of her own claims. That is a matter which rests very specifically upon background evidence. It is quite wrong to construe the judgments in *Islam & Shah v Secretary of State for the Home Department* [1999] Imm AR 283 as providing any broad basis for saying that women generally are to be regarded as capable of forming a particular social group for Refugee Convention purposes. The point is aptly made by Lord Steyne giving the leading judgment of the House early in his judgment where at page 285 he says:

“Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case. On the findings of fact and unchallenged evidence in the present case, the position of women in Pakistan is as follows...”

He then goes on to consider the specific situation in Pakistan at the date of the hearing before their Lordships. The distinctive features which he notes are that women are unprotected by the state and that discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state. This arises in particular under the statutory provisions in Pakistan which were accepted explicitly to discriminate against women as, for example, in some cases allowing only the evidence of men to be

heard and not of women, and that the Zena Ordinance had eroded women's rights and denied them equal protection by the law. There was specific evidence that arrests made under the Zena Ordinance could be made without a magistrate first investigating whether there was any basis for the charge and issuing a warrant so that women in Pakistan have often been held under that Ordinance for years although no evidence had ever been produced that they had committed any offence. It was found that men frequently brought charges against their former wives, daughters or sisters in order to prevent them marrying or re-marrying against the man's wishes and that most women remained in gaol for two to three years before their cases were decided, often on the basis of no evidence of any offence.

9. We have set out those matters from the judgments in *Shah & Islam* because they illustrate the very specific circumstances under which it was held that there was a lack of sufficiency of protection for women generally in Pakistan. It is quite clear from that that there were legal processes which could be set in motion against them which rendered them virtually powerless and subject to considerable periods of imprisonment before trial with possibly severe sentences at the end if matters ever came on for trial. That, it seems to us, is an entirely different situation from that which is propounded in relation to Albania (as to which, see paragraphs 15 to 17 below).
10. The Adjudicator dealt with matters at paragraph 21 of his determination as follows:

"The US State Department and CIPU reports confirm that violence against women remains a serious problem and that the police response is lax. Trafficking in women is a problem and police corruption and involvement is an issue. Again, this police behaviour is significant when considering the sufficiency of protection in this case. The fact that Albanian women are unable to access effective protection because of the discriminatory attitudes of men results in a causal nexus between the Convention reason and the harm suffered, as here where the appellant's complaints were not treated seriously by the police - as in *Shah & Islam*."

With all respect to the Adjudicator it seems to us that he has gravely misunderstood the effect of *Shah & Islam* in that rather generalised approach which does not suggest any active undermining of the position of women in Albania by the

provisions of the law. We do not therefore consider that his finding that the respondent forms part of a particular social group for refugee protection purposes in Albania is sustainable.

11. There is a further major difficulty with the Adjudicator's determination. At no point in the determination does he consider what is meant by persecution. He does not refer to any of the case law dealing with issues of persecution nor to the high threshold which has to be reached before action can be said to be persecutory in nature or potentially in breach of Article 3 rights. He simply appears to make the assumption that what he has found is sufficient to amount to persecution. Again we do not agree with him in that approach and regard it as being unsustainable.
12. We are therefore concerned to consider whether on the basis of the accepted factual matrix this respondent is able to engage the protection either of the Refugee Convention or of the European Convention.
13. We note that in the period of nearly three years from the date on which she broke up with her former boyfriend there was only a single act where she claimed to have been injured, namely the incident on 13 March 2002. Since she and her boyfriend lived in the same city and it is clear that he was able to access her and her family to make threats, which we wholly accept must have been very unsettling from her point of view, it seems to us of cardinal importance that matters never got beyond this and that the one occasion when it is said that there was a positive action to harm her is clearly from the extract from her own statement which we have set out above, one where there were at least two sides to the story, both of which were considered by the police on complaint leading to the arrest and detention of the former boyfriend whilst they carried out those investigations. Their decision was that it was not appropriate to take any further action because of the clear conflicts of evidence as to what had taken place. It seems to us that that is not a decision which can in any way be held to suggest an absence of protection on the part of the police. It is often overlooked that the police have to behave even-handedly and that they have to have regard for the rights of suspects as much as for the rights of the victim. In this country a prosecution is not mounted unless there is a more than equal prospect of it being successful and it would certainly hardly be surprising that here, on a similar factual background, no action would have been taken in relation to that particular occurrence.

14. We are therefore satisfied that, upsetting though they may have been, the actions of the former boyfriend did not amount to persecution or prohibited treatment for the purposes of Article 3 as they were not engaging a sufficiently high threshold to do so. But if we are wrong in that, we have to consider whether in any event the state provides a sufficiency of protection for the respondent.
15. In this connection we have been referred by Miss Brown to the latest October 2003 Albania Country Report produced by the Country Information and Policy Unit. This is a fully sourced report. It was before Mrs Charlton-Little. She did not seek to make any submissions to us that it was not to be relied on. Miss Brown drew our attention to paragraph 5.32, which was formerly paragraph 5.36 in the version of the report which was before the Adjudicator. That confirms that police officers have been receiving training since September 2000 on issues of gender and have been provided with guidance under international conventions and domestic law on the treatment of women who are victims of domestic violence and trafficking. It also notes that an Advisory Board consulted in the development of the course included members from local NGOS and human rights specialists from UNHCR. The training had become part of the International Criminal Investigative Training Assistance Programme sponsored by the United States State Department Training Supervisor and Mid-Level Manager Police Officers. To that extent she rightly criticised the Adjudicator's finding at paragraph 20 of the determination that police "received no training in domestic violence and are more concerned with crimes perceived as dangerous to society as a whole". More importantly she drew our attention to the section dealing with the position of women at paragraphs 6.59 to 6.66 of the current CIPU report and we note the following points from that.
16. Firstly, at paragraph 6.62 that there is no current definition of domestic violence in the Albanian law nor any specific law against domestic violence, but that there are laws against violence and violent behaviour that can be used in that context so that domestic violence is prosecuted under general assault laws. In the case of this respondent, of course, the general assault laws would have been even more applicable as she was not complaining of a situation of domestic violence in the sense that this is meant in the section of the report to which we refer. If there is a complaint of such a nature the Prosecutor or judicial police are made aware and can initiate a criminal prosecution. But, at paragraph 6.64, it notes that if a woman reports a crime and the police do nothing she can file a criminal law suit against

the police as well as a request against them via the People's Advocate Office for violation of her rights. Moreover, since 1997 the Women's Bar Association has been offering legal aid and legal counselling for women having legal problems. There are attorneys working to defend and represent clients in court and the association has branches in Shkoda where the respondent resided. That is a service said to be free of charge and held by the source from which this part of the report is derived to be a very professional one. That source is the South Eastern Europe Women's Legal Initiative in their report on "Criminal Code Report Albania" and was accessed by the makers of the current report in September 2003.

17. At paragraph 6.63, having looked at the mode of prosecution, it is emphasised, again from that report, that there are no discriminatory court procedures concerning women victims of violence. It is also noted at paragraph 6.65 that there is in Albania an entire NGO network called "Network Against Gender Violence and Trafficking" which provides many direct and indirect services to abused women.

18. As we are dealing with actions by an individual who cannot be regarded as an agent of the state for these purposes, it is important to consider whether the state offers a sufficiency of protection against this sort of conduct. It seems to us clear in principle from the matters which we have noted above that the state does so. We are also mindful of the decision of the European court in *Osman v United Kingdom* [2000] 29 EHRR 245. There the Osman family brought a complaint against the United Kingdom because of the failure, as they said, of the police to provide adequate protection for them in the particular circumstances where there was a known threat by somebody who was regarded as being at least unstable and which in fact led to the killing of Mr Osman Senior and of the son of the headmaster at the school at which both Mr Osman Junior and the assailant had been respectively pupil and teacher. There was clear evidence of continuing requirements for the police to take some sort of action of a pre-emptive nature but it was held that even in connection with Article 2 rights safeguarding life one had to bear in mind the difficulties involved in policing modern society, the unpredictability of human conduct, and the operational choices which had to be made in terms of priorities and resources, so that such an obligation to provide protection had to be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities. That seems to us to be very much the response of the immediate police department in the certificate which has been issued

where they make specific reference to the ability or resource of the department making it impossible to provide protection additional to that which exists under the law. The protection under the law we have already dealt with in our assessment of the CIPU report.

19. For all those reasons, even if the conduct on the part of the former boyfriend amounted potentially to persecution, we do not consider that there was a lack of sufficiency of protection in the state so that again, for that reason, the respondent would not be entitled to the protection either of the Refugee Convention or Article 3 of the European Convention.
20. For the above reasons we are satisfied that the Secretary of State is entitled to succeed before us and we accordingly allow his appeal.

J Barnes
Vice President