



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 44

P819/19

OPINION OF LORD ARMSTRONG

in the Petition of

ZL

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Tariq; Office of the Advocate General

14 May 2020

Introduction

[1] The petitioner is a citizen of China who arrived in the UK in 2014. By a decision, dated 28 November 2018, the respondent has determined that he is a victim of trafficking and modern slavery.

[2] By this petition, the petitioner seeks reduction of a decision letter by the respondent, dated 6 June 2019 (“the Decision”), not to grant him discretionary leave to remain in the UK as a victim of trafficking. The issues in the case concern the manner in which the respondent assessed the available evidence in that regard. Before me, counsel for both parties adopted

their respective notes of argument, the terms of which, together with the oral submissions advanced in the course of the hearing, are reflected in what follows.

Submissions

(i) the submissions for the petitioner

[3] The Decision was challenged on the basis that the reasons stated for the refusal to grant discretionary leave to remain were inadequate. In particular, (i) the respondent had erred in law in her assessment of the risk of the petitioner being re-trafficked, or becoming a victim of modern slavery, on return to China, and (ii) the respondent had erred in law in her assessment of the risks associated with the medical condition of the petitioner's son, in relation to the treatment available in China, and in her approach to the weight given to that in her determination.

(a) the risk of re-trafficking

[4] Under reference to Article 14(1) of The Council of Europe Convention on Action Against Trafficking in Human Beings 2005 ("the Trafficking Convention"), and the decision in *The Queen on the Application of PK (Ghana) v Secretary of State for the Home Department* [2018] 1 WLR 3955, a foreign national who is a victim of trafficking is to be granted discretionary leave to remain where the circumstances are such that the person's stay in the country is "necessary owing to his personal situation". Whether such action is necessary is to be seen through the prism of the objectives of the Trafficking Convention (*PK (Ghana)* at paragraph 44), which include the protection and assistance of victims of trafficking. In the case of the petitioner, whether his personal situation was such as to make it necessary for him to stay in the UK could only be assessed by reference to that objective (paragraph 50).

[5] It was submitted that return of the petitioner to China would render him vulnerable to the risk of being re-trafficked in two ways; (i) by falling back into the hands of those who had originally trafficked him, and (ii) by being trafficked by others as a consequence of his vulnerability as someone who was already a victim of trafficking.

[6] In her assessment of his personal situation, the respondent had considered the first of these categories, but the Decision disclosed no proper and adequate consideration of the second.

[7] In that regard, under reference to the second and third pages of the Decision, the respondent had taken into account, and indeed had quoted, parts of The US 2018 Trafficking in Persons Report: China ("the US Report"). It was reasonable to infer, however, that in placing reliance on the parts of the US Report which she did, the respondent had been selective. The passages quoted did not reflect the general content of the US Report which was extensive and detailed. Although the parts of the US Report quoted in the Decision indicated that steps were being taken in China to prevent trafficking, and to address the vulnerabilities of internal migrants returning to China from exploitation abroad, other parts of it, not quoted in the Decision, were to the effect that although the government of the People's Republic of China had taken some steps to address trafficking, it "does not fully meet the minimum standards for the elimination of trafficking and is not making significant efforts to do so"; "Unlike (in the year prior to 2018) the government did not report identifying any trafficking victims or referring them to protective services"; "The efficacy of the government's previously reported victim assistance ... remained unclear"; and "China's internal migrant population, estimated to exceed 180 million people, is vulnerable to trafficking, with Chinese men, women and children subjected to forced labour in coal mines and factories, some of which operate illegally to take advantage of lax government

enforcement". The report stated numerous recommendations as to how the position in China should be improved.

[8] Although there was no requirement on the respondent to quote the whole document, having regard to the structure of the Decision, it was reasonable to infer that the absence of reference to, or quotation of, those passages of the US Report critical of the situation in China was an indicator that no account had been taken of them.

[9] In the circumstances of the petitioner's case, which included his forced labour, following being trafficked to London, in considering the risk of the petitioner being trafficked of new on return to China, by persons other than his former traffickers, the respondent's reasons for her determination not to grant discretionary leave to remain were inadequate. The respondent's conclusion had resulted from a failure to have regard to the whole tenor of the US Report, described in the Decision as "objective evidence", and, in particular, a failure to attach appropriate weight to those parts of it which were indicators of clear concerns in relation to the relevant position in China.

(b) the medical condition of the petitioner's son

[10] The contextual background to this issue was section 55 of the Borders, Citizenship and Immigration Act 2009, which imposed on the respondent a duty to make arrangements for ensuring that any function of the respondent in relation to immigration was discharged having regard to the need to safeguard and promote the welfare of children who were in the United Kingdom (subsections (1)(a) and (2)(a)). Those provisions were consistent with the rationale of the decision in *Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department* [2009] 1 AC 115, in which, at paragraph 43 it was stated:

“once it is recognised that ‘there is only one family life’, and that, assuming the appellant’s proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim ... ”

[11] The respondent’s policy, relevant to the issue, was consistent with that approach. In the Home Office guidance document; “Discretionary leave considerations for victims of modern slavery”, under the heading “Background to discretionary leave for potential victims of modern slavery”, at page 7 of 19, it was stated:

“Leave is necessary owing to personal circumstances:

When deciding whether a grant of leave is necessary under this criterion an individualised human rights and children safeguarding legislation-based approach should be adopted”

[12] A medical report by Dr Andreas Brunklaus, consultant paediatric neurologist, dated 22 May 2019, in relation to RL (D.O.B. 11/03/15), the petitioner’s son, was in the following terms:

“(R) has a condition which has not yet fully been diagnosed. He began having seizures in August last year and these seizures quickly became severe and he was having multiple seizures everyday where he fell to the ground hurting himself. The seizures are now controlled on a combination of two medications but the likelihood of recurrence is high. His concentration and learning have been effected by the seizures and he is seeing the neuropsychologist here and has an EEG booked in three weeks.

(R) will not be able to access the treatment he has here in the area of China he would be going to which is likely to significantly affect the outcome of his epilepsy and the rest of his life. He has been seen by many professionals in the hospital who liaise with his nursery to ensure he gets the support he needs. We support the family’s application for asylum on the basis of their son (R’s) epilepsy and the fact that he will not be able to access appropriate treatment.”

[13] The Decision, at page 3, properly referred to the need to consider the duty imposed by section 55 of the 2009 Act, and to the fact of (R’s) epilepsy. On page 4, reference was made to a World Health Organisation report from which was quoted five paragraphs

describing the impact in China of a demonstration project conducted by the Global Campaign Against Epilepsy: Out of the Shadows. The quotations included the passage:

“Thanks to this demonstration project the government has supported the scale-up of the project to cover 7.5 million in 18 provinces, who now have better access to epilepsy diagnosis and treatment. As of 2012, over 24,000 public health workers have been trained in epilepsy management and nearly 200,000 people have been screened for epilepsy.”

[14] The rationale of the Decision in that respect was based on the conclusion, derived from the passages quoted, that “Therefore epilepsy treatment is available for your client’s child” (page 4). Viewed in context however, in a country of a population of some 1.5 billion people (UN estimate in 2019: 1,434,726,940), it was relevant to question the adequacy of the provision identified. On the basis of the figures quoted, it was clear that only a statistically small minority of the whole population had access to epilepsy treatment.

[15] The rationale of the test considered in *GS (India) and others v Secretary of State for the Home Department* [2015] EWCA Civ 40, in relation to health cases in which Article 3 ECHR was engaged, was not appropriate in this context. The appropriate approach was to consider the availability of appropriate healthcare in the foreign state on the basis of a full analysis of the available information. In that regard, the respondent had been partial in her approach to the issue. No account had been taken of the inevitable and reasonable inference from the available evidence that, for the vast majority of Chinese citizens, no access to appropriate epilepsy treatment was available. In this respect, in determining if leave was necessary owing to the petitioner’s personal situation, against the need to safeguard and promote the welfare of children in the UK, no proper and adequate consideration had been given to the issue raised.

(ii) the submissions for the respondent

(a) the background to the Decision

[16] The relevant approach was that set out in *PK (Ghana), supra*, at paragraph 50:

“50. Article 14(1)(a) of the Convention requires the identification of the individual’s relevant personal circumstances and then an assessment by the competent authority of whether, as a result of these circumstances and in pursuance of the objectives of the Convention, it is necessary to allow that person to remain in the United Kingdom. Leaving aside the Convention purposes of facilitating the investigation of criminal proceedings and/or a civil claim by the victim (neither of which apply in the appellant’s case), the only relevant objective of the Convention is the protection and assistance of victims of trafficking. As I have described, this is one of the primary objectives of the Convention, as expressed in the Preamble and Article 1. Whether the Appellant’s personal circumstances were such as to make it necessary for him to stay in the United Kingdom could only be assessed by reference to that objective.”

[17] There was no automatic right to remain by virtue of being a trafficking victim. The rights which arose from the Trafficking Convention were separate and distinct from the right to asylum.

[18] Article 4 of the Trafficking Convention defined the terms “child” and “victim” in the following terms:

“d ‘Child’ shall mean any person under 18 years of age;
e ‘Victim’ shall mean any natural person who is subject to trafficking in human beings as defined in this article.”

[19] “Victim” as a defined term, therefore, excluded a child from consideration of the relevant test of Article 14(1)(a), that is: whether “the competent authority considers that (the victim’s) stay is necessary owing to their personal situation”.

[20] Although for the purposes of the Trafficking Convention, the concept of necessity was referable to the victim, it was accepted that it remained incumbent on the respondent to take the duties arising from section 55 of the 2009 Act into account.

(b) the risk of re-trafficking

[21] The Decision took into account the facts that (i) the petitioner had been released by his traffickers in 2015; (ii) that full payment of his debt had been made; (iii) that he had no contact with his trafficker since his release; and (iv) that, under reference to the US Report, country guidance indicated that China was taking steps to provide assistance to citizens should they require support and protection.

[22] The respondent had made reference in the Decision to the relevant parts of the US Report. The respondent had paid due regard to the petitioner's personal circumstances. The petitioner had not demonstrated that he was in fact at risk of being re-trafficked in China. In circumstances where the test was one of necessity, it was not enough to demonstrate only that he might, or could be, subject to such a risk.

[23] The petitioner's challenge to the Decision was predicated on matters general in China, rather than on factors personal to him. That was an insufficient basis for challenge where the referable test was whether leave was necessary in the context of his personal circumstances. In that context, at best, under reference to the UK Government paper, "The Trade in Human Beings: Human Trafficking in the UK", 2009, it was noted that "With regards to the level of re-trafficking, it is difficult to ascertain scale", and that an independent study suggested that, of a sample group of 118 people, approximately 1 in 5 indicated that they had been re-trafficked (paragraph 26).

(c) the medical condition of the petitioner's son

[24] The medical condition of the petitioner's son had been taken into account by the respondent. The Decision included reference to the medical report bearing on his medical

condition, and concluded that since epilepsy treatment was available in China, it was in his best interests to be returned to China together with his parents.

[25] It was accepted that the respondent's policy did not exclude the operation of section 55 of the 2009 Act where the child himself was not a victim. In the petitioner's case, the referable duty had been taken fully into account.

[26] The decision in *Beoku-Betts (supra)* in relation to the need to have regard to the family unit as a whole, per paragraph 43, was to be distinguished from the circumstances of the petitioner's case. In contrast to the position in *Beoku-Betts*, in the petitioner's case there was clear language to be considered. The term "victim" was defined by Article 4 of the Trafficking Convention, and did not include the child.

[27] It was, nevertheless, accepted that the petitioner's personal circumstances included his family situation, but the test was in relation to what was necessary in respect of the petitioner's personal circumstances as a victim of trafficking. In that context, the obligation to promote the best interest of the child in terms of section 55 of the 2009 Act was to be considered as part of what was, in effect, an assessment of proportionality. The question was whether the petitioner had established that adequate treatment was not available in China.

[28] In that context, the fact that it was stated in the medical report that the treatment which the petitioner's child was currently receiving in the UK was not available in China did not mean that there was no epilepsy treatment available there. The statistical references quoted in the Decision from the World Health Organisation report: "Out of the Shadows: China Demonstration Project", to which criticism had been directed, were in respect only of the project there described.

[29] The interests of the petitioner's child were not determinative, but, rather, were part of a proportionate evaluation. The respondent had considered what was in the best interests of the child in the context of what was necessary in light of the petitioner's personal circumstances. Where it was determined that it was not necessary for leave to be granted, resulting in the petitioner being returned to China, it was legitimate to conclude that the family unit staying together, with the child residing with his parents in China, would best serve the interests of the child.

[30] Against the whole background, the Decision was one which was reasonably open to the respondent on the basis of the evidence before her.

Discussion

[31] In determining whether, in the case of the petitioner, the grant of discretionary leave was necessary owing to his personal situation, it was incumbent on the respondent, affording the word "necessary" its ordinary meaning, to consider what was required in order to achieve the objective of the Trafficking Convention in relation to the protection and assistance of victims of trafficking (*PK (Ghana), supra*, at paragraph 50). That approach is consistent with the Home Office guidance on the matter "Discretionary Leave Considerations for Victims of Modern Slavery", September 2018, in terms of which, at page 7 of 19, it is stated that the circumstances in which discretionary leave may be appropriate are dependent on the *totality* of evidence available in individual cases.

[32] On the basis of the passages from the US Report, quoted in the Decision, I am satisfied that it is reasonable to be concluded that the respondent has not attached due weight to the overall tenor of the report which, read objectively, is critical of the position in

China, describes numerous failings, and provides an assessment of a situation which is characterised as inadequate and of concern.

[33] Whether it is appropriate to describe the current situation in China in that way is a separate matter, but in the context of the particular evidence which the respondent has cited as relevant for the purposes of the Decision, in relation to the assessment of what was necessary for the purposes of securing the objective of affording the petitioner protection against the risk of being re-trafficked, I consider that there is force in the argument that, in the determination of this matter, there was a failure to follow the Home Office guidance which required due consideration of the totality of the available evidence.

[34] In relation to the issues arising from the medical condition of the petitioner's son, it was conceded for the respondent, that in the context of the assessment required for the purposes of the Decision, the operation of section 55 of the 2009 Act, and in particular the need to safeguard and promote the welfare of a child, was not excluded by circumstances in which the child himself was not a victim of trafficking, but rather that these obligations required to be taken into account as part of an overall assessment of what was necessary owing to the petitioner's personal situation.

[35] In response to criticism made of the adequacy of the relevant provision of medical treatment for epilepsy, as reported in the passages from the World Health Organisation report: "Out of the Shadows: China Demonstration Project" quoted in the Decision, it was accepted that the statistics to which reference was made were those pertaining only to that particular project. The respondent's position, however, was that, nevertheless, on that basis it could be said that, in China, epilepsy treatment was available for the petitioner's child.

[36] The relevant question, however, to which due weight ought to have been given, was not whether in China, on the available evidence, treatment for epilepsy, in general, is

available, but, rather, whether the particular treatment required by the manifestation of the condition presented in the case of the petitioner's son is available there. In that regard, the medical report by Dr Brunklaus, which was before the respondent, states in clear terms that the treatment being received by the petitioner's son would not be available and that, as a consequence, the outcome of his epilepsy, and the rest of his life, would be significantly affected. Against the background of the obligation to actively promote the child's welfare as part of the overall assessment required of the respondent, I am satisfied, in this respect also, that it has been demonstrated that in assessing the petitioner's personal situation, in particular that aspect of it concerning the welfare of his young child, there was a failure properly to take into account the totality of the available evidence.

[37] Having carefully considered the whole circumstances of the case, and, in particular, on a fair and reasonable reading of the content of the documents on which reliance was placed, I am persuaded that the cumulative effect of the manner in which the respondent addressed the issues now raised, against the evidence available, rendered the assessment which was required in determining the Decision materially deficient in the respects which I have identified.

Decision

[38] In the result, therefore, for these reasons, I shall sustain the petitioner's plea-in-law, repel the respondent's second, third and fourth pleas-in-law, and reduce the Decision. I reserve, meantime, all questions of expenses.