



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: PA/03210/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 31 July 2018

Decision and Reasons Promulgated
On: 03 September 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

MISS S K
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms J Wood, counsel, instructed by Kilby Jones Solicitors LLP

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
2. The appellant is a national of Albania, born on 30 November 1990. She appeals with permission against the decision of First-tier Tribunal Judge Walker, promulgated on 23 April 2018.
3. The appellant claimed to be a victim of trafficking, for sexual exploitation. She has had a child in the UK, born on 2 February 2017. She

is not in contact with the child's father. Nor is he contributing to her support. Her daughter is a dependant on her asylum claim. She fears for her safety if returned to Albania. She believes her former boyfriend will find her and she will be trafficked again as a sex worker. She has been disowned by her mother and cannot expect support from her.

4. Judge Walker noted that the appellant was referred to the National Referral Mechanism (NRM) on 15 July 2015. Her account was found not to be credible and a conclusive grounds decision was made that she was not a victim of human trafficking for the purpose of sexual exploitation. The Judge took that into account, noting that the standard of proof for a conclusive grounds decision is on the balance of probabilities, which is different to the standard that applies in the appeal.
5. He found that her account overall has not been credible or plausible [38]. His reasons for that conclusion is set out from paragraphs [38] onwards.
6. He stated that several of the reasons which he set out for considering that her account was implausible were individually not fatal to her claim. However, taken together, they are. He did not accept that she had been trafficked for sexual purposes; that she is estranged from her family and that there are threats to her in Albania or elsewhere. He was not satisfied that she had shown that her claims are genuine.
7. Even taking her claim at its highest, there would be a sufficiency of protection for her on return.
8. He had regard to the evidence that she is suffering from depression and anxiety. She has been prescribed antidepressants and has undergone counselling. He did not accept that these conditions are caused by her claims of being trafficked or being at risk in Albania. In any event, whatever the cause, there has been no claim that the treatment she has received or her medication is not available in Albania [50].
9. Most of the evidence about her health is dated in 2015. There was no up to date medical report provided. There was a recent prescription note for Zopiclone produced, dated 26 March 2018. There is however no evidence of any medication between this date and November 2015. The evidence showed that her health has improved and cannot in any way be considered serious [51].
10. The Judge considered the best interests of the appellant's daughter, born in February 2017. Her best interests are to remain with her mother wherever she may be. The appellant can return to Albania where she will have her family for support. She is educated and qualified and so will be at an advantage in the job market.
11. With regard to Article 8, she had not provided any evidence to show that she has established any family or private life in the UK. There were no

exceptional circumstances about her situation warranting a grant of leave to remain outside the rules.

12. In granting permission to appeal, First-tier Tribunal Judge P J M Hollingworth stated, inter alia, that it was arguable that the Judge has set out an insufficient analysis of the route to the Conclusive Grounds decision and the factors taken into account on that route in contradistinction to the combination of reasons found by the Judge. It is arguable that he has set out an insufficient footing for finding that the conclusive grounds decision was relevant in the absence of a full comparative analysis of the material provided for the NRM set against the extent of the evidence provided for the Judge.
13. Ms Wood, who did not represent the appellant before the First-tier Tribunal, referred to the grounds of appeal. There was an over reliance on speculation without sufficient engagement with objective evidence or the country guidance cases of TD and AD (Trafficked Women) CG [2016] UKUT 00092 and AM and BM (Trafficked Women) Albania CG [2010] UKUT 80. The Judge's credibility findings are accordingly tainted.
14. The Judge considered part of the appellant's chronology not to be credible without giving any reasons. It was not incredible that she did not tell her parents that she was pregnant. Nor was it incredible that she had an abortion or that the following day she should go to Italy to recuperate with her partner.
15. Ms Wood submitted that the Judge 'misrecorded' some of the appellant's evidence. She did not state that she had her passport with her whilst being forced to work in Italy or Albania. Nor was she examined on that point. The Judge failed to consider any other explanation including the fact that the traffickers retained her passport and provided it to her only when necessary for crossing international borders. He took into account both grounds 1 and 3 together and there has been no real engagement by the Judge with the objective evidence or country guidance.
16. Nor was there a proper assessment on risk on return. The flawed credibility assessment has influenced his overall conclusions. This was particularly so when having regard to her ongoing therapy and medication for depression and the GP's opinion that her return to Albania would cause her to deteriorate.
17. On behalf of the respondent, Mr Mills submitted at the outset that the grant of permission is in certain respects hard to follow.
18. He noted that permission was however granted on 2 June 2018. However, the Judge made no reference at all to the recent country guidance decision from the Court of Appeal in SSHD v MS (Pakistan) [2018] EWCA Civ 594. That decision was announced on 23 March 2018. The appeal was heard on 7 March 2018. Lord Justice Flaux and the other appeal judges agreed at [69] that

it is absolutely clear that the Court of Appeal in AS (Afghanistan) was limiting the circumstances in which on a statutory appeal against a removal decision, an appellant can mount an indirect challenge to a negative trafficking decision by the authority (in the circumstances where the appellant has not challenged it by way of judicial review), to where the trafficking decision can be demonstrated to be perverse or irrational or one which was not open to the authorities, those expressions being effectively synonymous for present purposes.

19. Lord Justice Flaux found that Mr Lewis, who represented the Secretary of State, is correct that there was a two stage approach. First, a determination where the trafficking decision is perverse or irrational or one which was not open to the authorities, and second, only if it is, can the appellant invite the Tribunal to re-determine the relevant facts and take account of subsequent evidence since the decision of the authority was made.
20. Accordingly, an appellant can only invite the Tribunal to go behind the trafficking decision and re-determine the factual issues as to whether trafficking has in fact occurred if the decision of the authority is shown to be perverse or irrational or one which was not open to it.
21. Mr Mills referred to [48] of MS (Pakistan), where it had been submitted on behalf of the secretary of state that the Upper Tribunal had been wrong when it said in effect that such a challenge could be made on the statutory appeal not just for perversity but on any ground which would have been open to the Court on a judicial review of the decision. It was submitted that because the Upper Tribunal was a creature of statute, it had no jurisdiction to assume such powers.
22. That argument was upheld by the Court of Appeal in MS (Pakistan).
23. Mr Mills noted that the current appeal was heard at Hatton Cross on 9 April 2018, several weeks after the publication of the Court of Appeal decision in MS (Pakistan). The decision was binding on the First-tier Tribunal but was not considered by Judge Walker.
24. Ms Wood submitted that although it may be correct that it was not open to the Judge to in effect re-determine the NRM decision, the standard of proof was on the balance of probabilities. This would thus not constitute the mounting of an indirect challenge to the NRM decision.

Assessment

25. First-tier Tribunal Judge Walker did have regard to the NRM's conclusive grounds decision. He noted that the decision was reached on the balance of probabilities. He nevertheless considered that the appellant's overall account was neither credible nor plausible.

26. He was unaware of the decision of the Court of Appeal in MS (Pakistan). That decision nevertheless bound him and is deemed to be the state of the law at the date of the hearing.
27. It had not been contended in any way either before Judge Walker or the Upper Tribunal, that the decision of the NRM authority was in any way perverse or irrational or one which was not open to the authority.
28. The appellant has sought to mount an indirect challenge to the negative trafficking decision pursuant to her statutory right of appeal. The NRM decision concluded that the appellant is not a victim of human trafficking or slavery, servitude or forced compulsory labour. There has never been any assertion that the decision was perverse or irrational.
29. Although, as submitted before the First-tier Tribunal, the NRM decision did not have available the additional evidence about the appellant's mental health which was placed before the Tribunal, the First-tier Tribunal Judge did have regard to that evidence. He noted that evidence about her health is dated in 2015. There was no up to date medical report.
30. He found that the evidence showed that her health had improved and cannot in any way be considered serious. Nor was there any claim that the treatment and medication of the sort she had in the UK is not available in Albania.
31. The Tribunal did not however have jurisdiction to undertake an indirect judicial review of a negative trafficking decision by the respondent. Nor was the Tribunal invited to determine whether the trafficking decision is perverse or irrational or one which was not open to the authority. Accordingly the appellant was not entitled to invite the Tribunal to re-determine the relevant facts and take account of subsequent evidence since the decision of the authority was made.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. The decision shall accordingly stand.

Anonymity direction continued.

Signed
August 2018
Deputy Upper Tribunal Judge C R Mailer

Date 19