



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11109/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 14 May 2018

Decision & Reasons Promulgated
On: 29 May 2018

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

XX
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Todd, Solicitor, Latta & Co
For the Respondent: Mr A Mullen, Senior Presenting Officer

DECISION AND REASONS

1. The appellant who is a national of China where she was born on [] 1998 has been granted permission to appeal the decision of First-tier Tribunal Judge Doyle who dismissed her appeal on asylum and human rights grounds against the Secretary of State's decision refusing her asylum claim which she had made on 26 January 2015 with the assistance of the Scottish Refugee Council. The appellant claims that she left China at the beginning of December 2014 by air and reached the United Kingdom after subsequent journeys by train and sea and completed her journey by car. She escaped her initial accommodation in the United Kingdom some four to five days after arrival. On 12 February 2015 the competent authority decided that there were

reasonable grounds to believe that she could be a victim of trafficking. On 4 August 2016 the competent authority concluded the appellant was not a victim of trafficking.

2. Although no anonymity order was made in the First-tier Tribunal, in the circumstances of the case and the appellant's circumstances I have decided that it is appropriate to do so and pursuant to Rule 14 of the Tribunal Procedures (Upper Tribunal Rules) 2008 the disclosure or publication of any matter likely to lead members of the public to identify the appellant is prohibited. Failure to comply with this order may result in contempt of proceedings.
3. The basis of the appellant's claim is that she was trafficked to the United Kingdom. Her parents had divorced when she was 2 or 3 years old and had lived with her father until he died in September 2014 when she was evicted from accommodation that had been provided with his employment. The appellant became homeless for a period of some six weeks after which she was approached by a woman who offered help but who later trafficked her to the United Kingdom. When she realised that this was for sexual exploitation purposes, she escaped and sought help with the Scottish Refugee Council. The appellant fear reprisals from the woman who had organised her trafficking.
4. These details were provided by the appellant when a minor in a substantive asylum interview on 30 July 2015. As revealed in a statement prepared on 17 May 2017 the appellant's claim includes her sexual orientation. An adjournment was sought at the hearing on 18 July to obtain a witness statement from the appellant's girlfriend and to arrange for her to attend as a witness. This was refused by the judge who considered there had been adequate time for the appellant's solicitors to investigate this aspect of her claim and for the girlfriend to give evidence.
5. The judge found that the appellant was unable to succeed because she had not established that she was the victim of a trafficking gang who influence extends throughout China. There was no suggestion of kidnap or forced enslavement in her account and the appellant had travelled voluntarily with her traffickers. Were the appellant to seek help in China she would obtain it. The judge concluded at paragraph 14(k)
 - “(k) Taking the appellant's account as its highest, the appellant has had a frightening time, but because of her own intuition and intelligence she had avoided what might have befallen her. She must have learned from that experience. Taking the lessons learned from that experience together with the protection (with its acknowledged imperfections) available in China, I find that if the appellant is telling the truth there is a safe and reasonable option of internal relocation available to her, and that there is a sufficiency of protection available to the appellant in China.”
6. He then turned to the appellant's orientation claim and reached these conclusions at paragraph 14(l) to (p).
 - (l) The appellant's account moves on. The appellant insists that she is gay and now has a girlfriend in Glasgow. The appellant's account is damaged by the delay of nearly 2½ years in mentioning to her solicitor that she is gay,

but I take account of the appellant's young age. The appellant's young age cannot, however, excuse the glaring inconsistency in the appellant's evidence. In her oral evidence the appellant insisted that she was aware of her sexuality whilst in China but did not tell her late father because she feared that her father would beat her, disown her and drive her from their humble home. That account was tested in cross-examination and the appellant adhered to that account. The account given in oral evidence is directly contradicted by paragraph 22 of the detailed witness statement dated 17 May 2017 - in which the appellant, for the first time gives an account of her sexuality.

- (m) At paragraph 22 of her witness statement the appellant says that the only reason she did not tell her father of her sexuality was that she only became aware of her sexuality after her father died.
- (n) I find the inconsistency in the account given by the appellant wholly undermines her claim that she is gay. But what have I am wrong? Just in case, I consider the appellant's claim at its highest. What would face a young gay woman returning to China?
- (o) The background materials tell me that there is societal discrimination against homosexuals in China. The background materials also tell me that homosexuality is acknowledged in China, that there are homosexual communities and gay clubs in China. The background materials quite clearly indicate that such discrimination as is found in China does not cross the high threshold to amount to either persecution or to engage article 3 of the 1950 convention. I was not refer to any country guidance cases, and could not find any country guidance cases which would help the appellant.
- (p) I remind myself of HJ (Iran) v SSHD [2010] UKSC 31. The weight of reliable evidence tells me that it is possible for a gay young lady to live openly in China. A gay young lady may find elements of society who display bigoted discriminatory views, but the treatment that a gay young lady in China receives, whilst rude and temporarily unpleasant, is not so severe as to amount to persecution; it is not so severe as to engage article 3 of the 1950 convention."

7. Permission to appeal was granted by Upper Tribunal Judge Kopieczek who considered it was arguable that the appellant's age had been relevant to the late disclosure of her orientation and also arguable that the judge's reasoning in refusing the adjournment did not deal with the issue of the potential relevance of some supporting evidence said to be available. He formed the view that it was unclear whether the judge had made an actual finding on the question of the trafficking and considered that the judge ought to have had before him the trafficking decision by the competent authority.
8. Two grounds of challenge are advanced. The first is that the judge erred by refusing to grant the adjournment request resulting in the appellant not having had a fair hearing. The appellant had wanted this so that her partner could give evidence. As observed by the judge it was not until the appellant's witness statement was prepared on 17 May 2017 that the appellant had told her solicitor she fears return because of her sexual orientation. On the morning of the hearing the judge records that the appellant had told her solicitor that she had a girlfriend. The solicitor sought

an adjournment to obtain a witness statement from the girlfriend and to arrange for her to attend as a witness.

9. The second is a failure by the judge to make a finding on whether the appellant was a victim of trafficking.
10. Ms Todd explained at the outset that she no longer pursued the second ground in the light of the decision by the Court of Appeal in *SSHD v MS (Pakistan)* [2018] EWCA Civ 594. This was an understandable position to take in the light of the observations by Flaux LJ at, in particular [70]:

“70. Of course a trafficking decision with a positive or negative, may be relevant to the issue before the Tribunal as to the lawfulness of the removal decision. However an appellant can only invite the Tribunal to go behind the trafficking decision and redetermine 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. This is clearly what Longmore LJ was saying in the last two sentences of [18] of his judgment.”

Flaux LJ continued at [71]:

“71. The Upper Tribunal was thus wrong and misinterpreted the decision of the Court of Appeal in *AS (Afghanistan)* when it said at [39] of its Decision that, in effect the Court of Appeal was contemplating that the Tribunal could go behind a negative trafficking decision and remake the decision as to whether there had been trafficking, whenever that trafficking decision could be challenged on any judicial review ground as opposed to the narrow ground of perversity. Contrary to the view of the Upper Tribunal, there is nothing in [12] to [18] of Longmore LJ’s judgment which justifies that conclusion. Certainly it is not justified by his reference to *Abdi*.”

11. As to the first ground, I reminded the parties of the decision of the Court of Justice of the European Union in *A, B and C v Staatssecretaris van Veiligheid en Justitie*, see 148/13 to C-150/13. In particular the considerations at [67] to [71] as follows:

“67. In the fourth place, as regards the option for the competent authorities finding a lack of credibility when, in particular, the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the grounds for persecution, it must be held as follows.

68. It is clear from Article 4(1) of Directive 2004/83 that Member States may consider it the duty of the applicant to submit ‘as soon as possible’ all elements needed to substantiate the application for international protection.

69. However, having regard to the sensitive nature of questions relating to a person’s personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

70. Moreover, it must be observed that the obligation laid down by Article 4(1) of Directive 2004/83 to submit all elements needed to substantiate the

application for international protection 'as soon as possible' is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) of Directive 2005/85 and Article 4(3) of Directive 2004/83 to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.

71. Thus, to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph."
12. Mr Mullen readily conceded that without even referring to the Court of Justice decision that for the appellant, taking account of her arrival as a minor, it was understandable that she might be reticent with regard to her orientation and there were legal and practical reasons why there had not been earlier disclosure. He considered that her right to a fair hearing had been curtailed and conceded error of law on the basis that there had been an absence of a fair hearing.
13. That being so I find the First-tier Tribunal erred in law in respect of its consideration of the appellant's sexual orientation and remit the case for a further hearing by the First-tier Tribunal in the light of the credibility assessment which it needs to undertake. The sole issue to be determined before the First-tier Tribunal is in respect of the appellant's orientation and any risk that she might face in China. In the event that the appellant wishes to rely on Article 8 in respect to her private life having since broken up with her partner, it will be a matter for her to amend the grounds of appeal before the First-tier Tribunal with sufficient detail to identify the issues that are to be determined.

NOTICE OF DECISION

The decision of the First-tier Tribunal is set aside for error of law and the appeal is remitted to the First-tier Tribunal for its further consideration.

Signed

Date 25 May 2018

UTJ DAWSON

Upper Tribunal Judge Dawson