Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11648/2018

THE IMMIGRATION ACTS

Heard at North Shields
On 7 August 2019

Decision & Reasons Promulgated
On 16 August 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

K. C.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation;
Appellant: Ms Brakaj, Solicitor, Iris Law Firm
Respondent: No attendance

DECISION AND REASONS

The Appellant, an Albanian national, entered the UK illegally and then made a protection claim in 2017 which was refused on 19 September 2018. The Appellant's appeal against that decision was heard and dismissed by First-tier Tribunal Judge K Henderson in a decision promulgated on 23 January 2019. In the meantime the Appellant was referred through the National Referral Mechanism for a decision upon whether she was a victim of trafficking, as she had claimed to be. A positive decision to that effect was made on 16 July 2018 (on the balance of probabilities – a higher standard than was required of her to establish the factual elements of her protection claim), and the

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Appellant was granted discretionary leave to remain in the UK as a result, which expired on 15 January 2019.

The Appellant's application for permission to appeal was granted by Upper Tribunal Judge Chalkley on 22 May 2019. The Respondent has not replied to that grant with a Rule 24 response. Neither party has applied pursuant to Rule 15(2A) to introduce further evidence. Thus the matter came before me.

The hearing of the appeal was originally listed for 2 August 2019, but on that occasion the entire list had to be adjourned because the presenting officer was indisposed on the morning of the hearing. Having consulted the Appellants and their representatives to ascertain their availability, and secured a court room, the entire list was adjourned to 7 August 2019 in an effort to minimise the expense and delay that the parties would otherwise face (two of the appeals being privately funded). Time for the service of the Notice of Hearings was thereby abridged.

On 6 August 2019 the Respondent applied by email of 1255 hours for an adjournment of the entire list on the basis it was anticipated that it would not be possible to provide a presenting officer as a result of seasonal staff shortages. That application was refused by email of 1414 hours on the basis there remained ample time for the Respondent to secure adequate representation, if necessary by resort to the services of the Bar. The application has not been renewed. The Respondent did not attend the hearing.

In the circumstances I was satisfied that the Respondent is aware of the hearing. I was not satisfied there was any good reason demonstrated as to why the appeal should be adjourned once again of the Tribunal's own motion. The issues were simple, and it was in the interests of justice to proceed with the hearing without delay and with minimal further expense, and the appeal therefore proceeded in the Respondent's absence, having considered paragraphs 2, 36, and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

<u>The challenge</u>

Although this is not immediately obvious from the grounds to the application for permission to appeal, Ms Brakaj confirmed that the core of the Appellant's challenge to the decision of Judge Henderson is contained in paragraph 6(f) of the grounds dated 15 April 2019. Thus the core complaint is that the Judge failed to recognise the extent of the concessions of primary fact that had been made by the Respondent in writing in advance of the hearing, and failed to take them as her starting point when assessing the weight to be given to the evidence concerning the issues of primary fact that remained in dispute. Instead, without warning the Appellant, or giving her the opportunity to deal with the possibility, it is argued that the Judge

went behind material concessions of primary fact and made adverse credibility findings on matters that were not in dispute, thereby rendering the hearing of the appeal procedurally unfair. Moreover, and in consequence, the assessment of the risk of harm that would be faced by the Appellant and her family upon return to Albania was fatally flawed, because it was an assessment founded on adverse findings of fact that were themselves unsafe.

The history of the appeal

The appeal was first listed for hearing on 1 November 2018, but it was adjourned by decision of First-tier Tribunal Judge Moran, with directions, once he had concluded that a fair hearing of the appeal could not proceed on that occasion. It was considered that the stance the presenting officer proposed to take, concerning the evidence of the Appellant, her husband, and, her sister, appeared to be inconsistent with the decision taken in relation to whether the Appellant was a victim of trafficking. The presenting officer had indicated he proposed to argue the appeal on the basis that significant parts of the Appellant's account were in dispute, whereas the Appellant and her representatives had attended the hearing of the appeal under the impression that the Respondent had conceded in advance of the hearing that past assaults, abduction, trafficking, and, forced prostitution had occurred by virtue of the positive trafficking decision, and consequential grant of discretionary leave to remain.

Although neither party appears at any point to have tried to break the evidence down in such a way, it may assist if I note at this point that the Appellant relied upon events in the following distinct time periods; (i) July 2010 – February 2011, (ii) February 2011 – December 2014, (iii) December 2014 - January 2017, and, (iv) January 2017 – to the date of the hearing. The evidence concerning period (i) was to all intents and purposes conceded in the refusal letter of 19 September 2018 [#14-17]. The refusal letter does not itself place in dispute any of the evidence concerning periods (ii)-(iv), the author merely takes as their starting point the trafficking decision, and proceeds to consider the adequacy of the state protection available to victims of trafficking who face re-trafficking, and the ability to relocate within Albania to avoid the risk that might be posed by any particular non-state agent.

The confusion over the Respondent's position deepened once the presenting officer disclosed to the Appellant and to the Tribunal at the hearing a fax of 1 November 2018, which was a copy of the file note prepared by a caseworker of the Respondent's reasons for reaching a positive conclusion in relation to the trafficking claim, and the grant of discretionary leave to remain.

By Judge Moran's direction the Respondent was required to set out her position in relation to the evidence of the Appellant, her husband, and her sister, in writing. The aim was to identify precisely what was conceded, and, thus what was in dispute requiring determination by the Tribunal. Pursuant to that direction the Respondent produced a supplemental letter of reasons for the refusal of the protection claim dated 19 November 2018. I am satisfied that this letter was intended to be read with, and as supplemental to, both the original refusal letter of 19 September 2018, and, the fax of 1 November 2018 that had already been disclosed at the hearing. Since neither of these documents had done so specifically it was in my judgement intended by Judge Moran that the Respondent should thereby deal with the evidence of the Appellant's husband concerning periods (ii) – (iv), and thus focus minds on what was in dispute concerning the Appellant's claim that she faced a continuing threat from the non-state agent. Whilst it was far from ideal that the Respondent's position should be set out in three different documents, I am satisfied that they were intended to be read together.

It may be that the far better course would have been for the Respondent to withdraw the decision under appeal, and to make a fresh decision after taking into account all of the material then available, so that if the protection claim was still to be refused the Appellant would be able to see in one document what case it was that she had to meet; which elements of the evidence she had relied upon were accepted, and which were placed in dispute. With the benefit of hindsight there would certainly have been far less scope for confusion had this course been adopted.

When the three documents are read together, it can however be seen that the Respondent had by the date of the hearing before Judge Henderson conceded in writing;

(a) that the Appellant had been trafficked and forced into prostitution, (the evidence concerning period (i) was accepted in the letter of 19 September 2018 p6),

(b) that her sister had been threatened after the Appellant's escape from her traffickers, (which was evidence concerning periods (ii) and (iii) accepted in the fax of 1 November 2018), and,

(c) that her husband had been beaten threatened and kidnapped after the Appellant's escape (which was evidence concerning periods (ii), (iii) and (iv) partly accepted in the fax of 1 November 2018 and partly accepted in the letter of 19 November 2018).

There was, however, no concession to the effect that there was any continuing adverse interest in the Appellant and her family from her trafficker in the letters of 19 September 2018, or 19 November 2018.

It is plain from her decision that Judge Henderson understood the Respondent's position to be that she did not accept as truthful the

evidence of the Appellant's husband concerning any continuing adverse interest in the Appellant or her family after February 2011 [46].

It is also plain from her decision that Judge Henderson makes no reference to any concessions over the evidence of the Appellant's sister, as set out in the fax of 1 November 2018. Indeed I am unable to identify any reference in her decision to the existence or content of the fax of 1 November 2018, whether explicit or implicit. As Ms Brakaj submits, when the decision is read as a whole, the reader is left with the distinct impression that the Judge has simply overlooked the existence and content of the fax of 1 November 2018.

In my judgement, even when read fairly as a whole, it is not possible to identify from Judge Henderson's decision that she took as her starting point all of the concessions of fact that had been made by the Respondent. Thus, no doubt inadvertently, she went on to make adverse findings of fact that went behind some of the Respondent's concessions in relation to the evidence relied upon by the Appellant. In consequence her starting point for consideration of the evidence of the continuing existence and level of threat to the Appellant was one that was not open to her. It follows that the whole of her assessment of the risk faced by this family upon return to Albania is unsafe and must be set aside.

One further point raised in the grounds is that the Judge confused the dates of a particular incident between hearing the evidence (December 2014) and when drafting her decision (December 2015) [65 & 70]. Since this occurred twice it is less likely to be a mere typographical error, although I note that the incident was initially correctly dated [30]. Initially it appeared that this error was unlikely to be material, but upon reflection I am persuaded that it would could reasonably appear to the reader that the placement of the incident in December 2015 was material to the Judge's reasoning upon the credibility of the claim that the Appellant faced a continuing threat [64 – 70]. If it were not a typographical error then this would indicate that the Judge had fallen into further error.

In the circumstances I am satisfied that setting aside the decision and remitting the appeal to the First-tier Tribunal for a fresh hearing is the only pragmatic course open to me, because it cannot be said that the Appellant has yet had a fair hearing of her appeal. In circumstances such as this, where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal in the course of a procedurally fair hearing, the effect of that error of law has been to deprive the parties of the opportunity for their case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 13 November 2014. Moreover the extent of the judicial fact finding exercise required is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted

to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 13 November 2014.

To that end I remit the appeal to the First-tier Tribunal for a fresh hearing with the following directions;

The appeal is to be heard by a judge other than First-tier Tribunal Judge Henderson, at the North Shields Hearing Centre.

An Albanian interpreter is required.

The Appellant does not currently propose to file any further evidence in support of the appeal, so the remitted appeal is suitable for the short warned list. The parties should expect the appeal to called on for hearing at short notice after 2 September 62019.

The Appellant shall serve and file by 5pm on 28 August 2019 a skeleton argument that sets out clearly, but in brief;

(i) the concessions of fact in relation to periods (i)-(iv) (see above) cross-referenced to the relevant source documents, that she asserts the Respondent has made in relation to her own evidence, the evidence of her husband, and, the evidence of her sister,

(ii) the disputed issues of primary fact that she says the First-tier Tribunal needs to resolve in order to assess whether or not the Appellant and her family currently face a real risk of harm in the event of their return to Albania,

(iii) her case in relation to the sufficiency of the state protection available to her, and,

(iv) her case in relation to her claim to be unable to avoid the risk of harm she says she faces from non-state agents through relocation within Albania.

Notice of decision

2. The decision did involve the making of an error of law sufficient to require the decision to be set aside on all grounds, and reheard. Accordingly, the appeal is remitted to the First Tier Tribunal for rehearing, with the directions set out above.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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.

Signed
Deputy Upper Tribunal Judge J M Holmes

Date 9 August 2019