Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02544/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 15 April 2019 **On 07 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ERMIRA [K]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Loughran (Waterstone Solicitors)
For the Respondent: Ms Holmes (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Ermira [K], a citizen of Albania born [~] 1990, against the decision of the First-tier Tribunal of 31 October 2018, dismissing her appeal against the refusal of her asylum claim and human rights claims, themselves refused by a decision of the Respondent of 7 February 2018.

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2. Taking as the starting point the summary of the claim given by the First-tier Tribunal, the Appellant arrived in the UK by lorry on 18 December 2015 having left Albania on 15 October 2015. The Appellant's claim for asylum was based on the fact that, having been trafficked into prostitution from September 2014 to April 2015, she feared serious harm either at the hands of her traffickers who would wish to punish her for escaping from them, or at the hands of her father who would punish her for bringing shame on the family. She escaped from her traffickers and stayed at a friend’s house for over a month, where she met [VT], who she married in [~] 2015.

3. She and her husband subsequently left the country together. She separated from her husband during the journey after he discovered that she had previously worked as a prostitute. Her daughter [AK] was born here on 21 December 2015. The documents did not establish the identity of [A]’s father.

4. She attended a screening interview on 1 February 2016 and had an asylum interview on 21 April 2016. She was then referred to the National Referral Mechanism for a determination of whether she was a victim of modern slavery. The NRM issued a negative decision on that claim.

5. The parties agreed before the First-tier Tribunal that no further evidence should be given by the Appellant in relation to her asylum claim, in the light of their understanding that the authority of *AUJ Bangladesh* limited the Tribunal’s jurisdiction in these cases, to an enquiry into whether the competent authority’s decision within the NRM mechanism was perverse or irrational. Only if the Tribunal so concluded would it be able to re-determine the issue for itself, taking account of all material matters including evidence postdating the NRM decision. Nevertheless, in the course of submissions the Appellant's counsel referred to the different standard of proof governing asylum claims to that governing the trafficking determination process, and submitted that “The decision was perverse as the evidence has moved on.”

6. The First-tier Tribunal concluded that the Secretary of State had correctly identified aspects of her account that were indeed inconsistent and implausible. Thus the NRM’s decision was not irrational and thus that no further evidence was admissible before it.

7. She would not face serious harm as a single female returning with a child because the evidence regarding the problems such individuals faced was inapplicable to an educated returnee with family members to help her. There was some evidence of mental health and PTSD issues, but no up-to-date report had been forthcoming; the available evidence could not cross the Article 3 threshold, and any private life she had established in the UK was established whilst her residence was precarious.

8. Grounds of appeal forcefully contended that the approach taken by the First-tier Tribunal was legally untenable in the light of the governing authorities for determining an asylum or human rights appeal raising trafficking issues, the Judge having deprived the Appellant of the effective remedy that European Union law demanded and made a decision on refugee status incompatibly with the standard of proof mandated by *Karanakaran*, and that this was the case whether or not the Appellant's former advocate had been complicit in the approach adopted.

9. Before me Ms Holmes accepted that the First-tier Tribunal had plainly erred in law given the legal framework as explained by decisions such as *AUJ*. Ms Loughran agreed, with appropriate concision.

Findings and reasons

10. As the advocates before me joined in accepting that the approach of the First-tier Tribunal was flawed I can be brief in my reasoning. Appeals arising out of trafficking claims will sometimes mean that the available material before a Judge will include a decision under the NRM process from the competent authority.

11. For a period the proper approach was put in doubt by the decision of the Court of Appeal in *MS (Afghanistan)* [2018] EWCA Civ 594, where it was held that in circumstances where a negative trafficking decision by the Competent Authority had not been challenged by way of judicial review, the First-tier Tribunal may only entertain an indirect challenge to such a decision if the trafficking decision is demonstrated to be perverse or irrational or one which was not open to the Competent Authority. In *AUJ (Trafficking – no conclusive grounds decision) Bangladesh* [2018] UKUT 200 (IAC) the Upper Tribunal touched upon this issue, opining:

> "62. In my view, applying *AS (Afghanistan)* and *MS (Afghanistan)*, cases in which the Competent Authority has reached a " Conclusive Grounds decision" should be approached as follows:
>
> > (i) Where there is a positive " Conclusive Grounds decision" and the Secretary of State has complied with her duty to provide reparation are unlikely to come before the Tribunal before such time as the individual concerned is refused a renewal of his residence permit and faces removal. In such cases, the judge should not go behind the decision of the Competent Authority that the appellant was a victim of trafficking or modern slavery. The focus will be on whether removal of the appellant at that stage would be in breach of the United Kingdom's obligations under the Refugee Convention or in breach of his rights under the ECHR.
> >
> > (ii) In cases in which the Competent Authority has reached a negative " Conclusive Grounds decision" but the appellant continues to rely (in his statutory appeal) upon evidence that he

> has been a victim of trafficking or modern slavery, the judge should decide, at the start of the hearing and before oral evidence is given, whether the decision of the Competent Authority was perverse or irrational or not reasonably open to it. At this stage, evidence subsequent to the decision of the Competent Authority must not be taken into account. If (and only if) the judge concludes that the Competent Authority's decision was perverse or irrational or one that was not reasonably open to it, that the judge can then re-determine the relevant facts and take account of subsequent evidence."

12. However, in the context of a decision that was more directly on point, the Upper Tribunal revisited the issue in *ES* [2018] UKUT 335 (IAC):

> "1. Following the amendment to s 82 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), effective from 20 October 2014, a previous decision made by the Competent Authority within the National Referral Mechanism (made on the balance of probabilities) is not of primary relevance to the determination of an asylum appeal, despite the decisions of the Court of Appeal in *AS (Afghanistan) v SSHD* [2013] EWCA Civ 1469 and *SSHD v MS (Pakistan)* [2018] EWCA Civ 594.
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> 2. The correct approach to determining whether a person claiming to be a victim of trafficking is entitled to asylum is to consider all the evidence in the round as at the date of hearing, applying the lower standard of proof."

13. The Judge in *ES* noted that her predecessor in *AUJ* had made comments which appeared to support the construction of *MS (Afghanistan)* at one time preferred by the Secretary of State (and adopted by the First-tier Tribunal below), but which did not form any part of the head note to the decision and which were thus "clearly obiter."

14. The thinking in *ES* is at one with the observation of Farbey J in *MN* [2018] EWHC 3268 (QB) §60-4 that the Court of Appeal in *MS (Pakistan)* was not aiming to change the function of the Tribunal in asylum and Article 3 cases – the lower standard of proof applies where ECHR or Refugee Convention issues are in play.

15. The lower standard of proof is a central tenet of decision making in the Refugee Convention status determination process, and in relation to the assessment of claims brought by reference to Humanitarian Protection and/or Article 3 ECHR. In *Sivakumaran* [1988] 1 AC 958 the House of Lords accepted that the same standard of proof applied for prognosticating future risks of harm in an asylum claim as prevailed in extradition cases: when deciding whether an applicant's fear of persecution was well-founded it is sufficient for a decision-maker to be satisfied that there was a reasonable degree of likelihood that the applicant would be persecuted for a Convention reason if returned to his own country. In this regard, there is no significant difference between such expressions as "a reasonable chance",

"substantial grounds for thinking", and "a serious possibility" as means of describing the degree of likelihood. These days the concept is often summarised as whether there is a "real chance" of the feared persecution eventuating. *Karanakaran* [2000] EWCA Civ 11 demonstrates that the low standard of proof carries over from risk assessment to the determination of facts: in that appeal Brooke and Sedley LJJ recommended that in asylum cases decision makers should consider each part of evidence, determining what they believe to be true, that which they reject, and that which remains in doubt, before considering all of it together in a holistic balancing exercise.

16. Indeed, given that Refugee Convention decision making lies within the field of European Union law, the standard of proof set out in Directive 2004/83 necessarily applies, for refugees at Article 2(c) being the "well-founded fear" standard, and for subsidiary protection claims ("humanitarian protection" as transposed in the UK), whether "substantial grounds have been shown for believing that the person concerned … would face a real risk of suffering serious harm".

17. Accordingly it is clear that the First-tier Tribunal erred in law in treating itself as effectively bound by the findings of the NRM within the context of the statutory appeal predicated on Refugee and Human Rights Convention grounds of appeal. The NRM has institutional competence over trafficking issues that are determined to the standard of proof of balance of probabilities. It has no jurisdiction to determine asylum and human rights claims. Similarly the First-tier Tribunal (Immigration and Asylum Chamber) has jurisdiction over claims arising from the Human Rights and Refugee Conventions; it does not have institutional competence for the ultimate conclusion as to whether a migrant is to be treated as a Victim of Trafficking for the purposes of administrative decision making in the context of the UK's obligations in relation to the Council of Europe Convention on Action against Trafficking in Human Beings, although its appellate findings are doubtless a matter which the competent authority would wish to have careful regard.

18. The fact that the Appellant's advocate below may have been complicit in the Tribunal's misdirection is nothing to the point. Firstly, as noted by Lord Hobhouse in *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40: "Still less is it right to decide appeals upon the basis of upholding wrong decisions arrived at using legally mistaken 'concessions' by counsel." Secondly, it is a general principle of appellate law and procedure that a party cannot influence an issue of jurisdiction by consent. Essentially the First-tier Tribunal believed it lacked jurisdiction to revisit the credibility findings on the trafficking case notwithstanding that the same factual issues now arose vis-á-vis the UK's obligations under the Refugee and Human Rights Conventions. However, as shown by *ES* and *MN* that was not the case.

19. As already indicated, the decision cannot stand and the appeal must be remitted for re-hearing afresh.

Decision

The appeal is allowed to the extent it is remitted to the First-tier Tribunal for re-hearing afresh.

Signed   Date 24 April 2019

Deputy Upper Tribunal Judge Symes