



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09073/2017

THE IMMIGRATION ACTS

Heard at Newport
On 28 February 2018

Decision & Reasons Promulgated
On 29 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MS H P X
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Tabacchi, counsel instructed by Linga & Co
For the Respondent: Mr. K. Hibbs, Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The Appellant is a national of the PRC, born on 28.8.83. She arrived in the United Kingdom on 4.6.15 and claimed asylum on 7.6.15. The basis of her claim is that her husband had been arrested following a fight with a government officer over land he had inherited in March 2006 and he was sentenced to 18 months imprisonment. She fled to Hong Kong and gave birth to their son there. She returned to the PRC in October 2007 after her husband was released from prison in September 2007. Due to the fact he was blacklisted the authorities refused to register their son and her husband was unable to work so left home in 2007 and has had no contact with him since 2007. The Appellant tried unsuccessfully to register her son and attracted the adverse attention of the authorities, as a result of which she was detained on two occasions, lastly in January 2015. The Appellant then decided to flee the PRC and utilised the

services of agents (snakeheads). En route to the UK in Holland, the agents demanded more money which she refused to pay as a result of which she was beaten and raped and told she would have to work as a prostitute to repay the money. The Appellant managed to escape when the vehicle in which she was travelling was stopped at customs.

2. After her arrival in the UK the Appellant entered into a relationship with a Chinese man known as William (in English) and gave birth to a daughter on 29.12.16. She said that she has had no contact with William since he became aware of her pregnancy. She fears return to the PRC due to repercussions from the snakeheads, to whom she owes money and because she would have continuing difficulties in supporting her children without being able to register them.

3. Her application was refused in a decision dated 1.9.17. Her claim to have been trafficked was also referred to the NRM who, in a decision dated 28.4.17 issued a conclusive grounds decision that the Appellant was not a victim of human trafficking, slavery, servitude or forced/compulsory labour.

4. The Appellant appealed and her appeal came before First tier Tribunal Judge Walker for hearing on 16.10.17. In a decision and reasons promulgated on 18.10.17 he dismissed the appeal, essentially on the basis that he did not accept the credibility of the claim and he found, contrary to the Appellant's assertion, that the Appellant's husband was likely to be the father of her son.

5. Permission to appeal to the Upper Tribunal was sought on the basis that the Judge had erred materially in law:

- (i) in failing to treat the Appellant as a vulnerable witness;
- (ii) in failing to properly consider the expert evidence of the consultant psychiatrist;
- (iii) in failing to properly consider the issue of documentation and internal relocation.

6. Permission to appeal was granted by First tier Tribunal Judge Shimmin in a decision dated 27.11.17 on the basis that all the grounds were arguable.

7. The Respondent lodged a rule 24 response on 8.1.18 opposing the appeal and asserting that the Judge found the Appellant not to be credible and gave adequate reasons for his findings at [36]-[40] and at [39] adequately addressed the medical report.

Hearing

8. In his submissions, Mr Tabacchi sought to rely upon the grounds of appeal. He submitted that the Judge did not engage at all with the psychiatric report of Dr Gupta, which should have lead him to the conclusion that the Appellant is a vulnerable witness. As a consequence, the Judge should have

applied the Presidential guidance of his own volition, requested more breaks and set boundaries on cross examination. It was further asserted that the Judge should have asked himself what weight should be placed on the evidence and any inconsistencies in light of re-traumatisation. However, it is clear from the findings at [34] and [36] that one of the criticisms of the Appellant was that she was vague and changed her responses but this could have been caused by her trauma. In the Appellant's witness statement she raises issues at [32] and [33] about her shame and vulnerability and this was before the Judge.

9. The Judge further made adverse findings in respect of the lack of supporting documentation at [37] and the lack of corroboration of documentary evidence, however, the Respondent accepted that the authorities had demolished her house and the Appellant in her asylum interview stated that she did not have any documentation: Q & A 24, B15, see also Q 25-28 and 32 & 33.

10. In respect of internal relocation, Mr Tabacchi asserted that the Appellant would be at risk wherever she would relocate in China and that the Judge's findings on internal relocation do not deal with relevant issues ie. that she would be returning with two young children, which is not reflected in the determination as a whole nor is it considered whether this would be unduly harsh.

11. In respect of significant obstacles to integration, Mr Tabacchi submitted that the judge's findings at [46] do not adequately cover the difficulties that would be faced by a single woman returning to China with two young children.

12. In his submissions, Mr Hibbs submitted that what the Judge has done is to put weight on the competent authorities' assessment of credibility, which is dangerous as this could be overturned on judicial review. At [32] the Judge refers to *Kasolo* and states he had made findings based on the evidence as a whole including that to which he had not made specific reference. He submitted that the determination could have been better drafted but this is not an error. Mr Hibbs submitted that the competent authority decision is the starting point but a Judge can reach a different conclusion.

13. Mr Hibbs further submitted that the grounds amount to a disagreement with the fact that the Judge at [35] agreed with the assessment by the competent authority, who had Dr Gupta's report and addressed it in the conclusive grounds decision: AB 42-46 refer. There was also nothing to show that the Appellant is receiving any treatment in the form of medication or counselling and the Judge's findings are sustainable.

14. Mr Hibbs further submitted that the Appellant was legally represented but there was no record of proceedings to show that the legal representative asked that the Appellant be treated as a vulnerable witness nor that the conduct of the appeal was such as to put the Appellant at risk of further trauma. There was no cross-examination on the Netherlands point but rather a focus on risk on return. He submitted that it would have made no difference whether or not

the Appellant was treated as a vulnerable witness because she was not cross-examined about the Netherlands. He further submitted that because the Appellant was found not to be credible little weight can be attached to the diagnosis of PTSD given she is not receiving treatment and there was no indication from the Appellant's witness statement that it was difficult to take instructions from her and no indication she was traumatized in giving the statement. Whilst the Judge could be criticized for drafting and presentation, the credibility findings were open to the Judge to find based on the conduct of proceedings and any errors were not material to the final outcome, given that at [32] the Judge looked at the case in the round.

15. Mr Hibbs submitted that the ground of appeal in respect of Article 8 was a mere disagreement with the Judge's finding of fact. The Appellant had been found not to be credible and there was nothing to show that a female returning to China would not be able to be helped on return. In light of the fact the Appellant has been found not credible she cannot rely on her evidence on this point.

16. In his reply, Mr Tabacchi, submitted that at [36] there was no record of the questions and answers which the Judge found unconvincing. He relied on her detentions not being mentioned in her Screening Interview so the questioning must have extended to her claim, which related to previous abuse. He submitted that inconsistency could have been dealt with differently if she had been treated as a vulnerable witness. There may be some other explanation why the Appellant did not say straight away that she had been abused and the fact she is not receiving treatment does not undermine her vulnerability. In Dr Gupta's response at AB 46 [73] onwards he has given some possible explanations for the inconsistencies see eg [74] page 47 and it follows that it is not uncommon for someone who has been subjected to human trafficking to deny and avoid discussions. Mr Tabacchi submitted that the Judge should have been aware of the possibilities that when interviewed the Appellant would not have said straight away how she had been treated and had the Judge properly directed himself he might have made different credibility findings.

17. I reserved my decision, which I now give with my reasons.

My findings

18. I have considered, firstly, whether if the Judge had either had the Presidential Guidance Note no.2 of 2010: *Child, vulnerable adult and sensitive appellant guidance* drawn to his attention or applied it of his own volition it would have made a material difference to his findings. I have concluded that it would. This is because the guidance is essentially concerned with ensuring that a person who falls within the guidance receives a fair hearing and that adjustments are made, if necessary.

19. What appears to have happened in this case is that the Judge, relying upon the findings of the competent authority in their decision of 28.4.17 that the Appellant was not a victim of trafficking, took that as his starting point and so

proceeded on that basis. I find that this approach did arguably infect his consideration of the Appellant's credibility because he did not consider at the outset whether she was a vulnerable witness.

20. On 27.3.16 the Competent Authority made a positive reasonable grounds decision in the Appellant's favour. However, upon further consideration a negative conclusive grounds decision was reached on 28.4.17, essentially due to inconsistencies in the Appellant's accounts given at different times as to the amount of money paid to the agents and where this came from and the whereabouts of her passport and failing to raise that she had been trafficked in respect of her asylum claim.

21. In MS (Trafficking - Tribunal's Powers - Art. 4 ECHR) Pakistan [2016] UKUT 00226 (IAC) the Upper Tribunal, following the judgment of Lord Justice Longmore in AS (Afghanistan) v Secretary of State for the Home Department [2014] Imm AR 513 held that in appeal proceedings the Appellant may, in certain circumstances, mount an indirect challenge to a negative trafficking decision of the Authority, which is not confined to perversity (or irrationality) grounds [39].

22. It is clear that as part of her asylum appeal, the Appellant continued to put forward a claim to have been trafficked to the UK and that this was not considered by the Judge, who treated the trafficking aspect of the appeal to have been settled by the Competent Authority. In light of the jurisprudence cited at [21] above this is a material error of law.

23. Consequently, whilst the Judge made adverse findings in respect of the Appellant's credibility at [36] I accept that these may be rendered unsustainable due to the failure to consider the Presidential Guidance Note no.2 of 2010: *Child, vulnerable adult and sensitive appellant guidance*.

24. I further consider that the Judge erred in failing to consider the best interests of the Appellant's daughter, born in the UK on 29.12.16. Whilst at [38] the Judge was entitled to find that the Appellant's evidence of the paternity of this child was questionable, this did not exempt him from considering the impact on the child of removal from the UK, where she was born. There is further no consideration of the impact on removal from the UK of the second Appellant and I consider that the assessment of the reasonableness of internal relocation by the Judge at [40] is inadequately reasoned.

25. For the reasons set out above, I find material errors of law in the decision of First tier Tribunal Judge Walker. I set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

27 March 2018