



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/03316/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7<sup>th</sup> November 2018**

**Decision & Reasons Promulgated  
On 7<sup>th</sup> December 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**AHH**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Ms E Harris, Counsel instructed by Longfellow Solicitors

**DECISION AND REASONS**

1. Although the Secretary of State is the Appellant in the Upper Tribunal I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of Albania, appealed to the First-tier Tribunal against the decision of the Secretary of State dated 25<sup>th</sup> February 2018 to refuse to grant her asylum, humanitarian protection or relief on human rights grounds. Judge K Swinnerton allowed the appeal in a decision promulgated on 27<sup>th</sup> April 2018. Permission to appeal was granted by Upper Tribunal Judge Hanson on 2<sup>nd</sup> October 2018.

3. The Secretary of State appealed against the First-tier Tribunal's decision on the grounds that the judge erred in his approach to the decision by the Competent Authority under the National Referral Mechanism (NRM) of 3<sup>rd</sup> October 2018 which reached a conclusion that the Appellant is not a victim of modern slavery. The grounds rely on the decisions in **AUJ (Trafficking - no conclusive grounds decision) [2018] UKUT 200** and **Secretary of State for the Home Department v MS (Pakistan) [2018] EWCA Civ 594**.
4. However, at the hearing Ms Harris submitted the decision of **ES (Section 82 NIAA [2002]; negative NRM) Albania [2018] UKUT 00335 (IAC)**. The Decision of the Upper Tribunal in **ES** is summarised in the head note as follows:
  - “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**.
  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.
  3. Since 20 October 2014, there is also no right of appeal on the basis that a decision is not in accordance with the law and the grounds of appeal are limited to those set out in the amended s 82 of the 2002 Act.”
5. In her submissions at the hearing Ms Isherwood submitted that, even taking into account the position as set out in the decision of **ES**, the First-tier Tribunal Judge had erred in that he failed to consider the decision of the Competent Authority within the National Referral Mechanism. She relied on the decision in **AUJ** in particular at paragraph 52 which quoted from **AS Afghanistan** paragraphs 17 and 18. She referred to paragraph 62 of the decision in **AUJ** and in particular 62(ii) which indicated that, where an Appellant continues to rely in a statutory appeal upon evidence that he has been the victim of trafficking or modern slavery, the judge should decide at the start of the hearing and before the oral evidence is given whether the decision of the Competent Authority was perverse or irrational or not reasonably open to it and only if the judge concludes that Competent Authority's decision was perverse, irrational or not reasonably open to it, could the judge re-determine the relevant facts and take account of subsequent evidence.
6. Ms Harris relied on the decision in **ES** where the Tribunal said that this part of the decision in **AUJ** was obiter. In **ES** that issue was directly at play and the Tribunal considered the issue fully and found ultimately that the Competent Authority decision had been made on the balance of

probabilities for different purposes and that the Tribunal had to look at all of the evidence in the round. In any event, in her submission, it is clear from the findings in this case that, although the NRM decision was not before the judge, the findings in that decision were made known to him and were assessed within the determination. In her submission the Respondent had raised the arguments dealt with in the NRM decision.

### **Error of Law**

7. It is clear that the position as set out in **ES** is directly relevant to the judge's decision in this case. In this case this Appellant's application for asylum was made on 18<sup>th</sup> March 2016. Accordingly, the option of deciding that a decision is not in accordance with the law was no longer before the First-tier Tribunal and the only ground before the judge was whether the Appellant's removal from the UK would give rise to a breach of the Refugee Convention (28 and 29 of **ES**). I note that in **ES** the Tribunal highlighted that it is necessary to consider all relevant evidence before reaching a holistic assessment of the credibility of the Appellant's account.
8. Ms Isherwood submitted that the Judge had failed to take account of the Competent Authority's decision. That decision is not contained in the Respondent's bundle nor is it in the Appellant's bundle. It is apparent that the decision was not before the First-tier Tribunal Judge. In any event it is clear from the Tribunal's decision that the judge was aware that such a decision had been made as pointed out in paragraph 8 of the decision. The judge's findings of fact have not been specifically challenged.
9. Instead it was contended by the Secretary of State that the judge should not have gone on to make any findings of fact based on the authority of **AUJ**. However, as the appeal was on asylum grounds, it was for the judge to consider all of the evidence and make findings of fact in relation to that evidence. The judge did so at paragraphs 16 to 22. At paragraph 24 the judge reached conclusions in relation to the evidence finding that the Appellant was credible and taking into account all of the evidence the judge found that the Appellant had given a truthful account and that she would be at risk of re-trafficking if returned to Albania [24]. This approach is consistent with that set out in **ES**. The findings made were all findings open to the judge on the basis of the evidence.
10. Accordingly, I conclude that the decision of the First-tier Tribunal does not contain a material error of law.

### **Notice of Decision**

There is no material error of law in the First-tier Tribunal Judge's decision.

The decision of the First-tier Tribunal will stand.

### **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 their 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

Date: 5<sup>th</sup> December 2018

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

I maintain the fee award made by the First-tier Tribunal Judge.

Signed

Date: 5<sup>th</sup> December 2018

Deputy Upper Tribunal Judge Grimes