



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/13299/2017

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 30<sup>th</sup> October 2018

Decision & Reasons Promulgated  
On 9<sup>th</sup> November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SL

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr. A Tan, Home Office Presenting Officer

For the Respondent: Mr. G Brown. Counsel instructed by Greater Manchester  
Immigration Aid Unit

**DECISION AND REASONS**

1. The First-tier Tribunal ("FtT") has made an anonymity order and for the avoidance of any doubt, that order continues. SL is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to

comply with this direction could lead to proceedings being brought for contempt of court.

2. The appellant in the appeal before me is the Secretary of State for the Home Department and the respondent to this appeal is SL. However for ease of reference, in the course of this determination I shall adopt the parties' status as it was before the FtT. I shall in this determination, refer to SL as the appellant, and the Secretary of State as the respondent.
3. The respondent appeals against the decision of First-tier Tribunal ("FtT") Judge Austin promulgated on 7<sup>th</sup> August 2018, allowing the appellant's appeal on asylum and humanitarian protection grounds.
4. The appellant is a Chinese national. She claims to have entered the UK in 2007 and on 2<sup>nd</sup> June 2016, she claimed asylum. The background to that claim is set out at paragraphs [29] to [39] of the decision of the FtT Judge. The appellant was the subject of a referral to the National Referral Mechanism ("NRM") on 2<sup>nd</sup> June 2016. On 8<sup>th</sup> June 2016, the Competent Authority reached a positive 'reasonable grounds' decision. That is, the Competent Authority suspected, but could not prove, that the appellant may have been trafficked to the UK. Subsequently, on 1<sup>st</sup> February 2017, the Competent Authority reached a negative 'conclusive grounds' decision. Having considered all of the material available, including the referral to the NRM, the information provided by the appellant at interview, and information from other sources, the Competent Authority concluded that the appellant is not a credible witness and no weight could be attached to her evidence.
5. The Judge of the FtT declined to reach a decision as to whether the decision of the Competent Authority was irrational or perverse, as a preliminary issue. At paragraph [13] of the decision, the Judge stated that in hearing the appeal, it was possible that the Judge would reach the same conclusion as the Competent Authority, or that he may reach a different view of the appellant, or decide that the decision of the Competent Authority had been irrational or perverse.

6. The Judge's findings of fact and conclusions are set out at paragraphs [57] to [68] of the decision. Having heard the evidence, the FfT Judge found the appellant to be a credible witness, relying upon his own individual assessment of the appellant as a witness. The Judge stated, at [61]:

"I do not find that the decision of the Competent Authority was irrational but I do come to a different view on more extensive evidence available to me."

7. The FfT Judge concluded, on the particular facts of the appeal, that the appellant is vulnerable to re-trafficking and that there is not a sufficiency of protection for her if returned to China. The FfT Judge found that there is a real risk of the applicant being exploited in the same way that she had been previously.

#### The appeal before me

8. The respondent advances two grounds of appeal, although they both relate to the approach adopted by the Judge in respect of the 'conclusive grounds' decision of the Competent Authority. The respondent claims that the FfT Judge made contradictory and irrational findings in respect of the decision of the Competent Authority. The respondent refers to the decision of the Upper Tribunal in MS (Trafficking - Tribunal's Powers - Art.4 ECHR) Pakistan [2016] UKUT 00226 (IAC) and claims that it is only where there is a finding that a 'negative trafficking decision' is perverse, that a Tribunal is empowered to make its own decision of whether an appellant was a victim of trafficking. Alternatively, a Tribunal is empowered to review a trafficking decision on the grounds that it has been reached in breach of the respondent's policy guidance. Here, the respondent claims that the Judge did not find the decision of the Competent Authority to be irrational or reached in breach of the respondent's policy guidance, but nevertheless, went behind the decision of the Competent Authority, by finding the appellant to be a credible witness as to her experiences since she left China, working as a beautician and masseuse, leading to several years of being exploited and trafficked to France and onward to the UK as a sex worker.

9. Permission to appeal was granted by First-tier Tribunal Adio on 4<sup>th</sup> September 2018. The matter comes before me to consider whether or not the decision of FfT Judge Austin involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
10. At the conclusion of the hearing before me, I announced that in my judgement, the decision of the FfT is not infected by a material error of law and that I dismiss the appeal. I said that I would give the reasons for my decision in writing. This I now do.

### Discussion

11. Permission to appeal was granted on 4<sup>th</sup> September 2018. The Upper Tribunal has since promulgated its decision in ES (s82 NIA 2002; negative NRM) Albania [2018] UKUT 00335 (IAC) and in my judgement that decision provides the answer the respondent's grounds of appeal. The headnote to that decision states:
  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.
12. Upper Tribunal Judge Finch drew a distinction between an appeal against the respondent's decision to refuse a protection claim under the new statutory framework, and an appeal against a decision to remove an individual from the United Kingdom, under the previous statutory regime setting out rights of appeal. She noted in particular that under the statutory framework as it is now, the only

issue before the FfT is whether the appellant qualifies for protection under the Refugee Convention. Therefore, when reaching a decision, the FfT Judge is obliged to look at the evidence in the round and, give it due weight before reaching a decision as to the credibility of an appellant's account.

13. In ES, the Upper Tribunal also found that the fact that the Government decided to adopt a balance of probabilities as the appropriate standard of proof for a conclusive decision within the National Referral Mechanism, as opposed to the far lower standard of proof applicable in Refugee Convention decisions, indicates that the Government recognised that the two processes were to be distinguished from each other. The Upper Tribunal concluded that the fact that the Competent Authority did not find, on a balance of probabilities, that the appellant was a victim of human trafficking does not prevent the Tribunal finding that she is entitled to asylum as a person who has been subject to human trafficking on the lower standard of proof and in the light of all relevant evidence.
14. In my judgement, the decision of the Upper Tribunal in ES provides a complete answer to the grounds of appeal advanced by the respondent and, rightly in my judgment, there was no real attempt by Mr Tan to persuade me to the contrary. In my judgment, the decision of the FfT Judge is not infected by an error of law.
15. It follows that I dismiss the appeal.

### **Notice of Decision**

16. The decision of the FfT Judge is not infected by the making of an error of law and the respondent's appeal against the decision of FfT Judge Austin is dismissed.
17. An anonymity direction is made.

Signed

Date

30<sup>th</sup> October 2018

**Deputy Upper Tribunal Judge Mandalia**

**TO THE RESPONDENT**

**FEE AWARD**

I have dismissed the respondent's appeal. As set out by the FtT Judge previously, no fee was paid and there can be no fee award.

Signed

Date

30<sup>th</sup> October 2018

**Deputy Upper Tribunal Judge Mandalia**