



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/07474/2017

**THE IMMIGRATION ACTS**

Heard at Manchester Civil Justice Centre  
On 20<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 26<sup>th</sup> February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

J S C  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Nicholson (Counsel), instructed by Greater Manchester  
Immigration Aid Unit  
For the Respondent: Mr C Bates (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge M Davies, promulgated on 11<sup>th</sup> January 2018, following a hearing at Manchester Piccadilly on 19<sup>th</sup> December 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of China who was born on 27<sup>th</sup> July 2000. He appeals against the decision of the Respondent dated 20<sup>th</sup> July 2017, refusing his application for asylum and humanitarian protection, pursuant to 339C of HC 395.

### **The Appellant's Claim**

3. The essence of the Appellant's claim is that he left China in November 2015 and flew to Hong Kong using his own passport, and then flew on to France utilising a false visit visa supplied by a snakehead. He states that he stayed in France for a one month before flying to Spain using a fake Hong Kong passport. He stayed in Spain and then he stayed subsequently in Italy using the same fake Hong Kong passport for two months. He then flew to Dublin and stayed there for one night, before leaving to come to the United Kingdom. He claims to have been trafficked. He was referred to the National Referral Mechanism (NRM) on 9<sup>th</sup> May 2006 and to Social Services and the police subsequently. The decision of the NRM was that the Appellant had not been trafficked.

### **The Judge's Findings**

4. The judge held that the Appellant had come to the UK because "he would have a brighter future in England" and that he "wanted to make and earn decent money and make a life for himself" (paragraph 73 of the determination), given that this is what he had himself expressed in his statements for consideration. The judge held that "that evidence indicates that he was not targeted by a trafficker but left China voluntarily because he believed his prospects outside China would be improved" (paragraph 73). The judge went on to say that the Appellant himself provided an additional photograph to the agent which was going to assist him to leave China and that the Appellant was able to leave China and go to Hong Kong using his own passport. This was indicative of the fact that he, despite his young age, was reasonably likely to have acted voluntarily and not under duress when he left China (paragraph 74).
5. The judge proceeded then to note that, "even taking into account the Appellant's age, that he is naïve and vulnerable as the witness Mr Mi Lap Sing claims", the claim could not be accepted as being a viable one. The judge considered the evidence that the Appellant, if returned to China, was likely to fall in with the "wrong sort of people", but rejected this on the basis that the Appellant, on his own testimony, did not fall in with the wrong sort of people when he lived in China (paragraph 77).
6. Consideration was finally given by the judge to the evidence contained in the expert's report about the attitude of the Chinese authorities to the victims of trafficking (paragraph 79) and it was concluded that, having taken into account the Appellant's age, and the fact that he was a vulnerable witness, the claim could not succeed (paragraph 79).

## Grounds of Application

7. The grounds of application state that the judge had erred in a number of important material respects. First, there was the issue of the Appellant's credibility itself. The way in which the judge has regard to this had distorted the recorded evidence. It had been taken out of context. What the Appellant had said was not consistent with how the judge had recorded the evidence. What the judge recorded (at paragraph 73) was that:

"The Appellant sets out in clear terms in his first witness statement why he wanted to leave China because 'he would have a brighter future in England'. He 'wanted to make and earn decent money and make a life for himself'. That evidence indicates he was not targeted by a trafficker but left China voluntarily because he believed his prospects outside China would be improved" (paragraph 73).
8. However, the grounds make it clear that the actual evidence in the Appellant's witness statement, together with what he said during his screening interview, was rather different because in his statement on 28<sup>th</sup> June 2016 the Appellant had made it clear that he did not have enough money. He met a man through a friend whom he had arranged to meet in a restaurant and any comments that the Appellant had made were made in the context of having been lured and seduced to the idea of going to the UK by the trafficker, and that was after having been targeted and tempted by the opportunity to leave. This is clear from the screening interview (at Respondent's Bundle page A4). Here the Appellant had said that, "in China, he met someone who told him he would get a job, better life when he came to UK. After he left China he realised they only asked him to work for nothing".
9. Second, there was the evidence of the expert, Dr Jackie Sheehan, and she recorded that there were a number of factors in the Appellant's account which were typical of cases of recruitment for trafficking out of China. The judge, however, contended that the Appellant's evidence itself demonstrated that he lacked credibility. It is only after the judge came to that conclusion that he began to consider the expert's report (at paragraph 78) and this was the wrong way of approaching expert evidence, which had to be looked at from the outset and in the entirety of the evidence as a whole.
10. On 19<sup>th</sup> April 2018 permission to appeal was granted on this basis. It was also stated that the parties should address at the hearing the case of **SSHD v MS (Pakistan) [2018] EWCA Civ 594**.

## Submissions

11. At the hearing before me on 20<sup>th</sup> August 2018, Mr Nicholson, appearing on behalf of the Appellant, raised two further additional matters. First, he referred to the fact that there was now a letter dated 19<sup>th</sup> June 2018 from the Greater Manchester Immigration Aid Unit, which was requesting a further NRM on the Appellant in the light of new evidence, which, it was stated, would demonstrate that the Appellant had indeed

been trafficked. Mr Nicholson took the matter no further, save to say that this was something that was being looked at.

12. Second, he drew attention to the case of **MS (Afghanistan)** itself. However, he also additionally added that there had been a recent decision which required consideration. After citing the decision in **AUJ (Trafficking - no conclusive grounds decision) [2018] UKUT 200**, Mr Nicholson submitted that he would place reliance upon paragraph 62(ii). This refers to an Appellant's claim that he was trafficked or was a victim of modern slavery in the past. The Tribunal here explained that this may be relevant in reaching a decision in a statutory appeal as to whether the Appellant's removal would be in breach of the United Kingdom's obligations under the Refugee Convention.
13. What was particularly important about this provision was its statement that,
 

"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" (see paragraph 62(ii)).
14. Finally, Mr Nicholson went on to say that the judge had failed (at paragraph 77) to refer to the evidence of the social worker, who was not referred to at all, although there was a reference to the evidence of Mr Mi Lap Sing at paragraph 77. The foster carer was also not referred to. Mr Nicholson indicated that he had a concern (see the Appellant's bundle at page 23) with respect to the reference to the Appellant as being a "streetwise 16 year old" because this appeared to indicate that the Appellant was not being treated as a "child" but was being treated as an adult, who had become streetwise. This was an erroneous impression to create in the determination. The Appellant remained a child to all intents and purposes whether or not he was a "streetwise 16 year old".
15. For his part, Mr Bates submitted that the judge did engage with the evidence. He did recognise that the Appellant was a 16 year old before him. He did recognise that he was vulnerable. This was repeated throughout the determination. Yet, the following factors could not be overlooked. First, the Appellant's evidence was that he had obtained a passport himself long before being approached by a trafficker. He always had the intention of going abroad. Second, he states that he was seduced into travelling abroad but the evidence is contrary to this. He had stopped attending school. He had obtained occasional employment. He had not been forced to leave China. He had made the decision to leave China himself. He had left on his own

passport. It is against this background that the judge made the factual findings that he did. Those findings were not erroneous. They were open to the judge.

16. In reply, Mr Nicholson referred to the fact that the substantial aspect of the Appellant's claim was set out at pages 59 to 68 and this had not been referred to by the judge at all. Secondly, at page 22 of the Appellant's bundle there was no suggestion that the Appellant had actually had a passport.

### **Error of Law**

17. I am satisfied that the making of the decision by the judge involved the making of a material error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
18. First, the judge has not considered the evidence on the basis on which it was presented by the Appellant, which is manifest from the Appellant's statement of 28<sup>th</sup> June 2016 (in the Respondent's bundle from D1 to D7), where he makes it clear that he actually was "young and inexperienced and it was impossible for me to get a decent job" when he was lured into travelling abroad and ended up working for nothing. This is also borne out by what he has said in the screening interview.
19. Second, the evidence of the expert, Dr Jackie Sheehan, was that the Appellant came across as typical of cases of recruitment for trafficking out of China, but her evidence is referred to by the judge only after the conclusion is reached by the judge (at paragraph 78) that the Appellant did not succeed in his appeal. It is only after that, that the judge goes on to then deal with the expert report (at paragraph 79).
20. Third, the case of **AUJ [2018] UKUT 200**, although a decision that was not available at the time of original judge's decision, is relevant in that, against the background of a case such as this, it is important that the deciding authority should make a decision, before oral evidence is given, as to whether the decision of the competent authority was perverse or irrational or not open to it (see section 62(ii) of **AUJ**). Insofar as **MS (Afghanistan)** is concerned what that decision made clear is 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.
21. In **MS (Afghanistan)** what Flaux LJ had said was that there is a two stage approach. First, a determination whether the trafficking decision is perverse or irrational or one which was not open to the authority and second, only if it is, can the Appellant invite the Tribunal to re-determine the relevant facts and take account of subsequent evidence since the decision of the authority was made (see paragraph 69 of the judgment of Flaux LJ). The two decisions are consistent. In **MS (Afghanistan)** the decision that was appealed to the First-tier Tribunal was a decision under Section 10 of the Immigration and Asylum Act 1999. What **MS (Afghanistan)** makes clear in the judgment of Longmore LJ (at paragraphs 17 to 18) is that First-tier Tribunal Judges are competent to consider whether the Secretary of State has complied with

her policy in relation to trafficking; if asked to consider that question, they should then decide whether she has in fact complied with her policy since that is (or may be) relevant to her removal decision. In this context it is important to be aware that a decision to refuse asylum is not itself an immigration decision appealable pursuant to Section 82(2) of the 2002 Act (any more than a trafficking decision is such a decision). The relevant immigration decision is the decision to remove the Appellant under Section 10 of the Immigration and Asylum Act.

### **Decision**

I am satisfied that the making of the decision by the original judge was an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Davies pursuant to practice statement 7.2(b).

There has been a delay in sending out this Determination to the parties concerned, because although it was dictated on the day of the Hearing, and typed up shortly thereafter, it appears to have been held up in the system, before promulgation.

This appeal is allowed.

An anonymity order is made.

### **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

Date

Deputy Upper Tribunal Judge Juss

25<sup>th</sup> February 2019