



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02787/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 16 July 2020 *via Skype for Business*

Decision & Reasons Promulgated
On 4 August 2020

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

YD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V. Templeton, Duncan Lewis Solicitors
For the Respondent: Mr S. Walker, Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to are in bundles totalling 326 pages, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the hearing had been conducted fairly. Ms Templeton was unable to access the video link but was able to dial in via Skype for Business and participate in the hearing that way. She was content that the hearing had been conducted fairly, notwithstanding the hardware difficulties experienced.

1. This is an appeal against the decision of First-tier Tribunal Judge Fowell promulgated on 16 January 2020 dismissing the appellant's appeal against a decision of the respondent dated 12 March 2019 to refuse his asylum claim. The appellant is a citizen of China, born on 3 June 1999. He is now 20 years old. He arrived in the UK by plane aged 15 and was encountered working in a Chinese restaurant. On 7 September 2015 he was recognised by the competent authority to be a victim of trafficking, in a positive conclusive grounds decision. He was granted discretionary leave until he was 17 and a half and placed in the care of the county council, through which he was housed by foster carers.
2. On 28 November 2016, the appellant claimed asylum on the basis that he would be at risk of being re-trafficked. The claim was refused in circumstances which were initially thought not to attract a right of appeal. Judicial review proceedings followed, with the result that the respondent took a further decision, on 12 March 2019, which did attract a right of appeal. That appeal was heard by Judge Fowell, and it is that decision which is under challenge in these proceedings.

Factual background

3. The appellant's case is that he was trafficked to this country by his mother to work. His journey was facilitated by an agent, who dealt with passport control at border here. He was made to work in a restaurant for £20 a day. He claimed asylum after being apprehended by the authorities. The appellant's case is that he has no contact with his mother or any other family in China, and that, in any event, he remains at risk from his mother, given she was responsible for trafficking him to this country. In an earlier decision, dated 28 October 2015, the respondent accepted that the appellant would not enjoy adequate reception facilities in China, and granted him leave as an unaccompanied minor on that basis.
4. In her decision of 12 March 2019, the respondent considered that, given the appellant is now an adult, it would be possible for him to return to China. It is a vast country, the respondent noted, with sufficiency of protection for former victims of trafficking. Not only was there no suggestion that either his mother, or the agent who facilitated his travel to this country, were or sought to be in contact with him, internal relocation would be a feasible alternative.

The decision of the First-tier Tribunal

5. Judge Fowell found that the appellant had not been trafficked to this country. He noted the decision of the competent authority dated 7 September 2015 accepted the appellant to be a victim of trafficking, but observed that that decision formed part of the background materials and did not tie his hands, adding that the role of the First-tier Tribunal was to arrive at its own decision. The appellant's case that he was a

victim of trafficking was partly predicated on his wider narrative that he has no contact with his mother, who was responsible for his trafficking. The judge found that the social care records submitted on behalf of the appellant revealed a different picture [43]. Although he did not set out the date of the extract, at [28] the judge had quoted extensively from one of the appellant's care plans. One of the excerpts stated:

“[The appellant] says that he keeps in touch with his mother over a social media... it is important that [he] is able to have contact with his mother.”

The above extract appears to be from a review dated 21 May 2015 (FTT bundle page 26).

6. The judge found that the above extract fundamentally undermined the appellant's case, and the operative assumption of the competent authority and the social workers, that he had no contact with his mother. At [44] the judge suggested that his foster parents must have known about the ongoing contact by the appellant with his mother, but that they had not mentioned it, “no doubt taking the view that to do so would be unhelpful and undermine [the appellant's] position.”
7. The conflict between the appellant's trafficking narrative and the single entry in the undated care records quoted by the judge “placed matters in a very different light”, making it “difficult to reconcile... with the account given of a neglectful and traumatic upbringing...” An account the appellant had given to Dr Arnsby-Wilson, a clinical psychologist, was similarly defective, found the judge.
8. The judge also had concerns about the positive way in which the appellant recounted to Dr Arnsby-Wilson his dealings as a with his “traffickers”. The account the appellant gave was that they treated him well, they did not hurt him, and were like friends: [47]. That suggested that the appellant was not imprisoned, nor was he working against his will, and the work would have enabled him to send some money back to China immediately: [48]. The judge said that Secretary of State “will not have been provided with the care records indicating that he was still in contact with his mother” [49]. At [54] the judge said,

“Victims of trafficking are often young women or girls and maybe returning with a baby. They will encounter social stigma. There may be a violent response from a father. They may not be able to support themselves financially or support their baby and so be forced back into prostitution. None of these concerns appears to apply here.”
9. There would be no risk on return, found the judge. He dismissed the appeal.

Submissions

10. The grounds of appeal contend that the judge erred in his assessment of whether the appellant was a victim of trafficking, by failing to conduct the assessment by reference to the definition of trafficking contained in Article 3 of the Palermo Protocol to the United Nations Convention against Transnational Organized Crime. The grounds contend that the consent of the victim, whether or not the victim is treated

“well” by the traffickers, and the fact he was paid a modest (£20) salary for his work cannot detract from a trafficking situation. Further, the judge speculated at [49] when stating that the Secretary of State had not been provided with the social care records. The judge’s definition of trafficking at [54] was simplistic and incorrect.

11. Secondly, the grounds contend that the judge made a mistake of fact, resulting in speculation and irrationality, when analysing the social care records. Although the judge quoted at [28] an extract from the social care records which appeared to suggest the appellant remained in contact with his family, he did not mention, and therefore appeared to overlook, a later entry which stated that “[the appellant] did not want to talk about contact with his family and it was agreed that this would not be raised at each meeting as [the appellant] finds it distressing. [The appellant] has had contact with family via social media currently does not wish to.” The grounds contend that the judge did not raise his concerns about the foster carers’ knowledge concerning the appellant’s contact with his family, nor did the presenting officer raise concerns on that basis. It was also an error, contend the grounds, for the judge to extrapolate the significance of the appellant remaining in contact with his mother to a position which fundamentally undermined the appellant’s case. Plainly, contend the grounds, the appellant’s mother would want to maintain some contact with him, having trafficked him to this country, for the purposes of her gain.
12. The grounds also contend that the judge failed to consider the country guidance materials submitted, although this is not particularised.

Discussion

13. At the hearing before me, Mr Walker conceded that the decision of the First-tier Tribunal involved the making of an error of law. That was a realistic concession, and I find the decision of the First-tier Tribunal involved the making of an error of law, for the following reasons.
14. While the judge was correct, in principle, to note that he was not bound by the conclusive grounds decision by the competent authority, it was incumbent upon him to (i) apply the correct definition of trafficking when looking back to ascertain what took place in China and following the appellant’s initial arrival here; (ii) to take into account all relevant evidence when reaching his own conclusions; and (iii) not to speculate.
15. Trafficking is defined in the following terms in Article 3 of the Palermo Protocol:
 - “For the purposes of this Protocol:
 - (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation,

forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age."

16. The sad reality inherent to many trafficking situations is that the victim will be manipulated by their traffickers into thinking that there is a relationship of some form of warmth between them. Many traffickers operate in that way. It is for that reason that Article 3(b) provides that the consent of victims of trafficking shall be irrelevant when any of the means of trafficking set out in Article 3(a) have been used. As a 15 year old boy in a foreign country, the appellant was particularly vulnerable. His case was that he was forced to work for minimum payment. That situation is capable of falling squarely within the "*recruitment... of persons... by means of... the abuse of power or of a position of vulnerability*" under sub-paragraph (a). That the appellant described the traffickers as being friendly is nothing to the point. Furthermore, where a child is involved, it is irrelevant if the means specified in Article 3(a) are not used: see Article 3(c), taken with 3(d).
17. Rather than anchor his analysis to the legal definition of trafficking, the judge's only discussion of what a trafficking situation looks like in practice appears to have taken place by reference to the judge's own personal opinions about human trafficking, which were nothing more than simplistic, stereotypical assumptions, which, on the facts of this case, were simply incorrect. See, for example, [47] where the fact the traffickers were described by the appellant as treating him well was a basis to call into question "whether he is a victim of trafficking at all." Similarly, at [54], the judge's discussion about the risk of onward trafficking was characterised by inaccurate, incorrect and stereotypical assumptions about the profile of victims of human trafficking. That was an error of law.
18. As noted above, extract from the appellant's care records quoted by the judge at [28] appears to be from the appellant's care plan dated 21 May 2015. The judge also had before him later care notes. In the entry for a subsequent review, conducted on 14 August 2015, the following featured under the heading *Summary of Review Discussion*:

"[Y] did not want to talk about contact with his family and it was agreed that this will not be raised at each meeting as [Y] finds it distressing. [Y] has had contact with family via social media but currently does not wish to."

The judge did not refer to the above extract. He highlighted an earlier extract from one of the initial reviews, viewing it in isolation, without considering subsequent developments. It is not clear whether the judge considered this entry, and did not

mention it, or whether he overlooked it. Either way, it was incumbent upon the judge to resolve this key factual conflict. He did not.

19. The judge did not put his concerns arising from the appellant's contact with his mother to the parties. While judges are not required to give running commentary on their likely decisions, where, as here, a judge resolves a case on a *wholly different basis* to that advanced by the parties, fairness may require the judge to canvass the new issue with the parties. See AM (Fair hearing) Sudan [2015] UKUT 656 (IAC), which states at (v) of the Headnote:

“Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing.”

20. It was common ground between the parties that the appellant was a victim of trafficking. There was no suggestion at the hearing that that was in issue, and consequently neither party addressed the judge on what was an agreed fact on both sides. While the judge was entitled to depart from the conclusive grounds assessment, given the parties had not been given the opportunity to address him on any of the many factual issues that would necessarily arise from the judge adopting that approach, unfairness resulted.

21. That unfairness manifested itself in a number of ways.

22. First, the parties would have been able to address Judge Fowell that the crucial evidence upon which he purported to base his departure from the conclusive grounds decision should not have been viewed in isolation. There were other social care records which cast the judge's conclusion concerning the appellant's contact with his mother in a different light.

23. Secondly, the parties may have been able to address Judge Fowell concerning the definition of trafficking in Article 3(a) of the Palermo Protocol, which could have explained a degree of initial contact between the appellant and his mother – his trafficker – in a way that the judge simply (and incorrectly) did not consider.

24. As a result, Judge Fowell made mistakes of fact which fell into the following category of errors of fact which may amount to errors of law, pursuant to [9(vii)] of R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982:

“Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.”

25. Thirdly, had Judge Fowell raised his concerns about the appellant's contact with his mother with the appellant, his foster parents, or with his representative, a proper explanation could have been given, which may have been consistent with the evolving position in the social care records. Instead, the judge implied – quite wrongly, unfairly and without foundation – that the foster parents had been

dishonest, in possibly deliberately omitting to mention what the judge speculated must have been sustained and regular contact on the part of the appellant with his mother.

26. It was deeply unfair for Judge Fowell to imply dishonesty on the part of the appellant's foster parents. Not only had Judge Fowell not raised the spectre of their dishonesty as a result of his misunderstanding of the evidence, it was unfair for him not to give them the opportunity to respond to his concerns.
27. Fourthly, the parties could have drawn to Judge Fowell's attention the fact that the appellant's social care records had been submitted to the respondent before the 12 March 2019 refusal decision was taken: see paragraph (y) on page 7 of that decision. Significantly, the respondent in that decision did not seek to revisit the earlier decision of the competent authority in which the appellant was found to be a victim of human trafficking, despite having the very care records relied upon by the judge to depart from the earlier competent authority decision.
28. Fifthly, the parties could have clarified with the judge whether the competent authority had access to the social care records when taking its positive reasonable grounds decision (1 September 2015) and its conclusive grounds decision (7 September 2015). Instead, at [49] the judge speculated as to which documents had been provided to the Home Office. There is no room for speculation in this jurisdiction.
29. Grounds 1 and 2 are made out. If the appellant were trafficked, the question of his vulnerability to re-trafficking must be considered. That is a question which falls to be addressed not only by reference to the ability of the authorities in China to protect victims of trafficking, or the appellant's ability to relocate internally, but by reference to the appellant's own vulnerabilities as a victim of trafficking (subject to any properly reasoned, evidence and fairly reached findings of a future tribunal to the contrary). As such, it is necessary for Judge Fowell's decision to be set aside.
30. As I have found Judge Fowell's approach rendered the hearing in the First-tier Tribunal unfair, the only solution is for the matter to be remitted to the First-tier Tribunal, to be heard by a different judge.
31. It is not necessary for me to consider Ground 3, which in any event is inadequately particularised.

Notice of Decision

The decision of Judge Fowell involved the making of an error of law and is set aside in its entirety with no findings of fact preserved.

The matter is to be remitted to the First-tier Tribunal to be reheard by a judge other than Judge Fowell.

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 *Stephen H Smith*

Date 20 July 2020

Upper Tribunal Judge Stephen Smith