



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04137/2018
PA/07882/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 24 September 2020

Decision & Reasons Promulgated
On 6 October 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

XPH
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms J Loughran, Counsel, instructed by Brighton Housing trust
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Hanes (the judge) who, in a decision promulgated on 3 March 2020, dismissed the

appeal of XPH (appellant) against the decisions of the Secretary of State for the Home Department (respondent) dated 13 March 2018 and 25 June 2019 refusing her asylum and human rights claim and her claim for Humanitarian Protection (HP).

Background

2. The appellant is a female national of China. She was 19 years old at the date of the First-tier Tribunal's decision. She entered the UK on 3 March 2016 aged 15 years old and claimed asylum on the basis that she was a victim of trafficking. Her claim to be a victim of trafficking was initially rejected by the Competent Authority and the respondent refused her protection claim on 13 March 2018. The Competent authority reconsidered its position and accepted that the appellant was a victim of trafficking on 23 May 2019. The respondent reconsidered her position as a result but refused the appellant's protection and human rights claims on 25 June 2019. The appellant appealed both the March 2018 decision and the June 2019 decisions, hence the two reference numbers.
3. Much of the evidence before the First-tier Tribunal was not in dispute. The respondent accepted that the appellant was a victim of trafficking and that she had been forced to travel to the UK. In her Reasons for Refusal Letter the respondent did not dispute the appellant's account of events that occurred in China or on her journey to the UK. In summary, the appellant, who was born and raised in Hefei City, Anhui Province, went to live with her maternal grandmother when she was around 7 years old because she was told her parents had gone to the UK. Her maternal grandmother died in July 2014 and the appellant was ill-treated by the grandmother's sister with whom she went to live. The appellant ran away after about a month, took a bus to a city she claimed not to know, slept in a park for a few days and then worked washing dishes in a restaurant that provided her with accommodation for 2 years.
4. She met a man one day in the same park who gave the impression that he knew her parents in the UK. He offered to arrange for her to travel to the UK, took some money from her and gave her 875 Euros. The man, who told the appellant to call him 'uncle', took her photograph and arranged plane tickets and accompanied her to an unknown country. On arrival the appellant was blindfolded, taken to a room and locked inside for around a week. Another man took her on another flight. She was threatened that she would be beaten if she said anything. On arriving in the next country, the appellant was blindfolded and placed in a car and then locked in a room. Men wearing masks brought her food. The appellant was later put on another flight. She was met by another man who had her photograph. She was sick in a car when blindfolded and the man struck her with his fist. She was taken to another room and blindfolded. The appellant was taken on a final flight to the UK and claimed asylum when she arrived at Gatwick.

5. Although the respondent accepted that the appellant was a victim of trafficking, and that she had a genuine subjective fear of ill-treatment in China, the respondent did not accept that the appellant would be at real risk of persecution. The respondent did not accept that a female victim of trafficking would be considered a member of a Particular Social Group (PSG) for the purposes of the Refugee Convention. I note that this was in contrast to the earlier decision dated 13 March 2018 in which the respondent accepted that the appellant was a member of a PSG. The respondent additionally concluded that the Chinese authorities were able to provide the appellant with a sufficiency of protection, and that she could, in any event, internally relocate to another part of China. Nor was the respondent satisfied that there were 'very significant obstacles' to the appellant's return to China, with reference to the requirements of paragraph 276ADE(1)(vi) of the immigration rules, or that her removal would breach Article 8 ECHR.

The decision of the First-tier Tribunal

6. The judge had before her a large bundle of documents served by the appellant that included, *inter alia*, the Competent Authorities' Conclusive Grounds decision, witness statements from the appellant dated 21 June 2016 (amended on 5 January 2018), 11 April 2018 and 24 January 2020, an expert country report prepared by Joshua Kurlantzick (the country expert) dated 5 December 2019, a psychological report on the appellant dated 16 September 2019 prepared by Dr Lissa Morrish, Child Psychologist (the Clinical Psychologist), an addendum report prepared by the Clinical Psychologist dated 24 January 2020, and a number of human rights reports relating to China. The judge treated the appellant as a vulnerable person in accordance with the Joint Presidential Guidance Note No 2010, although the appellant gave no oral evidence save on one limited matter. The judge heard oral evidence from LL, the appellant's foster carer, which she summarised at [9] and [10].
7. The judge acknowledged that the Clinical Psychologist conducted a 3½ hour assessment with the appellant on 12 September 2019, and that a further 1-hour assessment was conducted on 22 January 2020. The Clinical Psychologist assessed the appellant as suffering from PTSD, severe depression and mild anxiety. The Clinical Psychologist considered that if the appellant was returned to China there was a very real possibility that she would commit suicide as she would feel isolated and alone and was likely to act on her belief that death would reunite her with her grandmother. The judge recorded the Consultant Psychologist as stating that "the appellant would also benefit from antidepressant medication". At [16] the judge stated,

"With respect to the report of Dr Morrish, I make the following observations. She saw the appellant on two occasions (four months apart) at the request of the appellant's solicitors. At 2.5 and 2.7 Dr Morrish refers to the appellant being subjected to threats of death or serious injury and sexual violence at the hands of the people who trafficked her to the UK and that when she lived alone in a strange city in China, she may have been the

victim of sexual violence. At 5.7 there is reference to the appellant stating she felt 'dirty' with no further clarification, leading Dr Morrish to opine that the appellant was avoiding traumatic memories and would benefit from appropriate psychological intervention. There is however no evidence before me from the appellant relating to sexual violence perpetrated against her or of prostitution (which was confirmed at the hearing). I am not satisfied that there is any factual basis for Dr Morrish's remarks on this issue and I find that it is speculation. The appellant in her Statements refers to being threatened with violence during her journey to the UK but actually hit on one occasion when she was sick in a car. There was no indication of Dr Morrish having had access to the appellant's medical records. There is no evidence before me of the appellant being prescribed antidepressants (despite Dr Morrish's diagnosis and recommendations) or the appellant has been referred to a psychiatrist. The appellant has been referred for counselling with a Practitioner on 27 January 2020. LL was unable to assist me with the qualifications of the Practitioner and the nature of the counselling (nor do I have a letter from the Practitioner). The evidence before me is that the appellant has progressed with her studies and is now in college. She is now able to use the bus on her own to get to/from college and go out with friends. In conclusion, whilst I have taken into account the report of Dr Morrish, I give it limited weight."

8. The judge directed herself in accordance with the Qualification Regulations and **SB (PSG - Protection Regulations - Reg 6) Moldova CG [2008] UKAIT 00002** on the issue whether a victim of trafficking for sexual exploitation was capable of being a member of a PSG, and noted that the group in question must have a distinct identity in the society in question [18]. At [22] the judge set out the headnote of **HC & RC (Trafficked women) China CG [2009] UKAIT 00027**, a Country Guidance case in which it was conceded that a woman trafficked for the purposes of prostitution did constitute a member of a PSG. At [23] the judge did not accept that the appellant was a member of a PSG. The judge noted that in **HC & RC** the applicants had been trafficked for sexual exploitation and that this appellant has never engaged in prostitution. The judge stated,

"The expert report of Joshua Kurlantzick (JK report) at AB 527 is not particularly helpful on the issue of females who have not been trafficked for the purposes of prostitution. The Skeleton Argument refers to paragraph 22 of the JK report which appears to suggest that society in China equates trafficking with prostitution and returnees are shunned. I am not satisfied that the appellant who was, in effect, rescued on arrival in the UK is a member of a PSG, namely women who were trafficked for prostitution. Even if it were to be accepted that all women who have been trafficked (for whatever purpose, even if not sexually exploited) show a characteristic which cannot be changed, I'm not satisfied that *all* members of such a group are perceived as different with a distinct identity in China (or specifically females who were trafficked but not sexually exploited) I therefore conclude that the appellant's asylum claim is not for a Convention reason."

9. The judge then summarised the findings in **HC & RC** [25], rejected the appellant's claim that she did not know the name of the city in which she lived for 2 years [26], and then, at [27], concluded that the appellant would not face a real risk of serious harm if returned to China, either from her grandmother's sister or from those who trafficked her to the UK. The judge reasoned that the appellant was now an adult and would not be in danger of being recruited for child labour, and that although she was trafficked to the UK, the judge was not satisfied that there were good reasons to consider that she would be trafficked again. The judge said there was "no persuasive evidence" that those who were responsible for trafficking her previously would be in any position to find and abduct her. The persons who brought her to the UK were aware that she was in the country, no evidence had been adduced of any approach made to her in the UK, there was no evidence that traffickers would be in a position to know that she had returned to China, and there was no suggestion that snakeheads were involved or that the appellant had a contractual debt to pay off. The judge concluded that there was no persuasive evidence that individuals who trafficked the appellant to the UK operated throughout China.
10. At [28] the judge noted that the appellant was now a young adult and was more experienced in the risks of trafficking and had the benefit of being able to mature to adulthood with the support of her foster family. She was in a much better position than she was as a child on her own to work and to support herself. The judge referred to "background country information" that linguistic and cultural barriers were not inhibiting factors preventing ethnic Han Chinese from moving away from the place of hukou registration, and that even on the assumption that there was still a real risk of harm to the appellant on return, the judge was not satisfied there was no sufficiency of protection available to her. The judge was not satisfied "taking into account all the circumstances including the background evidence in the country guidance" that internal relocation would be unduly harsh.
11. Having found that the appellant was not entitled to Humanitarian Protection, and that her removal would not breach Article 3 EC HR in respect to her suicide risk, and that her removal would not breach Article 8 in terms of paragraph 276ADE and her free standing private life rights, the judge dismissed the appeal.

The challenge to the judge's decision

12. The Grounds of Appeal, amplified by Ms Loughran in her oral submissions, essentially contend that the judge failed to have regard to the evidence from the country expert when concluding that the appellant was not a member of a PSG and in assessing the issues of risk return, sufficiency of protection and relocation. The country expert provided evidence on all these issues and yet the judge only once mentioned the expert's report. the basis of the appellant's claim was not inconsistent with the conclusions of the extant CG case, which did not exclude the possibility that a victim of trafficking may face a real risk of

persecution on the particular facts of the case. The grounds further contend that the judge failed to give adequate reasons for rejecting the medical evidence and that she made material mistakes of fact as to the content of the medical evidence, and that the judge misdirected herself in respect of paragraph 339K immigration rules. The grounds contend that the judge failed to take into account relevant information, particularly the evidence from LL, when assessing whether the appellant would be at risk of re-trafficking or further exploitation, and in respect of internal relocation.

13. Mr Melvin, who produced written submissions for the 'error of law' hearing contended that the judge had considered the most recent Country Guidance on trafficking and had adequately referred to the country expert report and gave clear reasons for rejecting the appellant's claim that she was a member of a PSG. The judge fully considered the Clinical Psychologist's report and was entitled, for the reasons given, to attach only limited weight to that report. The judge gave full and adequate reasons at [27] for concluding that the appellant was not at risk of being read trafficked. The grounds were said to be no more than a disagreement with a factual assessment properly open to the judge.

Discussion

14. I am persuaded, for the following reasons, that the judge's decision involved the making of errors on points of law that require the decision to be set aside.
15. My first concern relates to the basis for the judge's conclusion that the appellant was not a member of a PSG. I note that in the March 2018 decision the respondent accepted, at paragraph 29, that "victims of trafficking are perceived as different in society and form a particular social group". This was based on long extracts from the US Trafficking in Persons report 2017 which considered in detail the attitude and actions of the Chinese government in respect of trafficking. The June 2019 decision, in contrast, concluded at [26] that victims of trafficking were not perceived as being different by the surrounding society. The extracts relied on however had little to do with the Chinese government's attitude and efforts to protect victims of trafficking. More significantly, although the judge directed herself according to the relevant authorities relating to membership of a PSG, I am persuaded that the judge has failed to give adequate reasons for concluding, at [23], that, as the appellant was "in effect, rescued on arrival in the UK" without the risk of being forced into prostitution materialising, she would not be regarded as a member of a PSG, particularly in light of the country expert's evidence. Mr Kurlantzick indicated that, "people who were trafficked once from China return and are often shunned by society - which often equates trafficking with prostitution" (paragraph 22). The country expert additionally stated, "people who were trafficked and/or engaged in sex work - are often viewed with a social stigma in China, one that makes it hard for them to gain employment, networks of friends and family, and find housing, particularly if they have no natural support network to lean on upon their return to the country" (paragraph 26). The country expert stated, "...

There is significant social stigma in China against people who are trafficked and returned (especially lone females) - landlords, employers, hospitals and others do not want to treat these people, for fear that the migrants' passed illegal activities will somehow bring the police and other security services to the landlords, employers and hospitals to investigate them" (paragraph 35). And at paragraph 36 the expert stated, "this social stigma against returning migrants - who are also assumed to have taken part in sex work, whether or not this is really true, - would make it very difficult for a woman to reintegrate into Chinese society." In reaching her conclusion the judge failed to take into account this evidence. Whilst the judge was not obliged to accept the views of the expert, it was incumbent on her to engage with this evidence and to give reasons for rejecting it. I'm additionally concerned that the judge misdirected herself at [23] in requiring that "all" members of the proposed PSG had to be perceived as different with a distinct identity in China. There is no requirement that all members of proposed PSG have to be perceived as having a distinct identity in order for the PSG to exist for the purposes of the Refugee Convention.

16. I am additionally satisfied that the judge's conclusion that the appellant would not be at risk from those who trafficked her to the UK, or at risk more generally of being trafficked or exploited, and that she could internally relocate, failed to adequately take into account the country expert report, or the accepted facts relating to the appellant's trafficking. It is apparent from the appellant's account that she was trafficked into the UK by a criminal gang. I fully accept that there was no mention of snakeheads, that the appellant does not claim to have a contractual debt to pay off, and that she has not been approached by any gang member in the UK. I additionally accept that **HC & RC** found that women and girls in China do not generally face a real risk of serious traffickers. There was however evidence in the country expert report suggesting that someone in the appellant's position may nevertheless be at risk on return. At paragraph 50 of his report the country expert indicated that the spread of the Internet and social media makes it easy for criminal networks including trafficking groups, to monitor people who come into China especially when they are removed from Europe or North American countries. At paragraph 16 the country expert stated, "... The use of social media and the Internet - combined with the extensive on-the-ground networking connections with police local officials that many Chinese criminal syndicates possess in the country - makes it possible in my experience for syndicates trafficked people to track returnees not only when they arrive in international airports but when they travel throughout the country." At paragraph 30 the expert stated that people were trafficked once are indeed at much higher risk of being re-trafficked if they are returned to China." At paragraph 58 the expert stated, "If she were returned to China, it is plausible that she (the Appellant) would be endangered again and find it difficult to obtain long-term shelter upon return. She would be easily traceable in her home area by her original traffickers or other trafficking groups. Moreover, even though she could relocate within China she would still be endangered and

vulnerable wherever she relocated within the country.” And at paragraph 62 the expert stated that, “... trafficking organisations are known to explicitly target people in China who have been returned to the country as they know these people often return unemployed and unskilled and homeless and have no protection from the threat of being trafficked.” Whilst the judge was not obliged to accept this evidence, it was incumbent on her to at least engage with it and to explain why this particular appellant, applying the extant Country Guidance case, would not be at risk of serious treatment if returned to her home area and why it was reasonable for her to internally relocate, particularly in light of her mental health. I find that the judge’s failure to consider these aspects of the expert country report anywhere in her determination constitutes a material error of law.

17. I have several concerns with the judge’s approach to the Clinical Psychologist’s report. The judge found that the Clinical Psychologist had no factual basis for her opinion that the appellant may have been the victim of sexual violence and that such a conclusion was speculative. It is clear however from the psychological report that the author was aware and accepted that her opinion was speculation as she said the appellant “*may* have been the victim of sexual violence” (at 2.7) [*my emphasis*]. This is not a legitimate reason for reducing weight to the psychological report. Moreover, at 5.7 of her report the Clinical Psychologist explained that she was asked in her letter of instruction to ‘investigate the possibility that (the Appellant) was the victim of abuse during her period of work in China at the age of 13.’ I do not accept the judge’s assertion that the Clinical Psychologist gave “no further clarification” as to why she concluded that the appellant was avoiding traumatic memories. It was her clinical judgement that the appellant had “... spent many years attempting to protect herself from the distressing thoughts and memories from her past” (at 5.7) and that the appellant’s pattern of thinking... led to the suppression or elimination of painful thoughts or memories, which appears to have resulted in the avoidance of a wide domain of traumatic memories” (supra).
18. The judge appears to reduce the weight she attaches to the psychological report because there was no evidence that the appellant was prescribed antidepressants, despite the Clinical Psychologist’s recommendations. The Clinical Psychologist however stated that the appellant “... is likely to benefit from long-term psychological therapy aimed at enabling her to process the traumas she has experienced” and she “*may* benefit from antidepressant medication to help reduce the severe symptoms of depression from which she is currently suffering” [*my emphasis*]. The judge has not taken into account the oral evidence from LL that the appellant wasn’t taking antidepressants because “we wanted to see how the counselling went” (with reference to an appointment letter dated 13 January 2020 from the Crawley Assessment & Treatment Team). In any event, the fact that recommendations from a Clinical Psychologist have not been put into effect, either in part or in whole, does not logically reduce the probative nature of the psychological assessment or the weight that could be accorded to an expert report. I’m further concerned that

the judge appears to have reduced the weight she has attached to the Clinical Psychologist's expert view because the appellant was now studying a beauty course in college, was able to travel 25 minutes on a bus to and from college, and went out with her friends. There was no explanation as to why the appellant's ability to undertake these tasks somehow reduced the probative weight of the expert's opinion. Nor does the judge appear to have fully considered the evidence from LL that the appellant did "not often" go out with her friends and that she was still living with LL because she was too scared to live on her own. I'm finally concerned that the judge has failed to explain in what manner she gave the psychological report "limited weight." The judge does not explain, for example, whether she attached limited weight to the diagnoses that the appellant was suffering from PTSD and severe depression.

19. I find the errors of law identified above render the judge's conclusions unsafe and that the decision must be set aside in its entirety.

Remittal to First-Tier Tribunal

- 20 Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
21. I have determined that the judge's decision is unsafe for reasons that include a failure to give adequate reasons and a failure to consider relevant evidence. I find that the appellant had been deprived of a fair hearing and of the opportunity to have her case considered. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Hanes.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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 *D. Blum*

Upper Tribunal Judge Blum

Date: 30/09/2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email