



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03881/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 September 2018

Decision & Reasons Promulgated  
On 10 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MISS D G  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms K Reid, Counsel instructed by Marsh & Partners Solicitors

For the Respondent: Mr P Deller, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Albania who was born on 6 September 1974. She has two daughters, both of whom were born in the UK (on 18 January 2015 and 21 April 2016). The appellant came to the UK on 30 September 2014 and claimed asylum on 2 March 2015. The basis of her application is that she was trafficked to the UK for the purpose of forced prostitution and would be at risk from her traffickers and/or family on return to Albania.

2. On 24 August 2017 a referral to the Competent Authority was made by the National Referral Mechanism. The Competent Authority concluded on 24 August 2017 that the appellant was not a victim of trafficking. The Conclusive Grounds Consideration Minutes state:

“Your case has been considered by a Competent Authority caseworker following the decision that there were reasonable grounds to believe that you could be a victim of modern slavery. As a result of further investigations into your case the Competent Authority caseworker has concluded that on the **balance of probabilities** you have not been exploited and are therefore not a victim of trafficking.” [emphasis added]

3. The appellant’s claim for asylum was refused by the respondent on 8 March 2018. The appellant appealed against that decision and the appeal came before Judge of the First-tier Tribunal Neville at Taylor House on 25 April 2018. In a decision promulgated on 6 July 2018 the judge dismissed the appeal, finding that the appellant had not established a well-founded fear of persecution and that no sustainable account had been put forward that could lead the Tribunal to conclude that returning her to Albania would be contrary to Articles 3 and 8 ECHR. The appellant is now appealing against that decision.

### **Decision of the First-tier Tribunal**

4. The judge directed himself that as a consequence of the Court of Appeal judgments in *MS (Pakistan) v SSHD* [2018] EWCA Civ 594 and *AS (Afghanistan) v SSHD* [2013] EWCA Civ 1469, he was required to accept the factual findings of the Competent Authority that underpin the appellant’s claim to have been trafficked from Albania unless the Competent Authority’s decision was perverse or irrational, or one that was not open to it.
5. At paragraphs 33 to 37 the judge considered whether the Competent Authority’s decision was perverse or irrational and concluded that it was not. The judge then stated that he was required by *MS (Pakistan)* to disregard any postdecision evidence in respect of the facts determined by the Competent Authority.
6. At paragraph 40 the judge stated that if he were not bound by the decision of the Competent Authority he would have reached a different view as to whether the appellant had been the victim of trafficking. At 40(l) he stated:
 

“I would have gone on to allow the appeal on asylum and Article 3 grounds. I would have allowed the appeal on Article 8 grounds, based on the Appellant and her children facing very significant difficulties on return.”
7. At paragraph 41 the judge stated that the appellant:
 

“is not to be considered as a victim of trafficking ... The tribunal is left in the dark as to her ‘true’ situation, as it would be if the Appellant’s core account had been judged entirely incredible by the tribunal. She bears the burden in establishing the facts said to give rise to her future fear, and she cannot.”.
8. At paragraph 42 the judge concluded:
 

“The Appellant’s account not having been established, she cannot engage the risk factors in TD. She does not establish a well founded fear of persecution or real

risk of significant harm. She puts forward no sustainable account that could lead the tribunal to conclude that return would be contrary to Articles 3 & 8 ECHR.”

### **Grounds of Appeal**

9. The appellant advanced three grounds of appeal. The first ground submits that the judge erred in finding that he was bound to follow the decision in *MS (Pakistan)*. The grounds argue that *MS (Pakistan)* is distinguishable from this appeal as the appellant in *MS (Pakistan)* received only a negative Reasonable Grounds Decision where the standard of proof is “I suspect but cannot prove”, whereas in the present appeal the appellant received a positive reasonable grounds decision but a negative Conclusive Grounds Decision where the standard of proof is balance of probabilities. It is argued that as the judge was deciding an asylum claim he should not have considered himself bound by findings that were made to a higher standard of proof and it was therefore submitted that *MS (Pakistan)* is not applicable in this case.
10. The second ground of appeal argues that the judge erred in finding that the decision of the Competent Authority was not perverse, irrational or one that was not open to it. In the Conclusive Grounds Decision significant weight is placed on a claimed internal inconsistency in the appellant’s account. The Conclusive Grounds Decision states:
 

“The internal credibility of your account has been considered. You claim that your problems in Albania started in August 2014. You claim that as a result you left Albania for a new life in the UK in September 2014. This is noted to be wholly at odds with the available information from Albanian authorities which confirms that you last left Albania in January 2014, several months before the claimed events took place in Albania. This is considered to fundamentally undermine your account as a whole.”
11. Before the First-tier Tribunal the appellant argued that it was wrong for the Competent Authority to place significant weight on a claimed discrepancy arising from information obtained from the Albanian authorities without giving her an opportunity to explain the discrepancy. At paragraph 34 of the decision this submission was rejected. The judge stated:
 

“There is no broader requirement of procedural fairness for which authority was cited, or discrete provision in the guidance, requiring claimed victims of trafficking to be able to comment on evidence adverse to them prior to reliance being placed upon it.”
12. In the grounds of appeal the appellant cited provisions of “Victims of modern slavery – Competent Authority guidance Version 3.0” where it is stated:
 

“When is the adult potential victim of modern slavery interviewed?  
Interviews are more likely to be relevant to a conclusive grounds decision rather than a reasonable grounds decision.  
Trafficking or modern slavery interviews do not have to be carried out with potential victims in all NRM cases. When the Competent Authority is considering the evidence it may be the case that the information submitted on the individual’s situation is so compelling that an interview is not necessary or it may be possible to clarify the

modern slavery issues as part of the asylum process by asking relevant questions during an asylum interview.

**If the information provided is slim or contradictory, an interview may help to clarify things - for example by allowing the potential victims to comment on any inconsistencies. A victim might also be asked to account for inconsistencies by other methods such as in writing.**

It is also reasonable to assume that a potential victim who has experienced an event will be able to recount the central elements in a broadly consistent manner. A potential victim's inability to remain consistent throughout their written and oral accounts of past and current events may lead the Competent Authority to disbelieve their claim. However, **before the Competent Authority come to a negative conclusion, they must first refer back to the first responder or other expert witnesses to clarify any inconsistencies in the claim.** [emphasis added]

13. It is maintained in the grounds that given the weight placed upon the evidence from the Albanian authorities as to the date the appellant is said to have left Albania, the judge erred in finding that there was no requirement on the Competent Authority to give the appellant an opportunity to comment on this before the final conclusive grounds decision was made.
14. The third ground of appeal argues that the judge erred in failing to make findings in respect of the appellant's Article 8 claim. The grounds submit that the judge dealt with this in only a cursory manner and that there is no engagement with issues relevant to Article 8 ECHR.

### **Submissions**

15. I heard submissions from Ms Reid on behalf of the appellant and Mr Deller on behalf of the respondent.
16. Ms Reid recognised that she was in some difficulty with her first ground of appeal given that I was bound by *MS (Pakistan)* but argued that the present case is distinguishable because the appellant in *MS (Pakistan)* had been subject only to a reasonable grounds decision and not a conclusive grounds decision.
17. In respect of the second ground of appeal Ms Reid highlighted that the Competent Authority had reached a decision without giving the appellant an opportunity to comment on an issue that was treated as determinative. She argued that this amounts to perversity. With regard to Article 8, Ms Reid's submission was that the judge had omitted to consider the relevant factors or give reasons for the decision.
18. Mr Deller acknowledged that the decision in *MS (Pakistan)* is difficult to reconcile with the lower burden of proof that is applicable in asylum claims, but maintained that I was obliged to follow it as he did not accept that it could be distinguished from this appeal.
19. With regard to the claim that the Competent Authority's decision was perverse, he argued that the judge had considered this carefully and that the criticisms advanced by Ms Reid were not sufficient to mount such a challenge.

20. However, Mr Deller accepted that the judge had erred by failing to address Article 8 ECHR and in particular by failing to consider the best interests of the appellant's two children. He accepted that the decision would need to be remade in respect of Article 8, but submitted that the decision of the First-tier Tribunal in respect of the asylum claim should stand.
21. Both parties were in agreement that if I were to find that the judge erred by finding he was required to accept the factual findings of the Competent Authority I should remake the decision by allowing the appellant's appeal for the reasons given by the judge in paragraph 40 of the decision (where the judge set out the findings he would have made if not bound by the decision of the Competent Authority).

### Analysis

22. The Court of Appeal in *MS (Pakistan)* has made clear that a Tribunal can only go behind a trafficking decision of the Competent Authority and re-determine the factual issues relevant to whether trafficking occurred if the decision of the Competent Authority was perverse, irrational or one which was not open to it. See Paragraphs 69 and 70 of *MS (Pakistan)*.
23. Whilst I can see the attraction of Ms Reed's argument that 'reasonable grounds decisions' (where there is a lower standard of proof) should be distinguished from 'conclusive grounds decisions' (where a higher standard of proof is applied), this is not consistent with *MS (Pakistan)* where no such distinction is made. It is notable that *AS (Afghanistan)*, which is commented on extensively in *MS (Pakistan)*, concerned a conclusive grounds decision but no significance was attached to this in *MS (Pakistan)*.
24. The judge was therefore correct when he concluded that he was bound to follow the Court of Appeal in *MS (Pakistan)* and consequently was unable to revisit the factual findings made by the Competent Authority as to whether trafficking of the appellant had taken place unless the decision of the Competent Authority was perverse, irrational or one which was not open to it.
25. I now turn to the second ground of appeal where it is contended that the judge erred by failing to recognise that the decision of the Competent Authority was perverse. The Competent Authority found that the appellant's account was "fundamentally" undermined "as a whole" because there was a discrepancy between the date she said she left Albania (August 2014), and the information obtained by the Albanian authorities which states that she left Albania in January 2014. This discrepancy appears to have been treated as determinative, as after referring to it the Competent Authority then considered other issues relevant to credibility only "for the sake of completeness".
26. The Competent Authority's conclusion that this discrepancy fundamentally undermined the appellant's account was reached despite the appellant claiming to have used false travel documents (which might plausibly account for it), and without the appellant being made aware of the information from the Albanian authorities so that she could give a response. The Competent Authority's guidance envisages that there will be circumstances where it is appropriate for a person to be given an

opportunity to comment on an inconsistency. Given that so much weight was being placed on the evidence from the Albanian authorities and that the appellant's account indicated that there could be a plausible explanation for the discrepancy, it was, in my view, perverse for the Conclusive Grounds Decision to be reached without giving the appellant an opportunity to comment on the inconsistency. The judge therefore erred by finding he was bound by the factual findings of the Competent Authority.

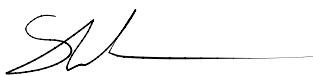
27. A further error was made in respect of Article 8 ECHR. As acknowledged by Mr Deller, the judge's evaluation of the claim was inadequate as, inter alia, he failed to consider the best interests of the children.
28. In remaking the decision I am not bound by the factual findings of the Competent Authority as, for the reasons given above, I have found that its decision was perverse. At paragraph 40 of the First-tier Tribunal decision the judge, applying the lower standard of proof applicable in asylum cases, set out the findings he would have reached if he did not consider himself bound by *MS (Pakistan)*. He found the appellant's account to be credible and, applying *TD & AD (Trafficked Women) CG* [2016] UKUT 92 (IAC), concluded that she faced a real risk of re-trafficking if returned to Albania. Given the cogency of the judge's unchallenged reasoning in paragraph 40, and that both parties agreed that if I found the judge was not bound by the fact finding of the Competent Authority I should remake the decision based on the findings of fact in that paragraph, I allow the appellant's asylum appeal for the reasons given by the judge in paragraph 40 of the First-tier Tribunal decision.

### **Decision**

29. The decision of the First-tier Tribunal contains a material error of law and is set aside.
30. I remake the decision of the First-tier Tribunal by allowing the appellant's appeal on asylum grounds.

### **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 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   
Deputy Upper Tribunal Judge Sheridan

Dated: 1 October 2018