Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04310/2015

THE IMMIGRATION ACTS

Heard at Manchester **Decision & Reasons Promulgated**

On 15 March 2016 **On 31 March 2016**

Before

Upper Tribunal Judge Southern

Between

R.P.

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L. Mair of counsel, instructed by Greater Manchester Immigration Aid Unit
For the Respondent: Mr G. Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Malawi, has been granted permission to appeal against the decision of First-tier Tribunal Judge Cruthers, promulgated on 27 May

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2015, by which her appeal against refusal of her asylum claim was dismissed. The essence of that claim was succinctly summarised by the judge at paragraphs 12-13 of the decision which I reproduce but without stating the names of those referred to, given that the appellant has the benefit of an anonymity order:

> "The appellant says that one "Uncle Joe" / Joe (K) arranged for her to come to this country, ostensibly to study, and then forced her into prostitution. She says that she would be at risk of mistreatment / death at the hands of Uncle Joe if she were returned to Malawi.
>
> The appellant also bases her case for remaining in the UK on on-going contact that her second son, (J) is said to have with his Dutch national father (Mr KK) (the appellant's own account is that her first son, (K), has never had any contact with his father."

2. The judge then went on to set out the key aspects of the appellant's account which, for present purposes, I can summarise as follows. The appellant's surviving parent died in 2004. Before coming to the United Kingdom on 28 January 2002 the appellant, having completed her schooling, worked as a receptionist for a while. Although she had spent some time living in the capital city of Lilongwe when aged 12 or 13, otherwise she lived with her father and relatives - an uncle and three brothers - in Blantyre. The appellant's move to the United Kingdom was arranged by Uncle Joe, who may have been a friend of the family rather than a blood relative, and he accompanied her. She was admitted with leave to remain as a student for 2½ years. However, as I have said, on arrival she was forced to work as a prostitute and did not undertake any studies.

3. In 2004 she commenced a relationship with one of her clients who took her to Birmingham where they lived together. In May 2009 she heard from a brother in Malawi that Uncle Joe had returned, had denied that she had been forced to work as a prostitute and had threatened to do harm to her on account of the lies she had told about him.

4. Her relationship with the former client came to an end in 2009 when he accused her of becoming pregnant by another man, which was in fact so, her child being born on 6 June 2009, his father also being a citizen of Malawi. The appellant had a short relationship with Mr KK and he is the father of her second son, J, who was born on 24 August 2011. An attempt made last year to register J as a Dutch citizen was unsuccessful and Mr KK, who gave oral evidence before the First-tier Tribunal, said that he was "too busy" to make a second attempt to achieve this.

5. In evidence, the appellant confirmed that she still has a brother, now aged 19, and a grandmother living in Malawi in a village in Mwanza district. She herself is not in any present relationship. She has worked as a care assistant but said she would find it difficult to find work in Malawi "principally because things there have changed and the qualification that she has is not valid any more".

6. Next, the judge recorded that it was accepted by the respondent and therefore not in dispute that the appellant was brought to the United Kingdom by Uncle Joe and exploited in the manner she described.

7. Thus, the risk of coming to harm on return to Malawi was asserted to be at the hands of Uncle Joe. The judge observed, at paragraph 52 of the decision:

> "In relation to both sufficiency of protection and internal relocation, the first point is that the appellant cannot give any real indication of where Uncle Joe is now (or even if he is still alive). On 18 May the appellant confirmed that her last news of Uncle Joe came from a conversation with her brother in early 2009. The appellant also told me that when she came to the UK in 2002, Uncle Joe had been living in this country for about 10 years. It follows that Uncle Joe may well have settled status in this country and could be based in this country (as opposed to being based in Malawi/ Blantyre). Additionally, the appellant "escaped from" Uncle Joe back in 2004 and it seems quite possible that the appellant having left his household then will no longer be a matter of interest to Uncle Joe."

8. The judge then went on to consider the questions of sufficiency of protection and internal relocation, explaining why he was satisfied that both provided a complete answer to the appellant's protection claim, should there be any continuing interest from Uncle Joe. He noted country evidence before him to the effect that although the government of Malawi does not fully comply with minimum standards for the elimination of trafficking, it is, however, making significant efforts to do so. Also, the country evidence indicated that the authorities were willing and able to assist "female victims of violence". The judge concluded:

> "Whilst… no state can 100% guarantee the safety from harm for any section of its population, applying the "practical standard" explained by the House of Lords in Horvath [2000] UKHL 37, I could not properly find that in Malawi there is no sufficiency of protection available to this appellant."

   He continued:

> "On the question of internal relocation, the appellant is a 37 year old woman without health problems. The appellant does not claim that her sons have significant health difficulties. Her only claim bordering on that was a suggestion that (J) is behind in learning to speak. But it is not especially unusual to find a child of (J's) age to be behind his peers in general when it comes to speaking, and there is no documentary information relating to this claim."

9. The judge noted that the appellant had spoken of Uncle Joe as being a "well known person" she did not suggest that he had any particular power or influence in Malawi. She was not aware that Uncle Joe had previously had any corrupt relationship with the authorities. He found, therefore that:

> "… even if Uncle Joe heard about the appellant's return to Malawi and was interested in finding the appellant in a part of Malawi away from Blantyre, there is no evidence to show that he would be in a position to do that."

The judge said that the appellant could go to live with her grandmother and 19 year old brother in Mwanza, a village in Blantyre some 3 hours by bus from Lilongwe. He added:

> "Even taking full account of the appellant's difficult history, I cannot find that it is unreasonable to expect this appellant to internally relocate with her two sons."

10. For these reasons the judge found that the protection claim was not made out.

11. In respect of that part of the decision, the appellant pursues two grounds of appeal. The second of those grounds, which is that the judge should have adjourned the hearing so that the appellant could have a further opportunity to arrange for legal representation, can be disposed of relatively shortly. It is said that as this was a complex claim, involving a victim of trafficking and the human rights of two small children, the judge should have "encouraged the appellant to try and seek further legal assistance".

12. The difficulty with that ground is that there is nothing to indicate that the appellant was in any doubt at all of the circumstances in which she found herself and she had ample opportunity to take steps to arrange for legal representation. It is notable that the desirability of seeking legal representation had been pointed out to her in clear and unambiguous terms. The decision under challenge was communicated to the appellant in two documents. A three page letter dated 25 February 2015 headed "ASYLUM DECISION" concluded by saying, under a heading "Your Asylum Decision – Refusal of Asylum":

> "This leaflet provides more information about your claim being refused and the options now available.
>
> If you have not yet taken advice on your position, you are strongly advised to do so now."

The second document, which was longer, running to some eleven pages, was headed "DETAILED REASONS FOR REFUSAL" The very last statement in that document was in similar terms:

> "If you have not yet taken advice on your position, you are strongly advised to do so now."

13. The appellant attended a preliminary case management hearing before the First-tier Tribunal on 30 April 2015 when, as is clear from the report sheet compiled by the judge who conducted that hearing, the question or representation was raised. Although it was recorded that the appellant had no legal representation, it is

apparent from this that on this occasion too the appellant was alerted to the question of whether she should arrange for legal representation at the appeal hearing that was to follow. Finally, on 18 May 2015, just short of three months after receiving the decision to refuse her asylum claim, the appellant attended at the substantive hearing of her appeal. It is clear from the record of proceedings that the judge raised with her at the outset the fact that she was unrepresented and made clear that he would take what steps he could to assist her in the presentation of her appeal. The appellant made no application for an adjournment and nor did she say that she did not want the appeal to proceed while she was without legal representation.

14. Ms Mair submits that the judge erred in failing to "encourage her" to seek an adjournment to provide her with a further opportunity to arrange for legal representation. I am, however, entirely satisfied that there was no procedural irregularity on that account and that the judge did not in any way fall into error. Although it is true that the appellant was, subsequent to the appeal hearing, able to secure legal assistance *pro bono*, there was nothing before the judge to suggest or indicate that the appellant would be represented if he declined to determine the appeal listed before him and instead adjourned it to some future date.

15. Ms Mair speaks of the case as being a complex one, but the summary above of the appellant's protection claim does not sit comfortably with such a categorisation. This was not a case where there had been a claimed risk of re-trafficking. Even now, as Ms Mair confirmed, the appellant's case in respect of her protection claim is that she faces risk on return only at the hands of Uncle Joe, not on the basis that she would be re-trafficked but because he would seek to do her harm in retribution for damaging his reputation by speaking of him forcing her into prostitution.

16. Therefore that ground fails. The judge made no error of law in refusing to grant an adjournment that had not been sought.

17. The other ground raised in challenge of the rejection by the judge of the protection claim is also articulated as being one of procedural unfairness in that the judge failed adequately to scrutinise the country evidence referred to in the refusal letter. Ms Mair submits that had the judge scrutinised adequately the country evidence that was available to him he would have appreciated that the material relied upon by the respondent related not to protection for victims of trafficking but was concerned with women who were victims of rape, sexual assault and domestic violence. Therefore, the evidence the judge thought was available to establish a sufficiency of protection for victims of trafficking in fact was illusory and did not establish that at all. Even if, by analogy, availability of shelter for women and willingness and ability to prosecute offenders was relevant, it is plain that such assistance and protection was limited in its extent. Properly understood, she submitted, the country evidence demonstrated that the government of Malawi relied upon NGOs to provide women's shelters but provided no funding. That was not evidence of the state providing a sufficiency of protection.

18. However, even if it were accepted to be an error of law by the judge not to carry out a more detailed examination of the country evidence before him for the reasons now put forward, that error would plainly not have been a material one. There was no question or expectation of this appellant being driven to seek refuge on return to Malawi in a Women's shelter or to have any anticipated need to seek protection from the risk of being re-trafficked. She had available to her the prospect of return to the protection of her own family in a familiar district of Malawi and there was nothing at all to suggest that would not be a reasonable and safe relocation option, even if it did not precisely replicate the arrangements of family living before her departure.

19. The reasons given by the judge for finding that there was no real risk of the appellant coming to harm at the hands of Uncle Joe on return to Malawi are clear, legally sufficient and simply unassailable. There was nothing to suggest that she faced a well-founded, or even articulated, fear of any other source of harm.

20. For these reasons the grounds challenging the decision of the judge to dismiss the appeal against refusal of asylum fail and in that respect the appeal to the Upper Tribunal is dismissed.

21. However, the position is somewhat different in respect of the grounds upon which the appellant challenges rejection by the judge of her claim under article 8 of the ECHR. In this regard I am entirely satisfied that the judge did fall into material legal error.

22. The article 8 claim before the judge was one that required detailed and careful assessment. The appellant, having been trafficked to the United Kingdom for the purposes of prostitution, has now been resident in the United Kingdom for 14 years. She has two young children, both born here and although she is not in any continuing relationship with the father of either child, or indeed anyone else, the father of the youngest child, who is said to be a Dutch citizen, continues to have contact with his son and supported the appeal by attending to give oral evidence.

23. The judge recognised that it was plainly in the best interest of the children to remain with their mother, who herself had no basis of stay. He recognised also that:

> "It is probably also the case that in this country the appellant's children would have access to better education and healthcare services than if they were in Malawi"

And that:

> "It also weighs heavily in the appellant's favour that her two sons were born in this country and have never known a life outside the UK."

Despite that, he concluded:

> "But in my assessment, such factors as do tell in favour of the appellant here are outweighed by factors indicating that this appeal must be dismissed on "classic article 8 principles" including:
>
> It seems to me to be of significance in this case that if the appellant and her children are allowed to remain in the United Kingdom, the UK taxpayer is likely, for the forseeable future, to need to pick up most of the costs of their accommodation, financial support, health care, education and so on."

Building upon this, the judge said that although Mr KK was paying £10 per week as a contribution to the cost of caring for his son, this was "a drop in the ocean when it comes to the costs of housing, feeding and educating a child in the UK", and he then said this:

> "Of course, such a situation arises very commonly in the cases of those seeking asylum, and those granted refugee status, but it has to be borne in mind that this is an appellant whose case for asylum has been rejected. And, as Rix LJ indicated in paragraph 49 of **AAO [2011] EWCA Civ 840 22 July 2011**, it is very unlikely to be a disproportionate breach of article 8 to refuse leave to enter (or leave to remain) where an appellant has not shown that they can be adequately maintained without [additional] public funds: "a requirement that an entrant should be maintained without recourse to public finds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens (and see Part 5A)"

24. There are a number of difficulties with that central plank of the reasoning of the judge that led him to reject the article 8 claim.

25. First, reliance upon that *dicta* of Rix LJ was, in the circumstances of this case, simply misconceived. The opening observations of paragraph 49 of *AAO*, to which the judge had no regard, were these:

> "There is no question of a proposed removal in this case, but only of whether the mother is to be given leave to enter. It is hard to say that refusal of such leave is an interference with the exercise of the mother's right to respect for her family life."

Thus the judge was simply wrong as a matter of principle to import into a removal case issues that arise in an entry clearance case. The addition by the judge of the words "or leave to remain" was not appropriate. This is evident from what followed:

> "However, let it be supposed that it is. (2) Will such interference have consequences of such gravity as potentially to engage the operation of article 8? Given the weakness of the family life in issue in this case, and the facts that the mother has accommodation, care and support from a near neighbour and old family friend, medical assistance, financial support and no life-threatening or debilitating illness,

> it is not possible to conclude that the answer to this question should be positive. But let it be supposed that it is. (3) Such interference would be in accordance with law, namely pursuant to the applicable immigration rules (subject of course to the ultimate outcome of the article 8 issue). (4) and (5) These questions of justification and proportionality are, as has been said, often taken together. I have no doubt that only one answer is possible to them, on any view of the previous questions. As Strasbourg and domestic jurisprudence has consistently emphasised (see above), states are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should be maintained without recourse to public funds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens. It is an unfortunate reality of life that states, especially one like the United Kingdom which is generally accessible and welcoming to refugees and immigrants, cannot undertake to allow all members of a family to join together here, even those members who can show emotional and financial dependency, without creating unsupportable burdens."

It can be seen that in this judgment the Court of Appeal was concerned with the particular dynamics of an entry clearance case and not one where an appellant was facing removal. It might be thought that the circumstances of this particular appellant, with 14 years residence in the United Kingdom and two young children who were born here, were about as far removed from those of the appellant in *AAO* as it is possible to imagine.

26. That is enough, in itself, to establish that the approach taken by the judge to the striking of a balance between the competing interests in play was legally and materially flawed. But he made other errors of law also.

27. The reference to Part 5 of the Nationality, Immigration and Asylum Act 2002 suggests strongly that the judge has impermissibly imported a threshold test into his article 8 assessment of a requirement to be financially self-sufficient. He assumed, without raising this with the appellant, that her ability to be economically active should leave be granted to her would be no better than it had been while she was unlawfully present without leave. Also, there is absent from his assessment any real consideration of the living circumstances for the children in Malawi, the judge saying this at paragraph 82:

> "And even though one can properly say that the best interests of the appellant's children probably mean that the appellant should be allowed to remain in this country, those best interests are outweighed by other relevant factors, including the maintenance of proper immigration control…"

That suggests that the best interest of the children have been displaced by the judge's flawed assessment of the weight to be given to his expectation that the appellant and her children would not be financially self-sufficient. While it is clear from s117B(3) of the 2002 Act that it is in the public interest that persons who seek leave to remain are financially independent that is not the same as saying that the

public interest requires the removal of all those who are not financially independent.

28. Also, at paragraph 79 of the decision the judge made clear that he regarded the fact that the two children were "conceived at times when the appellant would have been well aware that her immigration status was very uncertain" to be a factor that weighed in the balance against the article 8 claim being advanced. However, when considering the best interest of the children it is hard to see how that fact can properly be regarded to be a negative factor.

29. For these reasons, the decision of the judge to dismiss the appeal on article 8 grounds cannot stand and will be set aside. It was common ground and agreed between the parties that in the event of such an outcome the appeal should be remitted to the First-tier Tribunal to be determined afresh, even though the appeal on asylum grounds has been refused. That is because the appellant is now represented and so the case is likely to be agreed in a wholly different manner than it was advanced previously. Also, time has moved on and it is anticipated that there will be fresh issues relevant to infirm the article 8 claim.

Summary of Decision

30. The appeal to the Upper Tribunal on asylum grounds (and in respect of articles 2 and 3 of the ECHR) is dismissed so that in that respect the decision of First-tier Tribunal Judge Cruthers is to stand.

31. The appeal to the Upper Tribunal on human rights grounds (article 8 of the ECHR) is allowed to the extent that the decision of First-tier Tribunal Judge Cruthers in that respect is set aside and the appeal is remitted to the First-tier Tribunal so that the appeal be determined afresh on article 8 grounds only.

32. Signed

Date: 16 March 2016

Upper Tribunal Judge Southern