Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04095/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 10 December 2019	**On 7 January 2020**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

M Y C
(ANONYMITY DIRECTION MADE)
Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Ms E Fitzsimons of Counsel instructed by AB James Solicitors
For the Respondent: Mr A Tan, Home Office Presenting Officer

AMENDED[1] DECISION AND DIRECTIONS

[1] Amended under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in order to correct particulars of Counsel and instructing solicitors.

© CROWN COPYRIGHT 2020

1. The appellant, a national of China, has permission to challenge the decision of Judge McClure of the First-tier Tribunal sent on 1 October 2019 dismissing her appeal against the decision made by the respondent on 4 April 2019 refusing her protection claim.

2. The appellant arrived in the United Kingdom in April 2006 and claimed asylum the same day. Her application was refused by the respondent in December 2006. She did not appeal and thereafter was placed on reporting conditions when encountered for working illegally. In March 2015 and again in June 2016 she lodged further submissions. These were linked with a referral made on her behalf to the National Referral Mechanism (NRM) in order for a competent authority to make a decision as to whether she fell within the definition of a victim of trafficking. An NRM decision was made on 15 October 2018 concluding that she was a victim of human trafficking.

3. There were several strands to the appellant's asylum claim, including that she would be at risk on return because her parents had become involved in a village dispute about compensation for property where the government wished to build a railway, risk from local villagers who had targeted her and her family because of their Christian beliefs and risk from the snakeheads who had arranged for her journey to the United Kingdom. A further dimension to the appellant's claim arose out of the accepted fact that she had been forced into prostitution in the UK by snakeheads in the Scotland area.

4. The judge did not find the appellant's account of her and her family's adverse experiences in China to be credible. However, in light of the Conclusive Grounds decision of the NRM and the respondent's acceptance in light of that decision that the appellant was a victim of trafficking, the judge stated that he was willing to accept that once the appellant and her aunt contacted snakeheads, the appellant had then been trafficked by the snakeheads to the United Kingdom for the purposes of being forced into prostitution. At paragraph 77 the judge said "I accept from what the appellant has said that she was for a period of approximately a year forced into prostitution by snakeheads in the Scotland area". The judge considered whether there would be a risk on return to the appellant from the snakeheads and concluded that there would not. The judge further gave consideration to whether there would be a risk of re-trafficking more generally and concluded that in the light of the extant country guidance decisions there would be a sufficiency of protection in China. The judge also concluded that the appellant's Article 8 circumstances did not make the decision disproportionate.

5. There were three grounds of appeal. It was contended first of all that the judge had failed to have regard to material considerations when assessing the risk on return of re-trafficking, in particular the appellant's vulnerable status in the light of medical and psychiatric evidence. Secondly, it was submitted that the judge had failed to have regard to updating

background evidence contained in the US State Department Report. Thirdly, it was submitted that the judge had failed to have regard to material factors in the Article 8 proportionality analysis.

6. I heard clear and concise submissions from both the representatives.

7. I am persuaded that the judge did materially err in law.

8. In relation to the first ground, whilst the judge did refer to the appellant's claims to have psychological difficulties (including nightmares and finding it difficult to sleep, dreaming that she would be killed and dumped in a river by the sex traffickers) he nowhere considers whether this meant she was a vulnerable witness and whether, pursuant to the Joint President Guidance Note of 2010, allowances had therefore to be made when assessing the appellant's credibility. Compounding this error was the judge's treatment of her mental and psychological health. More than once the judge referred to the appellant being "not ill as no evidence of such has been produced" (paragraph 70) and as having suffered "no problems since 2008" (paragraph 77). Produced before the judge were a number of documents including a Rule 35 report from Dr Rebecca Ward who had described the appellant as having poor sleep and nightmares, and waking up screaming and dreaming of being buried. Dr Ward clearly considered the appellant to be significantly traumatised. There was also a letter provided by a Doctor Fletcher dated May 2019 confirming that the appellant had been attending regular interviews since December 2018 for "severe anxiety, insomnia and low mood, depression". There was a letter from Ms Westergren of the City Hearts Salvation Army Support Services who described the appellant as actively working with the Rape and Sexual Abuse Support Centre in respect of the psychological trauma of trafficking. Even separately from the evidence relating to the appellant's mental health, the judge was still obliged to treat the appellant as a vulnerable witness under the Joint Presidential Guidance Note of 2010 by virtue of his acceptance that she was a victim of trafficking. In short, there is nothing to indicate that the judge took any account of the appellant's psychological difficulties and trafficking history when assessing credibility. This disregard of relevant evidence was not only relevant to the issue of the credibility of her account of her past experiences in China, but was also relevant to the separate dimension of whether the appellant would be at risk on return by virtue of being re-trafficked. It is clear from the judge's assessment of this issue that he considered that not only would she have family support (from an aunt) but that she was resilient and would be able to support herself. At paragraph 85 the judge stated that "given all of the circumstances I see no reason why the appellant would not be able to work and fend for herself as she has done in the United Kingdom without apparent assistance for the period from 2008 through to 2010 ..."

9. The judge's reference to country guidance highlights a second error in his approach. The judge placed specific reliance on the country guidance given by the Tribunal in the case of **<u>HC & RC</u> (Trafficked women)**

China CG [2009] UKAIT 00027. The judge relies on this case at a number of points in his assessment, for example at paragraph 81 and paragraph 85. The difficulty with such reliance is that the case of **HC** was ten years old and at that time China was classified as a Tier 2 watch list country for the purposes of the US State Department Trafficking Report. Before the judge there was the US State Department Trafficking in Persons Report for 2018. This specified that the Chinese state did not fully meet the minimum standards for the elimination of trafficking and was not making significant efforts to do so and therefore remained a Tier 3 country – the worst possible rating. Mr Tan submits that this was not a material error on the part of the judge because although he did not refer to this report, he noted at paragraph 82 that there are organisations which provide help and assistance to women that had been trafficked. However, leaving aside that this reference by the judge was to the state of affairs "as indicated in the case law" (which was significantly out of date) but the recent US State Department Report evidence was far from categorical regarding the sufficiency of the Chinese state in providing protection to victims of trafficking. Early on in the report it is stated that the authorities detained women arrested on suspicion of prostitution sometimes for months and often forcibly returned foreign victims to their trafficking circumstances after they escaped and reported their abuses. The report's recommendations mentioned in particular the need for more positive action to assist inter alia, "Chinese victims returning from abroad". Under the subheading 'Protection' this report stated that the government had decreased efforts to protect victims.

> "Unlike last year the government did not report how many victims it identified during the reporting period nor did it provide agency specific data, although media reports indicated authorities continued to remove some victims from their exploitative situations. ... Access to specialised care depended heavily on victims' location and gender, and the extent to which victims benefitted from these services was unknown".

At the very least, the judge was required to engage with this material and explain why it was that, despite the marked worsening of the trafficking status of China since the relevant country guidance cases, the appellant could nevertheless be expected to receive sufficient protection.

10. In light of my findings on the appellant's first two grounds I do not consider it necessary to rule on ground 3. This relies in particular on the Court of Appeal decision in **PK (Ghana) [2018] EWCA Civ 98** in which it was stated that whether an applicant's personal circumstances were such as to make it necessary for her to stay in the UK must be assessed by reference to the aim of Article 14(1)(a) EC 18 which is the "protection and assistance" of victims of trafficking (paragraph 50). For the respondent and for the judge it was considered as counting against the appellant that her Conclusive Grounds decision did not include any recommendation for a grant of leave to remain in the UK. Whether that is a feature of such a decision that could or should be relevant must be regarded as extremely

moot in light of the analysis contained in the recent High Court judgment in R(JP) v SSHD [2019] EWHC 3346 (Admin). However, given the error of law found in the judge's assessment of the appellant's asylum, humanitarian protection and Article 3 grounds, it is clear that the judge's Article 8 assessment cannot stand either.

11. For the above reasons I conclude that the decision of the judge should be set aside for material error of law.

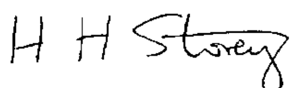
11. Both parties were in agreement with me that if I did find a material error of law the case should be remitted to the First-tier Tribunal. I consider that to be the appropriate course because there will need to be a fresh assessment of the credibility of the appellant's account. That will not be a straightforward task as the appellant has plainly offered contradictory narratives, but the assessment this time must keep to the fore the fact that the appellant is a vulnerable witness.

12. An anonymity direction 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 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 Date: 27 December 2019



Dr H H Storey
Judge of the Upper Tribunal