Neutral Citation Number: [2013] EWCA Civ 1469

Case No: C5/2012/1564

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2013

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE RYDER
and
THE RIGHT HONOURABLE LORD JUSTICE BRIGGS

- -

Between :

AS (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Mark Schwenk (instructed by **Jackson & Canter**) for the **Appellant**
Mr Bilal Rawat (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 30th October 2013

- -

Judgment

Lord Justice Longmore:

1. The question in this appeal is the extent to which (if at all) judges of the Immigration and Asylum Chamber should regard as conclusive decisions of the "Competent Authority" determining that an appellant before them has or has not been a victim of trafficking.

2. AS claims to have been a victim of trafficking and that the Council of Europe Convention on Action against Trafficking in Human Beings, signed by the United Kingdom on 16th May 2005 ("the Trafficking Convention") applies to him. If he is (or has been) a victim of trafficking he may be entitled to a temporary renewable residence permit and may be entitled to other assistance from the United Kingdom authorities. There is no national legislation giving effect to the Convention but the UK Government has met its convention obligations by creating a National Referral Mechanism ("NRM") to identify and support victims of trafficking. The United Kingdom Border Agency ("UKBA") is the "Competent Authority" for making decisions in situations in which trafficking is raised as part of an asylum claim or in the context of other immigration processes. In the present case the UKBA has decided that AS is not a victim of trafficking and that the circumstances on which he relied to support his case amounted to people smuggling rather than human trafficking.

3. AS's case is that he was born on 21st July 1991 in Afghanistan. He says that he left Afghanistan with other members of his family but became separated from them en route to the United Kingdom where he arrived on an unidentified date. On 21st July 2008 he was found by Hertfordshire police who, thinking he might be under 18, placed him in the care of the local authority. Not appreciating this gesture, AS absconded almost at once and was not heard of again until 11th October 2010 when he telephoned 999, asked for the police and said he had nowhere to go. He was arrested and immediately claimed asylum. He was interviewed on 11th October and an immigration officer completed an NRM referral form. He was interviewed for a second time on 22nd October for the purpose of assessing his claim to asylum. He claimed in those interviews that his father had had a dispute with an uncle as a result of which his father and his sister had been kidnapped; his sister had been murdered but he and his father had been able to pay a ransom to obtain their release. They decided to leave Afghanistan and agreed to pay $165,000 to an agent to smuggle the remaining family out of Afghanistan. He became separated from his family in Greece but with the assistance of the agent (or perhaps another agent) he was able to come to the United Kingdom.

4. He said that, after absconding from local authority care, he contacted the original agent in Afghanistan in order to establish contact with his family. That agent directed him to a Mr Saleem who said that the family had not paid the whole of the agreed sum to the original agent and that, because $50,000 was outstanding, AS would be held captive in the basement of a London hotel and would have to work as a kitchen assistant until the debt was fully paid. AS was only released in October 2010 when the debt was considered to have been paid. He was then taken into some woods by car, abandoned there and, after walking

for about half an hour, found a telephone box and telephoned the police. As a result of the interviews, AS was identified as a potential victim of trafficking to whom the Convention might be applicable and was referred to the relevant unit in the UKBA for a decision on the matter.

5. On 17th November 2010 the Secretary of State refused AS's claim to asylum on the basis that he had no well-founded fear of persecution if returned to Afghanistan; on 22nd November the Secretary of State made a decision to remove him, thus giving rise to an immigration decision which AS was able to appeal pursuant to section 82(2)(g) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). On the same day a decision was made that there were reasonable grounds to think that AS had been a victim of trafficking. This meant that he could not be removed for at least 45 days while the UKBA as the Competent Authority made a final assessment.

6. On 6th December AS gave notice that he intended to appeal the decision to remove him but it was decided that the appeal would not be processed pending a decision on his trafficking claim. AS was interviewed, for a 3rd time, this time in relation to the trafficking claim, on 20th January 2011; on 25th February 2011 the UKBA issued and sent to AS a "Conclusive Grounds Trafficking Consideration" signed by the decision maker, a Ms Terry Farrell. In considering the treatment of AS by Mr Saleem, Ms Farrell after quoting the relevant definition of "forced labour" said this:-

> "From the evidence provided it appears that [AS] was kept captive and required to work until the alleged debt was repaid. Ordinarily this could be considered to be a case of people smuggling rather than trafficking. However [AS] claims to have been a minor at the time that he was taken by the Agent and forced to work. It is considered that as a minor he should not have been held responsible for the debt incurred by his father, and that the work he was required to do by Mr Saleem could therefore be considered to be forced labour."

Ms Farrell then considered evidence about AS's age and concluded that he must have been at least 18 before he left Afghanistan and ended by saying:-

> "It is concluded that the arrangement [AS] then entered into with the UK based agent Mr Saleem is that he was to work for Mr Saleem until the debt of $50,000 was repaid. Once the debt was paid off [AS] was released. Although the conditions under which he worked are not considered acceptable in the UK, it is concluded that this is a case of people smuggling rather than human trafficking."

7. This decision could be said to be questionable in that Ms Farrell appears to have accepted AS's account of what actually happened to him namely that he was kept captive and required to work until "the debt" was repaid. Although this appears on any view to be "forced labour", Ms Farrell seems to think that it would only be forced labour if suffered by someone under 18. There does not appear to be any warrant for this in the Trafficking Convention or the Guidance

issued by the Home Office for Competent Authorities. If, therefore, a challenge to Ms Farrell's decision had been mounted by way of judicial review, on the grounds of Wednesbury unreasonableness, any such challenge might have had some prospect of success.

8. Once the decision of the Competent Authority was available, AS's appeal against the refusal of asylum was listed and heard in Manchester on 8th April 2011 by FTT Judge de Haney. Mr Schwenk appeared for AS and ensured that the documentation in relation to the trafficking decision was before Judge de Haney who was concerned that the police never investigated the allegation that AS had been held against his will for over 2 years. The judge permitted himself to observe that the Authority's conclusion that AS had not been a victim of trafficking was "astonishing" (para 29) but in the end he only considered matters which he considered were germane to the asylum and removal appeal, saying that the events of the previous two years appeared to him to be "peripheral" to the matters he had to decide. He then dismissed the appeal on the basis that AS had no well-founded fear of persecution if he was returned to Afghanistan.

9. On 29th July 2011 AS was given permission to appeal to the Upper Tribunal by SIJ Allen on the basis that it was arguable that FTTJ de Haney had not made it clear whether he accepted that AS had been trafficked to the UK and subjected to forced labour after his arrival. On 12th April 2012 UTJ Martin decided that the absence of any finding on that issue did not matter since FTTJ de Haney had no jurisdiction to review the trafficking decision of the UKBA. There was thus no error of law in Judge de Haney's decision. Permission to appeal has been given by Beatson LJ who identified the important point of principle for the purpose of what is, of course, a second appeal as being:-

> "whether the question of making a finding in relation to trafficking is one where the Secretary of State's decision can only be challenged by judicial review or whether it falls within the scope of an appeal."

10. The leading domestic authority on the Trafficking Convention is R (AA Iraq) v SSHD [2012] EWCA Civ 23. The judgment of Sir David Keene (with whom the other members of the Court agreed) introduces the subject in this way:-

> "33. The Trafficking Convention, which came into force in this country on 1st April 2009, imposes a number of obligations on the member States of the Council of Europe, obligations which in the United Kingdom have largely been implemented by the adoption of policies by the government minister mainly responsible, the Home Secretary. The identification of a person as a victim of trafficking provides no automatic right to remain on a long term basis in this country, although as will be seen there are provisions dealing with periods of time for the person concerned to recover and escape the influence of traffickers and also dealing with the grant of residence permits in certain circumstances. But decisions on claims by a person to be a victim of trafficking are not immigration decisions for the

> purposes of the immigration legislation and there is thus no statutory process for appeals. Judicial review would seem to be the only remedy."

He then sets out the relevant provisions of the Convention with its definitions of "victim" and "trafficking in human beings" which includes "forced labour or services". He also sets out Article 10 which in paragraph 2 requires each party to the Convention to ensure (1) that, if the Competent Authority has reason to believe that a person has been a victim of trafficking in human beings, that person is not to be removed until the identification process as victim has been completed and (2) that such person receives the assistance provided for by Article 12 of the Convention. Article 14 then provides that if the matter proceeds to a conclusive decision that the person is a victim of trafficking, a renewable residence permit is to be issued if the Competent Authority considers that their stay is necessary owing to their personal situation or for the purpose of their co-operation in investigation or criminal proceedings.

11. Mr Schwenk for AS at first seemed to submit, on the basis of SSHD v Abdi [1996] Imm. A.R. 148, that the Secretary of State had failed to follow her policy of giving assistance to victims of trafficking, that that meant that the decision to remove AS was not in accordance with the law and that that of itself meant that the decision of Ms Farrell was appealable to the FTT Judge. Mr Rawat for the Secretary of State submitted that that was directly contrary to the dicta in AA (Iraq) that a decision of the Competent Authority was not an immigration decision and the only remedy in respect of Ms Farrell's decision was by way of judicial review. So far I agree with Mr Rawat.

12. Mr Schwenk, however, also submitted that, on appeal to the First Tier Tribunal against a decision to remove AS, the appellant was not confined to arguments about asylum but could make any argument he wished which was relevant to the decision to remove. One such argument he should be permitted to raise was that he was (or had been) a victim of trafficking. The First Tier Tribunal could not (or should not) refuse to entertain such evidence because it was relevant to the decision to remove which was the immigration decision which was being appealed pursuant to section 82(2)(g) of the 2002 Act.

13. Mr Rawat did not strenuously oppose Mr Schwenk's argument framed in this way and in my judgment he was right not to do so. If the conclusive decision of the Competent Authority was that AS had indeed been a victim of trafficking, it would be very odd if the First Tier Tribunal could not take that into account but had to dismiss an appellant's appeal against a decision to remove without remitting the matter to the Secretary of State to take into account the decision that such appellant had indeed been a victim of trafficking and may need the assistance required by the Convention. That indeed has been decided by the Upper Tribunal in EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania [2013] UKUT 00313 a decision which I would respectfully endorse.

14. If the First Tier Tribunal is entitled to take into account a decision that an appellant is (or has been) a victim of trafficking it seems odd that, if a perverse decision has been reached that an appellant has not been a victim of trafficking, the Tribunal cannot consider whether the facts of the case do, in fact, show that

the appellant was a victim of trafficking. Abdi is authority for the proposition that a failure by the Secretary of State to apply her own policy is an error of law in the sense that she will have failed to take a relevant consideration into account. If in fact AS has been trafficked but the Secretary of State ignores that fact she will have failed to apply the relevant policy in relation to victims of trafficking. The mere fact that the Competent Authority has made a decision which on analysis is perverse cannot prevent the First Tier Tribunal judge from considering the evidence about trafficking which is placed before him; nor can it, in my judgment, be relevant that no judicial review proceedings have been taken by the applicant in respect of the Competent Authority's decision. The FTT judge should consider the matter for himself.

15. It is, moreover, not irrelevant that in the present case the Secretary of State's decision to remove the appellant under section 10 of the Immigration and Asylum Act 1999 contained the usual One-Stop warning:-

> "You must now make a formal statement about any reason why you think you should be allowed to stay in this country. This includes why you wish to stay here, and any grounds why you should not be removed or required to leave…
>
> This on-going requirement to state your reasons is made under section 120 of [the 2002 Act]."

Any submission by the Secretary of State that the First Tier Tribunal should not consider evidence relating to trafficking appears, on the face of it, to be inconsistent with the giving of the One-Stop warning contained in the decision of 22nd November 2010.

16. In SHL v SSHD [2013] UKUT 00312, however, a decision promulgated 3 days before that in EK, the Upper Tribunal reached a different conclusion. There was no adversarial argument but it appears that the appellant had sought to challenge on appeal to the First Tier Tribunal a decision of the UKBA that he had not been a victim of trafficking based on a finding that his assertions had not been considered credible. The Upper Tribunal held that the Convention could not be invoked as a free-standing source of rights since it was an unincorporated international treaty. As far as that conclusion is concerned, it does not purport to deal with the Abdi point that, if the Secretary of State has a policy, it is an error of law not to take that policy into account. That must be true whether the policy is derived from an international treaty or any other source. But para 34 of the decision also says this:-

> "Finally, we consider that it would have been open to the appellant to challenge the respondent's trafficking decision by an application for judicial review. The Tribunal was informed that such challenges have occurred. However, he did not pursue this remedy. We are of the opinion that backdoor challenges to trafficking decisions made by the respondent under the Trafficking Convention are not permissible in appeals of the present kind. They lie outwith the competence of the First Tier and Upper Tribunals."

17. For the reasons given above, I cannot agree with this paragraph of SHL. It seems to me that First Tier Tribunal judges are competent to consider whether the Secretary of State has complied with her policy in relation to trafficking; if asked to consider that question, they should then decide whether she has in fact complied with her policy since that it is (or may be) relevant to her removal decision.

18. In this context it is important to be aware that a decision to refuse asylum is not itself an immigration decision appealable pursuant to section 82(2) of the 2002 Act (any more than a trafficking decision is such a decision). The relevant immigration decision is the decision to remove the appellant under section 10 of the Immigration and Asylum Act 1999 (see s.82(2)(g) of the 2002 Act). It is in reaching the decision to remove that the Secretary of State must consider relevant matters including (where relevant) whether an applicant for asylum is a victim of trafficking. No doubt, if a conclusive decision has been reached by the Competent Authority, First Tier Tribunals will be astute not (save perhaps in rare circumstances) to allow an appellant to re-run a case already decided against him on the facts. But where, as here, it is arguable that, on the facts found or accepted, the Competent Authority has reached a decision which was not open to it, that argument should be heard and taken into account.

19. The question whether it should be heard and taken into account has been answered in the negative by the Upper Tribunal. That answer is wrong in law and I would, therefore, allow this appeal and order remission to the First Tier Tribunal for it to consider whether, in the light of the evidence about trafficking, it should allow AS's appeal and remit the matter to the Secretary of State for further consideration.

Lord Justice Ryder:

20. I agree.

Lord Justice Briggs:

21. I agree also.