The Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: **PA/11068/2018 (P)**

THE IMMIGRATION ACTS

Decided under Rule 34	**Decision & Reasons Promulgated**
On 16th June 2020	**On 25th June 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

RB

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. An anonymity direction was not made by the First-tier Tribunal ("F*t*T"), but as this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, RB is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family.

This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. This appeal was listed for hearing on 2nd April 2020. The hearing was vacated due to the Government advice on restricting movement in light of the COVID-19 pandemic. On 29th April 2020 directions were sent to the parties setting out my provisional view that in this case it would be appropriate to determine whether the making of the First-tier Tribunal's decision involved the making of an error of law, and if so, whether that decision should be set aside, without a hearing. I set out directions giving the appellant an opportunity to submit further submissions in writing to support the assertion that the decision of the FtT is vitiated by an error of law. The directions also provided an opportunity for the respondent to respond in writing, and, for the appellant to file and serve any further reply.

3. In response to the directions issued by me, the appellant's representatives sent an email to the Tribunal on 5th May 2020 confirming that they *"will not be submitting any further representations"* and the appellant seeks to rely on the grounds that were submitted as part of the application for permission to appeal. The respondent provided a written response dated 15th May 2020. The appellant has filed a written response to the submissions made by the respondent. I am grateful to the parties for their engagement with the directions that I previously made.

4. In the appellant's written response to the submissions made by the respondent, the appellant's representatives confirm the appellant is content for the matter to be dealt with without an oral hearing. Neither party has identified any procedural unfairness that arises in the event that a decision is made without a hearing. I am satisfied that it is in accordance with the overriding objective and the interests of justice for there to be a timely determination of the question whether there is an error of law in the decision of the FtT. Taking into

account the view expressed by the appellant, it is entirely appropriate for the error of law decision to be determined on the papers, to secure the proper administration of justice. For the avoidance of doubt, in reaching my decision I have taken into account the matters set out in the appellant's grounds of appeal and the written representations made by the parties in response to the directions.

5. The appellant is a national of Pakistan. She applied for and was granted a family visit visa to enter the UK in July 2007, valid until 25th January 2008. She arrived in the UK in 2007 and remained unlawfully, when her visit visa expired. The appellant made a claim for asylum on 17th October 2016. A referral was made to the National Referral Mechanism ("NRM") on 1st November 2016 in order for a Competent Authority to make a decision as to whether she fell within the definition of a victim of trafficking. A positive 'reasonable grounds' decision was made on 7th November 2016. Following further consideration, a negative 'conclusive grounds' decision dated 9th July 2018 was served upon the appellant by the Competent Authority. Thereafter, the appellant's claim for asylum was refused by the respondent for reasons set out in a decision dated 31st August 2018. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Rai for reasons set out in a decision promulgated on 27th November 2019. It is that decision that is the subject of the appeal before me.

6. The matters relied upon by the appellant in support of her claim for asylum are summarised at paragraphs [10] to [20] and [65] to [66] of the decision of the FtT. Simply put, the appellant is fearful that if returned to Pakistan she will be killed by her husband, children, and her family for leaving her husband for another man, whom I shall refer to as SB in this decision.

7. The appellant advances two grounds of appeal. First, the FtT Judge failed to take into account and/or resolve conflicts of fact on a material matter. The appellant claims that at paragraph [62] of the decision, the FtT judge found that the appellant was not a victim of trafficking for the purposes of domestic servitude. It is said that at paragraph [84] of the decision, the judge referred to the evidence of the appellant that she had been told by SB that her children may take action against her and kill her because they are ashamed of her as their mother. The judge noted that if he accepted that evidence, he could not place any weight on hearsay evidence purported to come from SB given that he would say anything to control the appellant. The appellant claims the judge failed to consider whether the appellant was a victim of modern-day slavery given the level of control the appellant's partner is accepted to have exerted over her. Furthermore, the appellant claims the judge failed to consider or resolve the conflict between his acceptance of the conclusive grounds' decision, and the findings in paragraph [84] of the decision. Second, the judge accepted the appellant is a vulnerable witness, but other than a brief mention in paragraph [88] of the appellant's cognitive difficulties, the judge does not appear to have later directed himself to the findings in the report of Dr Lawrence with respect to the consideration of the appellant's evidence and particularly, whether the conflicts in her evidence in interview arose from her psychological state and low intelligence.

8. Permission to appeal was granted by FtT Judge Shimmin on 11th February 2020 on both grounds. In this decision I consider whether the making of the FtT's decision involved the making of a material error of law, and, if so whether that decision should be set aside.

Ground 1

9. At paragraphs [22] to [23] of his decision, the judge refers to the referral made to the NRM and the decision's reached under the NRM,

noting in particular that a negative conclusive grounds decision was made on 9th August 2018 concluding the appellant is not a victim of trafficking or modern slavery. At paragraph [62] of his decision, the judge referred to decision of the Court of Appeal in SSHD -v- MS (Pakistan) [2018] EWCA Civ 594 in which the Court of Appeal held that in a statutory appeal against removal, an appellant could only invite the FtT or Upper Tribunal to go behind a decision that he/she had not been the victim of trafficking where the appellant could show that the decision of the Competent Authority was perverse, irrational, or one which was not open to the decision-maker. Taking his lead from that decision, the judge found the appellant is not a victim of trafficking.

10. It is in my judgment clear that at paragraph [62] of his decision the judge found the appellant is not a victim of trafficking, but did so on the basis that he should not go behind the decision of the competent authority unless the FtT found that the decision is perverse or irrational or one that was not reasonably open to the decision maker. I am satisfied the judge fell into error in finding at paragraph [62] that the appellant is not a victim of trafficking for the reasons given. The FtT Judge refers to the decision of the Court of Appeal in SSHD v- MS (Pakistan). However, in DC (trafficking: protection/human rights appeals) Albania [2019] UKUT 00351 (IAC), the Upper Tribunal set out the approach to be taken by the FtT and the Upper Tribunal in determining appeals brought on protection grounds in which it is alleged that the appellant has been trafficked, but where there has been a negative "conclusive grounds" decision of the Competent Authority which has not been challenged in judicial review proceedings. At paragraph [53], the Upper Tribunal summarised its analysis of the relationship between the decision of the Competent Authority pursuant to the Trafficking Convention and decisions of Tribunals deciding protection and human rights appeals. At paragraph [53] it said:

> "(a) In a protection appeal, the "reasonable grounds" or "conclusive grounds" decision of the CA will be part of the evidence that the tribunal will have to assess in reaching its decision on that appeal, giving the CA's decision such weight as is due, bearing in mind that the standard of proof applied by the CA in a "conclusive grounds" decision was the balance of probabilities…"

11. Recently in MS (Pakistan) -v- SSHD [2020] UKSC 9, Lady Hale *(with whom Lord Kerr, Lady Black, Lord Lloyd-Jones and Lord Briggs agreed)*, held that when determining an appeal in which it was argued that removal would breach rights protected by the ECHR, the FtT was not bound by a decision reached under the National Referral Mechanism as to whether the appellant was a victim of trafficking, nor did it have to look for public law reasons why that decision was flawed.

12. That is not the end of the matter because I must consider whether the erroneous approach adopted by the Tribunal was material to the outcome of the appeal. The appeal before the FtT was not a challenge to the decision of the Competent Authority, but an appeal under s82(1)(a) of the Nationality, Immigration and Asylum Act 2002 against the respondent's decision to refuse the protection claim made by the appellant. The judge was not required to determine whether the appellant is a victim of modern-day slavery, but it is necessary to say a little more about the appellant's claim to be a victim of trafficking or modern slavery and to consider the extent to which the resolution of the protection claim required the judge to make findings as to whether the appellant has been the victim of trafficking or slavery.

13. I draw upon the decision of the Competent Authority dated 9th July 2018 to set out the background to the trafficking claim and the decision of the Competent Authority. The decision states:

> "…
>
> You stated that you had been having an affair with [SB] for about one or two years before you travelled to the UK. Your husband and children found out about the affair and started to mistreating *(sic)* you. You

> agreed to travel to the UK to be with [SB] as you stated that you "used to love each other" you continued to pursue your relationship even though you knew your family disapproved of it because you "used to like each other". You travelled to the UK and lived with [SB], you even returned to Pakistan and then travelled back to the UK and continued living with [SB]. During your time of living with [SB] you stated that if you asked to go out, he would allow you to go out shopping or to the park. He would sometimes accompany you, but you were allowed out on your own sometimes.
>
> It is, therefore, not considered that you were subjected to an act of transportation or harbouring.
>
> …
>
> You stated that when you lived in Pakistan [SB] told you that if you came to the UK he would make you happy and you would get married. This did not happen as you had not divorced your husband in Pakistan, so you could not re-marry, therefore he did not deceive you.
>
> …
>
> You stated that you lived together with [SB], he was a cab driver and you used to do domestic jobs at home and look after the home. You would do the cooking and cleaning and when his children came to the UK you would do the same for them. You would have to get them ready for school on a morning. During your time living with [SB] he would provide you with food and toiletries a place where you could keep your possessions safe and you described that you had a good relationship with his children.
>
> It is, therefore, not considered that you were subjected to domestic servitude.
>
> Moreover, it is considered that your treatment is indicative of rape within a relationship which became abusive as opposed to trafficking for the purposes of domestic servitude. You stated that you were having an affair with [SB] whilst living with your husband in Pakistan. You chose to move to the UK to be with [SB]. At the beginning you described that you were in a good relationship and you loved him. You may have had to do the domestic work in the house and look after the home and children, however, it is considered that the work you were required to do within the home is not disproportionate. You were also allowed to go out shopping and to the park. Although you stated that you would sometimes have to be accompanied by [SB], it is not considered to be unreasonable for this to happen in a relationship. As time went by and you decided that you could no longer tolerate [SB's] behaviour towards you which is when you called the police to help you to escape from your rape and abusive relationship."

14. It is clear from the matters relied upon by the appellant in support of her claim to be a victim of trafficking that it did not form any part of her claim that should would be at risk upon return to Pakistan from SB, or at risk of re-trafficking. At paragraph [92] of his decision, the judge recorded:

> "For completeness, the appellant also does not claim to fear [SB] here in the UK or if she were returned to Pakistan. She claims he comes from a big family but does not describe him or his family having any particular level of influence."

15. At paragraphs [68] to [75] of his decision, the judge carefully considered the documents relied upon by the appellant to support her claim that she had had to leave Pakistan because of an attempt by her brother-in-law and [SB's] family to shoot her. The judge carefully considered the affidavits by the appellant and her husband, the FIR, the 'Application for Registration of Case' and the undated newspaper report. The judge noted at paragraph [76] that he was not satisfied that the documents submitted are reliable documents upon which he could place any weight. The judge rejected the appellant's claim that she was the victim of an attempted shooting as a result of an affair with SB. The appellant does not challenge that finding. The judge carefully considered the appellant's relationship with her husband and found that although the appellant's husband may have been annoyed at her on finding out about her affair with SB, the appellant had been able to continue residing in the family home between 2001 and 2006. Her husband did not seek to divorce the appellant and there was no suggestion that the appellant's husband had tried to file any charges against her for adultery or taken steps to harm her in any other way. In any event the judge noted, at paragraph [79], the appellant's evidence that her husband passed away about five or six years ago and at paragraph [82], concluded that the appellant has not established to the lower standard that she has a subjective fear of her husband or his family.

16. The judge then addressed the appellant's claim to be at risk upon return from her children. As set out at paragraphs [83] and [84] of the decision, the appellant confirmed that she does not have any direct contact with her children, and she has not been threatened by her children directly. The judge noted the concerns harboured by the

appellant have come after speaking to her sister and SB. At paragraphs [84] and [85], the judge stated:

> "84. The appellant further confirmed the same in her witness statement that she has not been threatened by her children directly and any such concerns have come after speaking to her sister and [SB] [para 43WS]. There are no details provided when the appellant was told by her sister that her children may seek revenge on her if she returned to Pakistan, or even if it was a credible threat. Her response at Q95 indicates she had no direct relationship with her children and at Q.96 [SB's] children who knew the appellant's children told her that her children do not like her because of what she has done. Her sister also confirmed they do not like her. In relation to [SB] telling the appellant her children may seek revenge, I note from the evidence he often made threats to kill the appellant or throw her out and had a controlling nature, if I accept that evidence then I could not place any weight on hearsay evidence purported to have come from him given he would say anything to control the appellant.
>
> 85. On this reading of the evidence, and that contained in the bundle as a whole the appellant's children posed no threat to her at any time, nor have there been any direct credible threats towards her since leaving Pakistan. The appellant was asked what leads her to believe that there is any seriousness to their threat in interview. At Q.113 she states "*because at the time when I was attacked they did not try to save me. The son of my husband's sister saved me, but not my own children".* I do not find this to be a rational basis giving rise to a well-founded fear given her account is that the children were very young at the time. The fact that they did not take on three men with a pistol, if indeed they were even present, is not evidence of them intending to harm her in the future."

17. The appellant submits the judge rejected the evidence of the appellant as hearsay evidence on the grounds that [SB] would do anything to control the appellant, and the judge erred in his assessment of that evidence. In my judgement, upon a careful reading of the decision, it is clear the FtT judge carefully considered the protection claim advanced by the appellant and looked at the evidence in the round, giving due weight to all the evidence before reaching a decision as to the credibility of the appellant's account. At paragraph [84] of the decision, when read in context, it is clear in my judgment that the judge was simply considering the weight to be attached to what the appellant had been told by SB, taking the claim made by the appellant at its highest. In my judgment, read as a

whole, the judge's consideration of the claim and his findings as to the credibility of the appellant are not tainted by the erroneous approach adopted by the Tribunal as to the decision of the Competent Authority. The issue before the FtT was whether the appellant qualifies for protection under the Refugee Convention. The correct approach to determining whether a person claiming to be a victim of trafficking is at risk upon return and thus entitled to protection, is to consider all the evidence in the round as at the date of hearing, applying the lower standard of proof. The judge clearly did so. On the evidence and the claim advanced, the error I have found would not have resulted in a different outcome for the appellant before the FtT and the error is therefore not material to the outcome of the appeal.

Ground 2

18. The appellant claims the judge accepted at paragraph [60] that the appellant is a vulnerable individual, but other than a brief mention in paragraph [88] of appellant's cognitive difficulties, the judge does not appear to have directed himself to the findings in the report of Dr Lawrence with respect to the consideration of the appellant's evidence from the asylum interview or her witness statement. The appellant claims the judge has specifically not considered whether the conflicts in her evidence in interview, arose from her psychological state and failed to make allowance for that condition and her low intelligence.

19. The judge notes at paragraph [37] of his decision that the appellant has been deemed unfit to give evidence by Dr Robin Lawrence and the appellant would not be giving evidence. At paragraph [56] the judge confirms that he has considered the report of Dr Lawrence and was satisfied that Dr Lawrence is suitably qualified. At paragraph [57], the judge summarises the conclusions reached by Dr Lawrence and at paragraph [58], the judge confirmed that he accepts the

overall conclusion that the appellant is suffering from depression and anxiety as a result of the unhappiness at the thought that her children would not accept her if she returned to Pakistan and what would happen to her. The judge was satisfied that the appellant should be treated as vulnerable, and reminded himself that not giving evidence cannot, of itself, be a factor tending to show the person is not to be believed, but equally, it is not a factor to show that the person is to be believed.

20. I have carefully considered the content of the Psychiatric Report of Dr Robin Lawrence that was relied upon by the appellant. Dr Lawrence noted in his report that he met with the appellant for two hours and she was accompanied by a professional interpreter. He states "*[The appellant] is illiterate and unintelligent. Several of her answers were vague and self-contradictory...".* Dr Lawrence records that there is nothing in the appellant's life that would suggest she had ever been traumatised and he expresses the opinion that the appellant's symptoms can be accounted for by anxiety and point to a diagnosis of depression with marked anxiety features. He notes the appellant has a prescription for 'Citalopram 40mg daily', an antidepressant. He does not believe there is any evidence of PTSD, but the relevant symptoms point to high levels of anxiety. Dr Lawrence states his impression is that *inter alia,* the appellant is of low premorbid intelligence (she is illiterate and has not learnt English) and her level of function is profoundly impeded by her depression. He considered the capacity of the appellant to take part in the appeal and in his opinion, the appellant was unfit to give oral evidence. The appellant's mental state was said to be such that she would find it impossible to answer questions clearly and face any kind of cross examination. Dr Lawrence stated the appellant's low intelligence should be remembered when/if she is questioned.

21. In reaching his decision as to the credibility of the appellant's account and the risk upon return to Pakistan, the judge noted that there are a

number of inconsistencies in relation to the core of the appellant's account. The judge noted that the respondent had referred to a number of inconsistencies in her decision and the appellant had sought to address matters in her witness statement. In considering the evidence the judge considered not only the answers given by the appellant in interview, but also the explanations provided by the appellant in her witness statement and the relevant background material. In my judgement, upon a careful reading of the decision it is clear the judge had in mind throughout, the opinion expressed by Dr Lawrence that the appellant is illiterate and of low premorbid intelligence. At paragraph [86], the judge referred to the inconsistencies and matters that the respondent considered to be implausible, and in considering those matters expressly noted that he had reached his decision, *"... taking into account her issues of concentration and recollection of events..."*. At paragraphs [88] and [89], the judge makes it clear that he has considered the evidence of the appellant taking account of her cognitive difficulties. At paragraph [94], the judge reminded himself that the burden is on the appellant to prove her case to the lower standard and the judge again confirms that he has taken into account the medical evidence as part of his holistic assessment of the evidence in the round.

22. The medical evidence confirming the diagnosis of clinical depression, high levels of anxiety and low premorbid intelligence was not determinative of the issue of credibility. The judge was not satisfied that there was any reasonable explanation for the many aspects of the appellant's evidence and behaviour which led to the rejection of her claim. When properly read, in my judgement, the judge reached his decision as to the credibility of the appellant and the core of her account by reference to the evidence as a whole, including the explanations set out by the appellant in her witness statement and after considering the background material before the Tribunal. The medical evidence did not deprive the FtT of the right to rely upon the

inconsistencies in the appellant's account provided the judge took into account the medical view. It is clear from a proper reading of the decision the judge had in mind throughout, the appellant's cognitive difficulties when considering her claim, even to the lower standard.

23. In my judgement, the judge identified the issues and gave a proper and adequate explanation for his conclusions on the central issues on which the appeal was determined. The findings made by the judge were findings that were properly open to the judge on the evidence before the FtT. The findings cannot be said to be perverse, irrational or findings that were not supported by the evidence. Having carefully considered the decision, I am quite satisfied that the appeal was dismissed after the judge had carefully considered the facts and circumstances of the claim, and all the evidence before him attaching appropriate weight to the psychiatric report. It follows that I reject the second ground of appeal.

24. In my judgment, the appellant is unable to establish that there was a material error of law in the decision of the FtT, and it follows that the appeal is dismissed.

Notice of Decision

25. The appeal is dismissed.

Signed **V. Mandalia** Date 16th June 2020

Upper Tribunal Judge Mandalia