ES (s82 NIA 2002, Negative NRM) Albania [2018] UKUT 00335 (IAC)

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Table of Contents

Case Comment

Immigration, Asylum and Nationality Law

J.I.A.N.L. 2019, 33(1), 68-70

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Immigration

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Cases cited
ES (s.82 NIA 2002, Negative NRM: Albania) [2018] UKUT 335 (UT (IAC))

Legislation cited
Nationality, Immigration and Asylum Act 2002 (c.41) s.82

***J.I.A.N.L. 68** **Facts**

The appellant was a female Albanian graduate who was “sold’, detained and beaten, before being forced to work as a prostitute in Albania and in Italy for almost two years. The appellant finally escaped in May 2015 and sought refuge with a friend after her parents refused to give her help. With assistance, she was smuggled to the UK in the back of a lorry where she applied for asylum the same day. She was subsequently referred to the National Referral Mechanism (NRM) as a potential victim of human trafficking.

The NRM found that the appellant had not established, on a balance of probabilities, that there were conclusive grounds for finding that she had been a victim of human trafficking. On the basis of these findings, the subsequent decision was to refuse her application for asylum.

Held

The Upper Tribunal departs from earlier authority. Upper Tribunal Judge Finch considered [at 24] that *AS (Afghanistan) v Secretary of State for the Home Department* [1] and *Secretary of State* ****J.I.A.N.L. 69*** *for the Home Department v MS (Pakistan)* [2] were both decided under s 82 of the Nationality, Immigration and Asylum Act 2002 that pertained to a previous appeal regime and consequently neither may be relied on in determining the present appeal. The amended part of the 2002 Act (as amended 20 October 2014) established the right to appeal against the refusal of an asylum claim itself, rather than a decision to remove a person from the UK, as had been considered by the Court of Appeal in both AS (Afghanistan) and MS (Pakistan).

Judge Finch recognised that the applicable international law required that a decision to recognise a person as a victim of human trafficking should not prejudice any related claim of asylum.[3] This had been emphasised in the UK by the fact that the Government had adopted a separate standard of proof (balance of probabilities) to determine a conclusive decision within the NRM, rather than the lower standard of proof (a reasonable degree of likelihood or a serious possibility) applicable in the determination of asylum applications.

Judge Finch ruled that the correct approach in determining whether a person who has previously claimed to be a victim of human trafficking is entitled to asylum is to consider all the evidence in the round at the date of the hearing, and apply the requisite lower standard of proof for the determination of the appellant's asylum claim.

In considering the evidence *de novo,* the Upper Tribunal accepted the claims made by the appellant and found her to be entitled to asylum as a victim of human trafficking, notwithstanding she had a negative conclusive grounds decision by the NRM.

Comment

This judgment recognises how tangled and interwoven decision making in asylum and trafficking cases has become. It is therefore extremely useful that the Upper Tribunal clearly and concisely articulates how asylum decisions that reach the First-tier Tribunal should be made. This is of huge benefit to the entire sector.

It has now been well-recognised that victims of exploitation may only be able to provide patchy accounts of their journeys and abuse, if they are able to do so at all, because of the impact the exploitation has had, not only on memory, but also more generally on their mental and physical health.[4] Arguably this is particularly relevant in cases where the victim is a child. This is well articulated in this decision [43-50], though it would be satisfying to reach a point where it does not have to be noted but simply generally understood.

In practice, it is all too often evident that there is confusion across the various relevant sectors around the applicable standard of proof and the interrelationship between the asylum case and the trafficking identification case. Decision making within the NRM structures clearly jars with the decision making in asylum procedures, as recognised in this judgment. This is not only because of the conflation of relevant burdens and standards of proof, but also due to wider issues including the hierarchy of international legal instruments and the timelines in terms of being in several complex processes at once.

****J.I.A.N.L. 70*** The judgment provides a welcome thought-process for Home Office decision makers that should serve as a pathway through the processes and procedures in their consideration of an applicant's claims for international protection.

ES (s 82 NIA 2002, Negative NRM) stands as welcome authority to require that asylum decisions should be made holistically, taking into account all the evidence available at the time and on humane grounds that sets aside some of the convoluted procedures that have existed before.

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Footnotes

1 [2013] EWCA Civ 1469.

2 [2018] EWCA Civ 594; [2018] 4 WLR 63 (CA (Civ Div)).

3 Article 14.5 of the Council of Europe Convention against Trafficking in Human Beings provides that recognising a person as a victim of trafficking "shall be without prejudice to the right to seek and enjoy asylum.' This is confirmed in art 40 of the same Convention.

4 See J Herlihy, L Jobson, & S Turner, "Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26 Applied Cognitive Psychology 661-676; A Memon, "Credibility of Asylum Claims; Consistency and Accuracy of Autobiographical Memory Reports Following Trauma' (2012) 26 Applied Cognitive Psychology 677-679; and J Herlihy & WS Turner, "Asylum Claims and Memory of Trauma; Sharing our Knowledge' (2007) 199 British Journal of Psychiatry 3-4.