Landmark CHAMBERS

MS (Pakistan): CONCLUSIVE GROUNDS DECISIONS AND JUDICIAL DECISION-MAKING

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FIRST-TIER TRIBUNAL JURISDICTION: OLD

- Section 84 NIA 2002 (until 19 October 2014) including a wide variety of grounds of appeal against an "immigration decision", including a refusal to grant leave or variation of leave, and the grounds included:
  - not in accordance with Immigration rules (section 84(1)(a));
  - breach UK obligations under Refugee Convention and HRA 1998 (so including breach of Article 3 ECHR) (section 84(1)(c) / (g));
  - Not otherwise in accordance with the law (section 84(1)(e)).
- Under first two of these, FTT has a first-instance decision making / fact finding role, to determine *all questions of facts for itself*.
- Under "not … in accordance with … law" jurisdiction, it could separately exercise what is in effect a judicial review function, to decide whether the decision to refuse leave to remain was taken in accordance with relevant policy etc.

DIRECT AND INDIRECT CHALLENGE TO CONCLUSIVE GROUNDS

- Critical starting point is that the question of whether a person has been trafficked may be relevant in one of two ways to an immigration appeal:
  - DIRECT RELEVANCE It may be directly factually relevant to human rights or asylum claim, because the fact of being trafficked may be part of, or even central to, the question of whether a person is at risk on return or a member of a social group
  - INDIRECT RELEVANCE The trafficking issue may be of marginal or no relevance to the asylum etc case (e.g. fear of conscription in Eritrea, but trafficked to the UK en route) but go only to whether refusal of leave was “in accordance with the law”

AA (Iraq) [2012] EWCA Civ 23

- Decided under old appeal provisions.

- Indirect challenge. *AA (Iraq)* concerned return to *Belgium*, under the Dublin Convention, so by definition the merits of her asylum claim was not in issue.

- CA observed that ordinarily a trafficking decision could only be challenged by way of judicial review.

AS (Afghanistan) [2014] Imm AR 513

- Also decided under old appeal provisions.
- Indirect challenge again. Appellant argued that, quite apart from the success or failure of his asylum decision, there was public law illegality in the refusal to recognise him as a victim of trafficking, and this in turn meant that the subsequent decision to refuse leave to remain was not in accordance with the law. The CA accepted this argument:

  … 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 … that he was (or had been) a victim of trafficking [which was] *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 … 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 [FTT] *… had to dismiss an … appeal … without remitting the matter … to take into account the decision that such appellant had indeed been a victim of trafficking … EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania [2013] UKUT 00313 a decision which I would respectfully endorse.*

AS (Afghanistan) [2014] Imm AR 513 (2)

- *14. … 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.*
- CLEAR:
  - (a) public law error in CG decision (perversity, but also including other matters) renders removal decision unlawful so appeal is to be allowed to permit SSHD to make lawful decision;
  - (b) earlier CG decision "cannot prevent" the FTT "from considering the evidence about trafficking"

DIRECT AND INDIRECT CHALLENGE REVISITED

DIRECT CHALLENGE: Where the Appellant's factual account of having been trafficked is relevant to the question of whether they will be at risk on return to their home country, or to some other aspect of a human rights of asylum appeal (e.g. member of a social group, the extent of their vulnerability in considering their private life under Article 8), FTT must determine facts for itself.

Further, any positive factual finding the FTT may make in the course of such consideration should arguably require the SSHD to reconsider any CG decision which is in in

INDIRECT CHALLENGE: The FTT has jurisdiction in the exercise of its "in accordance with the law" jurisdiction to consider whether an earlier CG decision was unlawful on public law grounds, in which case it should remit the matter to the SSHD to reconsider.

MS (Afghanistan) in the UT: [2016] UKUT 11226 IAC)

- Still determined under old appeal decisions
- At this level both *direct* and *indirect* challenges were made to adverse CG decision:

  (40) The … argument advanced is that this Tribunal should determine that the Appellant's removal would be contrary to section 6 of the Human Rights Act 1998 if either (a) he is at risk of re-trafficking in Pakistan or (b) he has been denied the benefits and protections which would have flowed from a decision that he was a child trafficking victim and a lawful investigation of his claim to be such a victim.

- UT accepted trafficking account (UT (47))
- Direct challenge rejected – no risk of re-trafficking and hence no risk of persecution, UT 66-7
- Indirect challenge succeeded, UT holding that there was public law error in CG decision and remitting

MS (Afghanistan) in the CA: [2018] 4 WLR 63

- In the CA, distinction between direct and indirect challenge seems to have been lost sight of. SSHD appealed, arguing that UT had been wrong in law to consider whether there was *any* public law error in CG decision. Rather, should have confined itself to considering whether decision was *perverse / Wednesbury* unreasonable / irrational.

- Plainly, since she had won, the SSHD could not appeal the finding that on the facts, the Appellant was in fact a victim of trafficking but that this did not expose him to a risk of persecution on return. So the "direct challenge" aspect of the case was not before the Court of Appeal, and it had business (indeed no power) to rule upon it.

MS (Afghanistan) in the CA: [2018] 4 WLR 63 (2)

- HEADNOTE:

  … that the circumstances in which, on a statutory appeal under [sections 82/84 NIA] against a removal decision, an appellant could mount an indirect challenge to a negative trafficking decision by the competent authority …, were limited to where the trafficking decision could be demonstrated to be perverse or irrational or one which was not open to the authority; that there was a two-stage approach. First, a determination whether the trafficking decision was perverse or irrational or one which was not open to the authority and second, only if it was, could the appellant invite the tribunal to re-determine the relevant facts and take account of subsequent evidence since the decision of the authority was made; …

- *Ratio*: challenges to CG decisions not permitted on *any* public law grounds, but only perversity ground.

- *Question:* is that confined to indirect challenge?

NARROW AND WIDER *RATIO*

- On one view (I suggest, the correct view), the ratio of *MS (Pakistan)* is confined to a narrow *ratio,* that in what I have called the "indirect challenge", where the facts relating to trafficking are not directly relevant to the asylum or human rights claim, the challenge can only succeed if the CG decision was perverse but not if it was unlawful in some other public law sense. On this view, where the trafficking facts are directly in issue for the purposes of the asylum or human rights claim, the FTT enjoys its ordinary fact finding role.

- On wider *ratio*, however, which I think is not the correct view of the *ratio,* it sets up an unheralded new obstacle to the FTT considering factual issues which would otherwise be within its jurisdiction to determine, because SSHD has made purely administrative determination (unsupported by any statutory *power* to make such a determination) on same factual issue.

- Most people seem to have assumed the wider ratio is correct!

What is the *ratio* of MS (Pakistan)?

- Not clear because not clear that the court actually had in mind the distinction between the two different kinds of challenge, direct and indirect, which might arise to a CG decision! Some comments of CA undoubtedly suggest that it did think the wider ratio is correct.
- But the better view is that (contrary to how the case is being interpreted) the court only ruled on the narrower issue.
  - As pointed out above, that was the issue on which the SSHD had appealed. There was not and could not be any appeal from its decision that the Appellant was a victim of trafficking but not at risk thereby. So the issue was simply not before the CA.
  - It is unclear that the CA had the point in mind so it should not be read as affecting so radical a change in the law as to cut-off the fact finding jurisdiction of the FTT.
  - The wider ratio is incontestably wrong (as to which see next slide)!

Why the wider ratio is wrong

- Whatever the Court of Appeal thought it was deciding, it was or would have been wrong to conclude that the FTT was barred, in a case where the question of whether a person is a victim of trafficking is directly relevant to the establishment of their asylum claim, to hold that the FTT was bound by an earlier CG decision (for at least the following reasons):
  - The FTT had a statutory fact-finding role, for the purposes of deciding a human rights / asylum / immigration rules claim, under section 84 NIA.
  - That fact-finding role cannot be taken away from it by the mere fact that the Secretary of State adopts a purely administrative decision-making role, pursuant to *policy* but not law / statute, intended to implement the Trafficking Convention.
  - In effect, the wider ratio would amount to making the SSHD's CG decision an "issue estoppel" for the purposes of the question of whether the claimant was trafficked. But it clearly does not satisfy the requirements of an issue estopppel, not least that an issue estoppel can only arise from a *judicial* decision. *A fortiori,* it cannot rise from an *administrative* decision taken by the SSHD who is a party to subsequent judicial proceedings in which the issue estoppel is said to bite.
  - The standard of proof in an asylum etc appeal is lower (real likelihood) than in a CG decision (balance of probabilities). So it is wholly perverse to treat a decision that a person is more likely than not not to be a victim of trafficking as requiring a subsequent judge to say that there is no *likelihood* of their being such a victim.

Why the narrow ratio is wrong!

- Further, however, even the narrow ratio of *MS (Pakistan)* is wrong (albeit binding pending a reconsideration by the Supreme Court)
  - As explained above, the genesis of the argument that the FTT can consider whether a CG decision is "perverse" is that it does so under its "not otherwise in accordance with the law" jurisdiction.
  - It is not beyond argument that, where the CG decision was made some time before the refusal of leave, it is too late for the FTT to consider whether the CG decision was lawful since it is a separate free-standing decision.
  - However, once it is accepted that it can do this, the only basis for it is that just given.
  - It is clear beyond argument, and as a matter of principle, that the "not in accordance with the law" jurisdiction encompasses all public law grounds of review. There is no principled basis for confining it to *perversity,* and there is plenty of case law to support the wider approach.
  - It follows that there can be no principled basis for saying that the FTT is confined to perversity as the sole public law ground.

NEXT STEPS

- The Appellant in *MS (Pakistan)* has sought public funding for an appeal
- If narrow *ratio* is correct, *MS (Pakistan)* is already irrelevant to new cases because "not in accordance with law" ground of appeal is abolished (so indirect challenge no longer possible and direct challenge unaffected)
- The UT in *AUJ (Trafficking – no conclusive grounds decision)* [2018] UKUT 200 considers *MS (Pakistan).* The headnote simply states that where there is *no* CG decision, the FTT can consider the facts for itself (as is plainly right). Its consideration of *MS (Pakistan)* is *obiter* and, to me at least, unclear.
- Denial of fair trial: FTT decision

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