

30.7.2019

BRIEFING NOTE

HUMAN TRAFFICKING NRM IDENTIFICATION CASE:

RE: R (BG (ALBANIA)) V SSHD

SETTLEMENT OUTCOME

This case, in which the judgment of Cranston J in *R (on the application of BG) v The Secretary of State for the Home Department* [2016] EWHC 786 (Admin)¹ (12 April 2016) was appealed, has been settled in favour of BG.

Brief Background

1. BG was a victim of abuse, multiple rapes and enforced prostitution in Albania. She suffered from PTSD and major depression as a result. She fled to the UK and sought protection but was issued with a Dublin II certificate by which the SSHD sought to return her to Italy. Her trafficking case was referred into the UK's NRM following a legal challenge and she was given a positive reasonable grounds decision but received a negative Conclusive Grounds decision, the SSHD finding she was a victim of 'severe domestic violence' at the hands of a 'boyfriend' rather than a victim of human trafficking who was forced into sexual exploitation by a trafficker. The SSHD maintained his decision to return her to Italy, thereby refusing her any substantive consideration of her asylum and human rights claims in the UK. In judicial review proceedings it was argued on her behalf that in view of her accepted facts and the legal definition of human trafficking she ought to have been formally recognised by the SSHD as a confirmed victim of human trafficking and that she was also entitled to protection procedures as a consequence, including the quashing of the Dublin II certificate.
2. Key questions before the High Court included whether the SSHD had erred in refusing to recognise her as being a victim of human trafficking and the High Court's obligation to

¹ The judgment that was under appeal is available at:
<http://www.bailii.org/ew/cases/EWHC/Admin/2016/786.html>

determine trafficked victim identification. The High Court refused the judicial review and the judgment of Cranston J was widely reported.

3. Permission to appeal to the Court of Appeal was granted.

Settlement Outcome

4. On the 9/10 October 2018, the Court of Appeal was due to substantively hear this ground-breaking case on the role of the Court in reviewing the lawfulness of a Conclusive Grounds decision on trafficking identification under the NRM. However shortly before the hearing the Secretary of State for the Home Department (“SSHD”) conceded the matter and withdrew the negative Conclusive Grounds decision in BG’s case.
5. This was a long-overdue development in favour of our client BG, who is a highly vulnerable victim of sex trafficking and whose struggle with the UK’s asylum/NRM processes began over 5 years ago. She is a single mother, now with two young children.
6. By a consent order sealed on 20th September 2018 the SSHD agreed to withdraw the negative Conclusive Grounds decision and to re-make it within 45 days of the sealing of the consent order.
7. **Of key significance the SSHD agreed the appeal should be allowed by consent under Ground 1, expressly accepting that, in view of BG’s accepted facts, Cranston J had been wrong to hold the SSHD had made a lawful or rational decision in finding that BG did not meet the trafficking definition under Article 4 of the Trafficking Convention.**
8. Accordingly, the appeal was formally allowed by consent under Ground 1.
9. Furthermore, **the SSHD agreed to consider BG’s asylum claim substantively in the UK.** The Dublin II certificate was thereby withdrawn.

Background

10. These are the accepted facts.
11. BG was a college student living with her parents in the conservative district of Shkoder, Albania. She was befriended by a man, K who persuaded her to believe that he loved her and wanted to marry her. She fell in love with him. She agreed to leave her parents’ home clandestinely and without any belongings and she travelled with K to the city of Tirana where he said his family lived. They lived there alone in his flat together. She had keys and was free to come and go. She did not know anyone in the city. He never took her to meet his family.
12. After a few months he said he had no money, he threatened her with a knife and told her she would be killed and her family harmed if she did not agree to be subjected to

prostitution by him. He brought men to the flat where BG was subjected to enforced prostitution for K's financial gain.

13. After a few weeks he began transporting BG to specific street locations in Tirana where he had arranged for men to collect her and take her to hotels for the purposes of subjecting her to enforced prostitution.
14. Each day K would take the clients' money from her. He would bring her back to the flat where he accommodated her before taking her back out to the streets the next day.
15. After a few months BG escaped with the help of a client and travelled alone to the UK via Italy on the Eurostar. On arrival at St Pancras she claimed asylum and gave a summarised, clear account in her screening interview of what had happened to her in Albania. The Border Official did not refer her into the NRM. She was detained.
16. The SSHD certified her asylum claim under the Dublin II Regulation. Judicial review proceedings were brought to challenge the asylum certification and the failure to refer her into the NRM. As a result, BG was released from detention and referred by the SSHD into the NRM.
17. A positive Reasonable Grounds decision was made. This was however followed by a negative Conclusive Grounds decision. In that negative decision the SSHD accepted that BG had been subjected to enforced sexual exploitation in Tirana by K, that it was achieved by K's threats to her life and harm to her family and it was for K's financial gain.
18. However, the SSHD refused BG a positive decision because of his refusal to accept that BG had been trafficked from Shkoder to Tirana, including by rejecting the likelihood that K had groomed BG in Shkoder, that he had trafficked her from Shkoder to Tirana and had started sexually exploiting her in Tirana once all the necessary arrangements for her exploitation had been made, as had been concluded by an independent trafficking expert. The SSHD decided instead that BG was "*a victim of severe domestic abuse*" which arose from 'her boyfriend' K's '*existential crisis*' that was generated by him '*running out of money*'. Whilst the independent trafficking expert instructed on behalf of BG had concluded that BG was a victim of trafficking from Shkoder to Tirana she had not specifically addressed whether BG had been trafficked within Tirana by K having harboured or transported BG within Tirana for the purposes of sexual exploitation and the SSHD also failed to consider this.
19. A request for reconsideration was therefore made on the basis that the SSHD had erred in his application of the trafficking definition to the accepted facts of the case, including by failing to consider K's harbouring and transportation of BG in Tirana for the purpose of sexual exploitation by means of threats and her position of vulnerability. However this reconsideration request was summarily refused. The submission that on the accepted facts BG had been trafficked by K within Tirana for the purposes of sexual exploitation and

she had also been harboured by K in the flat for that purpose, under threat of death, was ignored despite the SSHD expressly accepting that enforced prostitution by threat for financial gain had occurred, that she had been threatened by K, had been taken to properties for this purpose, had been housed by K during that time and despite the fact that the SSHD's own policy required the SSHD to consider all the "acts" of trafficking, including harbouring.

Proceedings in the Administrative Court

20. BG's challenge to the negative conclusive grounds decision was heard during a 2-day hearing before Mr Justice Cranston in the Administrative Court in 2015. The Judge refused the application and the link to the judgment is here: <http://www.bailii.org/ew/cases/EWHC/Admin/2016/786.html>.

21. In his judgment Cranston J implicitly if not expressly accepted that what occurred in Tirana, once K's sexual exploitation of BG began, could amount to human trafficking by harbouring, finding:

" 49... Harbouuring is not an everyday concept but I accept that it includes accommodating or holding a person at the place of exploitation or at a place prior to the exploitation."

22. However despite this finding he held that it was not the Administrative Court's function 'to prefer one person's interpretation of events over another's', namely that of the trafficking expert, Ms Stepnitz, over the SSHD's. The Judge placed undue weight on the fact that Ms Stepnitz had not argued that BG had been 'harboured' in law, in Tirana, even if BG's Counsel had done so. He held that the SSHD's decision to issue a negative Conclusive Grounds decision was not unreasonable or irrational "*at the time it was made*", finding:

"53. It is not my role to choose Ms Stepnitz's interpretation over that of the competent authority's or to characterise one rather than the other as right or wrong. It may have been that after October 2012 it was open to analyse the facts as trafficking through harbouring, but that was not the way the matter was presented to the competent authority by Ms Stepnitz. The issue for me... is whether the decision was unlawful or Wednesbury unreasonable."

23. In dismissing the judicial review brought by BG, Cranston J also erroneously found that K's action of taking BG from K's flat to pre-arranged street locations to meet men, who would then take BG to hotels for the purpose of sexual exploitation, was not '*transportation*' under the Trafficking Convention definition but was instead, according to the Judge, '*mere facilitation*'.

Proceedings in the Court of Appeal

24. The Court of Appeal granted permission to appeal against the judgement on several grounds, significantly under Ground 1, whereby it was argued that: The Judge was wrong to hold that the SSHD had made a lawful or rational decision in finding that BG did not meet the trafficking definition under Article 4 of the Trafficking Convention, on the accepted facts.
25. The Court of Appeal further held that it was arguable the Judge was wrong in his approach to the role of the Court in reviewing the lawfulness of the Conclusive Decision and his failure to determine whether BG met the trafficking definition was in breach of Article 4 ECHR.
26. On a separate Ground of Appeal relating to Dublin II and the conditions for her return to Italy, as well as the generic nature of the assurance given by the Italian authorities under Dublin II, the Court of Appeal stayed BG's challenge to her removal to Italy pending the application of NA before the Supreme Court for permission to appeal against the judgment in *NA (Sudan) & Anor v SSHD [2016] EWCA Civ 1060*.
27. By the Consent Order the appeal was allowed under Ground 1. Thus the SSHD conceded that Cranston J was wrong to hold that the SSHD had made a lawful or rational decision in finding that BG did not meet the trafficking definition under Article 4 of the Trafficking Convention, on the accepted facts. In addition, the SSHD agreed to consider BG's asylum claim substantively in the UK.
28. The vulnerabilities of BG and her small children, exacerbated by their years of uncertainty without settled status in the UK, were predominant reasons for the settlement of the case.
29. The question of the scope of the High Court's powers and obligations to decide on trafficking identification for itself under the operation of Article 4 ECHR, and which was raised for the first time in this case of BG, remains open.

Recent developments

30. The Dublin II certificate was withdrawn.
31. BG has received a positive Conclusive Grounds decision under the NRM and has thereby been formally recognised as being a confirmed victim of human trafficking.
32. She is awaiting a decision in respect of her asylum claim.
33. Please do get in touch with any of us if you have any queries

Representation

34. **Parosha Chandran is Leading Junior Counsel and Claire Physsas is Junior Counsel, both of 1 Pump Court, for the Appellant, instructed by Raja Uruthiravinayagan of**

Duncan Lewis. The case was also assisted by Catherine Robinson, also of 1 Pump Court, as Junior Counsel.

For any further information: please email Rajau@duncanlewis.com.

End.