



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/05302/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 13th February 2020**

**Decision & Reasons
Promulgated
On 5th March 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MA
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms S Armatrading, Home Office Presenting Officer

For the Respondent: Mr P Corben of Counsel, instructed by Lawmans Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Wright promulgated on 28 October 2019, in which MA's appeal against the decision to refuse her protection and human rights claims dated 21 May 2019 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with MA as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Algeria, born on 10 April 1989, who first arrived in the United Kingdom in January 2013 as a Tier 4 (General) student with leave to remain as such to 9 July 2013. On 6 May 2016 the Appellant was convicted of possession of false identity documents and sentenced to eight months' imprisonment. On 18 July 2016 she claimed asylum on the basis that she feared persecution on return to Algeria as a bisexual woman; as a Christian convert; that she would be subject to honour killing by her father and that she was at risk of re-trafficking and/or from her traffickers on return to Algeria. The referral was made through the NRM in respect of the Appellant's claims to have been trafficked and the victim of slavery, which resulted in a positive conclusive grounds decision on 2 October 2017.
3. The Respondent refused the application for the following reasons. First, although it was accepted that the Appellant was a victim of trafficking and slavery, it was not accepted that there was any current risk on return from her traffickers of being re-trafficked. In any event it was considered that there would be a sufficiency of protection available to the Appellant in Algeria. The Appellant's claims to have been threatened by her family on the basis of religion and sexuality were rejected on the basis that there was a lack of detail, lack of substantiation of the claim, a lack of clarity and overall the benefit of doubt did not apply to the claim. The Appellant's credibility was also considered to be damaged by section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 due to the delay in her claiming asylum. Overall, the Appellant was not recognised as a refugee, nor was there any need for humanitarian protection and her removal would not entail a breach of Articles 2 and/or 3 of the European Convention on Human Rights. Finally, the Appellant had not established family life in the United Kingdom and in terms of private life, she did not meet the requirements of paragraph 276ADE of the Immigration Rules and there were no exceptional circumstances for a grant of leave to remain.
4. Judge Wright allowed the appeal in a decision promulgated on 28 October 2019 on asylum grounds. I return to below to the findings made and reasons given for the decision. The Appellant had produced evidence in relation to an Article 8 claim, raised as a new matter as defined in section 85(5) of the Nationality, Immigration Act 2002 but which was not determined by the First-tier Tribunal because the Respondent did not consent to the same.

The appeal

5. The Respondent appeals on two grounds. First, that there was a material misdirection in law by the First tier Tribunal by considering only whether the Appellant had a subjective fear on return to Algeria, whereas the Refugee Convention, Qualification Directive and the Immigration Rules all require a well-founded, or objective risk on return. Secondly, that the First-tier Tribunal has failed to provide adequate reasons as to whether the Appellant is objectively at risk of re-trafficking on return to Algeria.

6. At the oral hearing, the written grounds of appeal were relied on by the Respondent. In relation to the first ground, although the decision of the First-tier Tribunal contains a correct self-direction in paragraph 52, expressly referring to the need of objective determination of a well-founded fear, in paragraph 67, the First-tier Tribunal finds only that the Appellant has shown a genuine subjective fear of re-trafficking on return and nowhere else in the decision is there any express consideration of whether this is objectively well-founded, nor and finding that it is. The First-tier tribunal's consideration of whether there is a sufficiency of protection and internal relocation on return is not relevant unless and until an objective risk has been established.
7. On behalf of the Appellant, Mr Corben submitted that this is not a case which on its facts starts from the usual point of the Appellant needing to show risk on return because it is already been accepted by the Respondent that the Appellant has been trafficked and by whom, taken together with the provisions in paragraph 339K of the Immigration Rules provides a sufficient indication of a real future risk. In effect, the First-tier Tribunal has considered the case from this standpoint, reversing the burden of proof looking to the whether there any reasons why they wouldn't be a well-founded fear on return by considering the options of sufficiency of protection and internal relocation, neither of which were found to be viable. It was further submitted that in any event, the First-tier Tribunal did consider objective risk on return in paragraphs 71 of the decision, which goes through factors relevant to a consideration of an objective risk. Although this is within a section of the decision expressly dealing with sufficiency of protection, Mr Corben submitted that even if the decision approaches the matter in the wrong order, the relevant factors had been considered.
8. In the alternative, Mr Corben submitted that any error in failing to expressly refer to objective risk would not be material to the outcome of the appeal on the facts of this case, given there is clear objective risk on return based on the findings set out in paragraph 71 of the decision and paragraph 339K of the Immigration Rules.

Findings and reasons

9. In determining this appeal it is necessary to set out the findings of the First-tier Tribunal in more detail. Following a summary of the reasons for refusal and evidence before the First-tier Tribunal, the decision sets out the burden and standard of proof and applicable law in paragraphs 49 to 52. It is not disputed that this is an appropriate self-direction of the relevant law and requirements. The findings begin in detail at paragraph 59 of the decision, reiterating what has and has not been accepted by the Respondent, with a summary of the Appellant's accepted claim to be a victim of trafficking.
10. The main factual conclusions appear in paragraph 62 as follows:

“62. However, whilst I have noted the SSHD’s acceptance of the facts (see above) that the appellant was “forced into prostitution and trafficked into the UK” (“After an investigation into this part of your claim by the National Referral Mechanism [‘NRM’] and noting your claim has been accepted on the balance of probabilities, a higher standard of proof”) and whilst, therefore, I must consider (in due course close, risk of re-trafficking on return to Algeria, I find that the appellant’s clear propensity/capacity for deception as demonstrated on the evidence simply leads me to conclude in the round that she lacked sufficient credibility, even applying the requisite lower standard, to accept her claimed bisexuality (described by Mr Corben in closing as “small beer compared to other aspects”), Christian conversion, threats from family or threats from [named trafficker] (other than as regards the latter, the accepted fact by the SSHD of the appellants trafficking must inevitably have involved some threat or threats at the time).”

11. The First-tier Tribunal in paragraph 63 sets out what it finds to be the Appellant’s clear propensity/capacity for deception, including the use of a false passport to enter the United Kingdom in 2013; the use of false Facebook account to contact her friend; having run away with €7000 belonging to her traffickers; her description of her journey to the United Kingdom; her failure to claim asylum on arrival and only following her conviction; an inconsistency about how the Appellant described her religion in Algeria; working unlawfully and then being convicted of possession of a false identity document. In paragraph 64 there is a reference to the Appellant’s marriage entered into within less than six months of arrival in the United Kingdom, with separation only two months after marriage. Paragraph 65 refers to the Appellant’s ‘unaccepted claims being fatally undermined’ by inconsistency, including an inconsistent date and reason for needing to support herself in Algeria; delay in her asylum claim and inconsistencies between her screening interview substantive interview. In paragraph 66, there is a further reference to the Appellant’s ‘unaccepted claims also being fatally undermined’ by the evidence from her sister referred to as undated, unsigned and self-serving and evidence upon which reliance could not properly be placed when looked at in the round.
12. Following these findings in paragraphs 62 to 66, which are almost exclusively critical of the Appellant and make significant adverse credibility findings against her (albeit in the absence of any assessment of much of her claim, evidence and reasons for certain matters) and the evidence of her sister there is a conclusion paragraph 67 that the Appellant to show only a genuine subjective fear in relation to re-trafficking return to Algeria. It was accepted that as a trafficked woman she was a member of a particular social group for the purposes of the Refugee Convention. From paragraphs 68 onwards, the First-tier Tribunal considers whether there would be a sufficiency of protection available to the Appellant on return and finally, internal relocation in paragraphs 73 and 78.

13. In relation to sufficiency of protection, the First-tier Tribunal refers to the US State Department report and then a number of factors in paragraph 71, as follows:

“71. Furthermore, whilst the appellant did not seek protection from the authorities in Algeria prior to coming here and whilst “Officials continue to allow victims to report abuses to authorities”, nevertheless the fact remains that it is accepted by the SSHD that the appellant was trafficked; [x and y] were the traffickers (notwithstanding Mr Archie’s [HOPO] position in closing that the “RFRL accepts A [appellant] has been trafficked but not by a prominent figure [...]”, no doubt based on [61] of the RFRL which states “it has not been possible to verify your claim of [y] being a member of Parliament or even Mayor of [...] as per your sister’s letter with external information”); both are Algerian; there connected to the appellant through the sister [...] of her friend [...]; the accepted fact of the appellants trafficking must inevitably have involved some subtle threats at the time; and [x or y] (whether prominent/high profile not) also have a motive for trafficking the appellant again (to recover the 7000 Euros taken by her from them even on her own account) and/or harming her (fear of being reported to the authorities by the appellant), notwithstanding the unreliable (as found in the round, see above) ‘Whatsapp’ evidence.”

14. The paragraph quoted above is very difficult to read and understand and does not expressly disclose any specific findings at all, let alone on the objective risk on return as suggested by Mr Corben. On a generous reading, the paragraph appears to identify a number of reasons as to why the Appellant could be at risk of re-trafficking, primarily in terms of motive; but does not go further and assess whether there is an objective risk of re-trafficking on return to Algeria now (as opposed to previous threats); whether or not the identified traffickers had the means to find the Appellant (the only reference being to the Respondent not having accepted that they were prominent or high profile figures); nor whether sufficiency of protection is relevant to all or some of the factors identified or not. I can not accept Mr Corben’s submission that this paragraph contains an objective assessment of risk, despite being clearly within the section dealing with sufficiency of protection, as in any event the paragraph lacks clarity and any actual findings. For the same reasons, I reject the alternative proposition that any error was immaterial based on findings in this paragraph.
15. I find that despite the correct self-direction in paragraph 52 and further reference to the need to consider risk of re-trafficking on return to Algeria in paragraph 62; the First-tier Tribunal erred in law in not in fact considering whether the Appellant’s fear on return was well-founded, or put another way, whether there was an objective risk on return. At its highest and without any express reasons being given for the finding, the Appellant was found to have established only a genuine subjective fear of re-trafficking. It is trite to say that this is insufficient to allow an appeal on

asylum grounds and to do so is a material error of law. The second ground of appeal is inextricably linked to the first in that if no findings are made as to objective risk on return, it goes without saying that there are also inadequate reasons for the same and for allowing the appeal. For these reasons, the decision of the First-tier Tribunal must be set aside and the appeal remade.

16. Overall, I would also add that whilst not raised as a cross-appeal by the Appellant, there are Robinson obvious errors in the First-tier Tribunal's approach to findings of fact in this case outside of the errors identified by the Respondent. First, there is no consideration at all of whether the Appellant is a vulnerable witness in light of her being an accepted victim of trafficking and modern slavery; no reference to the Joint Presidential Guidance Note No 2 of 2010: 'Child, vulnerable adult and sensitive appellant guidance' relevant both to the conduct of the hearing and assessment of evidence of a vulnerable witness; and no consideration at all of the Appellant's claim and evidence in the context of her being a victim of trafficking and modern slavery. To the contrary, there are numerous examples of where the First-tier Tribunal holds against the Appellant as indicators of deception a number of factors without considering the context, the Appellant's explanation or reasons for particular actions. For example, the fact that the Appellant falsely obtained a student visa to enter the United Kingdom, which she says was arranged by her traffickers for her forced journey to the United Kingdom; the fact that she created a false Facebook account, on the Appellant's account, to make contact with a friend to seek help having been trafficked to the United Kingdom; and the fact that she stole money from her traffickers on her account, whilst escaping from them.
17. Secondly, the First-tier Tribunal repeatedly refers to the Appellant's 'unaccepted claims' which appears to either adopt the Respondent's decision or reaches a conclusion dismissing the claims without any real assessment of them or reasons for rejecting them other than, as above, generic points about a propensity for deception and inconsistency of claims. The latter without any consideration of whether such inconsistencies are material (for example discrepancies between an asylum interview and the fuller substantive interview, about which caution should be exercised), whether they are affected by any vulnerability and without any reference at all to the Appellant's evidence or detailed claim on the issues. The First-tier Tribunal simply dismisses the Appellant's claims to be at risk on return due to her sexuality, religion and family circumstances solely because of a propensity to deception and without any consideration of the fact that the Appellant has, in terms of her claim to have been trafficked and subjected to modern slavery, been found to be credible on the balance of probabilities.
18. Thirdly, no reasons at all are given for the rejection in paragraph 66 of the evidence from the Appellant's sister save for the fact it is undated, unsigned and self-serving. Given the evidence included 'Whatsapp' messages (which would not be signed and the date may not be clear for

each); that the Appellant's sister is in Algeria and that caution should in any event be applied before simply labelling evidence as self-serving (it may be, but that does not necessarily mean that it is not credible); there are insufficient reasons for finding that reliance can not be placed on the evidence at all.

19. For these reasons, which show self-evident and obvious errors in the fact finding approach of the First-tier Tribunal, I do not consider that it is appropriate to preserve any findings of fact from the First-tier Tribunal. Taking into account paragraph 7 of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal and in particular the concerns I have raised as to whether there should at the very least have been express consideration of whether the Appellant is a vulnerable witness such that the Joint Presidential Guidance applies; it is appropriate and necessary for this matter to be remitted to the First-tier Tribunal hearing de novo.
20. At the end of the oral hearing, Mr Corben raised the issue of whether if remitted, there could be fresh consideration as to whether the Respondent consents to the new matter relating to Article 8 to be considered by the Tribunal in a de novo hearing. In my view, this is a matter that can appropriately be dealt with by the parties prior to any further hearing being listed and that it may be helpful for the Appellant to set out her claim on this basis (with any up to date information) with a specific fresh request for the Respondent to consent to the matter being dealt with as part of the appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The appeal is remitted to the First-tier Tribunal (Hatton Cross hearing centre to be heard de novo by any Judge except Judge Wright.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed 
2020

Date 14th February

Upper Tribunal Judge Jackson