



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/01913/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Centre
On 3 May 2016**

**Decision & Reasons
Promulgated
On 6 June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

HD

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Ms E Rutherford, instructed by Fountain Solicitors

DECISION AND REASONS

The First-tier Tribunal made an anonymity direction in relation to the respondent because of the nature of the case. I consider it appropriate to make a similar order in the Upper Tribunal under Procedural Rule 14(1) to prohibit the disclosure or publication of any matter likely to lead members of the public to identify the respondent. To give effect to this order the respondent is to be referred to by the initials above.

1. The Secretary of State appeals with permission against the decision and reasons statement of First-tier Tribunal Judge Ferguson that was promulgated on 23 September 2015. Judge Ferguson found the respondent to be a refugee.
2. Before considering the grounds of appeal to the Upper Tribunal, it is necessary to identify understand the respondent's immigration and appeal history. It is set out in detail in the chronology provided on 10 August 2015. The salient information is as below.
3. In September 2005, the respondent fled Tunisia to avoid being forced to marry her cousin. Towards the end of 2005 she met QM (who is now her husband) in the UK and they start living together early in 2006 although not as husband and wife. The couple underwent an unregistered Islamic marriage ceremony at the end of 2006. The marriage was registered with an Imam on 7 July 2013. QM is an undocumented Algerian citizen and has no lawful immigration status in the UK, having failed to show that he is a refugee. He has not made any applications since his fresh claim for asylum was refused on 2 June 2014.
4. On 28 June 2014 the respondent applied for asylum on the grounds that she had a well-founded fear of persecution in Tunisia from her family who were disgraced by her failure to marry her cousin and there was insufficient protection available to her from the Tunisian authorities. She claimed as a result she was a member of a particular social group and for these reasons was a refugee.
5. The Home Office refused the respondent's application on 21 January 2015. The Home Office rejected her claim for the reasons as set out in detail in the reasons for refusal letter of 20 January 2015. In summary those reasons were.
 - a. The Home Office did not accept the facts of the claim had the potential of engaging the refugee convention on the grounds of particular social group because the facts claimed did not identify an immutable characteristic or distinct identifiable feature in Tunisian society.
 - b. The Home Office did not believe the respondent's account of events regarding her studies in Tunisia or the UK or about the circumstances in which she left Tunisia in September 2005 because of her failure to provide evidence that should have been readily available to her such as educational certificates and her inconsistent answers as to why those documents had not been provided.
 - c. The Home Office did not find it plausible that the respondent had been able to maintain contact with one of her sisters if the circumstances of her claim were true.
 - d. The Home Office considered the background country information relied on by the respondent regarding "honour killings" and noted the evidence showed such incidents were rare in Tunisia and did not support the claim in general.
 - e. The Home Office believed it would be reasonable to expect the respondent to relocate within Tunisia, for example to Tunis, and did

not accept her relatives would be able to track her there. The Home Office did not accept the respondent's claim to have two uncles in Tunisia who are high ranking police officers or that it was plausible they would or could track her if she returned to Tunisia.

- f. The Home Office did not accept the respondent's husband could not live with her in Tunisia and therefore the respondent would have the protection of a male relative.
 - g. The Home Office also believed it was possible for the respondent to move with her husband to Algeria because it was likely she would be regarded as an Algerian national on the basis of marriage.
 - h. The Home Office did not accept the respondent to be a credible person because she had delayed claiming asylum for a number of years without reasonable explanation and therefore she could not be given the benefit of the doubt (paragraph 339L of the immigration rules applied).
 - i. The Home Office rejected the respondent's claim in relation to private and family life rights because the provisions of paragraph 276ADE and appendix FM were not met and there are no exceptional circumstances.
6. Judge Ferguson made the following findings in respect to the reasons for refusal and in favour of the respondent's claim to be a refugee.
- a. As per Shah and Islam the facts of the claim were capable of engaging the refugee convention on the ground of particular social group. The respondent's additional background country information identified that forced marriage was an issue in Tunisian society.
 - b. The Home Office reasons for rejecting the respondent's account of being subject to a forced marriage were weak, being based solely on issues of plausibility and the delay in claiming asylum. The Home Office failed to assess the respondent's claim in the round and in the round there was general consistency in the appellant's accounts.
 - c. The background country information indicated that the respondent's claim was plausible contrary to the Home Office's assessment. An expert report supported this view.
 - d. The delay in claiming asylum undermined the respondent's credibility because the explanations given did not explain the full period of delay (nine years).
 - e. The delay was not of itself sufficient to find that the core account was not credible because the evidence when looked at in the round was sufficient to establish the respondent faced a real risk of persecution from her family. The respondent could not obtain protection from the Tunisian authorities because they would view it as an internal family matter.
 - f. The respondent would return alone because there was no prospect of her husband going to Tunisia with her as he had no Algerian travel document and the attempts made by the Home Office to obtain one for him had failed.

- g. It would be unduly harsh to expect the respondent to live in another part of Tunisia as a single woman without family support because of the background country information.
7. The grounds of appeal to the Upper Tribunal focus on whether Judge Ferguson gave adequate reasons for his findings. In summary, the grounds argue that the judge failed to engage with the issues identified in paragraphs 25 to 28 of the reasons for refusal letter and therefore failed to give adequate reasons for finding that it would be unduly harsh to expect the respondent to relocate in Tunisia. Paragraphs 25 to 28 of the reasons for refusal letter indicate the Home Office's belief that the respondent's husband would be able to go to Tunisia with her or that the respondent could go with him to Algeria.
 8. As can be seen, the Home Office arguments are now very different from those in the reasons for refusal letter. There is no challenge to the bulk of Judge Ferguson's findings and I proceed on the basis that there is no challenge to his findings that the respondent has given a credible account to the extent that she has established she faces a real risk of serious harm from her family in Tunisia and that she would not be able to obtain adequate protection from the Tunisian authorities as a lone woman in that country.
 9. The question for me is whether Judge Ferguson adequately dealt with the two alternatives proposed by the Home Office. Although not explained well in the grounds of appeal, when put in context those alternatives are: (i) whether it would be unduly harsh to expect the respondent to relocate to another part of Tunisia with her husband (on the assumption he could return there) or (ii) whether the respondent could go to Algeria with her husband according to Algerian law and thereby not require international protection at all.
 10. Taking the second alternative first, in our discussions, Mr Mills acknowledged that the Home Office has no evidence that the respondent is a citizen of Algeria and accepts it is merely a possibility that she is such a national on the basis of marriage given the background country information about the nationality laws of Algeria. The fact the Home Office has been unable to establish that the respondent's husband is Algerian (as conceded in paragraph 25 of the reasons for refusal letter) makes the possibility of her being Algerian more remote and to this extent I find this part of the Home Office's allegation to be speculative and unreasonable.
 11. In reaching this conclusion I have proceeded on the basis that the prospect of the respondent being sent to Algeria is not one to be considered under principles of internal relocation. It is clearly not a situation of internal relocation because the respondent would not be returning to Tunisia. Removal to Algeria would be to avoid any persecutory treatment in Tunisia altogether. I have proceeded on the basis that the Home Office was in fact arguing that the respondent did not need international protection because she had another nationality and had no fear of persecution in that third country. It is trite refugee law that a person has no need of international protection if they have more than one nationality and can live in one of their countries of nationality.

12. It is, of course, for the appellant to show that she does not have any other nationality. She has never claimed to be Algerian. As indicated, Mr Mills confirmed there was no evidence to show that the respondent was Algerian. The evidence relied on by the Home Office regarding Algerian nationality law is far from conclusive that the respondent might be Algerian because of her marriage, particularly since his nationality was dubious since he could not be documented despite the Home Office's past attempts. The fact the evidence does not show that it is reasonably likely that the respondent has Algerian nationality means this argument must fail.
13. It follows that there could have been no need for Judge Ferguson to deal with this issue beyond the comments he makes in paragraph 26 of his decision and reasons statement and there no error on a point of law exists in relation to this matter.
14. The other option pursued by the Home Office is that the respondent's husband could move to Tunisia and she would be safe in Tunisia in his company. The arguments presented by Ms Rutherford in response to this possibility focused on the fact there was no evidence to show that the respondent could actually move to Tunisia. He had no documentation and there was no reason to think he would be admitted according to Tunisian law. These are, in essence, the only reasons given by Judge Ferguson for finding that the respondent would return on her own to Tunisia and why she would be at risk if on her own.
15. This approach might be regarded as being contrary to law because it appears to ignore the requirements of paragraph 3390 of the immigration rules regarding the internal relocation. Those provisions are binding because they transpose the provisions of article 8 of the Qualification Directive (2004/83/EC). Paragraph 3390(iii) indicates that technical obstacles to return do not prevent the Home Office making a finding that it is reasonable to expect a person to relocate in their own country to a place where they do not have a well-founded fear of persecution. On the face of the provisions, it might appear that the question of whether the respondent's husband could travel to or stay in Tunisia would be irrelevant to deciding if the respondent could relocate.
16. However, I cannot see how this provision can be extended to cover the situation of the respondent's husband. It is clear that paragraph 3390 is addressed only to the asylum seeker themselves and not to others. Therefore, to make the respondent's protection in Tunisia conditional on her husband being able to accompany her is going beyond these boundaries. Paragraph 3390 like article 8 is predicated on the fact the person seeking asylum can be admitted to the proposed country of destination. It proceeds on the basis that international law assumes that a country will admit its own nationals. The reference to "technical obstacles " is a reference to difficulties that might arise in obtaining documents or arranging travel in the context that the person is returning to a country where they have a right to live. Although I am not aware of any case specifically raising this point it would appear to be consistent with paragraphs 99 to 101 of the Court of Appeal's judgment in HF (Iraq) & Ors

v SSHD [2013] EWCA Civ 1276, which identifies obstacles as being those preventing the return of a person to their country of nationality.

17. Although I have some sympathy with the Senior Presenting Officer who settled the grounds that there was an appearance that Judge Ferguson had not dealt with everything, on close examination and having had the assistance of Mr Mills and Ms Rutherford, I conclude that there was in fact no need for Judge Ferguson to do more than he did. The Home Office argument that the respondent could return to Tunisia with her husband was speculative.
18. All that had been established at the date of hearing was that the respondent was to be removed to Tunisia. Judge Ferguson was bound to consider the situation at the date of hearing. There was no assurance that her removal would be delayed so that her husband could make arrangements to travel with her. It was open to Judge Ferguson to conclude that it was established the appellant would be returned to Tunisia on her own, as he found in paragraph 26. On the facts presented, there was no need for him to go further. He would have fallen into legal error had he entertained the speculation the Home Office suggested because to entertain speculation is to move away from the facts and a judge's decision must only be based on facts.
19. By way of a postscript, I wish to make clear that the fact the respondent is a refugee should not be seen to give an advantage to her husband. Throughout the conduct of the appeal this appears to be an undercurrent. He remains in the UK unlawfully and is liable to removal. Questions of his family life rights and whether they outweigh the public interest in his removal will no doubt have to be considered at some time in the future by the Home Office but are not ones that Judge Ferguson had to consider or ones that can or should be admitted at this stage in proceedings.

Decision

The Secretary of State's appeal to the Upper Tribunal is dismissed because there is no legal error in Judge Ferguson's decision that the respondent (HD) is a refugee and that decision is upheld.

Signed

Date 6th June 2016

Judge McCarthy
Deputy Judge of the Upper Tribunal