



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03476/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 15th January 2018

Decision and Reasons Promulgated
On: 24th April 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Respondent

and

AQL

(anonymity direction made)

Appellant

Representation:

For AQL:

Mr M. Gill QC, Counsel instructed by Thompson & Co

For the SSHD:

Mr T. Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Case History

1. AQL is a national of Vietnam born in 1993. On the 5th November 2015 he claimed asylum. Protection was refused on the 21st March 2016 and AQL exercised his right of appeal to the First-tier Tribunal.

2. The matter came before Judge Chowdhury of the First-tier Tribunal on the 20th September 2016. AQL advanced a claim based on a fear of persecution in Vietnam for reasons of his imputed political opinion. The determination contains no clear conclusion on whether the asylum appeal is dismissed, but it is implicit in Judge Chowdhury's reasoning on the substance of that claim that she considered it to be an account fabricated, and provided to AQL, by traffickers. She went on to find that AQL is a victim of human trafficking and 'allowed' the appeal with reference to Article 4 ECHR. Judge Chowdhury further made an order, with reference to Rule 13 Tribunal Procedure (First-tier Tribunal) (IAC) Rules 2014 in the following terms:

"In respect of this Appellant I make an order prohibiting the disclosure of this decision to the Appellant personally as I am satisfied that such disclosure would be likely to cause the Appellant serious harm and I am satisfied, having regard to the interests of justice that it is proportionate to give such a direction".

[at paragraph 73 of the determination].

3. The Secretary of State was granted permission to appeal the human rights decision on the 25th January 2017. On the 28th February 2017 the matter came before Mrs Justice Laing DBE and Upper Tribunal Judge Blum. Those representing AQL submitted that they were unable to effectively participate in the proceedings because the effect of Judge Chowdhury's decision was that they had been unable to take instructions from AQL. They had written to the First-tier Tribunal asking that the order be withdrawn, but had received no response. Laing J and UTJ Blum decided that it would in the circumstances be appropriate to adjourn the proceedings so that the President of the First-tier Tribunal could make a decision about Judge Chowdhury's order.
4. The matter came before me on the 21st November 2017. I was informed by Mr Gill QC, who appeared for AQL, that there was some uncertainty as to whether Judge Chowdhury's order remained in force. By a letter dated the 6th September 2017 the President of the First-tier Tribunal Judge Clements indicated that Judge Chowdhury has agreed to "waive" that order. Mr Gill expressed doubt about this approach. The terms of the order are clear on the face of the determination, and in the absence of a re-promulgated decision minus the offending paragraph, he and his instructing solicitors could not be confident that they were acting properly in discussing the case with their lay client. He asked therefore that order be set aside, in order that any doubt be dispelled. For the Secretary of State Mr Melvin had no objection. I therefore set the order contained at paragraph 73 of the decision aside on the grounds that there was a procedural irregularity, the Tribunal having made the order without receiving any representations from the parties.

5. That matter having been settled Mr Gill made an out-of-time application for permission to submit a cross-appeal, against the Tribunal's decision on the protection claim. The reason for the delay was that the terms of the order had prevented AQL from consulting with his representatives. I extended time and granted permission. Obviously that grant expanded the issues in the case and it was appropriate that before I hear full argument the matter be adjourned to enable Mr Melvin to formulate a Rule 24 response to AQL's cross appeal. Mr Gill accepted that in the circumstances an adjournment was appropriate.
6. The matter came back before me on the 15th January 2018 when I heard argument from both parties on whether the First-tier Tribunal had erred in law such that its decision should be set aside.

The Decision of the First-tier Tribunal

7. The determination begins by setting out the evidence that AQL gave to the Secretary of State. AQL stated that he left Vietnam because his father was arrested and detained by the authorities for political opposition; his mother lost her job; thereafter his mother borrowed money from loan sharks and as a result the family were harassed and threatened. There is no suggestion that it was the loan sharks who arranged for AQL to leave Vietnam: he states that it was organised at the instigation of his mother's friend. Having arranged for his journey from Vietnam to the UK AQL found himself in China, Russia and then in France. He entered the UK hidden in a vehicle in September 2010. When he came to the attention of UK immigration officers he was placed in the care of Kent social services because he was only 16 years old; they advised him to claim asylum. AQL avers that he faces a real risk of harm in Vietnam because of his vocal online support for the 'Assembly of Vietnamese Youth for Democracy' (AVYD). He has also attended demonstrations in the UK.
8. The determination then rehearses the reasons for refusal before summarising what happened at the hearing. Insofar as it is relevant to this appeal this section notes that AQL was extensively cross-examined about his involvement with the AVYD. He said he had not claimed asylum because he was afraid of being deported. People in the Vietnamese community supported him with accommodation and food but had not advised him to claim. The determination then reads as follows:

"It was at this point in the proceedings that I became concerned about the activities this Appellant was involved in for five years. I noted that the Appellant arrived in the UK when he was 16 years old. I asked him what he did 'for the community' in Deptford. He said he cleaned houses and washed dishes and did general domestic work for other Vietnamese people. I asked the Appellant who currently lived with him. He said another Vietnamese man".

9. The determination records that the Judge then asked Counsel for AQL and the Home Office Presenting Officer whether anyone had considered the possibility that AQL was being trafficked for the purpose of forced labour. A short adjournment was granted for them both to take instructions. When the representatives came back into court neither had any instructions on the point. The summary of the respective submissions indicates that no mention was made of trafficking.
10. The First-tier Tribunal Judge states at the opening of her 'Findings and Conclusions' that she is extremely disturbed by the case. AQL was very young when he arrived and quickly absconded from the care of Kent Social Services. Despite having lived in this country all of this time he could not speak one word of English. Noting some discrepancy in AQL's evidence about how he got in touch with the Vietnamese community in Deptford the Tribunal concludes that it is more likely that his absconding from social services care was orchestrated by others. The Tribunal's view of the facts advanced by AQL about the five years he had spent in the UK were that he was being "ruthlessly exploited": "this was a boy seemingly undertaking unpaid labour. In Article 4 terms, his human dignity was relentlessly violated and he was denied a fundamental freedom" [at §41]. The Tribunal referred itself to the Upper Tribunal decision in MS (trafficking - Tribunal's powers - Article 4 ECHR) Pakistan [2016] UKUT 00226 (IAC) and to various statements of policy made by the Secretary of State in respect of the UK's obligations under the Trafficking Convention. Noting that self-identification by the victim is not a pre-requisite the Tribunal concluded that on the facts before it, AQL had been a victim of trafficking in the UK. It further found that the account he had given of political involvement was most likely "learned under instruction" (ie an account given to him by traffickers).
11. In conclusion the Tribunal dismisses the protection claim on the grounds that it is a fabrication, and allows the appeal "under Article 4 of the ECHR".

The Secretary of State for the Home Department's Appeal

12. This was a case where the appellant himself had made no claim to have been trafficked. There had been no referral into the 'National Referral Mechanism' (NRM) and there was therefore no decision from the Competent Authority. At the request of the First-tier Tribunal Judge Counsel for AQL had taken his instructions on the morning of the hearing and he had denied that it was part of his claim that he had been trafficked. When asked under cross-examination whether he had felt exploited in any way he had replied that he had stayed with Vietnamese families who had given him food and shelter in exchange for his performance of household chores. That being so the Secretary of State submits that it was an error of law for the Tribunal to have concluded that AQL

was a victim of trafficking, and further to have allowed the appeal on human rights grounds for that reason. In particular it is submitted that:

- i) There was a procedural irregularity in that there had been no referral under the NRM. If the First-tier Tribunal was concerned that this was a case of modern slavery the proper approach would have been to adjourn the matter so that a referral could be made;
 - ii) The First-tier Tribunal erred in giving determinative weight to immaterial matters. The factors that the Tribunal identifies as indicators of trafficking – that AQL absconded from Kent Social Services, that he is young, that he has been confined to the Vietnamese community and that he does not speak English – are not capable of demonstrating that he has been a victim of trafficking and to that extent the decision is perverse;
 - iii) The First-tier Tribunal has erred in failing to take material matters into account. In finding that AQL was subjected to “domestic servitude” the Tribunal fails to consider his view that it was no such thing. In finding that AQL should be able to remain in the UK in order to assist in a police enquiry the Tribunal has failed to take into account the fact that the police have already encountered AQL and considered his circumstances, yet no investigation has been launched;
 - iv) The issue of “trafficking” was plainly a “new matter” that had not been previously considered by the Secretary of State and as such the First-tier Tribunal was not entitled to consider it without seeking the Secretary of State’s consent to do so. No such consent having been given, the Tribunal had no jurisdiction to consider the matter and its decision is a nullity: see s85(5) Nationality, Immigration and Asylum Act 2002. In his submissions Mr Melvin asked me to note that the grounds of appeal to the First-tier Tribunal make no mention of trafficking or Article 4.
13. In response Mr Gill accepted that Article 4 had not featured in the grounds of appeal but submitted that there was no need for this to be pleaded separately, since all the facts were known to both parties at all times. It is implicit in the language that where someone has been subjected to slavery they have also been subjected to degrading treatment, and so little turned on whether the case was pleaded under Articles 3 or 4. The fact that the Secretary of State had analysed those facts poorly could not limit the jurisdiction of the Tribunal. The *prima facie* case of trafficking had been raised in the claim and as such there were no ‘new’ matters arising. The First-tier Tribunal is a public body with its own obligations under the Convention. As such it could not as a matter of law ignore what it clearly saw as exploitation. It is completely wrong for the Secretary of State to

suggest that there is any obligation on the *victim* to identify that he has been trafficked.

14. Mr Gill further submitted, with reference to Mahmud (s85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC), that the amended s85(5) is a provision concerned with procedural safeguards. It cannot rationally be interpreted to be limiting the overall jurisdiction of the Tribunal. The point is that if a new matter of fact arises that the Secretary of State has not yet addressed, then she should be given the opportunity to do so. It cannot be construed so widely as to exclude new interpretations, or legal submissions, on existing facts. In this case it is apparent from paragraph 26 of the determination that the First-tier Tribunal considered the procedural fairness point. The Judge specifically puts the parties on notice that she is concerned about trafficking and invites their submissions on the point: if the HOPO felt unable to deal with it he could have raised s85(5) then.

AQL's Appeal

15. Mr Gill's point is simple: the First-tier Tribunal failed in its duty to clearly determine the protection claim. In respect of the claim as originally advanced by AQL the Tribunal disparages it in the body of its reasoning but it is clear from paragraphs 51 and 53 what the Tribunal's case theory had been: this claim was a fabrication by traffickers from whom AQL had learnt by "instruction". Mr Gill submitted that AQL was entitled to a discrete assessment of his account. Further, it is submitted that having made the findings that it did about trafficking, the Tribunal failed to proceed to consider whether AQL faced a well-founded fear of persecution from traffickers should he be returned to Vietnam.
16. Mr Melvin pointed out that the determination gives other reasons for rejecting the claim advanced by AQL. The Tribunal found his interest in politics to be "completely fabricated" and inconsistent with his own evidence. Even if it were true that AQL's father had been sent to prison for political opposition to the government and AQL was afraid of the local communist party, it remained open to him to relocate within the country, for instance to the anonymity of a large city like Ho Chi Minh. Even on the Tribunal's limited findings there is no risk to AQL of being trafficked once back in Vietnam. If he wishes to avoid being exploited abroad he should simply avoid contact with those offering 'work placements' outside Vietnam.

Discussion and Findings

17. This appeal was "allowed" with reference to Article 4 ECHR. Neither party was satisfied with that outcome. The Secretary of State because she submits that

the decision was procedurally unfair and because it was not, on the evidence before the Judge, one within the range of reasonable responses. AQL because the First-tier Tribunal made no findings on whether he faced a future risk as a result of trafficking; as it stood the bare finding that he had been exploited in the UK did not entitle him to protection.

18. It should be noted that the parties made their respective submissions before the Court of Appeal handed down its decision in *Secretary of State for the Home Department v MS (Pakistan)* [2018] EWCA Civ 594, which roundly rejects the approach taken by McCloskey J in *MS (trafficking – Tribunal’s powers – Article 4 ECHR) Pakistan* [2016] UKUT 00226 (IAC), an approach specifically adopted by the First-tier Tribunal in this case. I have considered whether to recall the parties to hear their amended submissions in light of *MS*, but for the reasons set out below I have not found that to be necessary. It is clear that whichever way you look at it, this is a decision that must be set aside.

19. I am not prepared to say that this young man was not trafficked. He cannot be expected to identify whether his working conditions fell so far below those routinely endured by the low-paid that it was in effect slavery. In the final analysis it may be established that he has been subject to exploitation such that the definition would be met. It is however manifestly the case that the unadorned facts asserted before the First-tier Tribunal were not a sufficient basis to warrant the conclusion that it reached. AQL was young, and although he has been in this country since 2010 had learned no English. He had left social services care. He was performing domestic chores in exchange for food and shelter. There was nothing on those facts to justify the Tribunal’s conclusion that he was being “ruthlessly exploited” or that “his human dignity was relentlessly violated”. His evidence was very much to the contrary. At Q45 of the asylum interview AQL was asked whether he feels that he has been exploited in any way since his arrival in the UK, to which he replied:

“No, since I arrived in the UK I have stayed with Vietnamese families and people and they gave me food and shelter and in return I do some house work and cleaning but no I am not subject to abuse in any way”

There being no evidential basis for the finding that AQL was being trafficked, that part of the decision must be set aside.

20. That lack of evidence illustrates the merits of the Secretary of State’s second ground: procedural irregularity. It was perfectly legitimate for the First-tier Tribunal to have raised its concerns about trafficking. A judge dealing with a young – and therefore vulnerable – appellant should be alert to the possibility of exploitation and be mindful of her duties under the Convention. Those concerns having been raised, however, it seems to me that the proper approach would have been to call a halt to the proceedings, and require a referral to be

made to the Competent Authority. Had that been done, it may be that the Authority, as the specialist body charged with investigating such crimes, *would* have identified a sufficient evidential basis to justify a finding of trafficking. But as it was, this was not an AS (Afghanistan) situation, because there was no decision to review.

21. I therefore find that the Secretary of State's appeal must be allowed and the part of the decision dealing with trafficking must be set aside. It is now a moot point whether the trafficking was a 'new matter'. Mr Gill may be right to say that this was not a new factual matrix, but that is only one part of the equation. To be a 'new matter' it must be something capable of constituting a ground of appeal. It is difficult to see what the new ground of appeal might have been, since the First-tier Tribunal stopped short of finding any future risk to AQL.
22. That brings me to his appeal. The findings on the protection claim advanced by AQL are not limited to the conclusion that this was a narrative foisted upon him by traffickers, but it is clear that this was the theory underpinning all of its findings. For that reason I am satisfied that if one part of this determination must be set aside, so too should the remainder. If the Tribunal was wrong about AQL having been trafficked, its reasoning on his asylum claim cannot survive. He is entitled to have that claim considered discretely on its merits. Conversely if the Tribunal was right about the trafficking, it should have gone on to make findings on whether there would be any future risk to AQL as a result. The peculiar outcome as it stands was that the appeal was allowed simply because AQL is *currently* in the UK subject to modern slavery. It is difficult to see how he would in those circumstances be assisted by any 'period of reflection', or by *not* being returned to Vietnam, a place where he was apparently free from exploitation.
23. Both parties have established material error of law in the determination. I therefore set the decision of the First-tier Tribunal aside in its entirety and remit the matter for hearing *de novo* in the First-tier Tribunal.

Decisions and Directions

24. Those representing AQL are directed to consider whether they wish to advance a case that AQL has been subject to trafficking. If they do then this must be communicated to the Secretary of State **as soon as it practicable and in any event no later than three weeks after this decision is received**, and a referral sought to bring AQL within the NRM.
25. Those representing AQL must further consider whether they wish to advance a case that AQL would face a real risk of harm upon return to Vietnam in the form of trafficking. If they do then this, with appropriate particulars, must be

communicated to the Secretary of State **as soon as is practicable and in any event no later than three weeks after this decision is received.**

26. If AQL makes no such submissions this should, **as soon as is practicable and in any event no later than three weeks after this decision is received**, be communicated to the Secretary of State and the First-tier Tribunal, so that the matter can be listed for substantive hearing *de novo*.
27. If AQL submits that he has been trafficked, and/or that he has a well-founded fear of being trafficked in the future, the Secretary of State is directed to consider those matters and issue a written decision explaining her response. The timing of such a response will depend on whether the NRM is engaged:
 - i) If no referral is made the written response must be filed and served **within three weeks** of notification of AQL's case
 - ii) If a referral is made the Secretary of State must (in accordance with her own policy) await the outcome of the Competent Authority investigation before giving her response. In this case the Tribunal must be kept informed of any developments and an indication be made **at the earliest possible stage** whether the Secretary of State intends to maintain or withdraw her decision pending further investigation.
28. The decision of the First-tier Tribunal is set aside for material errors in approach.
29. The decision in the appeal is to be re-made in the First-tier Tribunal.
30. There is an anonymity order in place.

Upper Tribunal Judge Bruce
21st April 2018