



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/13078/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 17th April 2018

**Decision & Reasons
Promulgated
On 11th May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**T D
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Burrett instructed by Wick & Co Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Vietnam whose date of birth is 24th October 1999, appealed to the First-tier Tribunal against a decision of the Home Office dated 9th November 2016 to refuse his application for asylum. First-tier Tribunal Judge N M K Lawrence dismissed the appeal in a decision dated 29th October 2017. The Appellant now appeals to this Tribunal with permission granted by Upper Tribunal Judge Rintoul on 21st February 2018.
2. The background to this appeal is that the Appellant claims that his father accumulated a number of debts in relation to his involvement with gambling. His parents were threatened and their home ransacked. He claims that his parents disappeared and the Appellant was left homeless,

that he lived on the streets and worked for street vendors. He claimed that he was trafficked to the UK and placed with an employer. He claims that he was about to be passed on to another employer when he was able to escape and claimed asylum in April 2016.

3. There was a referral to the competent authority through the National Referral Mechanism to consider whether the Appellant had been a victim of human trafficking. On 11th April 2017 the competent authority made a decision that there were reasonable grounds to believe that the Appellant was a victim of human trafficking. The competent authority subsequently made a conclusive decision that the Appellant had been the subject of human trafficking (although the letter is undated, the First-tier Tribunal Judge's decision notes that the decision was made on 17th October 2017). In that decision it appears to have been accepted that the Appellant's date of birth is 24th October 1999 and that he was subjected to forced labour in London.
4. In considering the Appellant's claim for asylum the Secretary of State accepted that the Appellant comes from Vietnam. His age was not disputed. The Secretary of State accepted that the Appellant and his parents were threatened and that their house was attacked due to his parents owing money to debt collectors. The Secretary of State accepted that the Appellant has no family support in Vietnam and that he had demonstrated a genuine subjective fear on return to Hanoi. However, the Secretary of State considered that the Appellant's genuine subjective fear is not objectively well-founded because there is sufficient protection provided by the authorities in Vietnam and there is an area of Vietnam to which he could reasonably relocate where he would not face a real risk of harm.
5. In considering the Appellant's appeal the judge found that the competent authority letter was issued on 17th October 2017. However, the judge said, "based on the oral evidence I heard, I find the reason (sic) he claims to have been trafficked are markedly different from the ones accepted by the Respondent" [11]. The judge went on to consider the circumstances of the Appellant's claim finding material changes to the Appellant's evidence which went towards his credibility. The judge made a number of adverse credibility findings at paragraphs 15 to 26 before concluding at 26:-

"However, the evidence upon which the Appellant claims he was trafficked is not made out, to the lower standard. He may have been sent to the UK by his parents to work or to study. Whatever, the real reason the reason he gives for being in the UK is not the truth. I therefore, (sic) the Appellant may meet the technical definition of being 'trafficked' (the Council of Europe 2005 Convention). However, I do not find he was recruited, transported, transferred, harboured or received person, within the terms of the 2005 Convention. This is migration masquerading as 'trafficking'. I therefore find the Appellant is not entitled to a residence permit pursuant to article 14."

The judge went on at paragraphs 27 to 31 to consider the expert reports. The judge concluded that the Appellant was not in need of humanitarian protection or any international protection on Refugee Convention grounds of appeal and also went on to dismiss the appeal under Article 8 of the ECHR.

6. There are three grounds of appeal articulated in the renewed Grounds to the Upper Tribunal. The first ground is in relation to the burden and standard of proof and contends that the judge has not made any findings or given any reasons as to why the decision of the competent authority has been disregarded. The second ground contends that the judge erred in his assessment of the medical evidence and the expert report as these were considered after the judge had found that the Appellant is not credible. The third ground contends that the judge erred in assessing the evidence and credibility in that he rejected the medical evidence and the expert report without considering the evidence as the whole.

Error of Law

7. At the hearing before me Mr Duffy accepted that there were difficulties in relation to this decision. Mr Duffy accepted that, although it appears that the judge was led that way by the Presenting Officer in the First-tier Tribunal, in circumstances where the Appellant had been accepted as a victim of trafficking, it was not appropriate for the First-tier Tribunal Judge to go behind that finding. He accepted that this was particularly the case in light of the recent Court of Appeal decision in **Secretary of State for the Home Department v MS (Pakistan) [2018] EWCA Civ 594**. In these circumstances he accepted that there was a procedural error in the judge's decision and in these circumstances he submitted that it was appropriate to remit the appeal to the First-tier Tribunal to be considered afresh. Mr Burrett agreed with that analysis and approach.
8. I firstly note that the judge did not appear to take into account the contents of the reasons for refusal letter and in particular the fact that the Secretary of State accepted that the Appellant and his parents were threatened that their house was attacked due to his parents owing money to debt collectors and that he had no family support in Vietnam. The judge also failed to take proper account of the decision by the competent authority that the Appellant had been the subject of trafficking and forced labour in the UK. This failure is particularly relevant in light of the decision in **MS (Pakistan)**. At paragraph 17 Lord Justice Flaux said:-

“Before considering the Decision of the Upper Tribunal in more detail, it is convenient to set out some of the legal framework. At the time that this appeal was lodged, section 82(1) of the 2002 Act set out that a person against whom an ‘immigration decision’ had been made could appeal to the Tribunal. Subsection (2) then set out the categories of immigration decision, which included, so far as presently relevant at (g) a decision that a person was to be removed from the United Kingdom. The categories of immigration decision did not include a trafficking decision.”

9. Flaux LJ said at paragraph 69:-

“In my judgment, it is absolutely clear that the Court of Appeal in *AS (Afghanistan)* was limiting the circumstances in which, on a statutory appeal against a removal decision, an Appellant can mount an indirect challenge to a negative trafficking decision by the authority (in the circumstances where the Appellant has not challenged it by way of judicial review), to where the trafficking decision can be demonstrated to be perverse or irrational or one which was not open to the authority, those expressions being effectively synonymous for present purposes.”.

He said that there is a two-stage approach:-

“First, a determination whether the trafficking decision is perverse or irrational or one which was not open to the authority and second, only if it is, can 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.”

He went on to say at paragraph 70:-

“Of course, a trafficking decision, whether positive or negative, may well be relevant to the issue before the Tribunal as to the lawfulness of the removal decision. However, an Appellant can only invite the tribunal to go behind the trafficking decision and re-determine the factual issues as to whether trafficking has in fact occurred if the decision of the authority is shown to be perverse or irrational or one which was not open to it ...”.

10. Although in **MS** the Court of Appeal was considering a challenge by the Appellant to a negative trafficking decision, the guidance is equally applicable to a positive trafficking decision. It is clear that the remedy in relation to challenging a trafficking decision is by judicial review and that on statutory appeal the only ground open is whether a trafficking decision was perverse or irrational and not open to the authority. No such allegation was made in this case. In these circumstances it was not open to the judge, in an analysis of the decision, to reach a conclusion contrary to that reached by the competent authority. The First-tier Tribunal judge clearly attempted to do so, for example at paragraph 26 and at paragraph 27 where he concluded that the Appellant was not trafficked within the terms of the Convention.
11. A further issue arises in relation to the way the judge considered the expert and psychiatric evidence. I find that, particularly in relation to the psychiatric evidence, in which the doctor concluded that the Appellant was suffering from PTSD, the judge should have considered this document as part of the evidence in the round rather than reaching a conclusion as to credibility before looking at the medical report. Further, as raised by Mr Burrett at the hearing, I accept that there is no indication that the judge considered the Practice Directions in relation to child vulnerability and sensitive witnesses in light of the diagnosis of PTSD and the fact that the

Appellant was a minor when he came to the UK and when he was interviewed.

12. As set out above, it is clear that the judge did not take the reasons for refusal letter and decision by the competent authority and concessions made in both as a starting point in assessing the risk to the Appellant upon return to Vietnam. Accordingly, the judge erroneously went behind the decision of the competent authority and failed to engage properly with the issue before him, that is the risk to the Appellant on return to Vietnam on the basis of the concessions already made.
13. As the judge failed to consider to engage with the issues in dispute, the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

14. The decision of the First-tier Tribunal contains a material error of law on a procedural matter. I set that decision aside.
15. The appeal is remitted to the First-tier Tribunal to be considered afresh.

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 his 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
May 2018

Date: 10th

Deputy Upper Tribunal Judge Grimes