



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00553/2020 (V)**

THE IMMIGRATION ACTS

**Heard by Skype for business
On the 9 April 2021**

**Decision & Reasons Promulgated
On the 21 April 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

K N

(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Frantzis, Counsel instructed on behalf of the appellant.

For the Respondent: Mr Diwncyz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a citizen of Vietnam, appeals with permission against the decision of the First-tier Tribunal (Judge Sills) (hereinafter referred to as the "FtTJ") who dismissed her protection and human rights appeal in a decision promulgated on the 8 October 2020.
2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. Unless and until a

Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. In the light of the COVID-19 pandemic the Upper Tribunal issued directions indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties. I am grateful for their assistance and their clear oral submissions.
4. The hearing took place on 9 April 2021, by means of *Skype for Business* which has been consented to and not objected to by the parties. The advocates attended remotely via video as did the appellant and E so that they could listen and observe the hearing. There were no issues regarding sound, and no technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means. I am grateful for their assistance and their clear oral submissions.

Background:

5. The history of the appellant is set out in the decision of the FtTJ, the decision letter and the evidence contained in the bundle.
6. The appellant is a Vietnamese national who stated that she left Vietnam for France in December 2016 and arrived in the United Kingdom on 26th February 2017 and made a claim for asylum on 21 September 2017. The factual claim made by the appellant was that when she had left Vietnam aged 16 she had been a victim of trafficking and had been the victim of a serious sexual assault during that process.
7. On 16 October 2019, the National Referral Mechanism (“NRM”), accepted that the appellant had been broadly consistent in her account and that she had been subjected to an act of transportation, transfer harbouring and receipt, that she was 16 at the point of the acts and thus did not need to show any element of force, threats, coercion as she was below the age of consent but that the account indicated that she was not subjected to these acts for the purposes of sexual exploitation but accepted that she had been the victim of a serious sexual assault.

8. The respondent refused her claim in a decision letter dated 6 January 2020 and beyond accepting her nationality, did not accept the factual account given or that she had been a victim of trafficking and thus there was no risk on return. In the alternative, it was considered that there was sufficiency of protection on return, or she could internally relocate. Her article 8 claim was also rejected.
9. The appellant appealed that decision to the FtT on the 25 September 2020. In a decision promulgated on 8 October 2020 the FtTJ dismissed her appeal.
10. The FtTJ accepted the appellant's account that she had been the subject of a serious sexual assault whilst in France by one of the individuals involved in bringing her from Vietnam to Europe but beyond that did not accept her account for the reasons set out at [15 - 28]. The judge set out a number of adverse credibility findings in relation to her account.
11. Having made those findings of fact, and addressing the risk on return, the judge reached the conclusion that the appellant would not be at risk from those who had brought her to the UK and that there was no ongoing intention to exploit the appellant any further nor was there any motivation for seeking to contact or in essence to re-traffic the appellant. Part of the assessment made was that the appellant could return to live with her mother. Reference was made to the report of Dr Tran (the country expert) and the respondents CPIN and the judge concluded that the only relevant factor relevant to risk was that the appellant knew her trafficker but considered that this alone would not significantly increase the risk of the appellant being re-trafficked. At [33] the judge concluded that even if any of the group did seek to contact re-traffic the appellant, she would have the protection of the authorities in her home area or in the alternative at [34] even if at risk in a home area, the appellant could relocate to a major city. Thus the judge dismissed the appeal against the refusal of a protection claim. At [36 - 37]. The judge also carried out an analysis of the article 8 claim but found that removal was proportionate.
12. Permission to appeal was sought on five grounds and permission was granted by UTJ Martin on 10 November 2020.
13. Ms Frantzis, who had appeared before the First-tier Tribunal appeared on behalf of the appellant and relied upon the written grounds of appeal. There was no Rule 24 response issued on behalf of the respondent.
14. At the outset of the hearing Ms Frantzis informed the Tribunal that the parties had the opportunity to discuss the issues set out in the grounds of appeal and upon which permission had been granted by UTJ Martin and that it was accepted on behalf of the respondent that the grounds disclosed the making of an error on a point of law. In

particular, and relevant to Ground 3 which related to the failure to record or make any findings on the evidence of a witness that had been called to give evidence, Mr Diwnycz had checked the notes of the Presenting Officer and confirmed that evidence had been given.

15. There are 5 grounds advanced on behalf of the appellant which challenged the factual findings and assessment of risk made by the FtTJ and which were instrumental in the decision of the FtTJ to dismiss the appeal. It is not necessary to set out all of those grounds, but they also include an error of fact (ground 4), a failure to take account of oral evidence given before the tribunal (ground 3) and failure to take into account aspects of the expert report when reaching a decision on risk (ground 5).
16. The challenge to the factual findings and the failure to take account of material evidence (the evidence of E) were material to the outcome. As the ground 3 sets out, the witness E gave oral evidence before the FtTJ that were relevant to the factual assessment of the appellant's claim but there was no separate or any analysis of that evidence in the decision. The only reference that I can see in the decision is that at [37] but that was not in the context of the evidence concerning the appellant's factual history and the relationship with T with whom the appellant had initially lived with. As set out above, Mr Diwnycz confirmed from the notes that the witness did give evidence and agreed that that evidence was material evidence which has not been taken into account in the factual findings at [20] relevant to the appellant's relationship with T and also the issue of the appellant's contact with her mother.
17. That is also relevant to the assessment of the expert evidence which set out the importance of family support and the disadvantages for those who cannot return to their families. The FtTJ considered this at [31], but as a result of the factual findings the FtTJ concluded that the appellant could return to live with her mother and that it had been her mother who had paid for the travel and therefore would the appellant would not fall into the category of those who need access to a social protection centre. However, as the respondent accepts, that assessment is relies upon the factual findings relating to the appellant's account and relies in part on the evidence of E in conjunction with the evidence of the appellant. I recognise that the FtTJ also undertook an analysis of the issue of internal relocation (at [34]) on the basis of not returning to her mother, however as the factual findings are challenged I cannot be certain that this assessment would also not be affected.
18. The respondent concedes that the grounds of challenge are made out and that they were material to the outcome and as such the decision should be set aside. In the light of that concession and for the reasons set out in the grounds which the respondent accepts as made out, I am satisfied that as this was a protection claim involving issues of

trafficking and sexual exploitation and thus the requirement of anxious scrutiny applied, the findings of fact are unsafe and therefore cannot stand.

19. For the reasons agreed between the parties, I am satisfied that it has been demonstrated that the decision of the FtT did involve the making of an error on a point of law and that the decision should be set aside.
20. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) 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, it is appropriate to remit the case to the First-tier Tribunal."

21. Ms Frantzis submits that the venue for hearing the appeal should be the FtT. I have considered that submission in the light of the practice statement recited above and by reference to the history of this claim. There will be the necessity for evidence to be given and therefore further fact-finding will be necessary alongside the analysis of risk on return in the light of the relevant documentary evidence. In my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a hearing.
22. I have considered whether any of the factual findings can be preserved and in doing so have considered the decision in *AB (preserved FtT findings; Wisniewski principles)* [2020] UKUT 268. The decision makes it plain that there is no hard-edged answer to whether findings of fact have been "undermined" or "infected" by any "error or errors of law". The decision also identifies the legal error in the task of assessing an individual's overall credibility is in general likely to affect the conclusions as to credibility reached by the First-tier Tribunal. When looking at the decision in this appeal, the grounds of challenge sought to undermine the approach to the appellant's credibility taken by the FtT as a whole as well as the evidence of a supporting witness. Having considered this issue I have reached the conclusion none of the findings of fact should be preserved.

23. I further observe that at paragraph [7] of the decision the FtT] noted an inconsistency in the decision making (which was reflected in the grant of permission). That should be rectified and if necessary, an addendum or note should be provided by the respondent.
24. Any further directions can be determined at the CMRH before the FtT and will include any application made for an all -female court.
25. I also record that the appellant's consolidated bundle is not with the file. I have an electronic copy of the consolidated bundle. The evidence relied upon by the appellant must be provided to the tribunal in either paper form or by electronic means.
26. Further directions should also include any issues of vulnerability identified by the parties in accordance with the of AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 in which Sir Ernest Ryder, Senior President, referred to the Joint Presidential Guidance Note No. 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant ("the guidance note") and also the Practice Direction, First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses.

Notice of Decision.

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT shall be set aside. The decision will be remitted to the FtT for a hearing on a date to be fixed.

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 her. 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 Upper Tribunal Judge Reeds
Dated 12 April 2021**