



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

Appeal Number: AA/13068/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 17 May 2017**

**Decision & Reasons Promulgated
On 8 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**S
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Moffatt of Counsel, instructed by Sutovic & Hartigan
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the Appellant, S, against a decision of First-tier Tribunal Judge Wright promulgated on 15 February 2017 in which he dismissed her appeal for protection on asylum grounds, humanitarian protection grounds, and human rights grounds.
2. Permission to appeal was initially refused by First-tier Tribunal Judge Grant-Hutchison on 13 March 2017 but was granted by Upper Tribunal Judge Gill on 6 April 2017. Judge Gill expressed the grant of permission as being 'reluctant', and confined the grant of permission to just one of three

grounds that had been presented on the Appellant's behalf. I shall turn in due course to the specific ground.

3. The Appellant's identity, date of birth, and nationality have been in issue in this appeal. The Appellant claims to originate from North Korea. She says she does not know her true date of birth or even her full true name - in due course she adopted a single forename, S. She acknowledges that she has spent much of her life in Mongolia, with visits to China, and she has stated in the course of her asylum interviews that her main languages are Mongolian and English. The Secretary of State says that the Appellant is in fact SM, a citizen of Mongolia with a date of birth of 26 October 1977. It was indeed in this identity that the Appellant obtained a visa in December 2010 to enter the United Kingdom and in due course entered pursuant to that visa.
4. In fact, the records show that the Appellant made an application for entry clearance on 14 October 2010 via the British Embassy in Beijing for entry clearance to travel to the UK as a visitor accompanied by her mother, but that application was refused on 22 October 2010. A second application for entry clearance that year on 3 December 2010 resulted in the grant of a visa issued on 7 December 2010. The Secretary of State has produced details of those two visa applications including photographs and fingerprint details which are a match to the Appellant's bio data now readily available in the United Kingdom. Indeed, the Appellant does not deny that she is associated with those two applications but, as I have indicated, disputes that those applications were made in her true identity.
5. In this context it is accepted by the Appellant that she presented herself in the identity of SM when she arrived in the UK on 7 January 2011. Subsequently, when arrested in relation to an assault in April 2011 she again gave her identity as being SM, and again it was this identity that she presented to the West London Magistrates' Court on 26 April 2011 when she pleaded guilty to a charge of racially or religiously aggravated harassment and battery in respect of which she was sentenced to a conditional discharge for twelve months and ordered to pay compensation and costs.
6. It has been said by the Secretary of State that the identity of SM was also utilised in 2002. An application was made at the British Embassy in Ulaanbaatar on 8 March for entry clearance to travel to the UK as an employee, and indeed a visa was issued on 18 March 2002 to that end. The Appellant has consistently denied any association with this earlier application of 2002.

7. The fact of the earlier application was raised both in the NRM trafficking decision that was made in the Appellant's case on 28 July 2014 - a 'conclusive grounds' decision rejecting her claim to be a victim of trafficking on the standard of a balance of probabilities - and in the 'reasons for refusal' letter ('RFRL') dated 23 October 2015 issued by the Secretary of State rejecting the claim for asylum. It should be emphasised from the outset that this was not the only issue relied upon either in the trafficking decision or in the protection claim decision for refusing the Appellant's claims.
8. Be that as it may, the matter having featured in the RFRL, it in due course became the subject of a Direction by the First-tier Tribunal in relation to preparation for the substantive hearing before the First-tier Tribunal. On 26 February 2016, ahead of a hearing then set down for 9 March 2016, the Appellant's representatives wrote to the Tribunal requesting an adjournment. The adjournment was sought on 'mixed' grounds. In part the adjournment application raised the issue in relation to the documentation with regard to the 2002 application for entry clearance, but it also raised other issues in respect of preparation of the appeal on the Appellant's side.
9. Nonetheless, this culminated in a Direction issued by the Tribunal on 26 February 2016 which, amongst other things, stated:

"The Respondent shall use her best endeavours to file and serve the following additional evidence:

 1. *Copies of any fingerprint evidence linking the Appellant known as S to records of SM and*
 2. *copies of any records of entry clearance applications made by SM together with any supporting evidence particularly photographs and passports."*
10. As I say, there is on file extensive details in respect of the two applications made in 2010 but in the event no documents were filed in respect of the 2002 application.
11. The appeal was subsequently adjourned again at the request of the Appellant's representatives. However, this second request for an adjournment was focused on the state of preparation of the Appellant's case rather than making further allusion to the absence of any materials in respect of the 2002 application.

12. It is the 2002 application that has become the focus of the challenge before the Upper Tribunal. Indeed the brief summary of the history I have given above emphasises the circumstances of the 2002 application and the circumstances in which it has become the focus of consideration at the present time. Otherwise it seems to me it is unnecessary for present purposes to set out herein any more particular detail of the Appellant's immigration history or indeed the basis of her claim. Such matters are summarised in some considerable detail in the documents on file, most particularly in the cover sheet to the Respondent's bundle, in the RFRL itself, and indeed in the decision of the First-tier Tribunal Judge. I do not propose to set out all those matters again but will refer to the chronology as is incidental for the purposes of this Decision.
13. As adverted to, the Appellant's claim to have been a victim of trafficking was rejected by a 'conclusive grounds' decision on 28 July 2014, and then in due course on 23 October 2015 her claim for asylum was also refused. The Appellant appealed the protection aspect of the case to the First-tier Tribunal by way of Notice of Appeal dated 6 November 2015. Necessarily much of what she relied upon in respect of her claim to be a victim of trafficking also related to her claim for protection.
14. The First-tier Tribunal Judge refused the Appellant's appeal on all grounds. In the Decision the Judge sets out the history and chronology in the opening paragraphs before going on to review the basis of the Appellant's asylum claim with, if I may say so, meticulous cross-reference to the relevant supporting documents. The Judge also goes on to review and summarise the basis of the Secretary of State's decision both in respect of protection and Article 8 grounds, and also in respect of discretionary leave. The Judge then reviews the documents at paragraphs 19 and 20 of his decision before setting out from paragraph 21 to paragraph 31 details of the hearing including in particular the oral evidence of the Appellant. In this context it is to be noted that there was only the one witness. No supporting witnesses were called and necessarily therefore no notes of evidence in relation to supporting witnesses are set out in the Decision. The Judge then directed himself as to the burden and standard of proof - in respect of which no criticism has been made before me - before going on from paragraph 36 to set out his findings and conclusions. In this context it is helpful to perhaps emphasise at this stage what is said at paragraph 36: *"I have had regard to the oral and documentary evidence and submissions and looked at all matters in the round with the most anxious scrutiny."*
15. The Judge's particular evaluation of the Appellant's credibility and reasons for rejecting it are set out at paragraph 39, which commences this way: *"However, in the round, I find that I am not satisfied that the Appellant's account is a consistent and credible one, the credibility of the Appellant*

being fatally undermined by, amongst other things, the following: ..." There then follows fourteen subparagraphs the fourteenth of which is further subdivided into subparagraphs (a) through to (i).

16. Having set out those matters the Judge then goes on to consider the supporting psychological report prepared on the Appellant's behalf by the Helen Bamber Foundation (in particular at paragraph 42), and two expert reports prepared in support of the Appellant's appeal (paragraph 43).

17. The Judge then reached his conclusions at paragraph 46 in these terms:

"In light of the above, I conclude that the Appellant does not have a well-founded fear of persecution on return to Mongolia (for the avoidance of doubt there also being no suggestion by Ms Moffatt for the Appellant that failed asylum seekers per se were at risk on return there). She does not therefore qualify for asylum and I also find that she is not entitled to humanitarian protection (Articles 2, 3 and 4 ECHR falling with the asylum claim, applying the same standard of proof under the Human Rights Convention as under the Refugee Convention)."

(Article 4 of the ECHR prohibits slavery and forced labour, and therefore the reference therein may be seen to be an expression of the rejection by the Judge of the Appellant's claim to have been a victim of trafficking.)

18. The Appellant raised three grounds of challenge to the decision of the First-tier Tribunal. Grounds 2 and 3 both related to the Judge's approach to the expert evidence. In this regard Judge Gill stated that those grounds were unarguable: *"It is unarguable that the Judge made his credibility assessment in isolation from the expert report"*; and *"The Judge unarguably gave adequate reasons in his assessment of the expert's evidence"*. I respectfully agree with the analysis of Judge Gill in this regard.

19. The ground upon which permission was granted is headed in the Grounds this way: *"Failure to take any, or any proper account of the Respondent's failure to evidence her assertions"*. The ground is amplified at paragraphs 6-10 of the Grounds of Appeal and has been further amplified in the course of submissions before me by Ms Moffatt.

20. The Secretary of State has made a Rule 24 response dated 26 April 2017 which submits that the First-tier Tribunal Judge made adequate findings of fact in respect of the Appellant's credibility and in particular reached a sustainable conclusion that the Appellant had *"clear propensity for*

deception as shown in her own account". Mr Whitwell on behalf of the Secretary of State relies upon the Rule 24 response and has additionally amplified that and made some response to the submissions of Ms Moffatt.

21. Before addressing the substance of the ground of challenge I make the observation that, in my judgment, the Grounds do not constitute a fair reflection of the level of weight accorded by the First-tier Tribunal Judge to the issue in relation to the 2002 visa application. The Grounds argue at paragraph 7 that: *"The 2002 visa application was, therefore, central to the Appellant's credibility"*. In my judgment, it was not central either in the context of the decision of the Secretary of State or in due course the decision of the First-tier Tribunal Judge, as will be seen in the later analysis.
22. In a similar way it seems to me stating at paragraph 10 of the Grounds that the Judge had relied *"heavily"* on the 2002 visa application, was to mischaracterise the nature of the significance of that application to the overall decision of the Judge. Indeed it is now acknowledged that the paragraphs of the Judge's decision cited at paragraph 10 of the Grounds - subparagraphs (iv) to (ix) of paragraph 39 - do not all relate to the 2002 application: it is only subparagraphs (vii), (viii), and (ix) that are potentially relevant.
23. For completeness I should also add that there was some discussion in respect of the use of the word *"readily"* at paragraph 9 of the Grounds of Appeal in the context of the availability to the Respondent of details of the 2002 application. In my judgment, that was essentially a subjective term. The degree to which such documents were available to the Respondent is not something that either party, it seems to me, is in a very good position to give any information at the present time. Be that as it may, ultimately I am not troubled or concerned by the use of that particular word in the overall context of this appeal.
24. In the premises of the Grounds reliance has also been placed on the cases of **Cvetkovs (visa - no file produced - directions) Latvia [2011] UKUT 00212 (IAC)** and **R (SF) v The Secretary of State for the Home Department [2015] EWHC 2705 (Admin)**.
25. The head note of the case of **Cvetkovs** at paragraph 1 is in these terms:

"Where a visit visa application is refused because the Visa Officer is not satisfied of the Appellant's intentions as a result of only limited documents being produced and translated; and the Respondent breaches Procedure Rules by failing to send documentation to the

Tribunal, directions can be given indicating that unless the Respondent complies with the Rules it may be that the Tribunal will assume that the appeal is unopposed.”

In my judgement the words “*it may be*” in that citation are to be emphasised. Moreover it is to be noted that it was absolutely clear that there was nothing to suggest that the Appellant’s appeal herein was unopposed before the First-tier Tribunal.

26. On its face, **Cvetkovs** does not appear to be on point. The matter becomes yet clearer upon further consideration of **Cvetkovs**. At paragraph 5 it is apparent that the Judge had been presented with no Respondent’s bundle in the file whatsoever, and at paragraph 6 it was identified that this failure to produce the application form and the material submitted with the application was in breach of the then applicable Rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Those circumstances are plainly and clearly very different from the circumstances that pertain in the present case. The Direction given by the Tribunal on 26 February 2016 was not an absolute direction but one to “*use her best endeavours*”: it has not been contended, and indeed Ms Moffatt confirms very sensibly that it was never contemplated, that the absence of a response to the Directions was such that it could be suggested that the Appellant’s case should succeed on that basis alone.
27. Indeed, when the matter was explored during the course of the hearing today Ms Moffatt - who had initially referred to the submission before the First-tier Tribunal at paragraph 15 of the Skeleton Argument to the effect that “*no weight*” on the Respondent’s submissions on the passport should be attached by the Tribunal - acknowledged that **Cvetkovs** was not authority for the contention that no weight should be accorded to the facts and circumstances surrounding the 2002 application. Indeed Ms Moffatt very correctly acknowledged that she could not go so far as to make that submission. I return to the consequence of this in due course.
28. The other case referred to in the Grounds of Appeal was **SF**, which is a judicial review case in the context of trafficking. The case is authority for the following proposition, as set out in the headnote:

“When determining a challenge to a gateway decision as to whether a person, especially a child, was a victim of trafficking for the purposes of the Convention on Action Against Trafficking in Human Beings the court should adopt a more rigorous or searching level of scrutiny as opposed to the ordinary test of reasonableness, both because the decision related to the fundamental right not to be held in slavery or servitude guaranteed by Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms and

because it arose in an area in which the court had the requisite knowledge.”

29. The context of the decision in **SF** is clearly the High Court recognising the very particular circumstances of its jurisdiction in respect of judicial review, and identifying that a different approach to the ‘reasonableness’ test - which must be taken to be a reference to **Wednesbury** (un)reasonableness - may be appropriate. I do not accept that this is an authority that makes any particular difference to the approach taken by the First-tier Tribunal, which is essentially a Tribunal of fact and not one evaluating error of law on public law principles, and in any event is exercising, as the Judge in this case correctly identified, an anxious scrutiny in the context of an asylum claim.
30. Further in this regard, I note that the First-tier Tribunal Judge expressly identified at paragraph 45 of his decision that the standard of proof applicable in the protection appeal before him was a different standard of proof than that applied in the trafficking decision of July 2014.
31. Accordingly, I cannot find anything in principle that suggests that the level of scrutiny to be applied in an asylum claim (or appeal) that involves an element of trafficking, is materially any different from the level of scrutiny that must be applied in all asylum claims. I can find no error of principle in the approach taken by the First-tier Tribunal Judge in this regard.
32. I return then to the acknowledgement made in the course of submissions today that it could not be maintained that the First-tier Tribunal Judge was, as a matter of law, duty-bound to accord no weight to the facts and circumstances pertaining to the 2002 visa application. Necessarily it follows from that that the Judge was entitled - if he considered it appropriate - to accord *some* weight to that circumstance, and the question really then becomes a matter of what weight might have been attached to it.
32. I have already identified that the Judge directed himself to the fact that he was undertaking an ‘in the round’ analysis, and set out over a number of closely written paragraphs details as to why he concluded that the Appellant’s account was not credible. Those paragraphs do not all relate to the issue of identity, and even those paragraphs that do relate to identity do not all relate to the 2002 application. The first subparagraph at 39 relates to the delay, the second to timing, the third to the Appellant’s explanation for reasons of delay; paragraphs (iv) to (ix) do indeed relate to identity but, as I have already stated (and as Ms Moffatt now acknowledges), it is only the latter three of those subparagraphs - (vii),

(viii), and (ix) - that relate to the 2002 application. Subparagraph (x) relates to elements of the Appellant's narrative account as to her circumstances after her entry into the UK and her claim to have been coerced into prostitution. Paragraphs (xi) and (xii) make reference to the Appellant's observations during the interviewing process and in her statement to how she identified herself. Paragraph (xiii) draws on the absence of supporting witnesses, and then paragraph (xiv) sets out in detail a significant number of discrepancies in the Appellant's narrative account.

33. It may readily be seen, therefore, that the paragraphs that have become the focus of the challenge are few in comparison to the overall analysis of the First-tier Tribunal Judge. This does not in itself inevitably determinatively undermine the challenge: it does, however, undermine the claims made in the Grounds as to the central significance of the 2002 application to the Judge's reasoning.
34. In my judgment, at paragraphs 39(vii)-(ix) the Judge is in effect finding on his evaluation that he did not accept that it was a mere coincidence that an application had been made in the identity of SM in 2002, and was therefore rejecting the Appellant's claim not to have been in any way associated with that application.
35. I remind myself that those paragraphs are not to be read in isolation. The Judge is setting out an 'in the round' approach, and necessarily that means that each element of his analysis will both inform and be informed by other elements of his analysis. These three, amongst many, subparagraphs are not isolated but are part of an overall credibility evaluation in circumstances where the Judge has identified a substantial number of reasons for not believing the Appellant's account. Those other reasons will inevitably and appropriately have informed his evaluation of whether he believed her account of not having been associated with the 2002 application.
36. In those circumstances I can identify no error of principle in the way that the Judge has appropriately accorded the weight that he considered fit to the circumstances of the 2002 application as a factor in a wider overall consideration of credibility.
36. It is to be noted in this regard also that the Judge expressly identified that there had been a failure to produce supporting documents. At 39(vi) the Judge concludes by stating: *"For the avoidance of doubt, the absence of documentary evidence of the previous visa application made in the name*

or identity of SM in 2002 is regrettable but not determinative of the identity issue in this appeal I find.”

37. Accordingly, I detect no error of law and the First-tier Tribunal Judge’s decision must stand. Even if the matter were different it seems to me that it would not have assisted the Appellant’s case in the circumstances where there was such detailed rejection of other aspects of her credibility. If the passport or identity that had been used in 2010 had indeed been previously used by another person in 2002 this would suggest that the Appellant had then in 2010 used a false identity and therefore was not SM. However, this circumstance would not establish her true identity or nationality, and the burden of proof in that regard would still rest on her. Nor would this circumstance establish her general credibility or go to establishing any other aspect of her narrative.
38. Whilst on the one hand if authoritative materials had been produced establishing that she was not the person who had made an application in 2002, the Appellant would have been able to say ‘therefore I cannot be SM as suggested by the Secretary of State’, on the other hand she would have been stuck with the fact of the deceit of having adopted a false identity not only in the context of making the application for entry clearance but repeatedly subsequently - and in this regard it is to be noted that she entered the UK unaccompanied and presented herself in the SM identity. She also would appear to have been unaccompanied when she was arrested and presented herself in the SM identity, and again presented herself in the SM identity of her own volition when appearing before the Magistrates’ Court. Accordingly it is difficult to see why being able to authoritatively distance herself from the 2002 application and the 2010 identity would in any way have materially made her a more credible witness.
39. In those circumstances, even if I am wrong in my analysis as to the Judge’s appropriate approach, as I find, to the weighing of the evidence in respect of the 2002 application, in the overall context of this case and in the overall context of the Judge’s clear and closely reasoned findings in respect of other credibility issues, I would have reached the conclusion that this decision should not be set aside in any event because this aspect of the case would have made no material difference to what on the Judge’s finding was an inevitable outcome.
40. For all these reasons I reject the challenge brought by the Appellant.

Notice of Decision

41. The decision of the First-tier Tribunal Judge contains no errors of law and stands.

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 or any member of her 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.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **7 June 2017**

Deputy Upper Tribunal Judge I A Lewis