



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13520/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 26th July 2018

Decision & Reasons Promulgated
On 6th August 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

FJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Dixon, Counsel instructed on behalf of the Appellant
For the Respondent: Ms H. Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria.

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.

2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 15th February 2018, dismissed her claim for asylum and humanitarian protection and on human rights grounds.
3. The Appellant's immigration history and factual background is set out within the determination at paragraphs 1-4, and in the papers before the Tribunal, namely, that the Appellant lived with her aunt after the death of her mother in 2001 and that her family were trying to force her into marriage with a man and so she ran away from home and met someone who told that they could assist her in coming to London to work. He introduced her to another man who then took at Italy where she was forced into prostitution. Two years later she was brought to London having being trafficked here for sexual exploitation. She managed to run away and lived in the UK dependent on friends and assistance from the church. She met the father of her child was said was violent to her and was mistreated by a further man until she became homeless. She went to an organisation for help who assisted her in applying for asylum.
4. The risks on return were identified by the judge at [16] when recording the submissions on behalf of the Appellant and at [17] namely, that as a result of her past history she was at risk as a vulnerable person and therefore would be risk being re-trafficked and also that she was at risk of harm from a prospective bridegroom or his family because she had fled the country after he had paid a dowry and also due to the fear that her family would take revenge on her because she had lost the dowry that they would have got and had brought dishonour to them.
5. Her appeal came before the FTT on the 25th January 2018 and in a decision promulgated on the 15th February 2018 her appeal was dismissed.
6. The judge set out his findings and conclusions at paragraphs 17-25 in relation to the protection claim. The findings of fact made can be summarised as follows:
 - (1) there was a dispute as to the date of birth given by the Appellant; she claimed that she was 22 when she left Nigeria although the date of birth at the Home Office recorded for her was seven years before that date. However the judge found that she was an adult at the time that she left her country of origin.
 - (2) As set out in the conclusive grounds decision the Appellant was identified as a victim of human trafficking following forced sexual exploitation. He accepted that she was able to escape in 2008 and had lived with the support of the church since that time [17].
 - (3) He did not accept that she would be at risk on return to Nigeria.
 - (4) He accepted that there was a reasonable likelihood that the Appellant may have been subject to some pressure to marry a particular individual because she had left her aunt and fell into the hands of those who trafficked her. However he was not satisfied that she remained at any ongoing risk from family relatives or from J, who already had two wives, because of the length of time that she had been away from Nigeria and also because she could

relocate to a different area in order to ensure that she did not come into contact with them. Furthermore the Appellant was a teenager at the time she is now a woman in her mid-30s [18].

- (5) As to the claim which related to a risk of falling into the hands of traffickers again the judge applied the country guidance case of HD (trafficked women) Nigeria CG [2016] AUT 00454 and set out the head note at [20]. He sought to apply that country guidance to the circumstances of the Appellant. He found the following:
- taking account of her age she is in her mid-30s on her own evidence or in early 40s on the Respondent's assessment. She was in her early 20s when trafficked from Nigeria. She escaped in 2008 and has lived in London for the past 10 years and has managed to provide for herself.
 - He found that there was no evidence from the church about support that they had given her and the fact that she lived independently from 10 years demonstrated that she had worked at some point since had been in the UK in the capacity of care assistant. He found that there was a complete absence of evidence from the church to confirm support they have provided [21].
 - He considered the medical evidence in a letter dated 14 June 2017 (the counsellor) but found there was no psychiatric evidence to support any particular mental health difficulty save for the reference to medication. He undertook a criticism of the report that she had not been referred to counselling notwithstanding medical and health professionals around the pregnancy and the birth of her son which he thought would have likely to have been picked up at the time. He rejected that she would require two years counselling. Thus he placed limited weight on that letter relating to any diagnosis of mental health problems. He also took into account a letter dated 14 June 2016 but observed that there was nothing from the GP despite the letter making reference to it.
 - In summary he found that she had left Nigeria expecting to come to London to work but had been trafficked. She escaped the traffickers in 2008; she had been living independently but may have had some initial support from the church. There was no evidence the church were continuing to support her and that she had worked as a care assistant at some point. She received an education with no qualifications. Her parents were not abusive and that she was 22 when she had left Nigeria. There was no evidence of any particular mental health or personality vulnerability and no evidence of former traffickers attempting to find in the UK having been free of them for nearly 10 years [23].
- (6) On the basis of those findings he was satisfied that she could return to Nigeria. He considered her return on the basis that she had no supportive family and thus found that there was a likelihood that she would be

received into a shelter. He found that this would only provide you with support for a short period of time but it would be sufficient to enable her to set up and obtain employment as a trader like her mother. He found that she had learned additional skills in the UK and while she may have had some limited support from the church he was satisfied that she had not been reliant on the church alone and had been resourceful in supporting herself and the child. [24].

7. He concluded that he was not satisfied that it had been established to the low standard that she would face a real risk of persecution or serious harm in Nigeria on the basis that there was no real risk she had been re-trafficked. The judge observed that she did not exhibit any of the vulnerabilities identified in the case of HD.
8. At paragraphs 26-32 the judge considered Article 8 in the context of the child aged 2 ½ years and that his primary attachment was with his mother and that his best interests were to remain with her, whether in the UK or Nigeria [29]. In addition he found that there were no “insurmountable obstacles” to her returning to live in Nigeria as there was no real risk of being re-trafficked, she could in the short term obtain assistance from the shelters having accessed support in the UK but in time would have to work to support herself and her son which was something she would have to do in the UK. He found that there were no exceptional circumstances as the Appellant was fit, able and resourceful and whilst he found it was likely that she was affected by her ordeal, there was no psychiatric or psychological evidence to suggest that she required any specialist treatment. He took into account that she was receiving counselling and that the only medication was that the depression which he found may be related to immigration status and her anxiety as to her experiences. Thus the judge dismissed her appeal.
9. The Appellant sought permission to appeal that decision and permission was granted by FTTJ Froom on the 4th April as follows:

“The strongest ground is ground 3 and the risk of re-trafficking in the light of the guidance in HD. It is arguable that the FTTJ should have made a finding regarding the Appellant’s age and recognised that some of the risk factors applied to her.

Ground 4 also discloses an arguable error as regards the test applied by the First-tier Tribunal judge in respect of paragraph 276 ADE (1) (vi).

All grounds may be argued.”
10. Thus the appeal came before the Upper Tribunal. It is for the Appellant to satisfy the Tribunal that there is an error of law in the determination of the First-tier Tribunal judge which is material to the outcome.
11. The grounds relied upon by the Appellant are set out in the papers and are four in number. I invited Mr Dixon to begin his submissions with Ground 3 on the basis that if this ground was made out, then it would be the position that the other grounds were also likely to be affected.

12. He submitted that the judge did not properly consider the evidence relating to the Appellant's mental health and in particular the finding of paragraph 22 was outside the claimed expertise of the judge. There was evidence from xxxxx as to her background and the counselling that she would require. That required consideration and was relevant to her vulnerability. It was not necessary to have a psychological or psychiatric report in every case and he submitted that it was important to look at the context given that the Respondent accepted that she had given a credible account of being trafficked into the UK.
13. Furthermore the judge did not put this concern set out at paragraph 22 to the advocates and whether there had been any type of breakdown and therefore the counselling was not necessary. He submitted that if it was to be relied on by the judge as a reason as to why this affected any assessment of vulnerability it should have been raised by the judge.
14. Mr Dixon made reference to paragraphs 13 to 15 of the written grounds. The focus of the risk of re-trafficking claim was the risk of re-trafficking by new traffickers. In the assessment made by reference to the CG decision, he submitted that the judge focused too greatly on her ability to provide herself in the United Kingdom (paragraphs 21, 23 and 24) and that this would avert the risk on return. However in the analysis that was made the judge failed to take into account specific factual circumstances that were relevant. The Appellant had been homeless before she claimed asylum prior to that had been into fine and in abusive relationships. It was submitted that the judge was aware of those factors (see paragraph 3) did not take them into account. They were powerful indicators that the Appellant was someone who's vulnerability letters to be targeted by predatory people and thus was contrary to the finding that she was a skilled, adaptable individual.
15. Furthermore when looking at the CG decision, the judge did not weigh in the balance that there was an absence of a supportive family willing to take back into the family unit. When looking at the particular factors set out in HD the judge made no finding as to any material and financial deprivation and also failed to consider the third criterion that someone who previously been trafficked was likely to mean that she would be identified by others as someone disclosing characteristics of vulnerability.
16. Mr Dixon also relied on grounds one which related to the failure to consider the internal relocation aspect of the appeal (see paragraph 7 - 9 of the written grounds) and ground for which related to the error of law in the assessment of Article 8 whereby the judge applied the "insurmountable obstacles" test and not that of paragraph 276 ADE (1) (vi).
17. Ms Aboni on behalf of the Secretary of State submitted that the judge directed himself appropriately and made findings that opened him on the evidence which related to the Appellants' circumstances. She made reference to paragraph [19] where the judge considered the vulnerability of the Appellant in HD where there were significant mental health difficulties and at [22] considered the medical evidence of the Appellant

which did not correspond in any way to the evidence in HD. There had been no evidence of any treating medical professionals such as a GP and it was open to the judge to place limited weight on the counselling evidence as it had been unclear as to how that referral had been made. It was not an issue that the Appellant could have clarified herself had the judge raised it and could only have been dealt with by way of medical evidence.

18. The judge had considered the Appellant's circumstances at [19] that she had been able to live independently in the UK and had worked in the UK and had given reasons as to why he found that she had more likely than not worked as a care assistant. The judge found that she had basic education in Nigeria and no particular vulnerabilities were identified and having escaped the traffickers there was no risk of any further ill-treatment. At [24] the judge found that she will be able to access shelters in the immediate period when she sought to re-establish herself and find employment. Thus the judge consider the relative factors in HD.
19. As to Article 8, she accepted that the judge has applied the wrong test but that there was no material error of law because the judge had taken into account all the relevant factors; that there was no risk on return of being re-trafficked, she could obtain assistance from shelter and then work thereafter and that there were no exceptional compelling circumstances in her case. The judge did consider the best interests of the child and therefore whilst the wrong test was applied, it was not material to the outcome.
20. I have carefully considered the respective submissions of the parties. Having done so, I am satisfied that the decision of the FtTJ discloses the making of an error on a point of law. I shall set out my reasons for reaching that conclusion.
21. The relevant CG decision is HD (trafficked women) Nigeria CG [2016] UKUT 00454 (IAC). The headnote to that decision reads as follows:
 1. *The guidance set out in PO (trafficked women) Nigeria [2009] UKAIT 00046 at paragraphs 191-192 should no longer be followed.*
 2. *Although the Government of Nigeria recognises that the trafficking of women, both internally and transnationally, is a significant problem to be addressed, it is not established by the evidence that for women in general in Nigeria there is a real risk of being trafficked.*
 3. *For a woman returning to Nigeria, after having been trafficked to the United Kingdom, there is in general no real risk of retribution or of being trafficked afresh by her original traffickers.*
 4. *Whether a woman returning to Nigeria having previously been trafficked to the United Kingdom faces on return a real risk of being trafficked afresh will require a detailed assessment of her particular and individual characteristics. Factors that will indicate an enhanced risk of being trafficked include, but are not limited to:*
 - a. *The absence of a supportive family willing to take her back into the family unit;*
 - b. *Visible or discernible characteristics of vulnerability, such as having no social support network to assist her, no or little education or vocational skills, mental*

health conditions, which may well have been caused by experiences of abuse when originally trafficked, material and financial deprivation such as to mean that she will be living in poverty or in conditions of destitution;

c. The fact that a woman was previously trafficked is likely to mean that she was then identified by the traffickers as someone disclosing characteristics of vulnerability such as to give rise to a real risk of being trafficked. On returning to Nigeria, it is probable that those characteristics of vulnerability will be enhanced further in the absence of factors that suggest otherwise.

5. *Factors that indicate a lower risk of being trafficked include, but are not limited to:*

a. The availability of a supportive family willing to take the woman back into the family unit;

b. The fact that the woman has acquired skills and experiences since leaving Nigeria that better equip her to have access to a livelihood on return to Nigeria, thus enabling her to provide for herself.

6. *There will be little risk of being trafficked if received into a NAPTIP shelter or a shelter provided by an NGO for the time that she is there, but that support is likely to be temporary, possibly for just a few weeks, and there will need to be a careful assessment of the position of the woman when she leaves the shelter.*

7. *For a woman who does face a real risk of being trafficked if she returns to her home area, the question of whether internal relocation will be available as a safe and reasonable alternative that will not be unduly harsh will require a detailed assessment of her particular circumstances. For a woman who discloses the characteristics of vulnerability described above that are indicative of a real risk of being trafficked, internal relocation is unlikely to be a viable alternative.*

22. The main focus of risk of harm in Nigeria was the risk of the trafficking by new traffickers. In HD at [156-158] the Tribunal found that there was no real risk of re-trafficking by reason alone having been previously trafficked but that there may be a risk of re-trafficking by reason of vulnerability (see [156]). At [158] the Tribunal found that if a victim who had been sexually exploited and was unable or unwilling to return to her family she may face a real risk of vulnerability to abuse. On the facts of the case the Appellant could not return to her family as a result of the issue of marriage and outstanding dowry.

23. The decision in HD considered the issue of vulnerability to abuse at paragraphs [167 – 171] and set out the indicators at [168] which were then explained further at [169] that it was not simply that a young woman may face destitution, mental health problems, lack of education and poverty that rendered her vulnerable and vulnerable to abuse and risk of serious harm, but that “the identifying factors that led to her being trafficked originally may be present to a greater or lesser extent on her return to Nigeria. She may, for example, no longer be likely to be deceived into accepting a job that in fact result in prostitution; she may no longer be of an age where she is likely to be trafficked for domestic servitude. But her vulnerability and the indicators of vulnerability to abuse may be enhanced. For example, although originally trafficked the purpose of domestic servitude she may have been sexually abused and may now be of an age where she’s vulnerable to being trafficked for the purpose of sexual abuse; she may find option so limited that she approaches the same or another traffic. The

“quasi consent” resulting from the abuse of vulnerability, and abuse of power, being the means by which the trafficking takes place.”

24. That paragraph makes it plain that by reason of the effect of the trafficking the vulnerability to abuse may be enhanced and this is explained further at [171] that “it is the vulnerability to abuse that puts her at serious risk of being trafficked, whether the purpose of sexual exploitation or domestic servitude. Whether the risk to which she is thus exposed amounts to serious harm is a matter for analysis. It is not poverty, destitution or vulnerability itself which is the basis of the claim, but the harm that ensues from that namely the exploitation.”
25. The question is whether the judge did carry out the holistic assessment of risk is necessary (see [82 of HD]) and reached a conclusion open to him on the evidence as to her particular vulnerability on return.
26. The judge considered her conduct in the UK having escaped from the traffickers in 2008 and then had lived independently for a period of 10 years. He concluded that the Appellant was able to provide for herself having been able to obtain some form of work although he accepted that she had been provided with some assistance from the church [21] and that while she had no family who could support in Nigeria she would be received into a shelter on return for a short period of time. She had learned additional skills to provide for herself [24].
27. I would accept the submission made by Ms Aboni that those findings were open to the judge to make and had relevance to the assessment. However as to her vulnerability to abuse as set out in HD there were a number of relevant factors from her history which were not taken into account. They are identified in the grounds relied upon by Mr Dixon. The Appellant had been homeless before she had claimed asylum (see A5) and while she had been in the UK she had been in two violent and abusive relationships with men. Whilst there was a reference to that at paragraph 3 there was no analysis of that evidence as to whether this was evidence of indicators that showed she had a particular vulnerability which would lead her to be targeted by others seeking to exploit that vulnerability as set out at [169] and [171] of HD. At [175] the Tribunal set out that “in making an assessment whether an individual is vulnerable to abuse a careful analysis of all the personal characteristics is required to assess whether the indicators of risk, including any mistreatment in her previous exploitative situation and the consequences of that her personally.” This was missing from the analysis of risk and there were no findings of fact were made in this respect.
28. The factors that are set out in HD indicate an enhanced risk of being trafficked are non-exhaustive. As to the absence of a supportive family, the judge did accept that she had no such supportive family as the case was predicated on the first risk of harm from her family and the issue of the dowry. The judge did consider this at [24]. However what was not taken into account was the context in which she had left her family and that she had run away from them and it was this which had led her to being vulnerable to being trafficked. She also had no social support network the judge should have taken into account any characteristics that she would have that would identified her to the

traffickers as someone who was likely to be vulnerable and be subject to exploitation and the findings at [23] and summarised at [24] failed to take those relevant characteristics into account (why she was trafficked in the first place, a lack of supportive family, the fact that she returns with a young child and the previous two violent relationships in the United Kingdom).

29. As to the medical evidence the grounds at [17] seek to challenge the finding at [22] and in particular that the judge rejected the diagnosis that she would require two years of counselling. The judge stated "... It is astounding that she has been able to live without any major breakdown despite claiming to have experienced an abusive relationship following her escape from the traffickers. I placed limited weight on the letter from xxxx in relation to any diagnosis of any mental health difficulties."
30. Ms Aboni submits that finding was open to the judge as there was no evidence from any treating clinician available other than the reports from the counselling organisation. However I consider the submission made by Mr Dixon has force. There was no evidential basis, medical or otherwise, for that particular finding and was outside the expertise of the judge. Furthermore if that was to be relied upon then it should have been identified to the parties so that the Appellant's representative would be able to deal with it by way of response.
31. A further vulnerability which does not appear to have been given any weight is that the Appellant would not be returning as a single woman but would be returning with a young child which was a relevant factor to place in the assessment as to whether or not she was at an enhanced risk of re-trafficking. I therefore find the ground three is made out.
32. As to ground 1 that relates to the issue of relocation. That is relevant not only to the context of relocating away from her family (see paragraph 18 of the decision) but also in re-establishing herself in a different part of Nigeria on return as a victim of previous trafficking. However there was no analysis as to the reasonableness of return in the context of her personal circumstances as required by paragraph 339O of the Immigration Rules and HD and the policy guidance set out in HD. As the analysis of the vulnerability was flawed for the reasons that I have set out above, it must follow that any assessment of internal relocation which failed to take into account those particular vulnerabilities was also flawed and could not be a complete assessment.
33. I am therefore satisfied that the decision of the FtTJ discloses the making of an error on a point of law and shall be set aside. As to the remaking of the 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. That reads as follows:

"[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."

34. Both Mr Dixon and Ms Aboni submitted that it would be necessary to hear further evidence and make further findings of fact. Given that the medical evidence was an issue, it was indicated that further medical evidence would also be necessary. Therefore I am satisfied that is the correct course to adopt. Accordingly, and in the interests of a fair and just disposal of the Appellant's claim, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a different Judge.
35. In the light of the issues raised in respect of the Appellant it will be necessary for the Appellant's solicitors to consider what, if any, evidence concerning the Appellant's mental health is to be adduced and, if appropriate, to agree any ground rules for the conduct of the hearing with the Tribunal and the Respondent. In this respect it may be necessary for any directions sought in advance of the hearing by way of a Case Management Review.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the decision is set aside; the appeal is remitted to the First-tier Tribunal for a rehearing.

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.

SM Reeds

Signed

Date: 30th July 2018

Upper Tribunal Judge Reeds