



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-006425**  
**First-tier Tribunal No:**  
**PA/52156/2022**  
IA/06594/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 21 May 2023**

**Before**

UPPER TRIBUNAL JUDGE REEDS

Between

HE  
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Wood, Counsel instructed on behalf of the appellant.  
For the Respondent: Ms Young, Senior Presenting Officer

**Heard at Phoenix House (Bradford) on 10 May 2023**

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Fisher (hereinafter referred to as the "FtTJ") who dismissed the appellant's protection and human rights appeal in a decision promulgated on the 2 December 2022.
2. Anonymity had been granted by the FTT and was granted because the facts of the appeal involved a protection claim. Neither party applied for or made any submissions that the order should not continue. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

3. Permission to appeal the decision of the FtTJ was sought and on 3 February 2023 permission was granted by FtTJ Austin.
4. The background to the appeal is set out in the decision of the FtTJ, the decision letter and the bundles provided. The appellant is a citizen of Morocco who arrived in the United Kingdom and claimed asylum on 29 January 2019, his application was refused in a decision taken by the respondent on 20 May 2022. In brief summary, the appellant's case was that he was of Sahrawi (literally, inhabitant of the desert) and a supporter of the Polisario which is the Western Sahara's national liberation movement to challenge Morocco's claim to sovereignty over the territory. His case was that he had been a supporter and that as a result he was arrested in September 2003 for attending a protest, but his father had secured his release. However having participated in another protest in 2010, he feared arrest by the Moroccan government. He left Western Sahara in October 2015, and travel to Turkey. He arrived in the UK on the date stated via a number of European countries.
5. The respondent in the decision letter did not accept the appellant was of Sahrawi ethnicity, nor was his political activity accepted and as a consequence it was not accepted that he had or would draw himself to the attention of the authorities on return. The decision letter made reference to external evidence which was said to be inconsistent with the appellant's replies given into substantive interviews as well as issues of credibility.
6. The appellant appealed the decision, and it came before the FtT for a hearing. The FtTJ dismissed the appeal in a decision promulgated on 2<sup>nd</sup> of December 2022. The FtTJ set out the background evidence which showed that in Western Sahara, the authorities continued to severely constrain the activities and the speech of independence activists. It explained that the UN sponsored process of negotiations between Morocco and the Polisario Front, the liberation movement seeking self-determination for Western Sahara, remained stalled after the May 2019 resignation of the envoy of the UN Secretary General. Morocco considers Western Sahara to be an integral part of the kingdom and rejects demands for a vote of self-determination which would include independence as an option. The judge also noted that the Moroccan authorities systematically prevented gatherings which support Sahrawi self-determination and, on occasions, beat activists in their custody. The FtTJ considered that the appellant's account was consistent with the background evidence however the information was in the public domain and would be accessible. The FtTJ considered his claim to be of Sahrawi ethnicity and support for the Polisario, and that some of the information which the appellant provided was externally confirmed by the respondent but that more of it was considered to be inconsistent. The judge noted that the expert had challenge those conclusions, but the judge was not satisfied that it was a truly independent objective report, as the expert referred to answers the appellant have given which may have been "influenced by human error and issues with the assignment interview." The judge rejected his account identifying that he was able to obtain Moroccan passport without difficulties in 2009 and by reference to the background evidence in the respondent's decision letter. Reference was also made to being able to remain in Western Sahara from 2010 until October 2015 and that he was able to leave Morocco by air. Having considered the evidence, the judge considered that whilst it may be the case that he was of Sahrawi ethnicity, he did not accept his account that he was politically active or was a supporter of the Polisario. He therefore dismissed the appeal.

7. The appellant sought permission to appeal which was granted by FtTJ Austin on 3 February 2023.

The hearing:

8. At the hearing before the Upper Tribunal, Mr Wood appeared on behalf of the appellant and Ms Young, Senior Presenting Officer appeared on behalf of the respondent. Both advocates gave their oral submissions.
9. Mr Wood relied upon the written grounds and supplemented them with his oral submissions.
10. As to ground 1, he submitted that the FtTJ erred in law at paragraph 10 of the decision by finding that the rebuttal part of the appellant's witness statement could carry little weight as, by then, the appellant has had time to reflect on issues which ought to have been explained by him in his 2 substantive interviews if he was recounting experiences. In his oral submissions he pointed to a number of examples by reference to the witness statement and the issues raised by the respondent which could not be said to have relied upon the appellant later "reflecting on issues" but providing evidence that the expert report had stated was consistent with external information.
11. Ground 2 related to the expert report and that the judge had failed to provide adequate reasons or findings on material matters or to resolve the conflict within the evidence before him. Mr Wood relied on the written grounds. He further submitted that whilst he accepted that the FtTJ gave reasons at paragraph 8 as to why weight given to the expert evidence was limited he was required to resolve the conflict within the reasoning, and that there was no consideration of the respondent's case by reference to the expert report. Both the decision letter and the expert report referred to differences in the external information.
12. Ms Young on behalf of the respondent confirmed that there was a Rule 24 response filed which she relied upon.
13. She submitted that the judge's comments at paragraph [10] were open to him to make on the evidence as he had previously made two substantive interviews of which the refusal decision was based. The Judge was clearly not satisfied with the rebuttal statement following the refusal. She submitted that paragraph 10 should not be read in isolation, and this was only one part of the evidence. She submitted that the finding at paragraph 10 did not equate with the fact that the appellant could not make a rebuttal statement.
14. Ms Young referred to the issue of the flag or symbol relevant to question 89 of the 1<sup>st</sup> interview and page 22 of the appellant's bundle. She helpfully provided a link to the decision letter footnote 21, which showed a different flag or symbol to that referred to by Mr Wood at page 23 of the appellant's bundle. Thus she highlighted that the link gave a different image. However when asked who was correct, either the appellant and his description or that of the respondent, Ms Young was not able to say, other than to accept that the judge did not deal with that point. She submitted the FtTJ did not have to deal with every point.
15. Dealing with ground 2, Ms Young submitted that the FtT Judge had considered the expert's report, accepted his credentials and considering the report as a whole especially the paragraphs highlighted by Counsel. The FtTJ gave positive weight to the point on the appellant's ethnicity, but the judge was not satisfied

that the expert has been wholly objective as he offered opinion on matters on which he is not an expert thus the judge reached a sustainable conclusion that the weight afforded to the report was of limited weight.

Discussion:

16. I am grateful for the submission given by each of the advocates. Dealing the first issue raised on behalf of the appellant, it challenges paragraph 10 of the FtTJ's decision where the FtTJ stated that the rebuttal part of the appellant's witness statement in response to the refusal letter can "carry little weight" because "the appellant has had time to reflect on the issues would ought to have been explained by him in his 2 substantive interviews, if he was recounting experiences." Whilst the grounds are couched in terms of irrationality I do not think that is what the grounds are really advancing. What the judge was stating was that the points subsequently raised in the witness statement in response to the refusal letter could only carry little weight because the appellant had had time to reflect on issues which ought to have been explained earlier. However, evidence given in a witness statement whether by rebuttal or not is evidence in the appeal alongside the other evidence. As Mr Wood submitted, if a rebuttal part of a statement is not taken into account or thought not to be capable of carrying anything other than little weight because it was provided after the decision letter, there would be no point in providing evidence in rebuttal.
17. The real issue relates to the content of the rebuttal statement and in this regard Mr Wood has submitted that there was evidence in the witness statement which did not relate to the appellant having had "time to reflect." At paragraph 84 (there are unhelpfully two paragraph 84's) refers to the decision letter at paragraph 52 which set out the appellant's answers concerning the aims of the Polisario and how they achieve their aims and that the appellant's answers were inconsistent with the external information. The appellant set out his evidence on this issue in the witness statement. The expert report also set out evidence relating to this at paragraph 14 which provided a footnote to an external source. The report on the face of it provided support for the appellant's evidence given in interview and in his witness statement that the Polisario do protest and use placards to achieve their goals but also been known to use armed violence and conflict and that the Polisario's actions are dependent upon the treatment they receive at any moment. The expert report appeared to lend support to the appellant's evidence given in the witness statement.
18. At paragraph 15 and 16 the expert report made reference to the arming of the party as a "political protest rather than an act of conflict" at paragraph 16 set out the evidence as to how the Polisario use their protests. Thus paragraph 84 of the witness statement did not relate to any refinement of answers, but the issue was really whether his answer was consistent with the background evidence.
19. A further example is set out at paragraph 86 of the witness statement which concerns the position of the Polisario. The appellant said the party is a subgroup of the Sahrawi Front however the respondent considered the response was inconsistent with the external information. The appellant's response was that the Popular Front was the same as the Sahrawi Front. The report at paragraph 19 set out that the appellant's evidence on this issue is consistent with the material that he had cited.
20. A further example deals with the rebuttal statement and the description of the flag. This is set out in the written grounds. The appellant was asked to describe in

his interview whether the Sahwran Front had a symbol or logo. The respondent in the decision letter at paragraph 50 considered the appellant's replies as set out questions 189 -190 and that he had said "a star under a Crescent, triangle in red, the top is black, the middle is white, and the bottom is green". In the appellant's bundle page 23 there is a copy picture of a flag which is consistent with the appellant's description in the interview. The link to the footnote at page 53 helpfully provided by Mr Young referred to the Polisario Front -SPLA ( the Sahrawi People's Liberation Army; the Armed Forces of the Polisario Front). Both pictures are different. At paragraph 18 the expert confirms that the appellant's answer was correct about it being the flag. There may be an issue as to what exactly the appellant was asked about ( whether a symbol, logo or flag) but on the face of it there was some support for the appellant's account.

21. A further example relates to the issue of the passport. At paragraph 13 of his decision the FtTJ considered whether the appellant could obtain a Moroccan passport without difficulty in 2009. The appellant's response at paragraph 95 was at the passport was issued before 2009 this was not refinement to his answer in interview to account for any inconsistencies. Further in relation to this the FtTJ did not engage the evidence set out in the footnote in the decision letter which was not necessarily in conflict with what the appellant was stating.
22. In summary, there were matters in the rebuttal statement which did not rely on giving answers which could be characterised as ones where he had had "time to reflect" but related to the consistency of the answers given in the interview and where they were supported by the expert report. They were not neutral matters because the respondent did not accept his ethnicity or that he was in fact involved with the Polisario and there was evidence which was capable of supporting that claim in the witness statement but also in the expert report.
23. Turning to ground 2, as Ms Young submitted there is an overlap between the 2 grounds. Ground 2 concerns the expert report and whether the FtTJ resolved conflicts in the evidence by reference to the expert report, and whether he set out appropriately what weight he gave to it.
24. At paragraph 8, the FtTJ considered the weight he could attach to the report, and he was prepared to accept that the author of the report was suitably qualified to provide an opinion of the appellant's account. The appellant appeared to place positive weight on the conclusions reached on the issue of the appellant's ethnicity but because the expert stated by reference the answers given by the appellant that there had been "influenced by human error and issues with the asylum interview" the judge considered that there had been no adequate explanation or support provided for that generalised assertion. The judge therefore considered that the expert offered an opinion on matters upon which he was not expert and crossed the threshold into the appellant's advocate. He was not satisfied it was truly an independent objective report which limited the weight he could attach to its overall conclusions.
25. Whilst the grounds assert that the FtTJ had not explained what weight he attached to the report, as Ms Young submitted the FtTJ did attach "some positive weight" to the report (see paragraph 8) and at paragraph 10, the judge again returned to the issue of weight stating the weight he was prepared to attach to the report was limited by the lack of objectivity.
26. It is well settled that the weight to be given to expert evidence is a matter for the fact-finding judge. However the point really relied upon by Mr Wood is that by

rejecting the expert report on the basis of lack of objectivity, which might be a reference to the conclusions reached, the FtTJ did not provide a resolution to the conflict of the evidence is set out in the respondent's case and the reference made to his evidence as being inconsistent with the background material in the opinion of the expert who set out why he considered the respondent was in error and why the appellant's answers could be viewed as consistent. There was a clear conflict in the evidence which had to be addressed. There is of course a distinction between plausibility and credibility and the latter concerns whether an appellant can be believed and that is a matter for the trial judge but when assessing plausibility, the matters set out in the main body of the expert report which considered the plausibility of the appellant's account by reference to country material and external evidence were matters to consider when resolving conflicts in the evidence.

27. I note that the FtTJ did make some adverse credibility findings, but the result of not resolving the evidential conflicts meant that parts of the account relating to the credibility of his claim had not been assessed "in the round."
28. For those reasons, the grounds are made out and the decision of the FtTJ did involve the making of an error on a point of law. It is set aside.
29. 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."

30. I have considered the submissions of the advocates and have done so in the light of the practice statement recited and the recent decision of the Court of Appeal in [AEB v SSHD \[2022\] EWCA Civ 1512](#). As to the remaking of the decision and having heard from the advocates I am satisfied that in light of the fact findings which will be necessary, the appeal falls within paragraph 7.2 (b) of the practice statement. I therefore remit the appeal to the First-tier Tribunal for that hearing to take place as both advocates have submitted. No findings of fact are preserved, and it will be for the tribunal to undertake a holistic assessment of credibility and risk in the light of the evidence as a whole.

### **Notice of Decision**

31. The decision of the FtTJ involved the making of a material error of law and is set aside and is remitted to the FtT for a rehearing.

Upper Tribunal Judge Reeds

**Case No: UI-2022-006425**  
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Upper Tribunal Judge Reeds

18 May 2023