IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004977
First-tier Tribunal No:
PA/55700/2022
LP/01204/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23rd September 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE RASTOGI

Between

ED
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P. Yong, Counsel instructed by Virgo solicitors
For the Respondent: Mr E. Terrell, Senior Presenting Officer

Heard at Field House on 27 August 2024

Order Regarding Anonymity

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.

DECISION AND REASONS

1. The basis of the appellant's claim for international protection is that in 2017 at the age of 14 he was trafficked from a hotel in Albania where he was working to a cannabis farm where he was forced to work against his will and not allowed to

leave. On 12 June 2018 his trafficker took him out of Albania having procured for him a passport and they travelled to the Netherlands where they were arrested. The appellant was detained for eight hours before being released. His trafficker remained in custody. Thereafter, assisted by some Albanians, he travelled clandestinely to France and then onwards to the UK where he arrived as an unaccompanied asylum seeking child on 13 July 2018.

The Procedural History

2. The appellant claimed asylum on 6 August 2018. He was referred to the National Referral Mechanism as a potential victim of trafficking and a positive reasonable grounds decision was made on 23 March 2019. A negative conclusive grounds decision was made on 30 January 2023.

3. The respondent refused the asylum and human rights' claims in a decision dated 25 November 2022. The respondent decided the appellant was not credible so rejected his account of having been trafficked in Albania or that he had a well-founded fear of persecution on return. The remaining parts of his protection claim were refused in line as was his Article 8 claim.

4. The appellant appealed to the First-tier Tribunal pursuant to section 82 of the Nationality Immigration and Asylum Act 2002. His appeal was heard by First-tier Tribunal Judge Kudhail ("the judge") on 27 September 2023 and, by way of a decision dated 20 October 2023, she dismissed the appellant's protection and human rights' claim ("the decision").

The Judge's Decision

5. By the time of the hearing the appellant was an adult and ostensibly for this reason, the judge declined to treat him as a vulnerable witness [13]. There is no challenge to this decision. The judge noted that the appellant's account of modern slavery was broadly in line with wider external evidence [29]. The judge rejected some of the respondent's concerns about his account in Albania on the basis either of his age at the time or as she could not identify inconsistency [30-33]. However, there were other concerns with which the judge agreed. At [34] the judge did not find the appellant to have addressed the respondent's concerns about how the traffickers were able to procure for him a genuine passport without his parent's consent and as the external evidence on which the respondent relied showed that he needed to produce his identification card which the appellant said he did not have [36]. The judge did not find the account credible [37] notwithstanding her acceptance at [35] that corruption exists in Albania. The judge also found an inconsistency between the appellant and his mother's witness statements as to when the traffickers visited the family home [38] and that his mother's statement lacked detail [39].

6. The judge then moved on to consider the appellant's account of events once he left Albania. At [40] she found some aspects of the appellant's account implausible, namely: that he was released from police detention in the Netherlands after 8 hours (contrary to the external evidence on which the respondent relied); that there were no safeguarding concerns given his age and the fact he was arrested with an older man not related to him, and that the appellant did not make the Dutch authorities aware of his plight. The judge decided the appellant was not being truthful about this account [41]. There were similar plausibility concerns regarding the events in Netherlands following

the appellant's release from detention and then in France and the judge decided he had concocted that account [42-43]. At [44] the judge said:

> "The respondent also relies on Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, namely the appellant's failure to claim asylum in both the Netherlands and France. These are matters of fact. I have given due weight to the fact the appellant was a minor at the time however given he was interviewed by the Dutch police and handed to the French authorities, I do not find it plausible that he would not have been given support given his age. Thus I find, his failure to claim asylum in the Netherlands and France is damaging. "

7. At [45] the judge carried out an evaluation of the evidence as a whole and relied on factors specific to the appellant's account which damaged his credibility, so notwithstanding the broadly consistent core account, she did not accept he was a victim of trafficking or that he has a well-founded fear of persecution on return to Albania. She rejected his asylum and other protection claims and his Article 8 claim (not challenged).

The appeal to the Upper Tribunal

8. The appellant applied for permission to appeal the decision on the following grounds:

> Ground 1 – the judge erred in her assessment of the appellant's credibility and in her approach when considering the evidence. The judge failed to properly or adequately apply the Guidance and provisions in relation to minors.
>
> Ground 2 – the judge erred in that her adverse credibility findings stem from procedural unfairness to the appellant
>
> Ground 3 – the judge erred in that she had misdirected herself in law in that there was no consideration of the Country Guidance case and the country information when determining credibility and risk of persecution. This omission renders her assessment of the adverse credibility findings, flawed and unlawful.

9. Permission was granted by Upper Tribunal Judge Owens on 26 June 2024. Although UTJ Owens noted there were three pleaded grounds, she also identified a "*Robinson* obvious" point. Her grant of permission reads as follows:

> "1. It is at least arguable that the judge failed to properly apply the caselaw and guidance on assessing the credibility of a minor in relation to the discrepancy over the timing of the visit by the traffickers to the appellant's family home, his evidence about how his passport was obtained as well as the reason he did not claim asylum in the Netherlands and France. Indeed , although not raised in the grounds, a Robinson obvious point is that the respondent appears to have accepted the appellant's explanation for why he did not claim asylum in the Netherlands and France at paragraph 50 of the refusal letter and the judge at [44] then impermissibly draws a negative inference from this failure.

> 2. It is also arguable that the judge did not consider relevant factors at TD and AD when assessing credibility and failed to take into account background evidence before her in relation to the possibility of traffickers obtaining a passport for him though corrupt means."

10. We were not assisted in our preparation for the error of law hearing as those representing the appellant did not comply with the standard directions as to the submission of the hearing bundle. We did not receive it until the morning of the hearing. It comprised 960 pages. We understand Mr Terrell had to chase it up and he received it the last working day before the hearing. The bundle itself did not contain all that was required. As we had not received the bundle in time, we had been working from different documents with different pagination which gave rise to time wasted at the hearing trying to identify the correct pages to which we were being referred.

11. The lack of procedural rigour also extended to the failure of those representing the appellant to submit a full copy of Counsel's notes to corroborate what was said at the hearing about matters not being put to the appellant (see Ground 2 above). One page of illegible notes had been provided but that was clearly not adequate.

The Parties' positions

12. As to the *Robinson* obvious point, Mr Terrell conceded at the hearing that as judge appeared to have gone behind the concession in the refusal letter, without due notice, she had fallen into error. Mr Terrell accepted it was a concession on which the appellant expressly relied as it is referred to in his skeleton argument ('ASA') which was before the judge (paragraph 3).

13. Initially Mr Terrell submitted that procedural irregularity of this type is likely to require the decision to be set aside and re-made. However his argument evolved to raise the issue of whether or not the irregularity was such that it infected the overall fairness of the decision given the other arguably more significant adverse credibility findings the judge made. He submitted it was inherently unlikely the judge's decision would have been any different even had she accepted the respondent's concession that section 8 was not damaging to the appellant's credibility. Otherwise, Mr Terrell confirmed that the respondent opposed the appeal on all other grounds.

14. Ms Yong relied on the grounds and elaborated on them in her submissions. As for the *Robinson* obvious point, she submitted that the judge's overall approach was one of cynicism of the reasons underlying the appellant's commitment to getting to the UK and that going behind the respondent's concession and treating that as damaging to the appellant's credibility infected the other findings such that the decision had to be set aside.

Discussion and Conclusions

15. Dealing first with the *Robinson* obvious point, the law on concessions is found at Kalidas (agreed facts – best practice) [2012] UKUT 00327 (IAC) as follows:

> "35. Judges, unless in exceptional circumstances, do not look behind factual concessions. Such exceptional circumstances may arise where the concession is partial or unclear, and evidence develops in such a way that a

judge considers that the extent and correctness of the concession must be revisited. If so, she must draw that immediately to attention of representatives so that they have an opportunity to ask such further questions, lead such further evidence and make such further submissions as required. An adjournment may become necessary."

16. IM (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 626 cited and confirmed the above at [23]. At [24] Hamblen LJ said that going behind a concession without notice deprives an appellant of the opportunity to address the issue and that amounts to an error of law for which the appropriate course is remission.

17. Subsequent to the grant of permission in this appeal neither party, but particularly the respondent, took issue with the *Robinson* obvious point nor claimed that the judge did, in fact, raise her concerns at the hearing.

18. Given that the judge has not acknowledged the respondent's concession nor explained why she deviated from it, it follows that neither has she confirmed that she gave notice of her concerns. It is not even clear from the judge's decision whether she had overlooked the fact of the concession or consciously chose to depart from it.

19. In any event, applying Kalidas, in our judgement it was incumbent on the judge to identify the exceptional circumstances to justify departing from the concession (notwithstanding that, in general terms, the weight to be attached to section 8 conduct is a matter for the decision maker (JT (Cameroon) v Secretary of State for the Home Department [2008] EWCA Civ 878).

20. Either way, as we cannot be satisfied that the judge raised her concerns with the parties as she was obliged to, we are satisfied she fell into error in departing from the respondent's concession and her approach was a procedural irregularity which is capable of impacting the fairness of the hearing.

21. Not every case of procedural unfairness is fatal (Rahman and Anor v Secretary of State for the Home Department [2022] EWCA Civ 310, although if the hearing was rendered unfair as a result, it almost always would be. Given the nature of the error, the fact it deprived the appellant of the opportunity of addressing the judge's concerns, and what was said at [24] of IM (Pakistan) (see [16] above), we are satisfied that the error infected the hearing in such a way that the decision is rendered unsafe and needs to be set aside.

22. In any event, we are satisfied from the way the judge set out her reasoning about section 8 that it was inextricably linked to her assessment of the appellant's overall journey from Albania to the United Kingdon about which she was sceptical and that she had already rejected as implausible and unbelievable.

23. In our judgement, had the judge had regard to the respondent's concession, it was incumbent on her to either view the appellant's account through the lens of the respondent's concession or to explain why she was considering going behind it. Had she done the former, we cannot be confident that her conclusions would necessarily have been the same.

24. We are satisfied that the judge's focus on the appellant's journey was a key (but not the only) factor in her decision that the whole of the appellant's account was to be rejected on credibility grounds notwithstanding her acceptance that it was broadly externally consistent.

25. For all these reasons, we are satisfied that the judge's error of law infected the fairness of the hearing and resulted in unsafe findings such that the decision has to be set aside pursuant to 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

26. In these circumstances, it is not necessary for us to address in any further detail the pleaded grounds. We would simply make the point in relation to ground 3 that it was not clear from the ASA whether the Tribunal was being asked to consider the appellant's risk on return to Albania in the event that he was not found credible. It appears that reference to the country information contained within the respondent's CPIN cited therein raised issues of risk which may survive adverse credibility findings, which, the judge did not deal with and that was arguably an additional error of law. We simply remind the parties that it is incumbent on them to be explicit about the issues and, when a large bundle of objective material is filed, that the judge's attention is specifically drawn to the sections of that material on which reliance is placed.

27. As to disposal, the representatives agreed that if our decision found the hearing to have been unfair, and as this appeal turns on credibility, the appropriate disposal is to remit the appeal to the First-tier Tribunal for a fresh hearing. Given that the hearing was rendered unfair due to the error of law, there can be no preserved findings of fact.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error on a point of law and is set-aside.

2. The appeal is to be remitted to the First-tier Tribunal to be heard before any judge except Judge Kudhail.

SJ Rastogi
Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 September 2024