



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001331
First-tier Tribunal No:
PA/51435/2023
LP/01083/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 September 2024

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE LODATO

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KA
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Lecointe, Senior Presenting Officer

For the Respondent: Mr Wilford, counsel instructed by MBM solicitors

Heard at Field House on 17 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family 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 and any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State appeals, with permission, against the decision of Judge Wright ('the judge') to allow KA's appeal against the decision to allow his appeal on Refugee Convention grounds.
2. To avoid confusion, I will refer to the parties as they were before the First-tier Tribunal: KA as the appellant and the Secretary of State as the respondent.

Procedural Background

3. The appellant is an Albanian citizen who arrived in the UK as an unaccompanied child. He claimed to have arrived on 5 June 2014. He was granted a period of discretionary leave to remain in the UK while still a child. Once he reached majority, a series of protection claims were made which were all refused. A right of appeal was granted in relation to the further submissions lodged on 10 January 2023. This decision was the subject of the appeal proceedings before the judge.
4. At [15] and [25] of his decision, the judge found in the appellant's favour that he and various members of his family had been victims of serious domestic violence at the hands of his father and that he was at risk of further violence on return.
5. The judge found, at [15], that the appellant was a member of a particular social group as a victim of domestic violence. The circumstances of the appellant's family members were addressed between [17] and [22]. The availability of sufficient protection was briefly dealt with at [23]-[25] before attention turned to the prospect of internal relocation at [26]-[31]. The appellant was found to have a sufficiently strong Article 8 private life claim to outweigh the public interest in his removal between [32]-[35]. At [36], the conclusion was reached that the appellant had a well-founded fear of persecution for a convention reason and faced a real risk of serious harm.

The Grounds of Appeal and the Grant of Permission

6. The respondent sought permission to appeal on three broad grounds. First, that the judge's reasoning was legally inadequate in finding that the appellant was at risk of persecution for the convention reason of being a member of a particular social group. Second and third, that the judge had left out of account important information and evidence before concluding that sufficient protection would not be available, and that internal relocation would be unreasonable.
7. In a decision dated 27 March 2024, First-tier Tribunal Judge Brannan granted limited permission on ground one only. The limited grant was clearly articulated in the notice of decision section of the order and supported by full reasons. Permission was granted on ground one because it was considered to be arguable that the judge did not apply the legal framework in s.33 of the Nationality and Borders Act 2022 in finding that the appellant was a member of a particular social group. This ground was also considered to be arguable because the judge's rationale arguably resulted in the group being defined by the persecution and the evidence did not support the proposition that the appellant was at risk because of his membership of the group. The remaining grounds did not attract permission because Judge Brannan concluded that it

was not arguable that the reasoning in the decision was so brief or perverse that it was defective in law.

8. In the five months between the limited grant of permission and the error of law hearing, the respondent did not renew the application for permission on the grounds which were refused permission by Judge Brannan.

The Error of Law Hearing

9. At the outset of the hearing, Mr Wilford (appearing on behalf of the appellant as he did in the tribunal below) conceded that the judge's decision disclosed material errors of law in how he dealt with the existence of a Refugee Convention reason. He explained that it was plain that the judge had not addressed his mind to the necessary causative nexus between the finding that the appellant was a member of a particular social group and whether there was a risk of persecution because of that membership. It was further recognised that the judge made no attempt to apply the statutory legal framework which now applies to the consideration of whether a person falls within the definition of a particular social group. He invited us to set aside the decision to allow the appeal on asylum grounds and to remake the decision by simply allowing the positive finding on humanitarian protection to stand.
10. Ms Lecointe applied for an extension of time to renew the grounds of appeal which did not attract permission before Judge Brannan. She explained that these grounds were not the subject of a renewal application because of an administrative oversight which led to the misunderstanding that permission had been granted for all grounds. The limited grant of permission was only discovered the day before the hearing. No submissions were made about the overall circumstances of the case to justify extending time.
11. In deciding whether the respondent should be granted relief from the sanction which naturally flows from the failure to renew within the 14-day time limit, we have considered the statements of principle in Mitchell v News Group Newspapers Ltd. [2013] EWCA Civ 1537, Denton v TH White Ltd. [2014] EWCA Civ 906 and R (Hysaj) v SSHD [2014] EWCA Civ 1633. These cases provided the analytical framework for considering whether relief should be granted from procedural sanctions.
12. We refused the application for an extension of time at the hearing. We were satisfied that the breach of the procedural rules was both serious and significant given that over five months had elapsed since the procedural time limit expired. On any sensible analysis, this was a serious and significant breach of the rules. The reason offered for the delay did not come close to a reasonable explanation. The fact that the administrative error was only appreciated the day before the hearing and after the consolidated hearing bundle was prepared strongly suggested that the matter had not been the subject of any meaningful consideration for several months after the important procedural event of permission being partially granted on the papers. As alluded to above, no submissions were made in respect to the overall circumstances of the case such that we should overlook the egregious failure to act with the necessary expedition and seriousness such proceedings demand. We were fully satisfied that it was manifestly not in the interests of justice to extend time bearing in mind the need to have regard to the important principle of procedural rigour.

Decision on Error of Law

13. While the judge asserted at [36] that the appellant did have a “well-founded fear of persecution for a convention reason”, the underlying reasoning to support this conclusion is to be found at [15]:

I find that the appellant was a victim of domestic violence at the hands of his father throughout his childhood as this was accepted by the respondent. I find that whilst the evidence shows that women will almost certainly fall into a PSG it does allow for men and children to also fall into the PSG of victims of domestic violence. Therefore, I find that the appellant is indeed a member of a PSG.

14. The appeal before the First-tier Tribunal was against a decision to refuse the appellant’s claim made on 10 January 2023 at a time after the relevant provisions of the Nationality and Borders Act 2022 (‘NABA’) came into force. S.33(2)-(4) of the Act provides as follows:

(2) A group forms a particular social group for the purposes of Article 1(A) (2) of the Refugee Convention only if it meets both of the following conditions.

(3) The first condition is that members of the group share—
(a) an innate characteristic,
(b) a common background that cannot be changed, or
(c) a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.

(4) The second condition is that the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

15. The care needed by decision-makers evaluating the new legal scheme was emphasised at [14] of JCK (s. 32 NABA 2022) (Botswana) [2024] UKUT 00100 (IAC):

[...] Sub-sections 33(2)-(4) NABA 2022 require a member of a particular social group to demonstrate not only the innate characteristic possessed by, for instance, an ethnic group, but they must also demonstrate that they have “an identity in the relevant country because it is perceived as being different by the surrounding society”. That ‘social visibility’ test can only be applied by looking carefully at the country background material (both expert and general), which is, at this stage, to be assessed on the balance of probabilities. Decision-makers must however be mindful that they are not here evaluating risk.

16. We have found it to be impossible to glean from the brief reasoning, at [14] of the judge’s decision, any engagement with the requirements of s.33 of NABA. Even if we were to accept that the appellant and his fellow sufferers of domestic violence at the hands of his father had a common background that could not be changed, it was necessary for the appellant to establish a second condition. The judge has not addressed his mind to whether the particular social group he has identified has a distinct identity in the relevant country because it is perceived as different by the surrounding society. We are satisfied that this is an error of

law because there is a material gap in the decision and reasons where an essential foundational plank of the decision to find a convention reason is simply absent.

17. Apart from the need to address the ‘social visibility’ dimension of the existence of a particular social group, the judge was legally required to assess whether there was a Refugee Convention reason for the well-founded persecution feared. The importance of establishing the necessary causative nexus was explained by the House of Lords in Fornah & K v SSHD [2007] 1 A.C. 412. At p.433F of the judgment of Lord Bingham, the following was held:

The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple “but for” test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case.

18. The same point was recently emphasised at [111] of the recent decision of the Upper Tribunal in EMAP (Gang violence – Convention Reason) El Salvador CG [2022] UKUT 00335 (IAC).
19. There is nothing in the judge’s reasoning to suggest that he moved from identifying the existence of a particular social group to assessing whether the well-founded and feared risk of persecution would be, at least in part, motivated by the appellant’s membership of that group. Again, an essential and foundational building block is missing from the analysis such that the decision to allow the appeal on Refugee Convention grounds reveals a manifest error of law. The gap in reasoning going to causation means that the analysis falls a considerable distance short of the “sophisticated approach” which the House of Lords referred to in Fornah & K.
20. For these reasons, we are satisfied that Mr Wilford was right to concede that the decision to allow the appeal on asylum grounds involved material errors of law. We find that the judge’s decision to find that there was a well-founded risk of persecution for the Refugee Convention reason of the appellant’s membership of a particular social group was tainted by errors of law.

Disposal

21. The judge allowed the appeal on asylum and humanitarian protection principles after he concluded that the appellant could not turn to the authorities for protection and could not reasonably internally relocate. For the reasons given above, we were not persuaded that the respondent should be permitted an extension of time to renew the grounds of appeal which did not find favour with Judge Brannan. It followed that there was no challenge to the judge’s finding

that the appellant would face a real risk of serious harm on return. In other words, there was no challenge to the conclusion that the appellant should succeed on humanitarian protection grounds.

22. We enquired of Mr Wilford whether in the circumstances the appellant wished to pursue the Refugee Convention claim by way of a re-making or was content to leave matters as they were, in other words allowed only on humanitarian protection/human rights grounds. Mr Wilford confirmed that the appellant did not wish to pursue the Refugee Convention grounds further.

23. We therefore set aside the decision to allow the appeal on Refugee Convention grounds and remake the decision by dismissing the appeal on Refugee Convention grounds but upholding the allowing of it on humanitarian protection/human rights grounds.

Notice of Decision

The decision of Judge Wright involved material errors of law in relation to the asylum (Refugee Convention) ground of appeal. We set aside that decision and remake it by dismissing the appeal on Refugee Convention grounds but upholding the decision allowing the appeal on humanitarian protection and human rights grounds.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 September 2024