Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06500/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2019	**On 18 February 2019**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

S S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Robinson, instructed by Duncan Lewis solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Walker promulgated on 31 August 2017 dismissing his appeal against the decision of the respondent to refuse his protection and human rights claim. I should set out at the outset that this matter comes before me as a result of permission being refused both by the First-tier and the Upper Tribunal resulting in a "Cart" JR, the application being remitted to the Upper Tribunal permission then being granted by the vice president.

2. The appellant is a citizen of Egypt and it is his case that he was whilst there exploited and trafficked by somebody who offered him employment in Qatar. He was exploited there and then was trafficked to the United Kingdom. He states his former employer who is a Qatari national has informed the Egyptian authorities that he is a member of the Muslim Brotherhood. This has put him at risk and the Egyptian authorities have shown an interest in him, speaking to members of his family and enquiries being made. These are set out in the decision of the judge but essentially the challenge in this case is to the findings of credibility he reached by Judge.

3. The Secretary of State did not accept the appellant's account and whilst there was an initial decision by the NRM in favour of the appellant, there was a conclusive decision that he was not a victim of trafficking. Although the narrative of what had happened to him in Egypt and subsequently in Qatar was accepted, the NRM finding that what had occurred in Qatar did not lead to the necessary threshold to amount to exploitation.

4. The judge heard evidence from the appellant and also had before him three expert reports: a report from a psychiatrist, Dr Foster; a report from an expert on trafficking, Miss Flint; and, third, a report of Dr Miles relating to the country situation and risks in Egypt.

5. The judge did not find the appellant to be credible. That conclusion is based primarily on inconsistencies in his account set out at paragraphs 28 and 29 of the decision. The first point made is that there was a discrepancy or inconsistency in the appellant's account of whether his mother believed that it was the police who were the three men in black who came to the family home. The second is regarding a number of inconsistencies about how his uncle had died it being noted that in information he gave to the psychiatrist, Dr Foster, he claims his uncle had been killed but that he had denied saying that in oral evidence. It was noted also the appellant's evidence about his uncle's death was variable. The judge recorded that "these inconsistencies lead me to conclude that these events did not happen as claimed. Further the appellant has accepted that there had been no other visits from the authorities or any other interest shown in him."

6. The judge drew adverse inferences from other inconsistencies about the circumstances in which the appellant had been arrested and whether he had in fact been working unlawfully. The judge also found the appellant had not been a victim of trafficking rejecting the report of Miss Flint on a number of grounds rejecting also at paragraph [36] the country report produced by Dr Miles. It is however only at paragraph [38] of the decision that the judge refers to the psychiatric report of Dr Foster which assessed the appellant as suffering from a depressive episode of a severe degree without psychotic features this report being based and relying upon the account of being trafficked and being at risk in Egypt, the judge concluding that this was not a severe condition as he was not being treated.

Accordingly, the judge found that that was not made out and the appellant would not be at risk on return to Egypt and dismissed the appeal.

7. There are three principal grounds to this appeal numbered one to three. There are an additional two grounds which it is accepted are in effect parasitic on the other two and I will deal with those at the end. It is I think sensible to set out the headings in which the grounds proceed as they require a significant degree of analysis.

8. The grounds are that:

   (i) the judge erred materially in failing to apply the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive to the appellant's guidance given the appellant's vulnerable mental health;

   (ii) the judge's approach to credibility is flawed first in having been made without reference to the psychiatric evidence, second in finding the appellant was not credible and only then considering the country and trafficking expert evidence contrary to the practice identified by the Court of Appeal in Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367 as being the correct course.;

   (iii) the judge's approach to first whether the appellant was exploited in terms of Part C of the trafficking definition and second whether he is at risk of re-trafficking is flawed for a failure to take into account material considerations.

9. I turn first to ground 1. It is evident that the judge did not refer to the Joint Presidential Guidance but that is not necessarily a material error. The difficulty is, as I put to Ms Robinson, that the psychiatric report does not set out and indeed the doctor does not appear to have been asked whether there were any particular problems which gave rise to difficulties either in giving evidence, in recalling, in being consistent or whether there were any adjustments that required to be made in order for him to obtain a fair hearing that goes to the materiality of the error. The difficulty I have with the report is that, as I have already prefigured, it does not state in terms that there were any difficulties with recall or memory.

10. What is said in the report is at [43] is that the appellant reports a poor memory and concentration, his cognition was not formally tested. Whilst at paragraphs [47] to [49] the doctor does consider the Istanbul Protocol and states that there is evidence that individuals have been traumatised under extremely situations of emotional arousal, experience difficulty in both encoding and recalling autobiographical memories in detail which can on occasions account for a lack of accuracy in narrative accounts of ill treatment, that is a reference back to the Istanbul Protocol. At [49] the doctor said she had also met people who have been traumatised and experienced particular difficulties with direct interviewing especially in contexts which seemed to them adversarial, research suggesting that such difficulties could not be seen as evidence of reduced credibility.

11. The difficulty with this is that it is not specific; what the doctor does not say is that this applies to the appellant. Not all of those people who suffer depression have difficulties in recalling or in giving evidence and it is noticeable there is no statement to the effect that this appellant has problems. It is not possible to infer from a generic and general statement about people in that position that is something which affects this appellant.

12. On that basis despite the fact there are findings of vulnerabilities, there is nothing said here as to any adjustments that would be necessary in order to give the appellant a fair hearing and for these reasons although I accept that the judge erred in not taking account of the medical report in not referring to the Joint Presidential Guidance and I note the fact was a point which concerned Mr Justice Walker when granting permission, I am not satisfied that that is a material error in this case.

13. I now turn on to ground 2. I consider that it is clear that in this case the judge did not look at the expert evidence until after he had made credibility findings that is as identified by the Court of Appeal in **Mibanga** a difficult issue. I do not consider it necessary to set out what the Court of Appeal said at paragraph [24] of that decision; it is well-known and is accepted law. But it is important to note that the Court of Appeal said that a what a fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then enabled him to ask whether the conclusion should be shifted by the expert evidence.

14. I have already dealt in some detail with the psychiatric evidence of Dr Foster. In this case she does make a number of findings which I consider were well made, but it is difficult to see for the reasons I have already given how that could have affected the approach to the appellant's credibility the issue on which this case turned. As I have already said it does not explain any discrepancies.

15. What is more difficult is the approach to the reports of Miss Flint and Dr Miles. In both cases and particularly in the case of Dr Miles there is a clear error of fact as to what the expert had taken into account in reaching his decision and in the case of Dr Miles that for a large part of the reasons for rejecting it. The judge held that the doctor had not taken into account relevant material specifically the NRM decision letter or the refusal letter where it is clear from the report that he did so. Mr Wilding for the Secretary of State submits that this is not material given that Dr Miles' report did not go to credibility but rather went to the situation on return where the facts were made out.

16. Turning then to the report of Miss Flint, on the material before the judge it was not entirely clear what she had taken into account in reaching her decision. She is criticised for not taking into account or referring to refusal decisions and it would appear from subsequent correspondence that she had in fact looked at them but did not comment on them. What the judge did however is to reject her report on the basis that she simply accepts the

appellant's case as presented by him and his representatives the respondent's view has not been considered at all. The difficulty with this is that the NRM did accept a large part of what he said which the judge acknowledges in the subsequent paragraph so there is at best an inconsistency of approach here. Turning back then to the grounds of appeal, there is a tension between what the judge has said in accepting parts of the narrative yet rejecting what Miss Flint did for in fact doing the same thing.

17. I turn to ground 3. This is in effect as Ms Robinson accepted, a submission that the judge failed to consider the second aspect of the claim: that is, not that he is at risk on account of being suspected of being a member of the Muslim Brotherhood but rather that he is at risk of being re-trafficked. The submission is that, given what happened to him in the past (the narrative accepted by the NRM), while it might not amount to trafficking because of a lack of exploitation, the fact is that he is a vulnerable person is at risk in that context of being trafficked in the future.

18. It is at this point that the doctor's comments about him being vulnerable come into play. It is in this aspect in which I have considered that the judge has compartmentalised the claim in incorrect. He has not properly set out what he accepted and what he did not. He has dismissed on grounds of credibility the account of what happened about the Muslim Brotherhood but he has also implicitly accepted large parts of the rest of the account and has adequately explained why he has rejected one part and not another. In the context of rejecting the report of Miss Flint and in considering her report only after he made credibility findings, I consider that in the facts of this case what the judge has done is put himself in jeopardy as identified in paragraph 24 of Mibanga and that the errors in approach to the expert reports have infected the credibility findings which for the reasons I have given cannot stand.

19. Accordingly, for these reasons I am satisfied that the decision of the First-tier Tribunal involved the making of an error of law in that the credibility findings are flawed and are unsustainable. On that basis I set the decision aside.

20. Given that the credibility findings have been set aside, and given that this appeal turned on credibility, fresh findings of fact on all issues will need to be made and, accordingly, it is appropriate, having had regard to the relevant guidance, to remit the appeal to the First-tier Tribunal for to be heard afresh. None of the findings of fact made by the First-tier Tribunal are preserved.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The decision is remitted to the First-tier Tribunal to be determined afresh by a different judge.

3. I make an anonymity order in this case. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

Signed Date 13 February 2019

Upper Tribunal Judge Rintoul