



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/11362/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 June 2019  
Extempore decision**

**Decision & Reasons Promulgated  
On 13 June 2019**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**P P**

**(ANONYMITY DIRECTION MADE)**

Respondent

**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 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.**

**Representation:**

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr U Sheikh, Solicitor from Ansar

## **DECISION AND REASONS**

### **Introduction**

1. For ease of reference, I shall refer to the Appellant in this matter as the Secretary of State and to P P as the Claimant.
2. It is a challenge by the Secretary of State to the decision of First-tier Tribunal Judge Dineen (“the judge”), promulgated on 11 April 2019, in which he allowed the Claimant’s appeal against the Respondent’s decision of 3 October 2017, which in turn had refused her protection and human rights claims.
3. The Claimant’s case was essentially put forward on the following bases. First, that she is a transgender woman and had suffered particular problems in Thailand. Second, that she had been trafficked to the United Kingdom and forced to work in the sex industry in this country and would on return to Thailand be at risk of being re-trafficked or forced to work in the sex industry there. Third, that her inability to be formally recognised as a woman in Thailand was a sufficiently serious breach of her protected Article 8 rights as to justify success in her claim.
4. The judge in effect accepted that the Claimant was credible and had indeed been trafficked to the United Kingdom. He concluded that she would be at risk on return to Thailand because of particular societal discrimination which either in combination with his conclusion that she would need to work as a sex worker, or that work being a result of the discrimination, would place her at risk of persecution. The judge also concluded that because the Claimant would be unable to have her gender recognised under Thai law, this would in of itself breach her Article 8 rights. Finally, the judge concluded that in respect of paragraph 276ADE(1)(vi) of the Immigration Rules, the inability to have her gender recognised under law would constitute “very significant obstacles” to her reintegration into the society of that country.
5. The Secretary of State put forward grounds which in essence assert that: the judge had failed to provide any or any adequate reasons in respect of material matters; that he had reversed the burden of proof; had failed to take relevant evidence into account; had failed to deal with issues arising under section 8 of the Asylum and Immigration (Treatment of Claimant’s, etc) Act 2004; and had failed to adequately explain why the Claimant’s Article 8 rights would be breached by her return to Thailand.
6. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchinson on 7 May 2019.
7. Prior to the hearing before me, Mr Sheikh provided a detailed Rule 24 response.
8. At the hearing Mr Kotas relied on the Secretary of State’s grounds of appeal and made a number of additional points arising therefrom.

9. Mr Sheikh relied on the Rule 24 response and submitted that whilst some of the reasons provided by the judge were somewhat limited in nature, they were sufficient in the context of this particular case. The judge had been entitled to find that the Claimant was a victim of trafficking and would be at risk on return to Thailand as a result of that.
10. In respect of the Article 8 issue, Mr Sheikh submitted that although the test was one of “flagrant denial” or “gross violation” of the Claimant’s Article 8 rights, her inability to have her gender recognised under Thai law was sufficient for her to have succeeded. This was the case notwithstanding the fact that the judge had not specifically addressed the relevant threshold set out in cases such as Ullah [204] UKHL 26
11. In reply, Mr Kotas emphasised the fact that the flagrant of denial test represents a very high threshold and it was simply not enough in the judge’s decision to have justified a conclusion that that it was reached in this case.

### **Decision on error of law**

12. This has not been an easy case to decide but taking the judge’s decision as a whole and reading it with appropriate care and attention and in light of the submissions made by both representatives, I conclude that there are material errors of law. My reasons for this conclusion are as follows.
13. I do have some concerns about the judge having potentially reversed the burden of proof at paragraph 43, but it may be said that the first sentence of that paragraph is sustainable if one were to take the position that he regarded the Claimant’s evidence as generally credible. There is merit in Mr Sheikh’s submission that the NRM reasonable grounds decision represented at least some support for the Claimant’s claim to have been trafficked.
14. However, even if one were to put these issues to one side, there is in my view a very real issue as to the judge’s failure to have considered matters within the scope of section 8 of the 2004 Act, in particular the undisputed fact that the Claimant had raised the trafficking issue only after the Secretary of State’s decision refusing her protection and human rights claims. The judge has simply failed to address this matter of contention.
15. Even if the section 8 point did not constitute an error, or at least a material error, in my view paragraph 46 of the decision represents an inadequate assessment of the issue of risk on return as that related to the trafficking issue.
16. There are perhaps two potential readings of paragraph 46. First, that it was a combination of societal discrimination and a finding (which I am bound to say is unsupported by any reasons) that the Claimant would have needed to work in the sex industry on return to Thailand that would

have led to a risk of persecution (one assumes on the basis of there being a risk of re-trafficking, although that is not spelt out). The other reading is that the societal discrimination would have led to the need to work in the sex industry and that work would have led to the same ultimate outcome. On either basis, in my view the judge has failed to provide adequate reasoning as to the nature and level of the societal discrimination and why (on the assumption that the Claimant would have worked as a sex worker on return) that would of itself have placed her at risk of being re-trafficked or would otherwise have placed into a situation of risk for any other reason.

17. On the country information that was before the judge it is clear enough that there was evidence going both ways on the issue of discrimination. Some materials were suggesting that as a matter of practical reality transgender people, whilst suffering a degree of discrimination, could lead reasonable lives, and other evidence indicated that the situation may have been more difficult than that. In any event, the judge has in my view failed to deal with the risk assessment in a sufficiently detailed manner.
18. I then turn to the issue of Article 8. Despite the judge apparently considering aspects of the country information on the basis of an assessment of persecution, the reality is that he in fact focused on the inability of a transgender person in Thailand to have their gender formally recognised under the law of that country and how this related to Article 8.
19. The judge's conclusion, as expressed in paragraphs 50 and 51, was that this inability *in and of itself* constituted a violation of the Claimant's Article 8 rights and was sufficient for her to have succeeded in her appeal on that basis alone. The difficulty with this conclusion is that the claim put forward engaged the "flagrant denial" test as elucidated in Ullah. This is because the argument concerned a "foreign case" scenario: in other words the violation said to take place would have occurred in Thailand, not in the United Kingdom. The threshold is a high one and required appropriate consideration and reasoning.
20. For his part Mr Sheikh, who I may say has argued the Claimant's case with skill and professionalism, suggested that the unchallenged evidence relating to Thai law was enough of itself to show that the appeal would have succeeded, notwithstanding any deficiencies in the judge's own evaluation.
21. I would respectively disagree. In my view Mr Kotas was right to say that the matter is not sufficiently clear cut for me to arrive at that conclusion. There is merit in Mr Sheikh's submission, but on the other hand there are clear arguments going the other way. To that extent I would conclude that the judge's error on this issue is material.
22. The final point relates to paragraph 276ADE(1)(vi) of the Immigration Rules. In my view the judge has erred in concluding that the Claimant was able to show "very significant obstacles" purely on the basis of the legal

prohibition of formal gender recognition in Thailand. This paragraph of the Rules requires what has been described as a “broad evaluative judgment”, involving subjective and objective issues (see, for example, Kamara [2016] EWCA Civ 813). It goes wider than simply formal legal provisions present in the country of return. On the facts of this particular case, there were a number of matters which on the face of it would appear to go against the Claimant’s assertion as to the existence of such obstacles. The judge has failed to consider matters in the round when setting out his conclusion in paragraph 52.

23. For the above reasons, I set the judge’s decision aside.

### **Disposal**

24. With reference to para 7.2 of the Practice Statement, I have decided that this appeal must be remitted to the First-tier Tribunal for a rehearing. The Claimant’s case has a number of strands to it and there will need to be careful and fairly extensive fact-finding undertaken.

25. I am expressly preserving one finding, namely that the Claimant is a transgender woman.

### **Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

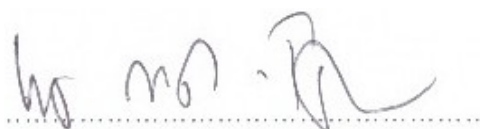
**I set aside the decision of the First-tier Tribunal.**

**I remit the case to the First-tier Tribunal.**

### **Directions to the First-tier Tribunal**

- 1. This appeal is remitted and shall not be reheard by the First-tier Tribunal Judge Dineen;**
- 2. The finding that P P is a transgender woman is preserved.**

Signed



Date: 12 June 2019

Upper Tribunal Judge Norton-Taylor

