



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

Appeal Number: AA/01164/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

On 4 July 2013

**Determination
Promulgated
On 16 July 2013**

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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T B A

Respondent

Representation:

For the Appellant: Mr K Hibbs, Home Office Presenting Officer

For the Respondent: Ms L Fenney of Duncan Moghal Solicitors & Advocates

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The Secretary of State appeals against the decision of the First-tier Tribunal (Judge Page) which allowed the claimant's appeal against the Secretary of State's decision to remove her to Nigeria by way of directions made on 1 February 2013. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.
3. The appellant is a citizen of Nigeria who was born on 15 August 1979. She arrived in the UK sometime in 2000 and claimed in June 2011. On 30 January 2013, the Secretary of State refused her application for asylum and made a decision to refuse her leave to enter. She appealed to the First-tier Tribunal. Before the First-tier Tribunal that the appellant was a victim of human trafficking. In a determination dated 21 March 2013, Judge Page allowed her appeal on asylum grounds. On 10 April 2013, the First-tier Tribunal (Judge Fisher) granted the Secretary of State permission to appeal to the Upper tribunal on the basis that Judge Page had arguably misapplied the Court of Appeal's decision in PO(Nigeria) v SSHD [2011] EWCA Civ 132. Thus, the appeal came before me.
4. In refusing the appellant's application, the Secretary of State relied, inter alia, upon the Asylum and Immigration Tribunal's country guidance decision in PO (Trafficked women) Nigeria CG [2009] UKAIT 00046 to conclude: (1) that the appellant was not at risk of being re-trafficked; and (2) that in any event the Nigerian authorities provided a 'sufficiency of protection' to victims of trafficking.
5. By the time of the hearing before Judge Page, that case had been appealed to the Court of Appeal who allowed that appellant's appeal and remitted the case back to the Upper Tribunal (the successor to the AIT by that time). In PO(Nigeria), the Court of Appeal allowed that appellant's appeal against the AIT's decision on two bases. First, the AIT had erred in finding that a sufficiency of protection was in general available in Nigeria, in particular through shelters provided by NAPTIP (National Agency for the Protection of Trafficking in Persons) by rejecting expert evidence on the basis of "email evidence" obtained during the hearing which was not subject to a statement of truth and not subject to cross-examination. Secondly, the AIT had misapplied its own guidance concerning any enhanced risk to an individual who had been trafficked by a "gang" by placing upon the appellant a burden of proof to establish that she had been trafficked by a gang. The AIT view, expressed at [192] was that:

"In the absence of evidence that a trafficked victim had been trafficked by an individual, it should be borne in mind that it is likely that the trafficking will have been carried out by a collection of individuals, many of whom may not have had personal contact with the victim."
6. In remitting the appeal, the Court of Appeal specifically retained paras 191 and 192 of the AIT's decision as country guidance (see [58] *per* Carnwarth LJ with whom Maurice Kay and Thomas LJ agreed).
7. Before Judge Page, the appellant relied upon the Court of Appeal's decision in PO in order to establish that she would be at risk on return from those who had previously trafficked her to the UK. Allowing the

appellant's appeal, Judge Page analysed the successful appeal of the appellant to the Court of Appeal in PO and then, in relation to the Secretary of State's refusal letter, rejected her reasoning as follows (at para 20):

"20. The respondent's refusal letter dated 30 January 2013 found that this appellant could safely be returned to Nigeria on the basis that the Tribunal in PO (Nigeria) had found that the appellant could relocate within Nigeria using the shelter facilities that are available and, moreover, that the appellant had not proved that her traffickers were part of a gang. Neither of those conclusions made relying upon the Tribunal's determination in PO (Nigeria) CG [2009] UKAIT 00046 can be sustained on appeal given the Court of Appeal judgment above."

8. Having done that, Judge Page then went on in para 21 of his determination to find that the appellant was at risk on return to Nigeria in the following terms:

"21. Fresh country guidance is now awaited on these issues and given the low standard of proof that I must apply in this appeal it follows that the decision under appeal cannot be sustained. The appellant has established to the low standard of proof that she could not safely relocate within Nigeria using the shelters that the respondent has said would be satisfactory for her and she should not have been required to demonstrate that her traffickers were part of a gang. Two points fall to be determined in the appellant's favour. Firstly, there is a serious possibility that the shelters would not offer a sufficiency of protection should the appellant wish to relocate and secondly her traffickers may have been part of a gang. Consequently this appeal is allowed."

9. On behalf of the Secretary of State, Mr Hibbs relied upon the ground upon which permission to appeal was granted by the First-tier Tribunal. First, he submitted that Judge Page had failed to consider the appellant's case against that part of the country guidance in paras 191 and 192 of the AIT's decision in PO which the Court of Appeal had expressly preserved. Secondly, he submitted that Judge Page had failed in para 21 of his determination to give adequate reason as to (1) the basis upon which he found that any shelters available would not offer a sufficiency of protection; and (2) in finding that the appellant's traffickers may have been part of a gang. Mr Hibbs reminded me that the evidence (which was accepted before the judge) was that the appellant had been trafficked by a "couple".

10. Ms Fenney, on behalf of the appellant submitted that the judge had been entitled to make the finding that he did and she relied upon [44] of the judgment of Maurice Kay LJ in which he concluded that on the issue of "internal relocation", the approach of the AIT in PO had been "infected by its erroneous approach to gangs and its defective approach to shelters". She submitted that in relation to the "gang" issue, para 19(c) of the preserved paragraph in the AIT's decision in PO entitled the judge, in the absence of evidence that the appellant had been trafficked by an individual, to find that it was likely that the trafficking had been carried out by a gang.

11. In substance, I accept the submissions of Mr Hibbs. Paragraphs 191 and 192 of the AIT's decision in PQ are in the following terms:

"Ability and Willingness of the Nigerian Authorities to offer Protection to Victims of Trafficking"

191. Our consideration of the background materials clearly demonstrates to us that in general the government of Nigeria is both able and willing to discharge its own duty to protect its own nationals from people traffickers. In particular:

- (a) The Danish Information Service Report: *The Protection of Victims of Trafficking in Nigeria: a Fact Finding Mission to Lagos, Benin City and Abuja, 9/26 September 2007* (April 2008) points out that the government of Nigeria have recognised the problem of traffickers and, since 2003, the legal and institutional foundation for combating trafficking and, equally important, support for victims of trafficking, have been in place in Nigeria.
- (b) The National Agency for the Prohibition of Traffic in Persons and other related matters (NAPTIP) is the principal organisation created by the Nigerian government to combat trafficking. The *Trafficking in Persons (Prohibition) Law Enforcement Administration Act, 2003* established NAPTIP and was enacted as a direct result of Nigeria wishing to fulfil its international obligations under the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.
- (c) NAPTIP's own Legal and Prosecution Department were said in the April 2008 report, to have concluded six cases and another five were said to be pending. 58 victims of trafficking have been rehabilitated, while another 24 were waiting rehabilitation. We accept that with more funds, NAPTIP could do more to help victims, but the same could be said of any government agency with a finite budget.
- (d) The US State Department Report suggests that whilst Nigeria is not complying with minimum standards, it is 'making significant efforts to do so' and has 'demonstrated a solid commitment to eradicating trafficking'. It also spoke of NAPTIP making solid efforts to investigate and prosecute trafficking cases, although the numbers of convicted traffickers remained low. There are clearly several reasons for that, but not, on the evidence before us, any lack of governmental effort or desire.

Risk to Victims of Trafficking in being Re-trafficked on Return to Nigeria

192. It must be born in mind, however, that a claimant may still have a well-founded fear of persecution if she can show that the Nigerian authorities know or ought to know of circumstances particular to her case giving rise to his fear, but are unlikely to provide the additional protection her particular circumstances reasonably required. To that end:

- (a) A very careful examination of the circumstances in which the victim was first trafficked must be undertaken and careful findings made. If a victim has been told that she is required to earn a particular sum of money ('target earnings') for the trafficker or gang, before being free of any obligation to the trafficker or gang, then, if the victim should escape before earning the target sums, there may well be a risk to the victim that on return to Nigeria she

may be re-trafficked if found. The extent of the risk of the trafficking will very much depend on the circumstances in which the victim was originally trafficked.

- (b) It must always be remembered that within Nigeria there are gangs of people traffickers operating who generate enormous sums of money from their activities. The evidence seems to us to be clear that where a victim escapes the clutches of her traffickers before earning the target earnings, then the traffickers are very likely to go to extreme lengths in order to locate the victim or members of the victim's family, to seek reprisals.
- (c) In the absence of evidence that a trafficked victim has been trafficked by an individual, it should be borne in mind that it is likely that the trafficking will have been carried out by a collection of individuals, many of whom may not have had personal contact with the victim. Within trafficking gangs, individual members perform different roles. One might, for example, be a photographer who takes the photograph which is used within the victim's passport, whether or not the passport is a genuine one. One gang member may, for example, be a forger who is involved in the preparation of false passports or other documents for use by the victim; one might be a corrupt police official, or a border guard, whose role is to assist in facilitating the victim's passage in some way. Gang members may perform any number of different roles but it is essential to bear in mind that if a victim has been trafficked by a gang of traffickers, as opposed to a single trafficker, then the risk of re-trafficking may be greater for someone who escapes before earning the target earnings set by the trafficker, because the individual gang members will have expected to receive a share of the target sum and will, therefore, be anxious to ensure that they do receive that share or seek retribution if they do not."

12. In allowing PO's appeal, the Court of Appeal simply set aside the AIT's conclusions in relation to the availability and effectiveness of shelters provided to traffic victims by NAPTIP. In PO that was particularly important in relation to an appellant who had a young child, where the evidence concerning the availability of shelters to women with young children was in dispute. That is not an issue in this appeal as the appellant does not have a young child.
13. Paragraph 191 of the AIT's decision sets out the country guidance and its conclusion that "in general the government of Nigeria is both able and willing to discharge its own duty to protect its own nationals from people traffickers." That finding survived the Court of Appeal's remittal of the appeal to the Upper Tribunal. Likewise, para 192 of the preserved country guidance identifies that, despite that "general" sufficiency of protection, a claimant may have a well-founded fear of persecution if she can show that the Nigerian authorities "know or ought to know of circumstances particular to her case giving rise to fear", but "are unlikely to provide the additional protection" those particular circumstances reasonably require. As the sub-paragraphs of para 192 make plain, a "very careful examination" is required of the circumstances in which the claimant was first trafficked, including whether she was required to earn a particular sum for the trafficker or gang and whether she has achieved her "target

earnings". The point being made is that the risk of being re-trafficked is likely to depend upon those circumstances. Likewise, the AIT accepted that there was an enhanced risk of being re-trafficked if the original trafficking had been carried out by a "collection of individuals". The guidance concludes that in the absence of evidence that a person has been trafficked by an individual it is "likely" that the trafficking was carried out by a "collection of individuals".

14. In my judgment, Judge Page failed in para 21 of his determination to give a "very careful examination" to the circumstances of the appellant.
15. First, the Court of Appeal's decision in PO(Nigeria) did not determine the outcome on the facts of this appeal without more. Secondly, it was accepted that the appellant had been trafficked and it was also accepted that a "couple" had brought her to the UK. The judge made no further findings in respect of the circumstances in which she was trafficked. He made no finding for example whether she was required to earn a particular sum of money and whether or not she had met that target. That, as the country guidance makes plain, was relevant to any risk of being re-trafficked on return. Thirdly, it is not clear whether Judge Page found that the "couple" were, in fact, part of a gang or "collection of individuals" that put the appellant in an enhanced risk category. He merely stated that they "may have been part of a gang". Finally, Judge Page failed to give any reasons or engage with the background evidence concerning the availability of shelters and the "sufficiency of protection" that the Nigerian government would be able and willing to provide her and whether, in the light of any particular risk to her, it would provide a reasonable level of protection. The AIT's finding in relation to the "general" level of protection that the state is both able and willing to provide set out in para 191 was not referred to by the judge, perhaps on the erroneous assumption that it had not survived the appeal to the Court of Appeal which, of course, it had.
16. In short, despite the Court of Appeal's decision in PO, the judge was still required to consider and apply the country guidance in paras 191 and 192 and to do so in the light of the background evidence submitted in the appeal. In this appeal, unfortunately, the judge did neither and as a result his finding in favour of the appellant is flawed in law and cannot stand.

Decision

17. The decision of the First-tier Tribunal to allow the appellant's appeal on asylum and human rights grounds involved the making of an error of law. That decision is set aside.
18. In light of the nature of the error, and the need to consider for the first time in this appeal the background evidence, the appropriate disposal of this appeal is to remit it to the First-tier Tribunal.
19. The fact that the appellant was trafficked to the UK is accepted. The issues for the First-tier Tribunal are whether the appellant has established (1) that she is at risk of persecution or serious ill-treatment on return; (2)

that the Nigerian state is not willing and able to provide a sufficiency of protection against any such risk; and (3) whether the appellant has the option of internal relocation.

20. For these reasons, the Secretary of State's appeal is allowed and this appeal is remitted to the First-tier Tribunal (other than Judge Page).

Signed

A Grubb
Judge of the Upper Tribunal