



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/13630/2011

THE IMMIGRATION ACTS

Heard at Glasgow
on 13 May 2015

Determination issued
On 18 May 2015

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

L T D

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance; no representative

For the Respondent: Mr Miles Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Vietnam, born on 20 October 1990.
2. The following is a summary of the account which appellant gave when interviewed by the respondent, with her corrections as put forward in a letter from her solicitors. Her mother died when she was aged 10. She was then brought up by an aunt. She stabbed her cousin during a violent disagreement in 2002. She left her aunt's house to stay with a neighbour. In the same year, she travelled with that neighbour to China. She became a servant to a group of prostitutes and later was forced into

prostitution. She was trafficked into prostitution in France around 2007 and into the UK in 2008. She went out only twice, to have abortions. She escaped on 1 May 2011 when taken to hospital due to a miscarriage. She worked in shops and sold scarves to support herself. She was arrested on suspicion of shoplifting on 25 October 2011, an allegation which she denied. Having received information from the police, she made her asylum application at the Croydon asylum screening unit the next day.

3. The respondent refused the claim for reasons explained in a letter dated 25 November 2011:

the appellant was accepted to be Vietnamese (¶10);

her account of a risk arising from an incident with her cousin was not credible, but if it did occur it did not give rise to a protection claim (¶11-26);

she might have been trafficked at age 12 - a separate referral had been made to the “competent authority” to decide that (¶29);

as to any risk of being trafficked again she could seek the assistance of the authorities in Vietnam (¶31) or other organisations, particularly as she was now over 21 and aware of the risks (¶32-35);

being Vietnamese speaking, educated [to primary level], young, healthy and resourceful, she would be able to fend for herself in Vietnam (¶37-38);

there were organisations in Vietnam to help her, and she could benefit from an assisted return (¶39-40);

she did not qualify for refugee or humanitarian protection or under Article 3 of the ECHR;

her removal would not be a disproportionate breach of rights to family and private life; and

all known factors having been considered under paragraph 395C of the Immigration Rules, it was appropriate to remove her to Vietnam.

4. The appellant appealed to the First-tier Tribunal. Her grounds simply insisted that her evidence was credible (although adverse credibility findings were not at the heart of the respondent’s decision), that she could not live safely anywhere in Vietnam, and that she was at risk of being re-trafficked.
5. Among the documents which the appellant submitted to the First-tier Tribunal there is a letter dated 12 January 2012 from the UK Border Agency as the “competent authority”. This finds that although the appellant was trafficked those circumstances no longer exist, and that she does not qualify for leave to remain because she is not currently assisting with police investigations and does not have any complex needs which would require her to remain in the UK.

6. A First-tier Tribunal Judge dismissed the appellant's appeal by determination promulgated on 20 February 2012. Permission to appeal to the Upper Tribunal was granted because arguably the judge ought to have adjourned (a) in the unexpected absence of the appellant and (b) pending an expert report. The respondent did not respond to the grant of permission. By decision dated 21 May 2012 the Upper Tribunal set aside the determination and remitted the case to the First-tier Tribunal to be heard entirely afresh.
7. Another First-tier Tribunal Judge, Judge Edwards, dismissed the appeal by determination promulgated on 3 July 2012.
8. The appellant sought permission to appeal to the Upper Tribunal on these grounds:
 - (i) error in approach to expert evidence - a report by Professor Bluth was too lightly rejected;
 - (ii) no analysis of case law relied upon by the appellant, relevant to risk of re-trafficking;
 - (iii) no analysis of country background information, which showed that government measures were ineffective;
 - (iv) absence of separate consideration of Articles 2 and 2 of the ECHR;
 - (v) having regard to s.8 of the 2004 Act, although the respondent had not relied upon any such point; and
 - (vi) failing to make findings on paragraph 395C of the Immigration Rules.
9. On 30 July 2012, permission to appeal was granted, on the view that the judge arguably gave inadequate reasons for dismissing the evidence of the expert, whose evidence had been approved by the Upper Tribunal and by the Court of Appeal in two cases about Korea.
10. In response to the grant of permission the respondent served a reply arguing that the expert evidence was adequately considered at paragraphs 22 and 29; that there was no failure to deal with relevant case law; and that separate consideration of Articles 2 and 3 had not been called for.
11. There was then delay in dealing with the case, for various reasons: the appellant's solicitors suggested that it might be suitable for country guidance, although that has not eventually been found appropriate; she moved to Scotland, leading to a change of hearing venue; she changed solicitors twice; directions of the Upper Tribunal were not complied with; and she failed to appear at a hearing on 4 November 2014, when her solicitors withdrew, she having changed her address without advising them and they having been unable to communicate with her. The respondent's representative was able to provide an up to date address (in Falkirk) and the information that the appellant was due to give birth in January 2015. In that light, the Upper Tribunal

issued an order and detailed directions dated 4 November 2014, and the case was set down for hearing on 13 May 2015. All documents were sent to the appellant's up to date address.

12. The appellant did not communicate with the Upper Tribunal prior to 13 May 2015, and she did not then appear. Nothing has been heard from her or from anyone on her behalf up to the time of promulgating this determination. Mr Matthews again confirmed her last known address. He also said that the respondent had written to her after the last hearing, including advice that she should instruct solicitors. He had checked records as to her reporting requirement. She failed to report to Falkirk police station on the last two monthly dates, and if she again fails to report next week, she will be listed by the respondent as an absconder.
13. In those circumstances it was appropriate under the Tribunal Procedure (Upper Tribunal) Rules 2008, rule 38, to proceed with the hearing in absence of the appellant.
14. The first question is whether the First-tier Tribunal determination errs in point of law.
15. The expert report dated 28 June 2012 says at paragraph 2 that the author is Professor of International Studies at the University of Leeds; his expertise is in international relations; he has considerable knowledge of Vietnam; as a specialist in the geopolitics of Asia he has studied and taught about Vietnam for over twenty years; and he recently supervised a Vietnamese doctoral candidate engaged in primary research on his country. He lists and summarises the materials he has considered. His conclusions are at paragraphs 6. Taking into account the appellant's background and lack of support and the operation of criminal networks with which it is "practically inevitable" that she will come into contact he finds a "high risk ... that she will be the target of trafficking gangs and that not sufficient support will be available to protect her."
16. Paragraph 22 of the determination is a summary of the report. It is even briefer than the above, although it is of course not necessary to quote all materials at length. The only analysis is at paragraph 29:

"The question then arises what the risk ... would be on return ... I have disregarded the report of Professor Bluth. He is an historian who is an expert on international relations. He does not say that he has ever visited Vietnam, or that he has studied the social consequences arising there from trafficking. He does not say what the subject of his doctorate is, or, indeed, what that of the person he is supervising is. I therefore do not find that he is an expert on the matters on which he has opined."
17. It would be unobjectionable to observe that the subject matter of this case does not appear to be very close to the Professor's particular area of expertise. The ideal expert would speak Vietnamese (an ability which Professor Bluth does not claim) and would have studied the topic directly. However, the activities of trafficking gangs are manifested not only at the personal level but as an aspect of relations among countries within Southeast Asia and with the rest of the world including Europe. It would be reasonable (indeed the duty of the tribunal) to weigh the report

rather than simply to accept its conclusions, to evaluate its conclusions in light of such observations, and perhaps to find its conclusions over-stated. But although Professor Bluth may not be an expert on the narrower focus of the case (e.g., the practical availability of refuges) his remit does go to the wider aspect (e.g., the international aspect of trafficking). In my opinion it was an error to find him not to be an expert on the matter at all. Mr Matthews did not seek to argue otherwise.

18. Is this an error which requires the determination to be set aside? The other reasons for dismissing the appeal are at paragraph 30 - the government takes measures and there is protection in place to meet the *Horvath* test; and at paragraph 31 - the appellant would not be deprived and unsupported, she admitted to being in touch with friends and she could re-integrate. Those findings are far from plainly wrong, but they are meagre in relation to a case which was thoroughly put in written submissions (and presumably in oral submissions, although these are recorded only briefly at paragraph 24). Mr Matthews acknowledged that the incorrect elimination of an expert report was an error of some significance, and that the rest of the reasoning to support the decision was skimpy.
19. Determinations should be as concise and to the point as possible. However, what remains of this determination is not robust enough for it to stand. The next issue is therefore the remaking of the decision.
20. There was nothing from the appellant to assist further, but Mr Matthews was able to help from the respondent's records. The address in Falkirk did not appear to be one provided through the respondent or by any other state body. The appellant would not have been entitled to more than basic benefit for living expenses. She would not have been entitled to accommodation or to benefit to cover rent. She would have had a motive to advise the respondent of the birth of a child, because that would result in a small increase in benefit paid. However, there was no copy birth certificate on record with the respondent.
21. Further enquiry by Mr Matthews disclosed a note that the appellant's asylum support claim was closed on 2 December 2014, on information from the social work department that she was working in a nail bar, above which her accommodation was situated. Any employment would not have been legally permitted. She was said to be living there with her boyfriend, whose initials are H T U, born on 31 May 1991. That was similar to a Home Office record of a failed asylum seeker, although the identification was not certain. It appeared that she had given birth, but further details were lacking.
22. Withdrawal of asylum support would explain why the appellant did not let the respondent know about the birth of any child, as she would not expect to gain by doing so. The father of her child may or may not be the same person noted as a boyfriend. The information suggests that the appellant now has some family support. It is probable that there is no relationship with anyone with any immigration or citizenship status which might have been cited in support of her case.

She seems to have chosen consciously to “go to ground” rather than advancing her claim.

23. I am satisfied that former victims of trafficking in Vietnam constitute members of a particular social group within the meaning of that Convention, as appears to have been implicitly accepted by the respondent from the outset (and cf. *AZ (Trafficked Women) Thailand* CG [2010] UKUT 118). There are no Article 8 or other available grounds of appeal which might realistically avail the appellant.
24. It was correctly conceded on the appellant’s side in prior proceedings that the incident in 2002 does not give rise to risk now. The respondent’s analysis of this issue is impeccable.
25. On return the appellant would not be among the elite or the middle class in Vietnam, but she would be no worse off and as capable of providing for herself (and her child) as the bulk of the population, and she would start with the respondent’s fairly generous assistance (see below). (If she had the potential support of a husband or partner, so much the better for her, but I do not have enough information to draw that conclusion.) Her case could not succeed on the basis of her likely circumstances, without a real risk of re-trafficking. The existence of such a risk would qualify her as a refugee, and is the decisive issue.
26. The factors reasonably pointed to so far on the respondent’s side are set out at ¶31-40 of the refusal letter, summarised above.
27. Mr Matthews referred also to more recent publications by the respondent, including an Operational Guidance Note (OGN) of June 2013, in particular the following sections:

3.11.10 The Vietnamese government sustained some efforts to protect victims of transnational sex trafficking and outlined additional victim protection plans in its new anti-trafficking law, though it did not make sufficient efforts during 2011 to identify or protect victims of labour trafficking or internal trafficking.

3.11.11 The government’s Vietnamese Women’s Union (VWU), in partnership with NGOs, continued to operate three trafficking shelters in Vietnam’s largest urban areas, which offered counselling and vocational training to female sex trafficking victims. The VWU and border guards also operate smaller shelters that provide temporary assistance to migrants in need of assistance at some of the most heavily used crossing points. The government, however, lacks the resources and technical expertise to adequately support shelters, and as a result, in many areas shelters are rudimentary, underfunded and lack appropriately trained workforce. Trafficking victims also are inappropriately housed at times in MOLISA shelters co-located with those of drug users’ rehabilitation and reintegration of individuals leaving prostitution. There are no shelters or services specifically dedicated to assisting male victims of trafficking or victims of labour trafficking.

3.11.12 The government reportedly encourages victims to assist in the prosecution of their traffickers, though Vietnam generally does not provide police-assisted witness protection to victims of crime. There were no data on the number of victims involved in prosecutions during 2010 or 2011. Victims are often reluctant to participate in

investigations or trials due to social stigma, particularly as it relates to prostitution, fear of retribution in their local communities and lack of incentives for participation. Vietnamese law does have provisions to protect trafficking victims from facing criminal charges for actions taken as a direct consequence of being trafficked. There are no legal alternatives for the removal of foreign victims to countries where they face retribution or hardship.

3.11.13 The Government of Vietnam failed to provide adequate remedies to overseas workers who experienced debt bondage or other forms of forced labour. During 2011, the government drafted new victim identification procedures. In 2011, the government finalised and disseminated a five year (2011-2015) national action plan on human trafficking and announced the allocation of the equivalent of \$15 million to implement this plan, which covers all forms of trafficking and co-ordinates the government's anti-trafficking responses through the National Steering Committee on Human Trafficking chaired by Deputy Prime Minister Nguyen Xuan Phuc. Although police officials acknowledged that internal trafficking and trafficking of men may constitute significant segments of the country's trafficking problem, the Government took no discernible actions to increase efforts to address these particular forms of trafficking during 2011.

28. The Country of Origin Information Report (COIR) dated 9 August 2013 overlaps with the OGN, but appears to draw on more recent sources:

24.16 With regards to offering shelters for male and female victims of trafficking, the USSD TiP [Trafficking in Persons] Report 2013, stated:

"The government's Vietnamese Women's Union (VWU), in partnership with NGOs [non-governmental organisations] and with foreign donor funding, continued to operate three trafficking shelters in Vietnam's largest urban areas; the shelters provided counseling and vocational training to female sex trafficking victims. The VWU and border guards also operate smaller shelters that provide temporary assistance to migrants in need at some of the most heavily used crossing points. At times victims were housed in Ministry of Labor, Invalids, and Social Affairs (MOLISA) social protection centers that provide services to a wide range of vulnerable groups, although officials acknowledged that victims were better served in trafficking specific shelters."

24.17 The USSD TiP Report 2013 added:

"In many areas shelters are rudimentary, underfunded, and lack appropriately trained personnel. There are no shelters or services specifically dedicated to assisting male victims, child victims, or victims of labor trafficking, although existing shelters reportedly provided services to some male and child victims. NGOs report some victims opt not to stay at a victim support facility or receive social services due to a fear of social stigma from identifying as a trafficking victim. Trafficking victims are eligible for a cash subsidy up to the equivalent of approximately \$50, paid through local authorities; the government did not provide statistics on the number of victims who received this benefit."

24.18 The UNIAP website, accessed on 4 July 2013, stated:

"This work consists of identification, rescue, legal proceedings, repatriation, recovery, reception and reintegration of trafficked women and children particularly from abroad. The local-level sub-committee and international organizations provide medical care,

counseling and initial support. As of May 2011, there are 9 shelters and reception centers which are located in Ha Noi, Quang Ninh, Lao Cai (2), Lang Son, An Giang (2), Can Tho and Ho Chi Minh City. These shelters and centers provide food, accommodation, medical care, counseling and vocational training. The victim protection agencies involved in the Reintegration Network to support returned victims of trafficking in Vietnam attempt to strengthen referral systems and capacity-building for social workers, police, hotline operators and others ... 60 % of victims were self-returnees, 19% were rescued and 21% were repatriated."

29. The main factors pointed to on the appellant's side are as follows, taken mainly from the written submissions by her counsel in the First-tier Tribunal. She has suffered past persecution. That is generally a serious indication for the future, unless there are good reasons to consider there will be no repetition (Immigration Rule 339K; this is another way of posing the live issue). She is an orphan, known as such in her home area. State protection needs to be realistic, not theoretical, and the respondent had accepted that Vietnam's anti-trafficking record remains poor. The factors to be assessed on a case-by-case basis as in *AZ* include age, marital status, domestic background, educational level, qualifications and work experience. While it might be said that the appellant would be wiser next time round, it is also arguable that a former victim might be more vulnerable (*AZ* at ¶150).
30. The written submissions, as I have observed, are thorough. They contain every significant point which could have been advanced for the appellant. On one issue, however, I find them clearly mistaken. They argue that the Vietnamese authorities will not allow the appellant to have the benefit of the reintegration assistance offered by the respondent. The evidence cited relates to lack of assistance from the Vietnamese government. It does not suggest that the government stands in the way of assistance from the respondent. There is no reason why that should be the case.
31. There has been some improvement in what is on offer from government and other sources in Vietnam. It remains meagre compared to what is offered by the respondent. Mr Matthews pointed out that the respondent's help takes such forms as direct payments, assistance in finding employment or setting up a small business, and the provision of initial accommodation, and that the return of a failed asylum seeker with a child is an elaborate and carefully planned exercise.
32. There is evidence of large-scale trafficking. It affects mainly younger girls and women from deprived backgrounds, such as the appellant. There is no specific evidence about the risk of women who have escaped from such a life being re-trafficked into it. It would be impossible to say that there is never any such risk. I take into account the report by Professor Bluth but for the reasons indicated above and in context of the rest of the evidence I do not accept its conclusion there is "a high risk". The appellant may not attract the attention of traffickers again. Even if she does, she should be able to resist it.
33. The appellant has been the victim of the relevant risk in her past, over a period of several years. The risk of her being a victim again is likely to have reduced now that she is aged 24 and sadly has seen some of the worse ways of the world. There

ultimate answer is not much affected by the availability of assistance from Vietnamese sources, which is not at a high level, but it is significantly affected by the resettlement package on offer, the greater personal resilience she may now be expected to have, and her indifference to the outcome of her case. She has not established the necessary subjective element, i.e. that she remains outside her country of nationality owing to a fear of persecution. Nor in my opinion does the evidence as a whole show any risk of re-trafficking to be a real rather than a remote or fanciful one.

34. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **dismissed** on all available grounds.
35. An anonymity direction was made by the First-tier Tribunal, and is confirmed. 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 her 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.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

13 May 2015
Upper Tribunal Judge Macleman