



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06323/2015

THE IMMIGRATION ACTS

Heard at Bradford
On 3 February 2016

Sent to parties on:
On 16 February 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

And

Appellant

OG

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Diwnycz

For the Respondent: Mr Hachimi

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Robson) to allow the appeal of OG against the Secretary of State's decision of 19 November 2015 refusing to grant him asylum but granting him limited leave outside the Immigration Rules in accordance with a Home Office policy on discretionary leave for minors.

2. OG, who has been granted anonymity in these proceedings, is a national of Vietnam. He was born on 25 November 1998 and he has been at all material times, and remains, a minor. I am not clear as to precisely when he entered the UK but he was encountered by immigration officers on 1 September 2014 and told them that he had arrived only a few days prior to that. He was then provided with assistance by a social services department, in view of his young age, and he claimed asylum on 9 October 2014.

3. In claiming asylum OG said that his family had owned some farmland in Vietnam which the Vietnamese Government had wished to have developed. The Government had decided that this would be achieved through the land being purchased by a development company and that compensation would be paid. Other Vietnamese persons in the area were also to have their land purchased and developed in the same way. It was proposed that they too would receive compensation but a dispute arose between the land owners and the Government as to the level of compensation payable. This resulted in a number of farmers affected by these proposals staging an anti-Government protest in Hanoi on 12 June 2012. The appellant says that he handed out leaflets at the protest, that he was arrested, and that he was subsequently released by the authorities after five days. He claims, though, that he continued with his leafleting and that, in early 2013, he was arrested once again. On this occasion, though, rather than being simply released by the authorities, he claims to have escaped. He says, in this context, that his grandfather had a friend in the Vietnamese Police Force. That friend, as part of the escape plan, gave him a tablet to take which he did take and which lowered his blood pressure and resulted in his losing consciousness. This was done deliberately with a view to his being taken to hospital for treatment. Once he had arrived at the hospital, still unconscious, he was taken out of the hospital and driven to a mountainous area. He then travelled out of Vietnam to China, Spain and France prior to entering the UK. He says that he will be at risk at the hands of the authorities upon return, in particular, because of his status as an escapee.

4. The Secretary of State, in considering the application for asylum, accepted most of what the appellant had to say but disbelieved the account of the escape. That being so, the Secretary of State took the view that OG would have simply been released by the authorities and so would not be of any ongoing interest. The respondent did, though, as indicated, in view of OG's young age, grant discretionary leave as a minor until he attained 17½ years of age which he is due to do on 25 May 2016.

5. OG appealed to the First-tier Tribunal against the refusal of his asylum claim and, in fact, his appeal was allowed by Judge Robson in a determination promulgated on 11 December 2015. However, I set that decision aside on the basis that it contained a material error of law. My full reasons for doing so are set out in a document headed "Decision and Directions" which was sent to the parties on

11 December 2015. In short, though, I did so because I thought the judge had erred in failing to resolve inconsistency in the evidence OG had given about his escape and in failing to explain why he accepted the account of the escape despite rejecting a key element of it being that OG had been given a pill, as part of the escape plan, in order to cause him to lose consciousness. While setting the decision aside, though, I did preserve most of the findings such that the respondent's concessions about the other aspects of OG's account, which had been adopted by the judge, remained. Thus, at the subsequent "continuance hearing", attention focused upon the escape.

6. At the continuance hearing representation was as indicated above. I am grateful to each representative. I heard oral evidence from OG who gave his evidence with the assistance of a Vietnamese speaking interpreter whom he appeared to understand throughout the course of the proceedings. At the end of the hearing I received oral submissions from the two representatives. As to documentation, I had all of the documents which had been before the First-tier Tribunal and the further documents which had come into being as a result of the appeal to the Upper Tribunal. There were no additional documents.

7. OG, in his evidence in chief, said it was true, as he had indicated in an asylum interview of 19 January 2015 and a witness statement of 20 November 2014 that he had been given a tablet, whilst in prison, which had caused him to lose consciousness. He explained that when he woke up, he saw his grandfather and asked where he was. His grandfather told him that they were in Lang Son Province in Vietnam which is in a mountainous area of the country close to the border with China. He was told that they would have to wait for someone to come and take him over the border. OG said he asked his grandfather how he had been taken out of prison and his grandfather had explained to him about the tablet, the loss of consciousness and his having been taken to the hospital.

8. In cross-examination OG was reminded of what he had had to say in answer to question 40 of his asylum interview and it was pointed out to him that he had not specifically said, in reply to that question, that he had lost consciousness. OG said that these events were a long time ago and that he only knew what he had been told by his grandfather. It was put to him that he had not mentioned losing consciousness in an earlier interview with an immigration officer or in his screening interview. OG said that there might have been a time when he had not mentioned the loss of consciousness because he had not been asked about it. However he had mentioned it at an interview and in his statement. He was pressed as to where he had been when he woke up, being given possible options of his being in a vehicle, in a house or in the open air. He said he could not say exactly because these events were four years ago and he could not remember every little detail.

9. I asked some questions of OG for clarification purposes. In response to those questions he said it was "someone in uniform" who had given him the tablet and that

person had told him it would help him to lose consciousness so that he would have to be taken to hospital. He was told that that was part of an escape plan. I reminded him of what he had said in answer to question 41 of his asylum interview, his answer having indicated that the escape had been achieved whilst he was on the way to hospital as opposed to while he was at the hospital. He said that the story had been told back to him by his grandfather, that he was unconscious at the time and that he did not remember “step by step” how everything had happened.

10. In re-examination OG said that when he had woken up he had seen his grandfather and had asked where they were and had been told they were in Lang Son Province. He had been waiting a long time before someone had come to take him out of Vietnam.

11. Mr Diwnycz, in submissions, indicated he would rely upon the content of the “reasons for refusal letter” of 19 March 2015. Whilst OG is a minor he is not a small child. He had been asked direct questions regarding his escape but had given three or four different versions of what had happened. He had not provided any more detail as to where he was when he awoke other than that he was in a mountainous area. Had he been telling the truth he would have been able to provide more detail. I should find that his claim to have been given a tablet and to have escaped is an embellishment. The account of the escape is not credible.

12. Mr Hachimi indicated he would rely upon the concessions contained in the reasons for refusal letter. OG could not be criticised for failing to mention the tablet and his lapse into unconsciousness at the screening interview because the provision of a full account is not the purpose of such an interview. As to inconsistency, there is always a margin of error where an interpreter is used. OG’s young age also has to be borne in mind. Further, if he was unconscious then it has to be remembered that he was not a direct witness to events himself but can only recount what has been told to him. As to his failure to give information about his surroundings upon waking up, he would have been “very groggy” and barely aware of those surroundings. The accepted parts of the account relate to the core of that account and the escape issue is merely marginal. In any event, he would be at risk on return on the basis that he did have problems with the authorities and has been arrested in the past.

13. It is, then, on the above basis, that I must now remake the decision. In so doing I remind myself that where an individual claims entitlement to international protection, be that on the basis of asylum, humanitarian protection or under Article 3 of the European Convention on Human Rights (ECHR) the burden of proof rests upon that person but the standard of proof is that of a “real risk” as opposed to any higher standard. Matters are to be assessed as at the date of hearing which means, in this case, the hearing before me of 3 February 2016.

14. I have decided it is necessary for me to consider, to the lower standard identified above, whether or not I can accept OG as being a wholly credible witness. In this context I have borne in mind his young age both at the time of his giving evidence to me and at the time of his being interviewed and providing statements.

15. The Secretary of State, in part in reliance upon background country material, has accepted much of OG's account as noted above. There is no reason why I should revisit that and I do not do so. The acceptance that much of the account he offers is true, therefore, is a matter which weighs in his favour and which I regard as tending to suggest that he might be telling the truth regarding the disputed part of his account. That said, though, there are some concerns about the account he has offered of the escape which do merit some careful consideration.

16. In this context, OG's oral evidence before me was to the effect that the escape had been affected after he had been taken to a hospital. That is consistent with what he had to say in a witness statement of 20 November 2014. In particular, at paragraph 23 of that statement he said this:

“During my time in prison my grandfather had a friend in the police and he helped me get released into a hospital. The friend got a pill to me which lowered my blood pressure and led to me passing out. I was taken to hospital for treatment and my grandfather's friends helped me get out from hospital and to escape.”

17. However, during his asylum interview of 19 January 2015 the following exchange is recorded:

- “ Question - Can you tell me how did you manage to escape from the hospital?
- Answer - My grandmother has a friend in the police force and that man helped me to escape. He gave me a tablet and it affected my blood pressure and it was going down. The police officer had to take me to hospital and on the way to hospital my granddad's friend helped me to escape.
- Question - What happened on your way to the hospital?
- Answer - That friend of my granddad he was working in the police force and he took me to the hospital and on the way he let me escape. My grand-dad was waiting for me and took me to LANG SON.”

18. Mr Diwnycz said he would not take any point about the reference to a “grandmother” as opposed to a grandfather so I will not either. However, the obvious concern is that in answering both of those questions, which are questions 40 and 41 in the interview record, OG indicated that the escape had been affected whilst he was on the way to hospital as opposed to whilst he was at the hospital. That does seem to me to be an inconsistency about a rather simple and straightforward matter.

19. It is said that OG is very young and was very young at the time he was recounting these events. I accept that but, nevertheless, that does not seem to me, of itself, to explain that particular inconsistency. It is said that there is always a margin for error when an interpreter is used. However, there was a Vietnamese speaking interpreter at the interview and it is recorded that OG indicated that he understood the interpreter and that, at the end of the interview, he confirmed that he had understood all of the questions put to him. It is said that OG did not witness the key events regarding his escape and can only rely upon the account given to him by his grandfather. However, even if that is right, one would expect, ordinarily, that he would be consistent as to what it was that his grandfather had told him regarding the manner of the claimed escape. Although it was not specifically drawn to my attention I do note that OG, in a further statement of 3 June 2015, said that he did not think there was a significant difference in the accounts he had given about the escape, that he was only 16 when interviewed, that the events had happened a long time ago and that he was frightened. I take that into account but do not think it amounts to a credible explanation for the inconsistency highlighted.

20. OG did not, in answering questions 40 and 41, actually state that he had lapsed into unconsciousness. This is despite his saying that he had in oral evidence before me and in his witness statement of 20 November 2014. I accept, as Mr Hachimi points out, that in answering question 40 he did refer to his blood pressure lowering as a consequence of his having taken the tablet. Nevertheless, as Mr Diwnycz, points out, the claimed lapsing into unconsciousness as a result of the taking of the tablet was a key component of the account regarding the escape. It is surprising therefore that OG did not actually make specific mention of that when recounting the escape in interview. That is, in my view, something which amounts to or is akin to an inconsistency.

21. OG was, in my judgment, very vague regarding the circumstances when he awoke from the claimed loss of consciousness. He was pressed as to where he was when he regained consciousness and, as noted above, Mr Diwnycz put to him a number of options. He was not able to give any clear indication as to, for example, whether he came round in a vehicle, in a house or in the open air. I do take the dual points that he was very young at the time and that all of this was said to have occurred some considerable time ago. I take Mr Hachimi's point made at the hearing that he would be somewhat "groggy" when coming round. Nevertheless, the escape was not a trivial incident. If it happened it was a very significant incident in OG's life. In the circumstances I would have expected him, notwithstanding the various points made, to have had some degree of recollection as to his surroundings when he regained consciousness. I do consider, therefore, that his obvious vagueness as to this causes a degree of damage to his credibility.

22. OG's oral evidence to me, as indicated, was that he come round from his bout of unconsciousness in Lang Son Province. However, at paragraph 24 of his witness statement of 28 November 2014 he said:

“After leaving the hospital I met with my grandfather and was taken to Lang Son.”

23. That wording does seem to suggest that he was saying he had come round from the bout of unconsciousness prior to being taken to Lang Son. That is inconsistent with what he said to me. The statement was prepared by his solicitors with the assistance of a Vietnamese interpreter. There is nothing to suggest that that interpreter was not competent and, indeed, one would not have expected his solicitors to use an interpreter who was not. Again, therefore, I regard this as an inconsistency which does cause some damage to OG's credibility.

24. In light of the above concerns, notwithstanding OG's young age and the various other points which have been taken on his behalf and which are referred to above, I do conclude that, whilst he has, as is accepted, told the truth about a number of matters, he has not told the truth about the claimed escape. I find that, in fact, that escape did not occur and that it is offered as an embellishment in order to artificially enhance his prospects of success with respect to his international protection claim. Thus, I find that if he is to return to Vietnam he will not be returning as an escapee and that, in fact, he would have been simply released from the second detention as had been the case, as he accepts, with respect to his initial detention.

25. The claimed escape was a very important, indeed it seems to me pivotal, aspect of the account OG was relying upon. Although Mr Hachimi sought to argue, in the alternative, that he would be at risk upon return in any event, finding to the effect that he has, in fact, simply been released by the authorities does not suggest that that is so. It is difficult to see why, if he was of ongoing interest, he would be released. Further, Mr Hachimi does not direct me to any background country material indicating that the Vietnamese authorities would seek to penalise individuals for leaving the country or for seeking international protection elsewhere. Any claim that he would be at risk upon return, therefore, absent the escape part of the account, is not made out.

26. In light of the above I remake the decision to the effect that OG has not demonstrated that he is a person entitled to refugee status or to humanitarian protection. Any Article 3 risk does not seem to me to arise bearing in mind his current discretionary leave but, if that was an issue, I would have resolved it against him for the reasons already set out above.

Decision

The decision of the First-tier Tribunal has already been set aside. In remaking the decision I allow the Secretary of State's appeal to the Upper Tribunal and conclude the claimant is not a refugee nor is he entitled to humanitarian protection.

Anonymity

The First-tier Tribunal made an anonymity order. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Therefore, the claimant and members of his family are granted anonymity throughout these proceedings. No report of these proceedings in whatever form shall directly or indirectly identify the claimant or any member of his family. Failure to comply with this order could lead to a contempt of court.

Signed

Date

Upper Tribunal Judge Hemingway

**TO THE RESPONDENT
FEE AWARD**

As no fee is paid or payable there can be no fee award.

Signed

Date

Upper Tribunal Judge Hemingway