



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06413/2015

THE IMMIGRATION ACTS

Heard at Glasgow
On 15 February 2016

Determination Promulgated
On 17 May 2016

Before

UPPER TRIBUNAL JUDGE DEANS

Between

PL
(Anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Devlin, Advocate, instructed by Neil Barnes, Solicitors
For the Respondent: Mrs M O'Brien, Home Office Presenting Officer

DECISION AND REASONS

- 1) This is an appeal against a decision by Judge of the First-tier Tribunal Wallace dismissing an appeal on asylum and human rights grounds.
- 2) The appellant was born in October 1997 and is of Vietnamese nationality. The appellant claimed asylum in April 2014 but he claims that he arrived in the UK as an unaccompanied minor around 10 months before that date.
- 3) According to the appellant he left Vietnam with his mother in 2012. They were in Russia for about a month but the appellant travelled on to the UK alone. His mother intended to follow him. The appellant thinks that she did not have enough money for

both of them travel. The appellant travelled with about 24 other people from Russia to Belarus. He was there for 7-8 months and finally succeeded in travelling to Poland hidden in a van. From Poland the appellant travelled to France where he stayed in the "jungle" near Calais for a further 3 months before entering the UK hidden in a lorry. On arrival he was initially detained by the police but released. He was then collected by someone who knew about him and taken to a house. After about a month there he was taken to a restaurant where he was made to work for around 9-10 months. When he escaped from the restaurant he made his way to Glasgow, where social workers provided him with accommodation and helped him make an asylum claim.

- 4) In April 2014 the appellant was referred to the national referral mechanism for a decision on whether he was a victim of trafficking. As a result of this process it was decided that he was not a victim of trafficking. This aspect of the appellant's claim does not appear to have been pursued further before the First-tier Tribunal.
- 5) Since his arrival in the UK the appellant has had no contact with his mother. He has approached the Red Cross for assistance in locating her but without success.
- 6) The reason given by the appellant for leaving Vietnam was that he had a fight with a boy whose family was powerful. The boy's father was a high ranking police officer, his uncle was an official, and his aunt was a Party secretary. According to the appellant he had endured verbal and physical abuse from this boy and, although his mother advised him to restrain himself, the time came when he hit the boy with a stone. The appellant said his mother later told him that the boy had required emergency surgery and that the police were looking for the appellant. The appellant's mother had had her difficulties with the authorities by virtue of being a Catholic, which was regarded as being anti-Communist. The appellant's mother had been arrested in November or December 2011 and held for two days. The appellant thought this was connected with her religious activities.
- 7) The Judge of the First-tier Tribunal did not find the appellant's evidence credible. The judge recorded that the appellant was forthcoming in giving oral evidence and was candid in answering questions but, in the judge's opinion, this candour highlighted weaknesses in the appellant's claim. The judge noted that the appellant himself had had no contact with the police and he did not have any first-hand knowledge of what had happened to the boy whom he allegedly injured. Although the appellant had asked his mother why she had been arrested she seemed to avoid answering the question. The appellant himself had not encountered any problems because of his religion. He had not received any adverse treatment from the authorities.
- 8) According to the appellant before they left the country his mother took him to Hanoi because the police were looking for him at the family home. It was the appellant's mother who had told him after they left home that the boy had required emergency surgery and that the police were looking for the appellant. Only in Hanoi did the appellant tell his mother what had happened. This suggested to the judge that the appellant and his mother had moved from the family home to Hanoi for some other

reason than the incident alleged by the appellant. The judge concluded at paragraph 45 that all “that has been presented to the court is evidence sourced from hearsay”. She added that there was no evidence to support the appellant’s assertion that he is, or indeed, ever had been, the focus of attention from the Vietnamese authorities.

- 9) The judge also found that the appellant would be able to relocate to a city such as Hanoi in order to avoid difficulties in his home area.

Application for permission to appeal

- 10) The grounds of the application for permission to appeal are lengthy but they start with the judge’s conclusion that all that the appellant had presented to the court was evidence sourced from hearsay and that there was no evidence to support the appellant’s assertions that he had ever been the focus of attention by the Vietnamese authorities. It is pointed out that independent or corroborative evidence is not required in an asylum appeal. It is further observed that the appellant was only 14 years and 3 months old when he left Vietnam. The Red Cross were unable to locate any family members of his there. The judge did not identify any inconsistencies between the appellant’s evidence and the country situation in Vietnam. She said that the appellant had been very candid in answering questions. The judge’s reason for rejecting the appellant’s account on the basis that there was no evidence to support his assertion that he was the focus of attention by the Vietnamese authorities could not be maintained.
- 11) It was further submitted that the judge was wrong to describe the evidence as hearsay. The Tribunal was not bound by the strict rules of evidence. There was nothing in the decision to suggest that the appellant’s credibility was rejected for anything other than a lack of corroborative evidence. Once it was accepted that there was a credible reason for the absence of corroborative evidence, it was irrational to reject evidence purely because it was hearsay.
- 12) It was further submitted that the judge had failed to give rational, adequate reasons for doubting the substance of what the appellant claimed to have heard or been told. The judge failed to take account of relevant considerations, such as the appellant’s age and level of maturity at the relevant time, in determining the significance of his inability to recall certain things, his lack of knowledge and his actions. Had the judge taken into account the appellant’s age and level of maturity, it is conceivable that she would have reached a different conclusion with regard to whether the appellant had established his account to the required standard of proof.
- 13) Permission to appeal was granted on the basis that it was arguable that the judge had failed to have regard to the fact that the appellant was a minor on arrival in the UK and at the date of the hearing before the First-tier Tribunal. No reference had been made to the Joint Presidential Guidance of 2010 on Child, Vulnerable Adult and Sensitive Appellants. It was further arguable that the judge’s apparent requirement for corroboration and the criticism of the appellant’s evidence as hearsay suggested that

she had not considered the decision in ST (corroboration - Kasolo) Ethiopia [2004] UKIAT 00119.

Submissions

- 14) In his submission at the hearing Mr Devlin began by referring to the decision of the competent authority in relation to the trafficking claim. He said this had been challenged by way of a petition for judicial review lodged in December 2015. As a result of this the decision of the competent authorities was withdrawn on 23 December and no further decision had been made as yet.
- 15) Turning to the grounds of the application for permission to appeal, Mr Devlin submitted that the judge was wrong to say there was no evidence to support the appellant's assertion that he had been the focus of attention by the Vietnamese authorities. There was the appellant's witness statement. If the judge thought that there ought to be further evidence the question to be asked was whether there was a good or credible reason for the absence of such evidence, in accordance with TK (Burundi). The appellant had fled Vietnam at the age of 14. He had been unable to contact his family since, even via the Red Cross. The judge had found the appellant had been candid in giving evidence but commented on what she regarded as a lack of evidence. This was an error of law.
- 16) Mr Devlin continued that the judge's second error was to regard such evidence as there was as hearsay. Evidence might be accepted by the Tribunal even if it would not be accepted under the strict rules. There was a credible explanation by the appellant as to the lack of corroboration. It made no sense to reject the appellant's evidence as based on hearsay. There was nothing implausible about the appellant saying he knew only what he had been told. There was no reason not to accept that the appellant had been told certain things by his mother. If it was accepted that this is what he had been told then was there any reason not to believe it? His mother had taken him to Hanoi and then they had left the country. Was there any reason to think that the evidence described by the judge as hearsay was inaccurate or unreliable? There was no basis for this having regard to the low standard of proof.
- 17) Mr Devlin continued that the appellant's evidence should have been given a benevolent construction. The Tribunal should not have read into the evidence something that was not there. The judge had not given rational reasons. The judge had not had regard to the appellant's age and level of maturity.
- 18) Mr Devlin then drew to my attention that there was a sentence missing from the grounds of the application for permission to appeal. After the seventh paragraph on page 5 there should have been a sentence reading: "In all the circumstances the fact that the appellant had had no first-hand knowledge of the *sequelae* of the attack or the visit from the police could not provide a rational or adequate reason for doubting the substance of what the appellant claimed to have heard and been told about the *sequelae* of the incident and the visit of the police."

- 19) Mr Devlin said the judge drew an adverse inference from the appellant having told his mother about the incident with the boy only in Hanoi. The judge was wrong to draw such an inference. The appellant was referring to having told his mother about the details of the attack. This was apparent from his use of the word “exactly” in Q47 of the asylum interview. This account was anyway consistent with what he had said about her telling him of the police visit. It was not appropriate to assume that the appellant had not told his mother anything about the incident and that therefore this could not have been their reason for leaving home and going to Hanoi.
- 20) On behalf of the respondent, Mrs O’Brien stated that a rule 24 notice had been filed, although unfortunately this did not appear to have reached the Tribunal’s appeal file. The thrust of the rule 24 notice was that the grounds in the application for permission to appeal were disagreements with the findings made by the judge and that the phraseology used by the judge had been misconstrued.
- 21) Mrs O’Brien pointed out that at paragraph 34 the judge made a positive finding in favour of the appellant about how candid he was in answering questions. The difficulty for the appellant, however, was that his account lacked substance. It was very vague. It was acknowledged that there were no strict rules of evidence and that this meant that the use of the term “hearsay” by the judge could be misleading. It was necessary however to look at the entirety of the reasons. The problem with the decision was one of terminology rather than of failure to consider the evidence appropriately.
- 22) Mrs O’Brien further submitted that the appellant’s account could be seen as an instance of prosecution and he could be seen as evading the consequences of criminality. What the judge said was that there was not enough evidence to make a positive finding even to the lower standard of proof.
- 23) With regard to the question of the appellant’s age. Mrs O’Brien pointed out that this judge was acknowledged to be an academic expert on the human rights of children. According to the judge’s findings the appellant left home with his mother without the mother being fully aware of the facts. This was why doubt was raised as to the reasons for leaving home. It was difficult to attribute the appellant’s alleged fear of return to the possibility of being brought before an unfair court in Vietnam. This might be a real question of prosecution rather than persecution.
- 24) Mrs O’Brien further submitted that when the judge referred to “no evidence” she was referring to the quality of the evidence. There was no evidence of the current situation. The Red Cross had not been able to trace the appellant’s mother and were silent on other family members. The question was whether the judge had done enough.
- 25) Mrs O’Brien further pointed out that the appellant had been given discretionary leave until he was 17½, which was the end of April 2015. It was pointed out that a further application by the appellant had been refused and a second appeal was pending. The

suggestion was made that if an error of law was found and the appeal was remitted then both appeals could be heard together before the First-tier Tribunal.

Discussion

- 26) Mrs O'Brien properly expressed the question in this appeal as one of whether the judge had done enough. If the appellant had been of full age when he appeared before the First-tier Tribunal I might have been inclined to accept Mrs O'Brien's arguments in this regard and find that although the judge's use of phrases such as "no evidence" and "hearsay" were misleading, nevertheless having weighed the evidence the judge was entitled to make an adverse finding.
- 27) This is not the position, however. The appellant was an unaccompanied child when he arrived in the UK and he was a minor at the time of his appearance before the First-tier Tribunal. It is not clear from the judge's decision what weight she gave to this as a factor in assessing the appellant's account. It is a matter which should have been taken into consideration. The knowledge the appellant would have been expected to have about what had taken place in Vietnam and the position of the people concerned would have been much greater if he had been an adult than should be expected of a boy of 13 or 14.
- 28) Having regard to the appellant's age, the judge ought to have had regard to the Joint Presidential Guidance. This would have drawn the judge's attention to particular issues which may arise in a hearing involving a child, such as the possibility that children often do not provide as much detail as adults in recalling experiences and may often manifest their fears differently from adults.
- 29) When the appellant's age is taken into account, many of the criticisms made by Mr Devlin of the judge's decision acquire significant weight. The judge does not appear to have taken into account the appellant's age when considering both the extent to which his knowledge depended on what he had been told by adults, particularly his mother, and the extent to which his knowledge of the circumstances surrounding the incident with the other boy were affected by his age. For example, the appellant did not know the rank in the police of the father of the other boy and he did not know the position occupied by the boy's aunt, who was a party secretary. These things would not necessarily be known to a boy of 13 or 14.
- 30) Mrs O'Brien suggested that the appellant's fear was one of prosecution rather than persecution but this was not the basis of the judge's reasoning. Again, the age of the boys involved in the violent incident must be taken into account. Different considerations may apply in terms of juvenile behaviour from the behaviour of offending adults.
- 31) The judge's decision relies upon an adverse credibility finding made without taking into account that the areas where the appellant's evidence appeared to the judge to be vague, or based only on what he said he had been told, might be accounted for by the

appellant's age at the time in question. This constitutes an error of law which would appear to have materially affected the judge's findings. Accordingly her decision is set aside.

- 32) The judge's error was central to the findings which she made and accordingly none of her findings should be preserved. Fresh findings should be made by remitting the appeal to the First-tier Tribunal to be heard before a different judge. If a combined hearing can be held with the appellant's current appeal that may well be the most appropriate procedure.

Conclusions

- 33) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
- 34) I set aside the decision.
- 35) The appeal is remitted to the First-tier Tribunal with no findings preserved for hearing before a different judge.

Anonymity

- 36) The First-tier Tribunal did not make an order for anonymity. As the asylum appeal is continuing, however, and as the appellant has made a number of claims about what happened to him as a minor, I consider that such an order should be made in the following terms. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly or indirectly identify the original appellant. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Deans