



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09222/2015

THE IMMIGRATION ACTS

Heard at Field House
On 8 February 2016

Decision & Reasons Promulgated
On 15 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[B Y]

(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

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

For the Respondent: Mr B Hoshi (Miles Hutchinson and Lithgow)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal to allow the appeal of [BY], a citizen of Malaysia, born 19 July 1990, against the decision of 5 June 2015 to refuse to grant him leave to remain and to make removal directions against him.
2. [BY] arrived in the United Kingdom with his father, younger brother and sister in August 2008. Their asylum applications, based on claims of suffering discrimination and harassment for reasons of the father's Chinese ethnicity and outspoken political

opinions, were refused by the Secretary of State. On appeal, their claims to refugee status were rejected by Judge Cope, because of the implausibility of the father's account that he had been subjected to harassment by the Malaysian government in this country. However, there was a flaw in the immigration decisions made against them, because whereas their expulsion was supposedly justified by their being illegal entrants against whom removal directions might be made under section 10 of the Immigration and Asylum Act 1999, in fact all had been visitors with current leave at the time of their asylum claims.

3. The appeal was subsequently heard in the Upper Tribunal, where the notices of decision were found not to be in accordance with the law, though without departing from the findings on the merits of the asylum claims. This left the matters outstanding before the Home Office. Surprisingly, the Secretary of State's reaction to the outcome of the appeal proceedings was to grant refugee status to the father, and to [BY]'s brother and sister, on 6 August 2010; on 16 November 2011 their mother was granted discretionary leave to remain. On 25 November 2011 [BY] was granted discretionary leave to remain to avoid what would otherwise be a disproportionate breach of his rights under Article 8 ECHR. I understand that on 10 September 2015 his father, brother and sister were granted indefinite leave to remain.
4. [BY]'s application for further leave to remain was refused because the grant of leave to the rest of his family had been predicated on an incorrect notice being issued to them: the fact was that their asylum claims had been refused and on appeal adverse credibility findings had been made. [BY] had no partner or dependent children, and did not live with his parents. There were no significant obstacles to his reintegration in Malaysia.
5. The First-tier Tribunal noted that [BY] had become firmly settled here, obtaining a first class honours degree from Bristol University and having worked with a web design company in Southampton, whose employers regarded him highly and considered that it would be difficult to replace him. It allowed his appeal, giving very succinct reasons: to wit, that whilst the findings on the merits of the asylum claim made by Judge Cope formed the starting point for its later assessment, subsequent events included the decision of the Secretary of State to grant the other family members refugee status. Given [BY]'s claim was identical to theirs, the only rational disposal of the appeal was to recognise that he too should be granted refugee status. This made his return to Malaysia incompatible both with the Refugee Convention and with Rule 276ADE, given that one could not reasonably expect a person to integrate in a country where they held a well founded fear of persecution.
6. Grounds of appeal argued that the First-tier Tribunal had been wrong to fail to explain its reasoning for concluding [BY] faced a fear of persecution, erred in determining his refugee status with respect to past rather than present circumstances, and contending that, given those flaws, that the consequent finding to allow the appeal on Rule 276ADE(vi) grounds was flawed too.
7. Permission to appeal was granted on 7 January 2016 because the judge had arguably failed to give adequate reasons as to why [BY] would be at risk of serious harm at the date of hearing.

8. Before me Mr Hoshi made submissions consistent with his commendably timely and concise Rule 24 Response, submitting that the findings below were legally adequate given that, if two international protection claims were essentially the same, they should have the same outcome. As [BY]'s father was still a recognised refugee at the date of hearing there was nothing inconsistent with the *Ravichandran* principle in accordingly finding that his son was a refugee also. Mr Kotes argued that on the authority of *Ocampo* [2006] EWCA Civ 1276 the appropriate finding on the Appellant's asylum claim was, bearing in mind the material overlap of evidence between his account and that of his father, that his claim too should fail, in the light of the independent judicial findings that the father's claim had been unfounded.

Findings and reasons

9. I do not consider that the approach of the First-tier Tribunal is legally sustainable. There appear to be only two routes to the conclusion that an individual is owed refugee status because of their personal circumstances, one borne of asylum law, the other of public law. The argument under the former is that the grant of refugee status to one family member is dispositive of the grant of status to another. The argument under the latter heading is that given the undoubted status of legal certainty and consistency as central to the rule of law, decision makers including judicial ones should strive to avoid inconsistent outcomes where cases are substantively identical.
10. However, it is difficult to see that either of these arguments justifies a finding of entitlement to international protection that flies in the face of previous appellate findings as to a person's need for it. Under Article 4 of the Qualification Directive addressing the assessment of facts and circumstances, it is made clear that an application for international protection is to be assessed on an individual basis taking into account the position and personal circumstances of the applicant, including factors such as background, gender and age, assessing whether, on the basis of their personal circumstances, they face a real risk of persecution. Undoubtedly the experience of their family members may be relevant to that assessment.
11. The starting point for my assessment of the applications is the prior determination of the appeal by Immigration Judge Cope. The approach to be taken to those findings is set out in *Devaseelan (D (Tamil))* [2002] UKIAT 00702: in short they are the authoritative historic resolution of the case, although subsequent facts may be taken into account. I do not consider that the grant of refugee status by the Secretary of State without any further development (such as a viable fresh asylum claim which neutralises the effect of a previous unsuccessful appeal) automatically trumps a reasoned judicial assessment on appeal. Indeed the settled position of the Tribunal is that a determination of status by the Secretary of State will not carry the same weight as one made by a judge upon appeal, being an unreasoned administrative decision: see *AC (witness with refugee status - effect) Somalia* [2005] UKAIT 00124 at [14].
12. As to the public law route, it is of course established that a public authority may be essentially estopped by a consistent course of dealings with an individual from altering its course of conduct. However that is an aspect of the law of legitimate expectation. It is very difficult to see that one could assert a *legitimate* expectation that one should benefit from what can only be considered to be an administrative error by

the Secretary of State. As Sedley J put it in *R v Somerset CC ex parte Dixon* [COD] 1997 323, QBD: "Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power."

13. It is very hard to argue that any public law wrong has been done to [BY] that now demands the grant of status. He has not been given any unambiguous and unqualified promise or assurance (see *Mehmood (legitimate expectation)* [2014] UKUT 469 (IAC)) that it would contravene the public interest to contradict. Indeed, it can hardly be said that to prevent him from benefiting from historic administrative failings would amount to conspicuous unfairness: quite the contrary, for to permit him to benefit from a past administrative failing would fly in the face of the disapproval of *Rashid* [2005] EWCA Civ 744 found in *MA and AA (Afghanistan)* [2015] UKSC 40 at [72], where the Supreme Court concluded that "The question whether the appellant qualifies for asylum status is not a question of discretion. It is one which must be decided on the evidence before the tribunal or court ..."
14. For these reasons I consider that the First-tier Tribunal erred in law. It misdirected itself as to the focus of the enquiry before it, and its approach to the question of international protection inevitably bore heavily (indeed decisively) on its determination of the private life question under Immigration Rule 276ADE.
15. None of the foregoing necessarily means that [BY] might not have a compelling case for departure for the Immigration Rules given the fact that he arrived here as a young person on the cusp of adulthood and has done the best to make a life for himself here in circumstances where other family members have been granted not only residence rights but ultimately indefinite leave to remain. However that assessment is for the future.

Decision:

The decision of the First-tier Tribunal contains a material error of law. As there are no lawful relevant findings upon which to build, the matter is suitable for re-hearing in the First-tier Tribunal. I accordingly remit the appeal to that forum.

Signed:

Date: 8 February 2016



Deputy Upper Tribunal Judge Symes