



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02581/2016

THE IMMIGRATION ACTS

Heard at: Manchester
On: 27th September 2017

Decision & Reasons Promulgated
On: 08th December 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DVV
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Karnik, Counsel instructed by Duncan Lewis & Co
Solicitors

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Vietnam born in 1981. He appeals with permission the decision of the First-tier Tribunal (Judge Brookfield) to dismiss his appeal against the Respondent's decision to refuse to revoke a deportation order. The Appellant had sought revocation on protection grounds.

Anonymity Order

2. The Appellant is a foreign criminal and would not ordinarily benefit from an order protecting his identity. He has however been found to be victim of trafficking. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Case History

3. In the absence of objection from the parties I adopt the summary set out in the First-tier Tribunal decision at paragraph 1. The Appellant first arrived in the UK in December 2003 when he was 22 years old. He claimed asylum. In April 2004 he lost his appeal against that decision, and in September of that year he was sent to prison for being concerned in the production of cannabis. The sentence of 12 months imprisonment was passed on the 4th September 2004. As a result, and after some delay, the Respondent took deportation action against him. The Appellant lost his appeal against the decision to deport, and a deportation order was signed on the 20th March 2008. He was deported to Vietnam in April 2008.
4. Sometime in 2010 the Appellant came back to the UK. In July 2011 he was arrested for possession of a Class B drug and on the 27th September 2011 he was once again deported.
5. By the 1st August 2015 he was back in this country. We know that because on that date he came to the attention of the police. He said that he had escaped from traffickers who were forcing him to work in a cannabis factory. He was arrested at Wood Green police station in North London on suspicion of immigration offences. He claimed asylum, and asked that his claim be treated as an application to revoke the deportation order in force against him.
6. The basis of the Appellant’s claim was:
 - a) That he had a well-founded fear of persecution by the Vietnamese government for reasons of his imputed political opinion. He claims

to have been involved in an anti-government demonstration (relating to the compulsory acquisition of land by the state) and to be wanted as a result. He fears that he will be arrested and ill-treated on return;

- b) That he has a well-founded fear of persecution for reasons of his membership of a particular social group and/or fears serious harm amounting to a violation of Article 3 ECHR. This part of the claim relates to the Appellant's fear that he will be re-trafficked and/or punished by his former traffickers for escaping them and failing to repay the 'debt' which they consider to be owed.

7. The claim was rejected on the 26th March 2016. The Respondent noted that the Appellant had claimed asylum in 2004 and that his account of political persecution had been rejected for want of credibility by both Home Office and Tribunal, the latter finding his account to be vague and implausible. In 2008 a differently constituted Tribunal had also made negative credibility findings, this time in the context of his deportation appeal. They endorsed the assessment of the 2004 Tribunal, and further found significant discrepancies in the account advanced. It perhaps goes without saying that both Tribunals concluded that there was not a real risk of harm to the Appellant if he returned to Vietnam. These decisions formed the backdrop to the assessment of the current claim for protection. As to that claim the Respondent noted that the Appellant had failed to make any mention of land protests or demonstrations in his initial interview. His account of being wanted for helping to organise protests is rejected for internal inconsistencies. As to the claimed fear of traffickers, the Respondent found there to be several discrepancies in the account given. If the Appellant did not want to remain in his home area, either for a fear of local government officials or traffickers, he could relocate within the country. His claimed fear was rejected on both counts and the protection claim refused. The Respondent went on to reject the suggestion that a refusal to revoke the deportation order would be a breach of Article 8, and the decision was maintained.

Appeal to the First-tier Tribunal

8. When the appeal came before Judge Brookfield in January 2017 there had been a significant development, in that the Competent Authority (CA) had determined, in a decision dated the 25th October 2016, that there were conclusive grounds for believing that the Appellant was a victim of trafficking. That became relevant to the Appellant's case in two ways. First, it obviously confirmed, on a balance of probabilities, what he had claimed about his circumstances. The Appellant therefore asked the Tribunal to give that decision considerable importance when assessing credibility and risk. Second, it was

submitted on the Appellant's behalf that the Secretary of State's refusal letter was not a lawful decision. The Secretary of State had failed to have regard to her own policy, which requires decision makers to await determination of trafficking claims before making decisions on protection. Had the Secretary of State known that the CA believed the Appellant, her own decision may have been different. Counsel therefore sought a *Greenwood* declaration that there had not been a lawful decision: Greenwood (No.2) (para 398 considered) [2015] UKUT 629 (IAC). The effect of such a decision would have been that the matter was returned to the Secretary of State to consider the matter afresh in light of the CA conclusive grounds decision.

9. The First-tier Tribunal proceeded to conduct its assessment on the basis that the Appellant is a victim of trafficking. At paragraph 11 the Tribunal notes that the Appellant had asked for the matter to be returned (the determination says 'adjourned' but issue is taken with that) to the Respondent so that a new decision could be taken. Judge Brookfield did not see the point in that given that she accepted the CA's conclusions. She considered his claim to be at risk from his former traffickers because of a 'passage debt'. She noted his discrepant evidence about who he owed money to. He had initially claimed that a friend of his in Vietnam had loaned him the money to get back to the UK. Then he said that it was two characters in the UK. Judge Brookfield noted that there was no evidence that either of these gentlemen had asked the Appellant for their money back. If they had been unable to find him in the UK it was highly improbable that they would be able to find him in Vietnam, with its population of over 90 million people. It was highly improbable that he would be at any risk from these men. If the Appellant still owed his friend money he could get a job and pay him back. There was no indication that he was at risk from his friend, or his friend's family. The Tribunal further directed itself to the country background material which indicated the Vietnamese government do pursue and prosecute traffickers: they are therefore willing and able to offer a sufficiency of protection.
10. As to the risk of re-trafficking by a different gang the Tribunal rejected the suggestion that the Appellant's history proved him to be at risk. It had been submitted on his behalf that the circumstances in which he had found himself in the UK on previous occasions were strongly suggestive of him having been trafficked. His socio-economic circumstances were such that he would be vulnerable to exploitation again. Judge Brookfield noted that there was no evidence that the Appellant had been trafficked in 2003 or 2010. She did not accept that he had any particular vulnerability. He is fit and well and able to work. His uncle and girlfriend in Vietnam would support him. He was not kidnapped off the street. He himself approached the traffickers and asked for assistance in getting to the UK. The solution would be not to do that again.

11. The account of the land dispute is rejected because the Appellant's evidence was at odds with that in the expert report and in the US State Department Report for 2013. The discrepancies were such that the Tribunal was unable to accept that the Appellant had been present at said protest. The Appellant's evidence about summonses he claimed to have received was inconsistent. The Appellant had failed to mention any of this in his asylum interview. Even if it were true, by the Appellant's own account it was not likely that the authorities would still be interested in him 4 years after the event: the Appellant himself had remained in the country for two years after the incident and his uncle who is also said to have protested has remained in Vietnam and there was no evidence that he had had any problems.

The Grounds of Appeal

12. The Appellant submits that the First-tier Tribunal erred in the following material respects:
 - i) In declining to make a *Greenwood* declaration. It is submitted that fairness required the First-tier Tribunal Judge to declare the Respondent's decision defective, and to remit the matter to the Respondent so that a fair decision could be taken;
 - ii) In failing to apply the Secretary of State's guidance on the assessment of trafficking claims;
 - iii) In failing to take the country background evidence into account in making its credibility findings. This led the Tribunal to err in fact and in so doing the outcome of the appeal was materially affected;
 - iv) In failing to address the expert evidence in its assessment of risk on return from the Vietnamese state.

Discussion and Findings

13. For reasons that will become clear I think it appropriate to deal with the grounds in reverse order.
14. In respect of the alleged risk from the Vietnamese state the submission is this. That the Appellant has been deported twice before from the UK. He would be returned for a third time on this occasion and as a victim of trafficking in those circumstances would present "an unusual proposition". Mr Karnik postulates that he would be likely seen by the authorities as someone who needs to be

detained for further investigation. The difficulty with that submission became apparent at the hearing before me when Mr Karnik was unable to identify any objective country background material capable of supporting his thesis. The references I was given in the report of country expert Dr Thi Lan Ahn Tran did not assist, referring as they did to violence in police stations and the possibility that the Appellant would be questioned on account of his political activities. This ground is not made out.

15. The alleged error of fact arises from the Tribunal's analysis of the Appellant's claimed attendance at an April 2012 protest against a land grab. At paragraph 13 (iii) of her determination the Judge notes that the Appellant claimed that there were 1,000 protestors to approximately 2000-4000 police officers in full riot gear; 20 people were arrested and tortured. This is contrasted with the information appearing in the US State Department Report, which was that 300 protestors clashed with between 1000-2000 local security officers; 20 people were arrested and then released when they agreed to admit guilt. The Tribunal notes that if those figures are to be accepted it is difficult to see how anyone escaped in the manner described by the Appellant. If they had wanted to arrest more people, they would have done. The determination goes on to record Dr Tran's evidence on the incident. It notes that neither the USSD or Dr Tran confirm the Appellant's evidence that the dispute arose - at least in part - because the land contained a burial ground.
16. The grounds contend that in making its findings the Tribunal failed to have regard to country background material which was highly consistent with the Appellant's version of events, namely a report on Radio Free Asia on the 24th April 2012 which said that approximately 2000 villagers stood against approximately 3000 police and military personnel in a seven hour standoff. This showed that there was not in fact "significant outnumbering" of the villagers and that the findings on plausibility of escape were flawed. It was that document which led Upper Tribunal Judge McWilliam to grant permission to appeal.
17. Before me Mr Mills for the Respondent pointed out that in fact Dr Tran also uses the figures cited by the State Department. At paragraph 28 of her report she states that 300 people attended the demonstration on the 24th April 2012, and that there were 3000 police officers and security personnel called in to affect the evictions. Dr Tran was being advanced as an expert by the Appellant; she referred to a number of sources for her information. I do not accept that the First-tier Tribunal can be criticised for making an error of fact when she described the villagers as being "significantly outnumbered". It was open to the Judge to find the Appellant's account of escape to be inherently implausible, and his account of events to be inconsistent with the country background material. I am satisfied that Judge Brookfield gave numerous cogent reasons for disbelieving the evidence about the land grab.

18. I now turn to consider the grounds relating to trafficking.
19. The substance of ground (ii) is that the Tribunal erred if it considered that traffickers only grab their victims off the streets. Many, if not most, victims of trafficking find themselves being exploited in entirely different circumstances, as the Secretary of State's guidance makes clear. The Appellant contends that he agreed to travel to the UK on the understanding that he would be working in a nail bar. It was only when he got here that he understood that he was in fact to be held in a situation of forced labour. Mr Karnik submitted that the First-tier Tribunal, in failing to appreciate this point, erred in its assessment of risk. The Appellant would be returning to exactly the same circumstances in Vietnam that he was in when he left, except for the added disadvantage of having the current debt to repay.
20. I reject this argument. The Appellant is not facing such dire socio-economic disadvantages that he would be compelled to turn to traffickers in order to support himself. As the First-tier Tribunal found, he is healthy, willing and able to work. He has family members there who would be willing to assist him in getting back on his feet. Mr Karnik was unable to point to any country background evidence to indicate that a person with the Appellant's characteristics would have no alternative but to allow himself to become exploited again. He could avoid traffickers by not approaching them and asking for help in working in Europe.
21. Mr Karnik's principle argument is that the entire decision was vitiated by Judge Brookfield's refusal to declare the Respondent's decision unlawful. The grounds refer to the Secretary of State's guidance on the issue 'Victims of Modern Slavery - Competent Authority Guidance' and reliance is placed in particular on the following: "The Home Office should not make a negative decision on an asylum claim whilst a person is being considered under the NRM process". In this case the Appellant claimed asylum on the 1st August 2015. Protection was refused on the 1st March 2016. (I am prepared to accept, for the sake of Mr Karnik's argument, that the policy cited would in fact apply to the Appellant, although I note that the NRM referral was not made until the 13th May 2016 and so it cannot strictly be said that the decision to refuse was taken whilst he was being considered "under the NRM process"). Mr Karnik submits that had the Secretary of State had the benefit of the Conclusive Grounds decision, taken on the 25th October 2016, her decision might have been other than it was. In proceeding to determine the claim in breach of her own policy (if indeed that was the case) the Secretary of State introduced an element of unfairness into the proceedings that could only properly be remedied by starting again. That unfairness further infected the First-tier Tribunal's decision.

22. I was not referred to any authorities on the question of procedural unfairness. Mr Karnik submitted, without any legal support for the proposition, that it was the procedural irregularity itself which rendered the decision unlawful. I do not agree. In assessing whether there has been a breach of the requirements of fairness the proper approach is to assess the decision-making process, including any appeal, as a whole: Calvin v Carr [1980] AC 574. The unfairness complained of here is that the Secretary of State reached her negative findings on credibility without the benefit of the Competent Authority's view that the Appellant had in fact been exploited in this country. When the First-tier Tribunal came to make its findings, that information was before it, and indeed was accepted by it in its entirety. The appeal was dismissed on grounds that could not logically have been any different even if the Conclusive Grounds decision had been available to, and accepted by, the Respondent. The findings were that the Appellant has not told the truth about his involvement in the land protests; no risk arises in Vietnam as a result of his 'passage debt'; he faces no risk of harm by the Vietnamese state; the Appellant can avoid any risk of harm from traffickers in the future by not approaching them and asking for their assistance in illegal migration. Considering the process as a whole, I am not satisfied that any material unfairness has arisen.

Decisions

23. The determination of the First-tier Tribunal contains no material error of law and it is upheld.
24. There is an order for anonymity.



Upper Tribunal Judge Bruce
25th October 2017