



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09149/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5th April 2018

Decision & Reasons Promulgated
On 9th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR ATT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Head, Counsel

For the Respondent: Ms Willcocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Vietnam born on 13th May 2000. The Appellant claims to have arrived in the UK on 27th February 2017 clandestinely and claimed asylum on 1st March. The Appellant claims to have left Vietnam on 1st July 2016. In his witness statement however his asylum interview states he left on 1st September 2016. The Appellant claims to have travelled via Russia, Latvia, Poland and France prior to arriving in the UK by lorry in February 2017.
2. The Appellant's claim for asylum is based on a purported well-founded fear of persecution in Vietnam on the basis of his membership of a particular social group, namely that he was an illegitimate child. The Appellant's application for asylum was refused by Notice of Refusal dated 30th August 2017.

3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Page sitting at Taylor House on 19th October 2017. In a decision and reasons promulgated on 16th November 2017 the Appellant's appeal was allowed on asylum grounds.
4. On 23rd November 2017 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 21st December 2017 Judge of the First-tier Tribunal Boyes granted permission to appeal. Judge Boyes noted that the grounds asserted that the judge had erred by failing to reach identifiable and clear conclusions in relation to a material aspect of the case. Judge Boyes considered the grounds were arguable, in that the judge might have applied the wrong standard and thus reached an incorrect conclusion, if at all, on whether the Appellant was an orphan.
5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. I note that this is an appeal by the Secretary of State. For the purpose of continuity throughout the appeal process Mr ATT is referred to herein as the Appellant and the Secretary of State as the Respondent. The Appellant appears by his instructed Counsel, Ms Head. Ms Head is familiar with this matter. She appeared before the First-tier Tribunal and she is also the author of a skeleton argument produced to me for this appeal. The Secretary of State appears by her Home Office Presenting Officer, Ms Willcocks-Briscoe.

Submission/Discussion

6. Ms Willcocks-Briscoe submits that the judge has not made clear findings on the principal issue as to whether the Appellant was born illegitimate and would as a result be at risk on return to Vietnam. Ms Willcocks-Briscoe acknowledges that the judge has referred to the appropriate standard at paragraph 6 and has thereafter she submits allowed the appeal merely because there was "a possibility" of the Appellant being an orphan. She submits that paragraph 21 of the decision makes no real findings regarding the position of the Appellant merely making observations and notes that the Appellant's account is doubtful and that the Appellant's evidence was vague. She submits that the judge has failed to make a conclusion in paragraph 21, particularly when it is read against paragraph 20. She submits that the judge has not engaged with the Secretary of State's position and confuses a grant of discretionary leave with asylum. She further contends that the judge has not applied anxious scrutiny or identified what social group or category the Appellant would fall into. She relies on the guidance of *MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)*. She asks me to find that there are material errors of law and to set aside the decision.
7. Ms Head in response points out that the key issue was whether or not the Appellant was without family and that there have been no adverse findings made on the Notice of Refusal. She takes me to her skeleton argument which I have considered and points out that the Appellant was granted discretionary leave on the basis that he was an unaccompanied asylum seeking child and that there is a lack of adequate reception facilities open to him on return to Vietnam. She points out the Appellant's

mother was a prostitute and resided with his grandmother who has passed away. She reminded me that the Appellant fears mistreatment on account of his minority and vulnerability if returned to Vietnam. She takes me to the decision, pointing out that the judge has made a finding at paragraph 20 that the Appellant is at risk and that it is not open to the Secretary of State now to raise the question as to whether or not the Appellant was a vulnerable child without parents. Had it been the intension of the Secretary of State to do so then that should have been raised in the Notice of Refusal. She submits that there is no material error in the decision of the First-tier Judge.

8. Ms Willcocks-Briscoe submits that the judge is still under a duty to identify the basis of the decision and in particular what factors would place the Appellant at risk on return if he were to be found to be an orphan. She submits that the Notice of Refusal undermines the whole basis of the Appellant's account and asks me to find that there are material errors of law, to set aside the decision and to remit the matter back to the First-tier Tribunal for the appeal to be reheard in its entirety.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Relevant Case Law

11. In *MK duty to give reasons Pakistan* the Upper Tribunal held
 - (1) *It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.*
 - (2) *If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for*

such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.

It is appropriate to apply these principles in this matter.

Findings on Error of Law

12. The approach adopted by the Upper Tribunal in *MK Pakistan* – set out above – is important. The fundamental principle upon which a Tribunal decision is based requires for reasons to be given by the judge. In this case whilst having set out the standard of proof the judge in his conclusion has merely stated

“There remains a possibility that the Appellant is an orphan who has been sent here.”
13. That does not set out reasons, it is merely a judge’s supposition. In such circumstances there is merit in the argument adopted by the Secretary of State. I agree with the submissions made by Ms Willcocks-Briscoe that such a conclusion does not actually amount to a finding and that it certainly does not amount to a reasoned finding, particularly bearing in mind that the First-tier Tribunal had previously commented that the Appellant’s evidence was vague and that there was no proper basis for concluding that the Appellant’s mother was in the UK and that the story that the grandmother had sold a house in anticipation of securing an agent for the Appellant to leave Vietnam was “a doubtful coincidence”.
14. In such circumstances I agree with the submissions made that other than appearing to accept the “possibility” in principle that the Appellant could be an orphan there is a substantial lack of clear findings made by the judge. In such circumstances the such lack of findings and the reliance on there being a mere possibility the Appellant was an orphan renders this decision unsustainable.
15. There are consequently disclosed material errors of law and the decision is set aside and remitted back for rehearing to the First-tier Tribunal. That of course is not to say that on a rehearing of this matter that a further judge will not agree with the findings of Immigration Judge Page, and provide sustainable reasons for reaching that finding. That is a matter for consideration on rehearing.

Notice of Decision

16. The decision of the First-tier Tribunal Judge discloses a material error of law and is set aside. Directions are given for the rehearing of this matter below.
 - (1) The decision of the First-tier Tribunal Judge contains a material error of law and is set aside with none of the findings of fact to stand.
 - (2) The appeal is remitted to the First-tier Tribunal sitting at Taylor House on the first available date 28 days hence with an ELH of three hours.

- (3) That the appeal is to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Page.
- (4) That there be leave to either party to file and serve an up-to-date bundle of subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing.
- (5) That a Vietnamese interpreter to attend the restored hearing. In the event that the Appellant's solicitors consider an interpreter of another language needs to be in attendance they must notify the Tribunal within seven days of receipt of these directions.

17. The First-tier Tribunal Judge granted the Appellant anonymity. No application is made to vary that order and the anonymity direction will remain in place.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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.

Signed

Date: 08/05/2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date: 08/05/2018

Deputy Upper Tribunal Judge D N Harris