Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/14196/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2018	**On 20 December 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

H T T H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Robinson of Counsel instructed by Bindmans LLP
For the Respondent: Ms N Willocks-Briscoe

DECISION AND REASONS

1. The appellant is a citizen of Vietnam born on 18 February 1995. She arrived in this country on 5 February 2010 with a false passport. She applied for asylum on 16 July 2010. That application was refused on 11 January 2011. Her appeal against that decision was heard and dismissed by Immigration Judge K F Walters on 27 June 2011.

2. The appellant claimed to have been trafficked but on 7 August 2012 the competent authority reached a negative decision.

3. The appellant's appeal rights were exhausted on 1 November 2011. After judicial review proceedings, however, further submissions were considered

in respect of a decision dated 16 December 2016 when the respondent refused the appellant's application on asylum, humanitarian protection and human rights grounds. Since the previous decision and appeal it was noted that the appellant had had a child born on 9 September 2016 who did not meet the requirements of Rule 276ADE(iv). It was considered there were no exceptional circumstances for considering the appellant's case outside the Rules.

4. The appellant appealed and her appeal came before a First-tier Judge on 3 September 2018. At the hearing various matters were agreed. It was agreed that the appellant had been born in 1995 and not 1991. It was noted that the female that the appellant had been found with had been convicted of facilitation of illegal entry – a trafficking offence – and Ms Morris said "she was unable to argue that the appellant had not been trafficked" as a result of becoming aware of the conviction of the woman who had accompanied the appellant to the United Kingdom of a trafficking offence. The judge initially took this as a concession but following a discussion between him and Miss Robinson (who appears before me) it was clear "this was not a concession" but "a lack of argument of the issue" by the Home Office. In the circumstances the judge decided to determine the claim on both bases – i.e. as if the appellant was either trafficked or not trafficked.

5. It was further agreed between the parties that the decision of the competent authority was binding on the Tribunal unless it was irrational or perverse in the light of **MS (Pakistan) [2018] EWCA Civ 954** and **AUJ [2018] UKUT 200**.

6. The judge considered the previous decision by Judge Walters in the light of **Devaseelan (second appeals – ECHR – extraterritorial effect) Sri Lanka [2002] UKIAT 00702**.

7. In relation to the competent authority's decision it was argued that the assessment had been made on the basis that the appellant had been born in 1991 and accordingly would have been an adult on arrival in the UK whereas it was now accepted that she had been born in 1995. It had also been accepted that the person accompanying the appellant had been charged with a trafficking offence. It was implied that those two factors were unknown to the competent authority and hence the decision was clearly irrational. The judge noted that Judge Walters had been aware of the prosecution and conviction of the woman accompanying the appellant and the competent authority's decision post-dated Judge Walters' decision by over a year and the judge was not persuaded that the evidence was not before the judge or the competent authority at the relevant times and concluded that no irrationality was demonstrated in the decision of the competent authority on that point. The judge also considered the evidence in relation to the age assessment that had been before Judge Walters in some detail at paragraphs 20 to 23 of his decision and found that it was neither irrational or perverse for the competent authority to have relied upon the evidence then available. In paragraph 24 the judge

found that he could not overturn the conclusion of the competent authority that the appellant was not trafficked. He added:

> "I can though consider the revised age assessment in the rest of my decision. As stated above I will make my findings based on alternatives of [the appellant] being and not being trafficked. If I do not distinguish, it is because there is not a material difference in my findings and conclusions."

8. While the judge took the findings of Immigration Judge Walters as his starting point he accepted that the decision had been based on his treatment of the appellant as an adult which had been materially incorrect and could be assumed to have affected his assessment. The judge said he had taken that into account when considering all his findings.

9. Before the judge there was a report from a consultant clinical psychologist, Dr Rachel Thomas. The judge deals with her evidence in great detail between paragraphs 26 and 34 of his determination. It was noted that Dr Thomas had had an interview with the appellant on 25 June 2017 with a telephone interview on 29 August 2018. The judge noted that Dr Thomas had said in her original report that if the appellant were able to remain in the UK to continue to receive her existing levels of current social support and to be referred for appropriate professional help she anticipated the appellant could make a reasonably good psychiatric recovery within two years with an improved quality of life for herself and her daughter. In paragraph 33 of the determination the judge noted that it was well over a year since Dr Thomas' initial report which had highlighted that it was expected that the appellant would make a good psychiatric recovery within two years and was no longer taking a commonly prescribed treatment for depression and had not sought any further treatment or medication since. She noted that Dr Thomas had changed her assessment of the appellant from post-natal depression to mixed anxiety and depressive disorder without having the benefit of seeing the appellant or of access to her medical records. The judge pointed out that it was noteworthy that the appellant had not sought any medical assistance from either her GP or the hospital and was clearly capable of attending hospital appointments and caring for her child despite the psychiatric condition that had existed in 2017. She concluded

> "The assessment of Dr Thomas about the risk of the appellant committing suicide stands in isolation to all the other circumstances and evidence before the Tribunal and cannot be the basis for this Tribunal concluding that the risk breaches the Article 3 ECHR threshold or realistically even gets close to it."

10. The judge referred to **AM (Zimbabwe) [2018] EWCA Civ 64** where the Court of Appeal had made it clear that **Paposhvili v Belgium** [2017] Imm AR 867 had relaxed the test for a violation of Article 3 ECHR but only to a very modest extent. In relation to the risk of suicide the judge referred to **J v Secretary of State [2005] EWCA Civ 629** and did not consider on the evidence presented that any of the six questions or tests set out in **J**

had been met in the appellant's case and there was no real risk of suicide or any violation of the appellant's rights under Article 3 if returned to Vietnam.

11. The judge noted that since the previous appeal the appellant had had a child who is a citizen of Vietnam. In support of her case that she would be at risk not only as a single woman with a child born out of wedlock but as a trafficked woman with a child reliance was placed on an expert report by Professor Christopher Bluth. The judge considered among other matters the decision of **Nguyen (anti-trafficking Convention: Respondent's duties) [2015] UKUT 170 (IAC)**. The judge also took into account a Home Office Country of Origin Report dated May 2016 and a country expert report before the previous judge and in paragraph 50 of the determination found that he preferred the findings

> "other than Professor Bluth's as they are more recent and are based on what appears to be a wider range of appropriate sources and his expertise in international relations and his undoubted knowledge of Vietnam albeit from a singular viewpoint. His is one view among several who reach different conclusions."

12. The judge did accept Professor Bluth's observations about societal discrimination against victims of trafficking and also single women with a child and the appellant who is unmarried with a child "will face discrimination in Vietnam" and he had based his decision "on the appellant being vulnerable in line with Dr Thomas's observations although I do not accept all her conclusions".

13. The judge in paragraph 54 found in the light of Judge Walters' decision that the appellant was not a victim of trafficking, stating: "That is my starting point and in the absence of any other evidence it must be my conclusion."

14. Judge Walters had considered that the appellant's fear of her stepfather was not credible and the judge had no reason to change those findings and in reaching that assessment he had taken into account the revised age assessment and potential vulnerability but neither could explain the significant inconsistencies and the credibility issues highlighted in the previous determination. The judge did not find that the appellant would abandon her child or that she would be re-trafficked or trafficked in the future and the discrimination relied upon did not reach the level amounting to persecution or inhumane or degrading treatment. The judge did make a reference to Section 8 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 and considered that the appellant's credibility must still be adversely affected as she did not claim asylum at the port on arrival but only after a few weeks. The judge stated that he would have made similar findings to Judge Walters while he appreciated that the evidence and submissions presented to him were now different – the appellant's claim had changed from fear of her stepfather as she accepted that he would not find her and continued

> "she claims to be vulnerable to being trafficked/re-trafficked herself and largely relies on the country expert and psychologist reports which emphasise on her mental health and vulnerability, but for the reasons set out above I conclude that neither of those matters show that there is a real risk of her being persecuted for any reason or even that she or her daughter would suffer a breach of Article 3 ECHR."

He found that the appellant's claim to fear persecution was not credible and she had a viable option of seeking protection from the authorities and internally relocating within Vietnam. He observed that the appellant had shown herself to be a capable woman "able to survive and make her way in a foreign country despite not speaking the language and to steadily improve her health and look after a young child." The judge accordingly dismissed the appeal on asylum, humanitarian protection and Article 3 grounds.

15. In relation to the Immigration Rules it had not been submitted that the appellant could meet any Rule. Her status had always been precarious, there was nothing to show that the appellant could speak English to any standard. She communicated with her daughter in Vietnamese and it was therefore credible that her daughter could speak Vietnamese. The daughter would be wholly reliant upon the appellant and was not attending school and was fit and healthy. He added "the appellant's physical and mental health seems to be improving, although she is still clearly vulnerable". The judge referred to **Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60** and other relevant authorities including **Razgar v Secretary of State [2004] UKHL 27** and **ZH (Tanzania) [2011] UKSC 4** when considering Article 8 outside the Rules. He noted the question whether there were insurmountable obstacles was a relevant factor having referred to **Agyarko [2017] UKSC 11**. The judge referred to Ms Robinson's skeleton argument and stated in paragraph 74 as follows:

> "74. Her arguments are that the appellant's particular circumstances mean that she should be granted leave under article 8 ECHR because of her fears of return to Vietnam, the appellants child best interests taking into account the assessment of Doctor Thomas and the concerns identified by a health visitor, and the appellant's vulnerable mental health. I was asked to take into account the fact that the appellant was brought to the United Kingdom when she was a child."

16. The judge when considering the appellant's case on human rights grounds noted, in the light of **Agyarko**, that the appellant had not shown she would suffer anything more than mere hardship or difficulty or hurdles or inconvenience. She had not shown the decision to remove her from the United Kingdom would be unjustifiably harsh for her or her daughter. He found there would be no insurmountable obstacles to the appellant moving to Vietnam even taking into account the need to register under the *Ho Khau*. In relation to registration the judge stated that he noted that previous experts and Tribunal decisions had not mentioned the

registration issue as a factor preventing an appellant's return. He acknowledged, however, that the lack of registration "will cause some difficulty for both the appellant and her daughter".

17. The decision concludes as follows:

> "86. The decision to remove the appellant from the United Kingdom would be in accordance with the laws of this country. I have taken the strength of the public policy in immigration control in this case and considered whether it is outweighed by the strength of the article 8 claim, and decided that it is not. She has made a claim for asylum which is not credible. There is no credible evidence that she would be at real risk upon return to Vietnam. The appellant may be a failed asylum seeker but there is nothing to show this would create any problems for her upon return. There is nothing to show she would suffer very significant obstacles if returned to Vietnam. I have taken into account the societal stigma and discrimination referred to by the experts and her representatives. The appellant may be a lone woman, but she is clearly capable as she has been surviving in the United Kingdom for some time. She has not shown that there would be any breach of her or her daughter's rights under article 8 ECHR if returned to Vietnam. It may not be easy for them but there are no circumstances let alone very compelling circumstances that make the decision to remove the appellant to Vietnam disproportionate.
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> 87. In reaching that conclusion I have taken into account the cumulative effects of the appellant's circumstances and the time she has been in the United Kingdom and the evidence that has been provided in support of her from people in the United Kingdom.
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> 88. I have not referred to all the material that appears in the documents placed before me as that would make this decision lengthy and repetitious and harder to follow but I have taken it into account."

18. The judge accordingly dismissed the appeal on all grounds.

19. There was an application for permission to appeal and permission was granted by the First-tier Tribunal on 9 October 2018 in the following terms:

> "2. The grounds of appeal allege, variously, that the Judge failed to consider whether the Appellant was a vulnerable witness, failed to make findings on the psychological evidence and erred in the assessment of the Appellant's credibility.
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> 3. There was evidence before the Tribunal regarding the Appellant's mental health. It is arguable that the Judge failed to make conclusive findings on this evidence. That precluded the Judge

from weighing the extent of any mental health condition in the subsequent assessment of credibility, of the viability of internal relocation and the application or otherwise of the Joint Presidential Guidance on Vulnerable Witnesses.

4. It is also arguable that the Judge, in finding that the Appellant's delay in claiming asylum weighed against her (at [60]), failed to have regard to a previous finding (at [3]) as to the Appellant's age (she was 15 when she entered the UK) and the prevailing circumstances (she was trafficked)."

20. The case was listed as an error of law hearing. There was no response filed by the respondent.

21. In relation to the first ground of appeal Counsel argued that the judge had not made it clear that the guidance note in respect of vulnerable witnesses had been applied. The approach to the appellant's credibility had been irrational. It was acknowledged that the case had proceeded on submissions only. The judge had not recorded in the light of the guidance whether the Tribunal had concluded that the appellant was a child, vulnerable or sensitive. Counsel conceded that the child was not a qualifying child and did not argue that the judge had erred in failing to refer to the issue of reasonableness which had featured in paragraph 13 of the grounds of appeal. The grounds had principally taken issue with the treatment of the evidence of Dr Thomas and while Counsel accepted there had been extensive references to Dr Thomas's evidence there had not been sufficient treatment in relation to the risk of suicide. There was a material error of law in the assessment of the evidence of Dr Thomas. In relation to the judge's alternative findings on the basis that the appellant had been a victim of trafficking Counsel relied on her grounds and submitted that the judge had erred in failing to grapple with key evidence in Dr Thomas's report and in particular the question of the appellant being highly vulnerable. Although the determination looked very detailed it had flaws in it when unpicked.

22. Ms Willocks-Briscoe submitted that the judge had accepted that the appellant was vulnerable as was clear from what had been said in paragraph 26 of the determination where, having referred to the report of Dr Thomas he stated: "It is partly because of those observations and the conclusions drawn that the appellant was treated as a vulnerable witness by the Tribunal". It was clearly demonstrated that the report of Dr Thomas had been properly applied and considered. The judge had found part of the report rather perplexing as he had stated in paragraph 27 of the determination. He had clearly said why he rejected part of the conclusions of Dr Thomas for example in paragraph 28 of the decision. The judge had properly dealt with the risk of suicide and had noted there had been no recent need to take medication. The judge had drawn a distinction between the earlier report which had been prepared after a face-to-face interview and the later report which had followed a telephone conversation. The high threshold set by Article 3 had not been met. She referred to **M-W (a child) [2010] EWCA Civ 12** at paragraph 39 where

the court had set out relevant propositions establishing that a judge was fully entitled to accept or reject expert opinions. The judge had taken Dr Thomas's evidence at its highest in paragraph 34 of the decision. The judge was satisfied that none of the questions or tests had been met as he had stated in paragraph 36. The judge had properly considered Professor Bluth's report and had taken into account **Nguyen [2015] UKUT 170 (IAC)** – in that case the mother had three children. The judge had given very detailed consideration to the expert evidence which was consistent with the guidance in **M-W (a child)**. He was entitled to prefer the other evidence. He did accept a measure of discrimination and assessed the claim in the light of the appellant's circumstances. The judge had adopted the correct approach on a holistic reading of the determination which was not irrational or perverse. He had taken a belt and braces approach when considering the appellant's case as if she had or had not been trafficked. It was clear that the reference to Section 8 formed a very minor part of the judge's approach and was not a determinative factor. Numerous reasons had been given for the judge's findings in every other respect. The judge had made his credibility findings in great detail long before the reference in paragraph 62 section 8. The judge was aware of the appellant being a minor at the time of her arrival.

23. The judge had applied the correct approach when referring to significant obstacles as was made clear in **Agyarko**. It was a very detailed determination and there was no material error of law.

24. Ms Robinson in reply maintained her arguments and pointed out that the case of **Nguyen** was not a country guidance case in relation to trafficking in Vietnam.

25. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the judge's conclusions if they were flawed in law. In summarising the judge's decision above I am conscious that I have not done justice to it. The decision is twenty pages long and it is acknowledged that it is extremely detailed. The judge went exhaustively into the medical evidence. It was by no means an easy determination to write since it had to be approached on alternative footings.

26. A major part of the argument presented related to the appellant's vulnerability and the claimed failure by the judge to apply the guidance for vulnerable appellants. As was noted by Ms Willocks-Briscoe the judge indeed made it clear that the appellant was treated as a vulnerable witness in paragraph 26. There are references throughout the determination to the appellant's vulnerability – for example in paragraphs 58 and 66. The judge had in mind all the relevant circumstances when considering the risks on return including the need to register under the *Ho Khau*. I am satisfied that the judge gave meticulous consideration to the appellant's case having properly assessed the expert material from both Dr Thomas and Professor Bluth. His analysis of the material is in no way flawed or irrational. He was entitled to reject parts of the expert evidence as is made clear by Wall L.J. in the propositions set out in M**-W** and he gave proper reasons for doing so. I am not satisfied that he arguably left

any material matter out of account and he considered the cumulative effects of the appellant's circumstances in the light of all the material before him – see the concluding paragraphs of his determination which I have set out above. I do not find any error in his approach to the case of **Nguyen** which the respondent had cited in the decision under challenge. It was a decision of a panel although not a country guidance case. I agree with the submissions made by Ms Willocks-Briscoe that the reference to Section 8 was not a material error of law in this case. The judge was entitled to reach the conclusions he did on a holistic view of the decision as she submits.

27. For the reasons I have given this appeal is dismissed and the decision of the First-tier Judge shall stand.

28. The First-tier Judge made an anonymity order which it is appropriate to continue.

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 the appellant 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.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 13 December 2018

G Warr, Judge of the Upper Tribunal