



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/10410/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 31 January 2019**

**Decision & Reasons Promulgated
On 09 April 2019**

Before

**THE HON LORD BECKETT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS**

Between

**H--- Q--- B---
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Loughran, Counsel instructed by Wilson Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. We make this order because this is a protection case and those seeking international protection are, generally, entitled to anonymity.

2. This is an appeal against the decision of the First-tier Tribunal by a citizen of Vietnam born in 1981 allowing in part an appeal by the appellant against the decision of the Secretary of State refusing him international protection and/or leave to remain on human rights grounds.
3. The First-tier Tribunal Judge allowed the appeal because he was satisfied that removing the appellant to Vietnam would subject him to a real risk of ill-treatment so serious that it would be contrary to the United Kingdom's obligations under Article 3 of the European Convention on Human Rights to expose him to that risk. However the Judge decided that the appellant had not shown that he was a refugee and had not shown he was entitled to humanitarian protection.
4. In extreme summary form for the purposes of introduction it is the appellant's case that he is a refugee but even if he is not a refugee he should, on the judge's findings, have been found to be entitled to humanitarian protection.
5. We begin by considering the appellant's immigration history.
6. He says he entered the United Kingdom in October 2017. Whether or not that is right, on 27 October 2017 he was encountered by police and arrested on suspicion of cultivating cannabis. He said during his police interview that he was a victim of trafficking. On 26 January 2018 he was convicted before the Crown Court at Bolton of being involved in the production of class B controlled drugs, in this case cannabis, and an offence of abstracting electricity unlawfully. On 8 February 2018 he was sentenced to a total of twelve months' imprisonment made up of one term of twelve months and a concurrent term of three months.
7. As a consequence of the conviction the respondent decided on 15 February 2018 to make him the subject of a deportation order.
8. On 3 March 2018 the appellant claimed asylum. On 15 August 2018 a deportation order was made (the decision on 15 February was to *make* the deportation order) and the respondent decided that the appellant was not entitled to protection or leave to remain on any other basis.
9. The First-tier Tribunal Judge noted that the appellant's case had been referred to the Competent Authority for a decision on his claim to have been the victim of trafficking and on 3 November 2017 the Competent Authority informed him that there were reasonable grounds to believe that he was a potential victim of human trafficking. However following the required further consideration he was told on 17 January 2018 that it was concluded that he was not a victim of human trafficking. That decision, which is made on a higher standard of proof than applies in asylum cases, does not bind the Tribunal when it applies the "real risk" standard to the evidence before it. The First-tier Tribunal Judge followed the decision of Upper Tribunal Judge Finch in **ES (s82 NIA 2002; negative NRM) Albania [2018] UKUT 00335 (IAC)** which explains the correct approach

in protection claims to a decision of the Competent Authority which we have outlined above.

10. Here it was this appellant's case that he started a genuine but unsuccessful business repairing motorcycles. His efforts to finance his business led him into debt with legitimate banks and then with loan sharks who used their control over him to make him their slave and he entered the United Kingdom to do their bidding.
11. The judge considered evidence of the activities of Vietnamese loan sharks and noted their links to illicit immigration agencies. In the event of the appellant's return he would still have debts.
12. The judge also considered evidence that the Vietnamese authorities were willing but generally unable to restrain the activities of traffickers. There was also medical evidence that the appellant had been injured.
13. The judge made clear findings. In 2014 the appellant started a motorcycle business and borrowed money. He ended up owing money to loan sharks and was assaulted. He found someone who would arrange for him to go Russia where he was handed over to other operators and made to do unpaid work. He was held captive and coerced to work and was taken to the United Kingdom and placed in charge of a cannabis factory where he was caught. The judge found expressly "that he is at real risk of serious harm and being re-trafficked because of his history".
14. Nevertheless, the judge decided that the appellant was not a refugee because he was not a member of a particular social group. It was the judge's finding that:

"I do not consider that he has shown that he is a member of a 'particular social group' in that there are immutable characteristics that mean he would be considered by others as a member of any such group. This will not always be the case with those who have been trafficked - for instance, those forced into sex work may be more readily identifiable than others."
15. However the judge had already indicated that there were links between loan sharks and people smugglers.
16. There was no meritorious claim under Article 8 of the ECHR. The points relied on were subsumed in the Article 3 finding.
17. We deal first with Ms Loughran's subsidiary point that the judge should not have concluded that the appellant was not entitled to humanitarian protection. The difficulty with the judge's approach is that at paragraph 74 he said:

"For similar reasons to those I have just given, I conclude that the appellant is not entitled to a grant of humanitarian protection."

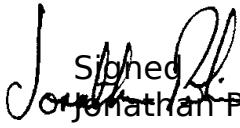
18. We do not follow these reasons at all. In the preceding paragraphs the judge had been considering the risks the appellant would face in the event of return and concluded that there was a risk of his being re-trafficked and a risk of serious harm. It makes no sense to suggest that these are reasons to say he is not entitled to humanitarian protection. Ms Loughran drew attention to Home Office guidance saying that the Secretary of State will normally give humanitarian protection “if there is a real risk of treatment contrary to Article 3 where the mistreatment does not amount to persecution for a Refugee Convention reason”.
19. In other words the respondent recognised that humanitarian protection would almost invariably follow a finding of Article 3 risk where the person was not a refugee. Mr Avery considered the point and did not feel able to make any submissions.
20. However it was Ms Loughran’s main contention that the judge was wrong to say the appellant was not a member of a particular social group. The precise characteristics of a “particular social group” are subtle, not to say elusive, but two broad strands emerge. At the minimum there has to be an “immutable characteristic”. Not everyone who is a member of a social group by reason of an immutable characteristic risks persecution but those that do and can prove it are refugees. There is an additional qualification in the minds of some that people must be recognised by society as a whole as part of such a group. We do not regard this as a second limb. Rather it recognises that in cases of protection a person needs protection only because of how that person is perceived. Very often a person is perceived as belonging to one of the qualifying groups correctly but if a person was perceived incorrectly, for example as following a particular religion, and to face persecution as a result then that person would be entitled to protection.
21. Ms Loughran drew our attention to the EU Qualification Directive particularly Article 10(1)(d) which states:

“A group should be considered to form a particular social group where in particular members of that group share an innate characteristic or common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity or conscience that a person should not be forced to renounce it; and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”
22. The immutable characteristic here is the history of having been trafficked. The perception of being different arises in the minds of those who know about the history, such as people-smugglers surveying a list of debtors as they look for people to exploit. Refugee status does not depend on the characteristic being “readily identifiable” as the judge seemed to suggest but of there being such a characteristic and a person facing a real risk of persecution as a result.

23. Mr Avery argued that there was no discernible social group here. With respect we disagree. Ms Loughran said that “victim of trafficking” would suffice and we agree. We find that the First-tier Tribunal erred.
24. On the findings the judge had made, which have not been challenged, he should have recognised that the appellant’s inalienable characteristic (history of being trafficked) and risk of being further trafficked show that he was a member of a group with a shared characteristic that was perceived by society to be different.
25. We find the First-tier Tribunal erred. We set aside the decision to the extent that it decided the appellant was not a refugee. We find the appellant is a refugee of being a member of a particular social group. If we are wrong, he was entitled to humanitarian protection.

Decision

26. The First-tier Tribunal erred in law. The appeal is allowed. The appellant is a refugee.


Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 4 April 2019