



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

Appeal Number: PA/13558/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 22 August 2019**

**Decision & Reasons  
Promulgated**

**On 5 September 2019**

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**MR T V N  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Gulliver-Andrew, Counsel, instructed by Duncan Lewis Solicitors

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

**DECISION AND REASONS**

**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.

1. This is an appeal against the decision dated 21 May 2019 of First-tier Tribunal Judge O'Garro which refused the appellant's asylum and human rights appeal.
2. The background to this matter is that the appellant is a citizen of Vietnam born in 2000. He came to the UK illegally on 17 July 2016. In a decision dated 22 November 2018 the respondent refused his protection and human rights claim.
3. The basis of the appellant's claim is that whilst in Vietnam he was involved with the Viet Tan Party (VTP). He maintains that on 11 May 2014 he took part in a demonstration outside the Chinese Embassy in Hanoi. The applicant claims that he and his paternal uncle, with whom he lived, were arrested and detained overnight at a police station. They were released having signed a declaration that they would not take part in any future demonstrations.
4. The appellant also maintained that on 10 April 2016 five people came to his home for a meeting with his uncle. His uncle told him that it was a meeting of the VTP. The appellant asked if he could become a member of the party but his uncle advised him that he could not do so until he was an adult but that he could support the party by distributing leaflets in secret. The appellant maintained that he go out to distribute leaflets with his uncle on 1 May 2016. Whilst he was doing so he saw two police officers approach his uncle and his uncle told him to run. His uncle was detained but the appellant managed to escape. He went to the home of his uncle's friend who assisted him to leave the country.
5. First-tier Tribunal Judge O'Garro did not find the appellant's claim to be credible, albeit some aspects of the claim were accepted. The credibility findings are set out in paragraphs 27 to 55.
6. In paragraph 37 the judge accepted the appellant's account of having attended the demonstration on 4 May 2014 as his account of this event was corroborated by the country material. In paragraph 38 the judge also accepted the arrest of the appellant and his uncle at the demonstration but did not find that arrest and detention for one night was sufficient to show that he had "become of interest to the authorities."
7. In paragraph 40 the judge found as follows:
  - "40. The appellant's uncle being a member of VTP would have known of the Vietnam government's position regarding opposition to its regime. It is therefore not credible that the appellant's uncle would have taken the irresponsible decision to allow the appellant to become involved in undertaking leafleting which would have put him at risk of arrest, detention and a lengthy imprisonment.

41. Furthermore, in light of the fact the government uses a variety of methods to keep its citizens under surveillance in order to prevent dissent, it is even less credible that the appellant and his uncle would go out to post leaflets putting them through letterboxes not knowing if a supporter of the government lives behind any of these doors which would then lead to their arrest.”
8. The judge went on to find that the claim of leafleting was not credible. In paragraph 43 the judge found as follows:

“43. In fact the appellant has provided no evidence that satisfies me that his uncle is a member of VTP or that he is either a member or supporter of the party and as I do not find him to be a credible witness, I do not accept that his uncle is a member of VTP as he claims.”
9. In paragraphs 44 to 48 the judge finds that the appellant’s evidence of sur place activity in the UK was very limited, would not make him of interest and that, in any event, the country evidence did not show that the authorities monitored to a sufficiently high level for the appellant to have been identified. In paragraph 51 the judge concludes that the sur place claim did not have merit.
10. In paragraph 53 the judge addressed the expert report of Christopher Bluth dated 19 February 2019. The report is at pages 93 to 125 of the appellant’s bundle. The judge says this in paragraph 53:

“53. I have not overlooked the appellant’s Expert, Mr Bluth’s report. I note he has accepted the appellant’s account without question but it is the task of the Tribunal and not the Expert to decide on the credibility of the appellant’s account and I find for the reasons I have given, I do not accept that the appellant had a political profile in Vietnam nor has he acquired one since coming to the United Kingdom which would cause him to be of interest to the Vietnamese authorities.”
11. The appellant put forward two main grounds before me. Firstly, the approach to the expert evidence was in error and secondly the finding on the implausibility of the appellant’s uncle assisting him to leaflet for the VTP disclosed a further error.
12. Mr Gulliver-Andrews submitted that the report showed that the expert did understand his duty to the Tribunal, understood that credibility was, ultimately a decision for the Tribunal and did assess whether parts of the appellant’s account was credible. He did not merely accept the account at its highest. This was shown, firstly, in paragraph 1 where the expert set out that the purpose of the report was “to consider and evaluate” the various claims made by the client and the Home Office. The expert set out his instructions which were “to consider and comment on whether the appellant has a genuine fear of persecution/risk to life on return to Vietnam on account of her (sic) political opinion and activities”. This showed that the expert understood that he was required to comment on credibility of the appellant’s account and not merely take the account at its highest.

13. In section 5.3 the expert considers the Home Office finding that parts of the appellant's evidence were not consistent or credible. In paragraph 5.3.2, the expert states:

"5.3.2 The Home Office considers the appellant's account of his involvement with Viet Tan internally inconsistent because his uncle told the appellant that he could not become a member of Viet Tan and yet was sent out to distribute leaflets. Membership of Viet Tan is organised around local cells with extreme secrecy (given it is designated as a terrorist movement) and therefore decisions about membership are made locally. There are many activists who participate in actions by Viet Tan or who are associated with the movement without being full members. There is no obvious reason to support the Home Office's contention that the appellant's uncle would not tell him that the activities of Viet Tan were illegal; quite to the contrary, it could have been a proper warning to induce caution. There is also nothing inconsistent for the appellant to be asked to distribute leaflets even if he could not be a full member due to his age. The various inconsistencies alleged by the Home Office have no basis in the country evidence."

14. The expert also assessed the Home Office findings on the appellant's claim to have attended a demonstration in 2014:

"3.3 The Home Office considers the appellant's account externally inconsistent because they claim that the protest was "authorised" and therefore questions that there were altercations with demonstrators or that the appellant would have been arrested. It is true that the authorities did not try to prevent the demonstration, but this is not the same thing as being "authorised" as it would be in democratic states like the United Kingdom where there is the rule of law. It is also the case that there was a very large contingent of uniformed and plain clothes police present who were trying to control the event and ensure a proper distance from the Chinese Embassy. It would be plausible that there would be hostile interactions between the police and the demonstrators at various points given the sheer size of the demonstration and the fact that the police considered the demonstrators to be enemies of the state. I am personally aware of several individuals were arrested at this demonstration, so I consider the appellant's account to plausible. In general, hostile interactions between demonstrators and police are common in demonstrations in western countries where political protest is considered to be a basic right of citizens. For all these reasons, I do not believe that the Home Office's claim that the appellant's account is externally inconsistent has any basis in the objective evidence."

15. The expert also commented in paragraph 5.3.7:

"5.3.7 Pro-democracy activists have sought to galvanise the younger population by focusing on particular social issue (sic) that they believe will concern young people, such as political corruption, respect for the rule of law, and supporting farmers in the fight against forced land seizures."

16. The expert sets out his understanding of his role as regards the credibility of the appellant's account in paragraphs 5.3.9 and 5.3.10 of the report:

"5.3.9 Although I am fully aware that credibility is for the Tribunal to determine, in my expert opinion the appellant's statement, if accepted, is plausible and her (sic) political concerns match with the concerns and activities of Viet Tan. Political demonstrations are illegal in Vietnam and these are very significant political issues.

...

5.3.10 In my opinion the appellant's statement is plausible in that it accords very well with the country evidence available in the public domain as to the concerns and activities of political activists in Vietnam and the response of the authorities.

...

Although I am aware that credibility is for the Tribunal to determine, the appellant's account is plausible in relation to the country evidence."

17. The expert set out the following comments in his conclusion at section 6 of the report:

**"6. Conclusion**

Although I am aware that credibility is for the Tribunal to determine, in my expert opinion the appellant's statement, if accepted, is plausible in relation to the country evidence. According to his account, the appellant has demonstrated against the policies and actions of the Vietnamese government, and this is an act that is always illegal in Vietnam. He is associated with Viet Tan, considered a terrorist movement by the Vietnamese authorities. By leaving the country illegally and engaging in what are considered anti-Vietnamese political actions abroad he is considered to have committed serious criminal offences against the Vietnamese state. Persons involved in such activities have received very serious criminal penalties. In my expert opinion, I believe that the appellant correctly believes that he faces serious risks of long term detention and torture if forced to return to Vietnam."

18. The expert goes on in section 7 of the decision to make a declaration as to his duties as follows:

**"7. Declaration**

I hereby declare that I have complied with my duty to the court and that all the statements in this report are true to the best of my knowledge. I have read the Ikarian Reefer guidelines and I understand that my duty is only to the court and not to those instructing me. I understand that my duty is to provide an impartial expert opinion with a view to assisting the court in reaching its decision, and that my duty is to the court and not those instructing me. I believe that I have complied with that duty. The report complies with the obligations on experts in court proceedings set out in the

Civil Procedure Rules (CPR) 35 and the Practice Directions with particular reference to Part 10 for the Immigration and Asylum Chamber of the First-tier Tribunal and Upper Tribunal. I have read the decision of MOJ and Others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC), which at [23] – [27] sets out the Tribunal’s instructions as to the appointment of (sic) expert. I confirm that, insofar as the facts stated in my report are within my own knowledge, I have made clear which they are, and I believe them to be true and that the opinions I have expressed represent my true and complete professional opinion. I confirm that I have read and understand the requirements placed on expert witnesses as stated in the Ikarian Reefer case.”

19. It is my conclusion that the expert did not merely accept the credibility of the appellant’s account at its highest. He considered the respondent’s view of the appellant’s claim and indicated why he found the appellant’s claim plausible. He showed that he understood that credibility was for the Tribunal. He showed that he understood his duty to the court and to act impartially and professionally. The statement of the First-tier Tribunal Judge in paragraph 53 of the decision that the expert “accepted the appellant’s account without question” is not correct. This was the only reason given for the First-tier Tribunal placing no weight on the expert report where, had it been considered further, it could have made a material difference to the outcome of the appeal. The credibility assessment must therefore be set aside for these reasons.
20. Further, the expert also comments on the appellant’s claim that he will face a risk on return to Vietnam as he left illegally and will be returning as a failed asylum seeker. The expert addressed this part of his claim in section 5.4 of the report and sets out why he considers that the appellant could be at risk on this basis. In paragraph 5.4.1 the expert sets out how returnees are treated which includes them being “interrogated by immigration officials” and those having been returned being “asked about where they have been, their activities and contacts abroad, their reasons for return and their destination in Vietnam. He goes on to state:
  - “5.4.1 However, in the case of failed asylum seekers the interrogation will be more thorough and take longer. There is no doubt that asylum seekers (or returnees in general) will be questioned or examined about their political loyalties or activities upon return. Human Rights Watch observed that during interrogations of returned asylum seekers from Hong Kong to Vietnam, immigration officials show particular interest in asylum seekers who worked with foreigners or foreign voluntary agencies or engaged in anti-communist or other political activities. It concluded that such “interest indicates a certain degree of danger for those asylum seekers who have been involved in these types of activities”.
  - 5.4.2 There is clear evidence that failed asylum seekers can be arrested upon return for alleged crimes which can include anti-government activities. A country report on human rights practices issued by the US State Department noted a number of instances in which returning Vietnamese citizens have been mistreated by the

Vietnamese government as a result of actual or alleged dissident activities and/or beliefs were “interrogated extensively by authorities upon their return”.

21. In paragraph 5.4.4 the expert identifies “various examples of asylum seekers being interrogated and arrested on return are documented” and goes on to provide details of those cases.
22. In paragraph 5.4.10 the expert considers the question of the appellant having left Vietnam illegally. The opinion of the expert is:

“For “causing public disorder” alone the appellant is liable for a sentence to lengthy imprisonment. Under Article 121 of the new criminal code “any person who, for the purpose of opposing the people’s government, emigrates illegally shall face the penalty of 03 - 12 years’ imprisonment”.

Paragraph 17 above sets out the expert’s conclusion which includes his opinion that leaving illegally can be a risk factor on return.

23. The First-tier Tribunal did not give any regard to these parts of the appellant’s claim or the expert report commenting on them. This is a further reason why the decision of the First-tier Tribunal discloses error on a point of law and must be set aside to be remade.
24. The second ground of appeal concerns the finding of the First-tier Tribunal Judge in paragraph 40 of the decision on the implausibility of the appellant being unable to join VTP but his uncle suggesting that he distribute leaflets with him, the decision characterising this as being “irresponsible”. The appellant challenges this finding relying on the case of HK v SSHD [2006] EWCA Civ 1037 in which the Court of Appeal found:

“Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases.”

25. It is uncontentionous that people, including young people, living in states with significantly adverse human rights profiles carry out opposition activities such as leafleting notwithstanding the risk. The expert provided support for the appellant being involved in leafleting notwithstanding the serious view that would be taken on this by the Vietnamese authorities. In that context, the First-tier Tribunal did not provide a rational reason for finding the appellant’s account of leafleting to lack credibility. This is a further error in the credibility assessment that requires that the decision of the First-tier Tribunal is set aside to be remade.
26. For all of these reasons I find an error of law in the decision of the First-tier Tribunal and set it aside to be remade *de novo*.
27. I was in agreement with the submissions of the parties that where there are no preserved findings and completely new findings of fact must be made it is appropriate here, notwithstanding the guidance provided in the

Senior President's Practice Direction, for the appeal to be remade in the First-tier Tribunal.

**Notice of Decision**

28. The decision of the First-tier Tribunal contains an error on a point of law and is set aside to be remade.
29. The decision will be remade in the First-tier Tribunal.

Signed   
Upper Tribunal Judge Pitt

Date 27 August 2019