Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00006/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd January 2020	**On 5th February 2020**

Before

THE HONOURABLE LORD UIST
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

THN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Allison, Counsel instructed by Rahman & Company Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("F*t*T") made an anonymity direction and it is appropriate to continue that direction. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member

of her 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.

2. The appellant is a national of Vietnam. Her appeal against the respondent's decision that her entitlement to refugee status has ceased, that she is excluded from the protection of the Refugee Convention and that her deportation to Vietnam will not be in breach of her human rights, was dismissed by First-tier Tribunal Judge Phull ("the judge") for reasons set out in a decision promulgated on 25th October 2019.

3. The Judge refers to the background, including the appellant's immigration history and her criminal conviction at paragraphs [2] to [4] of her decision. The judge sets out the relevant legal framework at paragraphs [5] to [9] of the decision. At paragraph [10] the judge identifies the documents that were placed before the Tribunal.

4. It was uncontroversial that the appellant had been recognised as a refugee and was granted refugee status on 19th October 2010. The appellant accepted that she had been convicted of an offence of kidnapping, and, on 22nd April 2013, she was sentenced to a 11 years and 6 months term of imprisonment. The judge recorded, at paragraph [19], the concession made on behalf of the appellant that in light of the circumstances giving rise to the conviction, the appellant is unable to rebut the presumption set out in s72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The consequence of that concession is that the appellant cannot benefit from the prohibition from expulsion or return, set out in Article 33 of the Refugee Convention, and the Tribunal was obliged to dismiss the appeal in so far as the appellant claimed that removal of the appellant from the UK, or a decision to revoke the appellant's protection status, would breach the UK's obligations under the Refugee Convention.

5. Nevertheless, the judge properly went on to consider the respondent's decision to revoke protection status and whether the criteria in Article 1C(5) of the refugee convention are met. That is, the appellant can no longer, because the circumstances in connection with which she has been recognised as a refugee have ceased to exist, continue to refuse to avail herself of the protection of the country of her nationality. The judge considered whether the appellant would be at risk of persecution in Vietnam such that her return would be in breach of the Refugee Convention. Although not expressed in that way, the judge appears to have adopted the 'mirror image' approach to the 'cessation' decision, that was referred to by Arden LJ in SSHD v MA (Somalia) [2019] 1 WLR 241:

> "…A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee…."

6. Arden LJ further stated at [47]:

> "….there is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which entitled him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection. There should simply be a requirement of symmetry between the grant and cessation of refugee status".

7. The appellant initially sought and was granted permission to appeal on two grounds. First, in reaching her decision the judge failed to apply the correct legal principles and/or give adequate reasons for her decision that the respondent was entitled to revoke the appellant's refugee status. The appellant claims the reasons given by the judge were directed to an assessment of the merits of an asylum claim, rather than the question to be determined when addressing 'cessation', that is, whether there has been a significant and non-temporary change in

circumstances in Somalia. Secondly, in considering the claim on medical grounds, the judge ought to have considered both the test set out in Paposhvili -v- Belgium, in which the appellant claims the ECtHR sets out the correct approach to be taken in Article 3 health cases, and the test set out in N.

8. At the hearing before us, Mr Allison confirmed that having had an opportunity of considering the rule 24 response filed by the respondent and the decision of the Upper Tribunal in AXB (Article 3 health; obligations; suicide) Jamaica [2019] UKUT 000397, the appellant no longer relies upon the second ground of appeal before us.

9. However, the appellant has made an application to amend the grounds of appeal, to include a further ground. In the new ground of appeal, the appellant claims the decision of the judge is this vitiated by procedural unfairness. In reaching her decision regarding the risk upon return to Vietnam, including issues of 'sufficiency of protection' and 'internal relocation', the judge refers to a 'Home Office fact-finding report of 2019 on Vietnam' that was not before the Tribunal and had not been relied upon by the respondent. The appellant had adduced expert evidence from Dr Tran Thi Lan Anh addressing the risk and obstacles that the appellant would be exposed to on return to Vietnam. The expert was expressly instructed to give an opinion as to the availability of protection and support for the appellant, and in particular, the protection available to victims of human trafficking. The appellant claims that fairness demanded that the appellant be given an opportunity to at least comment upon and address the evidence the judge considered as relevant to her decision.

10. On behalf of the respondent, Mr Tufan accepts that the 'Home Office fact-finding report of 2019' had not been referred to by the respondent in the respondent's decision, or at the hearing of the appeal.

11. Directions had been issued by the Upper Tribunal on 20th December 2019, expressly requiring the appellant to file with the Tribunal, and serve upon the respondent, a skeleton argument by 14th January 2020. No such skeleton argument was filed on behalf of the appellant. It is unfortunate that the appellant's representatives failed to comply with the direction. Before us Mr Allison claimed that no skeleton argument was filed because there was nothing to add to the grounds of appeal. We note that not only is the 'Home Office fact-finding report of 2019 on Vietnam', referred to several times by the judge in her decision, but it was also referred to by the respondent in the respondent's rule 24 response dated 24th December 2019 and in the respondent's skeleton argument dated 31st December 2019, filed in readiness for the hearing of the appeal before us.

12. Although it is important that the Tribunal is not a slave to form, the Tribunal Rules and directions made provide procedural requirements for good reason. Time is wasted if issues are not identified clearly and succinctly in the grounds of appeal, supported by arguments set out in a skeleton argument. Compliance ensures that appeal hearings are properly focused. Here, the appellant made no application, or no reasonably prompt application, to amend and introduce another ground of appeal until the morning of the hearing of the appeal and ordinarily the appellant should not expect an appeal court to be sympathetic. However, we are mindful of the issues at stake in this appeal and in the circumstances, we granted permission for the appellant to rely upon the further ground of appeal.

13. Mr Tufan accepts that there is an issue of fairness. He candidly accepts the judge has referred to background material in reaching her decision that was not in fact referred to by the respondent in her decision or referred to by the respondent at the hearing of the appeal before the First-tier Tribunal.

14. We acknowledge that a judge is entitled to rely on matters within his or her own knowledge, provided such matters are disclosed to the parties so as to afford them a fair opportunity to deal with them. This is particularly so where, as here, there was expert evidence commissioned by the appellant that addressed the background material that was relied upon by the respondent. In AM (fair hearing) Sudan [2015] UKUT 00656 (IAC) it was held that if a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date.

15. In MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC) the Upper Tribunal held that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal (the "FtT") to be set aside. The authorities referred to by the Upper Tribunal in MM make it clear that upon an appeal such as this the criterion to be applied is fairness and not reasonableness.

16. We accept the decision of the F*t*T is infected by an error of law on the third ground and that in the circumstances, the appropriate course is for the decision of First-tier Tribunal Judge Phull to be set aside and for the matter to be remitted for rehearing in the First-tier Tribunal afresh, with no findings preserved. In the circumstances we do not need to address the first ground relied upon by the appellant.

Decision:

The decision of First-tier Tribunal Judge Phull promulgated on 25th October 2019 is set aside and matter is remitted for rehearing before the First-tier Tribunal with no findings preserved.

Signed Date 22nd January 2020

The Hon. Lord Uist
and
Upper Tribunal Judge Mandalia