IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003282
First-tier Tribunal No:
HU/54530/2022
IA/06893/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 October 2024

Before

UPPER TRIBUNAL JUDGE LANDES

Between

D B
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hoshi, Counsel, instructed by Luqmani Thompson & Partners
For the Respondent: Ms S Nwachuku, Senior Presenting Officer

Heard at Field House on 26 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and his partner, child and stepchild are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and/or his partner, child or stepchild. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. An anonymity order was made in the First-Tier Tribunal in favour of the appellant. Although this is a case concerning deportation, in which there is rightly a strong public interest in open justice, the appellant is entitled to life-long

anonymity under section 2 (1) (db) of the Sexual Offences (Amendment) Act 1992 as a person who has been trafficked contrary to section 2 of the Modern Slavery Act 2015. I therefore maintain that anonymity order and extend it as I was requested to do in favour of the appellant's partner ("P"), child ("C") and stepchild ("S") to protect the appellant being identified by jigsaw identification.

2. The appellant, a citizen of Vietnam, appeals, with permission granted by Judge Nightingale, the decision of Judge Young-Harry promulgated on 26 May 2024 dismissing his appeal from the respondent's refusal of 14 July 2022 of his human rights claim made on his application of 26 March 2019 to revoke the deportation order made against him on 20 February 2014.

Background

3. The respondent accepted, there being a positive conclusive grounds decision in March 2013, that the appellant was trafficked to the UK in 2009 in order to work off a debt. The appellant pleaded guilty to cultivating cannabis and on 8 August 2012 received a sentence of 10 months' imprisonment. Judge Young-Harry found however that the appellant was not a "foreign criminal" for the purposes of section 117D of the Nationality, Immigration and Asylum Act 2002 as she was not satisfied that there was sufficient evidence before her to show that the appellant's offence was one which had caused serious harm [9].

4. The appellant met his partner P in the UK. The appellant's stepchild S is a British citizen. He is now 10 and his biological father has never been involved in his life. P and the appellant and P's daughter C who is 6 are Vietnamese citizens with limited leave to remain in the UK based on their relationship with S. The appellant has been the primary carer for the children, as P has worked to support the family.

Analysis of claimed errors of law

5. Ground 1 – unlawful breach of section 55 duty to make findings as to the children's best interests and to treat them as a primary consideration

   Although Judge Young-Harry considered the children's position in terms of what would happen if they stayed in the UK or went to Vietnam with the appellant, she made no findings at all about where their best interests lay, neither did she specifically mention the best interests of the children in carrying out the proportionality balance.

6. Ms Nwachuku accepted that this was an error, but she submitted that it was not material. She said the judge weighed many factors in the balance for and against the appellant and it was difficult to see how making an express finding even that it was in the children's best interests to remain in the UK and for their father to remain in the UK with them would have tipped the scales in the appellant's favour, given the best interests of children were a primary consideration not a paramount consideration.

7. The failure to make a finding as to the children's best interests was an error of law; I will return to whether it was a material error when considering it taken together with any other errors which I find.

8. Ground 2 – unlawful approach to expert evidence

Paragraph [24] of the decision is the judge's analysis of the expert report of Peter Horrocks, an independent social worker. The judge found:

> "Although the report sheds some light on the impact on the children if they remain in the UK without the appellant, it is silent on the impact on them if they move to Vietnam. Mr Swaby argued that the report fails to assess the benefit to the children of having their grandparents with them in Vietnam as part of their support network. I therefore reduce the weight I attach to the report on the basis that it fails to consider all the circumstances."

9. In fact, the report did consider the impact on the children if they moved to Vietnam (see paragraphs 4.18 and 5.3 of the report). Ms Nwachuku agreed that the judge had made a mistake, but said that was not material; clearly, she submitted, the judge's point was that Mr Horrocks had not taken into account the family support system in Vietnam. Mr Hoshi reminded me that the grounds were not simply about the mistake, the judge had not explained what weight she gave to the report, she simply said she "reduced" the weight she attached to it because it failed to consider all the circumstances.

10. I am satisfied that the judge erred in her approach to the report. I do not consider that her point can be simply that it fails to assess the potential benefit to the children of getting to know their grandparents and having their grandparents as part of their support network. The judge clearly says that the report is silent on the impact on the children of moving to Vietnam. On the face of it the judge did not engage with the whole of Mr Horrocks report. Again, I will return to the materiality of this error below.

11. Ground 3 – failure to make findings of fact as to risk from criminals on return

Mr Hoshi explained that although the appellant had not, at the hearing pursued his original international protection claim, the facts underlying that claim had been raised as part of the human rights claim and the only point that was disputed by the respondent was whether the appellant was still of interest to the gang. Mr Hoshi accepted as Ms Nwachuku submitted that the judge appeared at [30] to have made a finding that the appellant had failed to establish he remained in debt to gangs in Vietnam; he pointed out however as he had in the grounds that in the next phrase she said "I therefore make no finding in this regard". He submitted that if the judge had made a finding it was inadequately reasoned.

12. The judge recorded at [30] the appellant's case that he feared his traffickers on return because he still owed them money and his family continued to experience problems because of this. The judge does not explain why she rejected, or is not satisfied by his explanation, or indeed what she means by making no finding, when whether the appellant was still wanted by his traffickers was clearly relevant to the situation the appellant and the children would face in Vietnam. The judge's failure in this respect is indeed an error of law.

13. Ground 4 – failure to make findings of fact on material matters

The first point of this ground is in effect the same as ground 3. It is said the judge failed to make three other relevant findings; whether the index offence was committed as part of a trafficking situation, the claimed reasons for the appellant withdrawing his asylum claim and absconding and the family support available to

P in Vietnam (P had claimed she could not rely on her mother and brother for support as they had a poor relationship). It was also said that the judge gave no reasons for rejecting the appellant's account that he was not in contact with his mother and brother and could not rely on his father for support.

14. Ms Nwachuku submitted that the judge did accept that the appellant was a victim of trafficking, that she had made a clear finding that the appellant contributed to the delay by absconding and changing his correspondence address and that she had accepted that P did not have any contact with her father, but maintained minimal contact with her mother [28].

15. I consider that there is no clear finding about whether the appellant committed the offence under the direction of his traffickers. The judge simply records this as a "claim" and then says, "despite this, the appellant was culpable." It is important to know whether it is accepted that the offence was committed under the direction of the traffickers because this is relevant to the degree of culpability of the appellant and therefore to the weight to be given to the public interest side of the balance and this point was specifically raised in the appellant's skeleton argument. I consider the judge erred in law by making no clear finding on this point.

16. The reasons for the appellant withdrawing his asylum claim and absconding are not simply relevant to delay they are also relevant to the weight the judge gave to the public interest [20] as she considered the appellant had a poor immigration history. The appellant's explanation for this was that he did not know about the system or that he could get legal aid, and he was afraid because he was not confident his case would be considered positively. In the circumstances I do not consider the judge made an error of law by not making findings about the reasons for the appellant's poor immigration history; the judge was entitled to bear in mind the aim of maintaining a firm and fair system and this requires those who wish to stay in the UK to co-operate with the authorities and make the appropriate applications.

17. Although it might have been desirable to be more explicit, I do not consider the judge needed to make any more findings about the family support available to P in Vietnam. The judge's findings at [29] about P's resettling into life in Vietnam did not suggest that she would have any help from her own family.

18. The judge found that the appellant's parents and brother could assist the appellant with his resettlement. The appellant's most recent witness statement suggested that he and his father were not in contact with his brother; that he was in contact with his father every one or two months, but not with his mother who his father told him had gone to live with his maternal grandmother who was in poor health. It therefore required rather more reasoning for the judge to explain why she found all three could assist the appellant with resettlement; whilst this may not be significant on its own, it is also linked to the point about whether the appellant remains in debt to the gangs. If the appellant does remain in debt to the gangs, then understandably because of his fear he would be unlikely to return to his home area and so in that case rather more explanation would be required of how his family could assist with resettlement.

Materiality

19. When considering the materiality of any errors, I have reminded myself of the test set out in ASO (Iraq) v Secretary of State for the Home Department [2023] EWCA Civ 1282 namely whether it was clear on the materials before the tribunal that any rational tribunal must have come to the same conclusion. If it was, then any error would be immaterial.

20. Ms Nwachuku submitted that if one looked at the decision overall a fair balance had been taken on all aspects of the claim.

21. I do not consider that to be right. I have found errors in the judge's assessment or rather failure to assess the best interests of the children, in her engagement with the expert report, in her failure to give reasons why she was not satisfied that the appellant was still in debt to his traffickers and failure to be clear about whether he committed the index offence under the direction of his traffickers.

22. Given the errors taken together, I could not possibly say that any rational tribunal would have come to the same conclusion. The failure to assess the best interests of the children is particularly significant taken in conjunction with the failure to engage with the expert report or explain properly what weight was being given to it. This is because as the judge found that the appellant was not a "foreign criminal" she was not conducting the very structured statutory exercise prescribed by section 117C of the 2002 Act, but rather a more general proportionality exercise, in which the best interests of the children were clearly a primary consideration. Of course they were not a paramount consideration, but it is particularly significant in this context that Mr Horrocks considered that it was very strongly in the children's best interests to remain in the UK with the appellant. The judge needed therefore not only to make a finding about what was in the children's best interests but how strongly various factors pointed one way or the other. A finding about whether the appellant had committed the index offence under the direction of his traffickers would also be important as it could clearly be relevant to the strength of the public interest in his deportation. Properly reasoned findings were also needed as to whether the appellant owed a debt to his traffickers so that they might still be interested in him or that he would reasonably believe they were. This would affect whether the appellant could be reasonably expected to return to his home area, which would affect the difficulty or otherwise he would have re-establishing himself in Vietnam and would also affect whether the children, if they went with him to Vietnam, would be able to make contact with or receive any support from their paternal grandparents.

23. There are therefore material errors of law and the decision must be set aside.

Conclusion

24. The representatives agreed that, if, as I do, I found that the decision needed to be set aside for material error of law, it would need to return to the First-Tier Tribunal given the extent of fact-finding necessary.

25. Ms Nwachuku submitted that as the judge's reasoning was faulty, nothing should be preserved and that included her finding that the appellant was not a "foreign criminal."

26. I agree with Mr Hoshi on this point. I note there was no rule 24 response. Although the judge said only "I am not satisfied that there is sufficient evidence before

me to show that the appellant's offence caused serious harm" in fact there was no evidence. Mr Hoshi's skeleton argument set out in detail why he submitted the offence had not caused serious harm and the respondent's review said simply "it is the respondent's position that the appellant does meet the requirements of a foreign criminal for the purposes of s117D NIAA 2002 due to the fact that he was convicted of a serious offence of producing a controlled drug of class B..". Conviction of a serious offence is not the same as being convicted of an offence which caused serious harm as the skeleton argument points out at [16] and [17]. Mr Hoshi noted in his reply that the respondent continued to fail to provide reasons and evidence for considering that the offence of which the appellant was convicted was one which caused serious harm. The respondent has not pointed to anything before the judge other than the bare assertion of the respondent with reference to the offence causing serious harm. The judge was therefore entitled to come to the conclusion which she did and that is entirely separate from her Article 8 assessment.

27. Whilst I have not agreed with all the criticisms of the judge's decision, given the overall flaws in the Article 8 assessment, it is only right that Article 8 should be considered afresh. Obviously, any fresh assessment will have to be as at the date of the hearing and the factual situation may, in any event have changed.

Notice of Decision

The judge's decision contains errors of law and is set aside. The appeal is remitted to the First-Tier Tribunal at Birmingham/Nottingham to be heard by a judge other than Judge Young-Harry.

The only finding preserved is the finding and reasons at [9] that the appellant is not a foreign criminal for the purpose of section 117D of the NIAA 2002.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 October 2024