



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 48

P898/21

OPINION OF LORD ERICHT

In the cause

HHP (FE/LA)

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Pursuer: Winter; Drummond Miller LLP
Defender: Crabb; Office of the Advocate General**

15 July 2022

[1] The petitioner, a Vietnamese national, was trafficked into the UK. On 18 October 2016, he came to the British authorities' attention as a result of a police visit to a nail bar and claimed asylum. On 28 September 2018, the Home Office notified the petitioner's solicitors that the Competent Authority had concluded that he was a victim of human trafficking.

[2] The petitioner claimed asylum, claiming that he was at real risk on return to Vietnam due to risk of being re-trafficked and/or due to political activities in Vietnam and his *sur place* activities in the UK. On 28 September 2018 the respondent refused the claim. The petitioner appealed to the First-tier Tribunal which refused the appeal on 24 January 2021, and refused permission to appeal to the Upper Tribunal on 23 February 2021. The petitioner

applied to the Upper Tribunal for permission to appeal which the Upper Tribunal refused on 20 April 2021 for the following reasons:

“The judge gave careful and thorough consideration to the evidence. It was fully open to her to conclude that there was no reliable evidence that the authorities would be aware of the appellant's (minimal, on her sound findings) *sur place* activities in the United Kingdom. It was fully open to her to place the weight she did on the Respondent's Minute Sheet, for the reasons given. Numerous reasons were given by the judge for not accepting the Appellant's credibility, and none have been shown to be arguably flawed. In particular the findings at paragraph 73 of the judge's decision summarise why, on her sound findings, the claim could not succeed. In addition, the findings in respect of the claimed risk of re-trafficking are sound, bearing in mind the judge'[s] careful evaluation of the subjective and the background evidence. In particular the reasoning at paragraph 101 of the decision is sound. Again, the judge gave careful and proper consideration to the Article 8 issues. The grounds of challenge are no more than a matter of disagreement.”

[3] The petitioner brought judicial review proceedings seeking reduction of the Upper Tribunal's decision to refuse permission to appeal. The grounds of judicial review were set out in paragraph 10 of the petition and are dealt with below. The test to be applied is whether the Upper Tribunal has failed to identify that the First-tier Tribunal had arguably made an error of law (*Waqar Ahmed v SSHD* [2020] CSIH 59 at para 9)

***Sur place* activities**

[4] The Upper Tribunal refused permission to appeal in respect of the *sur place* activities stating:

“It was fully open to [the First-tier Tribunal judge] to conclude that there was no reliable evidence that the authorities would be aware of the appellant's (minimal, on her sound findings) *sur place* activities in the United Kingdom.”

[5] The *sur place* activities were two demonstrations which the petitioner attended in the UK. The first of these was outside a church in Edinburgh on 12 March 2017. The second was being outside the Vietnamese Embassy in London on 30 April 2017. The First-tier Tribunal accepted that the petitioner attended these two demonstrations. It accepted that he

was in a photograph of three men at the church demonstration (para [81]). It accepted that he was at the Embassy demonstration, finding that the petitioner was recognisable in a photograph taken at the demonstration (para [83]).

[6] The First-tier Tribunal deals with the *sur place* activities and the question of whether they would have come to the attention of the Vietnamese authorities at paras [76] to [91].

The Tribunal came to following conclusion:

“90. I find **there is no reliable evidence that the appellant[’s]... attendance** at the 2 previous demonstrations (one a very small affair shown outside a church in Edinburgh) and one presumably much larger in London in 2017 **have come to the attention of the authorities** such that he will be stopped and questioned either at the airport or once he had returned to his home commune....

91....I find that **there is no reliable evidence the authorities would be aware of any of the appellant’s sur place activities in the UK** which, minimal as they were, I find were only undertaken to bolster his asylum claim and were without any genuine political commitment or opposition to the authorities on the part of the appellant” (emphasis added)

[7] The ground of challenge in the judicial review petition (para 10(ii)) is that the First-tier Tribunal arguably erred in law when assessing whether the authorities would be aware of the petitioner’s political activities in the UK. This is a reference to ground 1(g) of the application for permission to appeal to the Upper Tribunal which is to the effect that the First-tier Tribunal’s findings regarding the petitioner’s attendance at the *sur place* demonstrations demonstrated a material error of law.

[8] The question for me therefore is whether in finding that there was no reliable evidence that the Vietnamese authorities would be aware of the *sur place* activities the First-tier Tribunal has arguably made an error of law.

[9] Much time was taken up at the hearing before me in looking at photographs which had appeared on-line. The First-tier Tribunal held that the petitioner was not recognisable in the photographs which had appeared on-line of the church demonstration (para [81]) or

the Embassy demonstration (para [82]). Having examined the photographs in detail, it seems to me that it is possible that another judge might have come to a different view.

However, the matter of whether the petitioner could be recognised from the photographs is a matter for the first instance judge, who had the benefit of seeing the petitioner on screen during the on-line hearing, and is not a matter which can be interfered with by an appellate court or tribunal. The First-tier Tribunal was entitled to decide as a matter of fact that the petitioner was not recognisable in the on-line photographs, and in making that finding the First-tier Tribunal has made no error of law. It follows that the Upper Tribunal has not failed to identify that the First-tier Tribunal has made an arguable error of law in that respect.

[10] However, the on-line photographs were not the only evidence going to the question of whether the Vietnamese authorities were aware of the petitioner's attendance at the Embassy demonstration. The First-tier Tribunal accepted that the petitioner attended at the demonstration. If a person takes part on a demonstration outside a country's embassy then one possible inference from that fact might be that that country's authorities would be aware of this. Demonstrators could be seen by, or even photographed by, Embassy staff. In coming to the conclusion that there was no reliable evidence that the authorities would have been aware of the petitioner's attendance at the Embassy demonstration, the First-tier Tribunal focussed only on the online photographs to the exclusion of the evidence of attendance at the demonstration. The First-tier Tribunal gave no consideration as to whether the Vietnamese authorities would have been aware of his attendance at the demonstration otherwise than by looking at photographs on-line. The First-tier Tribunal does not explain why the petitioner's attendance at the Embassy demonstration is not reliable evidence that the Vietnamese authorities would have been aware of his presence

there. In my opinion it is arguable that by concluding that there was no reliable evidence that the Vietnamese authorities would have been aware of his attendance at the Embassy demonstration without taking into account its finding that he was present, the First-tier Tribunal has erred in law in leaving out a relevant matter and reaching a conclusion on the facts which is irrational (*MA (Somalia) v SSHD* [2010] UKSC 49 at para [44]). It is of course not for me to express any opinion as to whether that arguable argument will succeed: all I require to consider is whether it is arguable. I find that it is, and accordingly that the Upper Tribunal has failed to identify that the First-tier Tribunal has arguably made an error of law.

Minute Sheet

[11] One of the factual matters in dispute before the First-tier Tribunal was whether at the petitioner's first interview by an immigration officer he mentioned being involved in any demonstration in Vietnam, or being wanted by the police or having any fear of traffickers because of any debt still owed (para [51]). The petitioner's position was that he had (para [53], [58], [64]). A Home Office Minute Sheet of the interview contained no such mention.

[12] The First-tier Tribunal found that it was not credible that if he had mentioned the demonstration the immigration officer would have not have noted this (para [61]) and that the Minute was a reliable record of what the appellant said at the interview (para [65]).

[13] This finding was challenged in the grounds of appeal to the Upper Tribunal on the basis that the First-tier Tribunal had materially erred in law in its consideration of the Minute as the Respondent had conceded that the Minute was not a verbatim record.

[14] The Upper Tribunal refused permission on this ground stating that it was fully open for the judge to place the weight she did on the Minute Sheet.

[15] That refusal was challenged in this petition (para 10(iii)) on the basis that the weight placed upon the Minute Sheet was vitiated by material error where the First-tier Tribunal went behind a concession of the Home Office confirming that the Minute Sheet was not a verbatim record.

[16] In my opinion the First-tier Tribunal did not arguably err in law in respect of its consideration of the Minute Sheet.

[17] A concession that a document is not a verbatim record is no more and no less than that. It is not a concession that the document omits matters, nor a concession as to what the omitted matters were. In coming to its conclusions on what was mentioned at the interview above the First-tier Tribunal looked at the evidence about what was said at the interview as a whole. It was entitled to come to these conclusions on the evidence before it and in doing so did not err in law.

Trafficking

[18] In refusing leave to appeal in relation to trafficking, the Upper Tribunal stated:

“the findings in respect of the claimed risk of re-trafficking are sound bearing in mind the judge[’s] careful evaluation of the subjective and the background evidence. In particular the reasoning at paragraph 101 of the decision is sound”.

[19] That refusal was challenged in the petition (para 10(iv)) on the basis that it was flawed by legal error for the reasons set out in the grounds of appeal to the Upper Tribunal ie (in summary) that the First-tier Tribunal failed to give adequate consideration to (a) the petitioner having suffered persecution at the hands of his traffickers and owing them a debt and (b) paragraph 2.4.8 of the Country Policy and Information Note on trafficking in Vietnam.

[20] In my opinion the First-tier Tribunal did not arguably err in law in respect of its consideration of trafficking. Trafficking is dealt with in detail at paras [92] to [101]. The CIPN is quoted at para [93]. The First-tier Tribunal gives detailed reasoning in para [101]. The Upper Tribunal was correct to refuse permission to appeal for the reasons it gave.

Article 8

[21] In refusing leave to appeal, the Upper Tribunal stated that the judge gave careful and proper consideration to the Article 8 issues and that the reasoning in para 101 of the decision was sound.

[22] That refusal was challenged in the petition on the basis that there were material errors in relation to Article 8 (para 10(v)).

[23] Counsel for the petitioner, in my view quite properly, did not develop this point in his oral argument. There is no merit in the point and there is no arguable error of law in relation to Article 8.

Solicitor's submissions

[24] A further challenge in the petition was on the ground that the First-tier Tribunal did not give a careful and thorough consideration to the evidence (para 10(i)), in particular that the First-tier Tribunal misunderstood the petitioner's solicitor's reference to a large chunk of the evidence having been accepted. That was a reference to para [49] of the Decision which stated:

"Mr Ruddy submitted that 'a large chunk of the appellant's case had been accepted.' I do not agree with that assertion. Whilst it has been accepted the appellant was a victim of traffickers in how he got to the UK, his reasons for leaving Vietnam were not accepted by the respondent and this, I find, is a most significant 'chunk' of his case regarding his claimed fear of returning to Vietnam."

[25] In my opinion that paragraph discloses no error of law. The First-tier Tribunal is dealing with vague and imprecise submission as to the extent to which the respondents accepted the petitioner's claim. The Tribunal was entitled to find that the respondents had not accepted the claim on fear of return. There is no arguable error of law and this ground fails.

Order

[26] I shall reduce the decision of the Upper Tribunal refusing permission to appeal to the Upper Tribunal and reserve all questions of expenses in the meantime.