



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00007/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19th December 2017

Decision & Reasons Promulgated
On 18th May 2018

Before

**THE HONOURABLE MR JUSTICE GOSS
UPPER TRIBUNAL JUDGE SOUTHERN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR NHAN AN MA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr I Jarvis, a Senior Home Office Presenting Officer
For the Respondent: Ms C Record of Counsel

DECISION AND REASONS

(given orally at the hearing of 19 December 2017)

1. Although it is the Secretary of State for the Home Department who is the appellant before the Upper Tribunal, it is convenient for us to refer to the parties as they were before the First-tier Tribunal and so we shall refer to Mr Ma as the appellant.
2. The appellant who is a citizen of Vietnam now aged 53 or thereabouts arrived in the United Kingdom as long ago as September 1980 when aged 16 years of age, together

with his parents and siblings, they having been granted entry clearance as settlement refugees. They were granted indefinite leave to enter.

3. The appellant now has six children by three partners, three of whom are under 18. Two of those by a former partner are in foster care but the third minor child, [K] aged 7, lives with the appellant and his current partner who is a citizen of Vietnam also, she being present without leave in the United Kingdom.
4. Although, therefore, the appellant and his family had on arrival had been accepted to be refugees, the appellant's parents are now deceased and he has no knowledge himself or recollection of how the asserted persecution experienced by his family manifested itself although as I have mentioned he was 16 years old on arrival. That became of some relevance when he was invited to attend an interview to discuss the continuation of his need for international protection, which invitation having taken advice from his lawyers, he declined.
5. The appellant has two significant convictions. In February 2005 he was sentenced to twelve months' imprisonment for threatening to damage property. He was facing the prospect of eviction from his home and it is said that he doused himself with some inflammable liquid and threatened to burn down his house with his family inside. In November 2006 he was sentenced, having pleaded guilty, to concurrent terms of two years and three years' imprisonment for cultivating cannabis and for possessing a controlled drug of class C with intent to supply. It is quite clear from the sentencing remarks of the judge who imposed those prison sentences that he regarded this as a substantial exercise of cultivation and supply of cannabis in respect of which the applicant was playing a significant role.
4. The respondent made a deportation order, having revoked one made previously which it was recognised was flawed because the Secretary of State had failed when making that earlier order to address the appellant's refugee status, but at the same time put the appellant on notice that she considered that Section 72 of the Nationality, Immigration and Asylum Act 2002 applied because the appellant had been convicted of an offence for which he was sentenced to at least two years' imprisonment and he was therefore presumed to have been convicted of a particularly serious crime and to constitute a danger to the community of the United Kingdom.
5. The consequence of that rebuttable presumption was that in any subsequent appeal the Tribunal must begin by considering the Section 72 certificate and if it agrees that the presumption applies must dismiss the appeal on asylum grounds. But the respondent went on to say that in any event it was not accepted that the appellant now faces a real risk of persecution on return to Vietnam and so even if the Section 72 presumption did not apply his asylum claim would fall to be refused.
6. It seems that the asylum claim previously advanced by the appellant's parents and maintained by the appellant was founded upon the fact of his father's Chinese ancestry. In the refusal letter the respondent set out a summary of the documentary

evidence upon which she relied in support of her conclusion that there had been a durable change in Vietnam such that no real risk any longer existed so that there was no continuing need for international protection. Therefore, the respondent having considered all representations advanced revoked the appellant's refugee status, certified his claim under Section 72 of the 2002 Act, went on to explain why in any event that claim could not succeed and then rejected the submission that there would be also an impermissible infringement of rights protected by Article 8 of the ECHR if the appellant were removed pursuant to the deportation order.

7. The appeal came before First-tier Tribunal Judge Andonian on 21st September 2017. Ms Record who appears before us appeared before the First-tier Tribunal. The judge allowed the appeal because he found that as the appellant had not committed any further offence since November 2006 he no longer constituted a danger to the community of the United Kingdom. Mr Jarvis acknowledges that the Secretary of State does not in her grounds seek to challenge that conclusion.
8. The judge also found that the appellant did have a well-founded fear of persecution in Vietnam and at paragraph 58 of his judgment he found that there would be "significant obstacles to relocating the appellant and he has a settled family life with his partner and [K]" therefore he concluded "there are significant obstacles to the relocation of the appellant and separating him from his family in the UK according to the Rules' requirements under Article 8. There are furthermore two compelling factors which make the case an exceptional one, namely the failure of the respondent to discharge the burden of proof in relation to the revocation of refugee status and [K]'s lack of connection to Vietnam".
9. The Secretary of State pursues two grounds in challenging that decision. In the refusal decision between paragraphs 54 and 76 the respondent set out an extensive summary of the documentary evidence upon which she relied in reaching her conclusion that there had been durable change in Vietnam and the appellant no longer faced the real risk of persecution on return to Vietnam. It is quite clear that the judge makes no mention at all of this evidence in his judgment and there is nothing we can draw from it to show that he has had any regard to it at all. Thus, in concluding that the respondent had failed to discharge the burden of proof in this respect the judge simply failed to have regard to the evidence the respondent said that she relied upon. It is submitted by Mr Jarvis that therefore the conclusion is not sustainable because the judge left out of account a material consideration.
10. In her submissions today Ms Record points to the fact that the complete reports relied upon by the respondent and referred to in the refusal letter were not produced before the judge, but on the other hand in a substantial bundle of evidence produced by the or on behalf of the appellant there was a country report, the United States Department of State Report upon Vietnam, which supported the appellant's case and it was her submission that if it was an error of law for the judge to fail to have regard to evidence relied upon by the respondent that error would not be a material one. The difficulty with that is disclosed by looking at the evidence concerned. The evidence relied upon

by the appellant at page 69 of the appellant's bundle speaks of the law of Vietnam discriminating against ethnic minorities but states that societal discrimination against ethnic minorities was longstanding and persistent. There is no mention in that paragraph of that societal discrimination reaching the high level of persecution such as to found a claim for international protection. True it is that in the paragraph that follows there is a reference to refugees claiming to be the victims of persecution but that relates to religious persecution which is not as I understand it the nature of the claim being asserted by this applicant appellant.

11. On the other hand, when one looks at the evidence upon which the Secretary of State sought to rely but which was disregarded by the judge, and I do not propose to go through all of that evidence now, the significant information which was absent from the evidence relied upon by the appellant and presumably to which the judge had regard was in respect of numerical evidence. At paragraph 59 of the Secretary of State's refusal letter there is reference to the fact that the UNHCR was satisfied in 1996 that large numbers of returnees had come to no harm on return. There was evidence reproduced that since 1975 no fewer than 240,000 Vietnamese refugees from Malaysia had been resettled and some 9,000 had opted to return to Vietnam. In the paragraph that follows paragraph 60 there was talk of those 9,000 people returning to Vietnam on an optional basis and there was no evidence that they had been subject to persecution and therefore it was considered that there was significant and durable change and finally at paragraph 64 and 65 there is a description of a large proportion of the inflow of remittances originating from overseas China and finally at paragraph 65 reference to the Home Office Country Information and Guidance Report which acknowledges that there is a level of a societal discrimination for this group of people showing the characteristics of the appellant, but that it is in general not such as to reach the level of persecutory or otherwise inhuman or degrading treatment.
12. Drawing all this together it seems to us that the evidence relied upon by the Secretary of State on one view chimes with the evidence relied upon by the applicant appellant, but the latter leaves out of account the numerical evidence relied upon by the respondent. We are unable to conclude that if the judge had had regard to this the outcome must necessarily have been the same and for that reason we are satisfied that it was an error of law for the judge to leave this material out of account and that for that reason it was a material error.
13. Turning to the second ground for the Secretary of State, that complains that there was nothing to indicate that the judge has had regard to the considerations of Section 117B-C of the 2002 Act, something which of course the judge was required to do by the provision of Section 117A(2). The consequence of this is that the judge has simply applied the wrong legal test. He has conflated the vocabulary of disparate parts of the framework in play and has spoken of there being insurmountable obstacles to family life continuing outside the United Kingdom but that of course was not the test. The correct test in relation to the appellant's child [K] who is a qualifying child is whether the effect upon him of the appellant's deportation would be unduly harsh. That is a term considered by the Court of Appeal in **MM Uganda** to be one which imports into

that consideration all of the circumstances, including the history of criminality to which we have referred.

14. In the light of that it is clear that the assessment of the judge is simply legally deficient and cannot stand. For these reasons we are satisfied that the judge did make these errors of law material to the outcome. The consequence of which is the Secretary of State's appeal to the Upper Tribunal will be allowed to the extent that the decision of Judge Andonian to allow the appeal will be set aside and the appeal will be remitted to be determined afresh by a different judge of the Tribunal.

Signed

A handwritten signature in black ink, appearing to read 'P. Bull', with a stylized flourish at the end.

Upper Tribunal Judge Southern