Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00170/2018

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Tuesday 29 October 2019	**On Wednesday 13 November 2019**

Before
MR JUSTICE DOVE
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH

Between
CT
[Anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Pinder, Counsel instructed by Kadmos Consultants
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was not made by the First-tier Tribunal. However, as this appeal raises protection issues, it is appropriate to make an anonymity order. 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 his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-tier Tribunal Judge K Swinnerton promulgated on 5 July 2019 ("the Decision"). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 23 October 2018 refusing his protection and human rights claims made in the context of a decision to deport him to Vietnam. Also of relevance to our consideration of the issues are decisions dated 13 September 2017 notifying the Appellant that the Respondent intended to cease his refugee status and one dated 24 May 2018 making the decision to cease refugee status applying Article 1C (5) of the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention"). Those decisions did not give rise to a right of appeal but the cessation of status forms part of the Respondent's decision under appeal. In her decision, the Respondent also applied section 72 Nationality, Immigration and Asylum Act 2002 ("Section 72") to exclude the Appellant from Article 33(2) of the Refugee Convention.

2. The Appellant appealed the Respondent's decision on protection and human rights grounds (Article 3 and 8 ECHR) and also challenged the decision to revoke as well as the application of Section 72. The Judge dismissed the appeal on all grounds.

3. The Appellant raised the following grounds of appeal challenging the Decision:

> (1) The Judge failed properly to assess the evidence in relation to the danger which the Appellant poses to the community when considering Section 72 (Ground One);
>
> (2) The Judge erred in his consideration of the cessation decision in the following ways:
>
> (a) Failed to consider whether there was a durable and fundamental change in the circumstances which led to the grant of refugee status and failed to take into account the UNHCR's views in that regard (Ground Two)
>
> (c) Failed to consider whether there were compelling reasons arising from past persecution such that the cessation clause should not be applied (Ground Three);
>
> (d) Failed to consider the evidence concerning the circumstances of the Appellant's family members in Vietnam (Ground Four);
>
> (e) Failed properly to evaluate the Appellant's expert report in light of the findings about the Appellant's family members (Ground Five).

(3) The Judge failed properly to consider the medical and background evidence in relation to the Appellant's health applying both Articles 3 and 8 (Ground Six).

(4) The Judge failed properly to consider the evidence as to the Appellant's relationship with his children (Ground Seven).

4. Permission to appeal was granted on limited grounds by First-tier Tribunal Judge I D Boyes on 2 August 2019 in the following terms (so far as relevant):

> "…2. The grounds assert that the Judge erred in the consideration of the presumption of s.72 (ground 1), erred in the consideration of the durable change argument (ground 2), erred in the compelling reasons argument (ground 3). In ground 4 it is argued that the Judge erred by failing to have regard to the appellant's evidence. Ground 5 alleges errors in the Article 3 assessment and Ground 6 alleges failures in the article 8 assessment.
> 3. Ground 1 is arguable. The Judge arguably does not consider the material provided from Lisa Davis nor the relevance of this in light of the failings of the OASYS report.
> 4. Ground 2 is arguable. The Judge was required to consider whether any changes were durable. It is arguable that the absence of specific findings on this issue support the contention the Judge fell into error.
> 5. Ground 3 flows from Ground 2 and is arguable.
> 6. Ground 4 is not arguable. Weight given to evidence is not an error of law.
> 7. Ground 5 is not arguable. The Judge has considered the matter with care. It is not arguable as the Judge found that the appellant could not achieve some treatment. The very high threshold of Article [3] did not apply found the Judge and there is no arguable error identifiable.
> 8. Ground 6 is not arguable. This was not a strong part of the appellant's claim as the Judge found. The Judge was entitled to refuse it and did so in a manner which was perfectly proper.
> 9. Permission is granted on grounds 1, 2, 3. Refused on 4, 5, 6."

5. As will be readily apparent, the numbering adopted by Judge Boyes is not the same as the numbering which we have used to identify the various grounds at [3] above. Upper Tribunal Judge Gill made that point when refusing the renewed application for permission in relation to the grounds on which permission was refused by Judge Boyes. She identified four grounds on which permission had been refused and made the following observations:

> "1. Ground 4 (paras 3-4 of the renewed grounds) is that, in his assessment of whether there has been a durable change in circumstances and whether there are very compelling reasons arising out of previous persecution such that cessation/revocation of refugee status should not apply, Judge of the First-tier Tribunal K Swinnerton erred by failing to have regard to the appellant's evidence when considering the circumstances of family members in Vietnam.

Ground 4 is unarguable as it is clear from para 25 of his decision that Judge Swinnerton was fully aware of the appellant's evidence that his sister returned to Vietnam on holiday and became ill there. The judge took into account the evidence of two of the appellant's children who said that their aunt was *living* in Vietnam. It is therefore unarguable that the judge failed to have regard to the appellant's evidence that his sister was only temporarily in Vietnam. The judge was unarguably entitled to reject the appellant's evidence and find that he does have a sister who is living in Vietnam. Further and in any event, the judge was unarguably entitled to find that the appellant would also be able to receive support from his partner's three siblings and her parents (para 25).

This ground is therefore in reality an attempt to re-argue the evidence although advanced as a failure by the judge to consider relevant evidence.

2. Ground 5 (para 5 of the renewed grounds) is that the judge erred in his assessment of the expert evidence of Professor Bluth, in that, the judge said that he only placed some weight on the expert's report because the expert had assessed the appellant's evidence on the basis that he had no close family in Vietnam whereas, as argued in ground 4, the judge erred in assessing the appellant's circumstances in Vietnam. Accordingly, following on from ground 4, the judge also erred in his approach to the expert's evidence.

This ground is unarguable for the following reasons:

(i) Firstly, the judge did not arguably err in law as contended in ground 4.

(ii) Secondly, the remainder of ground 5, which seeks to rely upon other aspects of the evidence of Professor Bluth, ignores the fact that, at para 25 of the judge's decision, he made it clear that the only aspect of the evidence of Professor Bluth that he had difficulty with was the fact that he had relied upon the appellant's evidence that he had no family or other ties in Vietnam. There is no reason to think that the judge had difficulty with any other aspect of the evidence of Professor Bluth. Nor is there any reason to think that he did not take all aspects of Professor Bluth's report into account, particularly as he said at para 18 of his decision that he had taken all the evidence into account.

It is simply unarguable that the judge erred in his assessment of the remainder of the report of Professor Bluth. For example, he specifically took into account the likelihood of the appellant being able to obtain household registration – see para 24. In any event, this part of ground 5 ignores the fact that the judge found that:

(a) The appellant has a sister who is living in Vietnam (para 25);
(b) He would be able to obtain support from the siblings and parents of his partner (para 25);
(c) The evidence produced by the respondent and as described in the refusal letter shows that treatment for diabetic retinopathy was available in Vietnam although affordability of care and treatment may be an issue for those living in remote areas (para 26); and
(d) His children in the United Kingdom would be able to give him financial support in order to access treatment (para 26).

3. Ground 6 (paras 7-10 of the renewed grounds) is that the judge erred in law in his consideration of the appellant's Article 3 and Article 8 claims based on his medical condition. This ground is wholly unarguable given the high threshold for Article 3 claims based on medical condition and, in any event, given para 2(a), (b), (c) and (d) above. Again, in reality, this ground amounts to no more than an attempt to re-argue the case.
4. Ground 7 (paras 11-12 of the renewed grounds) is that the judge erred in law in concluding that there were no very compelling circumstances over and above the exceptions. This ground is also unarguable for the following reasons:

(i) Firstly, para 11 of the grounds contends that the judge's finding that the appellant plays no meaningful part in [A]'s life was not supported by any of the evidence before him. This aspect of ground 7 simply ignores the judge's reasoning at para 28 of his decision. Again, this part of ground 7 amounts to no more than an attempt to re-argue the case, albeit that the ground is advanced as an assertion that the judge's finding was speculative because there was no evidence to support it. There plainly and unarguably was such evidence.

(ii) The remainder of ground 7 contends that [A]'s mother lacks the ability to help [A] with his homework and to help [A] understand the other aspects of life relevant to a child growing up in the United Kingdom. This part of ground 7 is also unarguable. In the first place, the judge made it clear that he had considered all of the evidence. He did not need to specifically refer to the social worker's report at para 28 of his decision. Secondly, and in any event, this part of ground 7 ignores the judge's finding, which was unarguably open to him on the evidence for the reasons he gave (see para 28), that the appellant plays a minimal role in the life of [A] and that "*he can in no way be said to have been a source of stability, security, emotional or financial support for him".* Furthermore, this part of ground 7 ignores the reasoning of the Court of Appeal in SSHD v PG (Jamaica) [2019] EWCA Civ 1213 in which the Court of Appeal said, in relation to the fact that PG had been able to intervene when his son had been threatened with a knife, *could not* elevate the case above the norm so as to make it unduly harsh for the wife/son to remain in the IK without him. This judgment not only demonstrates the elevated threshold in establishing what amounts to "unduly harsh" but the consequential high threshold for the requirement to show that there are very compelling circumstances over and above the exceptions.

All of the renewed grounds are therefore wholly unarguable. In the main, they contend that the judge failed to consider various aspects of the evidence and/or that his findings were speculative but, in reality, they amount to no more than an attempt to re-argue the case."

6. The issues raised by the grounds which the Appellant has permission to argue were helpfully summarised by Ms Pinder in her skeleton argument as follows:

Ground One: Whether the Judge properly considered and evaluated the evidence in relation to the danger which the Appellant poses to the community for the purposes of Section 72;

Ground Two: Whether the Judge failed properly or at all to consider whether any changes in Vietnam were durable taking into account the views of UNHCR, the background evidence and the expert report of Professor Bluth.

Ground Three: Whether the Judge failed to consider compelling circumstances when considering whether it was appropriate to cease refugee status.

7. The matter comes before us to assess whether the Decision does disclose an error of law and to re-make the decision or remit to the First-tier Tribunal for re-hearing.

Discussion and Conclusions

Ground three

8. We can deal shortly with ground three. Having considered the Respondent's Rule 24 reply, Ms Pinder accepted that the Appellant could not rely on the "compelling reasons" exception to Article 1C(5) as that applies only to statutory refugees and the Appellant is not such a refugee (see AMA (Article 1C(5) – proviso – internal relocation) Somalia [2019] UKUT 11 (IAC) – "AMA"). She drew our attention however to the Respondent's "Asylum Policy Instruction, Revocation of Refugee Status: Version 4.0" which says the following about this exception:

> "Article 1C(5) and (6) of the Refugee Convention contain an exception to the cessation provisions, allowing a refugee to invoke 'compelling reasons arising out of previous persecution' for refusing to re-avail himself or herself of the protection of their country of origin.
> This exception applies to cases where refugees, or their family members, have suffered truly atrocious forms of persecution and it is unreasonable to expect them to return to their country of origin or former habitual residence. This might, for example, include:
> - Ex-camp or prison detainees
> - Survivors or witnesses of particularly traumatic violence against family members, including sexual violence
> - Those who are severely traumatised
>
> The presumption is that such persons have suffered grave acts of persecution, including at the hands of elements of the local population, and therefore cannot reasonably be expected to return. **Application of the 'compelling reasons' exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees and reflects a general humanitarian principle.**

> As this provision is expected to apply only in the most exceptional of cases, any decision not to proceed with revocation on this basis must be taken by a senior caseworker."
> [our emphasis]

9. Ms Pinder of course relies on the words which we have emboldened above. We remind ourselves that we are here dealing with whether there is an error of law in the Decision. We accept that this issue was raised at [21] of the Appellant's skeleton argument before the First-tier Tribunal. We accept that it is not addressed directly by the Judge although he does refer to AMA at [24] of the Decision. However, we would not have found this ground to demonstrate a material error of law taken alone based on the facts and circumstances of the Appellant's case for two reasons. First, as is said in the headnote of the decision in AMA, "[t]he SSHD's guidance regarding the role of past persecution cannot in itself form a lawful basis for finding that removal would lead to a breach of the Refugee Convention, given the limited appeal rights at section 82 of the Nationality, Immigration and Asylum Act 2002, as amended.." Second, what is required is "the most exceptional of cases" based on "truly atrocious forms of persecution" such that it would be unreasonable to expect the individual to return to his home country. That is not this case.

Ground Two

10. Although much of the focus of the submissions to us was on the first of the grounds, Ms Pinder agreed with our view that it makes sense to consider ground two first as, if there is an error in relation to the Judge's analysis of the cessation issue, it is not necessary to go on to consider the Section 72 issue. As a matter of logic, if refugee status can lawfully be ceased, it is no longer relevant whether an individual could be excluded from protection of the Refugee Convention as it would no longer apply.

11. Article 1C (5) of the Refugee Convention ("hereafter the Cessation Clause") provides as follows:

> "This Convention shall cease to apply to any person falling under the terms of Section A if:
> …
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."

UNHCR Cessation Guidelines provide that for the Cessation Clause to be applicable, the changes in an individual's country of origin must be "fundamental and durable". Article 11 of Council Directive 2004/84/EC (the Qualification Directive) provides that the changes must be "of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm".

12. Our attention was drawn to a letter dated 13 September 2017 in which the Respondent put the Appellant on notice that she intended to cease/revoke his refugee status. In relation to the Cessation Clause, the Respondent noted that the Appellant's refugee status was obtained on the following basis:

> "11. As noted above, you were issued with a UK visa marked Settlement/Refugee in Hong Kong. In your letter dated 26 June 2017, you stated life was extremely difficult in Vietnam for you and your family. You managed to escape from Vietnam in 1980 but you were caught by the Chinese authorities and detained for four years. You managed to leave China and spent six years in a United Nations Refugee Camp in Hong Kong. A generous person helped you to come to the UK. After landing in the UK you claimed asylum and you were given indefinite leave to remain (ILR). The ILR was renewed in 2010 for another ten years expiring in 2020. There would be significant obstacles to your re-integration to Vietnam as you have not been there since 1980.
> 12. By letter dated 1 September 2017, your legal advisors Kadmos Consultants stated you fled Vietnam as a war deserter in 1990 at the age of 19 and you have not visited Vietnam since then. You have no ties with your family in Vietnam. If you are returned to Vietnam you will be destitute as you will not have a realistic prospect of finding a job at your age or be able to maintain yourself through savings or support from other family members. There is no system of social assistance that you could rely on."

13. The Respondent thereafter considered developments in Vietnam since the Appellant's departure. The Respondent gave specific consideration to the basis of the Appellant's original claim at [16] to [20] of the letter. She noted that fear of prosecution and punishment for desertion or draft-evasion did not amount to a well-founded fear of persecution in and of itself within the Refugee Convention and that Vietnam withdrew its troops from Cambodia in 1989. This was considered to be "a significant and durable change" in the situation for the Appellant in Vietnam ([17] of the letter).

14. The Respondent had regard to a 2001 document from the Research Directorate, Immigration and Refugee Board, Canada at [18] of the letter which reads as follows:

> "After the unification of South and North Vietnam in 1976 thousands of people fled from Vietnam, many of them being draft evaders and deserters. In the Memoranda of Understanding that were signed between the Vietnamese government and the United Nations High Commissioner for Refugees, provisions were made about not persecuting those who returned for military crimes. There are no known cases of returned refugees having been punished for draft evasion or desertion, although it must be noted that reliable information on such matters is hard to obtain from Vietnam."

15. The UNHCR provided its comments in relation to cessation and revocation by letter dated 6 April 2018. Our attention was drawn in particular to the following comments:

> "It is the opinion of UNHCR that the current situation in Vietnam as outlined below does not warrant the application of Article 1C(5) of the 1951 Convention on an individual or collective basis. Its application in this instance appears only to have been triggered by [CT]'s criminal convictions. UNHCR notes that:
>
> (i) The situation in Vietnam has not fundamentally and durably changed in the sense that would permit a reasonable and well justified application of Article 1C(5). It is important that the HO objectively discharges the burden of proof, by presenting material facts, which point towards and demonstrate the specific fundamental and durable changes in Vietnam that warrant the application of this provision; and
>
> (ii) There must be a clear connection between the fundamental and durable changes being relied upon by the HO to apply Article 1C(5) and the individual circumstances of [CT], addressing [CT]'s particular cause of fear and persecution. UNHCR notes with concern that the HO have not disclosed the circumstances which led [CT] to being recognised as a refugee. UNHCR wishes to emphasise that the HO should take further steps to obtain additional information regarding the circumstances under which [CT] fled Vietnam and his recognition as a refugee. UNHCR notes that it is accepted that [CT] was previously imprisoned in China. Therefore, UNHCR urges the HO to consider whether [CT]'s personal profile or history of political affiliations or other activity may put him at risk of attracting adverse attention of the Vietnamese authorities."

16. As we observed at the hearing, establishing the basis of the Appellant's refugee status may not be straightforward since he was originally recognised in Hong Kong. Furthermore, speaking for ourselves, we would not make the criticism which UNHCR does in its letter, bearing in mind the passage of the September 2017 letter which we have set out at [12] above. As is there indicated, and as the Appellant and his advisers have put forward, refugee status in this case was based on the Appellant's position as a draft evader/deserter. The UNHCR letter goes on to deal with that basis of claim generally and concludes by urging the Respondent "to assess whether the circumstances which led [CT] to flee Vietnam and be recognised as a refugee continue to exist on an individual basis, taking into account his experiences". The letter then moves on to deal with the general conditions in Vietnam.

17. The Respondent revisited the issue of cessation in her letter dated 24 May 2018. Having re-stated the contents of the September 2017 letter, she considered the UNHCR letter and representations made by the Appellant's legal advisers. Most of what is there said relates to the general conditions in Vietnam. At [40] of the letter, the Respondent said the following about risk on return:

> "40. It was shown in the letter of 13 September 2017 and herein that although you left Vietnam as a war deserter, there are no known cases of returned refugees having been punished for draft evasion or desertion, and consequently it is not accepted that you will be at risk from the authorities for having deserted the army or for having left the country illegally."

The Respondent went on to consider background information about risks to those opposed to the Vietnamese government but noted that the Appellant did not claim to have any political profile and would not therefore be at risk on that account. That assessment was imported into the Respondent's decision under appeal.

18. The Judge's consideration of the cessation issue appears at [23] to [25] of the Decision as follows:

> "23. The Respondent maintains that it is not accepted that the Appellant continues to face treatment amounting to persecution on return to Vietnam as it has been concluded that the objective evidence indicates that the change of country situation is significant and durable and obviates the circumstances upon which the Appellant was recognised as a refugee. In this respect, I was referred to the (non-binding) UNHCR letter dated 6.4.2018 which urged, amongst other things, a full assessment of the Appellant's family ties in Vietnam and obtaining further information about the family ties of the Appellant in the UK as well as stating that the Respondent has not discharged the burden of truth. In relation to the comments in the UNHCR letter, the Respondent in its letter of 24.5.2018 stated that there are no known cases of returned refugees having been punished for draft evasion and desertion and it was not accepted that he would [be] at risk from the authorities for having deserted.
> 24. I was also referred to the country expert report of Mr Christopher Bluth. In respect of that report, I was asked by Mr Bassi to bear in mind that the report makes little reference to the Appellant's partner and no reference to his sister who was said to be living in Vietnam by two of the Appellant's children. The report refers to the Appellant as having no family network in Vietnam. Mr Bassi also asked me to note that the report stated only that the Appellant *"may be unable to obtain household registration and have difficulty accessing healthcare"* [my underlining]. Mr Sellwood referred me to, amongst other things, the case of **AMA (Article 1C(5) – proviso – internal relocation) Somalia [2019] UKUT 00011 (IAC)** and emphasised the UNHCR letter and the comments in the report of Professor Bluth as to the risk of re-trafficking and the logistical difficulties relating to household registration.
> 25. The Appellant's witness statement of 21.6.2019 refers to his sister having lived in the UK but having returned to Vietnam on holiday, becoming ill and still being there. At the hearing [JT] was asked whether her father had any family members in Vietnam and she answered that he has a sister there who also has two children. [CT] was also asked what family members his father had back in Vietnam and he answered a sister. I do not accept, based upon the evidence given at the hearing, that the Appellant has no family members or family network in Vietnam and I find that his sister is living in Vietnam with her children such that the

> Appellant would have some family network there which would be able to offer support to him and assist him with some of the difficulties referred to in the report of Professor Bluth. I note also that the Appellant's partner has two sisters and a younger brother living in Vietnam by her own account and that, by the account of the Appellant, her parents are also living in Vietnam although his partner sated that they were deceased. I find that the family members of Appellant's partner would also be able to offer support to the Appellant. Overall, I do give some weight to the report of Professor Bluth but certainly not conclusive weight particularly as I consider that it has not engaged as fully as it could have done with family members of the Appellant and his partner currently living in Vietnam (as urged in the UNHCR letter) but simply states and bass some of its findings on the Appellant having no family or other ties in Vietnam which I do not accept as being correct. Having considered all the evidence on this issue, I do not accept that the Appellant would face treatment amounting to persecution or such that he would be in need of humanitarian protection based upon Article 3 grounds (on grounds of ill-health is considered below).

19. We remind ourselves that the Appellant does not have permission to argue that the Judge erred when considering cessation based on the general situation and his family circumstances in Vietnam. Given the detailed consideration given to those issues in the passage of the Decision cited above, it is unsurprising that permission was not granted on that ground. Permission was however granted on the basis that the Judge failed to make any finding whether there was a fundamental and durable change in relation to risk and to provide reasons why such change had occurred.

20. The Judge refers to the UNHCR letter at [23] of the Decision (cited above). He was of course entitled to note that the letter is not binding. When dealing with the issue of individual risk, however, the Judge refers only to the Respondent's assertion that there are "no known cases of returned refugees having been punished for draft evasion and desertion" and therefore that a risk on that account was not accepted. He notes that the Respondent maintains that there had been a fundamental and significant change such that the reasons why the Appellant was recognised as a refugee had ceased to exist but thereafter fails to make any finding whether that case is established.

21. The Judge had before him a report of Professor Christoph Bluth dated 10 December 2017. Professor Bluth is a Professor of International Relations and Security at Bradford University with considerable knowledge of the situation in Vietnam. The Judge referred to his report at [24] of the Decision (cited above) but only in the context of the general situation in Vietnam. As Judge Gill noted when refusing permission on the renewed grounds, the Judge does not take issue with Professor Bluth's report other than in relation to the general situation based on his acceptance of the Appellant's assertion that he has no family in Vietnam. We note that the majority of the report is concerned with this aspect of the Appellant's case and with trafficking.

22. However, the Judge does not refer to those parts of Professor Bluth's report which deal with the individual risk to the Appellant. In particular, Ms Pinder drew our attention to the following passages from the report:

> "5.5.2 There is doubt as to whether the Vietnamese government will permit the return of the appellant to Vietnam. This doubt exists due to the past practice of the Vietnamese government to refuse to permit the return of persons convicted of serious crimes.
> …
> 5.5.9 If the appellant were to be returned, he would face interrogations by Vietnamese officials. At arrival at the airport in Hanoi or Ho Chi Minh City, returned Vietnamese are interrogated by immigration officials. Questions are asked about where they have been, their activities and contacts abroad, their reasons for return and their destination in Vietnam. This "self-statement" amounts to a form [of] interrogation which according to a programme officer of the International Organisation for Migration (IOM) in Hanoi occurs before they go through immigration and can take an hour. 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 showed particular interest in asylum seekers who worked with foreigners or foreign voluntary agencies, or engaged in anti-Communist or other political activities. In this particular case it will be the criminal conviction of the appellant that will attract the attention of the authorities.
> 5.5.10 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". The report discusses an example relating to "thirteen potential refugees who received UNHCR protection in Phnom Penh", and who were returned to Vietnam independently were "interrogated extensively by authorities upon their return". Desertion from the army is an offence. Under the Vietnamese criminal code a military deserter is liable to be sentenced to up to two years of re-education in a military punishment unit or can be imprisoned for a period from six months to five years. A deserter is also potentially liable under the provisions of the military service law, under which they can be imprisoned for six months to two years. In principle a person could also be tried for offences committed in another country even if he has already [been] prosecuted abroad.
> 5.5.11 Prison conditions in Vietnam are very harsh, including for those arrested for their political opinions. Prisons are overcrowded, many of the prisoners are infected with HIV, there is a systematic mistreatment of prisoners and political prisoners are mixed in with violent offenders. Both the appellant's desertion from the armed forces and the drug offences he was convicted for in the United Kingdom are capital crimes in Vietnam that can attract the death sentence. There is a serious risk that the

> appellant will be interrogated and mistreated by the Vietnamese authorities.
>
> **6. Conclusion**
>
> …
>
> 6.2 As a deported person who previously held refugee status, the appellant will face interrogation upon arrival. As a convicted criminal who left Vietnam before 1995 the Vietnamese authorities will not consider that they are required to accept him and so it may not be possible to return him to Vietnam. His deportation may also cause the authorities to review his desertion from the armed forces which puts him at risk of serious ill treatment."

23. We do not view the evidence of Professor Bluth as to returnability (based on lack of Memoranda of Understanding) as of any significance to the revocation issue. If the Respondent is unable to return the Appellant, that may ultimately be relevant to an Article 8 assessment but not to the risk on return. We are in any event unable to discern the source of Professor Bluth's assertion that no such MOU exists between Vietnam and the UK.

24. Neither do we view as significant Professor Bluth's evidence about the interest of the Vietnamese authorities in their political opponents. We can find nothing in the evidence to suggest that the Appellant has ever claimed to have a political profile or, for that matter, any anti-government views.

25. We do however accept that the Judge has failed to engage with Professor Bluth's evidence as to individual risks and to determine whether there is such a fundamental and durable change in Vietnam that the Appellant would be at risk by reason of the original reason why he was determined to be a refugee, namely because he was a deserter/draft evader. The Judge has failed to mention the Cessation Clause; indeed, we are not clear from the Judge's analysis that he recognised that cessation of status was part of the appeal to be determined (even though this was raised in the grounds and skeleton argument). The findings on the protection issue as appear at [25] of the Decision read as if the Judge was determining a protection claim (where the burden of establishing the risk lies with the Appellant) rather than considering cessation of status where the burden is with the Respondent.

26. As we observed during the course of submissions, the issue of individual risk as a draft evader/deserter is not a central part of Professor Bluth's report. As we also pointed out, a number of the sources for the assertions in this part of the report are quite historic (mainly the US State Department report for 2005). We accept though Ms Pinder's submission that the sources on which the Respondent relies are also old (2001). We note that there appears to be an inconsistency between what Professor Bluth says at [5.5.10] and [5.5.11] about the penalties for draft evasion/desertion. There is little if any consideration of the extent to which prosecutions are brought in that regard. The Respondent's case is

that there are no known cases of such prosecutions. However, Professor Bluth does refer to what appears to be a 2013 report at footnote [52] which relates to deserters. He does not say what that article/report shows nor were we shown a copy of it. There is however no consideration of that evidence by the Judge.

27. Although we feel bound to comment on the paucity of evidence in relation to the individualised risk as a draft evader/deserter, we remind ourselves that the burden of proof in relation to cessation falls on the Respondent. We also repeat the point we make above that, in the context of a revocation of protection appeal, a determination of whether the Cessation Clause is satisfied is crucial. For that reason, we conclude that there is an error of law disclosed by the Appellant's ground two and that this error is material. The Appellant is entitled to reasons why cessation of his status is appropriate. For that reason, we set aside the Decision.

Ground One

28. As we began by saying, if we found for the Appellant on ground two, it would not strictly be necessary for us to deal with the Section 72 issue. If we had been against the Appellant on ground two, however, we would not have found an error on ground one. We therefore need to consider whether it is appropriate for us to preserve Judge Swinnerton's conclusions on this issue.

29. As Ms Pinder fairly accepted, the OASys report contains defects as identified at [20] of the Decision. Although Ms Davies, in her report, does explain why the OASys report may have been carried out as it was (given the difference in nature between the most recent offence and the earlier offences), the Judge was nonetheless entitled to rely on the deficiencies in the OASys report and to give little weight to the assessment for that reason. Ms Davies points out that the risk of reconviction scores in the OASys report were calculated before the rehabilitative efforts (which the Respondents says can be given little weight because they have been made within a controlled environment). As Ms Davies also points out, there is reference to the earlier, more serious offences in the report, but the later sections have not been completed because the more recent offence was not one involving risk of serious harm. As such, Ms Davies' points do not deal with the Judge's reason for giving little weight to the report because the OASys report does not include a complete assessment.

30. Furthermore, the Judge considered the risk of reoffending based on the evidence recorded at [19] to [22] of the Decision. His assessment whether the Appellant has rebutted the presumption in Section 72 and has shown that he is not a danger to the community therefore incorporates wider considerations. The Judge was entitled to reach the conclusion he did for the reasons he gave.

31. Although we have reached that conclusion, we do not preserve Judge Swinnerton's findings on this issue. We do not do so because there is a later OASys report on which the Appellant seeks to rely dated 8 August 2019. As such, it is appropriate for another Judge to consider this issue on the most recent evidence. We repeat the point we make above, though, that if another Judge finds that the Appellant's refugee status can be ceased, applying the Cessation Clause, there is no need to go on to consider the Section 72 issue.

32. Finally, we do not preserve Judge Swinnerton's findings on the human rights grounds (Article 3 and 8 ECHR). Those issues are to be determined as at date of hearing. Although the Appellant was not granted permission to challenge Judge Swinnerton's findings on these issues, it is appropriate that those be reconsidered based on any up-to-date evidence on which the Appellant wishes to rely.

33. For the above reasons, we find an error of law on ground two (the cessation issue). We set aside the Decision. The parties invited us to remit the appeal in the event that we found an error of law. Although the error of law is found on a narrow basis, for the reasons we have given it is not appropriate to preserve any of the findings. In relation to the appropriate forum for the re-making of the decision, we have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

Having regard to the failure of Judge Swinnerton to determine one of the fundamental issues in this appeal, we are satisfied that the appropriate course is to remit the appeal to the First-tier Tribunal for redetermination.

DECISION

We are satisfied that the First-tier Tribunal decision of Judge K Swinnerton promulgated on 5 July 2019 involves the making of a material error on a point of law. We set aside that decision. We remit the appeal to the First-tier Tribunal for rehearing before a Judge other than Judge K Swinnerton.

Signed  Dated: 11 November 2019
Upper Tribunal Judge Smith