Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03763/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24 May 2017

Decision & Reasons Promulgated
On 01 June 2017

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

PVT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Singer, counsel instructed by Russell Wise Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge I Ross, promulgated on 9 January 2017. Permission to appeal was granted by First-tier Tribunal Judge M Robertson on 20 April 2017.

Anonymity

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2. A direction has been made previously, and is reiterated below.

Background

3. The appellant arrived in the United Kingdom on 25 August 1994 with his wife, having been recognised as a refugee in Hong Kong. During January 2008, the appellant was convicted of conspiring to supply a Class C drug; producing a Class C drug, cultivating cannabis plants, money laundering and abstracting electricity and was sentenced to a total of 8 years' imprisonment. On 7 October 2011, the respondent decided to revoke the appellant's refugee status. His appeal against that decision and the decision to deport him was dismissed.

4. The appellant applied for asylum on 11 March 2014. The appellant's protection and human rights claim was refused on 12 April 2016. The respondent considered that the appellant had failed to rebut the presumption in section 72 of the Nationality, Immigration and Asylum Act 2002; that some aspects of his protection claim had been rejected by a judge in 2013; that he had involved himself with a political group in the United Kingdom only after he was facing deportation and that he failed to mention this during his previous appeal; he was excluded from eligibility for Humanitarian Protection and that no fresh information or very compassionate circumstances had been raised in respect of Article 8 ECHR since his appeal was dismissed.

The hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, the appellant and a Mr Clive Lindsay gave evidence. The judge found that the appellant had not rebutted the presumption under Article 33(2)/Section 72 of the 2002 Act and that he represented a danger to the community. His Article 3 appeal was dismissed, with the judge finding that he did not have a significant political role and was not a credible witness.

The grounds of appeal

6. The grounds of appeal challenged the judge's finding that a letter from a witness HG was unreliable; argued that the judge did not state whether he accepted Mr Lindsay's evidence as to the appellant's political involvement; that the judge dismissed or reduced the weight accorded reports by Professor Thayer, Professor Bluth and Amnesty International; that the judge failed to engage with the evidence of monitoring by the Vietnamese authorities abroad and the judge failed to consider evidence that the appellant had been photographed in prominent positions at every demonstration and one of these had been published by BBC Vietnam.

7. Permission to appeal was granted on the basis that as the evidence of Mr Lindsay was not mentioned, this may arguably be an error of law material to the outcome of the appeal.

8. Furthermore, Judge Robertson considered that there was no mention of the report of Professor Bluth and she was of the view that the judge's permissible findings on the reports of Professors Seddon and Thayer as well as that of Amnesty International may need to be re-examined should there be favourable credibility findings.

9. The respondent's Rule 24 response, received on 4 May 2017 opposed the appellant's appeal and submitted that the judge of the First-tier Tribunal directed himself appropriately. The judge had referred to the oral evidence of Mr Lindsay and correctly found that this did not take matters further than the background reports; he adequately dealt with the evidence of HG and the grounds were inaccurate to state that the judge failed to mention or consider the evidence of Professor Bluth. The response drew attention to the decisions in VHR (unmeritorious grounds) Jamaica [2014] UKUT 00367 (IAC) and VW (Sri Lanka) [2013] EWCA Civ 522. The grounds were dismissed as mere disagreement.

The hearing

10. Mr Singer submitted that the appeal concerned Article 3 alone; particularly the manner in which the First-tier Tribunal dealt with the expert evidence. He argued as follows. The appellant's fresh claim concerned his *sur place* political activities. These were not low level in that he was co-ordinating activities. The issue before the judge was whether the appellant's claims were true. The appellant called a witness, Clive Lindsay who was cross-examined for 10 minutes. No mention was made of Mr Lindsay's evidence. Nor was there any assessment of Professor Bluth's evidence as set out in two 2 expert reports. Professor Bluth's evidence went to the level of scrutiny that the Vietnamese authorities address to opponents.

11. Mr Singer spent some time on the judge's findings that there were inconsistencies between the appellant's description of his political activity and reality. He argued those findings were not safe if judge failed to make findings on Mr Lindsay's evidence or failed to adequately reason his findings. The same could be said of the evidence of Professor Bluth. Acknowledging the respondent's position, Mr Singer agreed that the judge did not have to particularise everything, however he contended that the evidence of Mr Lindsay was material and weighty.

12. Referring to YB (Eritrea) v SSHD [2008] EWCA Civ 360, Mr Singer criticised the judge for requiring affirmative evidence that the appellant was definitely photographed and these photographs would be sent to the Vietnamese authorities. The judge was provided with photographs of the appellant, some of which were publicly available on Facebook, You Tube and on the BBC website. This evidence could not be dismissed as immaterial and if taken into consideration the assessment of the appellant's credibility and the level of risk on return would have been different. He argued that the case was suitable for remittal owing to

unsafe credibility findings and that there needed to be a new fact-finding exercise on the *sur place* issue.

13. For the respondent, Mr Clarke addressed the grounds in order. Firstly, he asked me to note that HN's letter raised an allegation of solicitor misconduct, yet there had been no compliance with the findings in BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311. Furthermore, the copy of the appellant's letter to his solicitors, Victory @ Law, was unsigned and occurred 2 years after the event, there was no evidence it was sent and there were no follow up letters. Mr Clarke argued that it was hard to see how far HN's letter went in demonstrating solicitor misconduct. Mr Clarke reminded me that the appellant had previously been found not to be a truthful witness. There was a lack of medical evidence in relation to the non-attendance of HN and in any event the appellant's evidence was that he did not ask him to come.

14. Mr Clarke described the arguments in support of the second ground as misconceived. The judge noted that the evidence of Mr Lindsay was internally consistent but that it was different to that of the appellant. The judge found that the appellant was merely a steward. This was inconsistent with Mr Lindsay's evidence that the appellant was a co-organiser. The issue as to when the appellant started his sur place activities went to credibility given that the judge noted that he took part in two demonstrations in 2012 and two in 2013 and would have been aware of this at his 2013 appeal hearing. The judge directed himself appropriately, with reference to the previous judge's findings as well as the description in the probation report of the appellant as predatory and manipulative. He conceded that the judge did not go through the evidence of Mr Lindsay, he gave very clear findings based on the appellant's evidence and Mr Lindsay's evidence did not advance the appellant's case as it was inconsistent. It was open to the judge to find that the appellant's activities were exaggerated.

15. Mr Clarke argued that YB (Eritrea) concerned a different country and that it was wrong to take that case as the basis for saying no evidence was needed to demonstrate surveillance. The judge was entitled to take the circumstances of the founder of the organisation in issue, who returned to Vietnam without problems and was enlisted into the army. His subsequent arrest was for something different and therefore even with his profile, he was not at risk. The reports of Professors Seddon and Thayer provided no evidential basis for the existence of monitoring of opponents. Professor Thayer's report contained only a series of assertions, with the only footnote relating to his own role at the University of New South Wales. Mr Clarke summed up the appellant's case as follows. His role in the organisation was low-level work as a steward; there was no evidence of surveillance; no evidence of members of the organisation being

persecuted; no evidence of informants or monitoring and therefore it was open to the judge to find there was no risk on return.

16. In reply, Mr Singer argued that the judge cherry-picked the appellant's evidence. It could be seen from the appellant's witness statement that there was more to what the appellant saying about his activities than that stated in his oral evidence. While it was right that the appellant said that there was no evidence that he had persuaded others to join the organisation, he was referring to corroborating evidence and there was no inconsistency between his evidence and that of Mr Lindsay. The appellant's evidence was capable of being consistent with that of Mr Lindsay, however the judge did not say if Mr Lindsay was telling the truth. Even if the sur place activities were undertaken by the appellant to bolster his claim, that came within the directive, Danian considered. Lastly, that the founder of the movement was not arrested on his return to Vietnam over 7 years ago did not mean that the appellant would not be at risk. It was not necessary for the appellant to show that persecution was routine but that there was a real risk of it occurring.

17. At the end of the hearing, I reserved my decision.

Decision on error of law

18. The judge neither set out nor assessed the reliability of the evidence of Clive Lindsay in respect of his knowledge of the appellant's political activities. The witness is briefly mentioned at [8] in the following terms, "*Mr Clive Lindsay gave evidence in accordance with his witness statement*. *His assessment of the risk faced by the appellant in Vietnam was based on the contents of an Amnesty International Report and also Professor Thayer's report*." Mr Lindsay became Farnham's Amnesty International's co-ordinator in relation to Vietnamese Prisoners of Conscience from 2007 onwards. This role involved organising an annual protest outside the Vietnamese embassy, sending out letters of support by group members and keeping the group updated on the situation in Vietnam via speakers, information, reports and urgent actions. He became aware of the appellant's participation in demonstrations since 2012, describing him as "*one of the main initiators of protest amongst the UK Vietnamese diaspora with whom (he) had contact*." He further describes the appellant as a co-founder of UK Vietnamese Youth for Democracy, co-organiser of its protests and being responsible for increasing the attendance of younger Vietnamese at Amnesty protests. He gives detailed examples of the appellant's involvement in these activities. This evidence was deserving of some assessment and if it was rejected, at least some reasoning ought to have been provided.

19. The judge was of the view that the appellant had grossly exaggerated his involvement, referring to aspects of the appellant's witness statement and his evidence at the hearing in doing so. Mr Singer was right to describe this as cherry-picking. At [37] the judge finds that the appellant's role was no more than as an occasional steward at demonstrations. Yet, the appellant's description of his role in Viet Youth for Democracy was far more extensive than this and includes his claim that he invited people to join and support the organisation, that he had encouraged many new members to join and was jointly responsible for the organisation of demonstrations with Mr Lindsay and HN. The appellant's claims in his witness statement were supported by the written evidence of Mr Lindsay.

20. It is regrettable that the judge did not explain why he rejected this evidence or why he found that the appellant was not instrumental in the founding of the group and had no directing role in it. The appellant's oral evidence that there was no evidence that others had joined the group because of his activities was not an admission but a statement of fact, attesting to a lack of corroboration.

21. The judge dismisses the evidence of Professor Thayer because he has already decided that the appellant's account of his activities is not to be believed. He did not indicate whether he accepted Professor Thayer's expertise or his detailed evidence as to the surveillance methods used by the Vietnamese authorities including the use of informants among the Vietnamese community. The use of monitoring of dissidents by the Vietnamese authorities was referred to in the decision notice as well as by Mr Lindsay who gave eye-witness evidence to that effect. In any event, the judge concluded that the risk of return was "wholly dependent" on whether the appellant was telling the truth as to the extent of his involvement and whether the reports of embassy staff taking photographs and monitoring demonstrator were accurate. For reasons given above, the judge's findings as to the appellant's involvement are unsafe.

22. Furthermore, I have had regard to what was said in YB (Eritrea) as follows at *[18]:*

Where, as here, the tribunal has objective evidence which "paints a bleak picture of the suppression of political opponents" by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups."

23. Given the large quantity of expert, background and eye-witness evidence all pointing to the existence of surveillance of opponents by the

Vietnamese authorities, it is possible that had the judge not made the errors identified, the outcome of the appeal could have been different.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge Ross.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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.

Signed Date 19 July 2017

Upper Tribunal Judge Kamara