



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/02354/2018

THE IMMIGRATION ACTS

Heard at Field House
On: 28 September 2018

Decision and reasons Promulgated
16th October 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MINH [V]
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S Mahmud of Counsel

For the respondent: Ms S Vidyad Hanan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a national Vietnam born on 1 December 1999. He appealed to the Upper Tribunal against the decision of First-tier Tribunal Judge Connor promulgated on 30 May 2018 refusing his appeal against the decision of the respondent dated 26 June 2015 refusing his claim for asylum and humanitarian protection in the United Kingdom.

2. Permission to appeal was given by First-tier Tribunal Judge ID Boyes dated 31 July 2018. She was of the view that it was arguable that the Judge may have erred by failing to consider the case as a whole and by failing to give weight to certain witnesses. The Judge also failed to apply the standard of proof correctly.

3. Thus, the appeal came before me.

First-tier Tribunal's findings

4. The First-tier Tribunal Judge in his decision made the following findings which I summarise. The appellant fears returning to Vietnam as he fears persecution from nonstate actors and the government is not able to protect him from them. The appellant believes he would be at risk of human trafficking as a young person and he would have difficulty internally relocating. This risk is exacerbated because his father was not able to satisfy the gangsters and also because the appellant does not have any family or support in Vietnam.

5. The appellant made a claim for asylum after he entered the United Kingdom 7 October 2014 and his appeal was dismissed in a decision by First-tier Tribunal Judge Woodcraft dated 27 October 2016, but granted him limited leave as an unaccompanied minor until he reached the age of 17 ½ years.

6. In accordance with the principles of **Devaseleen**, the decision of Judge Woodcraft is the starting point. The appellant's appeal is based on his rights under Article 8 of the European Convention on Human Rights but and the findings made by Judge Woodcraft are relevant to his assessment under Article 8. The decision of Judge Woodcraft is of particular relevance in relation to the appellant's credibility and whether his family/father is in Vietnam, and the assessment of risk the appellant faces if he is returned to Vietnam.

7. The appellant's lack of credibility is evidenced by the fact that he lied to the French authorities about his true identity and this concerned Judge Woodcraft that the appellant would also lie to the United Kingdom authorities as to his identity. Judge Woodcraft did not find the appellant's account as to what happened to him after he left Vietnam credible. The Judge did not accept that the appellant's father who was arrested together with the appellant and fingerprinted had lost contact with his father. The Judge found that the appellant returned to Vietnam with his father. Judge Woodcraft also do not accept that the appellant had been trafficked therefore did not find the appellant would be on his return to Vietnam. The Judge considered the report of Prof Bluth which was based on the concept of the appellant being particularly vulnerable because he had been trafficked to the United Kingdom. Judge Woodcraft found that the appellant was returned as a resourceful young man had made a life for himself in the United Kingdom and did not fit the profile of a person vulnerable to trafficking. His father who was evidently not short of money spent a lot of money to send the appellant to send him to Europe.

8. The appellant was not uneducated as he was able to attend school in Hanoi and did not come from a rural area. The appellant does not have vulnerabilities and his only

vulnerability is his age which can be mitigated because his father remains in Vietnam and there are NGO support mechanisms for children in Vietnam.

9. In respect of Article 8, the Judge accepted that the appellant has established a private life in the United Kingdom as he has made a number of friends supported his application including his teacher Miss Patel has found him to be an engaging young man who she fully supports. However, these friendships have been developed when his immigration status was precarious. Regard must be had to section 17B of the Nationality, Immigration and Asylum Act 2002 as the appellant should have had no expectation that his leave to remain would be increased. Whatever relationships the appellant has built in this country can maintained through modern means of communication.
10. Judge Woodcraft found that the appellant has not been honest about his identity or the whereabouts of his father. His witness Mr Birkhamshaw stated that the appellant has not been in contact with anyone in Vietnam, but it is not clear how he would know this.
11. The social services do not consider the appellant resourceful young man. However, that decision is based on the criteria of social services which is not set out in the correspondence seen. It remains the case that the appellant was able to travel to the United Kingdom through Europe where he was caring for himself. He has since learned further skills whilst in the United Kingdom.
12. Mr Campbell explained that he has been teaching the appellant to be independent and therefore there is no reason why he would not be able to return to Vietnam where he can be supported by his father or alternatively if there is no family support, NGO support mechanisms re available to children in Vietnam.
13. It is accepted that the appellant is a man who has settled well in the United Kingdom and established close friendships and a bond with his foster brother, Nam. However, when carrying out a balancing exercise with regard to section 117B it cannot be found that the appellant's private and family life in the United Kingdom holds such weight that the decision of the respondent is disproportionate to its legitimate aim. The Judge then stated that "the appeal is dismissed" but did not outline sections of the law.

Grounds of appeal

14. The appellant appealed against the decision and the grounds of appeal state the following which I summarise. The first the Judge did not give sufficient weight, or any weight to the conclusion by the appellant's Independent reviewing Officer, Mr Brinkhamshaw, who had extensive knowledge of the appellant set out in a detailed letter dated 26 February 2018. Had the Judge given proper consideration to this letter, the decision would have been different.
15. The Judge failed to take into account that the appellant in the opinion of the Independent Reviewing Officer was that he was lacking in emotional maturity and

was not ready for semi-independent accommodation and required further care. The Judge when stating that he has not seen the criteria used by the Independent Reviewing Office did not apply the balance of probabilities test correctly because that was the conclusion reached by the team responsible for the appellant's care. The decision reached was that the appellant is one of the few who was not ready for independent living despite attaining the age of 18 to his lack of maturity. That should have been sufficient for the Court to conclude the appellant was more vulnerable than a young man of his age in the same situation and should have not required more when applying the balance of probabilities.

16. The Judge did not apply the correct burden of proof when he posed the question to whether the appellant has family in Vietnam said that this cannot be answered conclusively. He then posed the possibility that if returned without family support the appellant can avail the assistance of NGOs who help children in Vietnam. The Judge while accepting that his decision would be devastating for the appellant and his blood brother, did not take into account that separating the appellant from the much-needed care from his foster parent will have a disproportionate effect on their lives.
17. There was evidence that to date the Red Cross have not been able to track down the appellant's family in Vietnam. The Judge failed to take into account all the evidence in the round that the appellant has provided sufficient evidence that he is vulnerable and lacking in maturity and has thereby departed from the modest test of a balance of probabilities required something over and above that.
18. While the decision of Judge Woodcraft is the starting point, there was little consideration for why the appellant must continue to live in the care of his foster carer beyond the expected age of 18. The appellant is younger than his chronological age and returning him to a country where he may have spent a few years with no knowledge of his family or any link with his past would be to disrupt the established family life that the appellant now enjoys with others who are not blood relatives. The appellant's foster carer has helped him get a solid structure and foundation and returning him will set him back and undo what has been done to assist him.

The hearing

19. At the hearing I heard submissions from both parties which I will not set out.

Decision as to whether there is an error of law in the decision of the First-tier Tribunal.

20. I have given anxious scrutiny to the decision of the First-tier Tribunal and have taken into account the grounds of appeal and the evidence provided at the hearing before the First-tier Tribunal. The gist of all the grounds of appeal is that the Judge did not consider the evidence in the round and did not apply the correct burden of proof, on a balance of probabilities, in evaluating the evidence.

21. There is merit in this argument. The appellant came to this country as a minor and his asylum and humanitarian protection claim was dismissed by the respondent and his appeal against the decision was heard by Judge Woodcraft who found the appellant not credible and dismissed his appeal. The Judge was entitled to take into account the decision of Judge Woodcraft as the starting point and accept that that was the appellant's situation as of the date of hearing. The Judge was however expected to take into account evidence the appellant's situation after that date.
22. The Judge in this assessment of Article 8 did not give a wide berth to the evidence of the appellant within the parameters of assessing evidence of a vulnerable witness. Although the Judge conducted the hearing on the basis that the appellant was a vulnerable witness but that did not feature in his decision. He accepted the past adverse credibility findings made by Judge Woodcraft respect of his asylum and humanitarian protection claim and translated it into his analysis of Article 8 and proportionality.
23. The Judge did not consider the evidence of the appellant's Independent reviewing Officer, Mr Brinkshaw who in a detailed letter set out appellant's vulnerability and lack of maturity. The Judge in his decision stated that he was not familiar with the criteria used by independent reviewing officers. In the letter it was clear that Mr Brinkmanshaw set out why the appellant was not ready for semi-independent accommodation because he was younger than his chronological age and continued to require further support and accommodation by his foster parent. By requiring the criteria used by the independent reviewing officers, the Judge placed too high a burden of proof on the appellant.
24. This was an important piece of evidence and evidence which was not before Judge Woodcraft. Failure to consider this evidence is a material error.
25. The Judge relied on the conclusion of Judge Woodcraft that he was not telling the truth about his father's whereabouts because he had lied about his identity in France and therefore must be lying to the British authorities about his identity which is the reason why his father could not be traced. The Judge said even if the appellant's father cannot be traced, he can rely on the support of NGOs which provide support to children in Vietnam. The Judge did not take into account that the appellant was a child of about 13 years of age when he was in France and failed to consider the possibility that he did what he was told to do.
26. There was clearly insufficient analysis of the evidence in the round as to whether the appellant could be returned to Vietnam if his father had not been traced. It was incumbent of the Judge to make a fake finding as to whether the appellant would be returned to his father or avail himself of the services of an NGO in Vietnam. The Judge left it open ended and said that the appellant can be returned to Vietnam in either case without analysis of the difficulties in each scenario given the appellant's vulnerability and lack of maturity.

27. I find that the Judge was not entitled to reach his conclusion the appellant can be returned to Vietnam at the present time. The Judge did not consider all the evidence including the evidence from the Independent Immigration Officer respect of his analysis under Article 8 and relied on the findings of Judge Woodcraft about the appellant's adverse credibility. The Judge failed to take into account all the evidence that post-dated the decision of Judge Woodcraft
28. I find considering all the evidence, the appellant cannot be returned to Vietnam at the present time. The letter from the Independent reviewing Officer, Mr Brimkshaw makes it clear that the appellant's age is below his chronological age and he lacks the maturity to live on his own and still needs assisted accommodation until he is at least 21 years old when a further valuation would be needed.
29. I therefore set aside the decision of the First-tier Tribunal and remake the decision allowing the appellant's appeal under Article 8 of the European Convention on Human Rights. This concludes the appeal.

DECISION

The appellant's appeal is allowed

No anonymity direction has been made

There can be no fee award in this case

Signed by

Dated this 10th day of October 2018

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A Deputy Judge of the Upper Tribunal
Mrs S Chana