Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00023/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Wednesday 18 August 2021	**On Tuesday 12 October 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR LUNG MA

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr K Smyth, Counsel instructed by Kesar & Co Solicitors (Bromley)

DECISION AND REASONS

BACKGROUND

1. There is in this case an appeal by the Secretary of State and a cross-appeal by Mr Ma. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Kainth promulgated on 2 January 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 28 February 2019 (served on 4 March 2019) refusing his protection and human rights claim and purporting to revoke his refugee status. The Judge allowed the appeal on the basis that

the decision breached the Appellant's human rights applying Articles 3 and 8 ECHR. The Judge however concluded that the appeal did not involve any protection issue and therefore did not consider the appeal under the Refugee Convention. It is that latter conclusion which is the subject of the Appellant's cross-appeal.

2. The Appellant is (or perhaps, more uncontroversially, was) a national of Vietnam of Chinese ethnicity. He left Vietnam and claimed asylum in France in 1989. Although that claim was refused by the authorities, it was allowed on appeal. The Appellant was thereafter recognised as a refugee in France and issued with travel documents under the Refugee Convention by the French authorities. The basis of the Appellant's claim is, in short summary, that he was and still would be at risk due to his Chinese ethnicity and his desertion from the military following the outbreak of war between Vietnam and Cambodia.

3. On 31 January 1991, the Appellant married his wife, Minh Xuan Tang, a British national of Vietnamese origin. The Appellant was granted leave to remain in the UK as her spouse and indefinite leave to remain ("ILR") on 29 June 1993. They have a son born on 19 November 1992 who is therefore now an adult.

4. On 23 October 2012, the Appellant was sentenced (following a guilty plea) to being concerned in the production of cannabis. He was sentenced to eighteen months in prison.

5. The Judge found that, as the Respondent had not recognised the Appellant as a refugee (ILR having been granted on a different basis), she was not entitled to revoke protection status ([11] of the Decision). That finding was based on the Respondent's concession. The Judge observed that the Respondent had failed to consider the basis on which refugee status had been recognised by the French authorities ([12] of the Decision). It was said that the Respondent had failed to show that the situation for the Appellant had changed materially since the recognition of status. It was said at [14] of the Decision to be agreed between the representatives that the appropriate course for the Judge was to consider the appeal under section 32(5) UK Borders Act 2007 ("the 2007 Act") and then under Article 8 ECHR.

6. Having referred to the views of UNHCR as expressed in a letter dated 27 April 2016 ("the UNHCR Letter") at [36] of the Decision, the Judge found that "there [was] an absence of anything on which the respondent seeks to rely upon to identify a contrary position". He asserted at [38] of the Decision that "[t]here [was] no protection element to this appeal because the appellant has already been recognised as a refugee". He then directed himself that the appeal therefore "centres on the appellant's Article 8 rights with reference to his private and family life". Having so stated, he went on to consider the parties' cases in that regard before finding at [50] of the Decision that "[t]he appellant's appeal succeeds with respect to engagement of Article 8 and Article 3". He therefore allowed the appeal on human rights grounds applying those articles.

7. The Respondent appeals on two grounds. The first is that the Judge has erred in his findings as regards protection. The Respondent relies on the case of MA Somalia v

Secretary of State for the Home Department [2018] EWCA Civ 994 ("MA (Somalia)") and what is said at [49] to [52] of the judgment regarding cessation. It is there said that "a cessation decision is the mirror image of a decision determining refugee status". The Respondent points out that she has engaged with the Appellant's protection claim at [19] to [25] of the decision under appeal and that the Judge has failed to deal with that case. At [5] of the grounds, the Respondent asserts that "the appellant has failed to demonstrate that he is entitled to refugee status" and that "Article 1C (5) cessation applies as the appellant is no longer a refugee because the circumstances that led to his grant of refugee status no longer exist". For that reason, the Respondent asserts that there would be no breach of Article 3 ECHR (and therefore presumably that the Judge was not entitled so to find).

8. The second ground relates to the Article 8 determination. The Respondent submits that the Judge has failed to provide adequate reasons identifying how the deportation threshold for breach is met. That is particularly with regard to the position under the Immigration Rules ("the Rules") as also reflected in section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C"). It is also said that the Judge minimises the Appellant's offending in his comments at [45] of the Decision given the expectation that those living in the UK will abide by its laws. Reliance is placed on Olarewaju v Secretary of State for the Home Department [2018] EWCA Civ 557 ("Olarewaju") and what is said by the Court of Appeal at [17], [18] and [26] of the judgment.

9. Permission to appeal was granted on 27 January 2020 by First-tier Tribunal Judge Shimmin in the following terms so far as relevant:

> "... 2. It is arguable that the judge has not engaged with the respondent's refusal in respect of the arguments against the appellant's credibility.
> 3. Furthermore, it is arguable that the appellant has failed to properly address the argument that the appellant is no longer in need of protection under Article 3.
> 4. With regard to Article 8 is arguable that there is a material error of law as to why deportation would be unduly harsh and why this high threshold has been met.
> 5. I grant permission on all grounds."

10. The Appellant filed a Rule 24 response on 27 February 2020. Prior to that, on 16 January 2020, the Appellant also applied for permission to appeal the Decision. The Appellant asserted that, in spite of the Respondent's concession that she had no power to revoke refugee status as she had not granted it, the Judge still had to determine the Appellant's ground of appeal that he fell within the exceptions to deportation in the 2007 Act because deportation would breach his rights under the Refugee Convention. It was asserted that the Judge therefore erred "by failing to consider the appellant's claim under the Refugee Convention".

11. Unfortunately, due to administrative oversight, the cross appeal was not considered initially. It was however considered and granted by Resident First-tier Tribunal Judge Zucker on 4 May 2021 on the basis that "it is arguable that the judge erred in saying that that there was no protection element to this appeal (see para 38) because it is

arguable that the appellant had not already been recognised as a refugee and was relying upon s.33(3)(b) of the Borders Act 2007".

12. The provisional view was initially taken by this Tribunal that the error of law could be determined on the papers and without a hearing. Judge Kebede directed on 30 August 2020 that the parties make submissions on that suggestion. The Respondent did not object to that course and relied on her submissions made in a skeleton argument already served and dated 30 March 2020. However, following review of the file by Upper Tribunal Judge McWilliam, in February 2021, the decision was taken to list the appeal for an oral, remote hearing. That review identified also the outstanding cross-appeal by the Appellant to which I have already referred which was then dealt with by the grant of permission to which I have already referred.

13. The appeal and cross-appeal therefore came before me on 18 August at a hearing via Microsoft Teams in order to consider whether there was an error of law in the Decision and if so in what regards. If I found an error of law, I would then need to decide whether to re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal to do so. There were no technical difficulties affecting the conduct of the hearing before me. I had before me the Appellant's bundle before the First-tier Tribunal (referred to hereafter as [AB/page]), the Appellant's skeleton argument before the First-tier Tribunal and the Respondent's bundle (referred to as [RB/annex/page]). I heard oral submissions from Mr Smyth and Ms Cunha. Following those submissions, I reserved my decision and indicated that I would issue that in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

Respondent's Appeal on Article 3 ECHR and Appellant's Cross-Appeal

14. Since both the Respondent's appeal on Article 3 ECHR and the Appellant's cross-appeal turn on the Judge's approach to protection issues, I take these together.

15. As I have already noted, the Respondent conceded before Judge Kainth that she could not revoke refugee status as she had not granted it. The concession is recorded at [35] of the Decision in the following terms:

> "Mr Grennan conceded that he could no longer rely upon paragraphs 339A (cessation) and 339AB (misrepresentation) of the Immigration Rules because they were contingent upon a grant of leave under paragraph 334 having been made in the first place. It follows therefore that the respondent has no power to attempt to revisit the basis on which the appellant was granted asylum by the French authorities."

16. Since paragraph 334 of the Rules provides that the Respondent will only grant refugee status to a person who is in or has arrived in the UK, and consideration whether to revoke status under paragraph 338A of the Rules is linked back to such a grant, it follows that, as a matter of domestic law, the Respondent is not in a position to revoke status granted by another country. As such, the Judge was right to accept the

concession which I accept was rightly made. I do not find the judgment in MA (Somalia) to be of any assistance in this regard. Whilst I accept that this describes the revocation of status to be a mirror image of the grant, it says nothing about the situation where the country proposing to revoke status is not that which granted status in the first place. The judgment expressly notes that it is concerned only with "the test to be applied by the state which recognised a person as a refugee …when determining whether (or that) a refugee's status can be ended".

17. It is not entirely clear what is meant by the final sentence of [35] of the Decision. If the Judge meant that the Respondent could not consider the circumstances which led to the grant of refugee status against the position now, he was wrong. The issue before the Judge was whether the Appellant is now a refugee.

18. That leads me on to the point raised in the Appellant's cross-appeal. At [38] of the Decision, the Judge says this:

> "There is no protection element to this appeal because the appellant has already been recognised as a refugee. The appeal centres on the appellant's Article 8 rights with reference to his private and family life."

19. That statement is incorrect for two reasons, one of law and one of fact. That the Appellant had been recognised as a refugee in the past is of course relevant. That does not mean however that he remains a refugee. Nor does it mean that only the country recognising his status can make that assessment. A person either is or is not a refugee at any point in time. Recognition by a particular country is simply recognition of the fact which either does or does not exist. The second error made is that protection was very much an "element" in this appeal. The Respondent's decision involved also the refusal of a protection claim. The Appellant appealed on the basis that the Respondent's decision would breach her obligations under the Refugee Convention. Whether viewed through the lens of revocation or refusal of a claim, the Judge still had to consider the protection issues. What is said at [38] of the Decision therefore amounts to an error of law. The Judge has misdirected himself as to the issues before him. For that reason, the Appellant's cross-appeal succeeds.

20. That brings me on to consider also the remainder of the Respondent's appeal in relation to the protection issues. The Respondent submits not only that the Judge was wrong in relation to revocation (which he was not) but also that he failed to engage with the Respondent's assessment that the Appellant is not now a refugee, in other words to consider the refusal of the protection claim. That was in part the reason for the grant of permission to appeal.

21. At [36] of the Decision, the Judge said this:

> "The respondent within the reasons for refusal letter made specific reference to Article 1C(5) of the Refugee Convention 1951, but the respondent has not engaged with the appellant's profile as someone who had deserted from the military. Rather, the respondent focussed

> exclusively on whether the appellant would be at risk on account of his Chinese ethnicity. That is not a proper basis for invoking Article 1C(5)."

22. Having set out the views expressed in the UNHCR Letter, the Judge continued at [37] to say that he adopted the UNHCR view and that "[t]here is an absence of anything on which the respondent seeks to rely upon to identify a contrary position". The Appellant relied on the expert report of Professor Bluth dated 25 November 2019 ([AB/17-36]) ("the Expert Report"). Professor Bluth deals briefly with the desertion issue at [5.4] of the Expert Report and concludes that "the appellant may be at risk of prosecution for desertion if he returns to Vietnam" [my emphasis]. The Expert Report is mentioned at [30] of the Decision. The only finding made by the Judge arising from the Expert Report is at [47] of the Decision where the Judge says this:

> "Professor Bluth concluded that the appellant was likely to face a prison sentence of one to five years given his desertion took place during war time. This punishment in my assessment is disproportionately severe because the appellant deserted the army owing to the ill-treatment and suspicion towards him as an ethnic Chinese following the outbreak of the Sino-Vietnamese war."

It is however to be noted that Professor Bluth does not say that the Appellant is likely to be prosecuted. He says only that he "may be at risk" of such prosecution. The expert refers to the provisions of Vietnamese law which underpin such prosecutions but does not say whether such prosecutions are regularly pursued if at all, particularly when the Appellant's desertion is said to have occurred decades ago.

23. More importantly, in relation to the complaint made by the Respondent, the Judge makes no reference at all to the decision letter which deals extensively with the claimed risk arising from military service and otherwise. Whilst I accept that most of the decision letter is concerned with the credibility of the Appellant's claim, the fact that the Respondent has challenged his account was no less relevant. I accept that the fact of the Appellant having been recognised as a refugee previously is highly material. However, it is not entirely clear what was the basis for the grant in France. There is limited evidence about the claim as accepted by the French authorities aside what is set out at [15] of the Respondent's decision (taken from the document at [RB/P1-3] which suggests that the basis of the grant was the Appellant's Chinese origins and opposition to the regime". That extract does not mention army desertion. In any event, what the Judge had to decide was whether deportation of the Appellant would amount to a breach of the Refugee Convention now. That involved an investigation of the claim being made as at the date of the hearing.

24. I am therefore satisfied that the Judge erred by failing properly to identify that there was a protection claim with which he had to deal, failing properly to evaluate all the evidence and failing to give adequate reasons for his conclusions. In that regard, the Judge concluded that the appeal succeeded also on Article 3 ECHR grounds. He failed to provide any reasons for that conclusion. His finding regarding risk of imprisonment at [47] of the Decision does not rescue that conclusion. First, as I have already concluded, the Judge failed to deal with all the evidence in this regard to identify

whether such risk exists. Second, and in any event, the Judge dealt with that only in the context of Article 8 ECHR having wrongly determined that there was no protection claim with which he had to deal. As Mr Smyth also accepted, the Judge has not made express findings that any such prosecution would amount to persecution or that the detention arising from any such prosecution would involve a breach of Article 3 ECHR.

25. For those reasons, the Judge has erred in relation to his consideration of the protection issues in this appeal and erred when concluding that the appeal should succeed on Article 3 ECHR grounds.

Respondent's Appeal on Article 8 ECHR

26. At [41] of the Decision, the Judge identified the Appellant's position as being that he satisfies paragraph 399A of the Rules ("Paragraph 399A") in relation to his private life. Mr Smyth confirmed that the Appellant had not raised any issue in relation to the position of his wife and adult son. That is because, as I understood the submission, the Appellant's wife and adult son return to Vietnam from time to time and it could not therefore be said that it would be unduly harsh for them to return to Vietnam with the Appellant should they wish to do so.

27. In fact, the Appellant's skeleton argument before Judge Kainth does not even raise Paragraph 399A but indicates that, as I understood from Mr Smyth to be the correct position, the Appellant was pursuing an Article 8 claim outside the Rules. That perhaps explains why, having set out Paragraph 399A at [41] of the Decision, the Judge failed to make any findings which relate to that paragraph. There is a hint in what is said at [46] to [48] of the Decision that the Judge was considering obstacles to the Appellant's integration in Vietnam. There is however a failure to consider whether the Appellant is integrated in the UK and a failure to consider whether he had lived for most of his life lawfully in the UK. As the facts set out at [1] to [6] of the Decision make plain, the Appellant has not lived here lawfully for half his life. He has been here for about thirty years and that residence was lawful until the making of the deportation order in 2019. However, he was aged thirty-two when he was first given leave to join his wife in the UK in 1992.

28. I do not suggest that the factors raised at [46] to [49] of the Decision are not relevant. They clearly are (although what is said at [47] of the Decision is impacted by what I say above about the protection claim). The Appellant's relationship with his wife and the life he lives in the UK with his friends and family are also relevant. However, when looking at whether the Appellant could succeed based on Article 8 outside the Rules, the Judge had to consider the claim first in the context of Paragraph 399A (and whether paragraph 399 of the Rules was met). In other words, he had to consider the Article 8 claim in accordance with Section 117C (6) in order to decide whether there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" which would outweigh the public interest.

29. Although Section 117C(6) refers expressly only to those who are sentenced to a period of four years or more, the Court of Appeal has confirmed that it applies equally when deciding whether an appellant who is a "medium offender" can succeed in a claim if he or she cannot satisfy the exceptions (see [23] to [27] of the judgment in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662). The Judge sets out Section 117C (6) when citing the whole of Section 117C at [17] of the Decision but there is no recognition there or when reaching his findings in relation to Article 8 that this was the test to be applied.

30. Whilst I recognise that this is not the way in which the Respondent has expressed her grounds of challenge to the Article 8 conclusion, it is implicit in her reference to Olarewaju. Paragraph [26] of the judgment to which reference is made in the grounds encapsulates this point as follows:

> "In the end, I have concluded that Miss Rowlands is right and that, notwithstanding the considerable thought that Judge Beach clearly put into her decision, she arrived at a conclusion that was not reasonably open to her. The decision of the Supreme Court in the Ali case confirms that 'great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months' (see paragraph 14 above), that the FTT should 'give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders' (paragraph 15 above) and that, where paragraphs 399 and 399A of the Rules do not apply, in general only a claim which is very strong indeed … will succeed' (paragraph 15 above). The present case was not, in my view, of that kind. When arriving at her conclusion in paragraph 85 of her decision, Judge Beach drew attention to Mr Olarewaju's youth and his apparent rehabilitation. With regard to the latter, the period since Mr Olarewaju's last conviction was not that long (two years), but in any event the significance of rehabilitation is limited by the fact that the risk of reoffending is only one facet of the public interest (see paragraphs 17 and 18 above). While, moreover, the young ages at which Mr Olarewaju committed the various offences of which he had been convicted were to be borne in mind, he will already have had credit for this in the sense that he will have received lesser sentences than an adult would have and, moreover, youth cannot without more be regarded as amounting to 'very compelling circumstances' or it would never (or hardly ever) be possible to deport someone whose offences had been committed under the age of 18, which is not supported by the Strasbourg jurisprudence and cannot be the case. Mr Olarewaju's arrival in the United Kingdom 'at a young age' (to quote Judge Beach) was reflected in the fact that he 'would to all intents and purposes have considered himself to be British' and be bound to mean that there would be a 'very real culture shock' if he returned to Nigeria, but it is notable that Judge Beach did not find that there would be 'very significant obstacles to [Mr Olarewaju's] integration' into Nigeria (as section 117C(4)(c) of the 2002 Act and paragraph 399A(c) of the Rules would have required). Of course, not having been 'lawfully resident in the UK for most of his life', Mr Olarewaju could not anyway take advantage of section 117C(4) or paragraph 399A, but it is still of significance that Judge Beach neither said in terms that there would be 'very significant obstacles' to integration nor, as I see it, made equivalent findings. '[V]ery real culture shock' is not the same as 'very significant obstacles'."

31. Although the facts of that case were very different to the present, that passage supports the assertion that the correct approach to an Article 8 claim in a deportation case is

through the prism of Section 117C. That passage also supports the Respondent's criticism made of Judge Kainth's assessment of the public interest at [43] of the Decision. The time which has elapsed since the offence has some relevance but the Judge needed to consider the public interest against the backdrop of the assessment contained in Section 117C (1) and section 32 of the 2007 Act that deportation of foreign nationals is in the public interest.

32. For the foregoing reasons, I am satisfied that the Judge has erred in his conclusions that the appeal succeeds on Article 8 grounds.

CONCLUSION

33. I have found that the Judge has erred by failing properly to evaluate the protection claim. For that reason, no relevant findings have been made whether the Appellant is currently at risk on return. Although I have found that many of the factors raised by the Judge in his Article 8 assessment may well have relevance, there are no findings made about the Appellant's ability to meet the Rules and Section 117C exceptions or any part of them when considering the claim outside the Rules. The Article 8 assessment will therefore need to be made completely afresh. I do not consider it appropriate to preserve any of the findings. I therefore set the Decision aside in its entirety.

34. For those reasons, given the extent of the findings which need to be made and the issues which arise, I am satisfied that it is appropriate to remit this appeal to the First-tier Tribunal for re-making before a Judge other than Judge Kainth.

DECISION

The Decision of First-tier Tribunal Judge Kainth promulgated on 2 January 2020 involves the making of an error on a point of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Kainth.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 13 September 2021