



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 114

P1013/19

OPINION OF LORD BRAILSFORD

In the Petition

TIEN THUY HOANG

Petitioner

for Judicial Review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 9 August 2019 refusing permission to appeal to itself.

Petitioner: Winter; Drummond Miller LLP (for Latta & Co, Glasgow)

Respondent: Maciver; Office of the Advocate General

5 November 2021

[1] This petition for judicial review appeared before me for a substantive hearing on 21 January 2021. In accordance with procedural directions from the court, statements of issues and notes of arguments had been lodged on behalf of both parties. The result of this process was that the issues for the determination of the court had narrowed from those initially expressed in the petition. In terms of these documents, as supplemented by oral submission at the substantive hearing, it was apparent that the issue for determination was whether the Upper Tribunal (“UT”) erred in law in respect of two grounds of appeal before it, these being grounds 2 and 5 of the grounds of appeal to the Upper Tribunal¹.

¹ Number 6/4 of process

[2] The terms of ground 2 of the grounds of appeal before the UT are set forth in paragraph 6 of the petition and the argument in support of the challenge in this petition on that matter is set forth in paragraph 11 of the petition. The terms of ground 5 of the grounds of appeal before the UT are set forth in paragraph 8 of the petition and the argument in support of the challenge in this petition to the UT's decision in respect thereof is to be found in paragraph 12 of the petition. The grounds of challenge to the matters complained of stated in paragraphs 11 and 12 of the petition were developed by counsel for the petitioner in his note of argument which was to some extent further developed and refined in his oral submission.

[3] Before turning to the argument I record that counsel for the petitioner advanced a number of propositions relative to the role of the court in a dispute of this sort, which matters I did not understand to be challenged by counsel for the respondent. The first of those was that the question for the court was stark, whether the UT erred when finding that the First-tier Tribunal ("FtT") had not arguably erred in law.² The second proposition was to the effect that unless clear from the face of the UT decision that that body erred it will be necessary for the court to look at the FtT decision to determine whether the UT erred in law failing to recognise that there was an arguable error of law.³ Third, that in terms of materiality the question the court required to address was whether there was a real possibility that the UT could reach a different decision.⁴ Fourth, that the court can reach its

² *SA (Bangladesh) v Secretary of State for the Home Department* 2019 SC 451 at paragraphs 26-28

³ *Waqar Ahmed and Others v Secretary of State for the Home Department* [2020] CSIH 59 at paragraph 9

⁴ *HMD (Vietnam), Petitioner* [2019] CSOH 84 at paragraph 49

own view on materiality but that there is a high threshold placed on the respondent to show that the UT would inevitably reach the same decision.⁵

[4] The factual background against which the petition was presented was also a matter which was essentially agreed by the parties. It can fairly be summarised as follows. The petitioner is a Vietnamese national who claimed asylum in the UK on the basis that she would be at risk of persecution upon return to Vietnam due to her political opinions and participation in protest activities in that country. Her position was that she had been involved in three demonstrations against a toxic waste spill; to have suffered mistreatment as a result of such participation, and to be the subject of an arrest warrant in Vietnam which left her at risk of imprisonment and mistreatment amounting to persecution or serious harm as a result. The Secretary of State refused her claim. The FtT refused her appeal from that decision. The petitioner sought permission to appeal to the UT, both from the FtT and UT. Permission was refused on both occasions. It is the subsequent decision, that of the UT, which is the subject of the present judicial review.

Submissions

(a) *Petitioner*

[5] The first line of argument advanced on behalf of the petitioner was, as set forth in the written note of argument, and indeed oral submission, essentially a development of matters set forth in paragraph 11 of the petition. It emerged from ground 2 of the grounds of appeal presented to the UT. For the purposes of the substantive hearing counsel characterised this challenge as being on the basis of unclear or contradictory findings by the UT. This

⁵ *Khan v Secretary of State for the Home Department* 2015 SC 583 at paragraphs 11-12; *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 at paragraph 10

characterisation arose because, it was submitted, the UT while stating there was no contradiction in the FtT's findings stated that the FtT rejected the petitioner's account of events and "merely made alternative findings."⁶ This position of the UT was said not to constitute an adequate reason and left the informed reader in real and substantial doubt as to why permission to appeal had been refused.

[6] The basis for this proposition was said to be found in three findings. The first related to the tribunals findings in paragraph 11 of the decision relative to the petitioner's presence at a number of demonstrations. The criticism was that the finding that the petitioner was present at "some or all"⁷ of the demonstrations was not made in the alternative. Second, a finding at paragraph 17 of the FtT decision that the petitioner was no more than a low level participant at the demonstration was not made in the alternative. Third, also in paragraph 17 of the FtT decision, that any mistreatment the petitioner suffered at the hands of the Vietnamese police did not amount to persecution was not made in the alternative.

[7] Developing this point counsel noted that in their answers to the present petition the respondent accepts that the FtT accepted that the petitioner had attended three demonstrations and that she was detained and released and that she "may have got caught up in the melee of crown dispersals" and that she "was a low level participant and a person of no consequence to the authorities".⁸ It was said that if that was the reading given by the respondent to the FtT's decision then it emphasised that permission ought to have been granted in relation to ground 2 of the grounds before the UT. Particularising further in

⁶ Number 6/5 of process at paragraph 3

⁷ Number 6/1 of process at paragraph 11

⁸ Number 6/1 of process at paragraph 12

relation to whether or not the petitioner was an organiser it was submitted that if the respondent accepts the findings at paragraph 12 of the FtT decision then that would include that the FtT accepted that she made banners and that she was a demonstrator who was holding a banner. It was said that this would also include an acceptance that she participated by lighting candles and hanging banners (paragraph 11 of the FtT decision).

[8] Counsel also pointed out that although the FtT finds at paragraph 12 of its decision that there is nothing to suggest that the petitioner was an organiser it also finds at paragraph 17 that there is nothing to suggest that she was an “active organiser”. It was suggested that it was unclear from these findings what the FtT meant.

[9] A further point made by the petitioner was that the respondent in pleadings accepted that the FtT found that the petitioner was detained and released. This was said to emphasise that the FtT reached unclear findings. The finding by the FtT at paragraph 12 that the petitioner was detained and released is apparently inconsistent with material in paragraph 13. Put another way it was submitted that the findings at paragraph 13 “would seem to undermine the acceptance at paragraph 12 that the petitioner was detained and released.” A further criticism was made by the acceptance by the FtT that the petitioner was caught up in the melee of crowd dispersals. It was said that this rendered it unclear whether the FtT accepted that there was some mistreatment in terms of the findings at paragraph 17 that any mistreatment did not amount to persecution or serious harm.

[10] The second line of argument advanced by counsel was in relation to ground 5 of the grounds of appeal before the UT. The submission was that the UT erred in law by failing to give adequate reasons for its decision on this ground and thus failed to recognise that there was an arguable error on the part of the FtT. The argument centred on the FtT’s approach to

and treatment of two evidential documents before it, a Country Policy and Information Note (“CPIN”)⁹ and an independent expert report.¹⁰

[11] The submission was that the FtT had erred in law because even if the petitioner’s activities were not deemed high profile the objective unimportance of those is irrelevant as it is the view of the persecutor that is determinative.¹¹ It was said that the FtT had only approached matters on the view that the petitioner was a low level activist. The FtT did not ask itself how the Vietnamese authorities would view the petitioner in light of the accepted findings or, further, if it asked that if it asked the question on a flawed legal basis.

[12] This point was focused by posing the question of whether the petitioner was at real risk on a return to a Vietnamese airport. It was submitted that in that regard the petitioner’s expert was of the view that the petitioner would be questioned at the airport. That view was based on the expert’s opinion that the petitioner’s attendance at those demonstrations would be sufficient to show that she would be at real risk from the authorities for having attended those demonstrations.¹² It was said that the country expert report was indicative that the authorities would at least perceive the petitioner as being opposed to the state. That in turn is indicative that the petitioner is at real risk. The country expert did not categorise the petitioner as low level or a high level but simply proceeded on the basis that she would be perceived as opposing the Vietnamese state. Counsel further noted that the CPIN¹³ does not deal with the issue adverted to by the petitioner’s country expert. This was said to

⁹ Number 6/7 of process “Country Policy and Information Note Vietnam: Opposition to the State”

¹⁰ Number 6/6 of process “Country expert report on the freedom of religion and beliefs, and political system in Vietnam” by Dr T T L Anh

¹¹ *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 per Lord Dyson at paragraphs 53 and 54

¹² Number 6/6 of process at paragraphs 3.2-3.3

¹³ Number 6/7 of process

undermine the CPIN report. The proposition was that having regard to this factor it could not be said that the case would inevitably fail if reconsidered by another judge.

[13] Counsel further advanced the proposition that reading the CPIN as a whole disclosed factors therein which suggested that the petitioner would be at real risk if she was questioned at the airport. A number of passages in the CPIN were drawn to the courts attention. Counsel recognised that the FtT stated at paragraph 16 of its decision that it preferred the CPIN to the country expert report but that was said to in effect be a failure to recognise that the objective unimportance of the petitioner's activities is irrelevant as it is the view of the persecutor that is determinative. This error was said to be emphasised at paragraph 15 of the FtT decision where the judge stated he struggles to see the relevance of the expert report.

(b) Respondent

[14] Counsel for the respondent initially presented an analysis of the FtT decision. Having regard to the decision as a whole he observed that the Tribunal concluded that the central issue in the case was one of the credibility of the petitioner (paragraph 9). The Tribunal found the petitioner to be an unreliable and evasive witness (paragraph 10). It found as a matter of fact the petitioner to have been involved in "some or all" of the demonstrations she claimed to attend and that finding was made on the basis of the petitioner's own account and external reporting supporting her account, text messages supporting her account and a priest's letter setting out her participation (paragraph 11). It found her to have been a low level participant in these demonstrations, that finding being made on the basis of her own description of limited involvement and of her account of detention and subsequent release by the police (paragraph 12). The Tribunal found her not

to be credible in respect of her claim to have been persecuted, that conclusion being reached having regard to: lack of vouching for the mental health issues which was said to explain inconsistencies and omissions in her account (paragraph 13); her embellishment of her account throughout the process which included the provision of core information at a late stage (paragraph 13); her failure to mention the key elements of her claim to have suffered police mistreatment (paragraph 13) and her failure to produce the summons which was said to demonstrate that she was at risk of prosecution if she returned to Vietnam (paragraph 13). The Tribunal further found her credibility to be diminished due to her failure to claim asylum at an earlier stage when she was resident in France for a year before coming to the UK (paragraph 14). It found the petitioner's country expert's report to be of some weight in supporting the proposition that there would be mistreatment of activists but to have diminished weight by reaching conclusions on an irrelevant matter (paragraph 15). It found that the CPIN demonstrated that risk depended on the profile and activities of the individual making a claim (paragraph 16). It concluded that the petitioner was a low level participant who had not suffered persecution or serious harm and thereby would not be at risk on return to Vietnam (paragraph 17).

[15] In considering the FtT decision and the grounds of appeal before it the UT concluded that the grounds amounted to no more than a disagreement of factual findings made by the FtT.

[16] In relation to the challenge in the petition the respondent's note of argument proceeded on the basis that the outstanding challenge was focused in statement 12 of the petition, that is in respect of ground 5 of the grounds of appeal before the UT. In relation to that ground the respondent's submission was that the UT engaged with that ground in full and that its conclusion, essentially that the FtT gave reasons for the findings and that those

reasons were sound, was one that it was entitled to reach on the basis of the material before it.

[17] In relation to the views of the persecutor it was submitted the FtT reached a reasoned finding at paragraphs 16-17. It was said to be persuasive that the CPIN indicated that whether an individual was at risk as a result of political activity depended upon the level of political involvement and that although low level actors may face intimidation this would not amount to persecution or serious harm. It was also accepted that the level of risk was to be assessed in light of the individual circumstances. This was to be considered in conjunction with the finding that the petitioner had been a low level participant. In approaching the matter in this way the FtT properly carried out the task before it in accordance with the law. It assessed the level of the petitioner's activity and drew a conclusion based upon the CPIN evidence before it. The FtT did not treat the CPIN as determinative but engaged in an assessment process in a similar way to the other evidence before it. It was entitled to treat the CPIN as determinative and the country expert's report as merely persuasive. The argument was developed by submitting that the essence of the petitioner's argument appeared to be a contention that the FtT reached an erroneous view as to the level of activity and ought not to have accepted the petitioner's own characterisation of her involvement as being at a low level. That argument it was submitted was inconsistent. The petitioner's own account of her not being a high level actor was evidence before the FtT which it was entitled to take into account in reaching its decision.

[18] It was further observed that in its decision the FtT had provided sustainable reasons for its decision on this point. It was submitted that it was entitled to do so, the petitioner's argument amounted to no more than a disagreement of fact.

[19] Similarly the submission was that the FtT was entitled to conclude that the petitioner's account of having been detained and released indicated that she had not been of interest to the authorities. The FtT decision on this basis was in line with the CPIN guidance.

[20] In relation to the issue relative to mistreatment as persecution, it was submitted that the FtT in making a finding that the petitioner had not suffered sufficiently serious mistreatment so as to constitute persecution or serious harm was entitled so to do. It provided reasons for reaching this decision. A contemplation that she may have been detained and released or caught up in the melee of crowd dispersals was not as was suggested by the petitioner either unclear or inimical to the FtT decision. In similar vein the FtT were entitled to reject her claim to have been beaten and persecuted by the police on the basis of their adverse finding in relation to the credibility of the witness on this point.

[21] In summary in relation to these points it was submitted that the petitioner's contentions amounted to no more than disagreement of fact with the conclusions reached by the FtT.

Conclusion

[22] The challenge in this petition is to a decision of the UT which decision of necessity required detailed consideration of the underlying FtT decision. It seems, in my view, to follow that in circumstances where the UT uphold the decision of the FtT, as is the present case, it is equally necessary for this court to consider the FtT decision.¹⁴

¹⁴ *Waqar Ahmed* (supra)

[23] That approach was adopted by counsel for the respondent who, as I have already narrated when dealing with his submissions, took the court through the FtT decision. This is, again in my view, important as it is necessary for this court to assess the FtT as a whole in order to determine whether or not the criticisms made by the petitioner of the UT's decision relative to the FtT decision are justified and whether errors in law in the UT's reasoning can be determined.

[24] In approaching the FtT decision in that way, and at this stage focusing on counsel for the petitioners first line of argument based on ground 2 of the grounds of appeal before the UT, I do not find support for the proposition that reading the document as a whole the informed reader would be unclear or left in doubt as to its meaning. Equally I do not find support for the proposition that there are inconsistencies which are either unexplained or contradictory of other elements of the decision. In stating this I accept the construction advanced by counsel for the respondent to the effect that the approach of the FtT was to make findings in fact, some of which were made, and indeed depended upon, adverse findings anent the petitioner's credibility. I note that counsel for the petitioner did not challenge these adverse findings in relation to credibility. It follows that I am not prepared to accept the criticisms advanced on behalf of the petitioner. I find myself in agreement with the characterisation made by counsel for the respondent to the effect that when read as a whole the FtT decision was consistent and based upon factual findings which it was on the evidence before it entitled to reach. It follows that I accept the respondent's characterisation of the current challenge as no more than a disagreement on the matters of fact with the findings of the FtT.

[25] In relation to the petitioner's second line of argument, based on ground 5 of the grounds of appeal before the UT, it is clear the FtT considered and evaluated the evidential

relevance of the petitioner's country expert report.¹⁵ It is also clear that a similar exercise was conducted in relation to the CPIN.¹⁶ The tribunal's decision in relation to that evaluation process was to place "...greater evidential value..." on the CPIN than that accorded to the expert report. I observe that a reason for reaching a decision to place greater evidential value on the CPIN than on the expert report is stated in the latter part of the relevant paragraph of the FtT decision.¹⁷ I consider that the FtT was entitled to reach this decision. I further consider that in reaching the decisions I have just referred to the FtT was considering, correctly in my view, the two reports as adminicles of evidence. I find myself in agreement with the submission of counsel for the petitioner in his approach to this matter as narrated herein.

[26] On the basis of the foregoing it follows that I can determine no errors of law in the FtT decision and following therefore do not consider the UT to have been in error in relation to the decision it reached. The sole ground of challenge, as was accepted by counsel for the petitioner depended on there being an error in law in the UT decision. Having found that no such error existed I will refuse the prayer of the petition.

¹⁵ See number 6/1 of process at paragraph 15

¹⁶ See number 6/1 of process at paragraph 16

¹⁷ Number 6/1 of process, paragraph 16