



IAC-AH-KRL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/06048/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 25th January 2016**

**Decision & Reasons Promulgated
On 1st April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**MR KVN
(ANONYMITY DIRECTION MADE)**

Appellant

Respondent

Representation:

For the Appellant:

Ms S Sreeraman, Home Office Presenting Officer

For the Respondent:

Ms E King instructed by Hammersmith and Fulham Community Law Centre

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier

Tribunal, that is the Secretary of State as the respondent and Mr KVN as the appellant.

2. The Secretary of State appealed, with permission, against the decision of the First-tier Tribunal to allow the appeal of the appellant against the decision of the Secretary of State dated 20th March 2015 to refuse to grant asylum under Immigration Rules. The Secretary of State granted the appellant limited leave to remain for a period exceeding one year in accordance with Home Office published Asylum Policy Instruction on discretionary leave as an unaccompanied asylum seeking child under Section 83 of the Nationality, Immigration and Asylum Act 2002.
3. The appellant is a national of Vietnam and his date of birth is given as [] 2000, making him 15 at the date of the hearing. He claimed to have departed Vietnam by air in December 2013 and to have travelled by various means and through various countries before arriving clandestinely in the UK in July 2014. He sought assistance at a children's centre and was placed in the care of Social Services and claimed asylum on 24th September 2014.
4. It was said that he lived with his parents in Haiphong and was frequently left to his own devices by them. One day towards the end of December 2013 he returned home to find his parents had disappeared and the contents of the house removed to the street. He was approached by a person by the name of Dung who made arrangements to remove him from Vietnam to the UK. He was given a mobile phone without a SIM card and told that he would be given a SIM card on arrival at his destination.
5. It was maintained that should the appellant return to Vietnam he would be homeless, his parents having disappeared and his house having been seized by the police and he would be vulnerable to exploitation as a child.
6. The matter came before the First-tier Tribunal who allowed the appeal and a challenge was made to that decision by the Secretary of State who asserted that the judge had made conflicting findings in relation to a material fact as follows

"At [13] the judge finds that the appellant's parents engaged the services of Dung to have the appellant taken to a place of safety.

At [20] judge finds that

'he is highly likely to have been sent from his own country at the instigation of his parents ... he thus has parents in Vietnam who are concerned for his wellbeing and have taken steps to look to his safety when they apparently became fugitives'.

The judge at [21] finds that "means have been identified as a possible useful manner of attempting to trace the appellant's parents

Therefore it is respectfully submitted that the judge has failed to resolve a conflict in evidence in finding at 22 that the appellant would be vulnerable to exploitation as one separated from his family with no means of family protection. It is submitted that it is clear from the

previous findings that the appellant has a family that cares about him and means have been identified to attempt to trace them".

7. Permission was granted on the basis that the fact the judge found that the appellant had parents in Vietnam concerned for his welfare and had means of contacting those parents had been identified "albeit not yet successfully utilised" and the fact that the appellant would be removed as a lone child was arguably inconsistent.
8. A Rule 24 response was also served on behalf of the appellant which submitted that the grounds quoted only selectively from the findings. The judge had accepted that the appellant had given a credible and coherent account of his circumstances in Vietnam and there was a remaining concern on the part of Social Services about the ability and the willingness of the appellant's parents to care for him should they make an attempt to reclaim him (17). In particular there had been no contact between the appellant and his parents since his arrival in the UK and the promised SIM card had not been provided.
9. The judge was bound to make the decision on the appeal on the basis of the evidence before him at the hearing. The possibility of contact being made some time in the future was not a matter for the appeal and the findings were not contradictory. It was credible that the appellant's parents may have provided for his journey to the UK but then be unable or unwilling to resume contact thereafter.
10. Further the Secretary of State had an obligation under Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005/7) to carry out tracing of KVN's family and that she had not complied with those obligations in this case and therefore could not complain of lack of certainty when she had an obligation to resolve any such alleged lacuna. It was said to be in the best interests of the child to take a cautious approach.

The Asylum Seekers (Reception Conditions) Regulations

- 6.— (1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum.
- (2) In cases where there may be a threat to the life or integrity of the minor or the minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety.
- (3) For the purposes of this regulation—
 - (a) an unaccompanied minor means a person below the age of eighteen who arrives in the United Kingdom unaccompanied by an adult responsible for him whether by law or custom and makes a claim for asylum;

- (b) a person shall be an unaccompanied minor until he is taken into the care of such an adult or until he reaches the age of 18 whichever is the earlier;
- (c) an unaccompanied minor also includes a minor who is left unaccompanied after he arrives in or enters the United Kingdom but before he makes his claim for asylum.

The Hearing

11. At the hearing Ms Sreeraman submitted there was one sole ground for challenge which was a failure to resolve the conflicting evidence which was found at paragraphs 20 and 21. On the one hand it was accepted that the appellant had parents who had taken steps to look for his safety and yet on the other hand it was found that he was an abandoned child. The appellant was not at risk per se for a Convention reason and the judge had erred in applying LQ, without referring for example to cases such as TN and MA Afghanistan and Secretary of State for the Home Department [2015] UKSC 40. I was referred to paragraph 36 of the decision which states as follows

"The appellants all contend that the respondent's decision to reject their asylum claims was vitiated by her failure to carry out her tracing duty and, in particular, that they were prejudiced by the failure because proper inquiries may have produced evidence to support their accounts which the respondent disbelieved".

- 12. Was the mere fact that there is a lone child sufficient to engage a Convention reason when the parents at paragraph 20 were recorded to be in Vietnam and steps could be taken for the resumption of contact? In these circumstances was it correct to go on and allow the appeal outright? A failure to trace did not qualify the appellant for asylum and this appellant was not at risk on return.
- 13. Ms King argued that the essence in the Afghan case authorities was that the appellants were prejudiced by the failure because proper inquiries had not been made which would have enabled them to support their accounts which were disbelieved but there were two important ways those authorities could be distinguished. First they concerned the tracing obligations when the person turned 18 already and in those situations they could not engage the Convention reason per se. She submitted it was not appropriate to say a lone child did not come within a Convention reason. Secondly the case has dealt with a scenario where the person was not believed and that the Secretary of State was alleged to have acted unlawfully thereby depriving the appellant of the opportunity to get further evidence.
- 14. In this case the appellant had been believed and it was the case that the court heard credible evidence from a social worker that he had had no contact with his parents since he had arrived. There was a real risk that he would be without support on

return and therefore the line of authorities which had been produced were of no assistance to the Secretary of State in this case.

15. The Secretary of State had not said that she had wished to undertake their own investigations and there was enough evidence on which the judge could safely make a finding regarding the family's support which was likely to be available on return.
16. Ms King submitted that the claim did engage a Convention reason and the judge dealt succinctly at paragraph 22 regarding the risk attached to lone children returning. There was evidence before him that the appellant would be at risk of persecutory harm because he would be liable to be a street child and/or trafficked. It was accepted that there was evidence from Social Services that there is no contact with the parents and it was reasonable to conclude that they did not show an interest in checking him thereafter.
17. Ms Sreeraman submitted that the judge found there was no risk of trafficking but she accepted that the respondent in this case had merely referred the case to the Red Cross which was not enough to discharge the duty to trace the parents. At this point Ms Sreeraman submitted that it was open to the judge to allow the matter to remit it back to the Secretary of State to make inquiries and that it possibly should have been allowed to a limited extent.
18. In conclusion I note that there was a very narrow issue on which the grounds of challenge to the decision of the First-tier Tribunal were premised and that that was on the failure to resolve the evidence. I am not persuaded that that in fact is the case and I agree with Ms King's submission that the grounds do quote selectively from the findings and that when read as a whole it is plain that the judge made rational and logical findings that were open to him on the evidence.
19. Of importance and that which distinguishes this claim from that of the papers referred to in TN and MA, is that this appellant was found by the judge at paragraphs 14 and 15 to have given a credible and coherent account of his circumstances in Vietnam before leaving. I note that he was 13 years old when he left Vietnam and was now 15 years old and maintained throughout that he had no contact with his parents. There remained as the judge found a concern on the part of Social Services about the ability and/or willingness of the appellant's parents to care for him should they make an attempt to reclaim him, [17], and of key importance is that there had been no contact between the appellant and his parents since the arrival in the UK which was some two years prior to the hearing and promulgation of the decision, that means have been identified to make contact had not yet happened and he would return as a lone child.
20. The second point which is important to distinguish this appellant from the authorities in TN is that this is a child who is still currently under the age of 18 and indeed at present only 15 years old.
21. I find that the judge was entitled to take into account LQ (Age immutable characteristic) Afghanistan [2008] UKAIT when coming to his decision as to

whether the appellant was a member of a social group and at risk of persecutory harm on return to Vietnam. Indeed the judge finds at paragraph 18 that the appellant is an orphan and with no suitable reception facilities would be in a particular social group, namely a child vulnerable to exploitation.

22. It was open to the judge to state that the possibility of contact being made some time in the future was not necessarily a matter for this appeal. The Secretary of State has an obligation under Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005/7) to carry out tracing of the appellant's family and had not complied with those obligations in this case. It was the appellant's case that he was *not* in contact with his parents and indeed had not been in contact with them for the previous two years and it was not just the appellant's evidence on which the judge relied but also took into account the fact that the social worker's evidence that there had been no contact since the appellant's arrival in the United Kingdom (21). The judge records that indeed on the appellant's evidence the promised SIM card was never provided on arrival. The judge stated that "means have been identified as a possibly useful manner of attempting to trace the appellant's parents but the separation and lack of contact remains".
23. It was open to the Secretary of State to remedy this factor and indeed the Secretary of State was under an obligation to remedy this. There appeared to be no application for an adjournment as at the date of the hearing on behalf of the Secretary of State to make inquiries and it was open to the judge to find as he did at paragraph 21
"were the appellant to be returned now, therefore, it would be as a person who had proven an effective abandonment and loss of contact with his parents: no present means of communication with them: and thus returned to Vietnam as a lone child".
24. That was in essence the judge's conclusion having found against the background of evidence that there was a reasonable degree of likelihood of a vulnerability to exploitation for lone children without family support. The judge was under a duty to make a decision on the evidence as it was presented to him as at the date of the hearing. It was submitted at the First-tier Tribunal that there were insufficient facilities for children on return and the NGOs did not demonstrate that they could offer shelter or practical assistance to lone children. Children were victims of abuse and trafficking and at risk of being street children. The judge accepted that the background evidence established to a reasonable degree of likelihood the vulnerability to exploitation of lone children without family support and that
"The appellant has thus proven a present status as a child who would be vulnerable to exploitation as one separated from his family, with no family means of protection, on his return to Vietnam. This status, on the authority of LQ, is not adequately addressed by the procedural measure of deferral of removal pending a majority"[22].
25. On the findings overall and a reading of the decision in context, I do not accept that there was a failure to resolve facts.

26. Had the Secretary of State wished to explore the issue of contact further before the decision on asylum was made, it was open to her to seek to either delay the asylum decision or to seek an adjournment of the hearing but the respondent did neither, apparently being content for the matter to proceed on the available evidence.
27. For these reasons I find there is no error of law and the decision should stand.

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 his 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 10th March 2016

Deputy Upper Tribunal Judge Rimington