



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

Appeal Number: PA/04603/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 25 January 2018**

**Decision & Reasons
promulgated
On 26 January 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HTH
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Khan instructed by Thompson & Co Solicitors
(Wimbledon)

For the Respondent: Mr P Duffy Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Hussain promulgated on 29 August 2017 in which the Judge dismissed the appeal on both protection and human rights grounds.

Background

2. The appellant is a national of Vietnam born on 15 August 1960. The appellant entered the United Kingdom illegally in March 2009 and on 10 January 2016 was arrested but granted temporary release. On 8 March 2017 he was detained on reporting conditions and on 31 March 2017 applied for asylum, which was refused on 2 May 2017. It was the appeal against that refusal that came before the First-tier Tribunal.
3. The appellant claimed that if returned to Vietnam he will be arrested and attacked by the police because of his religion, being a follower of the Pure Hoa Hou Buddhist faith.
4. The Judge considered the evidence provided before setting out findings of fact between [32 - 54] of the decision under challenge, the key elements of which may be summarised in the following terms:
 - a. According to the report of the country expert, the 1992 Constitution of Vietnam allows free practice of all religions and beliefs but such beliefs and practices were subject to strict approval by the government. Religious groups in Vietnam were required to register with the government who must approve its operation under government control management board. The Pure Hoa Hou Buddhism followed by the appellant has not been approved by the government [34].
 - b. The appellant's religion is an ambitious political religion. The division followed by the appellant is against the government. The evidence supports the claim the religion the appellant follows exists and is not permitted to operate in Vietnam and that those who support and practice that religion might be considered as political activists. The local authority and police applied violent methods to suppress forbidden religious gatherings including the appellant's [35].
 - c. The Judge notes, at [37], an extract taken from paragraph 4.3 of the expert report in the following terms:

“If returned to Vietnam, the appellant might face numerous serious penalties as he would be prosecuted for the crimes of infringing upon national securities as mentioned in paragraph 4.1 above. If the appellant was prosecuted for the above-mentioned crimes. This could be classed as the kind of persecution and treatment which contrasts with article 3 of the European Convention of Human Rights. However, was this could happen, it is not true to say that it would happen. A more likely occurrence would be that the appellant would be subjected to excessive scrutiny because of his activities, family profile and his time in the UK”.
 - d. The Reasons for Refusal letter did not accept that the appellant was the subject of any adverse interest owing to his religious activity [42].

- e. Having considered the totality of the evidence the Judge concludes there is no truth in the appellants claim, other than his claim which the Secretary of State accepted, that he was a follower of the faith [44].
- f. The Judge found it damaged the appellant's credibility that he had been in the United Kingdom since 2009 and only applied for asylum in March 2017, and that whilst claiming to have been in a relationship for two years he had not discussed with his partner his difficulties back in his home country [45].
- g. The appellant had not provided a single item of evidence that corroborates his claimed arrests and detentions. Whilst noting corroboration is not required in asylum cases, there is no objective or independent corroboration making the significance of the appellant being a credible witness more important [46].
- h. The appellants written statement gives an account of his many arrests and detentions. The claim that the appellant was on one occasion detained for a year without being formally charged is contrary to his own expert's evidence. At paragraph 5.2 of the expert report it is stated the maximum period a person may be detained is seven months where someone is accused of an "extremely serious felony". In this case the appellant was not even charged [47].
- i. The appellant's expert claims at paragraph 4.3 that if returned to Vietnam the appellant will face numerous penalties and prosecution is contrary to his own evidence, that despite being arrested and no less than six occasions, when on each occasion the authorities came to be aware of his previous arrests and detentions, he was not prosecuted. This shows that either the appellants claims are not true or that there is no risk of any prosecution simply because he is the follower of the religion [48].
- j. Taken at its highest, the appellant is no more than a simple follower of his religion. He has never assumed any leadership role in his country or elsewhere. It is likely that if returned to his home country he will engage in prayers privately. The Judge did not accept that the appellant attended any congregations as he was not made the subject of any adverse interest by the Vietnamese state [49].
- k. There is no real risk of the appellant being persecuted if returned to his home country [50].
- l. It is accepted the appellant is in a genuine and subsisting relationship with his partner although could not conclude they had been living together for two years [51].
- m. The appellant could not satisfy the definition of a partner under the Immigration Rules because he was unable to satisfy the eligibility requirement to show he met the definition of a 'partner' as he had not proved he is either married to his girlfriend or that they have lived together for the requisite two-

year period [52]. Considering this, the appellant's family life claim under the Immigration Rules must fail [53].

- n. Outside the Rules, nothing exceptional in the appellants circumstances was not considered under the Rules. The appellant cannot satisfy the requirements of 276 ADE in relation to his private life. The circumstances do not merit consideration outside the Rules [54].

5. The Judge went on to consider entitlement to be recognised as a refugee considering the factual findings made in which it is stated at [57]:

"Given the above factual conclusions, I find that the appellant has discharged the burden of proof of having a well-founded fear of persecution for a Refugee Convention reason. I conclude that the appellant's removal would not cause the United Kingdom to be in breach of its obligations under the Refugee Convention."

6. The Judge similarly concluded the appellant had not shown he was entitled to a grant of humanitarian protection or that there will be a breach of any convention of the European Convention on Human Rights if the appellant was returned.
7. The appellant sought permission to appeal relying on three grounds namely (a) that the Judge applied the wrong standard of proof at [31] of the decision under challenge, (b) that the Judge misdirected himself about the background evidence including misrepresenting the content of the expert report, and, (c) that the Judge misdirected himself about his consideration of the appellant's article 8 claim.
8. Permission to appeal was initially refused by another judge of the First-tier Tribunal but renewed to the Upper Tribunal where, on 19 December 2017, permission to appeal was granted.

Error of law

9. Ground 1 raises a procedural issue relevant to considering the fairness of the decision under challenge. At [31] of the decision the Judge writes:

"... the burden of proof is on the appellant and the standard of proof required is the balance of probabilities".

10. This, on the face of it, is a clear misdirection of law as the appropriate standard in a protection claim is the 'lower standard' and not the civil standard referred to by the Judge.
11. In relation to Ground 2 it is argued the Judge, when referring to the expert report, makes adverse findings based on selective quotes from that report. There is specific reference to the fact the report did confirm that, in principle, the authorities could detain somebody for twelve months without charge contrary to the Judge's findings in [47]. The finding at [48] is also criticised as it was the clear opinion of the expert that prosecution was possible and that extra scrutiny was a more likely occurrence.

12. It is also asserted the Judge's conclusions about the background evidence are incoherent. The grounds specifically referred to the conclusions at [32] in which the Judge states "I have looked at that [background] evidence and find nothing there that is inconsistent with the appellants claims", yet goes on to claim that the appellants evidence is inconsistent with that evidence and in the paragraphs addressed above. This indicates either that the Judge has made incoherent findings, or not applied anxious scrutiny to the matter.
13. Ground 3 asserts the Judge misdirected himself in considerations of the appellants claim pursuant to article 8 is it was accepted at [51] that the appellant is in a relationship with a refugee although finds the appellant's removal to Vietnam would not violate his article 8 rights.
14. It is arguable the Judge erred in finding on the facts that there was no need to consider the merits of the claim outside the Rules. As the Supreme Court have reminded us the jurisdiction of both the First-tier and Upper Tribunal is a human rights jurisdiction which requires proper consideration, in a structured manner, of article 8 ECHR. Whilst the Rules form part of a structured assessment, setting out the respondent's view on how article 8 should be interpreted, there is a requirement for a decision maker to assess the merits the claim by reference to the *Razgar* guidance. The Immigration Rules may not, arguably, be the sole answer to the human rights claim considering all the facts as known.
15. In her Rule 24 reply dated 10 January 2018 the respondent states she does not oppose the application.
16. I find the errors pleaded in relation to the correct standard of proof, treatment of the expert evidence and failure to consider Article 8 ECHR to be made out. This is also a religious persecution case in which there is no analysis of the *Hj (Iran)* principle. It may not have been pleaded but may, arguable, need consideration on the next occasion considering the finding that the appellant would pray discreetly. It is the reason why this may be the case that may have to be considered.
17. The failure to apply the correct standard of proof is a fairness issue. Considering which there can be no preserved findings. I set the decision of the First-tier Tribunal aside. As there will have to be a complete rehearing of this appeal I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard by a judge other than Judge Hussain. Further case management direction shall be given by the Resident Judge upon receipt of the file.

Decision

18. **The Immigration Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remit the decision to the First-tier Tribunal sitting at Hatton Cross.**

Anonymity

19. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 25 January 2018