



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

Appeal Number: PA/09137/2017

THE IMMIGRATION ACTS

Heard at Field House

**Decision and
Promulgated
On 17 April 2018**

Reasons

On 13 April 2018

Before

Deputy Upper Tribunal Judge Pickup

Between

[M L]

~~[No anonymity direction made]~~

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A Jones , instructed by Thompson & Co Solicitors

For the respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Oliver promulgated 27.11.17, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 8.9.17, to refuse his protection claim.
2. First-tier Tribunal Judge Robinson granted permission to appeal on 18.1.17.

3. Thus the matter came before me on 13.4.18 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons summarised below, I found an error of law in the making of the decision of the First-tier Tribunal such that the decision should be set aside and remade before the First-tier Tribunal, in accordance with the directions set out below.
5. I agree with the preliminary view of Judge Robinson that there is no merit in the first ground of appeal, which asserts that the judge misdirected himself with regard to corroborating evidence. I do not accept the submission that the judge placed an undue expectation on the appellant to adduce evidence to support his factual claim. I am satisfied that it was open to the judge at [33] to reject the claim that the appellant left in a hurry and to point out that he brought with him a contact number for his mother and also for her landlord. He had spoken with his mother by telephone after arriving in the UK and last spoke with her 3 months after his arrival, by which time he had been questioned in the Screening Interview and had already instructed solicitors to act on his behalf. He failed to explain why he had not asked for supporting documentation to evidence the adverse attention of the police, or his father's death certificate. On the facts of this case it was entirely reasonable to expect the appellant to have sought supporting documentation.
6. The second ground of appeal is more problematic. It is clear from the documentation in the case that the appellant had been consistent in asserting membership of the Phat Giap Hoa Hao Thuan Tuy, also known as Pure Hoa Hao Buddhism, a proscribed religious sect. This is to be distinguished from a branch of the faith that is sanctioned in Vietnam. I understand that 'Thuan Tuy' refers to the 'Pure' branch of the faith. The appellant explained the distinction at [6] of his witness statement.
7. At [25] the RFR made the concession that the appellant was a follower of the Hoa Hao religion. Unfortunately, the RFR does not make clear whether his claim to follow Pure Hoa Hao was accepted rather than the sanctioned branch of the faith. I note that the appellant was not questioned on the difference in his Asylum Interview. For the purpose of the appeal before me, Mr Nath adopted the position that the Secretary of State did not accept the appellant was an adherent of the Pure branch of the faith. However, it is far from clear to me that
8. From the judge's handwritten notes forming the Record of Proceedings, it is difficult to decipher whether there were any submission on the distinction between the Pure and the sanctions branches of the faith. On one view, that may be that because of the concession made at [25] of the RFR it was assumed that aspect of the appellant's claim had been accepted. However, at [34] Judge Oliver notes that it was argued that there was no dispute that the appellant followed Pure Hoa Hao Buddhism.

9. In any event at [34] the judge went on to express his opinion that such a submission was not an accurate representation of the respondent's position in the RFR. It was pointed out that the concession made was because the appellant's knowledge of the faith's core principles. Judge Oliver did not challenge the concession but did not accept that it amounted to a concession that the appellant was an adherent of the unsanctioned branch of the faith. The judge then stated, "For this reason he has not established that he faces persecution or section 3 ill-treatment on return." It is not clear from the papers before me whether the judge indicated to the two representatives before him that he intended to draw such a distinction in what he accepted the concession amounted to. At [35] the judge made clear the significance of the finding, stating, "... it is the exaggeration of his claim beyond membership of the sanctioned Hoa Hao sect which I find not to be credible." The finding was thus crucial to the outcome of the appeal.
10. The problem stems from a lack of clarity in the concession as to faith made by the Secretary of State. It remains unclear whether the appellant's claimed membership of the Pure branch of the faith was accepted. On the other hand, if it were not, I would have expected the RFR to draw that distinction, as it was crucial to the factual basis of the appellant's claim.
11. Taking all of this into account, I find that at the very least the judge may have misconstrued the concession made by the Secretary of State. The appellant and his representative should have had the opportunity to address the judge on the meaning of the concession made at [25] of the RFR and to call for the Secretary of State to clarify its concession. I cannot be satisfied that the matter was resolved with procedural fairness to the appellant. In the circumstances, the decision cannot stand and must be set aside to be remade afresh.
12. It would be very helpful to the First-tier Tribunal hearing the remitted appeal for the Secretary of State to clarify in advance of that hearing what was or is intended to be conveyed by the concession made at [25] of the decision, and the First-tier Tribunal may issue suitable directions to that end.
13. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues.
14. In all the circumstances, I remit this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the

overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

16. The appeal is remitted to the First-tier Tribunal sitting at Hatton Cross;
17. The appeal is to be decided afresh with no findings of fact preserved;
18. The ELH is 3 hours;
19. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Oliver and Judge Robinson;
20. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
21. An interpreter in Vietnamese will be required;
22. The First-tier Tribunal may give such further or alternative directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal purported to make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal has yet to be decided.



Signed

Deputy Upper Tribunal Judge Pickup

Dated