



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

Appeal Number: HU/00351/2018

THE IMMIGRATION ACTS

Heard at Field House

On 24 June 2021

**Decision &
Promulgated
On 8 July 2021**

Reasons

Before

UPPER TRIBUNAL JUDGE PITT

Between

**TN
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Record, Counsel, instructed on direct access
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

**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 their 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.

1. This is a remaking of TN's appeal against the respondent's decision dated 2 December 2017 which refused to grant leave on Article 8 ECHR grounds.
2. The appellant is a national of Vietnam born in 1972. He came to the UK in 2003 illegally and has remained here illegally ever since. He claimed asylum on 19 December 2003. He absconded following his screening interview which was conducted on 5 January 2004. The asylum claim was refused on non-compliance grounds on 15 March 2004. The appellant did not appeal that refusal.
3. The appellant made further representations on protection grounds on 4 April 2011. Those submissions were rejected in a decision dated 26 June 2014.
4. The appellant maintains he formed a relationship with HN, a British national, who came to the UK from Vietnam as a child. On 31 March 2015 the appellant applied for leave to remain as the partner of HN. This was refused on 30 September 2015.
5. The appellant's appeal against that refusal was dismissed on 25 November 2016 by First-tier Tribunal Judge Black. Judge Black found that as of 23 November 2016 the appellant had lived with HN from January 2015 at the earliest and did not meet the requirement in the Immigration Rules for cohabitation for a period of 2 years; see paragraph 8 of her decision. She also found that, in any event, there would be no interference to any family life with HN who was born in Vietnam and spoke Vietnamese and that the couple could exercise their family life in Vietnam; see paragraph 11 of Judge Black's decision. She also found that there were no close ties between the appellant and his partner's youngest daughter, TT (born on 12 March 2000); see paragraph 11 of the decision.
6. On 2 December 2017 the appellant made a further application for leave to remain on form FLR(FP). This application was again made on the basis of his relationship with HN and her children. The application was refused on 2 December 2017. The appellant appealed on Article 8 ECHR grounds only.
7. The appeal was dismissed by First-tier Tribunal Judge Aujla in a decision dated 12 February 2019. The Upper Tribunal granted permission to appeal against that decision on 20 August 2019.
8. In a decision issued on 1 October 2019, Deputy Upper Tribunal Judge Farrelly found a material error of law in the decision of First-tier Tribunal Aujla such that it should be set aside and remade *de novo* by the First-tier Tribunal. Judge Farrelly found that the First-tier Tribunal had not addressed correctly the appellant's claim that he would face mistreatment on return to Vietnam because of his history there and had also taken an incorrect

approach to the evidence on HN caring for her mother and the evidence concerning the appellant's relationship with HN's children.

9. The appeal then came before the First-tier Tribunal for a second time on 24 December 2019. First-tier Tribunal Judge McIntosh dismissed the appeal in a decision issued on 16 January 2020. Judge McIntosh did not find that there were insurmountable obstacles to TN and HN living together in Vietnam or very significant obstacles to the appellant reintegrating there; see paragraph 41. Even though Judge McIntosh accepted that the appellant had lived with HN since 2015 and had a family life with HN and with her adult daughter, TT, those matters could not show that the decision amounted to a disproportionate breach of Article 8 ECHR; see paragraph 46.
10. The appellant appealed against the decision of Judge McIntosh and was granted permission by the First-tier Tribunal on 28 April 2020.
11. The matter then came before me in the Upper Tribunal on 17 September 2020 for an error of law hearing. In a decision issued on 2 October 2020 I found an error of law on the basis that the First-tier Tribunal failed to take into account a medical report relied on by the appellant as showing that he had been mistreated in Vietnam in the past; see paragraph 11 of the error of law decision.
12. It is expedient to set out at this point that although the grounds also challenged the approach taken by First-tier Tribunal Judge McIntosh to the appellant's family life claim with TT, I did not find an error in that part of the decision; see paragraph 12 of the error of law decision. The re-making of the appeal was therefore limited to a re-assessment of the appellant's claim that he had been mistreated in the past and would face adverse treatment on return such that there would be insurmountable obstacles to the appellant and HN returning together or very significant obstacles to the appellant reintegrating in Vietnam. The findings of Judge McIntosh regarding the other aspects of the appellant's Article 8 ECHR claim remained extant, the appellant's relationships with HN, TT and HN's other adult children, the care needs of HN's elderly mother and the appellant's length of residence and any private life in the UK being insufficient to show that the Immigration Rules were met or that there were exceptional circumstances capable of outweighing the public interest in the maintenance of effective immigration control.
13. In paragraphs 14 and 15 of the error of law decision I raised with the parties the issue of the grounds of the appeal shifting from a conventional family and private life claim to one concerning whether the appellant was mistreated in the past and whether he would face mistreatment in the future. The respondent maintained in submissions dated 26 November 2020 that the "protection" evidence was a "new matter" and that the case of Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC) was decided in error where it stated that the provisions of Section 85(5) of the Nationality, Immigration and Asylum Act 2002 did not apply to

appeals in the Upper Tribunal. The appellant maintained in submissions dated 27 November 2020 that Birch was correctly decided and that it was open to the appellant to rely on his evidence of past and future mistreatment.

14. In a direction dated 14 December 2020 I gave a preliminary view that the appellant should be permitted to rely on his claim regarding mistreatment in Vietnam. I confirmed this decision at the hearing on 24 June 2021. As well as relying on Birch, it was also my view that this was arguably not a “new matter” where the appellant had relied on it before the First-tier Tribunal twice and there had been no objection from the respondent. I also noted the guidance provided by the President of the Upper Tribunal in JA (human rights claim; serious harm) Nigeria [2021] UKUT 0097 (IAC) on permitting a claim of serious harm to be raised within the context of an Article 8 ECHR claim.
15. In paragraphs 8 to 22 of written submissions dated 17 June 2021, Ms Record raised a further jurisdictional issue, seeking to re-open the Article 8 ECHR assessment concerning the appellant’s relationship with TT. As above, my conclusion in the error of law decision was that there was no error in that regard in the decision of Judge McIntosh, that her findings on the relationship with TT stood and that this part of the Article 8 ECHR assessment was finally determined.
16. Ms Record set out, correctly, that at the time of the application and date of decision (2 December 2017), TT was a minor, aged 17 years’ old. The respondent addressed her circumstances as a minor on pages 4 and 5 the refusal decision. It was found that if the appellant left the UK, no undue hardship would arise for TT given the limited period they had lived together and given that she was an older child during any period of cohabitation. On page 6 of the decision the respondent found that there were no exceptional circumstances amounting to a breach of Article 8 ECHR. That assessment included “any relevant child” and the best interests of that child “as a primary consideration”.
17. Ms Record submitted that the findings of Judge McIntosh showed that the respondent had been incorrect to find no undue hardship for TT and showed that there were, as of the date of the decision, exceptional circumstances amounting to a breach of Article 8 ECHR. She sought support for this proposition from paragraph 46 of Judge McIntosh’s decision which found that the appellant had “established a family life with his partner and her daughter TT”. This, in turn, meant that the appellant could show that as of the date of the decision the Immigration Rules were met and he was entitled to have that factor weighed in his favour in the Article 8 ECHR assessment that I had to conduct.
18. I did not find that the main proposition underpinning Ms Record’s argument was made out. Judge McIntosh assessed the evidence before her as of January 2020, the correct approach in law in an Article 8 ECHR claim. She was not asked to and did not assess whether there were close ties or

a family life or anything exceptional in the relationship with TT as of December 2017. Her findings on the relationship with TT as of January 2020 cannot be “read back” to the date of the decision, some three years earlier, and relied upon as determinative of there having been exceptional circumstances amounting to a breach of Article 8 ECHR such that the Immigration Rules were shown to have been met as of the date of the decision.

19. That is additionally so where, as Mr Lindsay identified, only a year before the date of the decision of 2 December 2017, Judge Black had found no relationship for the purposes of Article 8 ECHR between the appellant and TT and those findings are undisturbed. Mr Lindsay was also correct to highlight that it was far from clear that there could be a finding of exceptional circumstances as of the date of the decision for other reasons. As in the refusal letter, the period of cohabitation had not been extensive. TT was an older child, very nearly an adult. Her mother was her primary carer and she had adult siblings and other adult relatives in the UK in addition to any relationship with the appellant.
20. In so far as Ms Record’s submission sought to rely on paragraph 12 of my error of law decision referring to a “strong relationship” between the appellant and TT, it was misconceived. That statement was made as part of a theoretical assessment of the appellant’s claim at its highest, conducted in order to show that, even then, the family life claim with TT could not succeed and there was therefore no error in Judge McIntosh’s decision in that regard.
21. I also did not accept that the Article 8 ECHR re-assessment should be widened as argued by Ms Record even if it was accepted that TT’s circumstances as of the date of the decision were exceptional and that the Immigration Rules were met at that time. As Ms Record accepted, that would have afforded the appellant, at best, a grant of limited leave. By the time of any further application, TT would have been an adult. It is entirely speculative that the appellant, having been granted a period of limited leave on the basis of his relationship with TT, would have been successful in any subsequent application for leave, whether under Article 8 ECHR or on any other basis. This was not a factor that could add material weight to his Article 8 ECHR claim now, therefore.
22. For these reasons, I did not accept that it was appropriate to re-open the Article 8 ECHR assessment further than already provided for in the error of law decision.
23. What must be re-assessed, however, is the appellant’s claim concerning past and future mistreatment in Vietnam and whether this can show very significant obstacles to the appellant being able to reintegrate or insurmountable obstacles to the appellant and HN exercising their family life in Vietnam.

24. There being no objection from the respondent, I admitted the appellant's additional materials provided on 17 June 2021 and took them into account with the materials that were before the First-tier Tribunal.
25. The appellant's claim that he was mistreated in Vietnam is set out in his witness statements dated 23 January 2019 and 14 June 2021. He maintains that he was working in the accounts department as a clerk in a timber company. He claims that in 2005 he was detained by the authorities on two occasions as part of an investigation of whether the company was involved in improper financial practices. The appellant was mistreated during the two detentions. When he was called for a third interview, he went into hiding. The head of the company, X, was arrested, convicted and sentenced to 20 years in prison. The appellant remained living in hiding for 8 years until he left Vietnam in September 2003 and came to the UK in December 2003. The appellant maintains that he will be of ongoing adverse interest now because of these matters.
26. There are numerous reasons why I do not find the appellant's claim to have been of adverse interest in Vietnam in the past to be at all credible.
27. After his screening interview conducted on 5 January 2004, the appellant did not pursue his asylum claim for the next 7 years. His claim was refused for non-compliance on 15 March 2004. He did not appeal that refusal. He claims to have come to the UK to seek asylum after having been mistreated and having to live in hiding for 8 years. If that were so he could be expected to pursue his protection claim. The fact that he disengaged for so many years after the initial interview indicated strongly to me that he did not have a genuine belief that he was in need of international protection. I did not find it credible that not having a fixed address and being without legal advice would prevent him from pursuing his protection claim, as he maintains in paragraph 8 of his witness statement dated 23 January 2019. I did not find it credible that he would not pursue his claim because he feared return to Vietnam as maintained in paragraph 4 of his witness statement dated 14 June 2021. This is not consistent with coming to the UK to claim asylum and choosing to claim here as the UK is "a developed country" and "better" than other countries; see question 1.37 of the screening interview.
28. Further, at question 1.71 on page 8 of the screening interview, the appellant was offered an opportunity to explain the delay in applying for asylum. His response was that he loved his country but that it was difficult in Vietnam and:

"therefore I would like to come here to work, to help my family. That is asylum".

That response is not consistent with his current claim to have left Vietnam in fear of an unfair prosecution because of financial wrongdoing and mistreatment in detention. It suggests strongly that he came to the UK as an economic migrant.

29. On page 14 of the screening interview the interviewing officer sought clarification of the appellant's response to question 1.71. It was put to him that what he had said about working in the UK "is not asylum". The appellant responded that "I thought that coming here to work was claiming asylum". That response also suggests that the appellant came to the UK as an economic migrant and not in connection with any history of adverse interest in Vietnam.
30. The appellant was then asked in the screening interview if his life was in danger in Vietnam. He responded:

"Yes, I have done some business before and then I was investigated by the police in Vietnam. Something to do with small company, that is why I had to leave."

The appellant was then asked if he had ever been arrested. He replied "Once for a month". Those responses might, on one view, be taken as support for the appellant indicating, finally, in his screening interview that was in need of protection. What he said about being detained once for a month, however, is entirely inconsistent with his witness statements in which he maintains clearly that he was detained twice. It is also entirely inconsistent with the information given to Dr Al-Wakeel who produced a medical report dated 29 September 2018 in support of the appellant's claim, as on the third page of that report under the heading "History" the appellant stated that during the first interrogation he was detained for two days and during the second interrogation was detained for three days. The appellant has therefore given highly inconsistent accounts of his alleged detentions in Vietnam and his claim is significantly undermined as a result.

31. Further, the appellant indicated in the screening interview that he last saw his mother in October 2003, again, more or less when he left Vietnam. He stated in response to question 1.94 that his father died in 1999. However, in his witness statement dated 23 January 2019 the appellant stated in paragraph 2 that when he left Vietnam he was living with his "parents and one elder brother". His claim to have been living with close family members when he left Vietnam is not consistent with his claim to have had to live in hiding to avoid the authorities. Further, his evidence about living with his father in 2003 is not consistent with his father having died in 1999. The appellant was asked about this discrepancy at the hearing before Judge McIntosh. His evidence, recorded in paragraph 22 of Judge McIntosh's decision, was that he lived with "acquaintances who accommodated him". This fails to explain how he had to be in hiding for 8 years but was also living with family members when he left the country in 2003.
32. There is also no more detail than already set out above in any of the appellant's accounts as to how he managed to live in hiding in Vietnam for 8 years. Given the amount of time that he claims he lived in hiding, his

account of this period is so vague and unparticularised that it lacks credibility.

33. There are further significant matters undermining the appellant's credibility. When he did engage again substantively with the respondent, making further submissions on protection grounds on 4 April 2011, those submissions bore no resemblance to the claim on which he relies now. The refusal letter dated 26 June 2014 shows that the appellant's submissions in 2011 put forward a claim based on religious persecution with no mention of the financial matter or any detentions or mistreatment or living in hiding for 8 years. The materials he relied on asserted a fear of mistreatment on the basis of the appellant being Catholic but he provided no evidence to show that he was Catholic or followed any form of Christian religion. Nothing of this nature was mentioned in the screening interview in 2003. The starkly different claim made by the appellant in 2011 undermines his credibility now and suggests strongly that he is someone prepared to make wholly unfounded applications for protection in order to try to remain in the UK.
34. Further, the appellant made no mention of being in need of protection because of the financial misconduct matter or on religious grounds when his case came before Judge Black in 2018. He made no mention of any concerns about any kind of mistreatment on return in that appeal. If he had a genuine subjective fear of mistreatment on return he could be expected to say so to Judge Black. The fact that he did not still further undermines his claim to have been mistreated in the past and to be in fear of mistreatment on return now. That is additionally so where he also did not raise any protection evidence in the application for leave made in 2017 that forms the basis of these proceedings, only doing so in the materials put before Judge Aujla in 2019.
35. The appellant relies on a medical report dated 29 September 2018 from Dr Baha Al-Wakeel. As above, the evidence provided to Dr Al-Wakeel about the claimed detentions is not consistent with the appellant's screening interview. Further, in paragraph 3 of the witness statement dated 23 January 2019 the appellant maintained that a bump on the left side of his forehead was caused by being hit with the butt of a gun. There is no specific reference to being hit on the head with a rifle butt in Dr Al-Wakeel's report, the "main" injury to the appellant's head being stated to have been caused by his being hit with a metal bar. In any event, Dr Al-Wakeel's report indicates at its highest that the marks on the appellant's body are "typical of the events described by him of being intentionally caused". As identified on the fifth page of Dr Al-Wakeel's report, under the Istanbul Protocol "typical" means "this is an appearance that is usually found with this type of trauma, but there are other possible causes". Given the significant credibility issues raised above and below across the evidence as a whole, the most that the medical report can confirm is that the appellant has been involved in a violent incident at some unspecified time in the past. It is not sufficient to bring any credence to his claim to have been mistreated by the authorities in Vietnam.

36. The appellant also seeks to rely on an undated letter from his former employer who was convicted of financial misconduct and sentenced to prison for 20 years. He also relies on a document describing her trial. These documents were provided for the first time for the hearing before Judge Aujla in February 2019. At that time there was no explanation as to how the appellant obtained these documents from Vietnam some 16 years after he left the country.
37. In his most recent statement prepared for the re-making hearing before me, in paragraphs 13 to 23, the appellant maintained for the first time that a friend in Vietnam contacted him in 2018 and sent these documents to him. This friend had also worked for the same company but had been able to protect himself from adverse interest by paying a bribe after his first detention. When their former employer had been released in 2018, his friend had contacted her and obtained the documents from her. The appellant also indicated in paragraph 28 of the statement dated 14 June 2021 that his friend in Vietnam had since died of Covid-19.
38. I found that the timing of this evidence significantly reduced the weight that could be attached to it. The appellant claims to have received these potentially important materials in 2018 at a time when he had legal representation. I did not find it credible that he would not have provided any of the details of how he obtained these materials until three years later and after two First-tier Tribunal hearings and two Upper Tribunal error of law hearings. He has still not provided any documentation or other materials demonstrating how these materials were physically sent to him, by way of an envelope or email, for example or even described how these documents were given to him. It would not have been difficult to provide a witness statement from his friend in Vietnam explaining how he obtained the materials and sent them to the appellant and setting out his knowledge of the investigation by the authorities into the company he and the appellant worked for. If the appellant could obtain a statement from his former employer, he could obtain one from his friend who had been prepared to take this significant action to assist him. When considered against the numerous aspects of the evidence showing the appellant to lack credibility, I found the appellant's statement that this friend had died during the Covid-19 pandemic, thus being unable to provide a statement supporting his new evidence as to how he obtained the documents, to be convenient to the point of incredibility.
39. I also found that aspects of the documents themselves meant that they attracted little weight. The appellant relies on a "letter of confirmation" from his former employer at page 14 of the 292 page bundle provided for the First-tier Tribunal hearing. It states:

"I established a private enterprise specialising in processing forest products in 1995. After a period of operation, the business went bankrupt. I myself had to serve a twenty year sentence in prison and Mr [TN] was a cashier who was also arrested but then fled.

Therefore, I write this letter to hereby confirm:

Mr [TN], born on February 27, 1972 previously was a cashier. He was arrested but then fled.”

The document is then signed and has a stamp on it from the “People’s Committee of Duc Tho Town – Ha Tinh Chairman”. There is no original copy of this document. It is undated. I did not find it credible that someone imprisoned for 20 years for a crime which they did not commit would be prepared to provide such a statement in support of a fugitive allegedly still wanted by the Vietnamese authorities in connection with the same false case. I found it additionally lacking in credibility that she would show her statement supporting a fugitive in order for it to be endorsed by a public official.

40. The appellant also relies on the court document contained at paragraphs 16 to 27 of the bundle that was before the First-tier Tribunal. This document purports to be a record of the trial of the appellant’s ex-employer. There is no mention of the appellant in this document. It does refer to his former employer’s son and a member of staff as also having been charged. The document also refers on pages 2 and 3 of the translation to other individuals involved in the matter but who were not prosecuted for various reasons. The appellant maintained before Judge McIntosh that his details were not included in these documents as “he had gone into hiding and he could not be named on the court documents in his absence”; see paragraph 25 of Judge McIntosh’s decision. Where the court document refers specifically to other individuals who were not charged but were involved in the case, I did not find the appellant’s explanation of why he was not referred to in this document (or any other document from the authorities) to be credible.
41. The appellant also relies on a country expert report from Mr Christoph Bluth dated 14 June 2021. The respondent accepted that Mr Bluth is qualified to give an opinion on the political situation in Vietnam. Section 5 of the report sets out details of how financial corruption has become a feature of life in Vietnam during a period of rapid economic growth. Mr Bluth sets out that investigations by the authorities into these matters do not follow basic principles of justice and can include physical mistreatment. Mr Bluth states in paragraph 5.3.5 that the appellant’s account is plausible when considered against that background. I have considered carefully whether that statement could assist in showing that the appellant’s claim was credible. In the context of all of the feature set out above showing that his claim is not credible, I did not find Mr Bluth’s statement could provide material support. Mr Bluth finds that the appellant’s claim is generally consistent with what can happen in Vietnam. His assessment that the appellant’s claim is plausible does not include consideration of the very significant issues I have identified in the wider evidence. In my judgment the shortcomings in the appellant’s case are too numerous and serious for the appellant to be found to be credible even after consideration of Mr Bluth’s comment.

42. Dr Bluth also indicates in paragraph 5.4 of his report that the appellant and HN could be stigmatised if they returned to Vietnam together as they are not married and she has children from another relationship. I did not find that this part of the report assisted the appellant's case. Firstly, nothing in the details of Mr Bluth's expertise set out at the beginning of the report refers to social issues as opposed to his knowledge of political and religious issues. None of HN's adult children are expected to go to Vietnam with the appellant and HN, there is no issue of "child abandonment" or difficulties for children of single parent families as referred to in paragraphs 5.4.1 to 5.4.5 of the report. The appellant and HN have not provided any evidence as to whether they are formally divorced from any previous partners. Nothing in the evidence suggests that they would not be able to divorce and then marry if this is a requirement for HN to relocate to Vietnam as the appellant's British partner.
43. Mr Bluth also comments in paragraph 5.5.1 on difficulties on return to Vietnam if the appellant is deported. The appellant is not facing deportation. He can be expected to return to Vietnam voluntarily using regular documentation where he has no basis of stay in the UK. He has no political activities or other potentially adverse profile to conceal. He is returning after being unable to obtain leave on the basis of his Article 8 ECHR rights. If specifically asked he can be expected to state that he claimed asylum on a false basis in order to try to remain in the UK to work and tried to remain to be with his partner. Applying Mr Bluth's comments on returns to Vietnam, that profile would not lead to a more extensive form of questioning on return and that would be so even if the appellant was removed rather than returning voluntarily.
44. I therefore did not find that Mr Bluth's report could add weight to the appellant's protection evidence or to his Article 8 ECHR claim.
45. For all of these reasons, it is also my conclusion that the appellant has not shown that he has ever faced adverse interest on any basis in Vietnam or that he would do so if he returns now.
46. It must follow that he has not shown that there are insurmountable obstacles to the appellant returning with HN or very serious obstacles to the appellant's reintegration in Vietnam. Their relationships with TT, HN's other adult children and HN's mother and the appellant's private life have not been found capable of making out an Article 8 ECHR claim under the Immigration Rules or in a wider assessment of any family and private life outside the provision of the Rules. All of the s.117B factors weigh against him where he does not speak English, does not support himself, and he formed any family and private life whilst here illegally. There is nothing here that shows a level of exceptionality capable of outweighing the public interest in the maintenance of effective immigration control.

Notice of Decision

47. The appeal on Article 8 ECHR grounds is refused.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 29 June 2021