



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

Appeal Number: PA/00252/2020

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 17 November 2021**

**Decision & Reasons  
Promulgated  
On 23 February 2022**

**Before**

**UPPER TRIBUNAL JUDGE LANE  
DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**TVD  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Mair, instructed by Fisher Stone, solicitors

For the Respondent: Mr Whitwell, Senior Presenting Officer

**DECISION AND REASONS**

1. By a decision promulgated on 25 May 2021, the Upper Tribunal set aside the decision of the First-tier Tribunal. Its reasons were as follows:

1. The appellant is a male citizen of Vietnam who was born in 1990. He appealed to the First-tier Tribunal against a decision of the Secretary of State dated 23 December 2019 dismissing his claim for international protection. The First-tier Tribunal, in a decision promulgated on 23 November 2020, allowed the appeal in Article 8 ECHR grounds but

dismissed it on asylum/Article 3 ECHR grounds. The appellant now appeals, with permission, to the Upper Tribunal. There has been no cross challenge to the Article 8 ECHR decision and the appellant does not seek to appeal the First-tier Tribunal's findings regarding his claim to international protection on account of his sexuality. The sole issue in the appeal relates to the appellant's claim that he is at risk of re-trafficking if returned to Vietnam.

2. That the appellant is a gay man who had been trafficked into the United Kingdom for the purposes of sexual exploitation was accepted by the judge [66]. As regards application of paragraph 276ADE (1) (vi) of HC 395 (as amended), the judge found that there would be very significant obstacles to the appellant's integration into Vietnamese society [99]. At [96] the judge found that ' [the appellant] has a strong subjective fear of what might happen to him on return to Vietnam which is likely to lead to a significant deterioration in his mental state, including his symptoms of PTSD.' At the First-tier Tribunal hearing the judge found that the appellant's mental health was such that he should treat him as a vulnerable witness [44]. As a consequence of his findings regarding paragraph 276ADE, the judge allowed the human rights appeal (Article 8 ECHR).

3. The judge has carried out a thorough analysis of the evidence, which includes the expert reports of Dr Miller (mental and physical health), Ms Smith (anti-trafficking support worker) and Mr Nguyen (country expert). In his Article 8 ECHR analysis, the judge makes it clear that he accepted Dr Miller's assessment finding that the 'appellant's current level of functioning is based upon the feeling of safety and support that he currently enjoys.' Dr Miller considered that a return to Vietnam 'will lead to worsening symptoms ... which will disrupt coping and functioning.' The appellant's coping strategies would begin to fail because he would be living 'under threat.' In addition, at [97], the judge found that the appellant, having been away from Vietnam for 9 years, would have no support network in Vietnam, has 'only limited practical skills', would face significant stigma as a former victim of trafficking and have access to little material or financial support.

4. Neither party challenges the very clear findings which the judge made in respect of the Article 8 ECHR grounds successfully raised in the appeal. Ms Mair, who appeared before both the First-tier Tribunal and Upper Tribunal, submitted, however, that the judge had erred in law by failing to give appropriate weight to those same findings of fact to his assessment of risk on return. The judge found that the passage of time, ignorance amongst the traffickers that the appellant had returned to Vietnam and background country conditions referred to in the CPIN report indicated that the risk of the appellant being re-trafficked by the same criminals or newly trafficked by others fell below the threshold of reasonable likelihood [85].

5. I find that, in what is otherwise a cogent consideration of the evidence and application of the relevant law, the judge has fallen into error. I say that for the following reasons. First, I agree with Ms Mair that the judge's assessment of the threat from the previous traffickers is tainted by his misunderstanding of the nature of the 'debt' which the appellant claims to owe to those individuals. At [80], the judge finds that there was, in reality, never a debt at all but simply a 'pretext used [by the traffickers] to justify to the appellant his own exploitation' [80] The judge appears to find that, because there is not and never has been any debt, that is a factor which

indicates that the appellant would not be at real risk. I agree with the judge that there never was a debt in the sense of a contract with repayment terms which the appellant and his family may have breached. However, the fact that the debt was nothing more than a pretext for exploitation must mean that the same pretext could be employed against the appellant again. Being able to argue that there is no debt will not assist the vulnerable appellant if criminals with considerable more financial and physical power than he possesses tell him that there is. The judge appears to have discounted the possibility of re-trafficking on a faulty understanding of the nature of the relationship and power dynamics existing between the appellant and those who abused him.

6. Secondly, I agree with Ms Mair that there is a disconnect between the judge's approach to the expert evidence in the Article 8 ECHR appeal and that same evidence in the asylum/Article 3 ECHR appeal. In the Article 8 ECHR appeal, the judge has no difficulty accepting that the appellant's mental health will suffer a significant deterioration on return to Vietnam whilst he will have no financial or material support. The judge unequivocally finds at [84] that the appellant's mental health will not expose him to the risk of re-trafficking 'to any significant degree' but, in my opinion, that finding is not supported by an adequate explanation as to why an individual who was manifestly vulnerable in the past would not be so in the future when his mental health and material circumstances have even further diminished. I do not say that the appellant cannot, in the light of the evidence, be returned safely, only that the judge has failed to justify dismissing the appeal given his own findings on the evidence.

7. My conclusion is supported by further, albeit lesser, errors in the decision. First, I accept Ms Mair's submission that the judge has not dealt fully with evidence that traffickers could use the corrupt central registration system to locate the appellant. The judge's comments regarding the lapse of time reducing any interest which the traffickers may still have in the appellant are valid but the size and population of Vietnam are unlikely to be relevant factors preventing the traffickers using the registration system to locate the appellant. Secondly, the judge's analysis addresses state protection but there are no clear findings as to risk in the appellant's home area and, if risk does exist there, the availability of internal flight within Vietnam. Thirdly, there is a tension between the judge's findings at [83] that the appellant could use, on return to Vietnam, skills acquired during the period of his exploitation and his assessment at [97] that the appellant has no education and 'only limited practical skills.' None of these matters are sufficient to vitiate the decision but, taken with the more serious errors discussed above, I find that the decision should be set aside. The decision can be remade in the Upper Tribunal. Ms Mair indicated that there would be no fresh evidence but, if either party wishes to rely on new evidence, then copies of any documents, including witness statements, must be sent to the Upper Tribunal and the other party no less than 10 days before the resumed hearing. If the appellant requires an interpreter, then his representative must request that an interpreter attend the hearing; I make no direction for an interpreter at this time. The First-tier Tribunal's decision in respect of Article 8 ECHR shall stand as shall its findings at [66] and its acceptance of the opinion of the medical and country experts. The only issue remaining to be determined is that of risk of re-trafficking.

## Notice of Decision

The decision of the First-tier Tribunal is set aside. The First-tier Tribunal's decision in respect of Article 8 ECHR shall stand as shall its findings at [66] and its acceptance of the opinion of the medical and country experts. The only issue remaining to be determined is that of risk of re-trafficking. . The decision in respect of asylum/Article 3 ECHR shall be remade in the Upper Tribunal.

2. On 15 November 2021, the respondent filed and served a Position Statement. In the light of 'the primary and preserved findings of fact by the First-tier Tribunal', the 'supporting medical evidence and 'in particular the evidence of the country expert, Ms Beddoe' (4 October 2021), the respondent states unequivocally that she 'did not oppose the appeal being allowed on the grounds of risk of re-trafficking...'
3. The Position Statement confirms that the respondent had, as a consequence of the First-tier Tribunal's allowing the Article 8 ECHR appeal, granted the appellant leave to remain on 11 December 2020. The Upper Tribunal was unaware of that grant until it received the Position Statement. The respondent relies on section 104(4A) of the Nationality, Immigration and Asylum Act 2002 which provides:

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on ... a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant—

(a). . . . .

(b) gives notice, in accordance with the Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground.

The respondent contends that no notice has been given and consequently the appeal should be treated as abandoned. However, the Statement concludes that 'the respondent does not contend that that [the section 104 notice] is conclusive of the matter and, if the Upper Tribunal is satisfied that notice was indeed properly given' then the decision should be remade without a hearing 'which will save time and costs for all parties.'

4. Upon receipt of the Position Statement, the appellant's representative, Fisher Stone Solicitors, emailed the Upper Tribunal on 15 November 2021. The appellant's representative states that the respondent had 'at no point' notified the Tribunal 'as to the grant of leave'. The representative does not say that either she or the appellant himself had been unaware of the grant of leave.

5. Secondly, the representative contends that there is no prescribed form for the 'notice' which is required under section 104 (4B) (b); an 'information sheet' provided to the appellant offered a link to a 'website for the AIT [Asylum and Immigration Tribunal] which no longer exists.' The appellant submits that the making of his renewed application for permission to appeal to the Upper Tribunal on 17 January 2021 'served as that notice, albeit several days out of time.'
6. Thirdly, the representative states that the respondent did not notify the Upper Tribunal at the error of law hearing on 12 May 2021 or at any time prior to 15 November 2021 that the respondent considered the 'appeal as being abandoned and/or invited the Upper Tribunal to view the appeal as abandoned.'
7. Fourthly, the letter concludes by (i) inviting the Upper Tribunal to treat the renewed application for permission to appeal as the relevant notice, there being no prescribed form of notice; (ii) submitting that, given the underlying merits of the appeal on asylum grounds (including the respondent's concession in the Position Statement) the Upper Tribunal should extend time for giving notice of an intention to proceed with the appeal notwithstanding the grant of leave to remain.
8. The issue before us, therefore, is a narrow one. If we find (i) that time can and should be extended and that (ii) that the renewal of the application for permission to appeal does constitute valid notice then, given the respondent's unequivocal comments regarding the merits of the appeal, the decision should be remade by allowing appeal on asylum grounds.
9. This area of practice was addressed by the Upper Tribunal in *MSU (S.104(4b) notices) Bangladesh* [2019] UKUT 412 (IAC). The headnote reads:

*Where s.104(4A) applies to an appeal, neither the First-tier Tribunal nor the Upper Tribunal has any jurisdiction unless and until a notice is given in accordance with s.104(4B).*

*If such a notice is given, it has the effect of retrospectively causing the appeal to have been pending throughout, and validating any act by either Tribunal that was done without jurisdiction for the reason in (1) above*

*As the matter stands at present, there are no 'relevant practice directions' governing the s.104(4B) notice in either Tribunal.*

*The Upper Tribunal has power to extend time for a s.104(4B) notice. Despite the provisions of Upper Tribunal rule 17A(4), such a power can be derived from s.25 of the Tribunals, Courts and Enforcement Act 2007.*

As *MSU* makes clear, an appeal is abandoned unless notice is given. If notice is given, it acts retrospectively to validate acts in the First-tier Tribunal and Upper Tribunal taken after the grant of leave. In the instant appeal, leave was granted on 11 December 2020 so the appellant was required to give notice within 28 days, that is by 8 January 2021 ( see The Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 17A(4)). If the appellant is right and the application to renew the application for permission to appeal can stand as valid notice, then the application which was filed at the Upper Tribunal on 18 January 2021 was 10 days out of time. (We note that, under the Procedure Rules, the time limit is 28 days if the notice is delivered personally or sent electronically and 30 days if posted; our copy of the application has been dated stamped by the Tribunal 18 January 2021, which is the same date the form was completed indicating that it was sent either by email or fax). We need, therefore, to determine (i) whether the renewed application constituted valid notice and (ii) if it did, whether we should extend time.

**Did the renewed application for permission to appeal constitute valid notice pursuant to section 104(4B)(b)?**

10. The conclusion of the Upper Tribunal in *MSU* (with which we respectfully agree) was that the Direction 5 of the Practice Direction: Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal is so out of date and inconsistent with the current law that it has been rendered ineffective [14-15] hence the Tribunal's conclusion that 'there are no 'relevant practice directions' governing the s.104(4B) notice in either Tribunal.' Neither party submitted that the Direction criticised in *MSU* had been replaced. Therefore, the details specified by the (now irrelevant) Practice Direction in a Section 104 notice do not apply (having said that, we note that the only item of information which the appellant's renewed application for permission did not provide was the date upon which he had been granted leave to remain).
11. Can a renewed application for permission which does not purport, in terms, to inform the Tribunal and the respondent that the appellant 'wishes to pursue his appeal' be a valid notice? Ms Mair, who appeared for the appellant, submitted that it could and should be so treated. She argued that the renewal of the application was an unequivocal statement by the appellant that he 'wished to pursue' those parts of his appeal in which he had been unsuccessful before the First-tier Tribunal. The practical effect of the notice was, in the absence of any relevant rules or guidance, all that mattered; the document was not rendered invalid simply because the appellant may not have intended the application to stand as a section 104 notice at the time he filed it but only did so subsequently.
12. We agree with Ms Mair's submission. At a time when the particular form and contents of a section 104 notice are not specified by practice direction or guidance, we do not consider it necessary to go beyond the words of the statute and invent our own requirements. We accept that the use of the words 'send or deliver a notice' in the Tribunal Procedure (Upper

Tribunal) Rules 2008, paragraph 17A(3) require notice to be given in writing rather than orally. In our opinion, filing an application for permission to appeal unequivocally gives notice of an appellant's 'wish to pursue an appeal'. It makes no sense to suggest that it does otherwise. Moreover, there is nothing in section 104 to indicate that the appellant must have been aware at the time he gave notice that his appeal had been treated as abandoned. The only requirement was that the Upper Tribunal should be notified that the appellant wished to pursue an appeal on asylum grounds, which had been dismissed in the First-tier Tribunal; the application for permission cannot have left the Upper Tribunal in any doubt of the appellant's wish. We also find that nothing turns on the reference in the Procedure Rules to 'a notice'. The statute refers only to the need to 'give notice...' In our view, it would be contrary to the statutory provision if an application for permission to appeal were to be excluded simply because it did not describe itself as 'a notice' or refer to section 104. We find, therefore, that the appellant did 'send or deliver a notice ... to the Upper Tribunal' when his representative filed a renewed application for permission to appeal. However, that notice remains invalid unless and until we extend time.

### **Can time for giving notice under section 104 be extended?**

13. The Upper Tribunal in *MSU* concluded that the Tribunal has the power to extend time for a section 104 notice but that, on the facts of the appeal before it, only the First-tier Tribunal was able to determine the validity of the notice:

37. When abandonment under s 104(4A) takes place it will sometimes be perfectly clear which Tribunal has the task of dealing with the validity of a notice of intention to continue, including any question of the extension of time. For example, if the grant of leave takes place before the First-tier Tribunal's decision on the appeal, the Upper Tribunal cannot be involved and any such issues must be for the First-tier Tribunal. On the other hand, if the grant of leave occurs at a time when the appellant's appeal is clearly before the Upper Tribunal, following a decision on the appeal and either a grant of permission or a refusal renewed to the Upper Tribunal, the matter must be for the Upper Tribunal: the First-tier Tribunal is functus. As Judge Grubb pointed out, however, in the present case the matter is not so clear. Given that there was an application for permission made to the First-tier Tribunal, which was refused, and that there was then an application for permission made to the Upper Tribunal before the notice of intention to continue the appeal was given, it appears superficially that questions relating to the notice ought to be considered by the Upper Tribunal.

38. That, however, in our judgment cannot be right. The grant of leave had the effect (provisionally, it may be said) of causing the appeal to be treated as abandoned; and unless and until a valid notice was given, any act by either Tribunal (other than acts connected with acknowledging the abandonment) was made without jurisdiction. In particular, an application for permission to appeal could not be received or determined. It follows from that at the time it received and determined the application for permission in the present case the First-tier Tribunal was acting without jurisdiction,

because both events followed the grant of leave. The Upper Tribunal has not been involved. (The correctness of this analysis can be tested by considering the position if no application for permission to appeal to the Upper Tribunal had been made: although the First-tier tribunal appeared to have become functus by incompetently determining an incompetent application, the Upper Tribunal could not be concerned at all. The answer cannot be different if a further incompetent application is made to the Upper Tribunal.)

39. On the facts of this case it can only be for the First-tier Tribunal to determine the validity of the notice, including deciding whether to extend the time for it to be given. Once there has been a valid notice, however, for the reasons set out at paragraphs [28]-[32] above, it has the effect of retrospectively continuing the appeal as a pending appeal, so that events that took place during the period when it was provisionally abandoned acquire validity. If the First-tier Tribunal does not extend time, the appeal stands as abandoned on 20 June 2019, and the Tribunal has only to send out the requisite notice acknowledging that. If time is extended, that will retrospectively validate (i) the application for permission to appeal to the First-tier Tribunal; (ii) the First-tier Tribunal's decision refusing that application; (iii) the application for permission to appeal to the Upper Tribunal; (iv) Judge Grubb's decision granting permission, and (v) the substantive appeal to the Upper Tribunal against the First-tier Tribunal's dismissal of the refugee grounds of appeal, which will be an appeal pending before the Upper Tribunal.

### **Should the time for giving the section 104 notice be extended?**

14. We agree with and adopt the reasoning of the Upper Tribunal in *MSU* at [37-39]. Accordingly, sitting as judges of the First-tier Tribunal, we consider whether we should extend time. We apply the familiar criteria as set out in judgments of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, *Denton v T H White Ltd* [2014] EWCA Civ 906 and *Hysaj v SSHD* [2014] EWCA Civ 1633.
15. We consider first the extent of the default. The notice was delivered 10 days out of time. The default is not trivial but equally it was not egregious.
16. Secondly, we consider the reasons for the default. In their letter of 15 November 2021, the appellant's representative, Ms Karin Oliver of Fisher Stone states that she 'was not aware that [she] was under a duty to notify the parties as to the grant of limited leave on human rights grounds.' She goes on to say that she 'was also not aware that a separate 'notice' was required to be filed if the appellant wanted to continue his appeal on Refugee Convention grounds and is still not aware what 'notice' this would be'. She 'apologises for any difficulties this has caused.'
17. The representative has sought to address the issue of whether the renewed application for permission is a valid section 104 notice rather than the reasons for the default. She does, however, candidly acknowledge that she was unaware of the provisions of section 104. For a representative practising in the field of immigration law, that is an



unhappy admission. Nothing that we have been told indicates whether or not the appellant himself may have been in any way responsible for the default, although his serious mental health problems (including PTSD) suggest that he has done nothing more than follow the advice of his representative.

18. We have considered all the circumstances of the case. We accept that Ms Oliver was, as she states in her letter, confused by the materials in the public domain concerning the requirement to give notice; as the Tribunal in *MSU* found, those materials are 'seriously defective.' We record also that it was not until we received the Secretary of State's Position Statement two days before the resumed hearing that we were aware that the appellant had been granted leave to remain; the Secretary of State's Presenting Officer did not inform the Tribunal at the initial hearing in May 2021 nor did he argue then that the appeal had been abandoned. Of particular significance, in our opinion, is the clear acknowledgement by the Secretary of State that the appeal on asylum grounds not only has merit but also that, leaving aside the issues of timeliness and validity of the notice, the appeal should be allowed. It is that concession which, taken together with the other factors which we have identified, leads to find that time should be extended and that the notice given by the appellant on 18 January 2021 should be regarded as in time.

## **Conclusion**

19. As judges of the First-tier Tribunal, we find that the appellant has given timely notice under section 104 that he wished to pursue his appeal on asylum grounds notwithstanding that he had been granted limited leave to remain on 18 January 2021. Consequently, the application for permission to the First-tier Tribunal, the refusal of permission by the First-tier Tribunal, the renewal of the application for permission directly to the Upper Tribunal, the grant of permission and the Upper Tribunal's error of law decision promulgated on 25 May 2021 are retrospectively validated. As judges of the Upper Tribunal, we remake the decision allowing the appeal on asylum grounds.

## **Notice of Decision**

The appeal is allowed on asylum grounds.

Signed

Date 28 January 2022

Upper Tribunal Judge Lane

**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.