



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

Appeal Number: PA/08329/2016

THE IMMIGRATION ACTS

Heard at Field House

On 14 January 2019

Decision & Reasons

Promulgated

On 13 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

M T T

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**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.

Representation:

For the Appellant: Mr E Wilford, Counsel, instructed by Qualified Legal Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge S J Clarke (the judge), promulgated on 31 October 2018, in which she dismissed his appeal against the Respondent's decision of 29 July 2016, which had in turn refused his protection and human rights claims.
2. The reason why the decision is so old is that this appeal has already been through the appellate process in the Upper Tribunal once before: the hearing before the judge was a remittal following a decision of Upper Tribunal Judge Southern, promulgated on 24 October 2017, that a previous First-tier Tribunal Judge's decision was flawed.
3. The central thrust of the Appellant's claim has always been that if returned to Vietnam he would be subject not simply to prosecution under the criminal law of that country, but also to persecutory treatment for the Convention reason of imputed political opinion. The Respondent had accepted that he had intervened when police officers had attempted to extort money from another individual. It was also accepted that the Appellant was then mistreated by the police officers, arrested, and then charged. He was able to leave the country, but on return would be prosecuted for the offence of obstructing police officers in the course of their duties.

The judge's decision

4. In a relatively brief decision, the judge sets out her findings and conclusions as follows.
5. At [6] she concludes that the Appellant feared prosecution and not persecution. At [7] she deals with the issue of arrest warrants in the context of an expert report. The judge makes reference to the expert's use of the term "might", and concludes that this indicated a state of affairs that was less than a real risk. Thus, at least by implication, the judge concludes that the expert evidence did not greatly assist the Appellant's case. At [8] and [9] and then [12] to [14], the judge deals with what was said to be an anti-government profile established by the Appellant on social media. This aspect of the claim is rejected. At [11] the judge concludes that the Appellant has sought to embellish his claim by saying that the police were visiting his family. In the same paragraph reference is made to what was said to be a newspaper article in a Vietnamese publication. At [15] the Appellant's credibility was said to be damaged by his delay in claiming asylum in this country. Finally, at [16] the judge brings all of the matters together and concludes that the Appellant will be subject to prosecution based on the summons produced,

and that alone. It is concluded that he was not otherwise of any interest to the Vietnamese authorities.

The grounds of appeal and grant of permission

6. The grounds of appeal are succinct. Ground 1 asserts that the judge has failed to explain why she concluded that the Appellant feared prosecution only. Ground 2 attacks the judge's view of the expert's use of the word "might" in the report, it being said that at the end of the report the expert had in fact stated that the Appellant faced a "serious risk" of torture. In ground 3 it is said that no reasons were given as to why the judge believed the Appellant to have embellished his account in any way.
7. Permission to appeal on all grounds was granted by Designated First-tier Tribunal Judge McCarthy on 21 November 2018.

The hearing before me

8. Mr Wilford relied on his grounds of appeal. He emphasised the fact that the police officers had been acting outside of their powers. In respect of the expert report, it was accepted that the term "might" would not be sufficient to meet the real risk threshold, but if the report was viewed as a whole, including references to country information, it had been supportive of the Appellant's case. In respect of any embellishments, it was entirely plausible that the authorities would have been looking for the Appellant given that he was wanted by them for an offence.
9. Mr Clarke submitted that there were no material errors in the judge's decision. The judge had firmly rejected the claim that the Appellant had any political profile of any sort. The Appellant was only wanted on the basis of the summons, as presented. Nothing relating to that stated offence had any political connotations, the Appellant had no political profile, and there had been no evidence to show that the Vietnamese authorities believed him to have had any such profile. It could not be right that anybody facing criminal proceedings in Vietnam would be regarded as having an actual or imputed political opinion. Mr Clarke submitted that the expert's use of the term "might" was significant, this term appeared repeatedly throughout the report and the terminology was only changed at the very end.
10. In reply Mr Wilford accepted that it would be difficult to challenge the judge's findings in respect of the claimed political profile. He submitted that the Appellant's act in intervening when the officers were trying to

extort money was itself seen as a political act. He also submitted that if there were no Convention reason, Article 3 would still be in issue. There was no real leap between the use of the term “might” and that of “serious risk” in the expert report.

11. At the end of the hearing I reserved my decision on error of law.

Decision on error of law

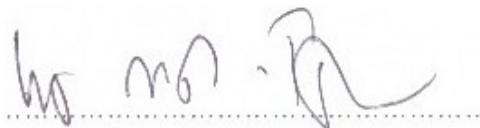
12. Having thought about the competing arguments with care and having read the judge’s decision sensibly and in the round, I conclude that there are no material errors of law.
13. In my view it is important to bear in mind the judge’s findings in respect of the claimed political profile. It is quite clear to me that the judge was fully entitled to reject this aspect of the Appellant’s claim for the reasons set out in her decision. There has been no express challenge to these findings and Mr Wilford quite rightly accepted that such a challenge would face an uphill struggle in any event.
14. Therefore, with this in mind and reading the judge’s decision holistically, she was entitled to conclude that in essence the Appellant had no political profile either at the time at which he intervened with the police officers’ actions or at any stage thereafter.
15. There was nothing in the evidence to suggest that the Vietnamese authorities would regard *any* person charged with *any* offence under the criminal law to be inherently anti-regime or political in some other way. The summons itself makes no reference to any political or pseudo-political offences. This is in my view an important context in which the judge’s other findings and conclusions need to be read.
16. I appreciate the reference to paragraph 339K of the Rules made by Designated First-tier Tribunal Judge McCarthy when granting permission to appeal. It is not clear whether this particular provision was cited to the judge. In any event, there is no finding that any mistreatment meted out to the Appellant by the police officers at the time was actually persecutory. Although ill-treatment of any sort may nonetheless may be an indicator of future repetition, the point has not been raised in the grounds themselves and in any event I must view this particular point in the context of the decision as a whole.
17. I turn to the expert report. When reading the papers in advance I saw merit in the Appellant’s challenge: it is certainly the case that the term “serious risk” is used by the expert at the very end of her report.

18. However, having reflected on the report as a whole and in light of the representatives' submissions, I have concluded that the judge was entitled to conclude that this evidence did not in fact lend significant weight to the Appellant's case after all.
19. The expert has in fact used the term "might" repeatedly throughout her report, and the only change in terminology does indeed come at the very end. One could potentially speculate as to why different words were used at different times, but that is not really the task of a judge, either in the First-tier Tribunal or on appeal to the Upper Tribunal. The fact is that this is what the expert has said.
20. It is also the case that Mr Wilford has quite rightly accepted that the term "might" is not sufficient to be supportive of a "real risk". I note, with reference to perhaps the most relevant part of the body of the report at page 13 of the Appellant's bundle (that relating to criminal proceedings for the offence in question), that the term "might" is utilised without any qualification. Taking the report as a whole and indeed the judge's decision as a whole, it was in my view open to her to conclude as she did.
21. The references to the Human Rights Watch reports makes no material difference to my conclusion on this point. Although the reports contained generalised information and which was potentially supportive of the Appellant's claim, such information must always be assessed in the context of the particular circumstances of any given case and of course these reports do not themselves set out relevant standards of proof applicable to appeals.
22. Turning to ground 3 and the issue of embellishments, again at first blush Mr Wilford's grounds disclosed merit. Yet the context in which the comment on embellishment is made in [11] is that he had provided apparently supporting evidence in the form of a newspaper article which the judge viewed as being unreliable. This has to be seen in the context of other adverse matters relating to both the social media evidence and the delay in claiming asylum. For these reasons it was open to the judge to conclude as she did.
23. Specifically, she was entitled to find that the Appellant would be subject to prosecution only and without the risk of persecution or Article 3 ill-treatment during the process, that he had never had any political profile, and that the Vietnamese authorities would not perceive him as having any such profile.
24. For these reasons, the Appellant's challenge to the judge's decision must fail.

Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law and it shall therefore stand.

The Appellant's appeal to the Upper Tribunal is dismissed.

A handwritten signature in black ink, appearing to read 'W. Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 29 January 2019

Deputy Upper Tribunal Judge Norton-Taylor