



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

Appeal Number: AA/04967/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
On 10 June 2015**

**Decision and Reasons
Promulgated
On 26 August 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR QUANG MINH VU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Price, Latta & Co Solicitors

For the Respondent: Mrs M O'Brien, Senior Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-Tier Tribunal Farrelly dismissing this appeal on asylum and human rights grounds.
- 2) The appellant was born on 20 October 1980 and is a national of Vietnam. He lived with his parents in Ho Chi Minh City. His parents were journalists. On 8 February 1998 they were arrested after writing an article of which the authorities disapproved. The appellant's parents were taken to a police station and then to a detention centre called Kim Chi. In May 1998 the appellant was in the family home when the police arrived to search it.

They were accompanied by five or six other men, whom the appellant believed were gangsters working alongside the police. The police told the appellant that they were confiscating property from the house. When the appellant argued he was assaulted. He tried to run away and in doing so pushed a door, causing a police guard to fall. He succeeded in escaping but learnt that the guard was injured. Colleagues of the injured guard engaged gangsters to track down the appellant. The appellant stayed with various friends and was advised not to return home because his friends had seen the gangsters come to his home looking for him.

- 3) The appellant learnt that his parents had been taken to a detention centre outside the city. They had been tried at a closed hearing. The appellant visited his parents on 20 September 1998, shortly before they were to be moved. He later ascertained that they had been taken to a prison on the island of Con Dao. The appellant left the area and worked at various jobs, including as a porter in a market and laying rainwater pipes. In December 2007 he left Vietnam. He arrived in the UK illegally in July 2008. He learnt from friends that he was still wanted in Vietnam because of what had happened to the police officer.
- 4) The appellant is in a relationship with another Vietnamese asylum seeker and they have a child together. Her claim was refused but her appeal was heard by the First-Tier Tribunal a week before the appeal by this appellant.
- 5) The principal issue before the First-Tier Tribunal was the credibility of the appellant's account. The evidence before the First-Tier Tribunal showed that there was an island named Con Doa but this was now a protected marine nature reserve. There had been several prisons on the island and it was used as a concentration camp during the Vietnam War. The prisons were now used as museums or were in a state of decay. When this was put to the appellant in oral evidence at the hearing before the First-Tier Tribunal he said that he did not know about the place but had heard from a friend that his parents had been taken there.
- 6) Other credibility issues were raised. For example, the appellant claimed that he was able to visit his parents at a detention centre called Kim Chi. The respondent was unable to identify a centre with this name in the country information. According to the appellant the detention centre was around Hai Dong. The Judge of the First-Tier Tribunal presumed that the appellant would have had to go through official channels to see his parents in September 1998. It did not seem credible that he would risk this if he were wanted by the authorities. Furthermore, the fact he was able to do this indicated that he was not being pursued. The appellant claimed he was able to visit his parents by accompanying family friends, whom he presumed had paid a bribe. He also claimed that the prison authorities had no jurisdiction outside the prison. The Judge considered that if the appellant's parents were political prisoners the state would have required the prison authorities to advise of any relevant occurrences.

- 7) The Judge noted that it was also the appellant's claim that he left Vietnam in October 2007. If this were true it meant that he was able to live in Vietnam for almost nine years without coming to the attention of the authorities. The Judge had regard to country information relating to local surveillance, and the operation of a household registration scheme and other systems used to monitor individuals.
- 8) The Judge referred to a delay by the appellant in claiming asylum. According to the appellant he was trafficked into the UK in July 2008 and locked up when he was not working. He managed to escape in May 2010. He was in London for two years but did not claim asylum. He said he did not know about the possibility of claiming. In December 2012 he and his partner moved to Glasgow. At this stage his partner was pregnant and she had to attend hospital in March 2013. He claimed asylum in March 2013 and his partner gave birth in May of that year. This suggested to the Judge there was a connection between the asylum claim and his partner's pregnancy.
- 9) The Judge did not accept the basis of the appellant's asylum claim as credible for the reasons summarised above.
- 10) The Judge then went on to consider the appeal under Article 8. The Judge found the appellant did not meet the requirements of the Immigration Rules. Nevertheless the Judge accepted that the appellant has family life in the UK with his partner and their child. She, however, was also from Vietnam and had no right to be here. The country information indicated that their child would be accepted in Vietnam as a citizen. Subject to the outcome of the appellant's partner's appeal, the intention of the respondent was that they would be returned to Vietnam together. Consequently their family life would be preserved. On this basis the decision was proportionate.
- 11) Permission to appeal was granted by the Upper Tribunal on the basis that the Judge of the First-Tier Tribunal arguably erred in drawing an adverse inference from the fact that Con Dao is no longer used as a prison without it being ascertained when it ceased to be a prison. It appeared that the appellant's parents had been detained there some years ago. Permission was granted on other grounds also. These included a reference to the appellant's partner and child having no right to be in the UK. It was pointed out that at the time of the hearing before the First-Tier Tribunal the partner and child had their own pending asylum appeals and therefore they had permission to be in the UK while appealing. It was then pointed out that their appeals were subsequently allowed. The partner and child of the appellant now have refugee status and leave to remain in the UK.

Submissions

- 12) Before me Mr Price relied on the grounds of the applications made both to the Upper Tribunal and the First-Tier Tribunal. He pointed out that according to the country information Con Dao was not a prison in 2007 but

the appellant's evidence was that his parents were there in 1998. Mr Price pointed out that the appellant's partner had been given asylum status in October 2014 and leave until October 2019. The Judge had found in respect of the appellant that there was family life with the partner and child.

- 13) For the respondent, Mrs O'Brien acknowledged that the Judge had failed to address the lapse of time between the detention of the appellant's parents and the reference to Con Dao no longer being a prison. With reference to the other grounds, Mrs O'Brien submitted that the Judge of the First-Tier Tribunal had not required corroboration of the appellant's evidence. The Judge was entitled to take into account the appellant's delay in leaving Vietnam. The Judge was also entitled to have regard to the length of time the appellant had spent in Vietnam following his parents' arrests and the tension between this and the evidence of a surveillance culture. Given this surveillance culture it was difficult to understand how the appellant could have remained "under the radar" for so long. The Judge was also entitled to take account of the delay in claiming asylum following the appellant's arrival in the UK.
- 14) In relation to Article 8, the appellant's partner's claim was still under consideration at the time of the hearing and the Judge could have gone no further. This was at the time an unresolved issue and it would have been improper for the Judge to speculate on the outcome.
- 15) In response Mr Price said that if an error of law was found he would have no further evidence to offer in respect of the asylum claim. He submitted that the appeal should be re-made under Article 8. The Judge erred in law by speculating about the outcome of the appellant's partner's asylum claim. This speculation was not justified and the decision was unsound as a result.

Decision

- 16) The Judge's treatment of the appellant's evidence that his parents were detained at Con Dao does contain a flaw in the reasoning. The evidence before the Judge indicated that Con Dao was no longer a prison by the date of the hearing but it does not follow from this that there was not a prison on the site in 1998.
- 17) This, however, is one of only a number of reasons given by the Judge for not accepting as credible the evidence by the appellant in relation to his asylum claim. Other cogent reasons were given, as summarised above.
- 18) Some of these reasons were also challenged in the grounds of the application. For example, ground 3 refers to the Judge's finding that the extent of surveillance in Vietnam was inconsistent with the appellant's claim that he had lived there for nine years without detection following the arrest of his parents. It was submitted on behalf of the appellant that this

finding was contradictory. If there was such surveillance then the appellant would readily be traced by the authorities on return.

- 19) I do not think there is any substance in this point. If the extent of surveillance is such that the authorities could readily find the appellant on his return to Vietnam, they ought to have been able to find him in the nine years that he lived there following the arrest of his parents. The Judge was entitled to find that the length of time that the appellant spent in Vietnam without detection by the authorities following his parents' arrests was inconsistent with the claim that the authorities were still looking for him.
- 20) It was submitted, however, in both the application to the First-Tier Tribunal and to the Upper Tribunal that the Judge was wrong to assume that the appellant's partner's appeal against the refusal of asylum would not succeed. The Judge was wrong to say they had no right to be in the UK as they were at the time pursuing appeals against the refusal of their asylum claims. On the basis of the assumption made by the Judge of the First-Tier Tribunal, the proportionality assessment was not properly carried out.
- 21) While I have some sympathy with the Judge, who attempted to assess the Article 8 claim as at the date of the hearing before him, the Judge did make an error of law in this regard. The Judge was wrong to say that the appellant's partner and child had no right to be in the UK. They had the right to stay in the UK while their asylum claims were pending. Furthermore, and more materially, the Judge assessed Article 8 on the basis only that the appeal by the appellant's partner would fail, and not on the basis that it would succeed. An even-handed approach would have required both possible outcomes to be considered. Furthermore, although this was not raised in the application for permission to appeal and may not have been material, the Judge made no reference to Section 117B of the 2002 Act as amended, which this was in force at the date of the hearing before the First-Tier Tribunal.
- 22) The Judge found that the appellant would not succeed in his claim to private or family life under the Immigration Rules. Although one of the grounds of the application suggests that the Judge was wrong to find that there were no significant obstacles to the appellant's re-integration to Vietnam, I do not think that this is a significant issue affecting the outcome of the appeal.
- 23) More important is that the Judge found that the appellant has family life with his partner and child in the UK. According to Section 117B(4) little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully. The appellant met his partner in the UK and formed a relationship with her while he was here unlawfully. It needs also to be taken into account, however, that the appellant's partner has now been recognised as a refugee and therefore there is no prospect of the couple continuing their family life in Vietnam. Furthermore, there is now a child

of the relationship, with whom the appellant has a genuine parental relationship, albeit that the child is not a “qualifying child” in terms of Section 117D.

24) I have approached the issue of Article 8 in accordance with the approach set out by the Inner House in Asif Ali Ashiq [2015] CSIH 31 at paragraphs 5 and 6. The question of the application of the Immigration Rules to private and family life has already been considered by the Judge of the First-Tier Tribunal. There is no intermediary test to be applied before proceeding to consider the same facts in relation to the application of Article 8 outwith the Rules. It is evident in this case that an Article 8 issue arises. The appellant has now been in the UK for seven years. He has a partner and a child here, with whom he enjoys family life. His partner has been recognised as a refugee, as has his child. There is no question of his relationship with them being carried on in the country of origin, which is Vietnam. Although in terms of Section 117B the maintenance of effective immigration controls is in the public interest, having regard to the factors in Section 117B(2) and (3), weight should also be given to the appellant’s partner’s refugee status and to the best interests of the couple’s child. The child has been recognised as a refugee along with the mother. It is therefore the case that the best interests of the child are to remain in the UK. It is also in the child’s best interests to have both parents residing together with him in the UK. When these factors are taken into account the assessment of proportionality in the balancing exercise falls in favour of the appellant. I am satisfied that it would be a disproportionate interference with the appellant’s right to private or family life to require him to leave the UK, having regard to the effect of this upon his partner and, in particular, his child, each of whom have been recognised as refugees. On this basis the appeal will succeed under Article 8.

Conclusions

25) The making of the decision of the First-Tier Tribunal did involve the making of an error on a point of law.

26) I set aside the decision in respect of Article 8 only.

27) I re-make the decision in the appeal by allowing it under Article 8.

Anonymity

28) The First-Tier Tribunal did not make an order for anonymity. No application of such an order has been made before me and I do not see any reason of substance for making one.

Fee Award This is not part of the determination

29) As no fee has been paid or is payable, no fee award is made.

Signed

Date

Judge of the Upper Tribunal