Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/07482/2015**

THE IMMIGRATION ACTS

Heard at Field House, London
On Thursday 2 May 2019

Decisions and Reasons Promulgated
On Monday 20 May 2019

Before

UPPER TRIBUNAL JUDGE SMITH

Between

A T P
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Mair, Counsel instructed by Wilson solicitors LLP
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

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DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Foudy promulgated on 9 January 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 28 April 2015 refusing his protection claim.

2. The Appellant is a national of Vietnam. He came to the UK on 30 March 2015 and claimed asylum on arrival. His claim is set out at [9] of the Decision and I need to refer to the detail of that only insofar as it is affected by the Appellant's grounds to appeal the Decision.

3. Judge Foudy accepted that the Appellant had been trafficked. She also accepted that the Appellant's account of his fears of return to Vietnam may well be genuine, but she concluded that those fears were objectively ill founded.

4. The Appellant raises five grounds of appeal challenging the Decision which I deal with in more detail below. Permission to appeal was granted by First-tier Tribunal Judge Beach on 14 February 2019 in the following terms so far as relevant:

> "…3. It is clear from the decision that the First-tier Tribunal Judge had in mind that the Appellant was to be considered to be a vulnerable witness. She clearly addresses all the expert evidence which was before her and gives reasons as to why she prefers the 'up to date information' contained in the CPIN over the expert report of Dr Tran [16]. The First-tier Tribunal Judge also considers the medical evidence. She gives cogent reasons for her doubts regarding Ms Robertson's conclusions. The fact that Dr Sinha is 'medically trained' [20] is one reason for the First-tier Tribunal Judge preferring Dr Sinha's report over that of Ms Robertson but other reasons are also given [20] which cannot be said to be irrational or perverse reasons.
>
> 4. The First-tier Tribunal has considered Article 8 outside the Immigration Rules but has concluded that the Appellant has not established any 'meaningful private life' in the UK. However, the First-tier Tribunal Judge does not consider whether the appellant fulfils the requirements of Paragraph 276ADE(1)(vi) i.e. whether the appellant would face very significant obstacles in reintegrating into Vietnam. This was specifically raised in Counsel's skeleton argument [32-33] which was prepared for the appeal. It is arguable that a consideration of very significant obstacles is distinct from a consideration of whether the appellant would face persecution, serious harm or a breach of Article 3 on return to Vietnam and that the First-tier Tribunal Judge's failure to consider this argument means that she has not made findings on all the relevant issues which were to be decided before the First-tier Tribunal.
>
> 5. Permission to appeal is granted on that ground only. Permission to appeal is refused on grounds 1-4."

5. The Appellant renewed his application for permission to appeal on grounds one to four. A decision was made on that application by Upper Tribunal Judge Lindsley

on 13 March 2019. Having set out the basis of the four grounds, she continued as follows:

> "5. I find that the grounds are all arguable. The fact that the appellant is not aware of any efforts by his previous traffickers to find him in the UK, see paragraph 16 of the decision, is arguably not sufficient reasoning to find that he will not be re-trafficked. There was an arguable failure to deal with the information in the CPIN at paragraph 8.4, which is found to be more useful, at paragraph 16 of the decision. There was also an arguable failure to deal with the other expert evidence on the issue of risk as outlined in the third ground. The criticism of the assessment of the psychological evidence at paragraph 20 has arguable weight for the reasons set out in the grounds. For these reasons, the conclusion that this appellant is not at real risk of serious harm in the form of re-trafficking as he has sufficiency of protection on return is arguably unsound."

6. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

DISCUSSION AND CONCLUSIONS

Ground One: Error with regard to vulnerability assessment

7 The Appellant submitted that as a victim of trafficking with significant mental health issues, he should be treated as a vulnerable witness. He relied upon the guidance provided in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 ("AM"), the Practice Direction of the First-tier and Upper Tribunals relating to vulnerable adult witnesses and the Joint Presidential Guidance Note No 2 of 2010 ("the Guidance Note"). This was raised in the Appellant's skeleton argument for the hearing before Judge Foudy.

8. The only reference to this submission is at [15] of the Decision where the Judge says this:

> "I find that the Appellant has been trafficked as that was the finding by the NFR when his claim was investigated. I remind myself of the President's Guidance on vulnerable witnesses."

9. The grounds refer to what is said in AM at [33]. The reference there is to the Guidance Note and the complete citation is as follows:

> "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
> 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those [who] are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
> 15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered

> the identified vulnerability had in assessing the evidence before it and this whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

Attention is also drawn to [30] of AM where it is said that a failure to follow the Guidance Note will "most likely be a material error of law".

10. The grounds say that this is relevant because of the other errors made by the Judge. In oral submissions, Ms Mair said that the error (which she said was a failure to make a finding in this regard) was material because it impacted on the Judge's failure to consider other evidence in relation to indicators of risk.

11. In light of that submission, I do not consider it necessary to look at this ground separately. Whether it is made out depends on the Appellant making out his other grounds. I only observe at this stage that, at [16] of the Decision, the Judge accepts the Appellant's fears as genuine and her findings thereafter are based on the other background evidence which is consistent with the Guidance Note as set out in AM. It can also be readily implied from what is said at [15] of the Decision that the Judge accepted that the Appellant was vulnerable.

Ground two: Unlawful treatment of the medico-legal report of Ms Mary Robertson

12. In order to understand this ground, it is necessary to have regard to the factual and evidential context relied upon. As noted at [18] of the Decision, the Appellant originally relied on a psychiatric report of Dr Sinha. That was dated 24 April 2017, some two years after the Appellant's arrival in the UK. Dr Sinha is medically qualified and provides medico-legal reports on behalf of Medical Justice. Dr Sinha concluded that the Appellant did "not meet diagnostic criteria for depression" and although he "exhibits trauma related symptoms and shows some symptoms and traits of PTSD" he did not at that time meet the criteria for a diagnosis of PTSD. Dr Sinha diagnosed the Appellant as suffering from a "mild depressive episode".

13. Before Judge Foudy, the Appellant relied on a report from a Clinical Psychologist, Ms Mary Robertson, dated 6 September 2018. Ms Robertson specialises in "Post Traumatic Stress, specialising in working with complex trauma, refugees and asylum seekers". She reached conclusions that the Appellant "meets the full criteria for a diagnosis of PTSD in the severe range", "meets full diagnostic criteria for PTSD according to DSM-V in the moderate range" and "meets the diagnostic criteria for a Major Depressive Disorder". Her report describes the methodology used to reach those conclusions. At [24.1] of the report, she says the following:

> "Based on [the Appellant]'s account of his mental health prior to being detained, he had some PTSD and depressive symptoms but probably did not meet the clinical threshold for a diagnosis of either disorder. In my view, detention caused his psychiatric injury to worsen to the degree that he now meets the threshold for PTSD and depression in the moderate range of severity."

14. The Judge dealt with that evidence as follows:

> "[20] I find that I can attach only little weight to Ms Robertson's opinion for the following reasons:
> – Ms Robertson is a Psychologist. She is not medically trained, whereas Dr Sinha is;
> – Ms Robertson identifies the fact that Dr Sinha found that the Appellant did not have PTSD when seen by Dr Sinha in 2017 but simply and baldly states that when she saw him 18 months later, he did have PTSD (report paragraph 17.10). Ms Robertson offers no explanation for the deterioration in the Appellant's condition and, in fact confirms that the Appellant's reported symptoms were similar. It follows that on largely the same symptoms Ms Robertson and Dr Sinha reached very different diagnoses. I prefer the opinion of Dr Sinha due to her medical qualifications."

15. As is immediately apparent by reference to the passage of Ms Robertson's report which I set out at [15] above, the second of those reasons does not withstand scrutiny. Although Ms Robertson did not say what she did by reference to Dr Sinha's earlier report, that passage evidently includes some explanation as to why the Appellant's symptoms might be different and worse. Further, it is difficult to see how it can be said that the diagnoses are "very different". Dr Sinha accepted that the Appellant was showing signs of trauma but that those were not sufficient to reach the threshold for a diagnosis of PTSD.

16. Whilst the Judge was entitled to take into account the respective qualifications of the authors of the two reports, it was also an error to fail to note their respective experience. In fact, as appears from a comparison of the CVs, if anything, Ms Robertson has more relevant experience. As such, I reject Mr Tufan's submission that Dr Sinha is clearly better qualified. Whilst I accept his point that the Judge did not give Ms Robertson's report no weight but gave it "little weight" and whilst I obviously accept that a Judge is entitled to prefer one report over the other, the Judge's treatment of Ms Robertson's report for the reasons given does disclose an error of law. I also observe as an aside that this error may also be relevant to the Appellant's first ground in terms of the Judge's treatment of the Appellant as vulnerable.

Ground three: Failure to consider fundamental evidence from medical/trafficking experts with regard to vulnerability/risk on return

17. The Appellant relied on the reports of Robert A Sellwood, Chartered Psychologist, dated 21 June 2018 and Elizabeth Flint's "Trafficking Indicator Report" dated 6 June 2017. The first dealt with the Appellant's cognitive abilities and opined that although he did not meet the formal criteria for a diagnosis of learning disabilities nonetheless those were "low enough to place him at risk of exploitation". Ms Flint opined that it was "more likely than not that [the Appellant] would be at risk of re-trafficking again".

18. Neither of those reports is mentioned in the Decision. Mr Tufan submitted that Mr Sellwood's report did not add materially to what was said by Ms Robertson. I have

of course already concluded that the Judge's treatment of her report involved an error of law and so this submission does not assist. He also submitted that the other report was mainly generic and made general points about risk on return which was for the Tribunal to determine. Whilst that is undoubtedly right, one of the main risks claimed was of re-trafficking on return and the assessment of risk required consideration of all relevant background and expert evidence. As such, I accept that there is also an error disclosed by this ground.

Ground four: Error with regard to risk on return

19. The Judge gave reasons at [16] of the Decision why the Appellant's claim was objectively ill-founded. Those were in summary as follows:
(1) The Appellant was not trafficked in Vietnam. He had been taken advantage of as a homeless child but was not trafficked until he moved to Laos.
(2) The Appellant did not say that his overseas traffickers were interested in him or had taken steps to find him which affected the likelihood of re-trafficking.
(3) There was a sufficiency of protection for victims of trafficking in Vietnam. In that regard, the Judge considered the expert report of Dr Tran on whose views the Appellant relied and the content of the Home Office Country Policy and Information Note ("CPIN"). She preferred the latter and criticised the opinon of Dr Tran as "not well-reasoned".

20. This ground is formed of a number of separate submissions. First, it is said that the Judge irrationally focussed only on whether the Appellant claimed that others would be interested in him; he had in any event said that he feared his traffickers amongst others. Second, the Appellant repeats the point that the Judge has ignored the evidence of Ms Flint. Third, the Appellant points to the Judge's comment about Dr Tran's report that "Dr Tran acknowledges that Vietnam has passed comprehensive laws against trafficking however she opines that enforcement is patchy. I can attach weight to that opinion but sadly that criticism can be levelled at many developed countries too, even the UK". As the Appellant points out, the issue whether there is a sufficiency of protection in Vietnam is one of assessment of the evidence about what happens in that country and does not involve a comparison with the situation in other countries. Fourth, in preferring the CPIN over Dr Tran's evidence, the Judge failed to have regard to all relevant passages (see [25] of the grounds for details). Fifth, the Judge placed reliance on the Upper Tribunal's decision in Nguyen (anti-trafficking Convention; Respondent's duties) [2015] UKUT 170. As the Appellant points out, the guidance in that case does not relate to the position in relation to trafficking in Vietnam but a point about trafficking generally. All of those matters go to the issue whether the Appellant was at risk of being re-trafficked on return to Vietnam.

21. As Mr Tufan submitted, some of those criticisms are not well-founded. The 2018 CPIN on which the Judge relies does contain passages largely supportive of the Judge's conclusions about the availability of protection. I have however already noted that the Judge did not deal with Ms Flint's report and, whilst that may well be generic, was relevant evidence which should have been considered. This ground

may have less force (and I accept that if not made out might affect the materiality of other of the grounds). However, as Ms Mair pointed out, although the fact that the Appellant was not trafficked in Vietnam in the past is relevant, there is the additional factor of the Appellant's vulnerability and exploitation in Vietnam which is simply not taken into account in what is said at [16] of the Decision. For that reason, I accept that this ground also is made out and that the other errors which I have already found to be made out are capable of impacting on the findings in any event.

Ground five: Failure to consider very significant obstacles

22. This is the ground on which permission to appeal was originally granted by the First-tier Tribunal. As FTJ Beach observed, the Article 8 ground of appeal was specifically raised by Counsel for the Appellant. As such, the Judge should have dealt with it. Also, irrespective of the Judge's findings on the risk issue, given the facts of this particular case, the question whether the Appellant would be able to integrate in Vietnam was a highly pertinent one. As Ms Mair pointed out, the Appellant's case which was accepted by the Judge was that he left Vietnam as an orphan child who had been significantly exploited in the past and had no resources or support there. The medical evidence to which I have already referred also has some bearing on this issue. There is no reasoning given at all for the bald assertion at [32] of the Decision that "Article 8 is not disproportionately breached by removal." Given the background to this case, I do not accept Mr Tufan's submission that the error which is clear on the face of the Decision could not be material.

Summary of Conclusions

23. For those reasons, I am satisfied that the grounds disclose errors of law as set out above.

Next Steps

24. Ms Mair asked that if I set aside the Decision, I should remit the appeal to the First-tier Tribunal as she said that there would be a significant amount of fact finding to be carried out in light of the deficiencies in the Judge's consideration. That may be one reason to remit but remittal might not be justified for that reason alone. This Tribunal is able to make findings of fact and the issues here are quite narrow.

25. I take into account that this would be the second time that the Appellant's appeal would be remitted (an earlier decision having been found to also contain an error of law). I take into account also that on the previous occasion, the error of law was a procedural one and the remittal was to ensure that the Appellant has a fair hearing of his appeal. I have set out above why I have reached the conclusion that the consideration of his appeal on this occasion was flawed. Having regard to the Practice Statement in relation to the remittals of appeals and the reason why the appeal was remitted on the previous occasion, I have reached the conclusion that the appeal should be remitted to ensure that the Appellant has a fair determination of his appeal.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Foudy promulgated on 9 January 2019 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judges Foudy and McAll.

Signed Dated: 17 May 2019

Upper Tribunal Judge Smith