Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00120/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 17 June 2013	**On 27 June 2013**
Prepared 18 June 2013	

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR QUANG TUAN TRAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Turner, instructed by Lawrence Lupin Solicitors
For the Respondent: Mr C Avery, Senior Presenting Officer

DETERMINATION AND REASONS

1. The First-tier Tribunal did not make an anonymity direction in this appeal, and neither have I been invited to make such a direction.

2. The appellant is a national of Vietnam born 22 December 1973. He was issued with a Home Office Visa Promise Letter on 21 July 1983 and travelled to the United Kingdom on 10 April 1991 in order to join his father, who had earlier been granted refugee status in this country. He has remained in the United Kingdom since that date.

3. On 19 December 2005 the appellant was convicted at Medway Magistrates' Court of cultivating, and possession of, cannabis. On 6 February 2006, at Maidstone Crown Court, he was sentenced to two years'

imprisonment for the former offence and six months' imprisonment to run concurrently for the latter offence.

4. On 1 October 2006 the appellant was served with notice that the Secretary of State intended to make a deportation order against him. He appealed against this decision, but his appeal was dismissed in a determination of promulgated on 11 May 2007, by Immigration Judge Suchak and Mr A Cragg sitting as a panel of the Asylum and Immigration Tribunal. The panel, *inter alia*, concluded that the appellant's deportation to Vietnam would not lead to a breach of his Article 3 or Article 8 ECHR rights.

5. On 20 November 2007 the appellant failed to report as required by a condition of his immigration bail. He was next encountered by the authorities on 28 March 2012. Representations were made on the appellant's behalf on 4 April and 5 May 2012, but these were rejected on 5 July 2012. A deportation order was then signed against the appellant on 6 July 2012. Further representations, treated by the Secretary of State as an application to revoke the aforementioned deportation order, were made by the appellant's representatives on 23 October 2012. On 13 January 2013 the Secretary of State made a decision refusing to revoke the deportation order. The appellant appealed this decision to the First-tier Tribunal. The First-tier Tribunal [a panel comprising of First-tier Tribunal Judge K.F. Walters, and Ms S.E. Singer (non-legal member)] dismissed his appeal on all grounds in a determination promulgated on 4 March 2013.

6. Permission to appeal to the Upper Tribunal was thereafter granted by Upper Tribunal Judge Rintoul by way of a decision dated 18 April 2013. Thus the appeal came before me.

7. The appellant's pleaded grounds of challenge against the First-tier Tribunal's determination are as follows:

   (i) The First-tier Tribunal's conclusion, at paragraph 122 of its determination, that the appellant has not established a private life in the United Kingdom is irrational;

   (ii) The First-tier Tribunal's alternative conclusion, that deportation would be a proportionate interference with the appellant's private life, is unlawful in that (a) it is irrational, (b) it fails to take into account a number of relevant factors and (c) it is inadequately reasoned.

8. At the hearing Mr Turner drew the tribunal's attention to the appellant's history in the United Kingdom, particularly noting that he had arrived here when 17 years old and that he had lived here continuously for approximately 22 years. He observed that paragraph 339A of the Immigration Rules, which came into force on 9 July 2012, recognises *prima facie* that an individual has a private life in the United Kingdom if they have remained here continuously for more than twenty years. Mr Turner further drew attention to a concession made by the Secretary of State, in

relation to the appellant's family and private life in the United Kingdom, and submitted that in all the circumstances of this case the First-tier Tribunal's conclusion that the appellant had not established a private life in the United Kingdom [122], was perverse. He asserted, in the alternative, that given that the appellant has been in the United Kingdom for 22 years any conclusion that interference with the appellant's private life would not be of sufficient severity so as to engage Article 8 was equally perverse.

9. Mr Turner then turned his submissions to the issue of proportionality, asserting that the First-tier Tribunal had failed to take into account, when coming to its conclusions on this issue, (i) the length of the appellant's residence in the United Kingdom, (ii) the fact that he has family members in the United Kingdom (iii) the fact of his poor health, (iv) his relationship with his wife, (v) the fact that he has not committed a criminal offence since 5 December 2005 and finally (vi) the fact that there is a low risk of the appellant reoffending; emphasis being particularly placed on those matters detailed at (v) and (vi) above.

10. In particular relation to the appellant's medical condition, it was submitted that the appellant could not afford to have surgery in Vietnam and that he would go blind without further surgical intervention.

11. Mr Turner, finally, submitted that the decision of the First-tier Tribunal was perverse in light of the European Court of Human Rights' decision in a case of A.A. v United Kingdom (Case No. 8000/08), a judgment given on 20 September 2011. He observed that in A.A. the applicant had remained in the United Kingdom for just eleven years and had been convicted of rape, yet the European Court of Human Rights had concluded that his deportation would not be proportionate on the facts of that case. He further observed that in the instant case the appellant had been in the United Kingdom for twice as long as the applicant in A.A. and that he had been convicted of a far less serious offence than A.A.

12. In response Mr Avery reminded the Upper Tribunal that the First-tier Tribunal's starting point had been the determination of the Asylum and Immigration Tribunal in May 2007, which had not been successfully challenged. He submitted that the First-tier Tribunal had been correct to conclude that there had not been any substantial change in the appellant's position since the determination of 2007, directing attention to the fact that the First-tier Tribunal had concluded that the appellant did not have any family life in the United Kingdom and further that it had not been impressed with any of the witnesses that had appeared before it.

13. In relation of the medical issue, Mr Avery observed that the substance of the evidence before the First-tier Tribunal was the same as that which had been before Asylum and Immigration Tribunal in 2007, i.e. a medical report dated from 2006.

14. He asserted that the First-tier Tribunal had taken into account all the relevant evidence and circumstances, including the length of the appellant's stay in the United Kingdom and the fact that he had not been convicted of any further offences since 2005.

15. As to the submissions made in relation to the case of A.A., Mr Avery submitted that A.A. was a decision on its own facts.

16. I now turn to consider each of the grounds in turn, observing first that no issue has been taken, either in the grounds or by Mr Turner during his oral submissions, with the First-tier Tribunal's failure to engage in any independent consideration of the appellant's appeal pursuant to the Immigration Rules.

17. The first and second of the appellant's grounds seek to challenge the finding of the First-tier Tribunal in paragraph 122 of its determination, made in relation to the appellant's private life:

> "[F]ollowing Razgar, and our findings of fact summarised herein, we find that, in principle, the appellant has not persuaded us that he has established that private and family life exists within the meaning of Article 8 of the 1950 ECHR which would not continue in all essential respects, notwithstanding removal from the United Kingdom."

18. Insofar as the First-tier Tribunal concluded that Article 8 ECHR was not engaged by the appellant's private life in the United Kingdom, I am in no doubt that its decision involved the making of an error on a point of law.

19. I observe that in paragraph 72 of its determination the First-tier Tribunal record a concession made on behalf of the Secretary of State in the following terms, *"It was conceded that the appellant had a private and family life in the United Kingdom, but it was claimed his family life did not go beyond normal emotional ties."* Further, it is not in dispute that the appellant arrived in the United Kingdom as a 17 year old, in 1991.

20. Given the length of time the appellant has spent in the UK and his age on arrival here, I find that the only conclusion open to the First-tier Tribunal was that the appellant has established a private life worthy of respect in this country and that deportation would lead to an interference with that private life of sufficient severity so as to engage Article 8.

21. It is important, at this juncture, to note that Mr Turner did not pursue challenge to the findings of the First-tier Tribunal made in relation to the appellant's claimed family life in the United Kingdom. This was for good reason. Although I have identified above a concession made on behalf of the Secretary of State in relation to the appellant's family life, it is significant that this concession was qualified using terminology found in the Court of Appeal's decision in Navaratnam Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. It is quite clear therefore that the Secretary of State's representative, although conceding that the appellant has a family life with his various family members in the

United Kingdom, was not conceding that this was a 'family life' within the meaning attributed to that phrase when used in the context of Article 8 ECHR. In addition the First-tier Tribunal concluded, at paragraph 114 of its determination, that it would not be unreasonable to expect the appellant's family members to join the appellant in Vietnam. This finding has not been challenged. As such, Mr Turner properly pursued the appellant's case before the Upper Tribunal solely on the basis of his private life ties to this country, which, of course, include the various relationships he has with his family members here.

22. I next turn to consider whether the error I have identified above is such that I ought to set the First-tier Tribunal's decision aside. I conclude that it is not, given that which follows on from the passage I have already cited above in paragraph 122 of its determination:

> "[I]f, however, we are incorrect in that, and bearing in mind concessions made by the respondent and her representative at the hearing before us, we find the appellant has established that private and family life exists within the meaning of Article 8 of the 1950 ECHR and potentially engages the United Kingdom's obligations toward him. We find that, following the jurisprudence summarised herein, the proposed removal will be an interference by a public authority with the exercise of the appellant's right to respect for his private and family life. Such interference with the appellant's private and family life and its consequences will be of such gravity as potentially to engage the operation of Article 8 of the 1950 ECHR. Such interference is in accordance with the law; and such interference is necessary in a democratic society, satisfying the criteria set out in Article 8(2) of the 1950 ECHR, having, among other things, the legitimate aim of the maintenance of effective immigration control."

23. The tribunal thereafter state at paragraph 123 of its determination:

> "The issue with which we are primarily concerned is whether any such interference with this appellant's right to respect for his private and family life is proportionate to legitimate public aims sought to be achieved …"

24. It is clear to me that the First-tier Tribunal was here considering the alternative scenario, in which the appellant had established that Article 8 ECHR was engaged. Consequently any error made by the First-tier Tribunal in relation to the issue of whether Article 8 ECHR was engaged by the facts of this case, was not one capable of affecting the outcome of the appeal.

25. To this end I turn to the third of the appellant's grounds, which brings challenge to the tribunal's conclusions and reasons on the issue of proportionality.

26. Mr Turner's primary submission in this regard is that the First-tier Tribunal erred in failing to take into account a number of relevant factors in its assessment of whether the appellant's deportation from the United Kingdom would be proportionate.

27. I observe that in paragraph 124 of its determination the First-tier Tribunal clearly states that it took into account all of the evidence before it when coming to its conclusions. This statement of itself is sufficient for me to dispose of the appellant's third ground.

28. However, if I am wrong in the above conclusion, I nevertheless find that the First-tier Tribunal adequately considered each of the issues referred to by Mr Turner [those issues being identified in paragraph 9 above].

29. As to the appellant's medical problems, the tribunal dealt with these in paragraphs 126 to 132 of its determination and, although it did so ostensibly in the context of Article 3 grounds, it nevertheless referred therein to the application of its conclusions to its considerations under Article 8 [132].

30. Further, in paragraph 125 of its determination the tribunal find that little of any substance had changed since the appellant exhausted his appeal rights in 2007. The primary evidence relied upon by the appellant before the First-tier Tribunal in relation to his current medical condition, and the impact of deportation on it, was a report dated from 2006; this being the same report that he relied upon before the Tribunal in 2007. The instant tribunal correctly took the determination from May 2007 as its starting point. That determination gave detailed consideration to the appellant's medical condition. Whilst there were more recent medical records before the First-tier Tribunal, that were not before the tribunal in 2007, these added little or nothing of substance to the appellant's case, but rather confirmed that he still has type 1 diabetes. There was no up to date medical report before the First-tier Tribunal setting out a prognosis for the appellant or detailing the severity of his medical condition, an observation made by the First-tier Tribunal in paragraph 132 of its determination.

31. Looking at the determination as a whole, I conclude that the First-tier Tribunal did not err in failing to take proper account the appellant's medical condition when coming to its conclusions on the issue of proportionality.

32. As to the appellant's length of residence in the United Kingdom, the tribunal clearly had this in mind when coming to its conclusions, having set out the appellant's immigration history at some length in numerous paragraphs within the determination. Indeed, at paragraph 125 of the determination the tribunal again refer to the appellant's immigration history, albeit by reference to the fact that it had set such history out earlier in its determination. This in my conclusion is sufficient to demonstrate that the tribunal bore the appellant's history, including his length of residence, well in mind when coming to its conclusions.

33. I further reject the submission made in paragraph 28 of the appellant's grounds that the tribunal erred in failing to take account of his familial relationships when coming to its conclusions. In doing so I note that at paragraph 114 of its determination the First-tier Tribunal find that it would

not be unreasonable to expect the appellant's family members to join or visit him in Vietnam. This is a finding that has not been challenged before the Upper Tribunal and was, in any event, a finding open to the First-tier Tribunal on the available evidence. Reference is also made in paragraph 125 of the determination to the appellant's customary Vietnamese marriage in 2008.

34. In my conclusion it is clear that the Tribunal had the appellant's familial relationships in mind when coming to its conclusions.

35. The core of Mr Turner's submissions before the Upper Tribunal related to the claimed failure of the First-tier Tribunal to take into account (i) the fact that the appellant has not been convicted in the United Kingdom of any offence since 2005 and (ii) that he is at low risk of being convicted in the United Kingdom in the future.

36. Again I reject Mr Turner's submissions. I find that the tribunal had these facts in mind when coming to its conclusions. It recorded the appellant's counsel's submissions in this regard at paragraph 76 of its determination and, thereafter, correctly directed itself to the relevant case law, including that relating to the effect of time elapsed since the appellant's last offence [89]. At paragraph 94 of its determination the tribunal record that the only conviction it found to be relevant to the proceedings was that of 19 December 2005. It further observed at paragraph 96 of its determination that the appellant had expressed remorse and, at paragraph 97, it correctly directed itself to case law relating to the relevance of the lack of likelihood of an individual reoffending. At paragraph 103 of its determination the Tribunal make reference to the jurisprudence considered and summarised between paragraphs 89 to 102 of its determination as being of application to its consideration of the appellant's appeal.

37. Further, as I have already identified above, at paragraph 124 of its determination the First-tier Tribunal clear state that it took into account all of the evidence and facts previously referred to in the determination when considering the issue of proportionality. This must, I find, be taken to include the fact that the appellant has not been convicted of a criminal offence since 2005.

38. Although the appellant has not been convicted of a criminal offence since 2005, he did fail to report as required by a condition of his immigration bail on 20 November 2007 and did not re-engage with the UK authorities until he was encountered by the police on 28 March 2012 [125]. This was a factor the tribunal were also entitled to weigh in the balance [see the decisions of the Upper Tribunal in Farquhrson (removal – proof of conduct) [2013] UKUT 00146 (IAC) and Bah [2012] UKUT 196 (IAC)].

39. The weight attached to the length of time the appellant has spent in the United Kingdom, his medical circumstances, the fact that he had not been convicted of an offence since 2005 and his familial relationships, was a

matter for the First-tier Tribunal and I do not accept its conclusions in this regard were perverse.

40. As to Mr Turner's reliance on the decision of the EctHR in A.A., I find this to be unarguable and misplaced. As the Court of Appeal identified in its decision in JO (Uganda) and JT (Ivory Coast) [2010] EWCA Civ 10, *'[T]here is only limited value in drawing comparisons with the outcome in other cases. All such cases are highly fact sensitive'* [22]. The decision in A.A. was not placed before the First-tier Tribunal, and its facts are, in any event, distinguishable from those in the instant appeal. In A.A. the applicant committed the offence, which led to deportation action being taken against him, whilst he was a minor. This in stark contrast to the instant appellant, who was 32 years old when he committed his offence. Further, although the instant appellant has remained free from conviction since his release from detention, he absconded from the immigration authorities between 2007 and 2012, a factor which was not present in the decision in A.A. These obvious, but by no means the only, factual differences between applicant A.A. and the instant appellant amply demonstrate the point made by Richards LJ in JO and JT , that each case turns on its own facts.

41. Looking at the First-tier Tribunal's determination as a whole, I do not accept that it can be said that the tribunal's conclusions were not open to it on the available evidence. The inescapable reality is that since the previous determination in 2007 the appellant has, for the most part, been an absconder in the United Kingdom. The evidence before the First-tier Tribunal was such that it was open to it to conclude that little of any substance had changed since the appellant exhausted his appeal rights in 2007.

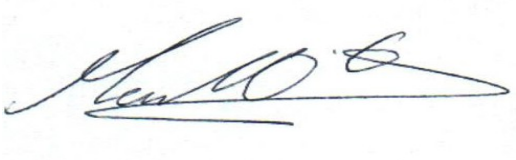
42. For all these reasons I do not accept that the First-tier Tribunal's decision involved the making of an error on a point of law such that it ought to be set aside.

43. The determination of the First-tier Tribunal therefore remains standing.

Decision

For the reasons given above I find that the determination of the First-tier Tribunal does not contain an error on a point of law such that it ought to be set aside. The First-tier Tribunal's determination is to remain standing.

Signed:



Upper Tribunal Judge O'Connor
Date: 21 June 2013