IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000184
First-tier Tribunal No: PA/11956/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 February 2023

Before

UT JUDGE MACLEMAN & DEPUTY UT JUDGE FARRELLY.

Between

T N
(anonymity order made made)

Appellant

and

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr A J Bradley, Solicitor
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 25 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of her family or other person the Tribunal considers should not be identified is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant nor other person. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

© CROWN COPYRIGHT 2023

1. The appellant is a citizen of Vietnam, aged 26. She came to the UK as a student in October 2016. She sought asylum in March 2019, claiming that she supported the Viet Tan party; was detained at a protest on 1 May 2016; and her father warned her, a week after she came to the UK, that the police wanted her over possession of a USB stick containing a subversive book.

2. The respondent refused her claim on 29 November 2019, finding that her account was not credible and she was of no interest to the Vietnamese authorities.

3. FtT Judge D H Clapham dismissed the appellant's appeal by a decision promulgated on 17 June 2021.

4. On 26 July 2021, FtT Judge Grant refused permission to appeal to the UT, on the view that there had been no arguable procedural unfairness and no arguable error of law in the adverse credibility findings.

5. The appellant applied to the UT for permission. Her grounds, as attached to that application, run to 17 paragraphs over 4 pages.

6. On 9 November 2021, UT Judge Kopieczek granted permission, for these reasons:

> First-tier Tribunal Judge DH Clapham ("the FtJ") identified various matters that she considered adversely affected the credibility of the appellant's claim. The grounds seeking permission take issue with virtually all aspects of that credibility assessment.
>
> I am dubious about some aspects of the grounds, for example the contention that the FtJ made an assessment of credibility before consideration of country expert evidence - the *Mibanga* point (*Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367).
>
> It may also be the case that the grounds misinterpret aspects of the FtJ's decision in its assessment of credibility.
>
> Nevertheless, I do consider that there is arguable merit in the grounds. The FtJ asserted that the appellant did not mention the witness summons in her witness statement; but she did. It also appears to be the case that the appellant was not asked at the hearing about the provenance of the summons yet the absence of an explanation as to that led to an adverse credibility finding. Likewise, the adverse credibility finding in the fact of the appellant having been able to leave the country unhindered does raise an arguable issue about the judge's conclusion in this respect.
>
> Overlaying the complaints about the adverse credibility assessment is what appears to have been the FtJ's failure to take into account what is said in the medical report, in particular at paragraph 50, about the potential difficulty for the appellant giving evidence, her vulnerability, and the need for adjustments to be made when she gives evidence.
>
> Whilst it is not clear from the FtJ's decision that the appellant's representative raised this as a preliminary matter, or highlighted it in closing submissions, that medical evidence is arguably something that should have been evident in the FtJ's credibility assessment.

> Notwithstanding the reservations I have expressed about some aspects of the grounds, all grounds may be argued.
>
> Prior to any hearing in the Upper Tribunal, the appellant's representatives must enumerate the existing grounds (without otherwise amending them).

7. At the hearing before us, Mr Mullen confirmed there was no rule 24 response .

8. Mr Bradley appeared for the appellant, as he had in the First-tier tribunal.

9. The central issue in the First-tier appeal was credibility . Mr Bradley firstly contended there was procedural unfairness. This was based upon matters subsequently raised by the judge in the determination not being put to the appellant at hearing for comment. This was relevant to a number of points argued.

10. The judge had commented on the appellant's ability to leave her home country. The country expert report was commissioned on behalf of the appellant on 10 January 2020. The expert said that the country information indicated she would still be able to travel out of Vietnam on her own passport if she had been detained at the protests. In order to prevent travel, there would need to be an exit restriction order, which was not suggested .

11. The judge's comment about the appellant being able to travel is at paragraph 42. She states:

> . ... The fact of the matter is though that even if she did attend the protest and even if she were beaten at one of them as claimed she was of no interest to the authorities. Indeed, as all of the above parties note she was able to leave the country unhindered.

12. Mr Mullen in response said that her ability to leave the country unhindered was an indication that she was not wanted. He suggested that the expert report did not really help the appellant. He submitted that the report was being argued in a selective manner.

13. In our view, when , read in context, the judge's comment is directed towards whether the authorities have an adverse interest in the appellant rather than her ability to leave the country. Her ability to leave was not central to the judges conclusion. The judge is making the general point that her ability to leave unhindered was indicative of a lack of interest in her by the authorities.

14. The second unfairness point taken relates to a summons the appellant produced in relation to her claim. The judge referred to it being produced at the hearing and was critical of the appellant for not mentioning it when her claim was being processed. The complaint is also that the judge queried the provenance of the summons without having questioned the appellant. At paragraph 43 the judge said that the appellant made no mention of the summons in her witness statement nor how she came by it. This is factually incorrect.

15. The appellant made two statements, the first on 24 May 2019 and the second on 26 February 2020. At paragraph 70 of the second statement, being the penultimate paragraph, she does state, `There is a summons for me'. There is a translation of a summons dated 1st November 2016 calling upon her to present herself on 10 November 2016 and answer questions that she was `spreading

propaganda and acting against the Socialist Republic'. The summons is headed as `2nd time', suggesting there was an earlier summons.

16. In her earlier statement the appellant refers to her father telling her on the telephone the police would come to their house looking for her and that they needed her at the police station for further investigation . She did not specifically refer to a summons but she said her father told the police that she was away. In her substantive interview on 10 October 2019 at question 62 she was asked if there was a warrant out for her and her response was recorded as, `I dont know, I'm not sure, my father told me the police came looking for me'. She went on to say that the police called at her family home every two months to check if she had returned. The refusal letter queried why this claim was not referred to in her witness statement.

17. Mr Mullen in response pointed out that the appellant at her interview had not referred to the summons beyond a comment at Qn 62. In her second statement she said there was a summons for her but she did not say when she found out. He submitted the appellant had failed to substantiate her own claim. She left the appearance of the summons a mystery, as it remains.

18. Mr Bradley referred us to the Inner House , Court of Session decision of HA and TS [2020]CSIH 28. This concerned procedural fairness and whether the immigration judge was entitled to base their conclusion upon matters which had not been raised in the course of the hearing. The court began by considering this generally along with the procedural rules. The court said that whilst general principles can be identified they cannot be applied by rote and what fairness demands is dependent upon the context of the decision. A judgement must be made in the light of all the circumstances of a particular case. The court indicated an appreciation of the practical difficulties First-tier Tribunal judges face and that they cannot be expected to be alive to every possible nuance in a case before it starts.

19. The judge correctly said there was no mention of the summons in the expert report commissioned on her behalf. The expert had various other documents, such as her statements and interview record. As noted above, the judge was factually incorrect in saying the appellant had not referred to the summons in her witness statement. However, the reference to it is tucked away in a breid reference in the penultimate paragraph of the second statement. The appellant was represented before the judge. No evidence was led as to how she came by the document. There was no presenting officer in attendance. It is understandable that the judge missed the reference to the summons.

20. In the overall context of the claim the point taken by the judge remains sustainable. Judges do not have to put every point of their analysis to parties for comment (which might become an indefinite process), provided that parties have the chance to put their case and are not taken unfairly by surprise. A procedural impropriety will not vitiate a decision if it is apparent that no prejudice was suffered (HA & TS at para15).

21. We acknowledge that the appellant was a vulnerable person, bearing in mind the death of her mother and younger brother. In the First-tier Tribunal Mr Bradley advised the judge that she was suffering from PTSD. However, we do not see anything in the course of the assessment of a claim by the respondent or in the

course of the hearing indicating she was unable to fairly express herself. It is to be borne in mind that she was represented throughout.

22. There are various other points taken by the judge in assessing the case The judge considered the appellant's claim to be involved in two protests in Vietnam. The judge commented on her evidence that she discovered only at a late stage that her mother had been heavily involved with the Viet Tan party. The judge did not find it credible if this were the case that her father would have no knowledge of it. The judge refers to the appellant's claim that she suspects the authorities were involved in her brother's drowning. However, the judge concluded this amounted to no more than speculation; and so it is. The judge referred to the significant delay in claiming protection. The judge dealt with her claim that she learnt through a friend that the British authorities have an agreement to cooperate with the Vietnamese authorities. The judge pointed out that her friend did not give evidence. Her *sur place* activities were assessed and not considered to place her at risk. The judge refers to her claim of having distributed a banned book in Vietnam and notes the absence of evidence the book was in fact banned.

23. We have had regard to all the points made in the leave application. Mr Bradley has at hearing sought to advance matters as far as he possibly could, but we have found nothing, either individually or cumulatively, which renders the decision unsafe. The judge was entitled to have regard to the immigration history of the appellant and in particular the precise circumstances in which the claim for asylum was belatedly made and to conclude that the appellant was a person of no credibility. We find that the judge has given the requisite degree of scrutiny to the entirety of the appellant's claim for protection in the United Kingdom. On the question of procedural fairness, we are not persuaded that there was any oversight which renders the decision unsafe.

Decision

No material error of law has been established. The decision of First-tier Tribunal Judge D Clapham, dismissing the appeal, shall stand.

F Farrelly

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
1st February 2023