IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003196

First-tier Tribunal No: PA/50262/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16th of November 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

DQL
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A. Jafar, Counsel instructed by Norton Folgate Solicitors LLP
For the Respondent: Mr N. Wain, Senior Home Office Presenting Officer

Heard at Field House on 28 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By a decision dated 3 March 2023, First-tier Tribunal Judge Ford ("the judge") dismissed an appeal brought by the appellant, a citizen of Vietnam born on 4 June 1994, against a decision of the Secretary of State dated 12 January 2021 to refuse his asylum and humanitarian protection claim. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

2. The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Oxlade.

Anonymity

3. The judge made an order for anonymity, which we maintain. The appellant has made a claim for international protection based, in part, on the risk he will face arising from surveillance activity conducted by the Vietnamese authorities. That claim is yet to be finally determined. We therefore maintain the order.

Factual background

4. The appellant was admitted to the United Kingdom as a student in October 2013, with leave until 18 January 2016, following which he remained as an overstayer. He claimed asylum on 7 December 2019. The claim was refused, and it was the refusal of that decision that was under appeal before the judge below.

5. The basis of the appellant's claim was that he became involved in a Vietnamese political party, the Viet Tan ("VT"), following his arrival in the UK. He had had some minor involvement with the movement in Vietnam prior to his departure for the UK, including being arrested and detained following his attendance at a demonstration, although he was later released. In October 2016, the VT were proscribed as a terrorist organisation by the Vietnamese government. The appellant says that has engaged in a number of *sur place* activities in the UK, including attending demonstrations outside the Vietnamese embassy in London. Those activities came to the attention of the authorities and led to them attempting to execute an arrest warrant against him at his parents' home in Vietnam. His family and Vietnamese lawyer remain under surveillance. They cannot communicate freely, preventing the appellant from obtaining certain supporting documentation from them. He cannot return to Vietnam because he will be persecuted for his political opinion.

The decision of the First-tier Tribunal

6. In her decision, after having summarised the parties' respective cases and marshalled the evidence, the judge commenced her operative findings at para. 39. She found that the appellant's credibility was harmed by the delay in the claim for asylum. The appellant had provided little proof that he had attended 30 demonstrations in the UK, as he claimed. The judge said that she was "prepared to accept" that the appellant had attended a VT demonstration in Vietnam, and that he had been detained "for a time along with other protesters and warned not to attend any further demonstrations" (para. 41), but she did not accept that he had been charged with any offences. As to that, she said:

> "I do not accept that any record will have been created alerting the authorities to this detention if enquiries are made at the current time. I find that the detention was only for a matter of hours and intended to intimidate the appellant and other protesters and deter them from getting involved in such protests/demonstrations in the future."

7. In her remaining findings, the judge said she saw “no reason” for the authorities in Vietnam to have waited five years after the appellant had left the country before issuing an arrest warrant against him, as he had claimed (para. 43). There is no satisfactory evidence of the appellant engaging in activities in the United Kingdom that may have triggered such a warrant being issued (para. 44). There was no documentary evidence concerning the claimed arrest warrant; it would have been open to the appellant to have made enquiries with the lawyer instructed by his family in Vietnam concerning the arrest warrant, even if it had not been possible to obtain a copy of the document itself (para. 45). The appellant’s claim to be hampered in his attempts to communicate freely with his family in Vietnam was undermined by the fact he had been able to convey some information they purportedly provided to him, such as the allegations relating to the arrest warrant. The judge also found that there was a “complete absence” of supporting evidence from any VT supporters in the UK about the appellant’s claimed activities, such as a witness statement from a party official, or similar attendance at the hearing on his behalf.

8. The judge nevertheless accepted that the appellant had made social media posts that were critical of the Vietnamese authorities, and that he had attended a “limited number” of demonstrations outside the Vietnamese embassy. As to the appellant’s Facebook posts, the judge accepted that the platform was monitored by the Vietnamese authorities, and that the authorities conducted surveillance outside the Embassy, something which she described as “hardly surprising”: see paras 48 and 49.

9. As to the consequences to the appellant of his activities outside the Vietnamese Embassy, and the authorities’ surveillance of those activities, the judge said at para. 50:

> “…I do not accept that the appellant could be recognised or identified from such monitoring. I have no evidence before me that the Vietnamese authorities could use facial recognition software or any other recognition methods that could reliably lead to the appellant being identified.”

10. On the same theme, in relation to the appellant’s presence in a photograph posted online in which he accompanied a senior VT official, the judge said at para. 50:

> “I do not see how the appellant would be identified from those photos and his details provided to the Vietnamese authorities.”

11. The judge addressed the appellant’s presentation of a VT membership card. At para. 51, the judge noted that the appellant had applied for membership only weeks before making the claim for international protection in 2019.

12. Overall, the judge found that the appellant’s political profile in the United Kingdom was limited. His claimed VT friendship group and contacts in the UK were limited, and the timing of such contacts “ties in with his asylum claim.” The judge was not satisfied that the appellant had ever been a member of the VT party in Vietnam or elsewhere, including the UK. She did not accept that there was any record of adverse interest on the part of the Vietnamese authorities in the appellant “so as to trigger any adverse interest in the appellant by reason of actual and/or imputed political beliefs.” The appellant had family members in Vietnam who would be able to assist him in the event of his return. His qualifications would assist him to find employment.

13. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

14. There are nine grounds of appeal. On a fair reading, they may be summarised as follows:

a. Ground 1: the judge made contradictory findings concerning the appellant's VT membership. At para. 51 she accepted that he had joined the party "only weeks before he claimed protection", yet at para. 64 she reached the contradictory finding that he had never been a member of the party.

b. Ground 2: the judge breached the principles in *YB (Eritrea)* [2008] EWCA Civ 360 by expecting the appellant to provide evidence going to the Vietnamese authorities' covert surveillance capabilities. As Sedley LJ said at para. 18, "this is a finding which risks losing contact with reality."

c. Ground 3: the judge's criticisms of the appellant's 'failure' to obtain evidence from his family about their contact with his lawyer were unfair because the appellant was only asked limited questions about that issue at the hearing.

d. Ground 4: in finding that the appellant's claim not to be able freely to communicate with his family and lawyers in Vietnam lacked credibility because there had been some information they had been able to convey to him, the judge failed to have regard to the appellant's evidence that they communicated through third parties.

e. Ground 5: the judge's approach to the absence of evidence from UK-based VT supporters was based on her own subjective assumptions, rather than objective background evidence.

f. Ground 6: it was irrational for the judge to ascribe significance to the appellant's failure to provide a copy of the arrest warrant. The background materials, in particular the report of a *Report of a Home Office fact-finding mission to Vietnam*, 9 September 2019 at part 1.3, provided no support for the contention that a copy of an arrest warrant would be provided in such circumstances.

g. Ground 7: there was no evidential basis for the judge to conclude that the appellant's detention in 2013, which she accepted had taken place, would not have been recorded by the authorities.

h. Ground 8: the judge's overall findings concerning the appellant's risk profile were plainly wrong when analysed by reference to the respondent's country policy and information note, Vietnam: opposition to the government, December 2014, at 1.4.

i. Ground 9: it was irrational for the judge to find that the appellant had only campaigned for the VT in order to bolster his claim. As the judge accepted, the appellant had been detained on account of his pro-VT activities in Vietnam prior to his departure for the United Kingdom. There was no rational basis for the judge to conclude that he was merely feigning support in order to bolster a week claim for asylum.

Relevant legal principles: challenges to findings of fact

15. The grounds of appeal challenge findings of fact reached by a first instance trial judge. Appeals lie to this tribunal on the basis of errors of law, not disagreements of fact. Of course, some findings of fact may feature errors which fall to be categorised as errors of law: see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at para. 9. Appellate courts and tribunals are to exercise restraint when reviewing the findings of first instance judges, for it is trial judges who have had regard to "the whole sea of evidence", whereas an appellate judge will merely be "island hopping" (see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para. 114). As Lady Hale PSC said in *Perry v Raleys Solicitors* [2019] UKSC 5 at para. 52, the constraints to which appellate judges are subject in relation to reviewing first instance judges' findings of fact may be summarised as:

> "…requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

Ground 7: no evidential foundation for finding that the appellant's 2013 arrest was not documented

16. It will be convenient to start with ground 7 since it deals with the pre-UK chronology that forms a significant part of the background to the appellant's claim, namely his pre-UK detention by the Vietnamese authorities. We have quoted the relevant findings at para. 6, above, in which the judge rejected the appellant's case that his detention (which she accepted to have taken place) would have been recorded such that he will be identified in the future as a previous detainee.

17. With respect to the judge, we accept Mr Jafar's submission that that was a finding without an evidential basis. The judge did not identify any background materials or other authority for that proposition. We cannot ascertain the evidential basis for her finding that no records would have been kept, from the reasons she gave in the decision, and the evidence in the bundle before her. We accept that the judge heard the case as a first instance trial judge, and we must resist the temptation to engage in "island hopping" (see *Fage v Chobani* at para. 114). It may well be that the appellant said something in oral evidence which merited this finding, but it is not clear from the decision. However, since the judge accepted (largely on account of the expert evidence) the appellant's detention narrative, it is difficult to ascertain the basis upon which the judge concluded that no records of the appellant's detention would have been kept by the Vietnamese authorities. This ground is made out.

Ground 2: unrealistic (and therefore unlawful) expectations concerning evidence of surveillance

18. The judge accepted that the appellant had engaged in a degree of *sur place* activity in the UK, albeit to a much lesser extent than he had claimed. She also had before her the report of Dr Tran Thi Lan Anh, which she found to contain "objective and well sourced background evidence" (para. 31). Dr Tran had opined that the appellant would have been the subject of surveillance by the authorities (para. 5.1), and that he would be interviewed by the authorities at the border upon being forcibly removed from the UK, and that that process would draw upon the surveillance records generated by the appellant's physical and online anti-government activity.

19. Mr Jafar's submission in support of this ground is simply that it was irrational for the judge to expect the appellant to provide evidence demonstrating the Vietnamese authorities' covert intelligence capabilities. In response, Mr Wain submitted that the judge was referring to the fact that the appellant would not be expected to reveal, when questioned by the Vietnamese authorities, that he had engaged in such activities.

20. We prefer Mr Jafar's submissions. In context, the extract from *YB (Eritrea)* at para. 18 referred to above is as follows:

> "…the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had 'the means and the inclination' to monitor such activities as a demonstration outside their embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality."

21. As we put to Mr Wain at the hearing, the Court of Appeal recently addressed this point in *WAS (Pakistan) v Secretary of State for the Home Department* [2023] EWCA Civ 894. The issue was whether, on remaking an asylum appeal decision for itself, the Upper Tribunal imposed unrealistic expectations on the appellant to adduce evidence of the Pakistani authorities' surveillance capabilities. At para. 84 Laing LJ said, with emphasis added:

> "I paraphrase a question which Phillips LJ asked [counsel for the Secretary of State] in argument, **'What evidence did the UT expect?' It is very improbable that there would be any direct evidence of covert activity by the Pakistani authorities, whether it consisted of monitoring demonstrations, meetings and other activities, monitoring social media, or the use of spies or informers.** I do not consider that Sedley LJ was suggesting, in paragraph 18 of *YB (Eritrea)*, that a tribunal must infer successful covert activity by a foreign state in the circumstances which he described. He was, nevertheless, making a common-sense point, which is that a tribunal cannot be criticised if it is prepared to infer successful covert activity on the basis of limited direct evidence. Those observations have even more force in the light of the great changes since 2008 in the sophistication of such methods, in the availability of electronic evidence of all sorts, and in the ease of their transmission. To give one obvious example, which requires no insight into the covert methods which might be available to states, it is very easy for an apparently casual observer of any scene to collect a mass of photographs and/or recordings on his phone, without drawing any adverse attention to himself, and then to send them anywhere in the world."

22. Contrary to Mr Wain's submissions, the judge was not addressing the prospect of the appellant being questioned upon his return to Vietnam. In any event, the same observation would apply: if asked by the Vietnamese authorities about whether he would have been the subject of surveillance activity by UK-based officers, he could not be expected to know the answer to that question for precisely the same reasons. He would, in any event, be expected to tell the truth about the nature and scope of his activities and could not be expected to lie.

23. We therefore find this ground of appeal to be made out: the judge imposed unrealistic, and therefore unlawful, expectations on the appellant to adduce evidence he could not reasonably be expected to obtain concerning the Vietnamese authorities' covert intelligence capabilities. She did so against the background of having accepted (by reference to the expert evidence) that appellant had previously been detained in Vietnam for his political activities, having accepted that he had engaged in some *sur place* activities and having accepted that it was "hardly surprising" that such protests were monitored (see para. 49). There was also expert evidence before the judge that some such activities would be subject to state surveillance.

24. In our judgment, this ground of appeal is sufficient to undermine the entirety of the judge's prospective risk assessment. It follows that ground 8 is also made out.

Ground 6: findings not supported by the background evidence

25. Resisting this ground, Mr Wain submitted that the judge merely expected corroboration of the sort that is reasonable to obtain.

26. In our view, the judge's findings at para. 45 were premised on the assumption that the Vietnamese authorities would have provided a copy of the appellant's arrest warrant, if they had really attended his parents' home looking for him. In turn, that finding is based on the footing that there would be such a document. That is an assumption which imputes to the Vietnamese authorities an expectation of due process and procedural propriety. That is an assumption which may only be made where the background evidence supports such a finding. Mr Jafar referred to the *Report of a Home Office fact-finding mission to Vietnam*, which the judge said at para. 37 she had considered. In the part of the report addressing arrests and detention, it states at para. 1.3.4:

> "Diplomatic sources added that in other cases such as where arrests follow on from demonstrations, the procedures will vary depending on circumstances, reasons for the arrest and the individuals involved, and numbers involved and the perceived threat, including political threat that the person arrested is deemed to pose. There have been numerous reports of activists and demonstrators arrested or detained without an arrest warrant, sometimes under broad interpretations of the emergency custody/security provisions."

27. Given the background materials specifically address the lack of due process in the execution of some purported arrest warrants, we accept Mr Jafar's submissions, and find that this ground is made out.

Ground 3: no evidence that questioning was unfair

28. This ground is without merit. There is no evidence concerning the questions that were (or were not) put to the appellant at the hearing concerning his contact with his Vietnamese family and lawyer, for example in the form of a witness statement from a person present at the hearing (see *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC)). The appellant has not applied for a transcript of the proceedings, either directly using the facility on www.gov.uk by filling in form EX107, or to the Upper Tribunal directly. Moreover, the appellant was on notice that this aspect of his case was not accepted by virtue of the Secretary of State's position as set out in the refusal letter. We find there is no evidence sufficient to merit a finding of unfairness and dismiss this ground of appeal.

Grounds 1, 4, 5 and 9: disagreements of fact

29. We accept Mr Wain's submissions that grounds 1, 4, 5 and 9 are disagreements of fact.

30. In relation to ground 1, properly understood, there is no contradiction. At para. 51 the judge observed that the appellant had only joined the party shortly before making his claim for asylum in 2019. That observation should be read against the judge's earlier finding that the appellant's credibility was harmed by the delay in his claim for asylum. At para. 64, the judge plainly meant that the appellant had not been a *genuine* member of the VT. In light of her observation at para 51 that the appellant's acquisition of the membership card had essentially been self-serving, there is no contradiction in her approach. This ground is a disagreement of fact.

31. In relation to ground 4, it was open to the judge to ascribe significance to the paucity of evidence concerning the appellant's claimed contact with his family and legal team in Vietnam. The judge was fully aware of his case that they communicated through third parties. It was rationally open to her to ascribe significance to the absence of any evidence of the sort that reasonably could be expected going to precisely that issue. There was no evidence, for example, from any of the claimed third parties. Not all judges would have reached this conclusion on this point, but it was not a finding that was not rationally open to the judge to reach.

32. Similarly, it was rationally open to the judge to note that there was no supporting evidence from anyone within the VT in the UK. Such evidence is commonplace in sur place claims for asylum. This aspect of the judge's reasoning was open to her.

33. In relation to ground 9, we consider that the judge was entitled to find that the appellant had sought to bolster his case, for the reasons she gave. Again, while not all judges would have reached that conclusion, nothing about this aspect of the judge's reasoning was such that no reasonable judge could have reached it.

Conclusion

34. This appeal is allowed on grounds 2, 6 and 7. The judge's findings concerning the appellant's pre-UK experiences at the hands of the Vietnamese authorities, the Vietnam-based execution of an arrest warrant, the extent of the Vietnamese authorities' UK-based covert surveillance capabilities and the appellant's overall risk profile involved the making of an error of law. Since the impugned findings concerned various points on the entire chronology of the appellant's claim, from his pre-UK detention to his prospective risk profile on his return to Vietnam, we do not consider that there are any findings of fact which may be preserved, notwithstanding the fact we have dismissed all remaining grounds of appeal. We set the decision aside in its entirety and, in light of the extent of the findings of fact yet to be made, remit the appeal to the First-tier Tribunal to be determined afresh, by a different judge.

35. Nothing in this decision should be taken as offering a view on the prospective merits of the appeal in due course. Such matters will be the exclusive preserve of the First-tier Tribunal.

Notice of Decision

The appeal is allowed.

The decision of Judge Ford involved the making of an error of law and is set aside with no findings of fact preserved.

The case is remitted to the First-tier Tribunal to be reheard by a judge other than Judge Ford.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 November 2023