Heard at Field House
On 13 May 2004

BV (Unaccompanied Minor – Timing of Decision) Vietnam [2004] UKIAT 00148

**IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

……03rd June 2004……

**Before:**

**Mr Andrew Jordan**
**Mrs L.H.S. Verity**
**Mrs L.R.S. Schmitt**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**APPELLANT**

**and**

**RESPONDENT**

Representation
For the appellant/Secretary of State: Mr G. Saunders, Home Office Presenting Officer
For the respondent/claimant: Ms S. Naik, counsel

**DETERMINATION AND REASONS**

1. The Secretary of State appeals against the determination of an adjudicator, Mr Timothy Thorne, promulgated on 2 September 2003, allowing the claimant's appeal against the decision of the Secretary of State to refuse the claimant's asylum and human rights appeals.

2. The claimant is a citizen of Vietnam and was born on 13 August 1991. He is now still only 12 years old. He left Vietnam in

September or October 2002, when he was just 11 years old, and flew to the United Kingdom. After the intervention of Social Services, an application was made on his behalf for asylum on 23 December 2002.

3. The circumstances in which the claimant came to the United Kingdom are clearly set out in the application made on 21 January 2003. In or about 2001, the claimant's parents went to work in Cambodia. In their absence, the claimant stayed with his grandmother. After his parents returned from Cambodia, they were arrested. The appellant said at A5:

   "I asked the police why they were taking my parents away but there was no answer. I asked my parents why they had been arrested, they did not answer but they said I should be a good boy and take care of my grandmother. There were two police officers. I heard one of the officers ask my parents some questions when I was outside. He said that he wanted to know the truth, whether they went there to work or to supply illegal goods from Vietnam to Cambodia. They did not say what. After the police took my parents my gran said that she was too old to take care [of me] and could not provide the money to continue with my education."

4. An arrangement was made for the appellant to be taken to a lady, whom he called "Aunty", with whom he stayed for five or ten days until they went together to the airport to travel to the United Kingdom. On arrival, the claimant stayed with her for a few weeks until he was taken to the house of the gentleman but the aunt he did not return. About a week later, the man said that he could no longer look after the claimant and took him to see two English ladies whom we take it must have been members of the social services department. Subsequently, the claimant was placed with foster parents. We understand the foster parents are an Eritrean family. It was accepted by the Secretary of State that they are likely to have some right to remain in the United Kingdom. At the hearing of the appeal, the claimant's foster father was called. The adjudicator refers to him in paragraph 24 of the determination:

   "He said that the appellant got on well at school and was very much a part of his family. He got on well with the other children in his family. He spoke good English. The witness looked upon the appellant as his son. "We would be devastated if he were returned." It would be difficult for him and his family (who were Eritrean refugees) to visit the appellant in Vietnam."

5. We were referred to the Home Office policy set out in an Information Note entitled "Unaccompanied Asylum Seeking Children". An unaccompanied asylum seeking child is a person who, at the time of making the asylum application has no adult relative or guardian to turn to in this country. The Home Office does not consider a child to be unaccompanied if he or she is being cared for by an adult prepared to take responsibility for him. IND staff will involve social services in any case where there is concern about the child's relationship with the "responsible" adult. Mr Saunders submitted that by the time the application was made on 23 December 2002, the claimant was being looked after by social services and was in a placement with a foster parent who signed the application on 21 January 2003 as the claimant's guardian. Accordingly, the claimant did not fall within the definition of an unaccompanied asylum seeking child. Although it is a matter for the Secretary of State to determine the ambit of his own policy, and to construe it as restrictively as he chooses, we do not consider it likely that such a restrictive interpretation as Mr Saunders put forward is tenable. There may be cases where the child has been so effectively placed under the care and control of a local authority or some other person as to cease to qualify under the policy at the time the application for asylum is made. In the present case, however, we do not regard the person referred to by the claimant as "Auntie" as an adult relative or guardian to whom the appellant could turn in this country. Nor do we regard the gentleman who looked after him for a few days as such a person. Thereafter, the local authority took charge of him just because he was an unaccompanied asylum seeking child. Inevitably, once the local authority took responsibility for the claimant, it required his immigration status to be regularised by making an application under either or both Conventions. By so acting, we consider that it would lead to a manifestly absurd result if the claimant then lost the protection afforded by the policy directed to children who have no adult relative or guardian to turn to in the United Kingdom. Accordingly, whilst the local authority had assumed responsibility for his care, we do not consider that this was an assumption of responsibility automatically rendering outside the definition of an unaccompanied asylum seeking child.

6. In paragraph 8.3 of the Information Note, it is said:

   "8.3 We will consider for refusal unaccompanied asylum seeking children who have no asylum or human rights claim. At this stage caseworkers will consider the safety of return. The Home Office Ministers have said that no unaccompanied child will be removed from the United Kingdom unless we are satisfied that

adequate reception and arrangements are in place in the country to which he/she is to be removed. If no satisfactory reception and arrangements can be made then IND will grant a period of exceptional leave to remain..."

The period of exceptional leave to remain, as applied until April 2003, was four years in the case the child under 14 years of age. At the end of this period the child was then permitted to apply for indefinite leave to remain in the same way as those granted four years ELR for humanitarian reasons.

7. In April 2003 the circumstances in which leave to remain was to be granted to unaccompanied asylum seeking children was left largely unaltered, although the phraseology changed:

"Discretionary Leave may be granted to an applicant who:

Is an unaccompanied asylum seeking child for whom adequate reception arrangements in the country are not available

Is able to demonstrate particularly compelling reasons why removal would not be appropriate."

8. Whilst the conditions for a grant of discretionary leave remained similar to those under the former policy, the grant itself was substantially altered. The current regime is that an individual grant of discretionary leave should not be made for more than three years (or less where specific instructions have been issued). Unaccompanied asylum seeking children should normally be granted three years or until their 18th birthday, whichever is earlier, although there may be some exceptions. Notable by its absence is the suggestion that at the end of the period the child may apply for indefinite leave to remain.

9. The Secretary of State did not grant the claimant exceptional leave to remain. He was, of course, entitled to have made a grant, with or without his policy. By making no decision prior to April 2003, the claimant did not have the benefit of the applicable regime. In effect, he was not granted four years exceptional leave to remain and lost the prospect of "converting" his limited leave to indefinite leave. Furthermore, the Secretary of State has not granted him three years discretionary leave under the April 2003 "policy". His only status, if status it be, is the status of irremovability pending a decision of what to do to him.

10. The Secretary of State's chosen course of action is to await the outcome of the asylum appeal and any associated human rights

appeals before deciding what to do. If the asylum appeal is successful, an appellant is granted leave to remain and any enquiry as to adequate/satisfactory reception and care arrangements in the receiving state is rendered unnecessary. Given the substantial period of time that may elapse before his asylum appeal is finally disposed of either before the adjudicator or on appeal to the Tribunal, reception and care arrangements that may have been both adequate and available at the time of deciding the asylum and associated human rights claims may well be neither adequate nor available at the end of the appeal process.

11. The claimant's principal complaint is levelled at the Secretary of State's "wait and see" policy. Ms Naik, who appeared on behalf of the appellant, asserts that the Secretary of State should make a decision and that his failure to do so is unlawful. It is an inevitable corollary of that duty to make a decision that the decision should have been made in her client's favour. Given the Secretary of the State's stance that he has not established there are adequate or satisfactory reception and care facilities the appellant must succeed.

12. It is argued that the Secretary of State was required to consider the appellant's claim in what is in effect the optimum moment for the appellant. If the claimant had been decided when the claimant entered the United Kingdom, he would not have established either private or family life in the United Kingdom for Article 8 purposes. If the claim had been decided at the time the application for asylum was made on 23 December 2001, similar considerations would probably apply. At most, the Article 8 claim would have the bare minimum of a private and family life of a few weeks since the foster parents stepped in. (We do not know the exact date when they did so.) By the time the claim came to be decided before the adjudicator the claimant had a full 7 months of private or family life with the foster parents. By the time the Tribunal considered the case, this had been extended to 14 months. By contrast, there are still no adequate care arrangements in Vietnam. It might be thought that the result is inevitable.

13. Must the Secretary of State make a decision? It seems as a matter of first principal that he need not. He is not presently contemplating the claimant's return so the claimant will suffer no present or imminent violation of his human rights. See paragraphs 62 and 63 of **L (Ethiopia) [2003] UKIAT 00016** (Dr H. H. Storey, chairman). The Secretary of State has a discretion when to make a decision. Be that as it may, his failing to make a decision

is not justiciable either before the adjudicator or the Tribunal under the umbrella of a human rights appeal, far less an asylum claim. This position was considered in **[2003] UKIAT00059 N (Vietnam),** (Mr J. Barnes, chairman), the Tribunal stated:

6. It is perhaps appropriate that we deal first with the question of that policy. It is, in essence, that no unaccompanied child will be removed from the United Kingdom unless the Secretary of State is satisfied that adequate reception and care arrangements are in place in the country to which he or she is to be removed. Enquiries will be made by the Secretary of State in the country of intended return to establish this before removal for the purposes of identifying a potential carer, and checking that there is a realistic prospect of setting up suitable arrangements for the child's return. Those enquiries will initially be with family members, although alternatively the Social Services or equivalent in the child's home country may be able to provide for the child but this will depend very much on the quality of care provision available. If, following all those enquiries, the Secretary of State is not satisfied that such adequate reception and care arrangements will be in place on the return of the unaccompanied minor then the general presumption is that he should be granted exceptional leave to enter or remain until he attains the age of 18 years.
7. We accept that there is no reason to doubt that the Secretary of State will follow his own detailed published policy in this respect. He clearly cannot be expected to make these enquiries and put in hand such arrangements until the asylum appeal process has been exhausted, partly because this might breach matters of confidentiality which he has undertaken to preserve in dealing with the claimant's application, and partly because it is self-evident that it would not be practicable to make such arrangements until a point in the asylum process had been reached when it was known whether or not the claimant was likely to be returned. That point has only just been reached in the present case with the refusal of leave to appeal other than on Article 8 grounds, and even then the asylum process will not have been exhausted until this determination is formally promulgated. Insofar as Mr Richmond sought to rely on any failure to have made enquiries in advance, we are satisfied that that cannot provide any valid basis for challenging the proportionality of the intended removal under Article 8.
9. Mr Richmond sought to contrast the situation that the appellant enjoys in this country, where we accept that he has made efforts to integrate both with his foster carers and in the pursuit of his further education here, with the situation which

would await him on his return. He said to us initially that there was an absence of family to receive him. We cannot accept that that follows from the evidence because it is clear that, for whatever reason, the appellant has preferred that there should be no attempt to make contact with his family in Vietnam since his arrival here. The Adjudicator was in our view perfectly entitled to look at the totality of the evidence before her as to the way in which the appellant had been cared for in Vietnam in the past, and to make the assumption that there was a reasonable likelihood that such caring ability would continue to apply after the comparatively short time since the appellant's departure from Vietnam. The medical evidence is aptly summarised by the Adjudicator in the passage which we have quoted above. It is right to say that the report from the South London and Maudsley NHS Trust does include a passage to the effect that the appellant is, in their opinion, a vulnerable teenager whose current symptomatalogy suggests that if he removes to an environment in which he feels unsafe and under threat, "such as he is likely to encounter in Vietnam", he will be at risk of developing a clinical depression which would require psychiatric treatment.

14. It is clear that the Tribunal's reasoning in **N (Vietnam)** might apply in the present appeal with equal force.

15. Ms Niak, however, whilst not expressly asking this Tribunal to differ from **N (Vietnam)**, contends that the Tribunal was not there asked to consider whether the Secretary of State had failed to apply his own policy. She contended that he had not done so and that his decision was, therefore, flawed, permitting the adjudicator to consider the matter afresh.

16. We do not consider that this is correct. If the Secretary of State had made inquiries and had satisfied himself that there were no adequate reception facilities for the claimant on return but had nevertheless decided to return him, such a decision would have been a clear breach of his own policy. Indeed, quite separate from that, it would be a violation of the claimant's human rights to return him to Vietnam in such circumstances. The Secretary of State has not done that. Instead, he has made a decision to refuse the claimant asylum claim and to issue directions for his removal to Vietnam. That gives rise to a right of appeal which the claimant is required to exercise if he wishes to challenge the asylum decision. In addition, the one-stop procedure requires the claimant to raise a human rights claim if he chooses to do so. In our judgment, there is nothing in this procedure that requires

the Secretary of State to consider the adequacy of reception facilities at this stage.

17. Ms Naik submitted that if the Secretary of State had considered discretionary leave prior to April 2003, it is likely that the claimant would have received the benefit of four years discretionary leave. She, therefore, submits that this was a clear failing to apply his policy. In our judgment, it is impossible to establish what the Secretary of State would have done. If he had found that there were adequate reception facilities in Vietnam, by applying his policy, he would have been quite entitled to issue removal directions in line with that policy. It does not, therefore, follow that consideration of the policy would inevitably have lead to the grant of leave to remain.

18. Ms Naik also submitted that the Secretary of State made no Article 8 decision and, therefore, the adjudicator was entitled to make the decision himself. The adjudicator, it was argued, was therefore entitled to apply the Secretary of State's own policy. On the state of evidence before the adjudicator, the adjudicator was both entitled, and indeed bound, to find that there were no adequate reception facilities and, therefore, that the claimant's return would violate his human rights. In our judgment, the adjudicator was not in the position of the Secretary of State. It was not part of his function to stand in the shoes of the Secretary of State and make a decision that the Secretary of State had himself declined to make at this stage in the process.

19. In support of her contention, it was argued on the claimant's behalf that where the Secretary of State fails to apply his own policy, the Tribunal is required to intervene. In **[2004] UKIAT 00027 H (Somalia)** (Ouseley J., President) the Tribunal considered in an entry clearance case the family reunion policy, (the statement of policy permitting leave to enter to family members where the sponsor has refugee status, irrespective of his ability to meet the maintenance and accommodation requirements of the Immigration Rules.) In paragraph 19 of the determination, the Tribunal accepted that although the policy was potentially applicable to the appellants, it had not been considered by the Secretary of State or, if it had, that it had not been considered on the correct factual basis. The President stated:

"Accordingly, on that basis, this appeal falls to be allowed, but we would not direct that entry clearance be granted. It is for the Secretary of State to consider whether the appellants fall within the scope of his refugee family reunion policy on the basis which

we have set out. He is entitled to reach a decision either way on that matter."

In paragraph 46 of the determination, the Tribunal concluded:

"The consequences of a conclusion is that these four appellants are entitled to have their Article 8 rights considered by the Secretary of State and are not confined to arguing what for them would be a hopeless case on the Rules, and a deliberately restricted one under the extra-statutory discretion. But it does not follow at all that that leads to much greater scope for them to enter. It would normally be the position that the combination of the provisions of the Immigration Rules and the extra-statutory policy and discretion would provide a proportionate basis for any interference with or lack of respect for family life in the light of the well-established right of the state to control entry, whether or not that is to be regarded as a free-standing restriction on the scope of Article 8 or as falling within the qualification in Article 8 (2)... It would be the exceptional case where circumstances fell outside the Rules and that the compassionate discretionary policy, and yet were such that exclusion was an unreasonable response by the Secretary of State."

20. Accordingly, the appeal was allowed with the effect that the Secretary of State was required to consider his own policy. It did not result in the grant of entry clearance. This procedure should, in our judgment, be strictly confined. In an asylum appeal, the adjudicator or the Tribunal is concerned to consider whether there is the reasonable likelihood of persecution or a violation of the claimant's human rights. The appeal process is not normally concerned with procedural irregularities or a consideration of whether the Secretary of State has applied his own extra-statutory policies. It is of course well-established in the case of **Abdi [1996] Imm AR 148** that a decision of an Entry Clearance Officer may be treated as "not in accordance with the law" where a policy of the Secretary of State outside the Rules has not been considered or has been considered on an erroneous factual basis.

21. In this appeal, the adjudicator concluded in paragraph 51 of the determination that the claimant was an unaccompanied minor who had been abandoned by his parents and grandmother in his own country. The adjudicator concluded:

"He has no one and nowhere to be returned to in Vietnam. In such circumstances I conclude that there is a real risk that the act of returning him at his age constitutes inhuman and or

degrading treatment in breach of the United Kingdom's obligations under Article 3 ECHR."

22. We do not consider that the evidence establishes that the claimant has been abandoned. The entirety of the evidence in so far as it relates to the circumstances in which the claimant came to the United Kingdom has been set out above in paragraph 3 of this determination. It establishes that the claimant's parents were arrested. It also establishes that elaborate (and costly) arrangements were made by the claimant's grandmother for the claimant to come to the United Kingdom. We do not consider this amounts to abandonment. More importantly, perhaps, it does not mean that, were the claimant to return to Vietnam, his parents or his grandmother would refuse to care for him.

23. Furthermore, by deciding that the claimant's family had abandoned him, the adjudicator was pre-empting the consideration that the Secretary of State was himself intending to give when he came to make his own enquiries in Vietnam. As appears from the Tribunal's decision in **N (Vietnam)**, the Secretary of State will first consider whether there are family members in Vietnam who are likely to assume responsibility for the child. In our judgment, until those enquiries had been concluded, it was not for the adjudicator to decide whether the claimant had been abandoned.

24. The adjudicator then went on to deal with the Article 8 claim. In paragraph 73 of the determination, the adjudicator decided that the Secretary of State had not considered proportionality at all and that it was, therefore, open to him to carry out the balancing exercise himself, albeit paying deference to the Secretary of State's duty to maintain effective immigration control. For the reasons that we have set out above, once the adjudicator had embarked upon a simple comparison of conditions in the United Kingdom and the absence of any information as to conditions in Vietnam, the contest was bound to result in the claim succeeding. For the reasons we have given, that is not the correct approach.

25. Finally, in paragraph 77 of the determination, the adjudicator found that the Secretary of State had failed to follow his own published policy. In our judgment, the adjudicator was confusing the fact that the Secretary of State had not embarked upon an examination of the adequacy of reception and care arrangements in Vietnam with a failure to comply with the policy.

26. Although Ms Naik sought to argue the appeal on the basis that this appeal raises the issues that were not considered by the Tribunal in **N (Vietnam)**, we do not consider that any fresh principles are involved. We consider that **N (Vietnam)** was correctly decided and applies with equal force to the circumstances in the instant appeal. In our judgment, the adjudicator reached the wrong conclusion in allowing the claimant's appeal.

Decision: The appeal of the Secretary of State is allowed.