Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32315/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 11 November 2014	**On 1 December 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

THI BICH LOAN TRAN

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No representative

DETERMINATION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Trevaskis) allowing Ms Tran's appeal against a refusal of the grant of her leave to remain in the United Kingdom under Appendix FM and para 276ADE of the Immigration Rules (HC 395 as amended).

2. For convenience, I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Vietnam who was born on 4 June 1983. In October 2008, she met Nicholas Booth (the Sponsor), a British citizen. He was in Vietnam teaching English. Shortly thereafter a relationship developed between them and they became engaged to marry in December 2010. They lived together covertly in Vietnam as the appellant's family disapproved of the relationship.

4. In 2010, they decided to leave Vietnam. The appellant left first and travelled to Spain in March 2012 to pursue her education by studying Spanish and child development. Mr Booth returned to the UK in June 2012 to study a Masters in Educational Psychology at Bristol University. He visited the appellant regularly in Spain.

5. On 31 October 2012, the appellant was granted entry clearance as a visitor valid until 30 April 2013. The appellant visited Mr Booth and his family over the Christmas period in 2012. During that time, the appellant became pregnant. She returned to Spain where she discovered in February 2013 that she was pregnant and returned to the UK on 25 March 2013 to spend Easter with the sponsor and his family. She has remained in the UK since that time.

6. On 29 April 2013, the appellant applied for leave to remain as the partner of the sponsor. On 11 July 2013, the Secretary of State refused to vary her leave to remain on that basis under the Immigration Rules (Appendix FM and para 276ADE) and on an exceptional basis outside the Rules under Article 8 of the ECHR. The Secretary of State also made a decision to remove the appellant by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2012.

7. On 31 August 2013, the appellant gave birth to the son of herself and the sponsor.

The Appeal

8. The appellant appealed to the First-tier Tribunal.

9. In a determination promulgated on 31 March 2014, Judge Trevaskis allowed the appellant's appeal under para 276 ADE(vi) on the basis that, although the appellant had not lived in the UK for 20 years, she had lost "all ties with Vietnam".

10. On 19 May 2014, the First-tier Tribunal (Judge Gibb) granted the Secretary of State permission to appeal.

11. The appeal initially came before me on 9 September 2014. In a decision dated 17 September 2014, I concluded that the First-tier Tribunal had erred in law in applying para 276ADE(vi). My reasons are set out in full in that decision. I set aside the First-tier Tribunal's decision to allow the appeal under para 276ADE and I remade the decision dismissing the appeal under para 276ADE on the basis that the appellant had failed to establish that she had no "ties" with Vietnam.

12. However, as a result of his finding in favour of the appellant under the Immigration Rules, Judge Trevaskis had not gone on to consider the appellant's claim under Article 8. I adjourned the hearing in order that the parties, in particular the appellant, could submit any updating evidence concerning the sponsor's current income and their circumstances as relevant to the issue of whether the respondent's decision breached Article 8 of the ECHR.

13. The appeal was listed for a resumed hearing on 11 November 2014. At that hearing, the appellant and sponsor were present but had no legal representation. The Secretary of State was represented by Mr Richards.

14. I heard brief submissions from Mr Richards and Mr Booth spoke on the appellant's behalf. He provided me with a contract of employment as a support trainer with "Developing Health and Independence" commencing on 13 January 2014 with an annual salary of £23,188. He also provided me with a supporting letter signed by him and the appellant.

Discussion and Findings

15. The appellant's claim relies solely upon Article 8 of the ECHR. As a result of her original application, the appellant could not succeed under the partner route in Appendix FM, namely R-LTRP as she did not qualify as a "partner" under GEN 1.2(iv) as she and the sponsor had not been "living together….in a relationship akin to marriage…for at least two years prior to the date of application". Further, as a result of my earlier decision, the appellant could not succeed under para 276ADE, in particular para 276ADE(vi).

16. Article 8 of the ECHR provides as follows:

> "1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

17. The burden of proof is upon the appellant to establish on a balance of probabilities a breach of Art 8 and, in particular, that Art 8.1 is engaged and it is for the Respondent to justify and interference under Art 8.2.

18. The essence of the appellant's claim is that her removal to Vietnam will be a disproportionate interference with her family life enjoyed with the sponsor and between the sponsor and their son.

19. That issue is the fifth stage of Lord Bingham's well-known five-stage test in R(Razgar) v SSHD [2004] UKHL 27 at [17]). As the appellant cannot succeed under the Immigration Rules, she must establish 'exceptional' or 'compelling'

circumstances which will result in unjustifiably harsh consequences if she is removed (see, e.g. MF(Nigeria) v SSHD [2013] EWCA Civ 1192; R(Nagre) v SSHD [2013] EWHC 720 (Admin)).

20. In his submissions, Mr Richards did not argue that Article 8 was not engaged. He accepted that there was a genuine and subsisting relationship between the sponsor and the appellant and that that had resulted in the birth of their son. There is no doubt that family life exists between the sponsor and appellant who have lived together, at least, since March 2013 when she last came to the UK. They had, of course, previously lived together in Vietnam. Equally, it is beyond doubt that the relationship between the appellant and sponsor (on the one hand) and their son (on the other hand) amounts to family life for the purposes of Article 8.

21. I am satisfied that if the appellant is required to return to Vietnam (whether permanently or only temporarily in order to obtain entry clearance) there will be a sufficiently serious interference with the family life between her and the sponsor and between their son and the sponsor so as to engage Article 8.1. I am satisfied that it would not be reasonable to expect the sponsor to leave the UK and live with the appellant in Vietnam. The sponsor is a British citizen and his life is now orientated around this country. He has recently obtained a Masters in Educational Psychology at Bristol University and has obtained permanent employment since January 2014. In their supporting letter the sponsor says this:

> "It might be argued that it is reasonable for me to return to Vietnam with Loan and our son. In doing so, however, I would have to resign from my job and give up our home leaving my wider family and friends behind. I would be leaving for a country whose language I do not speak and whose culture I have no ties to. It again, seems 'unduly harsh' to expect a British citizen to leave the country in which he was born and raised to go to a country that offers him little opportunity for work or to integrate."

22. I accept that evidence (as I do all the evidence of the appellant and sponsor) which was not challenged by Mr Richards. Even though the sponsor did at one time live in Vietnam, his life has moved on since then by him obtaining a Masters degree and permanent job in the UK. It would not, in my view be reasonable to expect him to now leave the UK and live in Vietnam with the appellant and their son.

23. For these reasons, I am satisfied that Article 8.1 is engaged.

24. There is no doubt that the respondent's decision was in accordance with the law and that the decision pursues a legitimate aim namely the economic well-being of the country reflected, as commonly expressed, by effective immigration control.

25. The crucial issue in this appeal, as Mr Richards accepted in his submissions, is whether the appellant's removal to Vietnam would be disproportionate.

26. The issue of proportionality involves a balancing exercise weighing the public interest against the particular circumstances of the appellant and also the sponsor

and their son whose rights must be taken into account (see respectively Razgar v SSHD [2004] UKHL 27 at [20] and Beoku-Betts v SSHD [2008] UKHL 39).

27. In determining whether the Secretary of State has established that any interference with the appellant, sponsor and their son's Article 8 rights are justified under Article 8.2, I must also have regard to the considerations set out in s.117B of the Nationality, Immigration and Asylum Act 2002 even though the Secretary of State's decision was taken before s.117B came into force on 28 July 2014 (see YM (Uganda) v SSHD [2014] EWCA Civ 1292).

28. S.117B provides as follows:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
>
> (a) are less of a burden on taxpayers; and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to –
>
> (a) private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the persons' removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

29. I must also take into account the "best interests" of the son of the appellant and sponsor as a primary, though not determinative, consideration (see ZH (Tanzania) v SSHD [2011] 2 AC 166 and s.55 of the Borders, Citizenship and Immigration Act 2009). In considering the issue of the child's "best interests", the Supreme Court set out the principles to be applied in Zoumbas v SSHD [2013] UKSC 74 at [10] as follows:

> (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

30. In his submissions, Mr Richards accepted that the facts were not in dispute. Indeed, Mr Richards did not seek to challenge any of the evidence in the appeal.

31. The essential facts are as follows. The sponsor is a British citizen. A relationship developed between the sponsor and appellant after they met in Vietnam in October 2008 where they became engaged to be married in December 2010. They lived together in Vietnam from 2010 until the appellant left to pursue her education is Spain in March 2012. The sponsor returned to the UK in June 2012 and obtained a Masters in Educational Psychology at Bristol University and a permanent job in the UK in January 2014. The sponsor regularly visited the appellant in Spain. The appellant came to the UK to visit the sponsor and his family over the Christmas period in 2012 when she became pregnant. Having returned to Spain in February 2013, and having discovered that she was pregnant, she returned to the UK to spend Easter with the sponsor and his family in March 2013. They have lived together in a relationship "akin to marriage" since that time and, I am satisfied, did so also

between 2010 and March 2012 in Vietnam. It is accepted that their relationship is a genuine and subsisting one.

32. As I have already concluded, it would not be reasonable for the sponsor to return to Vietnam in order to live permanently with the sponsor and their son. The disruption to his life which is now settled in the UK would be unduly harsh.

33. The sponsor has a permanent job in the UK and earns a gross annual salary of £23,188 which exceeds the required sum for entry clearance as a spouse or partner under Appendix FM. Mr Richards did not suggest anything to the contrary in his submissions.

34. Further, I accept the evidence that the sponsor's wider family, including their son's grandparents, uncles, aunties and cousins form a close family in the UK with the family unit made up of the appellant, sponsor and their son.

35. The evidence of the appellant and sponsor is that the sponsor has a "very strong" attachment to his son which would adversely affect him "emotionally and psychologically" if the appellant with their son returned to Vietnam. Although no independent evidence was put before me concerning the best interests of their child, I am satisfied that it is in the best interests of their son to be brought up by both the appellant and sponsor who, I have no doubt, are loving and supportive parents. I am in no doubt that it is in their son's best interests that the family unit of the appellant, sponsor and their son should remain in tact.

36. The evidence accepted before Judge Trevaskis (and which is not now challenged) is that as a result of the appellant becoming pregnant outside of marriage, her family and friends in Vietnam have ostracised her. I accept that finding. The consequence is that if the appellant were to return with their son to Vietnam she would not have the support of her family and friends there. That is not, in my view, in the best interests of their son.

37. Taking all these matters into account, I am satisfied that the best interests of the child are to remain with the appellant and sponsor in a family unit in the United Kingdom.

38. Taking the child's best interests as a primary consideration, the issue remains, therefore, whether the public interest outweighs those best interests and the rights of the appellant and sponsor?

39. First, by virtue of s.117B(1), the maintenance of effective immigration control is in the public interest. Secondly, by virtue of s.117B(2), the ability to speak English is a matter in the public interest. The evidence, which I accept, is that the appellant has the required qualification in English language and uses English on a daily basis in the family home and wider community. Thirdly, the appellant is "financially independent" and will not be a burden on the taxpayer in the UK because the sponsor (whom I accept will support her) has sufficient income to support the family unit. That is also "in the public interest" under s.117B(3). Fourthly, this is not a

situation where the relationship between the appellant and sponsor was formed whilst the appellant was "unlawfully" in the UK (see s.117B(4)). The appellant entered the United Kingdom with leave as a visitor and her leave has been continued under s.3C of the Immigration Act 1971 during the course of her application for further leave and the appeal proceedings. Fifthly, this is not a case where the appellant's claim rests upon her "private life" in the UK such that it should be given little weight while her immigration status is precarious (see s.117B(5)). The appellant's claim rests upon her "family life" in the UK.

40. Finally, s.117B(6) states that the public interest "does not require" the appellant's removal, as she has a genuine and subsisting parental relationship with a qualifying child (namely her son) and "it would not be reasonable to expect the child to leave the United Kingdom".

41. In his submissions, Mr Richards submitted that the key issue in this appeal was the application of s.117B(6) and whether it was reasonable to expect the child to leave the UK. He submitted that it was perfectly reasonable to expect the appellant to leave the UK and by extension perfectly reasonable to expect the child to leave with her.

42. I do not accept that submission. Given the Judge's finding as to the circumstances in which the appellant and their son would find themselves in Vietnam, I am satisfied that it would not be reasonable for the appellant to return there with their son. It would not be in his best interests to live in Vietnam with the appellant but rather it is in his best interests to remain in his family unit living in the UK. Although it is not determinative, I take into account the close tie that I accept exists between the sponsor and his son. I also accept that the child will be deprived of the support and comfort of the sponsor's wider family which is part of a close family in the UK. Having been deprived of that family in the UK, the child would return to Vietnam with, effectively, no family given the attitude of the appellant's family to her because of the shame she is perceived to have brought upon the family by becoming pregnant whilst not married. I am satisfied, therefore, that s.117B(6) applies in this appeal. The wording of it – "the public interest does not require the person's removal" – may well mean that in itself the public interest in effective immigration control is outweighed and the appellant's removal is not proportionate. In any event, it is a factor of some weight in carrying out the balancing exercise inherent in the issue of proportionality under Article 8.2. I have already set out the other relevant factors.

43. It was not argued by Mr Richards that the appellant should return to Vietnam in order to seek entry clearance as a partner. To the extent that such an argument could be made, I do not consider it reasonable to require the appellant to do so given that her relationship with the sponsor is accepted as a genuine one which has subsisted both during their time in Vietnam and, since March 2012, in the UK when they have lived together in a relationship "akin to marriage". I do not see any useful purpose reflecting the public interest in requiring the appellant to disrupt her family life with the sponsor (even temporarily), and given the impact upon her and their son of

returning to Vietnam, in requiring them to do so, (see Chikwamba v SSHD [2005] EWCA Civ 1779 and SSHD v Hayat and Another [2012] EWCA Civ 1054).

44. Taking all these matters into account including that the appellant cannot meet the requirements of the Rules, I am satisfied that there are 'compelling' circumstances which outweigh the public interest in this appeal.

45. For these reasons, the Secretary of State has not established that the appellant's removal to Vietnam would be justified under Article 8.2 of the ECHR.

46. Consequently, I am satisfied that the respondent's decision not to grant the appellant leave to remain on the basis of her relationship with the sponsor breached Article 8 of the ECHR.

Decision

47. The decision of the First-tier Tribunal to allow the appellant's appeal involved the making of an error of law. That decision is set aside. To that extent the Secretary of State's appeal to the Upper Tribunal is allowed.

48. I remake the decision:

(1) I dismiss the appellant's appeal under the Immigration Rules; but

(2) I allow the appeal under Article 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal under Art 8 and, having considered whether to make a fee award, I make a full fee award.

Signed

A Grubb
Judge of the Upper Tribunal