



**The Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: IA/53010/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On February 13, 2015**

**Determination Promulgated
On February 19, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MISS HOANG DUONG NGUYEN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan (Legal Representative)

For the Respondent: Mr Wilding (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born July 15, 1987 is a citizen of Vietnam. She entered the United Kingdom on December 16, 2005 as a student and her leave was valid until October 31, 2006. This leave was subsequently extended on a number of occasions until October 29, 2012. On that date she applied for leave to remain on the basis of private life and leave outside of the Rules due to a fear of persecution due to her sexuality. The respondent refused to vary her leave to remain on December 3, 2013 on the basis she did not satisfy the requirements of paragraph 276ADE HC 395 and there were no

exceptional circumstances that warranted consideration outside of the Rules. A decision was also taken to remove her by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant was further advised that if she feared persecution then she should make the appropriate application at an asylum-screening interview.

2. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on December 12, 2013 and on September 19, 2014 Judge of the First Tier Tribunal Majid (hereinafter referred to as the "FtTJ") heard her appeal and in determination promulgated on September 30, 2014 he allowed her appeal under the Immigration Rules, which he said embodied the spirit of Articles of the ECHR.
3. The respondent appealed that decision on October 6, 2014 submitting that there were two material errors:
 - a. The FtTJ failed to take into account the respondent's evidence and submissions and to resolve conflicts of fact on a material matter namely return to Vietnam and reception in Vietnamese society.
 - b. Misdirection on Article 8 by failing to have regard to all of the circumstances.
4. The matter came before me on December 17, 2014 and after hearing submissions I found there had been an error in law because the FtTJ did not properly consider the issues and appears to have been swayed more by his concern for the appellant rather than have regard to all the evidence. It was unclear whether the FtTJ allowed this appeal under the Immigration Rules, Article 8 or Article 3.
5. I adjourned the matter to the above date and gave directions. The appellant's solicitors complied with my directions by filing a statement setting out the basis of the appellant's claim and submitting a bundle of evidence.
6. The appellant indicated that the claim was being brought on two grounds namely Article 3 (health and risk to transgender persons) and Article 8 (private life).

SUBMISSIONS

7. Mr Khan referred me to the recent USAID report on LGBT (Lesbian, Gay, Bisexual and Transgender) for Vietnam and in particular to pages 6, 14, 19, 25 and 29 of the report. He submitted that transgender persons no longer feel safe in Vietnam and have experienced violence. There was a lack of medical facilities available to them for future operations and the law stated that it was illegal for a hospital to carry out future surgery for a transgender or provide medical treatment. Such persons also suffered general discrimination and whilst gay and lesbian people were accepted

transgender persons were not and employment opportunities were restricted. He further referred me to paragraph 20.13 of the latest COIS report and submitted that this evidence amounted human and degrading treatment. Alternatively, he submitted the appellant had been here lawfully since December 2005 as a student and had established a private life since arriving as a student and her student life went beyond merely being a student. She had undergone hormone treatment whilst here and was integrated into the transgender scene. Removal would be disproportionate.

8. Mr Wilding submitted the threshold for Article 3 was high and there was no evidence that returning the appellant to Vietnam would amount to inhuman and degrading treatment. The appellant had to show there was a foreseeable breach of Article 3 and he argued that any discrimination the appellant may suffer did not amount to inhuman or degrading treatment. He also referred to the LGBT report and in particular to the fact there was a thriving LGBT community in Vietnam especially in the larger cities. Whilst he accepted there were some problems he relied on the fact that there was access to HIV treatment and there were other avenues available for further “corrective” surgery such as by having the treatment abroad and there was nothing in any of the country evidence that suggested hospitals would not treat transgender persons for general medical problems. There was a lack of medical evidence submitted and whilst there were two letters in the original bundle neither of these letters suggested her life was in danger. The report from the Monteiro Clinic concluded “her examination was unremarkable” and the report from Guy’s and St Thomas NHS hospital confirmed she was in receipt of medication for HIV. He submitted the Court of Appeal recently in GS (India) and Others v SSHD [2015] EWCA Civ 40 made clear foreign nationals may be removed from the UK even where by reason of a lack of adequate health care in the destination state their lives will be drastically shortened. With regard to her Article 8 claim he reminded me what the Court of Appeal had said in GS from paragraph [85] onwards and submitted lawful residence in the United Kingdom did not create a stronger claim but he accepted it was a factor to be taken account of when considering the public interest element of Article 8 ECHR. The fact she was here lawfully did not alter the precarious nature of her student leave, as she had had to extend her stay here on regular occasions. Her leave gave her no rights to permanent status. The appellant had failed to provide any evidence of what she had been doing here. There were places in Vietnam where she could obtain employment and medical care more easily especially where there were large LGBT communities. Removal would be disproportionate.

DISCUSSION AND FINDINGS

9. The appellant came to the United Kingdom as a student in December 2005. In her original statement dated September 16, 2004 she confirmed that when she entered the United Kingdom she was “male” and it was only whilst here that she felt herself becoming “female”. In 2007 she stated she

began taking female hormone- a treatment she indicated through her representative she has paid for privately. Evidence of her hormonal treatment is contained in a letter dated September 5, 2014 from the Monteiro Clinic although according to this letter she only became a patient of this clinic in April 2009. She has hormonal therapy, progynon-depot injections, and the clinic described the process as being without problems and her examination as “unremarkable”.

10. Whilst the clinic diagnoses her as a transsexual and comments that she lives and functions as a female their letter contains no further information about future treatment and possible gender altering operation.
11. It is fair to say that this aspect of her private life is at the forefront of her private life and/or Article 3 claim because the appellant seeks to persuade the Tribunal that returning would either breach her Article 8 right to private life or would lead to inhuman or degrading treatment.
12. In approaching the appellant’s claim that return would breach Article 3 ECHR I have had regard to the evidence submitted, submissions and general case law on Article 3.
13. In Hariri v SSHD [2003] EWCA CIV 807 the appellant’s case depended on a real risk being established that he would suffer unlawful treatment as a member of a class or perhaps of two classes. The Court of Appeal said that, in such a situation, “a consistent pattern of gross and systemic violations of fundamental human rights far from being at variance with the real risk test was a functional application of it. The fact that ill treatment or misconduct may be routine or frequent would not be enough unless the appellant was likely to stand out as someone subjected to ill treatment“.In AA (Zimbabwe) v SSHD [2007] EWCA Civ 149 the Court of Appeal observed that the correct test to be applied by the Tribunal was whether the evidence showed a consistent pattern of mistreatment suffered by returning asylum seekers, such that *anyone* returning after a failed asylum claim faced a real risk of ill treatment, even though not everyone did.
14. With this test in mind I have had regard to the material that has been submitted by both parties. Whilst there is little evidence available both parties have attempted to provide me with material that would assist me in my assessment of conditions facing transgender persons.
15. I have reviewed the June 2013 OGN Report and at paragraphs 3.13.4 and 3.13.6 there is the following:

“3.13.4 ... Reports suggest that although discrimination and harassment do take place, Vietnamese society is becoming more accepting of LGBT individuals and culture. In the larger cities, such as Ho Chi Minh City, Hanoi and others, there are thriving LGBT communities with supportive services.

3.13.6 Same sex relationships are not illegal in Vietnam but societal hostility and discrimination against LGBT persons does occur. However there is no evidence to show that in general it would amount to persecution or reach

the threshold to engage UK's obligations under Article 3 of the European Convention on Human Rights. ...”

16. At paragraph 20.30 of the August 2013 COIS Report it is reported:

20.30 “... Vietnam’s Decree 88/2008/ND-CP forbids sex reassignment according to an individual’s perception of their identity or their desire to change sex. As a result, transgender people cannot undertake sex reassignment surgery in Vietnam. If they have such surgery outside Vietnam, they cannot register their identity or renew their personal identity papers....”

17. Both parties referred me to the “Being LGBT in Asia” report prepared by USAID. This reported conducted national dialogue and interviews with LGTB communities in Vietnam including over 650 LGBT people and 220 LGBT organisations. Page 18 of the report confirms that there have been many public events in Vietnam and in November 2013 Vietnam decriminalised same sex wedding ceremonies and gave same-sex couples the right to live together. Punishments for organising or participating in a same sex marriage ceremony were overturned. Mr Khan submitted that the situation for gay and lesbian citizens had improved but there were still many problems for transgender persons for the reasons set out on page 19 of the report but this report whilst containing some negatives also contained positives for the future:

- a. Limited resources dedicated to the specific needs of the transgender community especially female to male transgender persons.
- b. Difficult for transgender people to establish a separate and independent community although cyberspace has opened the doors to many transgender individuals, especially young people, to make friends and share information about gender identity and participate on various websites.
- c. Not legal for transgender people to have gender-confirmation surgery in Vietnam and surgeons are forbidden from performing such operations.
- d. Illegal for transgender people to change their name or gender on identification and legal documents. Transgender people who undergo gender confirmation surgery outside Vietnam cannot reflect the gender change on their legal documents.

18. What the evidence appears to demonstrate is that there is progress in Vietnam but as Mr Khan properly pointed out there remains discrimination. There is no evidence of penalties being imposed on transgender persons but in light of the comments of the court in GS (India) and Others v SSHD [2015] EWCA Civ 40 and earlier case law I am satisfied that this discrimination does not reach the level required for there to be a breach of Article 3.

19. I have also considered the position facing the appellant under Article 3 due to her HIV condition. Paragraphs 25.14 to 25.17 of the COIS Report and the decision of VP (Palliative Aids Treatment-return permissible) Vietnam [2004] UKIAT 00267 confirm that HIV sufferers can receive medical attention in Vietnam and in VP [2004] UKIAT 00267 the Tribunal dismissed an appeal by an end-stage AIDS sufferer, who would only survive for a few months without the retroviral treatment he was currently receiving, even though no such treatment would be available to him in Vietnam.
20. I therefore find the appellant cannot demonstrate there would be a breach of Article 3 if she were returned to Vietnam.
21. I have also considered her claim that returning her would breach her rights under Article 8. As I am considering this appeal now I have to have regard to the Immigration Rules (paragraph 276ADE HC 395) and Section 19 of the Immigration Act 2014.
22. I accept the appellant has studied here since 2005 and I also accept the appellant has been here lawfully throughout her stay. Her two statements tell me little about what she has been doing but I am prepared to accept the appellant has visited gay and transsexual clubs. At paragraph [11] of her latest statement he referred to her visit to Vietnam in November 2011 and noted he could not walk in the street without adverse comments being passed.
23. The COIS report and USAID report both describe large areas where LBTB persons are accepted and I do not accept the appellant's one and only experience of life back in her own country as being evidence that a transgender person cannot enjoy a life. The evidence coming out suggests that there are growing communities and whilst life would be different to that she currently experiences that does not mean she cannot live a life in Vietnam as a transgender person.
24. The USAID report described employment opportunities in certain areas being readily available but more importantly the reports describe changes that are being brought in by the authorities.
25. The appellant cannot meet the requirements of paragraph 276 ADE as at today's date. She has not lived here continuously for twenty years, she has not spent half her life in the United Kingdom and there are no significant obstacles to her integration into Vietnam-there is nothing preventing her travelling there and there are LGBT communities in Vietnam.
26. I have considered his case outside of the Rules and applied the test set out in Razgar [2004] UKHL 00027. I accept that she has a private life here and that removal would interfere with the life she has created. Removal is in accordance with the Rules because she cannot meet the requirements of paragraph 276 ADE and removal would be for a reason set out in Article 8(2) ECHR. Whilst the appellant has indicted she has not had recourse to

public funds it seems she has used public services such as the NHS because of her HIV condition.

27. The issue is therefore one of proportionality and in assessing proportionality I must have regard to the public interest as set out in Section 19 of the Immigration Act 2014. Applying section 19 I find:
- a. She speaks English and she would be less of a burden on the taxpayers and able to integrate better.
 - b. Limited evidence was adduced of her financial status despite leave being given at the earlier hearing before me. She has only ever been here as a student with a limited capacity to work. No evidence of qualifications has been adduced and the appellant did not address this in her statement. She was not prevented from giving evidence at the hearing before me.
 - c. She has been here lawfully throughout her stay.
 - d. She came as a student with limited leave to remain. She has had to extend her stay on a regular basis and I view her status as precarious as against unlawful.
 - e. She cannot benefit from Section 117B(6) of section 19.
28. I have to have regard to all of the appellant's private life including her HIV condition and transgender status. In GS (India) and Others v SSHD [2015] EWCA Civ 40 at paragraph [86] Laws LJ stated:
- “If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm.”
29. The appellant suffers from HIV but there is no evidence that she is either in serious ill health or he cannot obtain medication. Her condition did not reach a level where Article 3 was breached and I am satisfied his condition does not invoke Article 8 from either a medical or relationship prospective. . The country evidence confirms that she would not be the only transgender person in Vietnam.
30. I have considered whether Vietnamese laws would mean her Article 8 rights would be breached because the country does not allow gender-altering operations. I am satisfied no evidence has been submitted to me demonstrates it is illegal to be transgender. It may not currently be possible to have further operations but there is no evidence that there is any risk to the appellant per se as a transgender. She is able to mix freely with whom she wants to especially in areas where there are larger LGTB communities.

31. I have also had regard to the fact she has been here as a student but I find nothing special about her student life. There is little evidence, other than her claims about her studies, of her life here and applying the Tribunal decision of Nasim and others (Article 8) [2014] UKUT 00025 (IAC) I do not find any exceptional about her study life.
32. The appellant had not claimed she is unable to work and whilst jobs may be difficult to obtain I cannot overlook the fact the appellant came here to study and presumably has obtained qualifications that will benefit her otherwise the respondent would not have extended her Tier 4 leave.
33. In considering his Article 8 claim I have also considered the combination of her period of time here, medical condition and the fact she is transgender. Balancing all of the above together including those matters outlined to me by the representatives I do not find removal would be disproportionate. Life would not be as easy for the appellant there as it is in the United Kingdom but In assessing what the appellant wants I also have to have regard to the public interest element and in particular those matters outlined above in paragraph [27].
34. I ultimately find removal would not be disproportionate and there is no breach of Article 8 ECHR.

DECISION

35. The decision of the First-tier Tribunal did disclose an error in law. I previously set aside that decision and I have now remade it.
36. I dismiss the appeal under the Immigration Rules.
37. I dismiss the appeal under ECHR (Articles 3 and 8)
38. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order was not made in the First-tier and I see no reason to amend that order.

Signed:

Dated: **February 19, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I make no award on fees.

Signed:

Dated: **February 19, 2015**

Deputy Upper Tribunal Judge Alis