Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
IA/37406/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 27th July 2016	**On 28th July 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Le Thi Van Truong
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant:	**Mr H. Sayadyan, Counsel instructed by Gulbenkian Andonian Solicitors**
For the Respondent:	**Ms Z. Ahmad, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Vietnam date of birth 30th October 1979. She appeals with permission the decision of the First-tier Tribunal (Judge Jackson) to dismiss her appeal against a refusal to grant her leave to remain on human rights grounds and to remove her from the United Kingdom pursuant to s10 of the Immigration and Asylum act 1999.

2. The Appellant came to the United Kingdom in September 2004 with a work permit. By September of the following year she had become an overstayer. A number of unsuccessful attempts to regularise her immigration status followed, culminating in the Respondent's decision of the 2nd September 2014 which was the subject of the appeal before the First-tier Tribunal.

3. It was the Appellant's case that she had established an Article 8 family life in the years that she had spent in this country. She was married to a Mr Tran, a British national who lived and worked here. Although he agreed that if had to, he would return to Vietnam to live with his wife, she submitted that it would be unreasonable to expect him to go to live in Vietnam. Although he was originally from that country, he had not been there since 1966, had a home, job and established private life here and more importantly retained close contact with his daughter, a university student. Although his daughter was now an adult she was extremely close to her father, in part due to the untimely death of her mother when she was a young girl, and it would be disproportionate to interfere with that relationship.

4. The First-tier Tribunal accepted without reservation that the Appellant and Mr Tran are in a genuine and subsisting relationship. They were married in 2014. There would be an interference if she were to be removed, and so Article 8 was engaged. The interference would however be very limited, since on his own evidence Mr Tran was prepared to go to Vietnam to live with her. They could maintain contact with his daughter through modern means of communication. Having regard to proportionality the Tribunal directed itself to consider s117B of the Nationality Immigration and asylum Act 2002. It found that the couple's relocation to Vietnam "may involve some inconvenience for him but he did not state at any time that there would be obstacles to him doing so or that it would be unduly harsh to do so".

5. The Appellant now appeals on the grounds that the First-tier Tribunal erred in importing into its assessment the test of "unduly harsh" which appears only in the deportation provisions, and in failing to conduct a holistic evaluation of proportionality, having regard in particular to Mr Tran's relationship with his daughter. It was further submitted that the Tribunal erred in failing to apply the "Chikwamba principle".

Error of Law: My Findings

6. There is no merit in the argument that this appeal could or should have been allowed applying the "Chikwamba principle". First of all, there were no findings to the effect that the Appellant met the requirements in Appendix FM relating to entry clearance as a spouse. At paragraph 33 the determination states that with his two jobs "it is possible" that Mr Tran earns more than £18,600. Mr Sayadyan further pointed to the finding at 49 that the Appellant is not a burden on the state since she is supported by her husband. With respect, neither of those findings come anywhere close to establishing that the very prescriptive requirements in FM are met. Even if Mr Tran earns in excess of the minimum income threshold was no reference to the 'specified evidence' that he would be required to produce, nor to whether the English language test certificate had been produced. Secondly, applying R (on the application of Chen) IJR [2015] UKUT 00189 (IAC) it would be for the Appellant to demonstrate that the temporary interference caused by her short return to Vietnam would be disproportionate. In order to do that Mr Sayadyan pointed to Mr Tran's employment, his home and relationship with his daughter. None of that was capable of showing it to be disproportionate for her to return to her home country in order to make an application for entry clearance. The process would be no doubt frustrating, expensive and inconvenient, but those factors would not necessarily render it disproportionate.

7. The nub of the Appellant's case was that the Judge was wrong to have used the phrase "unduly harsh" at paragraph 50. In this the Appellant is quite right. I am not however satisfied that this error is in any way material.

8. The proper approach was for the Tribunal to first consider whether the Appellant met the requirements of Appendix FM. Since she was an overstayer, and had not produced the specified evidence as to income, this would have meant reliance on the exception at EX.1:

> EX.1. This paragraph applies if
>
> ….
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK

9. Before me Mr Sayadyan argued that the test "insurmountable obstacles" no longer had any validity since it had been declared unlawful on a number of occasions by the higher courts. He then explained that what he meant by that was that it had been found that it was a test that should not be interpreted in an unrealistically high way: see for instance Gulshan (Article 8 – new rules- correct

approach) [2013] UKUT 640 (IAC). In this he is correct. It remains however a stringent test: see for instance paragraph 21 of Agyarko & Ors [2015] EWCA Civ 440. The Rules themselves now provide further elaboration if it were needed as to what it might mean. EX.2 reads:

> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

10. This then was the hurdle that the Appellant had to get over if she stood any prospects of success under the Rules. The "very serious hardship" relied upon by Mr Sayadyan was the very long-standing private and family life enjoyed by Mr Tran in the UK, his relationship with his daughter and the fact that he is employed here. I am satisfied that the First-tier Tribunal had regard to all of those factors. The high point of the Appellant's case is the fact that her stepdaughter would be left alone in the UK whilst she was at university. It is understandable that the family are reluctant to do that, but for the reasons set out at paragraphs 47 and 50 of the determination, the sadness that they might endure as a result of that physical separation did not cross the threshold to show compliance with EX.1. In Agyarko Court of Appeal expressly rejected the submission that an upheaval of the kind feared by Mr Tran – leaving his job, home and other family members – would constitute insurmountable obstacles [25].

11. What was left was for the Tribunal to consider Article 8, which it did. Central to its reasoning was the fact that Mr Tran had conceded, albeit reluctantly, that he would go and live in Vietnam with his wife. Mr Sayadyan submitted that the Tribunal failed to consider all of the relevant factors (outlined above) and that had it done so, it would have found that it was not *reasonable* for Mr Tran to have to live in Vietnam; indeed it is submitted at paragraph 21 that any other outcome would have been perverse. That submission is to fundamentally misunderstand the current state of the law in respect of Article 8. The Appellant is an overstayer who cannot bring herself within the Rules. Whilst Appendix FM does not constitute a 'complete code' and there is room to consider Article 8 along classic *Razgar* lines, the gap between EX.1 and Article 8 is small: see for instance SSHD v SS (Congo) [2015] EWCA Civ 387, R (on the application of Nagre) v SSHD [2013] EWHC 720 (Admin) and Agyarko. In the absence of some particular feature of the evidence it was not perverse for the Tribunal to have concluded as it did that there was no breach of Article 8.

Decisions

12. The determination of the First-tier Tribunal contains no error of law and it is upheld.

13. I was not asked to make a direction for anonymity and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce
27th July 2016