Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/11286/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Working Remotely by Skype for Business On 28 January 2021	**Decision & Reasons Promulgated On 16 February 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

T M T H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Williams instructed by Qualified Legal Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Vietnam who was born on 15 November 1986. The appellant, together with her husband, illegally arrived in the United Kingdom on 2 August 2016. She claimed to have been trafficked and falsely claimed to be a minor and she gave a false identity. Together with her husband, the appellant was interviewed on 9 August 2016 and claimed asylum. On 15 August 2016, the appellant and her husband absconded and her asylum and trafficking claims were implicitly withdrawn. She was subsequently arrested, whilst working illegally, on 29 August 2017.

3. On 4 September 2017, the appellant again claimed asylum. She completed her asylum screening interview on 6 September 2017 and her asylum interview took place on 18 September 2017. Again, she made allegations of trafficking. Further submissions were made on 21 September 2017. On 22 September 2017, a negative reasonable grounds decision was made in respect of her trafficking claim by the NRM. Her asylum claim was refused on 2 October 2017. In a determination sent on 12 December 2017, the First-tier Tribunal (Judge Davey) dismissed her appeal on all grounds. She was subsequently refused permission to appeal by both the First-tier Tribunal and Upper Tribunal on 9 January 2018 and 16 February 2018 respectively. She became appeal rights exhausted on 16 February 2018.

4. On 29 August 2019, the appellant lodged further submissions which were treated by the Secretary of State as amounting to a fresh claim under Art 8 of the ECHR. She sought to rely upon her relationship with her 'partner' in the UK ("the sponsor") and with her partner's son, who lived with his mother in the UK. The sponsor's son was born on 14 November 2007, so was almost 12 years old at the date of the application.

5. On 31 October 2019, the Secretary of State refused the appellant's claims under the Rules and under Art 8 outside the Rules. The appellant appealed to the First-tier Tribunal.

The Appeal to the First-tier Tribunal

6. The appeal was heard by Judge G Wilson on 22 January 2020 and, in a determination sent on 3 February 2020, he dismissed the appellant's appeal.

7. Judge Wilson accepted that the appellant had a genuine and subsisting relationship with her partner ([31]). However, he did not accept that their relationship fell within GEN.1.2. of Appendix FM (HC 395 as amended) as he did not accept that they had, as the appellant claimed, been living together in a relationship akin to marriage for at least two years prior to the date of application. He did not accept that the appellant and her partner had lived together since November 2016 but, instead, on the basis

of the evidence, the judge found that they had lived together since "early to mid 2018" ([31]).

8. Further, the judge found that, despite the fact that the appellant's relationship with her partner did not fall within the 'partner' Rules, the judge concluded that applying para EX.1, there were not "insurmountable obstacles" to their family life continuing in Vietnam ([44]).

9. Finally, in relation to the Rules, the judge found that there were not "very significant obstacles" to the appellant's integration on return to Vietnam and so para 276ADE(1)(vi) did not apply ([45]).

10. The judge went on to consider Art 8 outside the Rules ([47]-[56]). In relation to the claim under Art 8 outside the Rules, the judge applied the five-stage approach in Razgar [2004] UKHL 27 ([48]).

11. The judge accepted that there was "family life" between the appellant and her partner ([49]). However, he did not accept that the relationship between the appellant and her partner's son amounted to "family life" though he accepted that it constituted "private life" ([34] and [49]). The judge reached his adverse finding in relation to "family life" between the appellant and her partner's son on the basis that he did not accept that the appellant had a "genuine and subsisting parental relationship" with her partner's son ([34] and [49]). He accepted that the appellant's removal would interfere with "this family and private life" so as to engage Art 8.1 ([49]).

12. The judge then went on to conclude that the interference was necessary for a legitimate aim, namely the maintenance of effective immigration control ([50]). At paras [50]-[56] considered whether the interference with the appellant's family and private life that he had identified was proportionate striking "a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention". The judge said this:

> "50. The maintenance of effective immigration control is in the public interest (per section 117B(1) of the NIA Act 2002). I place significant weight on the respondent's policy aim of legitimate immigration control.
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> 51. The appellant has had no lawful right to be in the UK since she entered in 2016. The appellant used deception in her dealings with immigration officers providing a false date of birth and false identification documents. The appellant brought a fabricated asylum claim to remain in the UK. The appellant cannot meet the requirements of the Immigration Rules. Each of these factors weighs significantly in favour of the public interest in the appellant's removal.
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> 52. Looking at the appellant through the lens of section 117B, there is no evidence before me to suggest that the appellant speaks English. This weighs against the appellant. The appellant is financially self-sufficient through the sponsor and I find this does not weigh against the appellant. I have found that the appellant has a private life within the UK. However, this private life was developed when the appellant's status in

the UK has either been precarious or unlawful. For these reasons I attach little weight to this private life. The appellant's and sponsor's relationship was established and had developed at a time when they have both been aware that her status has either precarious or unlawful. For these reasons, pursuant to section 117B, I place little weight upon their relationship. The appellant and sponsor have always been aware that the appellant would need to satisfy the Immigration Rules if she were to stay within the UK and they have entered into and developed a relationship in full knowledge of this fact. The appellant does not have a parental relationship with the sponsor's son and accordingly the provisions of section 117B(6) do not apply.

53. I bring forward my rational and findings in relation to very insurmountable obstacles to the appellant and sponsor continuing their family life outside the UK in Vietnam and very significant obstacles to the appellant's integration. In particular, I have found that the appellant and sponsor speak the language of Vietnam, to the extent that they have medical conditions. They have failed to demonstrate treatment would be unavailable and accessible; they will understand the culture and societal expectations upon them in Vietnam, they will be able to support themselves financially and have familial support. Accordingly, I find that the family life can be preserved by the appellant and sponsor returning to Vietnam together. In addition, similar factors apply should the appellant return without the sponsor.

54. I have found it would be within the best interests of the sponsor's child for both the sponsor and the appellant to remain within the UK. I have found that this is marginally in the sponsor's son's interest that the appellant should remain in the UK given that she does not have a genuine and subsisting parental relationship with the sponsor's child, the sponsor's child spends the majority of his time with and resides with his mother who provides the majority of his care. The appellant's care for the sponsor's child is limited and in essence is assisting the sponsor with daily tasks such that he can prove the quality of time that he spends with his son. It is in the sponsor's child's best interest[s] for the sponsor to remain in the UK such that he can continue to have regular direct contact with his father.

55. I found that the appellant has failed to demonstrate that should she return to Vietnam that the sponsor's care needs could not be met by social services or by a private care provider.

56. I have considered each of the factors set out above and have balanced those factors against one another. Having conducted this exercise, I find that the balancing exercise that must be conducted in relation to Article 8 weighs in favour of the respondent's policy aim of legitimate immigration control. I find that the return of the appellant to Vietnam without the sponsor, such that the sponsor could maintain his relationship with his son, would not amount to a disproportionate interference with the appellants, sponsors or sponsor's son's rights pursuant to Article 8 of the ECHR. Should the sponsor choose to follow the appellant to Vietnam, with the associated impact that may have on his relationship with his son, that is a matter of the sponsor's own choice. Given my findings, I am satisfied that the respondent's decision is not an unlawful interference with the appellant's, sponsor's or sponsor's son's rights pursuant to Article 8 of the ECHR."

13. As a consequence, Judge Wilson dismissed the appellant's appeal on human rights grounds.

The Appeal to the Upper Tribunal

14. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds.

15. First, the judge had erred in law in finding that there was no "family life" between the appellant and the sponsor's son given that the judge had accepted the evidence from the Independent Social Worker that the appellant, sponsor and his child formed a "family unit" and a settled and stable life with one another.

16. Secondly, the grounds contend in a variety of ways that the judge failed properly to factor in the "best interests" of the sponsor's son and to provide adequate reasons why, given the judge found that it was in the child's best interests for the appellant and his father to remain in the UK, that those best interests were outweighed by the public interest.

17. Permission to appeal was initially refused by the First-tier Tribunal (UTJ Martin) on 5 March 2020. However, the renewed application to the Upper Tribunal was granted by UTJ Owens on 20 May 2020 on the basis that it was arguable that the judge erred in-law in finding that there was no "family life" established between the appellant and the sponsor's son and in failing properly to take into account the child's best interests.

18. The appeal was listed at the Cardiff Civil Justice Centre on 28 January 2021 working remotely. The appellant was represented by Ms A Williams, and the respondent by Mr C Howells, a Senior Home Office Presenting Officer, who both joined the hearing remotely by Skype for Business.

The Submissions

19. Ms Williams sought to marshal the variety of grounds under four headings in her skeleton argument.

20. First, she submitted that the judge had been wrong in law to find that there was no "family life" between the appellant and the sponsor's son given his acceptance of the evidence that they formed a "family unit" and had a "settled and stable life with one another". Ms Williams submitted that the judge had been wrong in law to conclude simply because there was no "parental relationship" between the appellant and sponsor's son for the purposes of s.117B(6) of the NIA Act 2002 that there was no "family life" between them. Ms Williams submitted that it was not adequate to consider the relationship, as the judge had done, solely under the rubric of "private life".

21. Secondly, Ms Williams submitted that in treating the relationship as only giving rise to "private life" the judge had erred in law by failing to consider

the "family unit as a whole" and crucially to take into account his earlier finding that the child's best interests (even if only marginally so) were best served by the appellant remaining in the UK.

22. Thirdly, the judge had failed to consider the effect of severing a genuine and subsisting relationship between the sponsor and his son if he and the appellant returned to Vietnam together. In that regard, Ms Williams submitted that the judge had minimised the effect of the appellant and sponsor returning to Vietnam on the relationship with the sponsor's son by equating remote contact by the sponsor with his adult children in France and teenage daughter in Vietnam with the effect of losing the regular contact that the sponsor had with his son in the UK.

23. Fourthly, Ms Williams submitted that the judge had failed properly to take into account the best interests of the sponsor's son and had placed excessive weight on the appellant's poor immigration history.

24. On behalf of the Secretary of State, Mr Howells accepted that the judge had erred in-law in finding that there was no "family life" between the appellant and sponsor's son. He accepted that "family life" was established between them. Nevertheless, he submitted that error was not material. He submitted that the judge had considered the relationship between the appellant and sponsor's son to amount to "family life" and, he submitted, family life did not have a higher status than private life.

25. Secondly, Mr Howells submitted that the judge had considered the best interests of the sponsor's son. Mr Howells submitted that the judge had considered the case law at para 11 and at para 35 he had found that it was "marginally" in the son's best interests for A to remain in the UK. Given the relationship between the sponsor, son and the appellant, Mr Howells submitted that the judge was entitled to make that finding on the evidence.

26. Thirdly, Mr Howells submitted that the grounds did not challenge the judge's finding that para EX.1., if it had been applicable, was not satisfied in that the judge found that there were not insurmountable obstacles to the appellant and sponsor enjoying their family life in Vietnam.

27. Fourthly, the judge had, given the appellant's immigration history, been entitled to give "little weight" to her family life with the sponsor. The relationship had been formed when the appellant was "unlawfully" in the UK. He submitted that the judge had been entitled to find that there was no breach of Art 8 if the appellant and sponsor returned to Vietnam together. Likewise, he submitted that the judge had been entitled to find, given the sponsor's son's best interests were only "marginally" in favour of the appellant remaining in the UK, that if the appellant returned to Vietnam alone then there would be no breach of Art 8 of the ECHR.

Discussion

28. It is accepted that the appellant's claim was only under Art 8 outside the Rules. The 'partner' rules in Appendix FM did not apply because of the definition of a 'partner' in GEN.1.2. Further, no challenge is brought against the finding that para 276ADE(1)(vi) did not apply.

29. The appellant's claim was, therefore, that her removal breached Art 8 because it would be a disproportionate interference with the family life (1) between her and the sponsor and (2) between her and the sponsor's son.

30. It is accepted by the respondent that the appellant has established the first of her grounds, namely that the judge erred in law in finding that there was no "family life" between the appellant and the sponsor's son. Indeed, Mr Howells accepted that the finding should have been that there *was* "family life" between them. In those circumstances, it is unnecessary to set out the relevant law relating to what amounts to "family life" for the purposes of Art 8.1 in the well-known decision of Kugathas v SSHD [2003] EWCA Civ 31 and the helpful summary of the law by the Court of Appeal in Rai v ECO, New Delhi [2017] EWCA Civ 530 at [17]–[20] per Lindblom LJ. In my judgment, Mr Howells was correct to concede that, given the judge's findings based upon the Independent Social Worker's report at para 30 of his determination, there was the necessary closeness of relationship (amounting to "real" or "committed" or "effective" support) between the appellant and sponsor's son who together with the sponsor, when the sponsor's son came to stay with his father and the appellant on weekends, formed a "family unit" and, to that extent, had a "settled and stable life with one another".

31. Mr Howells' submissions was that this error was not material, not least because the judge had fully considered the relationship between the appellant and sponsor's son under the rubric of "private life". There is certainly dicta that, providing the substance of the relationship is considered under the rubric of "private life", it is unlikely to be material that the relationship was wrongly not characterised as amounting to "family life". The Court of Appeal acknowledged this in Singh and Singh v SSHD [2015] EWCA Civ 630 where at [25] Sir Stanley Burnton (with whom Richards and Christopher Clarke LJJ agreed) said this:

> "However, the debate as to whether an applicant has or has not a family life for the purposes of Art 8 is liable to be arid and academic. In the present case, in agreement with Sullivan LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in AA [v UK [2012] INLR 1], in a judgment which I have found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the appellants' private life rather than their family and private life. In my judgment, she took all the relevant factors into account, and her conclusion on proportionality is not open to challenge. Indeed, I would go further, in my

> judgment no reasonable Tribunal, on the facts found could properly have come to a different conclusion."

32. In other words, the Court of Appeal recognised that the proportionality assessment under Art 8.2 must in *substance* be undertaken even if the *form* is wrong by characterising the relationship under the rubric of "private life" rather than "family life". That said, therefore, the issue is whether despite the error in characterising the relationship between the appellant and sponsor's son, the judge nevertheless in substance properly considered the factors relevant in assessing proportionality. That, in turn, relates to the remaining grounds relied on by Ms Williams before me.

33. Before I turn to those, there is in this case one issue which, in my judgment, was material when considering the issue of proportionality under Art 8(2) which was affected by the judge's characterisation of the relationship as only giving rise to "private life". In para [52] of his determination, which I set out above, the judge concluded he would place "little weight" upon the relationship between the appellant and sponsor because they had been aware of her status which was either precarious or unlawful. No objection can be taken to that because, as Ms Williams accepted, the appellant had throughout been unlawfully in the UK and as a consequence s.117B(4)(b) of the NIA Act 2002 entitled the judge to give "little weight" to the relationship between the appellant and her partner.

34. However, the judge also gave "little weight" to the "private life" between the appellant and sponsor's son. To the extent that that "private life", and any interference with it engaging Art 8.1 occurred during the time that the appellant was unlawfully in the UK, s.117B(4)(a) entitled the judge to give it "little weight". However, if the relationship between the appellant and sponsor's son was properly to be characterised as "family life", s.117B(4) did not apply to that "family life" since it only applies to "family life" established by a relationship formed with a "qualifying partner" whilst the appellant was in the UK unlawfully. It could not apply to the "family life" between the appellant and the sponsor's son. If their relationship is properly characterised as "family life", then the "little weight" approach in s.117B(4)((b) may well be reflected in the Strasbourg Court's approach to breaches of Art 8 involving the removal of non-settled migrants where it can be said "family life" has been formed or established where the non-settled migrant's stay in the UK was "precarious" (see Jeunesse v the Netherlands (2015) 60 EHRR 17). That is not limited to relationships with 'partners'.

35. That notion of "precarious" appears, however, to import a requirement of "knowledge" by the individual whose family life is said to be infringed by the removal decision (see R (Agyarko) and another v SSHD [2017] UKSC 11 at [49]–[53]). No doubt, the appellant's relationship with the sponsor's son would have been formed when *she* had "knowledge" of her status but, as the grounds contend, it was not only the appellant's "family life" which was infringed by her removal but also that of the sponsor's son. It is difficult, if not impossible, to see how, consistently with the approach in

Jeunesse (as approved by the Supreme Court in Agyarko) that the "family life" between the sponsor's son and the appellant was formed at a time when *he* was aware of her precarious status. There are certainly no findings by the judge in that regard. In the light of that, by characterising the relationship as only giving rise to "private life", the judge was drawn, wrongly in my view, to conclude that he should give it "little weight" to that relationship in para 52 of his determination. Notwithstanding what was said in Singh and Singh, that, in my judgment, leads me to conclude that the mis-characterisation of the relationship between the appellant and the sponsor's son may have affected the outcome of the appeal.

36. I turn now to the remaining grounds. I have found it helpful to approach those grounds compositely, focussing as they do upon the issue of whether the judge properly had regard to the "best interests" of the sponsor's son. The grounds impact both upon the judge's findings in relationship to the impact, not only upon the family life between the sponsor's son and, the appellant and sponsor, but also the family life between the appellant and sponsor.

37. There is no doubt that the judge had well in mind that the best interests of the sponsor's son was a primary consideration and an integral part of the proportionality assessment. He cited s.55 of the Borders, Citizenship and Immigration Act 2009 at para [10] of his determination and the leading decisions of the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74, at para [11] of his determination.

38. There were two different scenarios which the judge had to consider: (1) the appellant would return to Vietnam alone and the sponsor would remain in the UK (the "remain scenario"); and (2) the appellant would be accompanied to Vietnam by the sponsor (the "leave scenario"). The judge had to consider, and take into account, the impact upon the best interests of the sponsor's child in each of these scenarios. It is not suggested, of course, that the sponsor's son could (or should) leave the UK as he lives with his mother (his primary carer) in the UK.

39. The judge directly addressed the best interests of the sponsor's child in para [35] of his determination in the 'remain scenario' where he said this:

> "The sponsor's son lives with his mother. The sponsor's son has weekly contact with his father. There is no evidence to suggest that the sponsor's medical conditions or other factors would prevent him having contact with his son should the appellant return. I accept the appellant's assertion that the appellant does carry out the day-to-day tasks such as cooking and visits to the park which I accept, due to the sponsor's health conditions, help facilitate the sponsor's contact with his son and ensure the sponsor can spend quality time with his son. There is no evidence to suggest that the appellant's removal would prevent contact. Although I accept that the quality of such contact may be reduced. Given that the sponsor's son resides with his mother I find that the removal of the appellant is unlikely to have a significant effect on his education or day-to-day care save for the assistance that the appellant gives during overnight contact. Accordingly, whilst I find that it is in the sponsor's

> son's best interests for the appellant to remain in the UK, I find that this is only marginally so."

40. That is, of course, an assessment of the best interests of the sponsor's son if the appellant returns to Vietnam. It may well be a sustainable finding given the appellant's role in the "family unit". It does not, however, entail a consideration of the "leave scenario" where the appellant and sponsor both return to Vietnam, with the sponsor's son in the UK. The "leave scenario" is, of course, connected to the issue of whether the sponsor can be expected to return with the appellant to Vietnam, including the issue of whether there are insurmountable obstacles to continuing family life with the appellant there (see Agyarko at [42]-[48]).

41. In para [44], looking through the lens of para EX.1 the judge found that there were no insurmountable obstacles to the appellant and sponsor enjoying family life in Vietnam. That finding is not directly challenged in the grounds of appeal. It is, however, indirectly challenged by the undercutting of one of the bases in para [44] for reaching that conclusion, namely what the judge says about the impact upon the sponsor's son if the sponsor goes to Vietnam. At para [44], the judge said this:

> "Whilst I accept that the sponsor has a son within the UK, the sponsor also has children within France, albeit [I] accept [they are] adult children, and a child in Vietnam who is a minor. The sponsor has maintained his relationships through visits and electronic means of communication and whilst I accept that the quality of the relationship may not be the same [as] currently enjoyed with his son it can nonetheless be maintained in a similar way."

42. This finding, taken into account in the judge's assessment at para EX.1, stands in contrast to his clear finding that it is in the child's best interests for the sponsor to remain in the UK "such that he can continue to have regular direct contact with his father" (see para [54]).

43. At para [44], the judge did not take into account his clear finding that it was in the child's best interests that his father should remain in the UK so that direct contact could be maintained (see [54]). The impact upon the sponsor's son if the sponsor went to Vietnam was central to the issue of whether there were insurmountable obstacles to the appellant and sponsor continuing their family life in Vietnam. Instead, the judge considered that the impact upon the sponsor's relationship with his son was only diminished by the fact that the sponsor would have to continue his relationship with his son in the same way that he had done, by electronic means of communication, with his adult children in France and his child in Vietnam. Certainly, as regards the former – but also in all probability in regards to the latter – the status quo was quite different from that of his relationship with his son in the UK. The evidence, which the judge accepted, was that the sponsor's son came to stay with appellant and his father on weekends when they formed a "family unit" which was a "settled and stable life" It is difficult to see how "electronic means of communication" – even if it was the status quo for the sponsor's

relationship with his other children – provided a comparable substitute for the relationship he had with his son in the UK. There would inevitably be a greater impact upon the sponsor's son if his father could only communicate with him by "electronic means" as his son would 'lose out' on direct contact, the beneficial nature of which was established by the evidence (see e.g., paras [30] and [54]). The judge did make some reference to this in the final sentence of para [44] set out above but, in my judgment, failed to place it in the context of his finding on the child's best interests.

44. As a result, the judge fell into error both in making his finding under para EX.1 and in reaching his decision on Art 8 outside the Rules as the judge read across his finding that there were not insurmountable obstacles to the sponsor going with the appellant to Vietnam.

45. In substance, therefore, I accept that the judge failed properly to consider the son's best interests both in assessing the impact upon his family life with the appellant but also upon the family life between the appellant and sponsor. The insurmountable obstacles issue was pertinent to the proportionality issue when deciding whether the appellant and sponsor would likely be separated by the decision to remove the appellant and, if they were, whether that was proportionate.

46. For these reasons, therefore, I am satisfied that the judge materially erred in law in reaching his finding that the appellant's removal did not breach Art 8 outside the Rules.

Decision

47. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.

48. Both representatives invited me, if that was my conclusion, to remit the appeal to the First-tier Tribunal for a *de novo* re-hearing.

49. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the appropriate disposal of the appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Wilson. Given the errors of law, it is appropriate that none of Judge Wilson's findings should be preserved.

Signed

Andrew Grubb

Judge of the Upper Tribunal
3 February 2021