



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09066/2013

THE IMMIGRATION ACTS

Heard at: Manchester
On: 18th May 2015

Decision & Reasons Promulgated
On: 13th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Hung Manh Nguyen

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Khan, Counsel instructed by Fountain Solicitors
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Vietnam. He appeals with permission¹ the decision of the First-tier Tribunal (Judge Lloyd-Smith)² to dismiss his appeal, on asylum and human rights grounds, against a decision to remove him from the United Kingdom under s10 of the Immigration and Asylum Act 1999.

¹ Permission was refused on the 27th November 2013 by Designated First-tier Tribunal Judge Appleyard but granted upon renewed application by Upper Tribunal Judge Allen on the 3rd January 2014

² Promulgated on the 7th November 2014.

2. The Appellant claimed asylum approximately three months after his arrival in this country on the 1st May 2013. The basis of his claim was that he had a well-founded fear of persecution in Vietnam for reasons of his political opinion, *viz* membership of a banned pro-democracy group. His human rights claim was based on his relationship with a Vietnamese national with refugee status whom he had known prior to his arrival in the UK. After they met in the UK she had become pregnant and they had got married in a traditional ceremony.
3. The First-tier Tribunal did not believe the Appellant's account of political involvement in Vietnam. A number of inconsistencies in his evidence are identified, set out at paragraph 41(a)-(k) of the determination. In respect of his claimed family life the First-tier Tribunal did not accept that they were in a relationship before she left Vietnam for the UK, since the Appellant had, upon claiming, described himself as single instead of attaching himself to the claim of a recognised refugee, as one might have expected. The live evidence of the Appellant and his claimed partner was unsatisfactory and contradictory to the extent that the Tribunal could not be satisfied that the baby was even his. Judge Lloyd-Smith was not satisfied that the Appellant had a family life and for that reason found no breach of Article 8.
4. The grounds of appeal are that the First-tier Tribunal erred in the following material respects:
 - i) Inadequate reasoning in respect of the Refugee Convention grounds;
 - ii) Failure to consider whether the Appellant would be at risk on return because of his own anti-government views or those of his wife: RT (Zimbabwe) and Ors v SSHD [2012] UKSC 38;
 - iii) Failure to consider relevant evidence in reaching a decision on whether there was a family life

Error of Law

5. The Appellant has shown there to be a material error in the approach taken to Article 8 in this determination. There was a good deal of evidence produced as to the Appellant's relationship that does not feature in the Tribunal's reasoning. There was for instance a bundle of wedding photographs, statements and letters written in support by third parties, a receipt from a jeweller said to relate to the ring, and the evidence of a witness who gave live evidence. The findings do not mention any of that evidence. The reasoning appears in large part to turn on the Appellant's failure to declare his relationship in his SEF. The Appellant's argument before the First-tier Tribunal was that the SEF simply did not give him the right box to tick; the only options were "single, married, widowed, separated, divorced". He submitted that having found no option to indicate that he was "in a relationship" he simply ticked "single". No consideration has been given to

that explanation for a matter which clearly troubled the Tribunal. For that reason I am satisfied that the Article 8 findings must be set aside and remade.

6. As to the remaining grounds I am satisfied that the First-tier Tribunal did not err in its approach to the question of whether the Appellant's account of events in Vietnam was true. The determination gives numerous sound reasons for rejecting the Appellant's account of involvement with a pro-democracy group. It may be that one or more of the reasons set out at (a) to (k) of paragraph 41 are open to criticism but taken together the Tribunal was entitled to find, on the evidence before it, that the Appellant had not discharged the burden of proof, even to the lower standard. Judge Appleyard's found the reasoning was not in any way inadequate, and he was quite right. The reasoning is clear and soundly based on the evidence.
7. If the First-tier Tribunal was correct to have rejected the Appellant's claims to be a political opponent of the Vietnamese government the RT point is limited to whether the Appellant can be expected to lie about his claimed association with a recognised refugee. This point does not appear to have any merit at all. The skeleton argument relied upon before the First-tier Tribunal makes no mention of this issue. Judge Lloyd-Smith can hardly be at fault for failing to deal with a submission that was not made. Nor was I directed to any country background material which might indicate that the Appellant would be asked anything at all on return, much less anything about his partner; I could not find any evidence to that effect in the massive bundle that was placed before the First-tier Tribunal. There was no error in law in failing to address a submission that was not made which in any event would have had no evidential support.
8. It is further submitted that the determination contains a material omission in that there is no analysis of whether the Appellant would be at risk in Vietnam as a result of some political opinion imputed to him by association with his claimed partner. I can find no evidence at all to suggest that the Appellant's claimed partner was granted refugee status as a result of a political issue, nor have I been able to find any material which might support a claim that he would be at risk as a result. There is no error in the determination in this respect.
9. The decision of the First-tier Tribunal is therefore upheld in respect of the protection claim, but set aside insofar as it relates to Article 8.

Re-Making the Article 8 Decision

10. I heard oral evidence from the Appellant and from his wife, a full transcript of which can be found in the Record of Proceedings. I was referred to the bundle of documents that had been before the First-tier Tribunal, in particular the witness statements and the documentary evidence referred to at paragraph 5 above. The Appellant applied, and was granted leave, to

submit further evidence in the form of a DNA report confirming that he is the father of Yen Hai Thi Hoang's baby.

11. The parties agreed that the appropriate legal framework was first to determine whether the Appellant could meet the requirements for leave to remain as a partner under Appendix FM, then if he could not, consider Article 8 outside the Rules. Ms Khan immediately conceded that at the date of the appeal, the Appellant could not meet the requirements under FM, since he and his partner have not been cohabiting long enough to meet the definition of 'partner' at GEN.1.2. I was however asked to make findings on the rest of the relevant requirements under FM; that is because come September the Appellant will have been cohabiting with his partner for 2 years and will therefore be eligible to apply as her partner.
12. I find as follows.
13. It is easy to understand why Judge Lloyd-Smith was so unimpressed by the Appellant's evidence. Although he was able to speak confidently about his daughter and his current relationship with his partner he struggled to give basic details about her life in Vietnam: he was not, for instance, able to say whether she had ever been detained, despite claiming to have been in a relationship with her since 2006. There was a fundamental contradiction in the oral evidence in that the Appellant claimed that he had spoken to his partner before he left Vietnam, it was she who had asked him to come to the UK and she knew that he was coming. Ms Hoang, on the other hand, repeatedly told Mr Harrison that she had no idea that he was coming and that it was a "big surprise" when she walked into her friend's home and saw him there. Those difficulties aside, the core of the Article 8 claim is accepted. The baby is the Appellant's, and I accept, as did Mr Harrison, that the three of them are currently sharing a family life. There were numerous photographs of the three of them together, and of the Appellant with his daughter. Ms Hoang is currently working as a nail technician in her own salon. She has a turnover of approximately £20,000 per annum and takes home between £200 and £300 per week. The Appellant looks after their child when she is working. I accept that there is a family life and that if the Appellant were to be removed there would be an interference with it: Article 8 is engaged.
14. The removal of persons who have no leave to remain under the Rules is rationally connected to the legitimate aim of protecting the economy, and it is a decision that the Secretary of State was in law entitled to take. The question is whether it is proportionate.
15. The Appellant is currently looking after the baby whilst his wife is at work. She is the sole breadwinner and is running her own, very recently opened, business. If the Appellant were to be removed she would have to find alternative childcare, and in the worse case scenario, give up work. She is

not currently earning enough from the business to be able to meet the financial requirements for maintenance under Appendix FM. If the Appellant were to return to Vietnam in order to apply for entry clearance it is likely that there would be a substantial delay in him being able to rejoin his family. That is because he would need to wait until his wife was earning enough money, no mean feat for a single mother. Those are the requirements of the Rules, and in many cases the interference arising from a failure to meet them will be entirely justified and proportionate. Certainly there would be sound public policy reasons to remove this Appellant. He entered illegally, made an ill-founded asylum claim and has no current leave. With reference to the public interest considerations in s117B of the Nationality, Immigration and Asylum Act 2014 (as amended) his case has little prospect of success.

16. There are however two features of this case which lead me to find otherwise. The first is that the Appellant's wife has only very recently been recognised as a refugee and cannot therefore reasonably be expected to return to Vietnam at all. The separation between the Appellant and his daughter could not therefore be mitigated by visits until his UK status was resolved. The degree of interference would be substantial, and at such a significant time in his daughter's development would have a long-term detrimental impact upon her, and to a lesser degree, him. It would be substantially contrary to her best interests.
17. The second feature follows from the first. That is that the circumstances of this case are such that the requirements of paragraph EX.1 (b) of the Rules is met:

EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who -

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK; (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ; and

(ii) it would not be reasonable to expect the child to leave the UK;
or

(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.

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

18. Ms Hoang is a refugee and as such I accept in this case that there are insurmountable obstacles to her returning to Vietnam. As I have noted above, at today's date the Appellant cannot "get to" EX.1 because he does not qualify for consideration as a partner. Come September he will do, since he will then have been living in a relationship akin to marriage with Ms Hoang since September 2013.
19. The appeal therefore boils down to this: should this man be returned to Vietnam today, with all the adverse consequences that will have for his daughter and his family life, when in September he will, all things being equal, qualify for leave to remain under the Rules. I have taken the public interest considerations in s117B into account, and have weighed against the Appellant the fact that he entered illegally and has no leave to remain. Having done so I find that balance is tipped – just - in the Appellant's favour.

Decisions

20. The decision of the First-tier Tribunal contains no errors in respect of the protection claim and those parts of the determination are preserved. There is an error identified in respect of Article 8 and those findings are set aside.
21. I re-make the decision insofar as it relates to Article 8 as follows: the appeal is allowed on human rights grounds.
22. I make no order for anonymity.

Deputy Upper Tribunal Judge Bruce
27th June 2015