



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/34141/2014

**THE IMMIGRATION ACTS**

Heard at Glasgow  
On 10 June 2015

Decision and Reasons Promulgated  
On 25 September 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS LIEN ANH PHAM

Respondent

**Representation:**

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer  
For the Respondent: Mr S Winter, Advocate, instructed by Livingston Brown

**DECISION AND REASONS**

- 1) This is an appeal by the Secretary of State against a decision by Judge of the First-Tier Tribunal David Clapham allowing an appeal by Ms Lien Anh Pham (hereinafter referred to as "the claimant").
- 2) The claimant was born in 1984 and is of Vietnamese nationality. She applied for a variation of leave as a Tier 1 (Entrepreneur) Migrant. This application was refused. The refusal was upheld on appeal but the Judge of the First-Tier Tribunal allowed the appeal under Article 8. The Judge's decision and reasons are brief and the reasoning for allowing the appeal under Article 8 was expressed in the following terms:-

"In relation to Article 8, however, I consider that the appeal should be allowed. As the appellant and her boyfriend plan to marry on 10 November 2014 there is obviously a valid and subsisting relationship between them. The relationship is evidently durable. The

boyfriend, while he does not have indefinite leave to remain, has a visa that is valid until 2017 and appears to be in receipt of an income above the relevant threshold. The fact that the appellant had started a business and also the fact that the appellant gave her evidence in English would seem to indicate that the appellant has a satisfactory knowledge of the English language and is not likely to be a burden on the taxpayer. Consequently, I would regard removal of the appellant as being disproportionate and I consider that the appeal should be allowed under Article 8."

- 3) Permission to appeal was granted on several grounds. It was arguable that the Judge misdirected himself by failing to take account of the limited leave held by the claimant's partner. The Judge arguably failed to consider compelling circumstances in accordance with *Gulshan* [2013] UKUT 00640, and did not take account of Section 117B of the 2002 Act, as amended.
- 4) A Rule 24 Notice was submitted on behalf of the claimant. This stated that as the claimant would not have qualified under Appendix FM the Judge was correct to look at Article 8. The Judge had regard to proportionality and although the Judge had taken a generous view he was entitled to reach the decision he did. The Judge took account of section 117B.

### **Submissions**

- 5) At the hearing before me Mrs O'Brien submitted on behalf of the Secretary of State that the Judge had made a material misdirection in law and had failed to give adequate reasons for his decision under Article 8. Although the Judge was not required to take a formulaic approach to Article 8, the reasons given fell short of the established legal principles. The claimant did not satisfy either the requirements of Tier 1 or of Appendix FM. Neither the claimant nor her partner were British citizens. There was a question as to whether their relationship was capable of engaging Article 8 in terms of family life.
- 6) Mrs O'Brien continued that the Judge had failed to have regard to the relevant facts despite statutory rules which would strike a fair balance between the public interest and Article 8 rights. The Judge did not explain why he considered it appropriate to consider Article 8 outside the Rules. The Judge did not even make a proper finding as to the existence of family life but accepted that the couple planned to marry. The Judge did not explain why Article 8 was engaged. Consideration of Article 8 in the decision was seriously defective. The relevant considerations were not set out for the reader of the decision. Neither partner was a qualifying partner in terms of paragraph EX.1 of Appendix FM. The Judge failed to understand the issue of precariousness in respect of private life. Neither member of the couple had settled status. A decision should be substituted dismissing the appeal. On the facts there was no disproportionate breach of Article 8. The couple would like to stay in the UK but there was no disproportionate interference with private or family life.
- 7) For the claimant, Mr Winter submitted that the grounds set out in the application on behalf of the Secretary of State were contradictory. It was accepted in the grounds that the couple did not meet the requirements of Appendix FM. The Judge followed the

case of *R* (on the application of *Ganesabalan*) *v* *SSHD* [2014] EWHC 2712 (Admin) at paragraph 9. There must always be consideration outside the Rules. Mr Winter further referred to the decision in *Singh* [2015] EWCA Civ 74 at paragraphs 64 and 65 and *Asif Ali Ashiq* [2015] CSIH 31 at paragraph 5. Mr Winter submitted that the Judge had gone on properly to the second stage to consider proportionality. There was no need to show exceptional circumstances. Mr Winter referred to the case of *Mirza* [2015] CSIH 28. In terms of section 117B the claimant was lawfully in the UK. The claimant had family life with her partner. They were not married but they were living together. The Judge recorded the evidence in relation to family life at paragraphs 11 and 16 of the decision.

- 8) Mr Winter further submitted that the decision should be read in a sensible manner as a whole. The application did not establish that there were errors of law. The claimant had a viable business. She was paying tax and had invested £20,000 to establish her business. There were no weighty factors against the claimant.
- 9) Mr Winter further submitted that if there was an error of law the claimant would seek to lodge further evidence. The closure of the business would be a relevant factor in terms of *UE (Nigeria)* [2012] 1 WLR 127, at paragraph 21. The claimant had come to the UK as a student and in this capacity it did not appear that she was restricted from establishing a business.

## Discussion

- 10) I approach the decision of the Judge of the First-Tier Tribunal with the view that certain of the errors advanced on behalf of the Secretary of State are not material. Although the Judge did not consider private or family life under the Immigration Rules, neither party considered that there was any prospect of success under the Immigration Rules. The main reason for this is that neither partner has settled status in the UK and therefore the claimant's partner would not be a qualifying partner in terms of Appendix FM. The Judge did not refer specifically to section 117B but as pointed out in the Upper Tribunal decision in *Dube* [2015] UKUT 00090, this is not necessarily fatal to the decision provided the relevant considerations have been taken into account. The Judge did not apply any intermediary test before considering Article 8 outside the Rules but, as observed in *Asif Ali Ashiq* [2015] CSIH 31 at 6, the Judge was not required to do so.
- 11) The questions I really must address are whether the Judge has nevertheless given adequate reasons for his decision and had regard to all the relevant considerations. It is in this regard that the decision falls short of the legal requirements. In particular, the Judge is clearly aware that neither member of the couple has settled status but fails to accord the appropriate significance to this factor. The Judge seems to think that because the claimant's partner has permission to stay in the UK until 2017 the claimant should be allowed to stay also. There is nothing in statute, in the Immigration Rules or in case law to support this proposition. In reaching this conclusion the Judge takes no account of the public interest in immigration control, as set out in section 117B(1) and does not consider the significance of the fact that the couple have only ever had limited

leave and therefore have no expectation of remaining in the UK permanently. These are defects in reasoning of such significance that they amount to errors of law and lead to the decision being set aside.

- 12) There are further errors as well that show the confusion in the Judge's reasoning. The Judge notes in his reasons that the claimant's boyfriend "appears to be in receipt of an income above the relevant threshold". It is not clear what the Judge means by the "relevant threshold" but this would seem to be a reference to the maintenance requirement in Appendix FM. It is not appropriate in this context to refer to Appendix FM because the claimant's partner is not a qualifying partner in terms of Appendix FM. By referring to the "relevant threshold" the Judge is taking into account an irrelevant factor.
- 13) The Judge goes on to point out that the claimant speaks English and that she is financially self-supporting. While these are factors in her favour in terms of section 117B they would not by themselves override the public interest in effective immigration control, as pointed out in *AM (s 117B) Malawi* [2015] UKUT 0260.
- 14) I have taken account of the helpful submissions by Mr Winter, who produced relevant case law to support the claimant's position. The support provided, however, was only partial in that it largely did not cover the omissions or defects in the Judge's reasoning which I have found to be material. The claimant may have thought that she was on strong grounds in reliance on *Mirza* but a difficulty for the claimant in relying on *Mirza* is that in that case the partner was a British citizen, which the claimant's partner is not. In my view this is a material distinction.
- 15) Mr Winter further submitted that if the Judge's decision was found to contain an error of law, then there should be an opportunity to submit further evidence. A bundle of further evidence was produced with a covering letter dated 8<sup>th</sup> June 2015 making an application for the evidence to be accepted under rule 15(2A). The covering letter states that the claimant and her partner are now married, that the claimant and her partner have purchased property together, and that the claimant employs two additional employees in her business. It must be observed that all this has been done by the claimant in the knowledge that neither she nor her partner have indefinite leave to remain and that her appeal was still to be finally decided. In these circumstances it is difficult to accord any significant weight to such actions. It is difficult to envisage how this further evidence would be so compelling as to alter the balance in favour of the claimant. Accordingly I do not see a need for a further hearing with the attendance of witnesses.
- 16) Assuming that the claimant and her partner have family life together in the UK, I would accept that Article 8 is engaged. I accept that the claimant speaks English and is financially independent. The couple formed their relationship when they were both here lawfully. The claimant's partner, however, is not a "qualifying partner", as defined in section 117D, as a qualifying partner means a partner who is a British citizen or is otherwise settled in the UK. The couple have only ever had limited leave and have therefore no expectation of being allowed to live permanently in the UK either

together or separately. The claimant has established a business in the UK but has done so in the knowledge that she did not have indefinite leave to remain. There is very little, if anything, in the way of compelling circumstances, in terms of *SS (Congo)* [2015] EWCA Civ 387 at 33, which would override the public interest, expressed at section 117B(1), in the maintenance of effective immigration controls. Indeed when the balancing exercise is carried out in respect of this claimant and her circumstances, even accepting that family life is engaged, the claimant's circumstances fall far short of showing that the refusal decision is disproportionate.

- 17) Accordingly the proper decision which should be made in respect of Article 8, and which the Judge of the First-Tier Tribunal should have given, is to dismiss the appeal under Article 8.

### **Conclusions**

- 18) The making of the decision of the First-Tier Tribunal did involve the making of an error on a point of law.
- 19) I set aside the decision.
- 20) I re-make the decision in the appeal by dismissing it.

### **Anonymity**

- 21) The First-Tier Tribunal did not make an order for anonymity. I have not been asked to make such an order and I see no reason of substance for making one.

Signed

Date

Upper Tribunal Judge Deans