



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05420/2015

THE IMMIGRATION ACTS

Heard at Field House
On 11 October 2017

Decision & Reasons Promulgated
On 17 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

NHU CHUAN NGUYEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Sayadyan of Gulbenkian Andonian Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Grant promulgated on 5 January 2017.
2. The Appellant is a citizen of Vietnam born on 6 May 1992. He last entered the United Kingdom on 31 December 2013 pursuant to a Tier 4 Student visa with valid leave until 30 October 2014. On 27 October 2014, prior to the expiry of his leave, he made an in-time application for leave to remain as a spouse.
3. His application was based on his marriage on 26 July 2013 to Ms Oanh Lan Nguyen, (d.o.b. 16 March 1984), a British citizen. In support of the application the Appellant relied upon the income of his partner through self-employment running a beauty

salon in the Stratford Shopping Centre. Her claimed income was a little in excess of £19,000 per annum.

4. On 2 February 2015 the Respondent refused the Appellant's application for leave to remain for reasons set out in a 'reasons for refusal' letter ('RFRL') of that date, and also made a removal decision pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. In essence the Respondent considered that the Appellant had failed to show that he met the financial requirements of the Rules. It was also considered that the Appellant and his partner could relocate to Vietnam, and that the Appellant did not satisfy the requirements of paragraph 276ADE in respect of private life.
5. The decision, being made in February 2015, was made prior to the recent changes to the appeal regimen introduced by the Immigration Act 2014: accordingly it was open to the Appellant to appeal on the basis that the decision was not in accordance with the Immigration Rules, as well as on other grounds as specified in the legislation in force at that time. The Appellant did indeed lodge an appeal with the IAC.
6. The Appellant's appeal was first heard by First-tier Tribunal Judge Adio on 13 October 2015. The Appellant did not appear on that occasion and neither did his wife. At paragraph 3 of Judge Adio's decision it is recorded that a communication was received from the Appellant's representatives dated 13 October "*which stated that the Appellant had been involved in a serious motoring accident and as a result is unable to attend the hearing*". The letter further indicated that the representatives' instructions were to ask the Tribunal to proceed 'on the papers'. (See decision of Judge Adio at paragraph 3.)
7. There is nothing apparent in that communication by way of explanation as to why the Appellant's claimed accident should have prevented his wife from attending the hearing either to seek an adjournment or otherwise to assist the Tribunal by supporting the case with her evidence - bearing in mind that a significant aspect of the appeal focused upon the failure, according to the Secretary of State, to satisfy the financial requirements of the Rules (such requirements being focused upon the earnings of the Appellant's partner). Be that as it may, Judge Adio proceeded with the appeal and allowed the appeal for reasons set out in his decision promulgated on 13 November 2015.
8. The Respondent, dissatisfied with the decision of Judge Adio, sought permission to appeal, which was granted by First-tier Tribunal Judge Lambert on 27 April 2016.

9. The error of law hearing came before Upper Tribunal Judge Canavan on 15 June 2016. She concluded for reasons set out in her decision promulgated on 17 June 2016 that Judge Adio had indeed fallen into error of law and accordingly his decision was set aside.
10. Judge Canavan observed, contrary to submissions that had been pursued on behalf of the Appellant before her, that there was no evidence to show that any concession had been made before the First-tier Tribunal by the Respondent's Presenting Officer in relation to Appendix FM-SE. Whilst Judge Canavan did not thereafter make any findings in respect of the requirements to provide specified evidence, she did observe at paragraph 16 of her decision that *"even brief consideration of the evidence provided with the application and in support of the appeal appears to disclose a number of possible gaps in the specified evidence."* Nonetheless Judge Canavan considered it appropriate to remit the appeal back to the First-tier Tribunal and did so, stating: *"No findings were made in relation to paragraph EX.1 or Article 8 outside the Immigration Rules. All issues must be reheard."*
11. It is in such circumstances that the appeal came before First-tier Tribunal Judge Grant on 13 December 2016. On that occasion the Appellant again did not appear, and neither did his partner. Communication had again been received from the Appellant's representatives, by way of letter dated 1 December 2016, which, in part, stated as follows:

"Regrettably despite our repeated attempts we were not able to obtain clear instructions from our client as to the appeal hearing of 13 December 2016. Regrettably we equally do not have specific instructions to appear at the hearing on 13 December 2016 to present date neither do we have instructions from our client to withdraw the appeal."

12. The letter of 1 December 2016 also contained a request for an adjournment. As is noted by Judge Grant, the application was refused by a Designated Judge (paragraph 3). Judge Grant reached the view that in all of the circumstances it was appropriate to proceed with the appeal in the absence of the Appellant (paragraphs 2-4).
13. Judge Grant also referred at a later part of her Decision to the Appellant's non-appearance before Judge Adio and the communication in respect of the claimed serious motoring accident that had supposedly prevented his attendance (paragraph 11). As regards the assertion of a motoring accident preventing attendance Judge Grant said this:

"There has never been any credible medical evidence supplied to the Tribunal to confirm that statement but nevertheless even if the Appellant was unable to attend his hearing as claimed in 2015 he had no excuse for failing to attend his second appeal hearing before the Tribunal on 13 December 2016. These are not the actions of a credible witness." (paragraph 12).

14. I pause to note that no express complaint is made in respect of either the Judge's decision to proceed in the absence of the Appellant, or her observation in respect of the damage to the Appellant's credibility. I do so because, contrary to the contents of the grounds submitted in support of the application for permission to appeal, in granting permission to appeal on 26 July 2017 First-tier Tribunal Judge Boyes stated in his decision: *"The grounds assert that the Judge erred principally by proceeding in the absence of the Appellant and remarking that it was not something [not attending] that a credible witness would do."*
15. Mr Sayadyan very properly acknowledges that there was no such assertion made explicitly in the grounds of challenge. Nor, in my judgment, was such an aspect of challenge implicit in the grounds, which are quite specific in the matters upon which they focus, and are particular in their articulation of those matters. To that extent Mr Sayadyan in effect acknowledges that permission to appeal was granted in part on the basis of a challenge not raised - and even now not pursued. It is unclear to me how it is that Judge Boyes formed the view that proceeding in the absence of the Appellant, and/or making an adverse inference from his failure to attend two appeal hearings without evidenced explanation, formed any part of the challenge. Nor have the grounds since been amended to incorporate any such challenge. Indeed, it seems to me that it is impossible to see that there would be any merit in a criticism of Judge Grant for proceeding in the absence of the Appellant - particularly where his own representatives had written to the Tribunal indicating that they were struggling to get any meaningful instructions from him, and moreover where there was a history of non-attendance with no explanation supported by evidence.
16. Judge Grant proceed in the absence of the Appellant, and dismissed his appeal for reasons set out in her Decision.
17. The Appellant's representatives sought permission to appeal, which was granted by Judge Boyes on 26 July 2017, as already indicated.
18. In addition to the erroneous characterisation of the grounds discussed above, Judge Boyes also identified that the grounds *"assert that the Judge erred... by refusing to consider the matter pertaining to Article 8 ECHR outside the Rules"*. Judge Boyes then stated that he found the grounds *"arguable"*, (but stated no reason for such a conclusion). Regrettably, it seems to me the treatment of the application for permission to appeal was in part erroneous, and otherwise unsatisfactory - leaving the parties and the Tribunal uninformed as to the basis of the decision.
19. Be that as it may, the matter comes before the Tribunal today to consider the issue of error of law.

20. Although Mr Sayadyan has attended the hearing, the Appellant is not in attendance. Mr Sayadyan explained that his firm had continued to have difficulties in communicating with the Appellant - and indeed he had not been in touch with his representatives since the communication sent to the First-tier Tribunal on 1 December 2016. Mr Sayadyan indicated that he was essentially acting on the implied authority of the retainer held by the firm: beyond that, as indicated, nothing specific had been communicated to his firm from the Appellant by way of instructions in respect of any pertinent matters, or indeed anything otherwise in regard to the Appellant's circumstances. In the course of submissions Mr Avery pointed out that one consequence of this was that there was nothing by way of evidential material before the Tribunal since a bundle filed in August 2015 ahead of the appeal hearing before Judge Adio.
21. Nonetheless, permission to appeal has been granted and Mr Sayadyan has appeared before the Tribunal to prosecute the grounds of appeal. I consider the challenge accordingly.
23. Judge Grant's Decision, after rehearsing the procedural matters with regard to the Appellant's non-attendance and identifying the bundles of evidence before her, then sets out the summary of the Appellant's case by way of quoting extensively from his witness statement. The witness statement of the Appellant's partner is also referenced, albeit it is also noted that the witness statement appeared to be incomplete (paragraph 9).
24. Judge Grant then goes on to rehearse the substance of the Respondent's case by extensive quotation from the RFRL before proceeding to her own evaluation of the evidence under the heading 'My Findings' (paragraph 11 *et seq.*). I have already made reference to paragraphs 11 and 12 above, and in particular the Judge's observation that the Appellant's non-attendances without any explanation on one occasion and without any evidence-supported explanation on another, were in all the circumstances of this particular case considered by her to be "*not the actions of a credible witness*". The Judge also stated that she concluded that notwithstanding the size of the bundle before her, the Appellant had not demonstrated that the necessary specified evidence pursuant to Appendix FM-SE of the Immigration Rules had been provided with his application (paragraph 12). She concluded, therefore, "*The Appellant does not meet the requirements of the Immigration Rules for leave to remain as a partner under Appendix FM.*" (paragraph 13).
25. I note that the Judge's conclusions are not expressly challenged in the grounds upon which permission to appeal was sought. Mr Sayadyan has invited me to consider that they are implicitly challenged by reason of criticisms of other aspects of the Judge's findings, which I come on to in due course. However, in my judgement those other criticisms (see below), are discreet in nature: accordingly, even in so far as

they are meritorious, I do not consider them material to an extent that they could be said to have 'infected' the Judge's analysis of the requirements of Appendix FM-SE. In the absence of express challenge to the Judge's conclusion on the core element of the case under the Rules, and given that I do not consider that any such challenge is implied, it is unnecessary to consider further the finding at paragraph 13 (quoted above): it stands unchallenged.

26. The Judge having concluded that the Appellant did not meet the requirements with regard to the financial requirements of the Rules, went on to consider the exception under paragraph EX.1 of Appendix FM (paragraph 14). She reached the conclusion that it had not been shown that there were any insurmountable obstacles preventing the couple from continuing their relationship in Vietnam.
27. In this regard the Judge observed that *"there is no credible evidence from either the appellant or his wife in front of me save for the incomplete witness statement of his wife and the witness statement of the appellant"*, before stating: *"Even if I accept the appellant is in a genuine and subsisting relationship with a British partner there is no credible evidence before this Tribunal that she is unable to live with him in Vietnam."*
28. Again, there is no express challenge to that aspect of the Decision; and, again, I do not accept that the Upper Tribunal now has jurisdiction impliedly to consider a challenge to those findings by reference to those matters that are pleaded in the grounds - which, as I have said, are quite discrete matters.
29. Judge Grant then stated her conclusion in respect of paragraph 276ADE (paragraph 15). In the circumstances it seems to me that that was an entirely sustainable conclusion - which, yet again, is not the subject of express challenge.
30. Thereafter, having concluded that the Appellant did not satisfy the Immigration Rules, the Judge turned her attention to the issue of Article 8: it is this aspect of the Decision that is the particular focus of the grounds.
31. The Judge refers to the case of **SS (Congo)** and states:

"In the absence of any credible evidence from the Appellant and his wife before the Tribunal I find the Appellant has not shown ... there are any compelling circumstances which require me to consider Article 8 on a freestanding basis outside the Immigration Rules and I decline to do so." (paragraph 16).
32. Notwithstanding this observation, the Judge went on to specify that she had borne *"in mind the public interest considerations in Section 117B of the 2002 Act"* (paragraph

17), and then indeed made reference to such public interest considerations (paragraph 18).

33. It seems clear, and indeed Mr Avery very properly acknowledges as much, that the Judge fell into two factual errors at paragraph 18.

(i) The Judge stated that she had no evidence before the Tribunal that the Appellant "*can speak and understand English*". However, as pointed out in the second of the Appellant's three pleaded grounds of appeal, there was included in the Appellant's appeal bundle a certificate from the Trinity College London in respect of English language skills.

(ii) The Judge stated that "*the Appellant has remained in the United Kingdom illegally*", before adding that "*little weight should be given to private and family life established when immigration status is precarious*". However, as is apparent from the rehearsal of the chronology in the opening paragraphs above, the Appellant made his application for variation of leave to remain at a time when he had current leave. There is nothing in any of the materials that suggest that the Appellant was at any point an overstayer. The Judge has clearly fallen into factual error in this regard. (This is the substance of the third ground of appeal.)

34. Mr Avery, on behalf of the Respondent, invites the Tribunal to consider that notwithstanding these errors there could rationally have been no different outcome in the appeal, and the errors of fact should be treated as immaterial. In particular, he says that at best the Appellant's ability to speak English would be a neutral factor in any overall evaluation. As regards the Appellant's immigration status he essentially identifies that so far as private life is concerned the Judge's point is essentially sound in that the Appellants' private life has been established at a time when his immigration status was precarious: section 117B(5) was applicable even if section 117B(4) was not. Further, even if section 117B(4)(b) - in respect of a relationship with a qualifying partner - did not apply, the reality was that neither the Appellant or his supposed partner had provided supporting oral testimony as to fact and/or quality of their mutual family life. I return to these matters in a moment in the overall context of the remaining ground of challenge.

35. The remaining ground of challenge - which was the first ground pleaded - is headed "*Refusal to consider Article 8 ECHR on a freestanding basis outside the Immigration Rules*". The ground articulates that the Judge fell into error by in effect applying an intermediary test at paragraph 16, rather than simply proceeding to a consideration of Article 8.

36. With all due respect to the drafter of the grounds, whilst there may be a technical argument to be raised in this regard it seems to me that this fundamentally ignores

the facts and circumstances in the appeal and the merits of the case. The Appellant and his partner had twice failed to attend appeal hearings to support their statements. Judge Grant considered this matter expressly at paragraph 12 and considered this damaging to the Appellant's credibility. She reiterated her doubts as to credibility at paragraph 14. And again, when giving consideration to the issue of Article 8, expressly observed that there was no credible evidence from the Appellant and his wife (paragraph 16).

37. Bluntly: the grounds of appeal ignore these significant findings which are properly made on the premise of the Appellant's failure to attend to support his case. Indeed, it seems to me, that whilst I understand the nature of Mr Sayadyan's perceived duty to a client for whom his firm holds a retainer, nonetheless there is an unfortunate element of impertinence in pursuing an appeal against a decision which is informed in substantial part by the Appellant's absence from the hearing, in circumstances where the representatives acknowledge that the Appellant himself has essentially entirely failed to engage in the process with the Tribunal - and indeed has not engaged with his representatives for a substantial period of time, including not giving up-to-date instructions as to his wishes in respect of the appeal given his non-attendance before Judge Grant.
38. In my judgement the reality is - whether Article 8 is considered on a basis inappropriately restricted to an intermediary step, or on a substantive 'freestanding' basis - in circumstances where the Judge concluded that there was no credible evidence before her from either the Appellant or his partner, the Appellant could not possibly have succeeded under Article 8. In short, as Mr Avery identifies, there was nothing before the Tribunal to demonstrate that the Appellant was still in a relationship with his partner after the materials that had been filed in August 2015; and moreover, as Judge Grant identified, the partner's witness statement itself was incomplete.
39. The other two grounds of challenge - which I have observed above to be well made - could not possibly have altered the outcome in those circumstances.
40. In short, with all due respect to the Appellant's representatives, this is an empty challenge and I reject it.
41. Finally I note that Mr Sayadyan voiced the difficult position that he found himself in in consequence of the absence of up-to-date instructions. For this reason, and this reason only, I make the following closing observation. For my own part, I cannot see how any criticism could be made of the Appellant's representatives if they were now in effect to recognise that in the absence of any up-to-date instructions they do not feel sufficiently competent to prosecute the Appellant's case any further. However,

how the Appellant's representatives conduct themselves henceforth in this matter is essentially a matter for them to decide according to their professional obligations - I offer no specific advice and only the tentative expression of opinion given above.

Notice of Decision

42. The decision of the First-tier Tribunal contained no material error of law and stands.
43. The appeal remains dismissed.
44. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing

Signed:

Date: **16 November 2017**

Deputy Upper Tribunal Judge I A Lewis