



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/17636/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 4<sup>th</sup> May 2018  
Oral Decision

Decision & Reasons Promulgated  
On 23<sup>rd</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THN (VIETNAM)  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Yong, Counsel, instructed by HRS Solicitors LLP

For the Respondent: Miss Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Vietnam whose date of birth is recorded as [ ] 1983. He arrived in the United Kingdom on 26<sup>th</sup> August 2010 with entry clearance as a student. He made various applications to renew his leave which were granted until eventually he made application for leave to remain indicating that he wished to be considered for the “partner route to settlement” in the United Kingdom.

2. On 7<sup>th</sup> July 2016 the application was refused. The Appellant appealed and in the grounds, he raised the relationship which he said he had formed with the Sponsor, Ms [N], a Vietnamese national, recognised as a refugee in the United Kingdom. The matter eventually found its way before Judge of the First-tier Tribunal Hanbury sitting at Taylor House on 18<sup>th</sup> December 2017.
3. It was accepted by the Secretary of State that there was a subsisting relationship between the Appellant and the Sponsor but because the relationship had not endured for two years, the requirements of Appendix FM were not met, and that meant that consideration needed to be given to EX 1. However, the Secretary of State contended that there were no insurmountable obstacles in the way of family life continuing outside of the United Kingdom.
4. As to private life the Appellant did not meet the twenty-year requirement and again for the same reasons, insofar as there is any exception, the judge accepted the submissions of the Secretary of State that the requirements were not met.
5. As to the wider application of Article 8 the judge touched upon the statutory considerations of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 but came to the view that it was inapplicable because were the Appellant to leave the United Kingdom to make application to return then the issue of the children being required to leave the United Kingdom did not arise. He said at paragraph 22 of his Decision and Reasons:

*"This is not a case where Section 117B(6) of the 2002 Act applies because it is not envisaged in the long term that any of the Appellant's partner's children will 'leave the United Kingdom'. It is anticipated that the Appellant will return to the United Kingdom having applied for entry clearance."*
6. Not content with that decision, by Notice dated 23<sup>rd</sup> January 2018 the Appellant made application for permission to appeal to the Upper Tribunal. There were various grounds raised but I do not for reasons which follow need to focus very much upon them.
7. On 7<sup>th</sup> March 2018 Judge of the First-tier Tribunal Parkes granted permission, thus the matter comes before me.
8. At the commencement of the proceedings I was told that the parties had agreed that there was a material error of law. I do not disagree. It was also suggested to me that the agreed way of proceedings was for the matter to be remitted to the First-tier Tribunal in order that a finding could be made as to the nature of the relationship between the Appellant and the children.
9. I raised my concerns and after further discussion with the representatives it was agreed that in fact this matter should stay in the Upper Tribunal to be remade by me because there were certain other facts that were agreed. These were:

- (1) that the Sponsor was a refugee in the United Kingdom and that part of her claim had arisen out of her relationship with her "husband" in Vietnam;
- (2) that there was no family life as between the Sponsor and her husband in Vietnam;
- (3) that there was now family life as between the Sponsor and any of the children now in the United Kingdom;
- (4) that there was a biological child as between the Appellant and the Sponsor.

10. Section 117B(6) of the 2002 Act provides:

*"(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -*

*(a) the person has a genuine and subsisting parental relationship with a qualifying child, and*

*(b) it would not be reasonable to expect the child to leave the United Kingdom."*

11. Miss Fijiwala quite properly and fairly on behalf of the Secretary of State accepted that Section 117B(6)(a) was met. It was also accepted after further discussion that Judge Hanbury had applied the wrong test as raised in the grounds. The question here was whether it would be reasonable for the children in this case to leave the United Kingdom?
12. There is only one candidate country where family life can be enjoyed as between the Appellant and Sponsor and that is the United Kingdom. The reason for that is self-evident. The Sponsor is not only Vietnamese but a refugee from Vietnam. She cannot go back there as a matter of law as declared by the finding that she is a refugee.
13. The judge appears to have accepted that by his finding the Appellant would return to Vietnam and make an application and then return to the United Kingdom, which is why he dispensed with consideration of Section 117B(6). That firstly is rather Kafkaesque in the "Chikwamba" way of approaching the case, but in any event, was wrong in law. These children cannot be expected to leave their mother and their mother cannot go to Vietnam. In those circumstances the public interest gives way as a matter of law. There was in my view only one reasonable conclusion that this judge could have come to and that was to allow the appeal.
14. It follows that I find, as is conceded, that there was a material error of law. In remaking the decision, I allow the appeal on Article 8 grounds for the reasons that I have stated. I do not need to make reference either to Appendix FM or 276ADE. There was only one Article 8 appeal in the end after all.
15. I make this observation, however. It is entirely a matter for the Secretary of State as to the type of leave that is granted to the Appellant and the length of it. The fact that

the appeal has been allowed does not necessarily lead immediately to indefinite leave to remain. If the Secretary of State took the view, given that this relationship has endured for a reasonably short period, notwithstanding the fact that there is a child of the union, then it would be open to her to limit the amount of leave granted but, as I say, that is a matter entirely for the Secretary of State.

**Decision**

The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside and remade. The appeal is allowed on Article 8 grounds.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 16 May 2018



Deputy Upper Tribunal Judge Zucker

**TO THE RESPONDENT**  
**FEE AWARD**

Miss Fijiwala resisted my suggestion that a full fee award should be made in this case on the basis that the Secretary of State was not bound to look at Section 117B. I do not agree. The Secretary of State in making a decision has an obligation to consider what is likely to happen on an appeal and in any event could have conceded the matter at the First-tier Tribunal even if not in the original decision.

Full fee award in the sum of £140.

Signed

Date: 16 May 2018



Deputy Upper Tribunal Judge Zucker