



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: RP/00034/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4<sup>th</sup> December 2017**

**Decision & Reasons  
Promulgated  
On 22<sup>nd</sup> January 2018**

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR PHI VAN PHAM  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer

For the Respondent: none

**DECISION AND REASONS**

1. This is the Secretary of State's appeal against the decision of Judge of the First-tier Tribunal Shore who, in a decision promulgated on 13<sup>th</sup> July 2017, dismissed Mr Pham's appeal against the refusal of his asylum claim and the decision to revoke his refugee status, but allowed his human rights appeal. The underlying decisions subject to the appeal to the First-tier Tribunal were made on 18 March 2016. For the sake of convenience I will refer to Mr Pham as the claimant.

2. The claimant is a national of Vietnam his date of birth 5<sup>th</sup> December 1949. He is almost 68 years old. He entered the United Kingdom on 26<sup>th</sup> September 1995 on the basis of family reunion, his wife having been granted refugee status. The claimant was automatically granted refugee status under the provisions then in existence as the spouse of a recognised refugee. The claimant's wife naturalised as a British citizen on 1<sup>st</sup> December 2004.
3. The claimants made various trips to Vietnam in 1996 and 1997. He was convicted of being concerned with the production of cannabis and, on 12<sup>th</sup> July 2005, received a six month prison sentence. He was thereafter convicted and sentenced on 3<sup>rd</sup> February 2009 to 30 months' imprisonment in respect of offences relating to the possession of and intent to supply cannabis, and in respect of an offence relating to the acquisition of criminal property. His two sentences, each of 30 months duration, were to be served concurrently.
4. On 23<sup>rd</sup> January 2013 the claimant was convicted of his involvement in the production of cannabis and on 27<sup>th</sup> February 2013 he received an eighteen months sentence of imprisonment. The claimant had previously been served notice of his liability to deportation on 18<sup>th</sup> June 2009. In spite of this he was given permission to visit his ailing mother in Vietnam on 15<sup>th</sup> May 2012.
5. On 3<sup>rd</sup> October 2013 the claimant was informed of the Secretary of State's intention to revoke his refugee status. On 4<sup>th</sup> November 2013 his solicitors at the time advised that they would not be making any representations challenging the Secretary of State's proposed intention. On 1<sup>st</sup> June 2015 the claimant was invited to rebut a presumption under Section 72 of the Nationality, Immigration and Asylum Act 2002 by which he was presumed to have been convicted of a serious offence and to pose a danger to the public. In December 2015 the claimant made a claim to be a victim of trafficking. This however was rejected by the Competent Authority later that month and, at the appeal hearing before the First-tier Tribunal on 22<sup>nd</sup> June 2017, the claimant disavowed any reliance on this assertion.
6. On 17<sup>th</sup> March 2016 a deportation order was made under the automatic deportation provisions of the UK Borders Act 2007. The claimant appealed the decisions to revoke his refugee status and the refusal of his protection and human rights claims.

### **The First-tier Tribunal's decision**

7. At the First-tier Tribunal hearing the claimant was not represented. There were no witness statements and no bundle of documents had been prepared. He was the only person to give evidence. That remains the position before the Upper Tribunal.

8. The judge confirmed that the claimant was not pursuing any appeal on trafficking grounds. The judge heard evidence from the claimant that he was still living with his wife, whom he married in October 1974. The claimant confirmed that he had a number of medical problems including high blood pressure, heart problems, high cholesterol and asthma. The judge considered some medication detailed in prescriptions produced by the claimant and noted the claimant's assertion that the medication he needed was not available in Vietnam and that it would, in any event, cost too much. The claimant claims that his wife's health was worse than his and she had an operation on her heart and had problems with her spinal cord. There was however no medical evidence relating to the claimant's wife before the First-tier Tribunal, and there was and remains no medical evidence before the Upper Tribunal.
9. The claimant explained that he committed his criminal offences in order to raise money to treat his brother's medical condition and to help his mother. Both are now deceased, his mother having died approximately three years ago. The claimant confirmed that his two adult sons lived in London and Kings Lynn and that they did not attend the hearing because they were very busy at work and they had children to look after. The claimant claimed to see his grandchildren weekly and that his wife was not well enough to attend the hearing. I note the absence of any evidence relating to the claimant's wife or his children or his grandchildren before the Upper Tribunal. The claimant confirmed at the First-tier hearing that his wife had family both in the United Kingdom and in Vietnam. She had returned to Vietnam approximately two to three years beforehand for a holiday. The claimant additionally confirmed that he had two surviving brothers in Vietnam but claimed that he had no contact with them because they had their own families and concentrated on their own immediate family.
10. The judge did not find the claimant to be a credible witness. The judge placed significant reliance on inconsistencies in the claimant's account of his contact with his children and grandchildren (he variously that he saw them every three months or every week).
11. In his assessment the judge found that the presumption under Section 72 of the 2002 Act had not been rebutted by the claimant. There is no challenge to that aspect of the decision. The judge however noted that it was accepted by the respondent that the claimant was married to his wife and there was no suggestion that they were not living together. Nor was there any challenge to the claimant's assertion that, regardless of the frequency, he did see his children and grandchildren. The judge however found that there was only the claimant's oral evidence concerning his wife's ill health and was not satisfied that the claimant demonstrated that she suffered from serious health issues.
12. The judge accepted the claimant's evidence that he was in poor health but rejected his assertion that there would be no treatment available in

Vietnam. In support of this conclusion the judge relied on the October 2013 COIS Report on Vietnam which indicated that the country had a mixed public private sector provider system in which the public sector plays a key role in healthcare and that by reference to a World Bank Report from November 2011 the majority of those who reported an illness were able to visit a healthcare worker or centre. The judge concluded that he was unable to find on the balance of probabilities, based on the limited evidence before him, that the claimant would be unable to access treatment for his medical conditions.

13. Having regard to the absence of any evidence provided by the claimant that he would be at risk on return to Vietnam, and given that he had visited the country on numerous occasions, the judge was satisfied that the limbs in paragraph 339A of the Immigration Rules for the revocation of refugee status had been met. There is no appeal against this decision.

14. The judge went on to consider Article 8 by reference to Sections 117A to D of the 2002 Act. The judge noted that the claimant could not speak English despite having been in the United Kingdom for more than twenty years. I pause to note that the claimant was able to communicate with me during the hearing, albeit to a limited extent. The judge noted that the claimant and his wife appeared to be dependent on taxpayers and they had not demonstrated any significant level of integration. In considering Section 117C of the 2002 Act the judge stated that the sentence of 30 months' imprisonment was only six months more than the threshold for the respondent to be required to consider deportation. This is incorrect. The threshold is one of twelve months and the claimant's sentence was eighteen months over that threshold. Having satisfied himself that Exception 1 of Section 117C(4) had not been met the judge considered whether the claimant met the requirements of Exception 2 contained in Section 117C(5). At [56] the judge stated,

"Given that the [claimant's] wife has UNHCR refugee status and that I accept the claimant's evidence that she does not wish to return to Vietnam, when I also take into account the ages of the [claimant] and his wife and the length of his marriage, I find that the effect of his deportation would be unduly harsh on the [claimant's] wife. I therefore find that Exception 2 applies to the [claimant] and that his appeal against deportation succeeds."

15. The judge proceeded to consider Article 8 pursuant to the **Razgar** [2004] UKHL 27 approach and having regard to the Supreme Court's decision of **Agyarko** [2017] UKSC 11. The judge concluded that the decision to deport the claimant amounted to an interference sufficient to attract the operation of Article 8 and, at [60], the judge stated,

"Such interference would not be proportionate to the legitimate public end that the respondent was seeking to achieve. The balance that I undertook were the public interest in removal, to which I have given substantial weight, and the ages of the [claimant] and his wife and the effect on the [claimant's] wife if he were to be deported. She still has refugee status and could not be compelled to return to Vietnam."

16. The judge found that these were very compelling reasons sufficient to resist the decision to deport and that the effect on his wife would be devastating and that, given his advanced age, the effect on the claimant would also be devastating. The judge consequently allowed the human rights appeal.

### **The grounds of appeal and the error of law hearing**

17. The Grounds of Appeal contend that the judge failed to give adequate reasons for concluding that the impact on the claimant's wife, if she was to be separated from the claimant, would be unduly harsh. It was submitted that the judge failed to identify what the unduly harsh consequences of deportation would be given the particular facts of the case. The grounds additionally contend that the judge made a material mistake or fact in concluding that the claimant's imprisonment was only six months more than the threshold required to trigger the automatic deportation provisions. In her submissions Ms Fijiwala expanded upon the grounds submitting that the judge did not give adequate reasons as to why the impact on the claimant and his wife would be devastating. In response, the claimant indicated that he had nothing to say.
18. I indicated to the parties that I was satisfied that the judge had materially erred in law and I then proceeded, pursuant to the directions issued by the Upper Tribunal, to remake the decision. No further documentary evidence was provided by the claimant.
19. The claimant indicated that he had now been in the United Kingdom for more than twenty years. He claimed that all his family were in the UK and that he had nothing in Vietnam. His duty to his deceased mother and brother came to an end on their passing. His life was in the United Kingdom and he had nothing in Vietnam and he was nearly 70 years old. He claimed that his wife had attended the previous court hearing but it was too cold for her to come out and his children did not live with him. There was no cross-examination.

### **Discussion**

20. In determining whether the impact on the claimant's wife of being separated from him, and, in particular, whether the impact would be unduly harsh, I find that the First-tier Judge failed to indicate whether he was adopting the approach identified in **MM Uganda v Secretary of State for the Home Department [2016] EWCA Civ 450** and **MA Pakistan v Upper Tribunal IAC [2016] EWCA Civ 705**. These authorities require consideration of the relevant public interest factors in determining what amounts to an unduly harsh consequence. It is unclear from the decision whether, in concluding that the impact on the claimant's

wife would be unduly harsh, that the judge took account of the nature and seriousness of the claimant's criminality, or his criminal history. In determining whether that impact on the wife would be unduly harsh the judge gave insufficient reasons and failed to adequately identify what specific impact on the wife would be unduly harsh. The judge relied on the fact that the wife had been granted refugee status, although she is now a British citizen who visited Vietnam two to three years ago, and the ages of the claimant and his wife, their length of marriage and her unwillingness to return to Vietnam. The requirement for an unduly harsh impact is however a high test and there has been no sufficient explanation as to why the impact on the wife would be unduly harsh in the absence of any medical evidence or any statement from her, or indeed any other evidence. There was simply no evidential basis entitling the First-tier Judge to conclude that the impact on the claimant's wife of being separated from him would be 'devastating', as was found at [61].

21. Furthermore, in assessing proportionality outside of the Immigration Rules and applying the **Razgar** approach the judge failed to assess whether there would be very compelling circumstances and failed to give adequate reasons for concluding that the impact on the wife would be devastating or why, because of his age, the impact on the claimant would be devastating. In so concluding the judge additionally failed to take into account relevant considerations, namely, the claimant's familiarity with Vietnam, that medical treatment was likely to be available and that both the claimant and his wife still had family in the country.

## **Remaking the decision**

22. In remaking the decision I have taken full account of the claimant's oral evidence, the length of time he has resided in this country and that he has his wife and immediate family in the UK. I also take into account the fact that he is nearly 68 years of age. I have considered the claimant's manuscript statement in which he makes specific reference to his length of residence, that his sons and British grandchildren are present here, that he committed his offences to provide medical treatment to his family in Vietnam, that he is remorseful, that his next of kin have their own families to care about, and to his illness and the time he has spent in hospital. I have additionally considered a typed letter from the claimant's wife dated 20<sup>th</sup> May 2013 in which she indicated that her health condition was not good enough to travel to visit her husband, that they are a couple, that they used to helping each other and that their children do not visit them on a regular basis because they live far away. I have additionally considered the various medical documentation including the 2013 medical notes indicating that the claimant is at high risk of heart disease, he has a chronic cough, that he has been in low mood, he has a vitamin D deficiency, he has chronic obstructive pulmonary disease, high cholesterol and that he has complained of chest pains in the past and that he has previously had prostate problems. There is nothing in the medical

evidence before me indicating that the claimant is at imminent risk of significant deterioration in his health or that he is unable to travel to and live in Vietnam in light of the availability of health care, as disclosed in the October 2013 COIS report.

23. Applying firstly the Immigration Rules relating to private life and paragraph 399A, which are reflected in Exception 1 of Section 117C(4) of the 2002 Act, it is apparent that the claimant has not resided in the United Kingdom for most of his life and that he is not socially and integrated in the United Kingdom. There is little evidence before me of the nature and extent of his integration and, despite being in the United Kingdom since 1995, he requires an interpreter. There is no evidence of his employment or involvement with the community, and no evidence of any private or other extended family life relationships he may have established. There is no evidence of any stake he has in society, and his criminal conduct undermines his claim to integration. Nor am I satisfied there are very significant obstacles to his integration. He has lived in Vietnam for most of his life and would be familiar with the language, the culture and the way of life. He previously visited the country frequently. He still has siblings in that country and his wife has family. There is nothing to indicate that his family in the United Kingdom would not or could not support him. Nor is there any evidence that medical treatment would not be available, and nothing to indicate that his medical conditions prevent him from travelling.
24. In considering whether the impact on the claimant's wife would be unduly harsh, I note firstly that his wife has not attended the hearing and there is no evidence from her other than the brief statement referred to earlier. There is simply no evidence that the impact on the claimant's wife if the claimant was deported would be devastating, and certainly no evidence that it would have an unduly harsh impact.
25. Whilst I accept that the claimant does have relationships with his adult children and his grandchildren there was nothing to indicate that these relationships contain any elements over and above what would normally be expected between adult children and their parents, or minor children and their grandparents.
26. Nor is there any evidence that communication could not be maintained through periodic visits or more remote forms of communication. I note that the claimant's wife visited Vietnam two to three years ago, which suggests that she could continue to visit or, perhaps, even relocate given that her visits suggest no risk of ill-treatment. In assessing whether there are very compelling circumstances I note that the claimant is unlikely to be without any support given that he has his wife's family in Vietnam and given that he has his sons and wife living in the United Kingdom. They are both said to be very busy suggesting that they are in employment, and there was nothing to indicate that they would not be able to financially support the claimant, at least in the short term to enable him to obtain accommodation and means to a living. The claimant is almost 68 years of

age but this along does not amount to very compelling circumstances. Nor is there any new medical evidence before me. I once again I note that the claimant is familiar with Vietnam.

27. Having regard to the public interest in deportation and the seriousness of the claimant's offending, and the need to deter foreign nationals from offending, I am satisfied that the claimant's deportation would not amount to a disproportional breach of Article 8. I consequently dismiss the appeal.

**The First-tier Tribunal's decision contained a material error of law. I proceed to remake the decision, dismissing Mr Pham's human rights appeal**

No anonymity direction is made.



Signed

Date 18 January 2018

Upper Tribunal Judge Blum

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

I have dismissed the appeal and therefore there can be no fee award.



Signed

Date 18 January 2018

Upper Tribunal Judge Blum