



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/20500/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7<sup>th</sup> October 2019

Decision & Reasons Promulgated  
On 17<sup>th</sup> October 2019

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

B T N  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms M Mac, Mac & Co Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Vietnam born in March 1993. He appeals against the decision of First-tier Tribunal Judge L Shand QC promulgated on 12 June 2019 dismissing his appeal against the refusal of leave to remain on human rights grounds.
2. Permission to appeal was granted by Upper Tribunal Judge Gill on 28 August 2019 for the following reasons:-

“It is arguable that Judge of the First-tier Tribunal L Shand QC may have erred in law by failing to consider whether the appellant satisfies EX.1(b) of Appendix FM.

Para 7 of the grounds contends that the judge was mistaken when she said, at para 41 of her decision, that it was not contended on the appellant’s behalf that his family life claim could succeed if she did not find that the appellant had a parental relationship with O. I agree that it is arguable that the judge may have misapprehended the appellant’s case in this respect, given that para 15 of the skeleton argument that was before her contended that there were insurmountable obstacles to the Appellant and his wife continuing their family life together outside the UK.”

3. It was accepted at the outset of the hearing that the judge had made an error of law in failing to consider and apply paragraph EX.1(b) of Appendix FM. Ms Mac submitted that I should remake the decision on the facts found by the First-tier Tribunal. She submitted that there were insurmountable obstacles to family life continuing outside the UK because the Appellant’s wife had shared custody of her 10 year old son. She invited me to allow the appeal.
4. Mr Bramble submitted that there was insufficient evidence to show that there would be unjustifiably harsh consequences if the Appellant returned to Vietnam to obtain entry clearance. The Appellant’s wife could live without the Appellant in the UK with her son as she had done in the past. Ms Mac submitted that this was not a requirement of the Immigration Rules, but in any event the Appellant’s wife could not meet the financial requirements and therefore the Appellant would not be able to obtain entry clearance. Family life could not continue outside the UK.

### **Conclusions and reasons**

5. The Appellant entered the UK clandestinely in 2013 and remained illegally. He met his wife in December 2015, and they started living together in April 2017. On 27 November 2017 the Appellant applied for leave to remain on the basis of his family life with his partner and her son. The Appellant married his partner in March 2018. There was no challenge to the finding that the Appellant did not meet the requirements of EX.1(a). The judge found that it was in the best interests of the child to remain in the UK with both his parents and the Appellant had no parental relationship.
6. At paragraph 41 of the decision the judge stated:-

“I have also considered the appeal based on Article 8 outside the Rules on the basis of the appellant’s private life and his family life with his wife, although it was not submitted on the appellant’s behalf that his appeal could succeed on either of these grounds if I did not find that he has a parental relationship with O.”

7. I am of the view that the judge has misunderstood the case as presented by the Appellant. It appears from the bundle submitted for the First-tier Tribunal hearing in April 2019 that the Appellant did rely on paragraph EX.1(b) of Appendix FM and submitted that there were insurmountable obstacles to family life continuing outside the UK because the Appellant's wife had shared custody for her son. There was evidence in the Appellant's witness statement to support the contention that there were insurmountable obstacles. The skeleton argument drafted by counsel for the hearing, dated 9 April 2019, clearly puts this in issue at paragraph 15.
8. It is agreed that the judge has erred in law in failing to apply paragraph EX.1.(b) of the Immigration Rules which states:-
  - "EX.1.(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."
9. I find that the judge erred in law in failing to apply this relevant provision to the facts as she found them, and I set aside her decision to dismiss the appeal on Article 8 grounds.
10. I am not persuaded by Mr Bramble's submission that there needs to be further evidence in this case, in particular in relation to whether there would be unjustifiably harsh consequences were the Appellant to return to Vietnam to obtain entry clearance. I find this is not a requirement of the test set out in EX.1(b) as clarified by EX.2. The test is whether there are insurmountable obstacles to family life continuing outside the UK.
11. It is quite clear on the facts of this case that family life cannot continue outside the UK. The Appellant's wife is unable to relocate to Vietnam because she has to remain in the UK to care for her British citizen child when he is not cared for by his father. The Appellant's wife has shared custody of her 10 year old son, O, from a previous relationship. O lives with his mother and the Appellant for half of the week and lives with his biological father the other half of the week. This is set out in a child arrangement order dated 6 May 2016 which does not permit O to be taken out of the country without his father's written consent or leave of the Family Court. The court order makes clear the elements of this arrangement.
12. The Appellant's wife cannot leave the UK to go and resettle in Vietnam with the Appellant because of her British citizen child and the shared custody arrangements. I find that there are insurmountable obstacles to family life continuing outside the UK.

It is not relevant whether the Appellant can go out of the country to obtain entry clearance because that is not part of the test explained in EX.2. Such an argument would only be relevant to an assessment of Article 8 outside the Immigration Rules.

13. Given that the Appellant satisfies the Immigration Rules, it would be disproportionate to remove the Appellant. Further, Mr Bramble's argument on Article 8 could not succeed because the evidence before the First-tier Tribunal and before me is that the Appellant would be unable to obtain entry clearance to re-enter because his wife earns £520 per month which is insufficient to satisfy the financial requirement. The Appellant's removal would split the family permanently and therefore there would be unjustifiably harsh consequences in requiring the Appellant to return to Vietnam and obtain entry clearance.
14. Accordingly, I find that there are insurmountable obstacles in this case and the Appellant has satisfied paragraph EX.1(b) of Appendix FM. His appeal is allowed under the Immigration Rules and on Article 8 grounds.

### **Notice of Decision**

**Appeal allowed**

### **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.**

*J Frances*

Signed  
Upper Tribunal Judge Frances

Date: 14 October 2019

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

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.

*J Frances*

Signed  
Upper Tribunal Judge Frances

Date: 14 October 2019