**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/26200/2013

**THE IMMIGRATION ACTS**

| **Heard at Newport** | **Determination Promulgated** |
|---|---|
| **On 15 May 2014** | **On 20 May 2013** |
| | …… |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

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

Appellant

**and**

**THUONG THI NGUYEN**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No appearance

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Deavin) which allowed the claimant's appeal under the Immigration Rules (Appendix FM) against a refusal to vary her leave made on 23 July 2013 on the basis of her marriage to a British citizen, Stephen Heaven.

2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

**Background**

3. The appellant is a citizen of Vietnam who was born on 5 May 1986. On 23 December 2013, she entered the United Kingdom as a visitor with entry clearance valid until 12 June 2013. On 29 April 2013, she married Stephen Heaven, a British citizen (the "sponsor"). On 10 June 2013, she made an in-time application for further leave to remain as his spouse under Appendix FM. That was refused by the Secretary of State on 23 July 2013.

**The Appeal**

4. The appellant appealed to the First-tier Tribunal. The appeal was determined by the First-tier Tribunal (Judge Deavin) on the papers as no oral hearing was requested. He accepted that the parties' marriage was a "genuine and subsisting relationship" and that, given the serious health condition of the sponsor, there were "insurmountable obstacles" to the appellant and sponsor continuing their family life outside the UK. As a consequence, Judge Deavin was satisfied that section EX.1 of Appendix FM applied and he allowed the appeal under the Immigration Rules.

5. The Secretary of State sought permission to appeal on the basis that the appellant could not show that she met the requirements of Appendix FM even if section EX.1 applied. That was because the eligibility requirement in E-LTRP 2.1(a) was that:

> "[t]he applicant must not be in the UK –
>
> (a) as a visitor; …."

6. Section EX.1 did not absolve the appellant from satisfying the requirement in E-LTRP 2.1(a) although it did mean that the appellant did not have to meet the financial requirements in Appendix FM.

7. On 6 March 2014, the First-tier Tribunal (Judge Cruthers) granted the Secretary of State permission to appeal on the basis that that ground was arguable citing Sabir (Appendix FM – EX.1 Not Free-standing) Pakistan [2014] UKUT 0063 (IAC). At para 4 of his grant of permission, Judge Cruthers also commented that:

> "At least on the face of the facts summarised in the determination under consideration, one might think that the appellant has a strong case for leave to remain on 'classic Article 8 law principles', ie the law relating to Article 8 of the European Convention on Human Rights which goes beyond the 'Article 8 Immigration Rules'."

8. Thus, the appeal came before me on 15 May 2014.

9. The appellant is not legally represented and she did not appear at the hearing. Notice of the date and time of the hearing was sent to the appellant's address on the file (which was confirmed by Mr Richards as being that held by the Secretary of

State) on 14 April 2014. In the absence of any explanation for the appellant's absence, I considered it to be in the interests of justice to proceed with the hearing in the absence of the appellant exercising my discretion under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

**The Submissions**

10. On behalf of the Secretary of State, Mr Richards handed up a small bundle of documents under cover of a letter from a firm of solicitors which whilst not acting in the appeal stated that they dealt with other matters for Stephen Heaven and had been requested to forward the documents to the respondent. Those documents showed that on 9 April 2014, the appellant gave birth to a son in hospital at Aberystwyth. Stephen Heaven is named as the father on the birth certificate. Mr Richards reminded me that at the date of Judge Deavin's decision, the appellant had been pregnant.

11. Mr Richards made two submissions. First, he submitted that the Judge had made a clear error in allowing the appeal under the Immigration Rules on the basis of section EX.1. The appellant could not succeed under Appendix FM if she was in the UK as a visitor. On that basis, he invited me to dismiss the appeal under the Immigration Rules. Secondly, however, Mr Richards drew my attention to the factual situation of the sponsor set out in Judge Deavin's determination and, in particular, his health condition resulting from two heart attacks and a serious motor accident that had occurred in September 2012 which had caused him to no longer to be able to work as a construction manager/overseas and had required him to return to the UK. Mr Richards indicated that he was content for me to remake the decision in relation to Article 8 of the ECHR. He invited me to consider whether there were compelling circumstances such that the appellant's removal would be disproportionate under Article 8 outside the Rules.

**Error of Law**

12. The requirements for being granted limited leave to remain as a partner are set out in section R-LTRP in Appendix FM. So far as relevant, R-LTRP 1.1 provides as follows:

> "**Section R-LTRP: Requirements for limited leave to remain as a partner**
>
> "LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-
>
> (a) the applicant and their partner must be in the UK.;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
>
> (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets all the requirements of Section E-LTRP

Eligibility for leave to remain as a partner; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP 1.2-1.12and E-LTRP 2.1; and

(iii) paragraph EX.1 applies."

13. The appellant clearly met R-LTRP 1.1(a) and (b). In addition, in order to succeed the appellant was required to either satisfy R-LTRP 1.1(c) or R-LTRP 1.1(d). R-LTRP 1.1(c) requires, inter alia, that the appellant meet all the requirements of section E-LTRP. R-LTRP 1.1(d) on the other hand, required the appellant only to establish (so far as the relevant for the purposes of this appeal) paras E-LTRP 1.2-1.12 and E-LTRP 2.1 providing that also section EX.1 applies.

14. Importantly, both R-LTRP 1.1(c) and R-LTRP 1.1(d) required the appellant to meet the requirements of E-LTRP 2.1. That provision relates to the individual's immigration status and is in the following terms:

" **Immigration Status Requirements**

E-LTRP.2.1 The applicant must not be in the UK –

(a) as a visitor

(b) with valid leave granted for a period of 6 months of less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings; or

(c) on temporary admission or temporary release (*unless paragraph EX.1 applies).

E-LTRP.2.2. The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies."

15. In order to succeed under either R-LTRP 1.1(c ) or R-LTRP 1.1(d), E-LTRP 2.1(a) required that the appellant should not be in the UK " as a visitor". However, that was precisely her immigration status in the UK when she made her application for further leave as a spouse. As a consequence, she could not succeed in meeting the requirement in R-LTRP 1.1(c) or R-LTRP1.1 (d) even if in the latter case section EX.1 applied. Section EX.1, again so far as relevant states that:

"**Section EX: Exception**

EX.1 This paragraph applies if ….

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen…and there are insurmountable obstacles to family life for that partner continuing outside the UK."

16. Judge Deavin found in the appellant's favour on the substantive issues in section EX.1, namely that her relationship with the sponsor was a genuine and subsisting one; he was a British citizen and that there were insurmountable obstacles to their family life continuing outside the UK. Nevertheless, as the Upper Tribunal recognised in Sabir, section EX.1 is not 'free-standing'. The appellant had also to satisfy the requirement in E-LTRP 2.1(a) which she could not.

17. Thus, the appellant could not establish that she met the requirements of Appendix FM and was entitled to further leave as a spouse. In finding that she did meet those requirements, Judge Deavin erred in law. His decision cannot stand. I set it aside. There is no other basis upon which the appellant could have succeeded under the Immigration Rules at the time of Judge Deavin's decision. I remake that part of his decision dismissing the appellant's appeal under the Immigration Rules.

**Re-making the decision**

18. Mr Richards invited me to remake the decision under Article 8 of the ECHR. He accepted that there was family life between the appellant and sponsor. He invited me to consider whether there were compelling circumstances which made the appellant's removal unjustifiably harsh such that her removal would be disproportionate.

19. The relevant evidence is set out in Judge Deavin's determination beginning at para 10. The sponsor worked in Singapore and Malaysia as an oil rig construction manager earning approximately $200,000 per annum. The sponsor met the appellant in September 2008 in Singapore where he was working and the appellant was a student. Their relationship developed and they lived together for extended periods prior to their marriage.

20. In March 2012, the sponsor suffered two heart attacks and was admitted to hospital in Thailand. In September 2012, he suffered serious injury in a motor accident and had one eye removed. On 25 November 2012, the sponsor returned to the UK as his cardiac condition and the injuries he had sustained in the accident meant that he could no longer continue to work as a construction manager. He was severely incapacitated following the accident and lives with his 77 years old father.

21. On 23 December 2012, the appellant entered the UK with entry clearance as a visitor giving her valid leave until 12 June 2013. The appellant and sponsor married in the UK on 29 April 2013. They lived together in the home of the sponsor's father in north Wales.

22. The Judge dealt with the evidence concerning the sponsor's health conditions and the impact that that might have on his ability to live abroad at paras 19-20, 22, 24 and 27-28 as follows:

> "19. The Sponsor's GP is concerned about his medical condition and has referred him to a consultant neurologist. He collapsed and blacked out recently without warning, which caused him to suffer further injury. His GP fears

some sort of neurological problem may have been sustained during the motor accident. His GP considers that he requires twenty four hour care.

20. The Sponsor's father alone is not strong enough to provide him with such care and his son cannot provide care as he spends extended periods at work and shares a flat with a friend in Birmingham. The only person able to provide him with the required care currently is his wife.

… .

22. To refuse the application will cause a great deal of undue stress to the Appellant, as she will be required to leave her spouse and return to Vietnam. She wishes to settle in the United Kingdom on a permanent basis with her spouse. The Appellant has established her own family unit in the United Kingdom with her spouse and they wish to continue their subsisting relationship and family life on a more permanent basis together in the United Kingdom.

….

24. Her husband does not want to live abroad anymore as they felt that medical treatment is better in the United Kingdom and she wants to remain with him to care for him. They have now been together for five years. His father is aged seventy seven and not able to care for him properly. She was asked if she had ever been refused a visa before and said she was refused on the first application, as the British Embassy in Hanoi wanted them to show they had been in a relationship since 2008. Her husband had emails dating back to then and photographs and the Embassy could see that they had visited several Asian countries together. When she reapplied, she was granted six months…

...

27. In a covering letter, the Sponsor says that he cannot live in Vietnam because of his medical conditions.

28. Additionally, he says that the Appellant visited the doctor in August and has now been told that she is pregnant with their child."

23. As regards the appellant's pregnancy, as I have already indicated Mr Richards provided me with a birth certificate relating to the son of the appellant and sponsor who was born on 9 April 2014.

24. In relation to the Immigration Rules, Judge Deavin made a number of findings at paragraphs 37-45. Relevant to my decision under Article 8, he found, as the respondent had accepted and Mr Richards did so before me, that the parties' relationship was a "genuine and subsisting" one. At para 40, the Judge noted the evidence of the appellant and sponsor that because of the sponsor's "substantial medical problems" it would not be possible for them to move away from the UK and live in Vietnam. At paragraph 42, he referred to a letter from the sponsor's GP which set out that the sponsor had suffered two major heart attacks before moving back to the UK following his road accident and that he "is in need of support and care". At paragraph 43, the Judge found:

> "It is on that evidence that I am satisfied that any suggested removal to Vietnam for the Sponsor would give rise to an insurmountable obstacle on account of his current medical problems."

25. In applying Article 8 of the ECHR, the five stage test set out by Lord Bingham of Cornhill in Razgar [2004] UKHL 27 at [17] requires the following questions to be answered:

> "(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case maybe) family life?
>
> (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Art 8?
>
> (iii) If so, is such interference in accordance with the law?
>
> (iv) If so, is such interference necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (v) If so, is such interference proportionate to the legitimate public aims sought to be achieved?"

26. At [20] Lord Bingham stated that question 5:

> "…must always involve the striking of a fair balance between the rights of the individual and the interest of the community which is inherent in the whole of the convention. The severity and consequences of the interference will call for a careful assessment at this stage."

27. As I have already indicated, Judge Deavins accepted that a relationship with the sponsor was a genuine and subsisting one. They have known each other since September 2008 and have cohabited for extended periods prior to their marriage which took place on 29 April 2013. Since the appellant came to the UK in December 2012, she has lived together with the sponsor in his father's home in north Wales.

28. I have set out the evidence concerning the sponsor's health conditions and I am in no doubt that it would not be reasonable to expect him to leave the UK to live with the sponsor as her husband elsewhere, in particular, Vietnam. That mirrors Judge Deavin's finding (which is not challenged) that there was an "insurmountable obstacle on account of [the sponsor's] current medical problems" in the parties living abroad.

29. For those reasons, I am satisfied that Article 8.1 is engaged: there is family life which will be sufficiently seriously interfered with if the appellant is not permitted to remain in the UK.

30. As regards Art 8.2, the appellant does not meet the requirements of the Immigration Rules, in particular Appendix FM and consequently the decision is in accordance with the law. The interference is for a legitimate aim, namely the economic well-

being of the country. The crucial issue is, as Mr Richard accepted before me, in question (5) of Lord Bingham's speech in Razgar at [17], namely whether the removal of the appellant would be proportionate.

31. As I have said, the appellant does not meet the requirements of the Immigration Rules. It is clear from the case law which has developed since the new "Article 8 rules" came into effect on 9 July 2012 that it will only be where there are "compelling" circumstances such that unjustifiably harsh consequences will result from the decision that an individual who cannot meet the requirements of the new rules may, nevertheless, establish that the decision is disproportionate under Article 8 (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192; R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC)).

32. In my judgement, there are a number of features of this appeal which do give rise to compelling circumstances and unjustifiably harsh consequences such that the public interest is out weighed by the rights of the appellant and her partner to respect for their family life.

33. First, and foremost, there is the sponsor's medical condition. Judge Deavin accepted that it was a serious condition and I entirely agree with that assessment. The sponsor has suffered two serious heart attacks and a serious road traffic injury which resulted in him losing an eye. The evidence from his GP is that the sponsor has collapsed and blacked out recently without warning and the GP considers that there maybe some sort of neurological problem which was sustained during the road accident. The GP considers that the sponsor requires 24 hour care and, in practical terms, that is provided by his wife, the appellant. The sponsor's father is 77 years of age and not, in practical terms, able to provide that care and the sponsor's son is unable to do so due to his work and the fact that he lives in Birmingham.

34. I take into account that when the appellant came to the UK she had no expectation of being allowed to remain beyond the maximum six months of her visit visa. She and the sponsor married in full knowledge of that limitation. However, the appellant is lawfully in the UK and there is no suggestion that her residence has ever been otherwise. She has a long standing relationship with the sponsor dating back to September 2008 even though their marriage is relatively recent having been celebrated on 29 April 2013. At the date of Judge Deavin's decision the appellant was pregnant and it is now the case that the appellant has given birth to a son and, as the birth certificate shows, the sponsor is the father. As a consequence of his father's nationality, that child is a British citizen.

35. It is also the case that the appellant met the substantive requirements of Appendix FM; she only failed on the basis that she could not obtain the leave by switching from leave as a visitor. In my judgement, it would place a procedural requirement (and therefore form) over the substance of the appellant's claim if she were required to return to Vietnam and seek entry clearance (Chikwamba v SSHD [2008] UKHL 40 and SSHD v Treebhowan and Hayat [2012] EWCA Civ 10). Given the obvious

dependence of the sponsor upon her because of his medical condition, it would be wholly unreasonably, in my judgement, to require her to leave him (even on a temporary basis) to seek entry clearance. She does, of course, also now have a young son (just over 1 year old) which would add to the difficulties of doing so.

36. I accept, as did Judge Deavin, that there are insurmountable obstacles to the appellant and sponsor continuing their family life outside the UK. Given his health condition, it would not be reasonable to expect him to leave the UK and live abroad. I also take into account, as I am entitled to under s.85(4) of the Nationality, Immigration and Asylum Act 2002 a matter arising since the date of decision which is relevant to the substance of the decision, namely the birth of the parties' child in the UK and who is a British citizen. That fact only seeks to emphasise, in my judgement, the unreasonableness of expecting the appellant to return to Vietnam not just to seek entry clearance but also to counter any suggestion that the parties should relocate to Vietnam to carry on their married life.

37. For these reasons, therefore, I am satisfied that there are compelling circumstances such that there will be unjustifiably harsh consequences if the appellant is not granted leave to remain in the UK. Balancing the public interest against the Article 8 rights of the appellant and sponsor, I am satisfied that the appellant's removal (whether temporarily or permanently) would be a disproportionate interference with the right to respect for her and the sponsor's family life in the UK.

38. For these reasons, the appellant's removal would breach Article 8 of the ECHR and I allow her appeal on that basis.

**Decision**

39. The decision of the First-tier Tribunal to allow the appellant's appeal under the Immigration Rules involved the making of an error of law. That decision cannot stand and I set it aside.

40. I re-make the decision dismissing the appellant's appeal under the Immigration Rules but I allow the appeal under Article 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

**To the Respondent**
**Fee Award**

Judge Deavin made a whole fee award of £80. Although I have reversed his decision in relation to the Immigration Rules as I have allowed it under Article 8, I too make a whole fee award of £80.

Signed

A Grubb
Judge of the Upper Tribunal

Date: