



IAC-BFD- MD

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

Appeal Number: IA/33467/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 21st August 2015

Decision & Reasons Promulgated
On 18th September 2015

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MS A N N P
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer

For the Respondent: Miss E King of Counsel, instructed by Rahman & Company
Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department with permission, against the decision of the First-tier Tribunal (Judge Bruce) in which it allowed A N N P's appeal against the Secretary of State's decision to refuse her leave to remain on the basis of her family/private life and to remove her to Vietnam.

2. For the purposes of continuity I shall refer, in this decision, to the Secretary of State as “the Respondent” and A N N P as “the Appellant”, which reflects their respective positions before the First-tier Tribunal.
3. Permission to appeal was granted on the basis that it was arguable that the FtT Judge may have erred in;
 - (i) misdirecting herself on the meaning of “financially independent” in Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended)
 - (ii) failing to take into account and weigh in the balance, the Article 8 rights of the Appellant’s 6 year old child residing in Vietnam;
 - (iii) attaching too great a weight to the relationship between the Appellant and her UK partner which began, and continued, when the Appellant was unlawfully in the UK;
 - (iv) failing to give adequate reasons for finding as she did “that there was absolutely no prospect in future” that the Appellant would be able to return to the UK;
 - (v) giving too much weight to the rights of an unborn child.
4. By the time of the hearing before me, the Appellant had given birth to her son EDK on 3rd August 2015. (Birth certificate produced). EDK is of course a British child.

Background

5. The Appellant is a Vietnamese national born 29th August 1983. She entered the UK on 14th February 2010, in possession of a Student Visa valid until 30th October 2011. She completed an IELTS course.
6. In January 2011 she met a Mr N a British citizen. They entered into a relationship and were married on 23rd July 2012. The Appellant did not leave the UK when her visa expired in 2011 but overstayed.
7. The Appellant claimed that she was subject to sexual, physical and emotional abuse from Mr N. She left him therefore on 26th November 2013 and reported the abuse to the police. On 30th January 2015 he was convicted on two charges of ABH. He is now serving a term of four years six months imprisonment. The Appellant has initiated divorce proceedings against him, but this process has become protracted because of his lack of cooperation.
8. In January 2014 she met Mr K another British citizen. They began a relationship and moved in together in March 2014. At the time of the hearing before the FtT, the Appellant was pregnant with Mr K’s child – the baby EDK was born on 3rd August 2015.
9. Mr K is employed as a graphic designer and earns approximately £1,200 to £2,000 per month. The Appellant applied for leave to remain outside the Immigration Rules but this was on the basis of her relationship with her husband Mr N. This application was refused on 3rd October 2013 with no right of appeal. She applied again on 18th

March for leave to remain but the application was voided on 22nd April 2014. It was resubmitted on 29th April 2014 and refused by the Respondent on 24th July 2014. It is the appeal against this refusal which was heard and allowed by the FtT.

10. When the appeal came before the FtT, it was accepted by the Appellant that she could not meet the requirements of the Immigration Rules. The sole issue therefore was whether her removal would be contrary to her Article 8 ECHR ,private/family life rights. The FtT judge found that circumstances of the Appellant's case were such that it required her to look outside the "complete code" of the Rules. This she did and in doing so went on to allow the appeal under Article 8.

Error of law/Consideration

11. I heard submissions from both parties. After hearing those submissions, I find I am able to deal with points (i) and (ii), set out in paragraph 3 above, briefly, since I find they are not material to the conclusions reached by the FtT. I say this for the following reasons. I accept that the FtT Judge wrongly described the Appellant at [19] as "self sufficient". She is not; nor is she financially independent. She is wholly dependent upon the financial resources of her British partner Mr K. However the FtT found as a fact, he has adequate financial resources to maintain her and is willing to do so. There is no evidence (and there was none before the FtT) that there is any reliance on public funds. I am satisfied therefore that although the FtT erred in describing the Appellant as 'self sufficient', when plainly she is not, nevertheless it was entitled to take into account the fact that Mr K was both financially capable of and willing to maintain her when deciding what weight to give to the public interest in maintaining immigration control. This error is not material.
12. Equally, I am satisfied that nothing turns on the FtT's failing to take into account evidence that the Appellant has a 6 year old child living with his grandparents in Vietnam. That child is outwith the jurisdiction. I fail to see how the uncertain future prospect of that child joining his mother in the UK, amounts to a material consideration. The time for any consideration of that prospective application will be if and when such an application is made. Presumably any such application will be made for him to enter as the Appellant's dependent child and will be successful only if the relevant Immigration Rules are met.
13. I turn now to the remaining grounds upon which permission was granted. These revolve around the central pillars of the Appellant's case as put before the FtT. The Judge in reaching her conclusions properly took into account the fact that the Appellant was pregnant. I have already noted above, by the time of the hearing before me, the Appellant had recently given birth to her child EDK. The child's father Mr K is a British citizen. The child , therefore, is also a British citizen.
14. The Judge considered it to be artificial to discount the fact that at the time of the hearing before her, the child was unborn. It is hard to see that the Judge was wrong in that. What else should she do in these circumstances? I suppose she could have said that as the child was unborn, his prospective presence should be excluded from her assessment, but as she said that would be wholly artificial. I see nothing wrong in that reasoning. Indeed by the very nature of these matters, by the time of the hearing

before me the child was born. It seems to me that much of the argument on this point is now academic. The Judge, found with reasons that the Appellant had a relationship with the child's father Mr K, to which she gave little weight, but gave great weight to the fact of the Appellant's pregnancy no doubt because she kept in mind the fact that a British child would be born in the reasonably foreseeable future. The interests of that child fell to be weighed in the balance as a primary consideration

15. Weighing those factors into the balance, she found that it would not be reasonable to expect the Appellant's partner to give up his job and home because if he did, she was satisfied, there would be no prospect of his being employed in Vietnam and therefore there would not be the financial support available to look after his British child. It would not be reasonable in those circumstances to expect the child to follow his Vietnamese mother and give up the advantages of his British citizenship.
16. It has been said that the Judge erred by saying that "there would be absolutely no prospect of the Appellant ever being able to come back and this family reunited here". Whilst I agree that the use of the words "absolutely no prospect" may be categorised as over stating the case, this is only when they are taken in isolation. A full reading of the decision leads me to the conclusion that the Judge was simply trying to emphasise the point she was making. The sentence has to be read in the full context of the paragraph. When so read, it seems to me that the Judge was saying on the evidence before her, that there was no realistic prospect of the Appellant's partner relocating to Vietnam, finding employment there at a level equivalent to at least £18,600 in a country where he doesn't speak the language and where he has no contacts. Should he follow this course, then clearly it is most unlikely the family could return to the UK as a family unit because it would be most unlikely that the Appellant would be able to meet the financial requirements of the current rules.
17. In short I do not find the decision contained such error to warrant it being set aside. The findings made by the FtT were ones reasonably open to it. The decision of the First-tier Tribunal contains no error of law requiring it to be set aside and remade.

Decision

18. The appeal of the Secretary of State is dismissed. The decision of the First-tier Tribunal allowing A N N P's appeal against the Secretary of State's decision to refuse her leave to remain stands.
19. An anonymity direction has been made, that direction remains.

Direction regarding anonymity – Tribunal Procedure (Upper Tribunal) Rules 2008 Rule 14

The appellant is granted anonymity throughout these proceedings, unless and until the Tribunal directs otherwise. No report of these proceedings shall directly or indirectly identify her or any member of their 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

Signature

Judge of the Upper Tribunal

Dated