



IAC-FH-AR-V1

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

Appeal Number: AA/02812/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 3rd December 2015**

**Decision & Reasons Promulgated
On 7th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**TUAN HA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

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

For the Respondent: Ms J Norman, Counsel, instructed by Immigration Advice Service

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a citizen of Vietnam, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 30th January 2015 to refuse to grant him asylum in the UK or to grant him leave to remain on the basis that his removal would breach Article 8 of the European Convention on Human Rights. Judge of the First-tier Tribunal Wellesley-

Cole dismissed the Appellant's asylum appeal but allowed the appeal on human rights grounds. The Secretary of State appeals against that decision with permission to this Tribunal.

3. The background to this appeal is that the Appellant claims to have arrived in the UK in September 2010 and, following his arrest for working illegally, he claimed asylum on 25th October 2013. The Appellant entered into a relationship with a British national with whom he has lived since November 2013. The Appellant's partner has three British children. The First-tier Tribunal Judge noted that it was accepted by the Presenting Officer that the Appellant had a strong relationship with the children and that he enjoys a genuine and subsisting parental relationship with the two elder children and has contact with the younger one who he cares for [15].
4. In considering the human rights aspect of the appeal the First-tier Tribunal Judge in a section headed "Family and/or Private Life Paragraph 399A and 117B (vi) (a) and (b)" said "In assessing the public interest under Article 8(2) I have kept in mind the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 ..." [27]. The judge went on to consider the provisions of section 117B and paragraph EX1 of the Immigration Rules. The judge concluded that paragraph EX1 applied and concluded in the notice of decision "The Appeal on human rights grounds under family life Appendix FM EX succeeds and is allowed on that basis".

Error of Law

5. There is no challenge to the judge's decision to dismiss the asylum appeal. The challenge is from the Secretary of State who contends in her Grounds of Appeal that the judge made a material misdirection in law in relation to the Article 8 decision. It is accepted in the grounds that the Appellant has a genuine and subsisting relationship with his stepchildren. However it is contended that the Appellant cannot meet any of the definitions of partner within Appendix FM and cannot therefore qualify for consideration under Appendix FM-EX on the basis of his relationship with his partner. It is further contended that the Appellant cannot meet any of the requirements of Appendix FM for limited leave to remain on the basis of family life as a parent. The Secretary of State relies on the case of **Sabir (Appendix FM - EX1 not freestanding) [2014] UKUT 00063 (IAC)** which makes clear that EX1 does not create a freestanding right of appeal. It is contended in the grounds that paragraph 9 of **Sabir** notes the requirements of Appendix FM have to be read sequentially and EX1 does not create a separate category of individual that can succeed under the Rules, it only excludes an applicant from meeting certain of the Rules. It is further submitted that the First-tier Tribunal Judge misdirected herself by going on to consider EX2 of paragraph 27 in respect of the Appellant's relationship with the children as EX2 does not apply to considerations under EX1A and there is no test of insurmountable obstacles.
6. It is contended that the Appellant cannot meet the requirements of Appendix FM and the appeal should not have been allowed on that basis

and that the First-tier Tribunal failed to consider the appeal under Article 8 and did not carry out a balancing exercise of relevant factors.

7. At the hearing before me Mr Kotas relied on the grounds. He submitted that the judge erred in allowing the appeal on grounds of EX1 given that that is not a freestanding provision.
8. Miss Norman submitted that at the first sentence of paragraph 27 of the decision the judge made clear that she was conducting an assessment under freestanding Article 8 not under the Immigration Rules. She relied on Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which states that 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. She submitted that it is not in the public interest to require the Appellant's removal and that it is clear that the judge allowed the appeal under Article 8 outside the Immigration Rules. She submitted that if the words "Appendix FM EX" were taken out of the notice of decision section of the determination it would be clear that the judge allowed the appeal on the basis of Article 8.
9. In response Mr Kotas submitted that Section 117B(6) is not freestanding and the judge needed to take into account all of the elements of Section 117B and he submitted that it would be wrong to speculate as to the outcome of a full analysis of Article 8.
10. I indicated to the parties that I was satisfied that the judge had made an error in terms of the structure of the Article 8 assessment and the notice of decision element of the determination. The structure of the decision means that it appears that the judge may not have considered the Immigration Rules before going on to consider freestanding Article 8. It seems to me that there is some confusion in the judge's decision particularly when one looks at the heading before paragraph 27 and the conclusion at the notice of decision section. The issue for me was therefore whether this error is material.
11. I heard submissions from the parties in relation to materiality and/or remaking the decision. Mr Kotas submitted that Section 117B(6) is not freestanding and the judge should have taken into account all of the elements of Section 117B and that it would be wrong to speculate as to the outcome of a full analysis of Article 8. Miss Norman submitted that Section 117B(6) is clear in that it says there is no public interest in removing a person who has a genuine and subsisting parental relationship with a qualifying child when it would not be reasonable to expect the child to leave the UK. She submitted that it is impossible to see how, even if the judge went through all the elements of Section 117B, she could have reached another conclusion. She submitted that any error was not material in light of the judge's findings.

12. Mr Kotas submitted that Section 117B(6) is not a trump card, he said that it applies where all other things are equal but all other things are not equal in this case given the Appellant's immigration history. He submitted that it could be open to the Appellant to make a fresh entry clearance application and it would not be disproportionate in light of his immigration history to expect him to return to Vietnam to make an entry clearance application. He submitted that **Chikwamba v SSHD [2008] UKHL 40** does not bite in this case as it is not a foregone conclusion that entry clearance would be granted to the Appellant in this case.
13. Miss Norman submitted that there is nothing in the statute to add the extra words suggested by Mr Kotas in Section 117B(6). It is not parasitic on any other provisions of 117B and there is no case law to permit the inference suggested by Mr Kotas. In any event, she submitted, bearing in mind the other findings, there is nothing in Section 117B which impacts negatively upon the Appellant. She submitted that the evidence before the judge as set out in paragraph 14 is that the Appellant's partner supports the family and he is therefore financially independent. She understands that the Appellant speaks English but accepted that that was not referred to in the determination. She accepted that the Appellant does not meet the requirements of Appendix FM. She submitted that this was an appropriate case for consideration on the basis of Article 8 outside of the Rules and that Section 117B makes clear in a consideration of the public interest that the Appellant should not be removed.

Assessment

14. Although the judge's determination in relation to Article 8 should have been better structured I accept that the judge made no material error in this case. Despite the misleading heading above paragraph 27, the first sentence of that paragraph refers to Article 8(2) and Section 117B. I bear in mind the concession made by Ms Norman before me that the Appellant cannot meet the requirements of Appendix FM, a submission also made by the Secretary of State in the Grounds of Appeal. Of course, in any consideration of freestanding Article 8, it is necessary to bear in mind whether an Appellant meets the terms of the Immigration Rules. It seems to me that in considering Section EX1 the judge was attempting to consider the Rules in terms of the public interest.
15. I note that the judge did take into account the fact that the Appellant had a precarious immigration history and was an asylum seeker [27]. The judge noted that the Home Office Presenting Officer placed little emphasis on Section 117B(4) which suggests that little weight should be given to a private life or a relationship formed with a qualifying partner established by a person at a time when the person is in the UK unlawfully. I note that the judge accepted that the Appellant has parental responsibility for his partner's children and that he looks after the youngest child. The judge took into account the interests of the children as a primary consideration. The judge took into account that the children are British citizens and found that they could not be expected to relocate to Vietnam. The judge took

into account the fact that the children go to school and that would be disrupted if they were to leave and that the judge took fully into account the children's best interests. Although the judge referred to EX1 I note that this is almost identical to Section 117B (6).

16. The judge concluded at paragraph 28:

"There are compelling reasons why this case outweighs other factors under Article 8 of the ECHR and there would be a disproportionate breach if the Appellant were to be removed which would not be in the interests of his partner or step-children."

17. Had the judge ended there then the erroneous emphasis on Section EX of Appendix FM would not have been made.

18. Mr Kotas submitted that Section 117B (6) is not free standing, however in my view the wording of Section 117B (6) is clear and is in the context of Section 117B(1) which says that the maintenance of effective immigration controls is in the public interest. There are then listed a number of factors which are in the public interest culminating in paragraph 6 which sets out what the public interest does *not* require. Whilst a relationship with a child is not a trump card it is a clear expression of the public interest in circumstances where there is a parental relationship with a qualifying child. That relationship was not in dispute in this case and the judge's findings in relation to reasonableness were not challenged.

19. In these circumstances, whilst I accept that the judge appeared to conflate the Immigration Rules and Article 8, on more detailed analysis I accept that the judge's consideration of the Appellant's family life was on the basis of freestanding Article 8. Whilst the decision should have been structured more clearly, preferably by following the steps set out in **R v SSHD ex parte Razgar [2004] UKHL 27**, I accept that the judge's decision is sufficiently clear and reasons are adequate to ensure that there is no material error of law in this case.

Notice of Decision

20. The judge made no material error of law. The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 4th January 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 4th January 2016

Deputy Upper Tribunal Judge Grimes