



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16321/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9 October 2018

Decision & Reasons Promulgated
On 16 November 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

LAI THI NGUYEN
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan, Counsel instructed by Morgan Hall, Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for an anonymity order in this case and I discharge the order that has been made.
2. This is an appeal against the decision of the Secretary of State on 23 June 2016 refusing the application of the appellant for leave to remain on human rights grounds. The appeal has been dealt with unsatisfactorily by the First-tier Tribunal and I set aside the decision of the First-tier Tribunal on 13 August 2018. I gave directions on that occasion intending that the case be fully prepared for today and I am sorry to record that little, if anything, has been done. The evidence before me is the evidence that was before the First-tier Tribunal

without the possible advantage of hearing from the appellant directly because she does not have sufficient command of English to give evidence and nobody has provided an interpreter.

3. Nevertheless, I have other evidence before me, particularly the evidence of the appellant's husband, who, although clearly speaking a second language, was able to understand the questions and give answers that we could understand if we were patient and I have documentary evidence.
4. If the appellant can satisfy me that she had been living with her partner for more than two years before the application was made, on this occasion that means cohabitation starting in 2 April 2012, then it is common ground the appellant would satisfy the requirements of the Rules. For the purposes of an Article 8 balancing exercise, that is a compelling, if not determinative, reason for allowing the appeal.
5. The evidence is not entirely satisfactory but it is there. Both the appellant and her partner said in their statements that they started to cohabit in October 2010. They did not give a date, but the appellant's partner before me remembered the date. He could not explain why he remembered it and I am doubtful that he could. I do not suggest that he is necessarily being dishonest; it may be that he is adding things to his recollection because that is the way the mind works sometimes, but I do not regard his evidence about the *precise* date the relationship started as being reliable in any way.
6. The evidence that the relationship started in October 2010 is a different matter. It has the advantage of consistency, not only in the witness statements, where it might be expected, but in the written application. It is not a particularly obvious date to choose for someone who is being dishonest.
7. The documentary evidence is unhelpful. There is no documentary evidence tending to put them together until 2013, but Mr Khan did point out that the photographs tend to show the appellant and her husband with her husband's children at different stages of their lives which might well support the idea of cohabitation starting as early as October 2010. It is a pity the Secretary of State in the refusal letter referred to there being no evidence about cohabitation beginning in 2010 because there is; there is the evidence of the appellant and the evidence of her partner. What they mean is no independent evidence but this is not really the point.
8. The appellant's evidence has been discredited. She was not believed in several respects by the First-tier Tribunal Judge and I bear that in mind.
9. No such adverse finding has been made about the partner's evidence. He was not criticised for being unreliable in any way and although I found a degree of unexplained exaggeration I note the consistency in his position.
10. Certain things are clear. There is a genuine relationship. The couple seem to be very much together. This was the finding before the First-tier Tribunal. It is evidenced by their being together today. Mr Duffy had no reason to investigate or challenge this point in cross-examination. I am satisfied that they are together.
11. It is also clear that this is not a case where there is going to be any burden on public funds. The appellant's husband who came to the United Kingdom as one of the "boat people", if I might be permitted this very convenient phrase, has been sufficiently industrious to buy

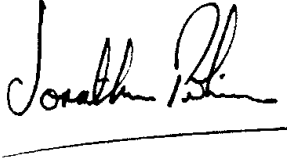
his own house and accumulate savings, I think somewhere in excess of £50,000. Many people would regard as entirely commendable.

12. I am not allowed the luxury of indecision and I am persuaded just about that the couple probably did start to live together in about October 2010 as they always said. There is no contrary evidence and there is no reason to discount the Appellant's partner's evidence.
13. It follows that means that I am satisfied they do satisfy the requirements of the Rules, and that, coupled with the fact that the relationship still seems to be entirely genuine and the couple are together is, I am persuaded, sufficient reason to allow the appeal on human rights grounds.
14. I do not do this confident that I have made the correct decision on the facts but I hope my decision is at least rational for the reasons given. I am satisfied that this is a genuine relationship which on Article 8 terms ought to be respected.
15. For those reasons, having set aside the decision on the last occasion, I allow the appeal now.

Decision

16. The First-tier Tribunal erred in law. I set aside its decision and I substitute a decision allowing the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 12 November 2018

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2018

Decision & Reasons Promulgated
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Before

UPPER TRIBUNAL JUDGE PERKINS

Between

LAI THI NGUYEN
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Manzur-e-Mawla, legal representative from Morgan Hall
Solicitors

For the Respondent: Miss A Fijiwala, Senior Home Office Presenting Officer

**REASONS FOR FINDING ERROR OF LAW AND
DIRECTIONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant. Breach of this order can be punished as a contempt of court. I will review the need for this order when I finally determine the appeal and invite representations on whether such an order is appropriate.
2. This is an appeal brought by permission of First-tier Tribunal Judge Doyle against the decision of the First-tier Tribunal dismissing on human rights grounds the appellant's appeal against the decision of the Secretary of State refusing him leave to remain on Article 8 grounds. The short point is that the decision is reasoned inadequately and I have no hesitation in finding that claim made out.
3. It is right to say that the Decision and Reasons is in some ways commendably brief. Certain points are made pithily but the decision breaks down because of a lack of express consideration of Part 5(A) of the Nationality, Immigration and Asylum Act 2002.

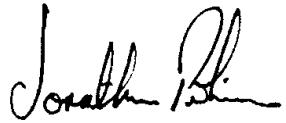
4. I consider in more detail the grounds of appeal to the Upper Tribunal.
5. The central issue in appeal is the proportionality of refusing the Appellant permission to stay. The grounds complain that the exercise was “skewed” (I wonder if “skewed” was the intended word) and gave by way of example the alleged failure to consider the appellant’s partner’s earnings and savings. There was also no regard for the appellant’s partner’s bank statements and this, it was said, led to an unsustainable conclusion on the proportionality of refusal.
6. At paragraph 6 of the decision and reasons the judge says: “It is not contested that the appellant meets the financial requirements under the Immigration Rules”.
7. The same paragraph noted that it was “not challenged” that there was a genuine relationship between the appellant and her partner. I have to read paragraph 6 as the finding that the appellant did not meet the financial requirements of the Immigration Rules. The difficulty is whilst that may be strictly right because of the way documents were produced with the application, there is evidence of substantial financial provision which does not seem to have been considered.
8. Ground 2 complained that the judge had referred to the appellant having made a “bogus” asylum claim. The word “bogus” is undesirable. It has clear connotations of a person making a wholly unsustainable claim that could not possibly succeed or one that should not succeed because it was entirely dishonest. Judges should not be reluctant to criticise people when the criticisms are justified but as the Decision and Reasons in the unsuccessful appeal was not available before the First-tier Tribunal Judge the judge should not have used the word “bogus”. The judge should have contented himself with saying that the application was unsuccessful and that the appeal was dismissed. More than that was speculation and as the word “bogus” has connotations which should be avoided unless the word is wholly justified. Further the judge used the delay caused by the “bogus” claim as a reason to say that delay did not matter and that was unsustainable.
9. The third ground says, again with some justification, that the judge said that further delay was caused by the appellant making applications that were unmeritorious and intended to delay. That cannot be justified or at least not for the reasons given.
10. Finally, ground 4 complains that delay is a relevant factor and should have been considered and given some weight and ground 5 complains that the Tribunal did not consider that the evidence of the appellant was slanted by her reliance on the Vietnamese interpreter.
11. I say immediately there is no point to be made there whatsoever. If it was suggested that the interpreter was incompetent then the point should have been clear and supported by evidence. Ground 5, like the use of the word “bogus” in the Decision, in my judgment would have been best left out.
12. Miss Fijiwala did what she could to draw attention to the positive aspects of the decision but it is clear to me that this decision is unsatisfactory. It does not delve into the issues that need to be resolved.
13. Although I had hoped to be able to deal with the matter without a further hearing I find myself in an impossible position. It appears from the face of the decision that the appellant accepted that she did not satisfy the requirements of the Rules. This is quite

plain from paragraph 7 where the judge stated: "It was conceded on the appellant's behalf that she did not satisfy the requirement to demonstrate that as at the date of the application, they had been living together for two years as man and wife, she did not meet the definition of 'partner' under the provisions of paragraph GEN 1.2."

14. In the light of other evidence and findings this makes no sense to me at all. The decision was made following an application made on 2 April 2014 (I think) but it was the evidence in the witness statement which seems to have been accepted that cohabitation began in about October 2010. The recorded concession was not challenged in the grounds and I can only conclude that I have just misunderstood something completely. Given the judge's clear finding that the claimant's partner cannot be expected to go and live back in Vietnam, an entirely sensible finding that I can understand and that has not been challenged, it is hard to see why the application should not have succeeded under the Rules but only if the relationship was then a qualifying relationship.
15. I must ask that the matter be heard again and I direct that it be heard again in the Upper Tribunal before me as soon as is reasonably practicable. Neither party has made any application to call any further evidence and I draw the parties' attention to the need to make an application if that is the course to take. It may be that the case can be dealt with by way of submissions and at the moment that is all that the Rules allow. It is a matter for the parties to ensure that the case is ready and it is next listed.
16. For the avoidance of doubt I set aside the decision of the First-tier Tribunal for error of law and I have given directions for the future conduct of this hearing.

DIRECTIONS

- 1 This appeal will be listed before me on the first available date after 14 days.
- 2 No later than 7 days before the day fixed for hearing the following must be served on the Tribunal and on the other party:
 - (i) Copies of any photograph, letters, reports or other copiable documents
 - (ii) Witness statements to stand as evidence-in-chief without the need for further evidence from any witness on which a party seeks to rely.
 - (iii) Details of any requests for interpreters.



Signed

Jonathan Perkins, Upper Tribunal Judge

Dated: 13 August 2018