



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01717/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 1 May 2018

Decision & Reasons Promulgated
On 9 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

DINH THUY CHU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Rashid (counsel) instructed by Verax, solicitors
For the Respondent: Ms R Petterson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Thorne promulgated on 1 August 2017, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 17 November 1981 and is a national of Vietnam. The appellant applied for leave to remain in the UK on article 8 ECHR grounds (both family and private life). On 14 March 2016 the Secretary of State refused the Appellant's application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Thorne ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 28 March 2018 Upper Tribunal Judge Gleeson gave permission to appeal stating

1. The appellant seeks permission to appeal against a decision of the First-tier Tribunal (Manchester hearing centre). The appellant is a citizen of Vietnam, who appealed to the First-tier Tribunal against the respondent's decision to refuse him leave to remain in the United Kingdom with his wife, a British citizen, on private and family life grounds under article 8 ECHR.

2. The First-tier Tribunal dismissed the appellant's appeal. The appellant challenges that decision on the basis that the First-tier Tribunal erred in law in treating his stay in the United Kingdom as precarious, applying Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803 at [43]. As both a house and a business owner in the United Kingdom, the appellant submits that there are circumstances of a special and compelling character for which he ought to have been given leave to remain. He considers that the Judge failed to apply paragraph 276ADE properly or at all to the facts of this appeal.

3. The grounds are arguable. Permission to appeal is granted.

The Hearing

5. (a) Mr Rashid, for the appellant, moved the grounds of appeal. He took me to [44] of the decision and told me that the Judge's findings of fact are contained there. He relied on paragraphs 44 and 53 of Rhuppiah v SSHD [2016] EWCA Civ 803. He told me that although the Judge made findings of fact which favour the appellant, the Judge failed to factor those findings of fact probably into his proportionality assessment, and that the Judge failed to follow the guidance given in Rhuppiah when he came to the conclusion, at [44(v)], that the appellant's immigration status was precarious.

(b) Mr Rashid told me that the Judge does not give adequate reasons to support his proportionality assessment. He told me that the appellant owns a house and a business and that between 2012 and 2015 the appellant had leave to remain in the UK as the spouse of a British citizen. He referred me to Onwuje [2018] EWCA Civ 331 and told me that the appellant enjoyed article 8 private life which the Judge not fully appreciate. He told me that the Judge's findings at [44] are not properly reasoned.

(c) Mr Rashid told me that the decision is inadequately reasoned and contains material errors of law. He urged me to set the decision aside.

6. (a) Ms Petterson, for the respondent, told me that the decision does not contain errors, material or otherwise. She told the Judge was fully aware that the appellant

had previously been granted leave to remain, and that the Judge made a clear finding that the appellants marriage is no longer subsisting. She told me that the Judge's findings are consistent with the guidance in Rhuppiah because the appellant did not have indefinite leave to remain at the time of application. The appellant was therefore not settled in the UK so that his immigration status must be precarious.

(b) Ms Petterson turned to the appellant's private life and told me that having a business & a home in the UK is not sufficient to create a compelling characteristic of private life. She told me that the Judge's focus at [44(iii)] was on section 117B of the 2002 Act, and reminded me that at [44(vii)] the Judge finds that the appellant's family are in Vietnam and that the appellant can realise his assets in the UK to help relocate to Vietnam.

(c) Ms Petterson told me that the Judge's proportionality assessment is more than adequate and that the Judge took all relevant factors into account before reaching a conclusion which was well within the range of reasonable conclusions available to the Judge. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. In Rhuppiah [2016] EWCA Civ 803 it was held that where Parliament had itself declared, such as in section 117B(1) - (3), that something was in the public interest, that was definitive. The words in section 117A(2) that regard must be had to the considerations listed in section 117B did not mean that courts had a discretion. However, having regard to such considerations did not mandate a particular outcome in a balancing exercise under Article 8 of the ECHR.

8. In Onwuje v SSHD [2018] EWCA Civ 331, the Court of Appeal looked at Article 8 of the European Convention on Human Rights in the context of a Tier 1 (Entrepreneur) Migrant and although the appeal was dismissed, the court confirmed that running a business may amount to private life for the purposes of Article 8 of the European Convention on Human Rights.

9. In Rhuppiah [2016] EWCA Civ 803 it was held that the concept of precariousness in immigration status in section 117B(5) was distinct from the concept of unlawful presence in the UK in subsection (4). Even if the two concepts could be said to overlap, subsection (5) would be redundant if they were the same. The concept of precariousness extended more widely, to include people who had leave to enter or remain which was qualified to a degree such that they knew from the outset that their permission to be in the UK could be described as precarious. The extension and re-extension of limited leave to remain did not mean that the person's status was not still precarious. In the context of section 117B, the relevance of precariousness of immigration status was the effect it had on the extent of protection which should be afforded to private life for the purposes of the Article 8 proportionality balancing exercise. The more that an immigrant should be taken to have understood that his or her time in the host country would be comparatively short or would be liable to termination, the more the host State was able to say that a fair balance between the rights of the individual and the general public interest in the firm and fair

enforcement of immigration controls should come down in favour of removal when the leave expired.

10. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave;

11. The appellant's application was an application for leave to remain as the spouse of a person present and settled in the UK. It is common ground that the appellant was granted leave to remain as the spouse from 7 March 2013 to 7 March 2015. The appellant's application for indefinite leave to remain as a spouse was submitted on 4 March 2015. The changes to appeal rights brought in by the 2014 came into effect on 6 April 2015. The transitional provisions preserved full of appeal for this appellant.

12. At 24 the Judge says

The only ground of appeal is human rights. However, I must also look at the human rights appeal through the prism of the immigration rules and do so below.

13. The Judge is wrong. The appellant has a valid appeal under the immigration rules. In any event, having resolved to consider article 8 ECHR grounds of appeal in the light of the immigration rules, the Judge does not do so.

14. The Judge says that he starts his findings at [23] of the decision, but does not. [24] to [31] is nothing more than guidance taken in law. There is nothing in those paragraphs which contains a finding of fact relevant to this appeal. Between [34] and [43] the Judge continues to seek guidance in law and does not make findings of fact. There is however one crucial finding of fact at [33], and that is that the appellant has established article 8 private life in the UK.

15. To an extent those errors may be academic because of the passage of time. The appellant's application was made on the basis that he continued to live with his wife. The respondent's decision was made on the basis that the appellant is no longer a party to a genuine and subsisting marriage, and the appellant used fraud to obtain an English-language certificate.

16. At [15] the Judge records that the appellant concedes that he and his wife have lived apart since 2013. The skeleton argument produced for the appellant makes it clear that the appellant hopes for reconciliation, but five years have now passed and reconciliation has not been achieved. At [33] the Judge finds that article 8 family life does not exist for this appellant. At [44 (iv)] the Judge finds that the appellant had not employed deception to obtain an English language certificate.

17. No submissions were made to me in relation to the immigration rules or to article 8 family life. The focus in this case has quite clearly shifted to private life. It is argued that the existence of a home and business in the UK are important elements of private life. The Judge finds that article 8 private life is established. The real problem

with the decision is that the proportionality assessment is carried out in a staccato style at [44] of the decision.

18. Hesham Ali (Iraq) v SSHD [2016] UKSC 60 recommends a balance sheet approach to article 8 assessment. At [44] there is every likelihood that the Judge had s.117B of the 2002 Act in mind, but he has restricted his assessment of proportionality to section 117B factors. The Judge has not addressed paragraph 276 ADE of the immigration rules.

19. The net effect is that the Judge's proportionality assessment is inadequate. The proportionality assessment is the central feature of this case, so that the error is clearly a material error of law. I set the decision aside. There is sufficient material before me to enable me to substitute my own decision.

My Findings of Fact

20. The appellant is a Vietnamese national. He entered the UK in 2009 as a student. He has leave to remain as a student until 31st of May 2012.

21. On 6 September 2011 the appellant applied for leave to remain in the UK as the spouse of a British citizen. The respondent refused that application on 24 October 2011. On 29 May 2012 the appellant applied for leave to remain in the UK as the spouse of a British citizen. That application was successful and he was granted leave to remain from 7 March 2013 to 7 March 2015.

22. On 4 March 2015 the appellant submitted an application for indefinite leave to remain on the basis of his marriage to a person present and settled in the UK. The respondent refused that application on 14 March 2016. It is against that decision that the appellant appeals.

23. The appellant and his wife have lived in separate households since 2013. The appellant still seeks reconciliation with his wife, but his efforts have been unsuccessful. The respondent invited the appellant's wife to attend marriage interviews on two separate occasions. The appellant's wife has not attended a marriage interview & has not cooperated with the application. In January 2015 the appellant passed the ESOL English language test. The appellant has taken and passed the life in the UK test.

24. The appellant owns the house in which he lives in the UK and owns and operates a business in the UK from which he earns more than £19,000 per annum.

The Immigration Rules

25. The appellant cannot meet the requirements of the immigration rules because he does not live with his wife. Because he does not live with his wife he cannot meet the requirements of paragraph 287(a)(ii) of the immigration rules. Even though the appellant demonstrates that he has a valid English-language certificate and has

passed the knowledge of life in the UK test, he cannot get past paragraph 287(a)(ii) of the rules.

26. Because of his age and the length of time that the appellant has lived in the UK the appellant cannot meet the requirements of paragraph 276 ADE of the immigration rules. It has never been argued that there are very significant obstacles to the appellant's reintegration to Vietnam.

Article 8 ECHR

27. The appellant has lived in the UK since 2009. The Judge found the private life is established. It is not disputed that the appellant owns his home in the UK, and that the appellant derives his income in the UK from his business. It is not disputed that the appellant earns more than £19,000 from his business. The private life in the appellant has established is made up of his home, his business, his income. No reliable evidence of the circle of friends or contribution to society is placed before me, but the appellant has been here since 2009 both as a student and as a businessman. Those aspects of private life are, at the very least, implied.

28. s.117B of the 2002Act says

Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) 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.

29. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

30. Immigration control is in the public interest. The effect of removal is that the appellant will be deprived of contact to his estranged wife. The appellant will have to sell his home. He will either sell or lose his business and he will lose his source of income. Against those negative aspects of removal, the appellant will be able to sell his home and his business, take the money realised back to Vietnam with him and use that money to re-establish himself.

31. In Onwuje v SSHD [2018] EWCA Civ 331, the Court of Appeal ultimately concluded that removal would not be disproportionate. It was, however, accepted that *"an entrepreneur's ownership of, and involvement in, his or her business may also be regarded as an aspect of their private life for the purpose of Article 8"*, as stated in Niemietz v Germany (1993) 16 EHRR 97.

32. What is argued for the appellant before me is one aspect of life. The appellant's home and his business are dominant aspects of his private life, but they do not automatically outweigh the public interest in immigration control. The appellant is a healthy 36-year-old who has demonstrated his ability to work hard to establish a business. He can take the fruits of his labours back to Vietnam with him, where his parents and siblings live. All the decision spells for this appellant is the upheaval of relocation.

33. On the facts as I find them to be, the upheaval of relocation does not amount to a disproportionate breach to the right to respect for private life. When the process of relocation is complete the appellant will have lost little, if anything. He will be able to realise his assets in the UK and take them with him to Vietnam.

34. The appellant cannot succeed on article 8 ECHR grounds because the decision is not a disproportionate interference with his private life. His separated from his wife, so that article 8 Family life is not established.

Decision

35. The decision of the First-tier Tribunal promulgated on 1 August 2017 is tainted by material errors of law and is set aside.

36. I substitute my own decision

37. The appeal is dismissed under the Immigration Rules

38. The appeal is dismissed on article 8 ECHR grounds.

Signed *Paul Doyle*
Deputy Upper Tribunal Judge Doyle

Date 8 May 2018