



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13309/2017

THE IMMIGRATION ACTS

Heard at Field House
on 26 October 2018

Decision & Reasons Promulgated
on 27 November 2018

Before

UPPER TRIBUNAL JUDGE BLUM
DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HGN
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

This is an appeal brought on behalf of the Secretary of State. For the first part of this decision, we refer to the Home Office/Secretary of State as 'the appellant', and the appellant at first instance as 'the respondent' to this appeal.

1. This is an appeal against the decision of Judge Juss of the First-tier Tribunal ('the judge'), promulgated on 22 February 2018, allowing the respondent's appeal

against the appellant's decision, dated 27 November 2018, that had refused his asylum, humanitarian protection and human rights claims.

2. In short, this onwards appeal advances on the following basis: namely, that the judge made a material error of law in his determination by allowing the respondent's appeal on Article 8 grounds (outside of the Immigration Rules) on the basis of the existence of exceptional circumstances.
3. The appellant maintains that this amounted to a material misdirection in law on rationality grounds because the judge failed to give adequate reasons for his findings, including failing to consider any adverse features, as part of the proportionality assessment, particularly given that the respondent was a failed asylum seeker. This the appellant maintains renders the decision both unfair and unsafe.
4. On 14 March 2018, Judge Grant of the First-tier Tribunal gave permission to appeal on the basis that it was arguable that the judge had given inadequate and misconceived reasons for his findings and had misapplied higher authority case law.
5. On 10 April 2018, Upper Tribunal Judge Dawson gave directions in relation to the listing of this matter, including a timetable for the service of evidence.
6. It is against the above background that this matter is listed before us today.

Background

7. The central facts in this matter are as follows: the respondent is a national of Vietnam, born in 1999. He maintains that he arrived in the UK clandestinely on 10 June 2015 '*to have a better life*' (Q1.19). He claimed asylum on 14 July 2015.
8. The judge at first instance made various findings of fact in his determination, including that the respondent claimed that his mother had left Vietnam in 2009 to work in Russia and that he had lost contact with her. On the respondent's account, he had lived with his grandmother in Vietnam until she passed away in 2014. He maintained that he did not have any other relatives in Vietnam. He arranged for a man to help him travel to Russia, so that he could look for his mother there. He initially found work, before meeting another individual who said he could arrange for an agent to get him to the United Kingdom. His purported fear was that upon return to Vietnam he would have to repay the people from whom he borrowed money to travel to Russia in the first place.
9. The respondent further maintained that he would be mistreated on account of his membership of a particular social group, namely that he was an orphan and a victim of modern slavery. His claim for humanitarian protection was based

upon a fear that if he returned he was at risk of unlawful killing, torture or inhuman and degrading treatment.

10. We remind ourselves that the judge's decision to dismiss the respondent's asylum and humanitarian protection claims are not before us today. His findings in that regard are categoric and are not disputed, and we can find no proper reason to interfere with them as a result. That element of the judge's decision must therefore stand.
11. Further, we concur with the judge's conclusion that because he found that the respondent had not established a well-founded fear of persecution, the judge was entitled to find on the facts of the instant case that the claim did not engage Article 3 of the Human Rights Convention. Again, that finding has not been subject to challenge before us, and we do not propose to reopen it. There are no proper grounds to do so.

This appeal and the law

12. The nub of the appeal revolves around Article 8 of the Human Rights Convention, and the respondent's right to a private life.
13. The appellant submits that the judge has not fairly considered the public interest considerations set out in section 117A and B of the Nationality, Immigration and Asylum Act 2002. In particular, it is suggested that the fluency or otherwise of the respondent's English is a moot point, and the financial independence of the respondent has not been considered at all. The presenting officer today submitted that that is relevant to the Article 8 proportionality assessment set out in *R (on the application of Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11.
14. We agree. The Supreme Court in *Agyarko* outlines the requirements for granting leave outside of the Immigration Rules where 'exceptional circumstances' apply, in order to ensure compatibility with the applicant's right under Article 8 of the European Convention on Human Rights. In our judgement, the judge at first instance in his decision failed to fairly balance the competing public and individual interests involved when applying the proportionality test in Article 8, in particular by failing to properly consider the factors in section 117B. Fairness means fair to both sides. The case of *Agyarko* involved family life, but the same considerations apply, namely that the tribunal should look at the policy considerations first when weighing the competing issues and striking a fair balance.
15. The public interest considerations set out at section 117B identify the matters the tribunal and /or court at first instance should take into account in all cases when considering Article 8.

117B 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.

16. *Agyarko* specifically cites *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544, which suggests “something very compelling which will be exceptional is required to outweigh the public interest in removal” (para 42). It is for that reason that appropriate weight should be given to the public interest considerations set out above.

17. That sentiment was repeated by the Supreme Court in *Agyarko*, which stated the critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it (paragraph 57).

18. It will only be in genuinely exceptional circumstances, having struck a fair balance between the competing public and individual interests involved, that refusing an individual leave to remain and then removing them from the UK would breach Article 8. Exceptional means circumstances in which refusal

would result in unjustifiably harsh consequences for the individual (see GEN 3.1 of Appendix FM), and such that refusal of the application would not be proportionate (see paragraphs 54 – 60 of *Agyarko*).

The judge's decision in the instant appeal

19. We are satisfied that the judge made a material error of law in his assessment of the appeal.
20. At paragraph 18 of his determination the judge suggests that the question is whether there are any exceptional circumstances for the grant of discretionary leave to remain and whether the position outside of the Immigration Rules would be the same as the reasons set out in the refusal letter. In answering this, the judge considers the facts. He states that the respondent arrived in the UK aged around 16. He had been in the UK for 3 years at the time of the hearing, and was at that time 19 years of age. The judge proceeds to consider whether or not the respondent could integrate into Vietnam and concludes that he could not, because (applying the broad evaluative judgement required '*whether [the respondent] had a reasonable opportunity of being accepted in Vietnam*'), he was recognised as an orphan, had no friends or relatives there, no one to help him find a job, and no evidence of a home there, making reintegration into Vietnamese society, a country that he left at the age of 14, by implication difficult.
21. In our considered opinion, it was incumbent on the judge to look first at the public interest considerations under Article 8 as part of the proportionality exercise and balance those when considering exceptional circumstances. In our finding, the judge failed to take properly into account a number of relevant factors and failed to direct himself to the relevant requirements in section 117B. In particular, we find that he failed to give proper consideration to the maintenance of effective immigration controls being in the public interest; that his assessment of the respondent's ability to speak English 'fluently', or at any level, was without proper evidential foundation; and the financial independence or otherwise of the respondent was not properly considered.
22. Viewed in the round, the judge's determination lacks sufficient reasoning and a balanced approach. A decision not rationally reasoned is a decision that the judge is not entitled to reach.
23. The judge's conclusion that the respondent's case is exceptional in the sense that a refusal would result in unjustifiably harsh consequences for the individual, such that the refusal of the application would not be proportionate, lacks the proper and fair balance required, see *Agyarko*.

24. We find the judge's explanation for why the consequences of removal would be unjustifiably harsh to be thin in all the circumstances and insufficiently supported by the evidence he identified. We make it clear that this is not just simply a case of the Upper Tribunal taking a different view on the facts: the judge has failed to properly consider the case law and the other evidence available.
25. We therefore set aside the decision in terms of the Article 8 human rights claim. It is therefore necessary for us to remake the decision.

Re-decided appeal

For the second part of this decision, we refer to the Home Office/Secretary of State as 'the respondent', and the appellant at first instance as 'the appellant'.

26. In order to redecide the Article 8 aspect of the case, and with the consent of the Home Office presenting officer, the appellant gave further evidence. He also produced, in contravention to the directions given by Judge Dawson, some documentary evidence from Bedford College relating to the qualifications he had obtained and a covering letter that vouched to his reliability and courtesy as a student. Again, the Home Office did not object to the admission of these documents and we were satisfied that it was in the interests of justice to admit them, bearing in mind the appellant was a litigant in person.
27. In evidence, the appellant told us that when his grandmother had died her home had passed to him. This was situated in a village called Thien Loc. He was unsure if the property still remained in his name. Part of the deal he struck to travel to Russia, he said, was to hand over the ownership papers ('the red book') for that property to the person arranging his passage.
28. We were satisfied that he had grown up in this village and that he had worked there for a while. We had reservations about the other parts of his account because the appellant had provided no depth to his evidence. In particular, the appellant had given no indication of the value of the bungalow he inherited, or what became of the furniture inside, of his personal possessions, and the like. Further, his initial account was that he had handed over the red book as surety for the loan. This did not necessarily mean that ownership of the bungalow had passed, and the appellant provided nothing to show that it had. The appellant did not appear to have taken any steps to investigate this, notwithstanding the fact that he made reference in interview to one of his neighbours having a telephone, and him having received money sent back from his mother on previous occasions, suggesting reliable means of communication. Bearing in mind such methods have improved in terms of social media and the World Wide Web over time, we were not persuaded that the appellant had taken proper steps to establish his case in this regard. Further, the tribunal found that

the appellant had failed to demonstrate that the people who he suggested he owed money to had any ongoing interest in him or any clear motivation for pursuing him.

29. The appellant confirmed that he went to school in Thien Loc, including a secondary high school (Nghi Hoa), where he studied maths, physics and chemistry. That is not disputed, and we found accordingly. He also confirmed that he had friends at that school. He said he had lost contact with them, but assumed they were still in the village. He confirmed that they were close friends of his and that he had played village football with them on the local team.
30. The appellant was also able to confirm that some of the villagers had helped him out after his grandmother's death. These were people who his grandmother and he had known all of his life, albeit he claimed he was not in contact with them at the moment. He said he had never tried to contact them. The tribunal found that the appellant had showed some resilience in being able to travel from Vietnam to apparently Moscow, where he had obtained a job in a sewing machinist factory cutting fabric, and then from Russia through a number of countries, before arriving in France, and then onto the UK.
31. The appellant had initially suggested in interview that he wished to be a hairdresser, but he had not pursued a qualification as a hairdresser in the UK, although his support worker had suggested that funding may be available at some point. He had not thought about being a translator or interpreter in Vietnam and stated he had never thought about returning to Vietnam or what his life might be like there. He said he had met friends in the UK and he saw them as his family. The appellant had met a girlfriend here; she was also Vietnamese and was applying for asylum. They did not live together, and had only been in a relationship for 8 months. He lived with 3 other Vietnamese and he received £57 per week. He had some classes during the week and played football with his friends. He had no health issues other than a small problem with his stomach, having eaten a lot of spicy food.

Article 8/private life and the Immigration Rules

32. Paragraph 276 ADE of the Immigration Rules identifies the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK. We bear in mind that the burden is on the appellant in this regard.
33. The appellant is 19 years of age and therefore an adult. He has not lived continuously in the UK for at least 20 years. He has not spent at least half of his life living continuously in the UK. The other considerations under paragraph 276 ADE (1)(i)-(iv) also do not have application.

34. We therefore considered whether there were any *very significant obstacles* in terms of the appellant's return to Vietnam and reintegration under paragraph 276(1) ADE(vi).
35. The tribunal found that the appellant had spent his formative years up to the age of 14 growing up in Vietnam. He had worked at a furniture shop close to his home between February 2014 and June 2014; and had had some work experience in Russia. He had had almost 3 years of education in the UK. Taken together, we found this gave him a number of appropriate life skills. The certificates that he produced showed that he had various entry level certificates for skills for life; including a pass in skills for life speaking and listening, and a functional skills qualification in mathematics. He also had a skills for life certificate for writing and reading, together with further entry-level awards. These were all to his credit. In our finding, they would serve him well upon his return to Vietnam, where his job prospects, for example with tourism, may be enhanced because of them.
36. When asked whether there would be any significant obstacles in his view to him returning, he said the biggest obstacle to it was that he had nowhere to go, no home, no family, and a relationship here and he felt he would lose contact with people.
37. We disagree. His relationships could be maintained through modern means of communication including the Internet. It was unclear whether he had retained his family home in Vietnam. It was apparent through his evidence that he still had school friends and social contacts in his village. His wish to continue his education here was not a factor that the tribunal could properly take into account. He told the tribunal he had only been romantically involved with his girlfriend for 8 months, and we find accordingly. His house mates appeared to be transient, and his temporary membership of a college could not amount to having established a private life.
38. In the tribunal's finding he could establish no right to remain. He was not here as a student, so Article 8 could not be established via that route. Nor did he have any family members in the UK. Article 8 under the Rules was simply not engaged because he had failed to demonstrate a significant private life in the UK.
39. In our finding, the Article 8 claim under the Rules (para 276 ADE) was not made out.

Article 8 – outside of the Immigration Rules

40. We went on to consider Article 8 outside of the Rules. In considering the proportionality factors set out in section 117B, the tribunal was not persuaded

about the extent of his proficiency in the English language, although we accepted that he had some English (his certificates in this regard were basic, and were not to GCSE level. Further, while the tribunal disregarded this as a factor, it is correct to observe that the appellant used an interpreter throughout the hearing).

41. There was no evidence of financial independence and the tribunal proceeded on the basis that at present he had no right to work.
42. While the tribunal was conscious that the appellant had been an orphan and maintained that he had no family in Vietnam, the tribunal had to balance this with the fact that he, in our finding, had been able to adapt to life in the UK relatively easily, where the same considerations could be said to apply.
43. When the appellant was asked why he could not return to Vietnam, the appellant struggled to give an answer, other than he had not been there for a long time and he had imagined himself progressing in the United Kingdom.
44. Maintaining the balance set out in *Agyarko*, we could not find, giving due weight to the strength of the public interest and striking a fair balance between the competing public and individual interests involved, anything disproportionate in his return to Vietnam. The appellant should be able to find a job, make friends, and pursue an active life at the age of 19, in a country where he spoke the language and was familiar with the culture. This was reinforced by his witness statement and his contact with the Vietnamese community in the UK. Vietnam has a functional health care and education system – see paragraph 127 of the decision letter, which there was no evidence to contradict. We further note that he may benefit from a resettlement package/voluntary return service, as set out in the decision letter.
45. As a result, we found that exceptional circumstances did not apply.

Notice of Decision

The First-tier Tribunal decision is confirmed in that the asylum, humanitarian protection and Article 3 decisions stand unchanged. They were not subject to this appeal.

The First-tier Tribunal's decision allowing the Article 8 appeal is set aside for material error of law. The following decision is substituted.

The Article 8 appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him 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.

Signed



Date 15 November 2018

Deputy Upper Tribunal Judge Sutherland Williams
Upper Tribunal Judge Blum