



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

Appeal Number: HU/16900/2019\_P

**THE IMMIGRATION ACTS**

Decided under Rule 34 without a hearing  
On 16 September 2020

**Decision & Reasons Promulgated**  
On 22 September 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Ms L N  
**(ANONYMITY ORDER MADE)**

Appellant

And

The Secretary of State for the Home Department

Respondent

**Anonymity**

**I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. No report of these proceedings shall directly or indirectly identify her. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. The parties at liberty to apply to discharge this order, with reasons.**

I make the anonymity order because the appellant gave evidence at the hearing before the First-tier Tribunal that she had been trafficked to the United Kingdom. This justifies an anonymity order notwithstanding that this appeal was not brought on protection grounds but only on human rights (Article 8) grounds.

This is a decision on the papers without a hearing. The appellant requested an oral hearing. The respondent had no objection to the decision being made on the papers. The documents described at para 4 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 6-21 below. The order made is set out at para 78 below. (*Administrative Instruction No. 2 from the Senior President of Tribunals*).

**Representation (by written submissions):**

For the appellant: Mr R O'Ryan, of Counsel, instructed by Prolegis Solicitors.

For the respondent: Mr C Bates, Senior Presenting Officer.

**DECISION**

1. The appellant, a national of Vietnam born on 20 January 1973, appeals against a decision of Judge of the First-tier Tribunal Nazir (hereafter the "Judge") who, in a decision promulgated on 11 January 2020 following a hearing on 11 December 2019, dismissed her appeal on human rights grounds (Article 8) against a decision of the respondent of 30 September 2019 to refuse her application of 17 June 2019 for leave to remain on human right grounds (Article 8) on the basis of her family life with her partner, Mr PB, a British citizen (hereafter the "sponsor").
2. Permission to appeal was granted by the First-tier Tribunal ("FtT") in a decision signed on 7 April 2020 and sent to the parties on 14 May 2020.
3. On 10 June 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge Kekić dated 9 June 2020. Para 1 of the "*Note and Directions*" stated that, in light of the need to take precautions against the spread of Covid-19, Judge Kekić had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (a) and (b) set out at para 1 of her "*Note & Directions*", reproduced at my para 5(i)(a) and (b) below, without a hearing. Judge Kekić gave the following directions:
  - (i) Para 2 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions in support of the assertion of an error of law and on the question whether the decision of the FtT should be set aside if error of law is found, no later than 14 days after the "*Note and Directions*" was sent to the parties; for any other party to file and serve submissions in response, no later than 21 days after the "*Note and Directions*" was sent to the parties; and, if such submissions in response were made, for the party who sought permission to file a reply no later than 28 days after the "*Note and Directions*" was sent to the parties.
  - (ii) Para 3 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and (b) may submit reasons for that view no later than 21 days after the "*Note and Directions*" was sent to the parties.
4. In response to the "*Note and Directions*", the Upper Tribunal has received the following:

(i) On the appellant's behalf, a document entitled: "*Further Submissions*" dated 24 June 2020 by Mr O'Ryan, submitted under cover of a letter dated 24 June 2020 from Prolegis Solicitors, the appellant's representatives and an email to the Upper Tribunal from Prolegis Solicitors dated 24 June 2020 timed at 16:02 hours.

(ii) On the respondent's behalf, a document entitled: "*SSHD's Skeleton Argument*" dated 29 June 2020 by Mr Bates, submitted under cover of an email to the Upper Tribunal dated 29 June 2020 timed at 08:33 hours.

(iii) The appellant's response to the respondent's skeleton argument in a document entitled: "*Appellant's Reply to Respondent's Submissions of 1.7.20*" dated 6 July 2020 by Mr O'Ryan, submitted under cover of a letter dated 6 July 2020 from Prolegis Solicitors and an email dated 6 July 2020 from Prolegis Solicitors timed at 17:10 hours.

### **The issues**

5. I have to decide the following issues (hereafter the "*Issues*"),
- (i) whether it is appropriate to decide the following questions without a hearing:
    - (a) whether the decision of the Judge involved the making of an error on a point of law; and
    - (b) if yes, whether the Judge's decision should be set aside.
  - (ii) If yes, whether the decision on the appellant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

### **Whether it is appropriate to proceed without a hearing**

6. In his skeleton argument, Mr Bates confirmed that the respondent had no objection to the Upper Tribunal deciding on the papers whether the Judge had erred in law.
7. At para 14 of his submissions dated 24 June 2020, Mr O'Ryan requested an oral hearing on the issue whether the decision of the Judge involved the making of an error of law. At paras 15-16, he quoted extracts from the dicta of the late Laws LJ and Keene LJ at paras 38 and 47, respectively, of Sengupta v Holmes [2002] EWCA Civ 1104 and dicta of Brennan J in a US decision, Goldberg v Kelly 397 US 254, 269 (1970) cited by Lord Bingham in Smith v Parole Board [2005] UKHL 1.
8. At para 17 of his submissions, Mr O'Ryan said that "*The appellant therefore requests an oral hearing of the appeal*". Mr O'Ryan did not engage with the facts or circumstances in the instant appeal in support of the request for an oral hearing.
9. I have considered the facts and circumstances of this appeal for myself in deciding whether it is appropriate for the Upper Tribunal to decide the Issues without a hearing.
10. I am aware of, and take into account, the force of the points made in the dicta of the late Laws LJ at para 38 of Sengupta v Holmes to the effect, inter alia, that "*oral argument is perhaps the most powerful force there is, in our legal process, to*

*promote a change of mind by a judge*"; Keene LJ at para 47 of Sengupta v Holmes concerning the impact that oral submissions may have on the decision-making process; paras 35 and 48 respectively of the judgments of Lord Bingham and of Lord Slynn in Smith v Parole Board; the dicta at para 17(3) of Wasif v SSHD [2016] EWCA Civ 82 concerning the power of oral argument; the dicta in the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done; and the dicta at para 8 of R (Siddiqui) v Lord Chancellor and others [2019] EWCA Civ 1040 to the effect that it is an "*undeniable fact that the oral hearing procedure lies at the heart of English civil procedure*", to mention just a few of the cases in which we have received guidance from judges in the higher courts concerning the importance of an oral hearing.

11. I am aware of and have applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61.
12. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence or considering any evidence at this stage.
13. In addition, I take into account the seriousness of the issues in the instant appeal for the appellant. The decision letter contends that she had used a false document in obtaining her entry clearance as a visitor. The instant case therefore relates to an important matter, as it goes to the appellant's character. Of itself, this is a matter of some seriousness, not to mention that a decision against her on this point may affect any future application by her, whether in-country or for entry clearance.
14. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.
15. Whilst I acknowledge that the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases.
16. Of course, it is impermissible, in my view, to proceed to decide a case without a hearing if that course of action would be unfair in the particular case. If it would be unfair to proceed to decide an appeal without a hearing, it would be unfair to do so even if there would be a lengthy delay in order to hold a hearing face-to-face or remotely or even if there is a consequent delay on other cases being heard. The need to be fair cannot be sacrificed.
17. There are cases that can fairly be decided without a hearing notwithstanding that the outcome of the decision may not be in favour of the party who is the appellant. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.
18. Taking a preliminary view at the initial stage of deciding whether it is appropriate and just to decide the Issues without a hearing, I considered the Judge's decision, the grounds and the submissions before me. I was of the view, taken provisionally at this stage, that there was nothing complicated at all in the assessment of the Issues in the instant case. I kept the matter under review throughout my deliberations.

19. No issues arose regarding the Issues during the course of my deliberations that I would have asked the parties to address if there had been a hearing, whether a face-to-face hearing or a remote hearing.
20. Accordingly, at the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis, that it was appropriate to decide the Issues without a hearing.
21. Having considered the matter with anxious scrutiny, taken into account the overriding objective and the guidance in the relevant cases including in particular Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

**Questions (a) and (b) - whether the Judge erred in law and whether her decision should be set aside**

22. The appellant's Article 8 claim was based, in part, on her relationship with the sponsor who she met in 2017 and, in part, on private life said to have been developed since her arrival in the United Kingdom on 22 November 2015 with entry clearance as a visitor valid from 14 October 2015 until 14 April 2016. Entry clearance was granted to the appellant on her application of 12 October 2015 for entry clearance as a visitor in order to travel to the United Kingdom for 3 days to attend a conference in London.
23. After making the application of 17 June 2019 for leave to remain that was the subject of the appeal before the Judge, the appellant disclosed to her solicitor that she had a fear of persecution if returned to Vietnam. She was advised to claim asylum, and did accordingly. She was interviewed about her asylum claim on 6 November 2019 (AB/133-145) and referred to the National Referral Mechanism on 6 November 2019 (AB/146-147).
24. In the appeal, the appellant gave evidence that she had been brought to the United Kingdom by "*the Mafia*" who exploited her and forced her to work. In early 2017, she escaped.
25. Shortly after her escape, the appellant created a profile on a dating website. About one week later, she began speaking to the sponsor. The couple met twice in early 2017. In March, they decided to move in together. They live together in York. At the date of the hearing before the Judge, the sponsor was 65 (nearly 66) years of age. In his witness statement dated 18 November 2019 (AB/17-19), he said, inter alia, that he has two adult daughters and also grandchildren in the United Kingdom. He has Wolff Parkinson White Syndrome. At para 5 of his witness statement dated 18 November 2019 (AB/18) and in oral evidence before the Judge (para 48 of the Judge's decision), he said that his medical condition is managed by medication. In his witness statement, he said that he struggles to cope with heat and that the climate in Vietnam would cause him great distress. At para 2 of his witness statement, he says he works 40 hours a week as a domiciliary carer. According to the documents at AB/104 and 107-108, he is also in receipt of income from two pensions, i.e. an annual (gross) pension income of £11,322.84 as at 16 March 2009

from Kelda Group and an annual (gross) pension income of £13,618.62 from Capita (AB/104).

The respondent's decision

26. As at the date of the respondent's decision (30 September 2019) on the appellant's application of 17 June 2019, there was no evidence before the respondent concerning the applicant's trafficking claim.
27. It is necessary to explain the issues considered by the respondent in her decision letter, which were as follows:

*In relation to the appellant's family life claim under the Immigration Rules:*

(i) The respondent considered that the appellant did not meet the suitability requirement in section S-LTR 4.2. The respondent considered that the appellant had submitted a false document with her entry clearance application of 12 October 2015. The respondent noted that entry clearance was initially granted under the visitor route but it was subsequently revoked in a decision letter dated 24 November 2015 because the respondent considered that the appellant had submitted a false letter of employment in support of her 2015 entry clearance application.

(ii) The respondent considered that the appellant did not meet all of the eligibility immigration status requirements in para E-LTRP.2.1 to 2.2. because she had entered the United Kingdom on 22 November 2015 with entry clearance granted under the visitor route valid until 14 April 2016 but the entry clearance was revoked and because the appellant had not been granted any further form of leave to remain since her entry.

(iii) The respondent considered that para EX.1 of Appendix FM did not apply because there were no insurmountable obstacles to family life continuing between the appellant and her partner, the sponsor, outside the United Kingdom.

*In relation to the appellant's private life claim under the Immigration Rules:*

(iv) The respondent considered that the applicant's application fell to be refused on the grounds of suitability by reference to section S-LTR under para 276ADE1(i) of the Immigration Rules.

(v) The respondent considered that the appellant could not meet the eligibility requirements in paras 276ADE(1)(iii), (iv) and (v) given her age and length of residence in the United Kingdom. She could not meet the requirements of para 276ADE(1)(vi) because the respondent did not accept that there were very significant obstacles to her reintegration in Vietnam.

*In relation to the appellant's Article 8 claim outside the Immigration Rules:*

(vi) The respondent considered that there were no exceptional circumstances in the appellant's case that would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences.

### The Judge's decision

28. At the hearing before the Judge, the appellant was represented by Ms Cleghorn, of Counsel, instructed by Bankfield Solicitors, the appellant's then representatives. The respondent was represented by Mr Stainthorpe.
29. It is necessary in this case to quote from significant parts of the Judge's decision, given the grounds and my assessment below.
30. The Judge summarised the appellant's evidence at the hearing at paras 3-8, the submissions advanced on the appellant's behalf at paras 9-12 and on the respondent's behalf at paras 13-20. These paragraphs, together with the preceding para 2, read:

#### "The Appellant's case

2. The Appellant's case, as it was presented at the hearing of the appeal, may be conveniently summarised as follows.
3. The Appellant was born and raised in Vietnam. The Appellant was brought to the UK by the Mafia, who exploited her and forced her to work. She was made to work on what the Appellant describes as a farm, and she lived in the basement of a warehouse. In early 2017, the Appellant managed to escape.
4. The Appellant escaped and ran away. She did not know where she was, but simply tried to escape. Shortly after this, the Appellant registered a profile on dating website and around one week later, began speaking to [the sponsor], her partner.
5. The couple met twice in early 2017, and in March of the same year decided to move in together. The couple continue to reside together in York.
6. The couple have a strong and subsisting relationship and the Appellant made an application for leave to remain in the UK on that basis.
7. It would not be possible for the Appellant and her partner to continue their relationship in Vietnam. The Appellant's partner works as a carer in the UK, and also suffers from health problems that would make it very difficult for him to live in Vietnam. It would also take him away from his family, to whom he is very close.
8. Following the refusal of the human rights application, the Appellant disclosed to her solicitor that she had a fear of persecution if returned to Vietnam. The Appellant was advised to claim asylum, and did accordingly. The Appellant says that she did not provide details of the Mafia or of her fear of return previously as she was scared.
9. In submissions, Ms Cleghorn, argued that the actions of the Appellant should be viewed from the perspective of an individual that has suffered trauma as a result of her experience of being trafficked to the UK. The fact that the Appellant did not disclose details about the mafia earlier is indicative of someone that has been through a traumatic experience.
10. With regards to the relationship between the Appellant and her partner, Ms Cleghorn argues that they have both provided open and candid evidence about how they met. She asks that I find their evidence credible. She

referred me to the evidence in the bundle to demonstrate that the couple are cohabiting and have an ongoing relationship.

11. Ms Cleghorn argued that there are insurmountable obstacles that would prevent this relationship from continuing in Vietnam. The Appellant's partner is 65, and is a father figure to his grandchildren. Relocating to Vietnam would take him away from his family. Furthermore, he would struggle to cope in Vietnam because of his health problems.
12. Ms Cleghorn asks that I allow the appeal.

#### The Respondent's Case

13. The Respondent's case, can be conveniently summarised as a follows.
14. It is accepted that the Appellant is a citizen of Vietnam. It is also accepted that the Appellant has a relationship with her partner, [the sponsor].
15. However, the Appellant does not meet the Suitability requirements of the Immigration Rules, on the basis that she used false documents as part of her entry clearance application in 2015.
16. It is also argued that the Appellant does not meet the Immigration Status requirement of the Rules, as the Appellant has not had any leave in the UK since her entry clearance was revoked.
17. In submissions, Mr Stainthorpe, relied on the reasons for refusal letter. He argued that the Appellant's claims to have been trafficked to the UK are not credible.
18. With regards to the relationship, he argues that although there is likely to be some disruption to the relationship, the Appellant has failed to establish that there are insurmountable obstacles that would prevent their relationship from continuing outside the UK.
19. The Respondent also argues that the Appellant's case does not give rise to any exceptional circumstances.
20. Mr Stainthorpe asks that I dismiss the appeal."

31. The Judge then directed himself concerning the applicable legal framework at paras 21-23, saying at para 23 as follows:

"23. The burden of proving the primary facts is upon the Appellant and the standard is on the balance of probabilities. The Tribunal may have regard to any matter, including one arising after the decision, if it is relevant to the substance of the appealed decision (section 85(4))."

32. At para 27, the Judge said that he wished to emphasise that he had considered all of the evidence in arriving at his conclusions.

33. At paras 28-30, the Judge said as follows:

#### "Preliminary Issue

28. Upon my reading of the papers, I noted that the Appellant has now made a claim for asylum whilst the present appeal has been ongoing. There has also been a referral under the National Referral Mechanism to investigate whether the Appellant has been a victim of trafficking.
29. With that in mind, I raised this point with the representatives during initial discussions and the potential impact of my findings in this case. I provided



Ms Cleghorn an opportunity to discuss the matter with the Appellant and those instructing her. On return, Ms Cleghorn confirmed that her instructions were that the Appellant wished to proceed with this appeal.

30. I therefore confirmed that the appeal would proceed, but reminded Ms Cleghorn that she could advance arguments in relation to her human rights claim and not in relation to a protection claim."
34. At para 31, the Judge said that accepted that the appellant and the sponsor had co-habited for more than 2 years and were in a relationship together. At para 32, he said that he found the sponsor to be "*a truthful and reliable witness who had no apparent motive to mislead me*". However, he said that he did not find the appellant to be a truthful and reliable witness "*for the reasons set out below*". The Judge then proceeded to give his reasons at paras 33-38, concluding at para 39 as follows:
  - "39. In summary, I find that the Appellant has provided an inconsistent and incredible account. I do not accept that the Appellant is a witness of truth. To the contrary, it is clear to me that the Appellant has deliberately withheld information and has provided a fabricated account of her circumstances since arrival in the UK, and this has not stood up to scrutiny when subjected to questioning."
35. In giving his reasons at paras 33-38, it is clear that the Judge engaged with the evidence that the appellant had given that she had been trafficked to the United Kingdom, in particular, her evidence that she had escaped from "*the Mafia*" and her evidence of the events that followed. For example:
  - "34. ... I do not find it credible that, if the Appellant was held against her will and forced to work as she claims, that the same people would have given the Appellant her passport and documents or given her such easy access to them."
  35. ... despite being asked a number of times, the Appellant was unable to provide even the most basic detail in relation to the names of towns or areas through which she travelled after her escape. The Appellant's explanation is that she did not understand English. That may have been an acceptable explanation, had it not been the case that following her escape, the Appellant managed to purchase a smart phone and register herself on a dating website, through which she later met her partner.
  37. ... The Appellant claims that the mafia have made serious threats against her and her family, including threats against her son. However, despite the serious nature of the threats, the Appellant admitted in her evidence that she has not disclosed these to her family. One would expect that if the Appellant had received such threats against her family, she would have at least made them aware so that they could take appropriate precautions or take measures to protect themselves."
36. In relation to the appellant's Article 8 claim outside the Immigration Rules, the Judge set out at para 40 of his decision the step-by-step approach explained at para 17 of Razgar [2004] UKHL 27. He then said, at para 41, that he was satisfied that the relationship between the appellant and the sponsor amounted to family life; at para 42, that the respondent's decision was taken in accordance with the Immigration Rules and was thus in accordance with the law; and at para 43, that the respondent's decision was also taken in pursuance of the legitimate aim of maintaining the economic wellbeing of the country through the consistent application of immigration

controls. The Judge then considered proportionality at paras 44-48, concluding, at para 49, that the respondent's decision was proportionate. He gave his reasons at paras 44-48 which read:

- "44. The remaining question is whether the decision to refuse is proportionate to that end. Having taken into account all of the circumstances of the case, as presented at the hearing and in the documents, I find that the Respondent's decision is proportionate, for the following reasons.
45. The Appellant does not meet the Rules, as discussed above, and this must be a weighty factor in considering proportionality. There is a clear public interest in the Rules being applied consistently for the maintenance of effective immigration control.
46. Although the Appellant and her partner are in a relationship, I am mindful that this was formed and developed whilst the Appellant had been resident in the UK unlawfully. In accordance with section 117B (4), I attach little weight to the relationship as a result.
47. I also note that whilst the Appellant has a partner in the UK, she also has close and significant family members in Vietnam, including of course her young son
48. I accept the evidence that [the sponsor] has children and grandchildren in the UK and also suffers from health problems. I accept that he would experience some difficulty in relocating to Vietnam if he chose to do so, but I do not accept that this would amount to insurmountable obstacles or result in unjustifiably harsh consequences. [The sponsor] has a significant pension income, upon which he could rely should he choose to relocate or travel between the UK and Vietnam. Although he has medical conditions, he confirmed in evidence before me that those were managed by medication."

### The grounds

37. Following the dismissal of her appeal, the appellant changed her representatives. Her application for permission to appeal was lodged by Prolegis Solicitors and her grounds of appeal to the Upper Tribunal were settled by Mr O'Ryan.
38. There are four grounds set out in the appellant's application for permission to appeal which are set out under headings which I did not find entirely helpful, especially with regard to the heading for ground 1. I have instead focused on the submissions advanced under each heading which I summarise as follows:
  - (i) Ground 1: It is not clear what issues the Judge considered he had before him for determination. The Judge's purported adverse findings at paras 33-39 were a nullity because the appellant's protection claim constituted a "*new matter*" in respect of which the respondent's consent had not been obtained as was required pursuant to s.85(6) of the Nationality, Immigration and Asylum Act 2002. Furthermore, it was not entirely clear what relevance the Judge's adverse findings at paras 33-39 had in relation to his determination of the appeal. Nevertheless, the reader cannot be assured that the Judge's negative credibility findings did not have a negative bearing on the Judge's overall proportionality balancing exercise.

(ii) Ground 2: It was unclear on what basis the Judge was able to say at para 45 that "*the appellant does not meet the rules, as discussed above, ...*". The Judge failed to give any reasons at all for finding that the appellant did not meet the Immigration Rules. The Judge failed to make a finding on whether the appellant had used a false document and therefore did not satisfy the suitability requirements of the Immigration Rules, although he said, at para 45, that "*the appellant does not meet the rules, as discussed above*". In the alternative, if the Judge simply adopted, without the more, the respondent's position, then the Judge erred as follows:

(a) He failed to give any or any adequate reasons for accepting the respondent's position that the appellant had used a false document.

(b) He failed to note that the Immigration Rules in Appendix FM set out three categories of wrongdoing which were of decreasing seriousness, with different consequences ranging from mandatory refusal to refusal being the normal course to the possibility that an application "*may*" be refused.

(c) In that regard, he was obliged to consider the exercise of discretion but he failed to do so.

(d) He failed to consider the appellant's evidence that, if false documents were submitted, this had been done by "*the Mafia*".

(iii) Ground 3: The Judge failed to take into account a material consideration in the proportionality balancing exercise, i.e. that the appellant's then representatives (Bankfield Heath Solicitors) had asserted in their letter dated 18 June 2019 accompanying her application for leave to remain that the sponsor was able to financially support the appellant, having an annual income over £18,600 and that it would not be proportionate to require the appellant to leave the United Kingdom in order to make an entry clearance application. The grounds draw attention to the fact that financial evidence was provided by the appellant at pages 101-107 of her bundle. The Judge failed to consider Chikwamba v SSHD [2008] UKHL 40 and SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054.

(iv) Ground 4: The Judge gave inadequate reasons for his finding that there were no insurmountable obstacles to family life between the appellant and the sponsor being enjoyed in Vietnam.

39. In relation to ground 4, the permission judge said that it was also arguable, in light of the judgment in Lal v SSHD [2019] EWCA Civ 1925 (the citation for which was helpfully provided by Mr O'Ryan in his submissions dated 24 June 2020), that the Judge failed to give adequate reasons for the finding that the appellant's British citizen partner could relocate with her to Vietnam.

### Submissions

40. I shall deal with the submissions of Mr O'Ryan and Mr Bates in my assessment below, to the extent that I consider it necessary to do so.

## Assessment

41. Before turning to ground 1, it is relevant for me to say that appeals brought in relation to Article 8 of the ECHR do, on occasion, raise issues which ought to be subject of a protection claim but which the individual nevertheless decides to pursue in the context of Article 8 instead of pursuing an asylum claim or in addition to pursuing an asylum claim. There is nothing to prevent appellants from relying upon matters that ought to be the subject of a protection claim in support of their Article 8 claim in an appeal, albeit that it would be prudent for them to bear in mind that the standard of proof in relation to Article 8 is the balance of probabilities.
42. It is now appropriate to look at paras 1-6 of the appellant's witness statement dated 18 November 2019 (AB/13-15) which read:
- "1. I ... make this statement in support of my appeal against the decision of the Secretary of State for the Home Department to refuse my application for leave to remain as the partner of [the sponsor].
  2. I have recently claimed asylum in the UK because I am scared to return to Vietnam. I have been scared to return to Vietnam since I escaped from the Vietnamese Mafia here in the UK but I did not tell the Home Office about this before because I was scared to say anything. The Mafia gang constantly told me bad things about the police in this country. If I go back to Vietnam then I am scared that the Mafia who forced me to come to this country will kill me because I escaped from them and have not paid off the debt.
  3. I had a meeting with my solicitor on 21 October 2019. At the appointment I told my solicitor why I was scared to go back to Vietnam. My solicitor told me that I should claim asylum. My solicitor helped me to call the Home Office on the same day to tell them I wanted to claim asylum.
  4. As I explained to the Home Office when I went to Croydon to claim asylum, I was forced to come to the UK because I borrowed money from people in Vietnam which I could not pay back. When I arrived in the UK I was taken to a place and forced to grow plants. I was forced to do this for over a year before I managed to escape.
  5. I understand that this appeal however is not about my asylum claim. I understand that this appeal will deal with whether I should be granted leave to remain as [the sponsor's] partner.
  6. One of the reasons the Home Office has refused my application is that they say that I submitted false documents when I applied for my visa a few years ago. I want to say that I had nothing to do with that visa application. I did not prepare it. I just did what the Mafia people told me to do. The application was prepared by the Mafia people who brought me to the UK. If any false documents were submitted then I am sorry but it was the Mafia who did this."
43. It is therefore clear from the appellant's witness statement, in particular para 6, that her trafficking claim was relevant to her explanation concerning the employment letter she had submitted in support of her entry clearance application. The appellant's explanation, which was linked to her trafficking claim, was therefore plainly an issue that had to be considered by the Judge.
44. Ground 1 assumes that the Judge considered the appellant's evidence that she had been trafficked as a *protection claim*. It may well be that this is a misconception that

is attributable to the fact that Mr O'Ryan did not appear before the Judge and Prolegis Solicitors were not acting for the appellant at the date of the hearing.

45. I reject the submission that the Judge's assessment at paras 33-39 concerned his assessment of her protection claim, for the reasons given below. It is clear, in my judgment, that he considered it as part of her Article 8 claim, for the reasons given below. For the same reasons, I reject the submission at para 22 of the grounds (in relation to ground 2) that the Judge failed to consider the appellant's explanation for the submission of a false employment letter in her 2015 entry clearance application. My reasons are as follows:

(i) The Judge had before him the appellant's witness statement, paras 1-6 of which made it clear she understood that her protection claim was separate from her Article 8 claim and that she understood that the hearing before the Judge concerned her Article 8 claim only. She then advanced an explanation to address the fact that her application for leave to remain had been refused on suitability grounds.

(ii) It is clear from paras 28-30 of the Judge's decision that there was some discussion about the fact that the appellant had made an asylum claim. It is clear from para 30 that the Judge made it clear to Ms Cleghorn that she could advance arguments in relation to the appellant's human rights claim but in relation to a protection claim.

(iii) This was plainly the correct approach because the appellant's grounds of appeal to the FtT did not include any protection ground. This is because sections d.1 and d.2 of the appellant's form IAFT-5 were left blank. Only section d.3 of the form was completed and this referred only to Article 8, and not to any protection claim. There was no application before the Judge for the grounds of appeal to be amended so as to include any asylum or humanitarian protection ground.

(iv) At para 1 of his decision, the Judge set the scope of the appeal as an appeal that concerns the appellant's right to respect for her private and family life under Article 8.

(v) At para 17 of his decision, the Judge referred to Mr Stainthorpe's submission on the respondent's behalf that the appellant's claims to have been trafficked to the UK are not credible.

(vi) At para 4 of his submissions dated 6 July 2020, Mr O'Ryan said that the appellant does not object to the Upper Tribunal admitting Mr Stainthorpe's post-hearing minute into evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. At para 5 of his skeleton argument, Mr Bates quotes from Mr Stainthorpe's post-minute record which states:

"I did maintain suitability, on apps account fraud was used in her visa application (although she says this was the mafia trafficking her), I asked for suitability to be considered in the context of her (untruthful) evidence today."

(vii) At para 50 of his decision, the Judge dismissed the appeal on human rights grounds. There is no mention of any decision on asylum grounds or humanitarian protection grounds.

(viii) The Judge's self-direction on the law at paras 21-23 and 40 only relates to Article 8.

(ix) At para 15, the Judge recorded the submissions of Mr Stainthorpe that the appellant does not meet the suitability requirement of the Immigration Rules on the basis that she had used false documents as part of her entry clearance in 2015.

(x) At para 45, the Judge said: "*The appellant does not meet the Rules, as discussed above, ...*"

(xi) Taking all of the above into account, I have concluded that, on any legitimate view, para 45 of the Judge's decision could *only* relate to his assessment at paras 33-39 and that his assessment at paras 33-39 could *only* be in relation to the appellant's explanation for the submission of the employment letter with her entry clearance application. He found her evidence that she had been trafficked to be lacking in credibility and therefore found, implicitly, that her explanation for the submission of the employment letter to be lacking in credibility.

46. I accept that the Judge did not state *in terms* that the reason why he considered the appellant's credibility in relation to her evidence that she had been trafficked was because he had to assess her explanation for the submission of the false employment letter with her entry clearance application. It would have been preferable if he had done so. Nevertheless, it is implicit, on any legitimate view, that that is the reason why he did so, for the reasons given above.
47. I therefore reject para 22 of the grounds (advanced in relation to ground 2) that the Judge failed to consider the appellant's explanation. He did consider it. He rejected her explanation.
48. Ground 1 correctly states that there was a "*new matter*" before the Judge but not for the reason advanced in ground 1. As I have explained above, the Judge did not decide the appellant's protection claim. However, the appellant's evidence that she had been trafficked which she advanced as the background to her explanation that it was "*the Mafia*" who had submitted the employment letter if it was a false document did constitute a "*new matter*" in respect of which the respondent's consent was required.
49. In this regard, Mr Bates quotes the following from the post-hearing minute of Mr Stainthorpe:
- "I had asylum and trafficking claim dumped on me yet rep (who sought advice during a 5 min break) and maintained her instructions were to proceed despite IJ and myself saying that we would have to deal with protection today as it is advanced as an obstacle to return. I said that I would basically have to take a view on the claim (in the absence of any detailed WS) during cross which was not great. IJ was amenable throughout to all, rep accepted shared issues between art 8 and protection."
50. As I have said above, Mr O'Ryan confirmed that the appellant does not object to the Upper Tribunal's admission of Mr Stainthorpe's post-hearing minute. It is clear from paras 3-8 of the Judge's decision that, when the hearing proceeded, the appellant gave evidence about her trafficking claim, that Ms Cleghorn made submissions in relation to her evidence (para 9 of the Judge's decision) and that Mr Stainthorpe also did (para 17 of the Judge's decision).

51. Para 6(ii) of Mr O'Ryan's submissions dated 6 July 2020 states that Mr Stainthorpe's post-hearing minute, quoted at my para 49 above, "*potentially*" represents the granting of consent. Given what I have said at paras 49-50 above, I am satisfied that Mr Stainthorpe did, in effect, consent on the respondent's behalf to the Judge considering the appellant's evidence that it was "*the Mafia*" that was responsible for submitting the employment letter and therefore the appellant's evidence that she had been trafficked. There is therefore no issue as to lack of jurisdiction.
52. I therefore reject ground 1.
53. Before turning to ground 2, I should mention that the appellant has not produced any evidence from either Prolegis Solicitors or Ms Cleghorn to support any of the submissions in the grounds of appeal or to counter the respondent's evidence of the post-hearing minutes of Mr Stainthorpe.
54. My assessment above in relation to ground 1 also decides the following submissions in ground 2:
  - (i) that it is unclear on what basis the Judge was able to say at para 45 that "*the appellant does not meet the rules, as discussed above, ...*".
  - (ii) that the Judge failed to make a finding on whether the appellant had used a false document and therefore did not satisfy the suitability requirements of the Immigration Rules; and
  - (iii) that, in the alternative, the Judge simply adopted, without the more, the respondent's position.
55. Contrary to ground 2, it is clear that the basis upon which the Judge concluded that the appellant did not meet the Immigration Rules is that he found, implicitly, that she did not meet the suitability requirement. This was because he rejected her evidence that she had been trafficked and therefore implicitly rejected her explanation that it was "*the Mafia*" that had submitted the employment letter. It is not the case that the Judge accepted, without more, the respondent's position. He considered the credibility of the appellant's explanation.
56. The remainder of ground 2 concerns the exercise of discretion under the Immigration Rules. As ground 2 correctly states, the Immigration Rules provide for three categories of wrongdoing which were of decreasing seriousness, with different consequences ranging from mandatory refusal to refusal being the normal course to the possibility that an application "*may*" be refused.
57. However, I do not accept that the Judge erred by failing to consider the exercise of discretion. In my judgment, the submission that the Judge was obliged to consider the exercise of discretion is misconceived, for the following reasons:
  - (i) This part of ground 2 reads as if the appellant had a right of appeal against the respondent's decision under the Immigration Rules on the ground that the decision was not in accordance with the Immigration Rules, which is not the case.
  - (ii) Prior to the abolition of the right of appeal against a decision made under the Immigration Rules on the ground that the decision was not in accordance with the Immigration Rules, it was an established principle that a judge who

decides an appeal brought on the ground that the decision is not in accordance with the Immigration Rules was obliged to consider for himself the exercise of any discretion conferred on the Secretary of State under the Immigration Rules.

(iii) However, there is no longer a right of appeal against a decision made under the Immigration Rules on the ground that the decision is not in accordance with the Immigration Rules. It is therefore not open to a Judge to consider the exercise of discretion for himself, in my judgment.

(iv) The appellant's right of appeal was against the decision to refuse her Article 8 claim outside the Immigration Rules. Accordingly, all that was required of the Judge was a legally adequate assessment of the relevant circumstances and proportionality. The Judge gave his reasons for concluding that the decision was proportionate, at paras 45-48. He found that the appellant did not meet the requirements of the Immigration Rules, at para 45. I have said above that this related to his implicit finding that the appellant did not meet the suitability requirements under the Immigration Rules. He took into account the other relevant factors. In relation to para 13 of Mr O'Ryan's submissions dated 6 July 2020, the Judge was plainly aware that since the appellant's entry clearance application, she had entered into a relationship which he accepted was genuine. In these circumstances and taking into account my reasons for rejecting grounds 3 and 4 (see below), which concern proportionality, I am satisfied that the Judge's assessment of the appellant's circumstances and proportionality was legally adequate.

58. Accordingly, ground 2 is not established.
59. Ground 3 relates to the Chikwamba principle. Para 6 of Mr O'Ryan's submissions dated 24 June 2020 states that the appellant had submitted through her then solicitors (Bankfield Heath Solicitors) "*a full six months' worth of financial evidence, in compliance with Appendix FM-SE*" with her application for leave to remain. I reject the submission in para 7 of Mr O'Ryan's submissions that, given that the respondent had not taken issue with the reliability of the evidence submitted on the appellant's behalf, "*the appellant was entitled to proceed on the basis that that documentation was accepted as reliable by the respondent*". The fact is that silence does not equate to a concession on the part of the respondent.
60. In any event, even if the evidence as to the sponsor's income did meet the minimum threshold income of £18,600 and even if the requirements of Appendix FM-SE were satisfied, ground 3 is wholly lacking in substance. Mr Bates correctly draws attention, at para 7 of his skeleton argument, that the appellant said in evidence before the Judge that the reason why she was unable to provide even the most detail in relation to the names of towns or areas through which she travelled after her alleged escape from "*the Mafia*" in early 2017 was that she did not understand English. In any event, the appellant's bundle before the Judge did not include any evidence to establish that the appellant satisfied the English language requirement. Accordingly, it simply cannot be said that, on the evidence before the Judge, an application by the appellant for entry clearance as the sponsor's partner would be successful. The Chikwamba principle was therefore simply not relevant.
61. I therefore reject ground 3.



62. In relation to ground 4, I have to consider the following:
- (i) The submission in ground 4 that the Judge gave inadequate reasons for his finding that there were no insurmountable obstacles to family life between the appellant and the sponsor being enjoyed in Vietnam.
  - (ii) The issue raised by the permission judge who said that it was also arguable, in light of the judgment in Lal, that the Judge failed to give adequate reasons for the finding that the appellant's British citizen partner could relocate with her to Vietnam.
63. Mr O'Ryan made submissions in relation to Lal at paras 10-11 of his submissions dated 24 June 2020.
64. I have carefully considered the judgment of the Court of Appeal in Lal and have concluded that it does not assist the appellant, for the following reasons:
- (i) At para 37 of Lal, the Court of Appeal said:

"We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable – in either of the ways contemplated by paragraph EX.2. – just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. **The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together.**"

(My emphasis)
  - (ii) The evidence of Mr Wilmshurst, the husband of the appellant in Lal, who was in his 70s and retired, that *"there was no way that he would be able to live in India as he could not put up with the heat"* was supported by the witness statements of two of his children who said that their father could not stand hot weather and had never been able to go on holiday in hot climates. Furthermore, when cross-examined on this point at the hearing before the First-tier Tribunal judge, Mr Wilmshurst explained how he had refused a good and very well-paid job in Majorca because he would be unable to live with the heat (para 20 of Lal).
  - (iii) In contrast, there was simply no evidence before the Judge in the instant case other than the sponsor's own evidence in his witness statement that because he has Wolff Parkinson White Syndrome and the medication that takes, *"I will struggle to cope with the heat, and the climate in Vietnam would cause me great distress"*.
  - (iv) However, it is clear from the judgment in Lal that, the sponsor's subjective perception of the difficulties that he would face in Vietnam is simply not enough.
65. At para 11 of his submissions dated 24 June 2020, Mr O'Ryan also raised the fact that the sponsor gave evidence that the medication that he takes for his heart condition may not be available to him in Vietnam. This does not assist the appellant either, given that the appellant had not submitted any background material to

establish that the medication that the sponsor takes for his heart condition is not available in Vietnam.

66. I turn now to ground 4 as pleaded, i.e. that the Judge gave inadequate reasons for his finding that there were no insurmountable obstacles to family life between the appellant and the sponsor being enjoyed in Vietnam.
67. Para 26 of the grounds of appeal contends that "*Bearing in mind the other arguable errors of law, as set out above, the judge was arguably obliged to provide his reasons on this important issue in greater detail*". However, I have rejected all the other grounds.
68. Para 26 of the grounds also contends that the Judge's finding at para 48 of his decision that there were no insurmountable obstacles to family life continuing outside the United Kingdom, was given "*in the barest of terms*". I do not accept that the Judge gave legally inadequate reasons for not accepting that the difficulties that the sponsor would experience in relocating to Vietnam would amount to insurmountable obstacles to family life being enjoyed or result in unjustifiably harsh consequences. He was plainly aware that the sponsor was a British citizen. At para 45, he said that the appellant does not meet the requirements of the Immigration Rules which he said was a weighty factor in considering proportionality. At para 46, he said that the appellant and the sponsor had formed and developed their relationship whilst the appellant was in the United Kingdom unlawfully. At para 47, he took into account that, whilst the appellant has a partner in the United Kingdom, she has close and significant family members in Vietnam including her young son. At para 48, he took into account that the sponsor has children and grandchildren in the United Kingdom; that he also suffers from health problems which were managed by medication; that he would experience some difficulty in relocating to Vietnam; and that he has a significant pension income which the Judge said he could rely upon if he chose to relocate or travel between the United Kingdom and Vietnam.
69. I therefore reject ground 4.
70. Having rejected the grounds as pleaded, I turn now to make the following points:
71. Para 4 of Mr O'Ryan's submissions dated 24 June 2020 raises an additional matter. Mr O'Ryan contends that the Judge erred in law by proceeding unfairly, in that, it was not clear whether the appellant was asked at the hearing about the circumstances in which she was in possession of her passport or other documents at the time that she said she had escaped from captivity in the United Kingdom.
72. However, this ground was not raised in Mr O'Ryan's grounds of appeal. No application for permission to amend the grounds to include this ground has been made. Accordingly, the appellant does not have permission to argue the ground raised at para 4 of Mr O'Ryan's submissions dated 24 June 2020.
73. In any event, it simply has not been established that there was any procedural unfairness, i.e. that the appellant was not asked at the hearing about the circumstances in which she was in possession of her passport or other documents at the time that she said she had escaped from captivity in the United Kingdom. Mr O'Ryan simply poses the possibility that the appellant may not have been asked.

There is no witness statement from Ms Cleghorn to confirm the position one way or the other.

74. Finally, at para 6(iii) of his submissions dated 6 July 2020, Mr O’Ryan submits, in relation to the post-hearing minute of Mr Stainthorpe quoted at my para 49 above, that, if the respondent’s consent was given to the Judge considering the appellant’s protection claim, then the Judge erred in law by failing to consider the credibility of the appellant’s evidence on the low standard of proof.
75. However, this ground was not in Mr O’Ryan’s grounds of appeal. In any event, I have concluded that the Judge did not consider the appellant’s protection claim, for the reasons given at para 45 above.
76. For all of the reasons given above, the grounds as pleaded and as elaborated in Mr O’Ryan’s submissions, do not establish that the Judge erred in law, nor do any additional issues raised in Mr O’Ryan’s submissions even if the appellant had had permission to argue such additional issues, which is not the case.
77. I therefore dismiss the appellant’s appeal.

### **Notice of Decision**

78. The decision of the First-tier Tribunal did not involve the making of any error on a point of law such that it fell to be set aside. The applicant’s appeal to the Upper Tribunal is therefore dismissed.

*Upper Tribunal Judge Gill*

Date: 16 September 2020

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal’s decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent” is that appearing on the covering letter or covering email