



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case Nos: UI-2023-000763
First-tier Tribunal No:
HU/18955/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THI LAN ANH DOAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Mavrantonis, Counsel instructed by London Law Chambers

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard at Field House on 12 May 2023

DECISION AND REASONS

Background

1. The appellant appeals against the decision of First-tier Tribunal Judge K Swinnerton promulgated on 3 July 2019 (“the Decision”). By the Decision, the judge dismissed the appellant’s appeal against the respondent’s decision dated 3 September 2018, refusing her human rights claim.
2. The appellant is a national of Vietnam. She first came to the United Kingdom as a student in April 2012 and returned to Vietnam in June 2012. She last entered the United Kingdom in January 2013 for the purposes of studying an English language course. In September 2013 she married a British citizen. In March 2015 she claimed asylum and this was refused in September 2015, but she was granted leave to remain until 14 March

2018 on the basis of her marriage. That marriage ended in divorce on 20 April 2017. The Appellant had a child with a man from a previous relationship born on 8 May 2017 and who died on 16 September 2017.

3. On 26 February 2018 the appellant submitted an application for further leave to remain. It was the respondent's refusal of this application that was the subject of the appeal before Judge Swinnerton. By the date of the appeal hearing, the appellant had given birth to her second child born on 13 April 2019. The respondent gave her consent for consideration of the child's best interests to be dealt with at the hearing.
4. The appellant claimed that her removal would lead to separation from her current partner, who is from Iraq, and that she would be denied the right to visit her child's grave who is buried in the United Kingdom thus violating her rights contrary to Article 8 ECHR.
5. The respondent refused the appellant's human rights claim on the basis that it was not accepted there would be very significant obstacles to her integration on return to Vietnam and nor was there evidence of exceptional circumstances.

Decision of the First-tier Tribunal

6. The judge did not accept that the appellant was in a relationship with her claimed partner. He noted that there was "a clear discrepancy" in her evidence as to the period of claimed cohabitation; the partner had not provided a witness statement and nor did he attend the hearing.
7. The judge took into account the difficulties the appellant experienced with both pregnancies, but there was no medical evidence to demonstrate that there was any risk to the health of her child or that any treatment was required.
8. With respect to the effect of removal to Vietnam on the appellant and her child, the judge's findings are set out at [22]-[23]. The grounds of appeal focus on these paragraphs of the Decision and therefore I set these out in full:

"22. In respect to the Appellant visiting the grave of her deceased son following his tragic death aged four months in September 2017, I heard evidence which I accept that the Appellant typically visits the grave of her deceased son once each week. I was referred briefly at the hearing to **the case of Abbasi** mentioned above. This related to a refusal of a visa to foreign nationals seeking to enter into the UK for a finite period for the purposes of mourning with family members the recent death of a close relative and visiting the grave of the deceased being capable of constituting a disproportionate interference with the rights of the persons concerned and Article 8 of the ECHR. It is also stated in **the case of Abassi** that whether Article 8 applies and, if so, is breached will depend upon the fact sensitive context of the particular case. In the present case, which does not relate to a finite period of time as did the Abbasi case, the Appellant's deceased son died almost two years

ago having lived for four months and the Appellant has had the opportunity to mourn his loss and to visit his grave frequently during the last two years which she, understandably, continues to do. That passage of time, I fully accept, does not in any way mean that the mourning of the Appellant for the tragic loss of her son has ended. Were she to have to return to Vietnam, she would clearly be unable to attend the grave of her deceased son. That said, I do not find that this circumstance engages Article 8 and, even if it did, I do not find that the decision of the Respondent is disproportionate in this respect as although the Appellant would be prevented from being able to continue to visit and herself maintain the grave of her deceased son, that does not outweigh the public interest in maintaining immigration control.

23. There is a duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children in the United Kingdom. It is generally the case that it is in a child's best interest to remain with their parents. I have found that the Appellant lives with her son and not with her son and Mr Salem as a family unit. The family unit is the Appellant and her son and I was provided with little if any evidence of the claimed involvement of Mr Salem with the upbringing of his son. Surprisingly, the Appellant stated at the hearing that Mr Salem had claimed asylum but she was completely unaware of whether any decision had been made in respect of his claim. The Appellant has been in the UK for about six and a half years and, prior to coming to the UK, had lived all her life in Vietnam which included having worked in a pharmaceutical company for four to five years. With respect to the Appellant's relationship with her family in Vietnam, at the hearing the Appellant gave evidence that she last had contact with her family in Vietnam in 2013 and that she feared her family, particularly her brother, as they would not approve of her having married a Muslim man. That was the basis of the asylum claim which was refused and I, similarly, am not persuaded by it. I see no reason why the Appellant cannot return to Vietnam with her child and continue her family life there which I find would be in the best interests of the child. I do not find that there is any need to consider Article 8 of the ECHR outside of the Immigration Rules."

[emphasis as per the Decision]

9. The appellant applied for permission to appeal on 17 July 2019. The grounds of appeal are not drafted with particular clarity, but they can be summarised as follows: (i) the judge did not adequately consider and reason why Article 8 was not engaged by reference to the case of **Abbasi (visits - bereavement - Article 8) [2015] UKUT 463 (IAC)** and, (ii) the judge failed to adequately consider Section 55 and the best interests of the child.
10. Permission to appeal was granted by First-tier Tribunal Judge Lawrence on 10 March 2023. In his grant of permission Judge Lawrence stated as follows:

"I have been provided with a letter from London Law Chambers, dated 20 February 2023, in which it is stated that they applied for permission to appeal on 17 July 2019 and are still waiting for a response. Documents are

attached to that letter that are described as ‘the relevant documents’ and include an unsigned application form, covering letter, and grounds of appeal. There is also a fax transmission report that appears to correspond with the assertion that an application for permission to appeal was made on 17 July 2019 and, while Tribunals Service staff have informed me that there is no record of such an application by the Appellant on the date in question, I proceed on the basis that the application was made in time on 17 July 2019 in the light of the evidence fax transmission and the statement that is made in the solicitors’ letter.”

11. In respect of the grounds of application Judge Lawrence considered that it was arguable that the judge failed to give adequate reasons for finding that preventing the appellant from visiting and maintaining her child's grave would not engage her rights under Article 8 ECHR, and that preventing her from doing so would not outweigh the public interest in maintaining immigration control. Permission was granted on all grounds.
12. The respondent filed a response on 30 March 2023. It incorrectly asserts that Judge Lawrence “appears to extend time” in granting permission, but nevertheless, it is argued that the grounds were a mere disagreement with the Decision and that Judge Swinnerton gave adequate reasons for dismissing the appeal.
13. On 19 April 2023 the appellant filed what is stated as being “amended (additional) grounds of appeal” drafted by Mr Mavrantonis. Therein reliance is placed on the initial grounds of appeal and an additional “discrete ground” as a consequence of a “4-year delay in considering the application for permission to appeal”. It is argued that the delay itself vitiates the Decision, and given the effluxion of time, the appellant has continued to develop her private and family life in the United Kingdom through no fault of her own. In the alternative, it is said that these matters are relevant to the issue of materiality.
14. The representatives made their respective submissions in line with the appellant’s grounds of appeal and the respondent’s response. These submissions are reflected below where necessary in order to support my conclusions.

Discussion

15. There is no dispute by Mr Avery on behalf of the respondent that in view of the reasons given by Judge Lawrence in granting permission to appeal that the appellant’s application was made in-time on 17 July 2019. It is not clear why the Appellant’s representatives, who had not received a response from the First-tier Tribunal (see paragraph 7 of the amended grounds) waited until the 20 February 2023 to alert it to the fact that the application remained outstanding. Nothing turns on this, but it is unfortunate. Nonetheless, I acknowledge that a period of approximately three years and seven months lapsed between the appellant’s application for permission to appeal and the subsequent grant of permission; a delay which is regrettable.

16. Mr Mavrantonis relies on the delay as an additional ground of appeal. He submits that the delay renders flawed the judge's entire proportionality assessment or, that the delay is relevant to the question of materiality. He refers to Section 11 of the Tribunal, Courts and Enforcement Act 2007, which sets out the statutory right of appeal to this Tribunal, namely, that a right of appeal originates from a point of law arising from a decision made by the First-tier Tribunal, in support of his submission that the delay is attributable to the First-tier Tribunal rather than an individual judge (in this case that would be Judge Swinnerton). Mr Mavrantonis submitted that a consequence of the delay was to allow the appellant to further her family and private life ties in the UK, including visiting her child's grave over that period.
17. In his amended/additional grounds of appeal, Mr Mavrantonis applies for permission to appeal on this basis, albeit he avers in a footnote, that pursuant to Rule 21 of The Tribunal (Upper Tribunal) Procedure Rules 2008 permission to appeal may not be required because permission has been granted on all grounds. Mr Avery did not address this point in his submissions.
18. Rule 21 of The Tribunal (Upper Tribunal) Procedure Rules 2008 provides the statutory framework for applications to this Tribunal for permission to appeal against a decision of another tribunal "only if - (a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and (b) that application has been refused or has not been admitted" (see paragraph 21(2)). I do not see how Rule 21 assists the appellant. It does not address the situation of the appellant whose application has been granted and who is seeking to raise an additional ground as a consequence of circumstances that arise following the grant of permission. Nor does a grant of permission on all grounds give the appellant carte blanche to raise additional grounds, at a future date, on matters unrelated to the initial grounds of application upon which permission has been granted.
19. Whilst I accept that the Tribunal has power to permit amendment of grounds of appeal, it seems to me that some distinction is to be made between the situation where an application to amend is made on the basis of previously un-argued grounds (as is the case here), and where an application to amend is made in effect on the basis of renewing grounds in respect of which permission has already been refused. I am of the view that the appellant requires permission to argue this additional ground.
20. I bring my own independent scrutiny to bear on this ground. Whilst I accept the delay is attributable to the First-tier Tribunal (as it accepted the appellant's application for permission to appeal was made timeously), the appeal to this Tribunal is on a point of law arising from a decision made by the First-tier Tribunal. The relevant decision made by the First-tier Tribunal is the decision of Judge Swinnerton and no other. I agree with Mr Avery that it is difficult to see how a subsequent delay in considering the application for permission to appeal can establish an error of law in the Decision. I accept that an inevitable consequence of delay is that it has

permitted the appellant to further develop her ties to the United Kingdom, however, Mr Avery in my view is correct in his contention that such matters are relevant to any future application the appellant may wish to make, and bears no relevance either to establishing an error or to materiality. Whilst, I formally refuse permission to appeal on this ground, should I be wrong about that, for the above reasons, I find there is no merit in this ground of challenge.

21. I next turn to deal with the grounds of appeal upon which permission to appeal has been granted.
22. The grounds are essentially a reasons challenge first in relation to the judge's consideration of whether Article 8(1) was engaged by reference to the case of **Abbasi** and second, whether the judge gave adequate consideration and reasons in his assessment of the child's best interests.
23. The written grounds are essentially based on the adequacy of the reasoning in the Decision. In this respect there should be an acknowledgement of the need for appropriate restraint before interfering with a decision of the First-tier Tribunal, bearing in mind its task as primary fact-finder on the evidence before it, allocator of weight to relevant factors, and overall evaluator within the applicable legal framework. Decisions are to be read sensibly and holistically, perfection might be an aspiration, but is clearly not a necessity, and there is no requirement for reasons for reasons.
24. Whilst the Decision lacks a degree of clarity and structure, I am not satisfied that on a holistic reading of it, the judge fell foul of his duty to give adequate reasons. It is prudent to consider in the first instance the basis upon which the appeal was pursued before the judge. The appellant made a human rights claim based on her family and private life. Whilst the appellant maintained that she was in a relationship before the judge, it was not argued by her counsel that she qualified for leave to remain on the basis of that relationship under the Immigration Rules, and that explains why there is no reference to, or consideration of them in the Decision. The submissions recorded by the judge at [14], made on the appellant's behalf, indicate that the appeal was argued on the basis that removal would deprive her of a right to visit the grave of her deceased child who is buried in the United Kingdom. That being the case, it is not clear why the judge at [23] stated, "there is no need to consider Article 8 of the ECHR outside of the Immigration Rules", but the appellant makes no complaint about that.
25. There is no challenge to the judge's finding that the appellant was not in a relationship with Mr Salem and that she lived alone with her child. Mr Mavrantonis in amplifying the grounds submitted that this finding is of no consequence as it does not impinge upon the judge's failure to apply the two-stage test enunciated at paragraph 11 of **Abbasi**.
26. In the case of **Abbasi** the first three paragraphs of the italicised words reads:

“The refusal of a visa to foreign nationals seeking to enter the United Kingdom for a finite period for the purpose of mourning with family members the recent death of a close relative and visiting the grave of the deceased is capable of constituting a disproportionate interference with the rights of the persons concerned under Article 8 ECHR. The question of whether Article 8 applies and, if so, is breached will depend upon the fact sensitive context of the particular case. The Tribunal should adopt a structured and sequential approach to the Article 8 issues.”

27. In **Abbasi** at [11] the Tribunal stated:

“11. As the decided cases of the ECtHR make clear, the FtT's decision that the Appellants' appeals did not fall within the ambit of Article 8 ECHR is unsustainable. The Judge's error was driven by an impermissibly narrow approach to the scope of Article 8 protection and a concentration on the Appellants' family life in Pakistan, to the exclusion of both their family ties in the United Kingdom and the central purpose of their proposed visit. The essence of the error was a failure to recognise that the particular aspect of private and family life invoked by the Appellants was capable of being encompassed by Article 8 ECHR. The protection, or benefit, which they were asserting had the potential of being protected by Article 8 ECHR. The first question for the Judge should have been whether, having regard to all relevant facts and circumstances, it was. The Judge's error was committed at this preliminary stage. It consisted of a failure to recognise that the Appellants were asserting a discrete facet of family and private life which Article 8 is capable of protecting. In consequence of this error of law the Judge did not proceed to consider any of the succeeding stages of the exercise, namely interference, legitimate aim and proportionality.”

28. Whilst **Abbasi** is a case concerning applications of foreign nationals seeking to visit the United Kingdom for a finite period for the purpose of mourning with family members the recent death of a close relative and visiting the grave of the deceased, I do not read **Abbasi** as seeking to ring fence the applicability of Article 8 considerations to cases solely concerning the issue of entry clearance.

29. **Abbasi**, however, makes it clear that the question whether Article 8 applied and if so was breached would depend upon the fact-sensitive context of the particular case. In the instant appeal the judge reminded himself that Article 8 could potentially be engaged in such cases and that each case must be determined on its facts. The judge performed that exercise and, in doing so, noted that the appellant's case did not relate to a finite period of time and that she had had the opportunity to mourn the loss of her child and visit his grave frequently over a period of two years since his death. He took into account that that period did not signify an end to the mourning of the appellant of her son and to the fact that she would be unable to attend the grave of her son if she was forced to return to Vietnam.

30. Having considered these factors the judge was not persuaded that Article 8 was engaged. The judge then proceeded to make a finding in the alternative, and found that even if Article 8 was engaged the appellant's

removal would not outweigh the public interest in maintaining immigration control. In my judgement, in order to understand why the judge reached that conclusion, the decision has to be read in a much wider context and beyond paragraph [22]. The judge was clearly live to the fact that removal would prevent the appellant from continuing to visit and maintain the grave of her deceased son. That was a factor relevant to the issue of proportionality, but it is not a determinative factor and the contrary was not argued. Other relevant factors the judge was plainly cognisant of was the opportunity and period over which the appellant had mourned the loss of her son, the fact that she was not in a relationship with Mr Salem, and that, she could safely return to Vietnam where she had family and could potentially find work. It is not argued that any of these reasons were not open to the judge on the evidence and/or that they are irrational or perverse.

31. In my judgement, the complaint that the judge failed to adhere to the approach in **Abbasi** at [11], is not a justified criticism of the decision when read as a whole. As I stated earlier, whilst the Decision could have benefited from a more structured approach, and whilst the judge could have said more, I am concerned with whether the judge erred in his approach and whether his reasons are adequate. I am satisfied that unlike in the case of **Abbasi**, the judge adopted the correct approach, gave sufficient reasons for his conclusion all of which was based on a fact sensitive analysis of the evidence. I do not agree with the submission that the judge applied a broad brush approach to this issue and did not fully engage with the fact that the appellant had lost a child. The judge was in my view sensitive to that issue and was clearly sympathetic to the appellant's "sad" and "tragic" loss, a matter that he referred to in his reasoning. I am satisfied the first ground is not made out.
32. The second ground relates to the judge's consideration of Section 55 and the best interests of the child. The written grounds complain that the judge failed to apply Section 55 and argues that, the best interests of the child is to remain with both parents in the United Kingdom. There is no merit in this ground. Notwithstanding the fact that the grounds patently fail to recognise that the judge did not accept the appellant was in a relationship with the father of the child, and that the father was not involved in the child's upbringing, a finding that is not challenged and is unimpeachable, it is appreciably clear that the judge considered the child's best interests by reference to the duty under Section 55 and gave adequate reasons for his conclusion that the child's best interests was to return with the appellant to Vietnam at [21] and [23].
33. There is no merit in the submission of Mr Mavrantonis that the judge again applied a broad brush approach to this issue. The judge considered the limited evidence available to him and made findings that were entirely open to him on the evidence. Mr Mavrantonis submitted that the judge failed to consider the child's immigration status and/or nationality (it was accepted the child is not a British citizen), and the practicalities of removal, it being said that there had been difficulties registering the child

with the Vietnamese Embassy. These are not matters that were raised in submissions before the judge by the appellant's representative (at [14]), and the judge cannot be fairly criticised for not dealing with a matter not raised before him. In any event, there was no evidence before the judge that the child is potentially stateless and, as a non-qualifying child, I fail to see how this could have made a material difference to the outcome, let alone establish a material error of law. I have no hesitation in concluding that the second ground is not made out.

34. In conclusion and when properly analysed, the grounds of challenge are not made out and amount to no more than a disagreement with the decision. When addressing the issue of adequacy of reasons, in **MD (Turkey) v SSHD [2017] EWCA Civ 1958** the Court of Appeal confirmed that adequacy meant no more nor less than that. It was not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why he or she has lost, and it is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case there has been an error of approach.
35. Having considered the Decision, the judge was required to consider the evidence that was before him as a whole, and he plainly did so, giving adequate reasons for his decision. The findings and conclusions reached by the judge are neither irrational nor unreasonable. His approach in my view is sustainable.
36. The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently (re)summarised by the Court of Appeal in **Volpi v Volpi [2022] EWCA Civ 464**. With those propositions in mind, the decision reached by the judge was one that was reasonably open to him on the evidence before him and he gave adequate and sustainable evidence-based reasons for his decision. Consequently the appellant has not established that the Decision involved the making of an error on a point of law, therefore the Decision shall stand.

Notice of decision

37. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

R. Bagral

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 June 2023