IAC-PE-SW-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/08121/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 8 December 2014** | **On 10 December 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**PHUC TAM DANG DANG**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr P Duffy of the Specialist Appeals Team
For the Respondent: Mr A Swain of Counsel instructed by Dotcom Solicitors Ltd

**DECISION AND REASONS**

**The Respondent**

1. The Respondent to whom I shall refer as "the Applicant" is a citizen of Vietnam born on 8 April 1986. On 13 October 2007 he arrived with leave to enter as a student which was extended until 31 January 2010. An application for further leave as a student was made out of time and leave was granted until 4 April 2011. Two further student applications failed and on 18 September 2012 the Applicant applied for leave to remain on the basis of his relationship with A Lenh Sy. They state they have been

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living together since September 2010 and on 7 April 2011 had married. She was born in Vietnam on 25 October 1988 and was brought to the United Kingdom at the age of about 3 years and is a British citizen.

**The SSHD's Decision**

2. On 21 August 2013 the Applicant was served with notice in form IS.151A that he was a person liable to removal. On 8 November and 2 December 2013 his solicitors made further representations to the Appellant (the SSHD). On 23 January 2014 the SSHD refused the application and decided under Section 10 of the Immigration and Asylum Act 1999 to remove the Applicant to Vietnam, although the destination was omitted from the Notice of Decision.

3. On 11 February 2014 the Applicant through his solicitors lodged a notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds assert the Applicant satisfied the requirements of paragraph 276ADE and Appendix FM and in particular paragraph EX1(b) of the Immigration Rules. Additionally, they assert that to require the Applicant to leave the United Kingdom would place the United Kingdom in breach of its obligations to respect the private and family lives of the Applicant and his wife protected by Article 8 of the European Convention.

**The First-tier Tribunal Determination**

4. By a determination promulgated on 11 September 2014 following a hearing on 27 August 2014 Judge of the First-tier Tribunal Meah allowed the appeal under both the Immigration Rules and on human rights grounds (Article 8).

5. The Judge found the Applicant and his wife were credible witnesses. They were in a genuine and subsisting marriage. The Applicant had two brothers in the United Kingdom and his mother and a half-sister live in Vietnam. The wife's parents and siblings are in the United Kingdom. She is very close to them and has an established social circle. She is a beauty therapist and a nail technician. She speaks some Vietnamese but does not read or write it.

6. At paragraphs 19-21 of his determination the Judge found it would be a "major and insurmountable obstacle" if the wife had to return to Vietnam and to learn to read and write Vietnamese. He also found she would be unable to follow her profession there, noting she is thoroughly English and has never lived outside London since the age of 3. Her only experience of Vietnam was a one month long holiday which she took with friends at around the age of 18 and more recently a ten day visit with the Applicant to meet his mother.

7. At paragraph 22 of his determination the Judge found:-

> …. the culmination of all these factors lead me to make the firm finding that the obstacles that would be faced by the spouse in attempting to relocate to Vietnam would be insurmountable and that she would face serious hardship as a result

> hence I also find that the provision at paragraph EX.1(b) alongside the criteria at EX.2 are satisfied. *Nagre*.

The Judge then went on to deal with the Applicant's claim under Article 8 outside the Rules. He referred to the judgment in *R (oao MM and Others) (Lebanon) v SSHD [2014] EWCA Civ 985*, noting the different consequences for a consideration of an Article 8 claim outside the Rules in the event the Rules provide a complete code. He referred generically to the judgment in *Huang and Kashmiri v SSHD [2007] UKHL 11* and summarised the appropriate tests for assessment of an Article 8 claim at paragraphs 7-12 of *EB Kosovo v SSHD [2008] UKHL 41*. He found there were significant factors making the case of the Applicant "exceptional" which merited consideration.

8. He noted the family life of the Applicant and his wife and his wife's roots and ties in the United Kingdom, that she had lived virtually all her life here where she had a job and a career. These circumstances he found:-

> … in these circumstances the Appellant's removal from the UK would cause a disproportionate interference with both theirs and the spouse's family's Article 8 family life rights.

Having made this finding the Judge then went on to say:-

> The Appellant also has two siblings in the UK and one of them has been supporting him financially alongside the support he receives from his spouse. I find that this financial dependency takes the relationship they enjoy beyond the threshold of normal emotional ties hence a breach would also occur in this scenario if the Appellant were made to return to Vietnam. *Kugathas*.

The Judge noted the Applicant had been in the United Kingdom for almost seven years and residing with his wife for "the best part of this period". At paragraph 30 he found:-

> They have sufficient funds to adequately maintain and accommodate themselves without recourse to public funds and the removal of the Applicant would be a disproportionate interference with the right to a private and family life of himself, his wife and their respective family members when set against the need to maintain proper immigration control.

9. The SSHD sought permission to appeal. The grounds of appeal assert the Court held in *MF (Nigeria) v SSHD [2013] EWCA Civ 1192* that the Immigration Rules are "a complete code that formed the starting point for the decision maker" and assert the Judge failed to have regard to the Immigration Rules. The grounds also refer to the determination in *Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC)* and the judgment in *R (oao Nagre v SSHD [2013] EWHC 720 (Admin)*. They assert the Judge had failed to identify compelling circumstances and an unjustifiable harsh outcome to support his conclusion with regard to the Article 8 claim. The grounds then challenge the Judge's assessment of insurmountable

obstacles with reference to Appendix FM paragraph EX.1 and maintain that the Applicant and his wife could return and integrate into Vietnamese culture.

10. On 23 October 2014 Judge of the First-tier Tribunal PJG White granted the SSHD permission to appeal because Judge Meah had arguably made an error of law for the following reasons:-

> "(a). The judge allowed the appeal with specific reference to Appendix FM, EX1 and Article 8.
>
> (b). It is arguable that in respect of EX1 the judge gave inadequate reasons as to why there were 'insurmountable obstacles' preventing the Appellant's spouse from relocating to Vietnam.
>
> (c). It is arguable that in assessing Article 8 outside the Immigration Rules the judge failed to have regard to Sections 117A and 117B of the 2020 Act … .
>
> (d). It is arguable that in regard to the issue of the Applicant returning to Vietnam to make an out of country application as a spouse, the judge failed to place sufficient regard to the comments of the Upper Tribunal in *Sabir (Appendix FM-EX1 not free standing) [2014] UKUT 00063 (IAC))*."

**The Upper Tribunal Hearing**

11. The Applicant and his wife attended the hearing. The Applicant appeared to have limited English because he needed his wife to explain to him what was happening.

12. For the SSHD Mr Duffy submitted the Judge's finding that the obstacles to removal were insurmountable was inadequately reasoned. He had failed to take account that the Applicant did not have the right to choose in which state he should pursue his private and family life. The Judge's findings at paragraphs 19-21 of his determination did not show there would be any significant problems for either the Applicant or his wife or both of them, on return to Vietnam.

13. For the Applicant Mr Swain submitted the determination did not contain an error of law. There had been a thorough examination at the hearing of the circumstances of the Applicant and his wife. The social, cultural, linguistic and professional factors which had been identified as reasons for the Judge's decision were reflected in his determination and his reasons were sustainable.

14. The wife had very limited connection to Vietnam and the facts which the Judge found placed the Applicant within the scope of Appendix FM paragraph EX1 were within his discretion and for the exercise of which he had given sustainable reasons.

15. He referred to paragraph 31 of *VW (Uganda) v SSHD [2009] EWCA Civ 5* in which in the only reasoned judgment of the Court Sedley LJ said:-

> … It is no longer necessary to follow their (the Tribunal's determination) scholarly tracing of the concept of insurmountable obstacles in the Strasbourg jurisprudence or their endeavour to reconcile it with domestic case-law, because

> – as is common ground - the correct test is now to be found in *EB (Kosovo)*. But recognition should be given … to the conclusion … that, if a removal is to be held disproportionate, 'what must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience.'

He then referred to the comments in *Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC)* about how "insurmountable" should be construed.

16. The Judge had looked at the relevant factors and his determination was within his ambit of discretion and did not contain an error of law. Mr Duffy for the SSHD had no further submissions to make.

**Consideration**

17. Looking at the grant of permission to appeal, I do not find it necessary to address the first reason given in sub-paragraph (a). Turning to grounds (b) and (d) of the permission, The Judge's findings that the need for the Applicant's wife to learn to read and write Vietnamese, a language in which she had some speaking facility, to be a major and insurmountable obstacle and that she would not be able to find employment are insufficiently reasoned to show that they amount to insurmountable obstacles. Further, the Judge failed in his consideration of the appeal under the Rules to look at the circumstances of the Applicant and whether there were insurmountable obstacles preventing his return to Vietnam.

18. The grounds referred to in (c) of the permission do reveal an error of law. The hearing was after 28 July 2014 and the Judge was required to take into account the SSHD's view of Article 8 having regard to the factors referred to in Sections 117A, B and D of the 2002 Act. He failed to make any reference to these factors or to the statutory provisions.

19. The SSHD's grounds relying on *MF (Nigeria)*, *Gulshan* and *Nagre* do not disclose any arguable error of law. None of the case law from and including *MF (Nigeria)* has established that the Rules are a complete code other than in deportation cases. What has come to be known as the "Gulshan Gateway" has been shown to be an unnecessary additional step in consideration of Article 8 claims outside the Rules in *R (oao MM)* and in *R (Oludoyi) v SSHD (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC)*.

20. The Judge sought to allow the appeal by way of reference to Appendix FM paragraph EX.1. The ground in the grant of permission referring to *Sabir* does disclose an error of law. Appendix FM is an appendix. It must be read in conjunction with the appropriate paragraph in the Rules. The Judge has not considered any of the possible relevant paragraphs 284 or 287 of the Rules before proceeding to consider Appendix FM. The SSHD made a similar error in the reasons letter.

21. Paragraph 26 of the Judge's determination seeks to address the "*Razgar*" questions but fails fully so to do. There is no explanation why the Judge reaches his decision that the interference is disproportionate in paragraph 26 and then, having reached his decision, goes on to refer at paragraph 28 to consider further or additional facts about the private and family life of the Applicant.

22. The circumstances of the Applicant and his wife are different from those of the appellant in *Chikwamba*. In that case the husband could not return to Zimbabwe because he had been recognised as a refugee. Additionally, the appellant had a young child. There was no evidence before the Judge how long it might take for the Applicant to complete an entry clearance application and obtain a decision. There is no child whose best interests have to be considered. He with his wife has returned to Vietnam. The Judge failed to show he had taken into account that the Applicant had originally come to the United Kingdom as a student and so had no expectation of being able to stay indefinitely: see *Patel and Others v SSHD [2013] UKSC 72*. The Judge did not consider the rest of the Applicant's immigration history. These are matters of which had he taken account of Sections 117A, B and D of the 2002 Act he would have been reminded.

23. For all these reasons, the determination contains errors of law such that it cannot stand and should be set aside under Section 12 of the Tribunals, Courts and Enforcement Act 2007. I have considered whether the appeal should be remitted to the First-tier Tribunal for hearing afresh. The assessment whether there are insurmountable obstacles or that removal is disproportionate to the need to maintain immigration control will require to be made after a full consideration of the evidence and the extent of any judicial fact finding necessary to reach such decision is such that, having regard to the over-riding objective it is appropriate for the appeal to be remitted to the First-tier Tribunal for hearing afresh.

## ANONYMITY

24. There was no request for an anonymity order and having considered the papers in the Tribunal file and the likely issues and the issues raised by the appeal I do not find that any is warranted.

## NOTICE OF DECISION

**The determination of the First-tier Tribunal contained errors of law such that it should be set aside and remitted to the First-tier Tribunal for hearing afresh before a Judge other than Judge Meah.**

**Vietnamese interpreter required.**

Signed/Official Crest Date 10. xii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal