Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/12858/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 7 August 2014

Determination Promulgated
On 22 August 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

ENTRY CLEARANCE OFFICER (BANGKOK)

Appellant

and

THI LUYEN VU

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Presenting Officer
For the Respondent: Dr E Mynott, a legal representative instructed by Quality Solicitors, Jackson & Canter

DETERMINATION AND REASON

INTRODUCTION

1. The Entry Clearance Officer has been granted permission to appeal the determination of First-tier Tribunal Judge Devlin who allowed the appeal on Article 8 grounds by the respondent (referred to as the claimant) against the decision refusing her application dated 13 May 2013 to settle in the United Kingdom with her

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husband, Mr Ho Le. The judge found the claimant was unable to meet the maintenance requirements of the Rules but allowed the appeal on Article 8 grounds.

2. The challenge by the Entry Clearance Officer is on the basis that the judge had failed to identify the nature of the compelling circumstances not sufficiently recognised under the Rules when giving reasons for his decision. There had been no analysis why the claimant could not submit a further application and it could not be considered unjustifiably harsh to require her to do so once Mr Ho could demonstrate that the financial requirements were met.

3. The relevant facts are these. The claimant was born on 12 September 1982. Mr Ho was born 1 August 1966. He has lived in the United Kingdom for a lengthy period. Between 1995 and 2010 he lived with Mary Chan. They separated on terms which are set out in an agreement dated 2 December 2011. This agreement shows that the couple have two children, Natasha born 8 June 1997 and Richard born 22 January 2003. The deed of separation also provides the basis on which certain payments were to be made to Mr Ho including a lump sum of £150,000 of which £45,000 had by then already been paid and a further payment of £20,000 was to be paid no later than 1 January 2012. Apart from some other sums, the remaining amount was to be discharged by monthly payments of £800.

4. Mr Ho also has another British national daughter called Leah Bach who was born on 3 September 1991. Her mother is Tracey Gregory.

5. Mr Ho first made contact with the claimant by Yahoo messenger in May 2009. They met in person on 6 February 2010. They married on 24 July 2011, in Vietnam, where they lived for eighteen months. Their son Le was born on 25 July 2012. He is a British citizen. Mr Ho has regularly visited Vietnam since his lengthy stay there following the marriage. Richard and Natasha live with their mother. They accompanied Mr Ho together with Leah Bach to Vietnam for the wedding.

6. The application was refused by the Entry Clearance Officer because he was not satisfied on the evidence before him that the relationship was genuine and subsisting or that the couple intended to live together permanently in the United Kingdom. Furthermore, after noting the deed of separation and bank statements produced by way of evidence of payments received, he did not accept that Mr Ho was genuinely receiving the "non-employment income" he relied on. Furthermore, although Mr Ho held cash sums, he did not hold the minimum amount of £62,500 for the period required. The claimant needed to demonstrate that Mr Ho had a gross income of at least £18,600 per annum.

7. The judge heard evidence from Mr Ho and Leah Bach and was provided with a volume of documentation regarding the claimed income of £23,150. After detailed analysis he concluded that the claimant had failed to prove Mr Ho had any non-employment income as specified in s.A1(13) of Appendix FM-SE which in summary required evidence of such income in the twelve months prior to the date of

application. Dr Mynott conceded that the claimant could not succeed on the basis of cash savings alone.

8. The judge therefore dismissed the appeal under the Immigration Rules. He did so without making a finding on the requirements as to the genuineness of the relationship. Under Article 8 however he reached a positive conclusion on that aspect and at [135] of his determination referred to the evidence before him, in particular that of Ms Bach regarding the close relationship between the claimant and Mr Ho. He also considered at [136] that the birth of a son strongly indicated the relationship's genuineness. He found therefore that family life existed between them and their son. He also found that family life existed between Natasha, Richard and Mr Ho. He considered there was no evidence of elements of dependency going beyond normal emotional ties between Leah and Mr Ho.

9. After directing himself in relation to further authorities including *Gulshan (Article 8 – new rules – correct approach) Pakistan* [2013] UKUT 640 (IAC), *Patel & Others v SSHD* [2013] 3WLR 1517, *Sanade & Others (British children – Zambrano – Dereci) India* [2012] UKUT 48 (IAC) and *MA & SM (Zambrano – EU children outside EU) Iran* [2013] UKUT 380 as well as *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC) the judge concluded at [184] that he was bound to find by reason of the fact that Mr Ho's son is a British national, family life between him, the claimant and their son could not reasonably be expected to be enjoyed in Vietnam with reference to the concession made by the Home Office letter of 24 November 2012 (in *Sanade).*

10. After observing that there was very little evidence as to the nature and extent of the relationship between Mr Ho and Richard and Natasha, the judge concluded at [206] that if Mr Ho were to relocate to Vietnam "...this would inevitably result in some degree of rupture in the relationship with them". This led him to conclude that this would not be in their best interests.

11. After referring to the public interest, with reference to the claimant's failure to produce the documents specified in the Rules and her marriage at a time having been contingent on an ability to meet those Rules, the judge concluded that were it likely the claimant could do so, there would be nothing disproportionate in expecting her to make a further and properly substantiated application. But he was not satisfied this was the case and so reached these conclusions:

> "215. Looking at everything in the round, I have concluded (albeit not without much hesitation) that (i) the length of the sponsor's lawful residence in the United Kingdom; and (ii) the presence of his three children here, all of whom are British citizens, two of whom were minors, and none of whom can reasonably be expected to follow him to Vietnam, constitute compelling circumstances not sufficiently recognised under the new rules that require the grant of leave.

216. I therefore find that, in the very particular circumstances of this case, the respondent's decision prejudices family life in a manner sufficiently serious as to violate the fundamental right protected by Article 8.

217. Indeed, having regard to the rather weaker facts of the second appellant's case in *MA & SM (Zambrano: EU children outside EU) Iran* [2013] UKUT 380, I would have felt compelled in any event, to that conclusion."

12. It is argued in the grounds of challenge that the judge should have weighed in the balance the extent of the claimant's failure to meet the requirements of the Rules and that the timing of an application is a matter for an applicant. The couple had married in Vietnam with no legitimate expectation that family life could be established in the United Kingdom. They had lived there following their marriage and no evidence had been provided why they could not do so. The child of the marriage lives with the claimant and Article 8 does not oblige the United Kingdom to accept the choice of a couple at which country they prefer to reside in. The determination amounts to a finding that the Immigration Rules will never be proportionate in a case involving British citizen children and that no weight had been given to the public interest.

13. In a Rule 24 response it is argued that the judge had addressed the question of whether the claimant had established arguably good grounds for a grant of leave outside the Rules. The judge had properly directed himself and made a structured assessment that the grounds amounted to disagreement rather than identifying any material misdirection in law.

14. With reference to the assertion that no evidence had been provided why family life could not continue in Vietnam, the grounds ignored the judge's consideration of the line of authorities culminating in *MA & SM* which provided an alternative basis on which the appeal fell to be allowed.

15. I had careful regard to the submissions by Mr McVeety and Dr Mynott who both accepted that I could proceed to re-make the decision in the event that error of law was found based on the positive evidential findings reached by the judge. Mr McVeety confirmed that there was no challenge to the genuineness of the relationship.

DID THE TRIBUNAL MAKE AN ERROR OF LAW?

16. The First-tier Tribunal Judge has set out his thought process in a particularly lengthy determination which in part is not easy to follow. In particular it appears that the judge may have misunderstood the *Zambrano* principle most recently addressed by the Upper Tribunal in *MA & SM.* It is not at all clear from the determination whether the appeal was being allowed on Article 8 grounds because the decision offended *Zambrano* principles or because the presence here of British citizenship children with whom Mr Ho has family life was sufficient to constitute compelling circumstances not recognised under the Rules to warrant the appeal being allowed on Article 8 grounds.

17. Although the basis of the Entry Clearance Officer's challenge is headed "A material misdirection of law", it is in reality a reasons challenge. I am not persuaded by Dr Mynott's argument that the challenge is no more than a disagreement.

18. The judge himself admits confusion over the relationship between Article 8 and the *Zambrano* principle which he expresses in these terms at [179]:

> "I must confess to some difficulty in understanding how a principle of EU law, that only applies in exceptional circumstances, and is not even engaged by the fact that family life is adversely affected, can be 'extrapolated' into a general principle of European human rights law, that is engaged whenever family life is adversely affected."

19. The finding that the best interests of Richard and Natasha would not be served by Mr Ho relocating to Vietnam is difficult to reconcile with the preceding paragraph in the determination at [205] where the judge referred to there being very little evidence regarding the nature and extent of the relationship between them. There appears to be no consideration of how those interests were affected by the regular absences of Mr Ho in Vietnam and, in particular, the lengthy stay following his marriage. It appears that Richard and Natasha went to the wedding. Beyond that and the evidence of Leah that the three have a very close relationship, the determination despite its length contains no analysis of how significant a role Mr Ho plays in his children's lives which would be a relevant factor in the proportionality exercise.

20. My conclusion is that the judge failed to give sufficient reasons for his conclusion to allow the appeal on Article 8, such reasons which he gave for doing so are inadequate. I therefore set aside his decision which I proceed to re-make.

RE-MAKING THE DECISION

21. I drew the attention of the parties to the recent decision of the Court of Appeal in *MM & Ors, R (on the application of) v SSHD* [2014] EWCA Civ 985 which is of particular relevance to this case where it is undisputed that the claimant was unable to meet the maintenance requirements of the Rules.

22. At paragraph 128, Aikens LJ observes "...if the applicant cannot satisfy the Rule, then there either is, or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker".

    At [134]:

    > "...but if the relevant group of IRs is not such a 'complete code' then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law".

    And at [137]:

> "...There is nothing in the 1971 Act or the common law that grants a 'constitutional right' of British citizens to live in the UK with non EEA partners who do not have the right of abode in the UK and who are currently living outside the UK. Of course, I accept that the UK partner (whether a UK citizen of a refugee or person with HP) is entitled to respect of his or her right to marry and to found a family. But those are not absolute rights; there is no absolute right to marry and found a family in the UK if it involves marriage to a non-EEA citizen who then wishes to reside in the UK."

And finally at [162]:

> "First, paragraph GEN.1.1 of Appendix FM states that the provision of the family route 'takes into account the need to safeguard and promote the welfare of children in the UK', which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the IRs should provide that the best interests of the child should be determinative. section 55 is not a 'trump card' to be played whenever the interests of a child arise. Thus, thirdly, the new MIR are only a part of requirements set out in Appendix FM, but an important part. If a child in the UK is to be joined by a non-EEA partner under the 'partner rules' (as compared with those under E-LTRPT.2.3) then it is reasonable to require, for the child's best interests, that there be adequate financial provision for the unit of which the child will be a part if the non-EEA partner joins it. If the financial requirements are otherwise judged to be lawful, then, on the financial front, that must mean the section 55 duty has been discharged in framing the relevant IR."

23. Family life was found by the First-tier Tribunal Judge as between Mr Ho and Richard and Natasha and as between Mr Ho, the claimant and their son. Richard and Natasha do not live with Mr Ho and the evidence is unclear as to the extent of his role in their lives. They have however a close relationship inevitably as the result of his presence in their lives until separation from Ms Chan. I have no difficulty in understanding why the judge concluded that it was in their best interests that he should continue to be present in the United Kingdom. That is an important part of the proportionality exercise which I shall return to in a moment.

24. As to the second family relationship which Mr Ho has, this might be best described as the primary one since he has married the claimant and they have a child. It is open to that child at any stage to exercise his rights as an EU citizen and make his way to the United Kingdom. On the evidence before me there is no suggestion that he would be unable to do so without the claimant being present. Mr Ho has been a father to three other children here and there is no suggestion he does not have good parenting skills. Accordingly the refusal to admit the claimant to the United Kingdom would not deprive her son of the genuine enjoyment of the substance of his rights associated with his status as an EU citizen and there would therefore be no breach of Article 20 of the Treaty on the Functioning of the European Union.

25. It is necessary to turn to the familiar *Razgar* test. There is no doubt that Article 8 is in play because of the two elements of family life that have been found. As Mr Ho was unable to demonstrate the funds the claimant needs to meet the requirements of the Rules the only basis on which he can continue his family life with her and their son is by moving to Vietnam. This is unattractive to him because he has lived in the United Kingdom for a lengthy period. This of itself is not enough in the light of the observations of Aikens LJ to engage Article 8. The impact on the family life he has with Richard and Natasha would however be sufficiently serious to engage Article 8.

26. The aim pursued by the Entry Clearance Officer is both lawful and legitimate.

27. Section 117A of the 2002 Act requires me in the particular circumstances of this case to have regard to the considerations listed in s.117B in the context of the "public interest question" meaning the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

28. Section 117B is in these terms:

"117B. Article 8: public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) private life, or

(b) a relationship formed with a qualifying partner that is established by a person at a time when the person has been in the United Kingdom unlawfully.

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

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

29. The claimant's son is a qualifying child, however he is not living in the United Kingdom and accordingly s.117B does not apply. The impact of this new legislation is limited with regard to applications from abroad.

30. Regard needs to be had to the best interests of Le, the claimant's son. Those interests are that he should be brought up by both parents. He has spent the whole of his short life in Vietnam and therefore the decision does not result in any severance of ties with the United Kingdom except that of nationality. He is able to exercise his rights as an EU citizen or indeed as a British national by coming to the United Kingdom. Although I have concluded that Mr Ho is capable of caring for him, his best interests would be served by having his mother present also.

31. As observed by Aikens LJ those best interests cannot operate as a trump card in the face of the inability of the claimant to meet the financial requirements. My conclusion therefore is that those interests can be as well served by Mr Ho moving to Vietnam. The proportionality exercise requires a resolution of the competing interests between the best interests of Natasha and Richard and the public interest in maintaining immigration control. In my view, in the absence of any detailed evidence of the extent of Mr Ho's role in their lives, I am not satisfied that their interests are sufficiently compelling for the claimant to be granted entry clearance. As I have observed above, Mr Ho has been content to spend an extended period in Vietnam and to visit there regularly. There is no evidence that his extended absence has adversely impacted on Richard and Natasha. They will be able to visit him and it will be open to him to make return visits. In all the circumstances of this case I am not persuaded that there are the sufficient compelling circumstances which justify allowing this appeal on Article 8 grounds.

32. By way of summary therefore the decision of the First-tier Tribunal on Article 8 grounds is set aside for error of law. I re-make that decision and dismiss the appeal. The decision of the First-tier Tribunal dismissing the appeal under the Immigration Rules stands.

Signed

Upper Tribunal Judge Dawson Dated 20 August 2014