Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36081/2013

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Determination Promulgated**
On 7 January 2015	**On 22 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

<u>Appellant</u>

and

Toan Cong Vu
[No anonymity direction made]

<u>Claimant</u>

<u>Representation</u>:

For the claimant: Ms J Heybroek, instructed by Eagle Solicitors
For the appellant: Mr I Jarvis, Senior Home Office Presenting Officer

<u>DETERMINATION AND REASONS</u>

1. The claimant, Toan Cong Vu, date of birth 9.2.76, is a citizen of Vietnam.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Lingham promulgated 8.10.14, allowing the claimant's appeal against the decisions of the Secretary of State, dated 23.8.13 to refuse leave to remain on human rights grounds and to remove the claimant from the United Kingdom under section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 18.9.14.

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3. First-tier Tribunal Judge Parkes granted permission to appeal on 24.11.14.

4. Thus the matter came before me on 7.1.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Lingham should be set aside.

6. In a lengthy decision Judge Lingham found that the claimant met both the parent and partner route under Appendix FM. The judge then went on to find in the alternative that the claimant had established family life with his partner and child in the UK and that it would be disproportionate to remove him, having regard to the position of his partner's son.

7. In essence, the grounds argue that the judge appears to have treated EX1 as a free-standing provision. It is asserted that the judge failed to properly take into account that family life had been established when the claimant was in the UK illegally and the circumstances identified could not be said to be insurmountable.

8. In granting permission to appeal, Judge Parkes stated simply that the grounds are clearly arguable.

9. At §54 the judge noted that the Secretary of State relied on S-LTR 1.6, to the effect that the presence of the claimant in the UK is not conducive to the public good because, "their conduct (including convictions which do not fall within para S-LTR 1.3-1.5), character, associations or other reasons, make it undesirable to allow them to remain in the UK."

10. The claimant's Rule 24 response, dated 9.12.14, maintains that the First-tier Tribunal Judge was correct in law to reject the reliance of the Secretary of State on S-LTR 1.6 and then proceed to consider EX1, as it had not been proven that it was conducive to the public good to refuse the application. However, it is clear from §53, §57 and §60 of the decision that Ms Heybroek, who represented the claimant at the First-tier Tribunal appeal hearing, did not advance this argument in the First-tier Tribunal. At §57 the judge specifically stated that in respect of S-LTR 1.6 Ms Heybroek "did not make any submissions in support of the appellant. Indeed the appellant accepts that he had over stayed following the end of his 2005 visa and he had not tried to regularise his stay until after his arrest in August 2013," when he was encountered working illegally.

11. Further, as it is clear from §60 that the judge concluded that the claimant failed to meet S-LTR 1.6, it ill-becomes Ms Heybroek to assert in a disingenuous submission, including at §12 of her Rule 24 response, and almost entirely revisionary of the content of the First-tier Tribunal decision, that the judge had rejected the Secretary of State's reliance on S-LTR 1.6. To the contrary, it is clear that the judge proceeded from the position that S-LTR 1.6 had been satisfied. Whether she was right to so conclude is not in fact in issue in this appeal, as that part of the decision has not been appealed. However, the statement at §60 of the decision that the judge went on to consider the claimant's family life in the UK "on the basis that although he fails to

meet S-LTR 1.6 he can meet E-LTRT 2.2 because it stipulates that "The applicant must not be in the UK in breach of immigration rules (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies," was wrong in law. If the claimant cannot meet S-LTR 1.6 he fails at that preliminary hurdle and cannot reach the stage of consideration of E-LTRT 2.2 or EX.1. When the terms of the decision in relation to S-LTR 1.6 were put to Ms Heybroek, she eventually conceded that it had not been challenged at the First-tier Tribunal.

12. It follows that the judge cannot in law have been satisfied that as the claimant has shown a genuine relationship with Ms Bui, paragraph EX.1 applies to him, as the judge purported to find at the conclusion of §60.

13. I also note that the refusal decision relied not only on S-LTR 1.6 but also S-LTR 1.7, as the claimant failed to provide an immigration officer with his address during questioning. In respect of this, the judge found that the claimant had offered a reasonable explanation for not offering an address in Aberdeen. However, the judge makes no such similar finding in relation to S-LTR 1.7.

14. It follows from the above that the findings of the judge in relation to Appendix FM are fundamentally flawed and cannot stand. EX.1 is not free-standing, as has been made clear in Sabir (Appendix FM EX1 not free standing) [2014] UKUT 00063 (IAC). The discussion and findings that follow from §60 through to §69 are wrong in law. Since the claimant failed at the stage of S-LTR 1.6 none of the EX.1 considerations are relevant.

15. I note in passing that at §66 the judge refers to two parts of R-LTRP, when it appears she is in fact referring to EX.1. Further, it is not clear from §67 that the judge intends to refer to E-LTRP 3.2, as I can find no reference to that provision in the refusal decision.

16. At §69 the judge appears to have considered that the claimant may succeed under the parent route, before going on to find that even if he does not, he can succeed under the partner route. This finding is also fundamentally flawed. It is not possible for the claimant to meet E-LTRPT 2.3 or 2.4 where the child concerned lives with their mother and the claimant. The claimant has to show sole responsibility or the parent or carer with whom the child lives must not be the partner of the claimant. In effect, leave to remain under the parent route has no application to the facts of this case.

17. Given that the findings in relation to Appendix FM are flawed and cannot stand, they necessarily infect the article 8 ECHR consideration outside the Rules, as the fact that a person cannot meet the relevant Rules for consideration of private and family life is highly relevant to any proportionality balancing exercise.

18. Further, in relation to the article 8 assessment, although the judge recites, somewhat incorrectly, some of the provisions of section 117B, it is not clear that the judge has in fact taken account of them. For example, it is not clear whether the judge has accorded little weight to the claimant's relationship with his partner, established at a time when he was in the UK unlawfully. Neither has the judge addressed the issue of reasonableness of expecting his partner to relocate, given that she was fully aware of his precarious immigration status and that they may not be able to continue such a

relationship in the UK. She has spent at least part of her life in Vietnam and would be returning with the claimant who still has ties to Vietnam. There was no evidence that she had made any enquiries as to whether she would be able to remain there with him, or whether she might be able to obtain employment there. In the absence of these considerations, I find that there has been an insufficient assessment of the obstacles to relocation of family life in Vietnam. Most of the discussion in the decision from §83 onwards relates to the child Daniel. In the circumstances, the article 8 assessment is incomplete and inadequate.

19. For the reasons set out the decision of the First-tier Tribunal has to be set aside and remade. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the findings are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

20. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusion & Decision:

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to the First-tier Tribunal to be remade afresh.

Signed: Date: 7 January 2015

Deputy Upper Tribunal Judge Pickup

Consequential Directions

22. The appeal is remitted to the First-tier Tribunal at Taylor House, to be heard by any First-tier Tribunal Judge other than Judge Lingam;
23. The appeal is to be heard afresh with no findings of fact preserved;
24. The estimated length of hearing is 2 hours.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed: Date: 7 January 2015

Deputy Upper Tribunal Judge Pickup