



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/46416/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19<sup>th</sup> May 2015

Determination Promulgated  
On 3<sup>rd</sup> June 2015

Before

THE HONOURABLE MR JUSTICE EDIS  
DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR HONG THANH HUA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr C Talacchi (Counsel)

For the Respondent: Mr S Whitwell (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. The appellant's appeal against a decision to remove him from the United Kingdom was allowed by First-tier Tribunal Judge Hussain ("the judge") in a determination promulgated on 19<sup>th</sup> August 2014. That decision was set aside as containing a material error of law, in a decision promulgated on 30<sup>th</sup> March 2015. Findings of fact made by the judge were preserved. These included the judge's finding that the

appellant and his wife have enjoyed family life together since 2004, that the appellant supports her in practical terms on a day-to-day basis, that the appellant's wife has lived in this country since 1979, when she arrived as one of the Vietnamese "boat people" aged 16 and that she returned to Vietnam five years ago to visit her elderly mother. The judge also found that the appellant's step-daughters were born in the United Kingdom and that they and their mother are British citizens.

2. The appellant's case is that he can succeed under the Immigration Rules ("the rules"), in the light of the family life he has established here. In particular, he claims that he falls within EX.1.(b) of Appendix FM, as he and his wife have a genuine and subsisting relationship and there are insurmountable obstacles to family life continuing outside the United Kingdom. EX.2. provides that "insurmountable obstacles" means "the very significant difficulties which will be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner". The appellant relies on cumulative factors showing insurmountable obstacles, including the difficulties in reintegrating in Vietnam, the very limited ties to Vietnam that remain, his wife's physical problems and lack of mobility and her mental ill-health, the substantial ties established in the United Kingdom by the appellant and his wife and their children.
3. Mr Talacchi said that the evidence contained in the bundle before the judge was relied upon in the re-making of the decision. In addition, guidance from the Home Office, handed up, was helpful in relation to insurmountable obstacles. The guidance at paragraph 2 on page 24 referred to very significant difficulties leading to serious hardship for one or both of a claimant and his or her partner. The case was advanced on the basis that insurmountable obstacles to relocation could be shown, so that the appellant succeeded under the rules. If the Upper Tribunal were to find no insurmountable obstacles, he would invite a finding that there were exceptional circumstances and that an Article 8 assessment outside the rules would lead to the conclusion that the removal decision amounted to a disproportionate interference with the appellant's family and private life here. The Secretary of State recorded the appellant's claimed arrival in the United Kingdom in 2003 and his application for leave in March 2012, in the decision letter dated 25<sup>th</sup> October 2013. She acknowledged that the appellant met the relationship requirement of the partner route but found that there were no insurmountable obstacles preventing family life continuing outside the United Kingdom. Again, the Secretary of State accepted that the appellant's wife is British and has lived in the United Kingdom for most of her life but concluded that this did not mean that she and the appellant would be unable to live together in Vietnam, although a degree of hardship might be caused.
4. The appellant was called and adopted his witness statement, which appeared at page 35 of the appellant's bundle. In that statement, he described the years 2005 to 2011 as very difficult as his wife suffered from depression, had physical problems with her mobility and hips. He helped his wife with most of the household chores and, when her hip problems recurred, helped her with dressing. He described his relationship

with his step-daughters Sonia and Stacey as very strong. He and his wife have been married for over ten years.

5. Mr Talacchi asked whether he had relatives in Vietnam. The appellant replied that his mother and younger sister remain there but they would be unable to help him re-establish himself. His mother was old and now a pensioner and his younger sister had her own family and children. He had nowhere to live in Vietnam and would not be able to find anything to do there. He has no savings and would be homeless in Vietnam.
6. In cross-examination, he said that his mother lives in Saigon with his sister and his sister's children. Mr Whitwell asked whether his mother might help with accommodation, if the appellant returned to Vietnam for a short period of time. He replied that their house was like a box and was very small and there was nowhere for him to live there. There was not enough space. It was not really a house and was more like a metal box. His mother, sister and the three children cooked, ate, slept and lived there. His wife had not seen the property and did not visit when she was in Vietnam seeing her mother. Before he came to the United Kingdom, the appellant sold things on the street such as biscuits and peanuts to people going to the cinema. He would be unable to get work as he left a long time ago. He could speak a little English.
7. The appellant said that his wife would be unable to join him in Vietnam because her children lived here. She had to go to hospital for checkups because of her health conditions. They had never discussed the prospect of return to Vietnam. There would be nowhere to stay there, no work and so his family life would not be the same, even if his wife were to return to Vietnam with him.
8. There was no re-examination.
9. The appellant's wife Jade Cheung, gave evidence. She adopted the witness statement which appeared in the appellant's bundle at page 174. Ms Cheung arrived in the United Kingdom as a refugee, one of the boat people, in 1979 and naturalised as a British citizen in July 1991. Her relationship with the appellant began in 2004 and they married in August that year.
10. Ms Cheung said that her mother remains in Vietnam. She is now 80 and lives with her grandchildren in a small space, about 4 metres square, in Hanoi. If she returned to Vietnam, she would have nowhere to live and there was no room at her mother's place, which only had space for a double bed. There were six or seven people living there.
11. Ms Cheung said that she had now lived in the United Kingdom for 36 years and was a British citizen. Her children and whole family were here and apart from her mother, she knew nobody in Vietnam. She is in receipt of Employment Support Allowance ("ESA") because of her disability. She is unable to work. When she was married to her first husband, he looked after her but following their divorce and after the birth of her children, she had no choice but to claim benefits as she was unable to

take employment. She would have no money in Vietnam. One of her daughters married last year and she expected grandchildren soon. She lived here with her husband and there was nothing for them in Vietnam.

12. The appellant helps her on a day-to-day basis. She has to take anti-depressant medicines and painkillers and sometimes sleeping pills. Without her husband, she could not cope and if she needed to travel anywhere, her husband had to be there to help her.
13. In cross-examination, Ms Cheung said that she receives council tax benefit but has to contribute £37 per month. Her rent is £131 a week but she did not have to pay this. She pays the £37 towards council tax out of her income support. If the appeal were lost and her husband went to Vietnam, she wondered how she could live by herself. Her family was here. If her husband were removed, this would make her mental ill-health more serious and she would not be able to cope. Her children no longer lived with her. She was unable to support her mother in Vietnam.
14. So far as her health is concerned Ms Cheung said that the medical evidence appeared in the bundle and that since her last hip operation seven years ago, she has suffered limited mobility and pain as she has a crack in her femur. She has been offered another operation and a new hip but success is not guaranteed. She has pain every day because of the cracked bone. Mr Whitwell asked about possible return to work, in the light of the prognosis which appeared at page 201 of the bundle, suggesting that a return was unlikely for at least two years at the time the report was prepared in May 2012. Ms Cheung replied that she still could not go to work. Although she speaks English, she cannot write it well. Without qualifications and with her disability, work could be difficult for her. She still receives disability benefits. Her children can help sometimes and graduated here. Her daughters support Ms Cheung and the appellant financially.
15. There was no re-examination.
16. Ms Sonia Pham then gave evidence and adopted her witness statement. Since it was written in February 2014, she has married. In paragraph 3, she referred to her mother's mental health and the positive impact of the relationship between her parents. Since the proceedings began, both had been under pressure. Her mother had a history of ill-health but the symptoms were alleviated by her father's presence and help. She and her mother worried about the impact of separation if her parents returned to Vietnam. Ms Sonia said that she accompanied her mother to visit her grandmother a few years ago. Her grandmother lives in a shack in Hanoi, made of concrete with no water and no proper roof. She is in a small, damp room about one metre square and the rain comes in. It is not a fit place to live.
17. In cross-examination, Ms Sonia said that she is able to support her mother and tries to visit every few weeks. She and her husband live in London and her mother is in Chertsey. She relies on her father to pick them up when they visit. She has no real

relationship with her grandmother. Ms Sonia was born in the United Kingdom. She was not aware of any real financial support given to her grandmother.

18. Ms Stacey Pham gave evidence and adopted her witness statement. She said that she can see that her mother's depression has become worse. She seemed to be facing a horrible choice between staying here, where her daughters were, and moving away and leaving them. In cross-examination, Ms Stacey said that she has moved to Peckham since making her witness statement. She was aware of her father's lack of immigration status but this did not prevent bonds forming. Her parents were working things through. They encouraged Ms Stacey and her sister to develop their careers.
19. In submissions, Mr Whitwell said that reliance was placed upon the notice of decision and the letter giving reasons. Certain findings of fact made by the judge were preserved. The appellant had withdrawn an application for leave at an earlier stage and this informed the basis on which family life was developed. Although it was correct that he had been lawfully here with a residence card as a family member, it was not clear when the relationship which gave rise to that grant of leave ceased to subsist. Family life with his wife and daughters developed at a time when his immigration status was not settled and was, instead, precarious. The Secretary of State's view was that EX.1 did not apply as there were no insurmountable obstacles to family life continuing in Vietnam. The Home Office guidance was of assistance here. EX.2 was introduced on 28<sup>th</sup> July 2014 and was not in effect when the appellant made his application or when the adverse decision was made but it was still relevant and fell to be applied. The critical question was whether very serious hardship would be caused to one or other of the couple. On the evidence, both the appellant and his wife spoke Vietnamese and there were no cultural barriers to integration on return. Ms Cheung was born and brought up in Vietnam for sixteen years and there were some evidence of extended family members present there on each side. The appellant had his mother and sister in Vietnam and Ms Cheung's mother live there. The children were now in their late 20s and led independent lives. A relevant factor was the medical position regarding Ms Cheung. The GP's letter written on 14<sup>th</sup> February 2014 suggested that she was not receiving ongoing treatment for her hip or in relation to her mobility, although she suffered pain. The report appeared to show that Ms Cheung could not walk long distances, although she clearly was able to walk to an extent and there was no expectation that she would never be able to return to the labour market. The medical evidence had to be seen in that context. Overall, the Tribunal should conclude that there were no insurmountable obstacles to family life continuing abroad.
20. If an Article 8 assessment were made outside the rules, the appellant could not meet the requirements of paragraph 276ADE as he had been present here for only twelve years. It would not be disproportionate to require him to leave the United Kingdom and, if he wished, make an entry clearance application from Vietnam. So far as section 117A to D of the 2002 Act was concerned, the appellant was not financially independent and his relationship with Ms Cheung developed at a time when his status was precarious. There was no evidence regarding his residence card or the

circumstances in which his relationship with an EEA national spouse came to an end and so it was difficult to establish whether the relationship with Ms Cheung was formed at a time when he was present here unlawfully. It was also far from clear that the appellant would succeed on an entry clearance application. If he did make an application in Vietnam, the Home Office guidance on processing times showed that 100 percent of settlement applications were completed within 30 days.

21. Mr Talacchi said that the assessment was fact sensitive. The evidence showed that significant difficulties would be faced by the appellant or his wife, amounting to insurmountable obstacles within the rules. There were cumulative factors. The appellant's daughters' evidence was important. They referred to their mother's depression and mental ill-health and her physical problems. Ms Cheung had a lack of mobility and there would be real difficulties finding a place to stay in Vietnam. There were insufficient finances to enable the appellant and his wife to establish themselves there. Although they had some ties to Vietnam, these were meagre. The Tribunal ought to conclude that the family members remaining there would be unable to assist.
22. Ms Cheung was in receipt of ESA and unable to work at present. There was nothing to show any similar benefit or assistance in Vietnam. A summary of the medical treatment she had received appeared in the appellant's bundle at page 200. She had limited mobility and there had been extensive surgery over the years. She was described as having substantial residual functional loss. The prognosis in 2012 was that she would be unlikely to return to work for at least two years. There were ongoing medical issues, as set out in the GP's letter and a general worsening in Ms Cheung's health since 2010.
23. If an assessment were required outside the rules, there were exceptional circumstances which would result in unjustifiably harsh consequences for the appellant and his wife. Ms Cheung had lived here since she was 16. So far as the public interest was concerned, the bank statements in the appellant's bundle showed that she has received disability living allowance, housing benefit and council tax benefit. As his spouse was in receipt of these benefits when the application was made, the appellant was exempt from the financial requirements of Appendix FM. The resources available were sufficient to show that he could be adequately maintained. So far as a temporary separation was concerned, should the appellant return to Vietnam to make an entry clearance application, this would remove the care he provided for his wife on a day-to-day basis. Again, the two daughters gave evidence regarding the importance of that support to enable their mother to cope and to promote her mental health.

### **Findings and Conclusions**

24. We first assess whether the appellant has shown, on a balance of probabilities, that there are insurmountable obstacles to family life with Ms Cheung continuing outside the United Kingdom, under EX.1.(b) of Appendix FM to the rules. It is not in dispute that he has a genuine and subsisting relationship with his wife, a British citizen.

EX.2, inserted into the rules with effect from 28<sup>th</sup> July 2014 but of application in this case, provides that “insurmountable obstacles” means “the very significant difficulties which will be faced by the applicant or their partner in continuing their family together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner”.

25. We have taken into account the Secretary of State’s guidance on insurmountable obstacles, contained in the IDI on family migration published in April 2015. That guidance contains illustrative examples of difficulties which do not amount, in the Secretary of State’s view, to insurmountable obstacles. They include a British citizen partner who has lived here all his life, has friends and family here, works here and speaks only English who is faced with the prospect of relocating “half way across the world”. Lack of knowledge of a language spoken in the country of return would not usually amount to an insurmountable obstacle and nor would separation from extended family members unless there were particular exceptional factors in the case. A material change in quality of life would, similarly, not usually amount to an insurmountable obstacle and neither would a reduction in income. The guidance suggests that an insurmountable obstacle would exist if a person was unable to lawfully enter and stay in the country of return or where cultural barriers would result in a severe restriction of a person’s rights and freedoms. The impact of a mental or physical disability is another example although mere hardship would not suffice. In some circumstances, a lack of health care might lead to very serious hardship, amounting to an insurmountable obstacle.
26. Although the appellant has been present here for twelve years, a substantial period of time but insufficient to show that he meets the requirements of paragraph 276ADE of the rules, Ms Cheung has lived here for most of her life, having arrived long ago in 1979 and having naturalised as a British citizen twenty four years ago. Her two daughters were born here and are also British citizens and Ms Sonia married recently. The medical evidence, which is not challenged, shows that Ms Cheung is disabled and has limited mobility and that she still suffers pain on a daily basis notwithstanding extensive surgery over the years. She also has some mental ill-health, in the form of depression. Her circumstances are such that she is entitled to ESA and she has, in the past, received disability living allowance (before the introduction of ESA). Her housing costs are met by means of welfare benefits.
27. The appellant and his wife retain modest ties to Vietnam, his mother living in Saigon with his sister and Ms Cheung’s mother in Hanoi. We accept the evidence we heard from the witnesses that these relatives live in rather straightened circumstances, in poor accommodation which is also limited in size. Overall, we find that they would be unable to assist in any substantial way with relocation, should the appellant and Ms Cheung return to Vietnam or should the appellant return there alone.
28. So far as an application for entry clearance abroad is concerned, we accept Mr Whitwell’s submission that there is no certain prospect of success at all. We do not speculate on the outcome of any such application, were it to be made, in the light of SB (Bangladesh) [2007] EWCA Civ 28, and we also find that any period of

separation would also be uncertain, should Ms Cheung remain in the United Kingdom, notwithstanding the efficient service at the overseas post in completing visa applications.

29. We found the evidence of Ms Sonia and Ms Stacey impressive in relation to the closeness of the family ties. Although they now live independently, we do not doubt that they retain close bonds to their parents and we accept what they said about the practical, day-to-day support the appellant provides to their mother. Although the remaining bonds between the daughters and their parents fall short of showing family life in themselves, they are plainly a material factor in the assessment which, accepting Mr Talacchi's submission, is one which involves consideration of the relevant factors cumulatively.
30. If the focus were put on any of the salient features individually, we doubt that an insurmountable obstacle or obstacles would be shown. It is clear that some factors fall within the guidance, including the separation from Ms Sonia and Ms Stacey that would result should the appellant or both parents return to Vietnam. Similarly, the medical evidence shows that Ms Cheung suffers from a physical disability and has modest mental ill-health. Her circumstances are sufficient to entitle her to welfare benefits here on the basis that she cannot at present work. Mr Whitwell is right that there is no definite prognosis that she will never return to work but it is clear, on the other hand, that her disability is a practical impediment at present and is likely to be so for some time to come. That impediment would be present on return to Vietnam.
31. If the appellant and his wife were to return, so that they could continue family life in Vietnam together, this would necessarily involve separation from their daughters. We have already found that the family members who remain there would be unable to offer any substantial practical assistance and Ms Cheung's disability would, in her particular circumstances, be likely to impede access to employment. Return to the country she fled as one of the boat people some 36 years ago, and leaving the country of her present nationality twenty four years after she became a British citizen, would, we find, be likely to have an adverse impact on her mental health although we had no expert evidence on this particular aspect before us.
32. Should Ms Cheung remain in the United Kingdom, the appellant being removed or returning alone, this would result in separation for an uncertain period of time. Contact with his daughters would also be severed. Although practical help with her disability might be available from other sources in this country, including perhaps the local authority, Ms Cheung would also lose in her spouse the day-to-day carer she relies upon, not merely to assist with physical needs but also, on the evidence, as a bulwark against the return of depression.
33. Having weighed the evidence overall, and having taken into account all the relevant factors, we conclude that insurmountable obstacles have been shown as the continuation of family life abroad would entail very serious hardship for the appellant and, more so, Ms Cheung. The requirement of EX.1.(b) has been met and



we allow the appeal on this basis. There is no need for us to proceed to make an assessment outside the rules.

**DECISION**

The decision of the First-tier Tribunal is remade as follows:

The appeal is allowed as the requirements of the Immigration Rules have been met.

**ANONYMITY**

There has been no application for anonymity and we make no direction.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

**TO THE RESPONDENT**  
**FEE AWARD**

No fee is payable in these proceedings and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell