Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/26408/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 August 2018	**On 11 September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

DIEP [N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Singer, Counsel
For the Respondent: Mr A McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant a national of Vietnam, date of birth 26 March 1994, appealed against the Respondent's decision, dated 15 November 2016, to refuse leave to remain.

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2. His appeal came before First-tier Tribunal Judge Talbot (the Judge) who on 28 March 2018 dismissed the appeal on human rights base grounds. Permission to appeal that decision was given on 3 May 2018.

3. The substance of the criticism is that the Judge failed to provide adequate and sufficient reasons for the conclusion that the Appellant and his partner had a child in which there was an active subsisting parental relationship who was a British national. The child was for the purposes of Section 117B(6) of the NIAA 2002 as amended a 'qualifying child' and the Judge accepted that there was a genuine and subsisting parental relationship between the Appellant and that child. In addition there was another child who was not a qualifying child.

4. The Judge heard evidence from the Appellant and his partner and evidence of the family unit of which the Appellant, his partner and their daughter, date of birth 6 January 2017 and the qualifying child were apart. The Judge accepted the submissions made by Miss Jaquiss (erroneously referred to as Mr) and in particular the evidence was substantively unchallenged about that relationship. It was accepted that there was a genuine and committed relationship between the Appellant and his partner.

5. The Judge did deal albeit not in the order usually expected with the best interests of the children, but went on to address the fact that the Appellant had entered the UK unlawfully, had made an unmeritorious asylum claim and essentially had no basis to remain. The Judge went on [D24]:-

> "Whilst living here unlawfully, the Appellant has established a relationship with another Vietnamese national (whose status in the UK is itself precarious). He has established a family life with her, her son by a previous relationship and they now have a young child together. If the Appellant is removed to Vietnam, it is open to his partner to accompany him with the two children. Alternatively if she is successful in acquiring settled status in the UK when her current discretionary

leave expires it may be open to the Appellant to apply for entry clearance to join her here. In any event I am satisfied in terms of the Respondent's decision in this case that the public interest in the Appellant's removal is proportionate to any interference with his Convention rights and the associated rights of his family members."

6. It is accepted wholly properly by Mr McVeety that the Judge's reasoning is really insufficient to show a proper assessment, even taking into account the Appellant's poor immigration history, of the reasonableness of requiring the qualifying child to leave the UK. The Judge cites MA Pakistan [2016] EWCA Civ 705 but does not refer to AM Pakistan [2017] EWCA Civ 11. The Judge failed to determine the issue of whether in the context of Section 117B it is reasonable to effectively require the child to leave the United Kingdom.

7. It is clear from the case of SF (and others) Albania [2017] UKUT 00120 that the Secretary of State has provided important guidance on when it would be reasonable to expect a British citizen child to leave the UK.

8. Mr McVeety points to the fact that the Judge has perhaps unintentionally, somewhat selectively, set out these matters but has simply not dealt with the issue of reasonableness. Accordingly it has been accepted that the Original Tribunal's decision discloses an error of law and cannot stand.

9. Accordingly the parties are agreed that I should remake this matter on the basis the findings which the Judge has made. In doing so I also take into account the case of ET and MT [2018] UKUT 00088 and the reminder of the need for powerful reasons why it would be reasonable to expect a child who has been in the United Kingdom over ten years, in other words a non-British national, to be removed notwithstanding also the child's best interests lie in remaining.

10. The Appellant had an immigration history but it is not one which is bad enough. The Appellant was an overstayer but that alone does not appear in the light of the case law and the understanding of powerful reasons sufficient to show it is reasonable for the British national child to remove with parents to Vietnam.

11. In the circumstances Mr McVeety properly accepts that the Judge's findings show the necessary relationship with the child establish the child's nationality and do not demonstrate powerful grounds why it is reasonable for the child to leave the United Kingdom.

12. It follows if it is not reasonable for the child to leave the United Kingdom then it is not in the public interest and it will not be proportionate.

13. Mr McVeety made no submissions on the remaking, other than to accept on the face of it the findings demonstrate that the appeal should be allowed.

NOTICE OF DECISION

The appeal of the Original Tribunal decision cannot stand and the following decision is substituted.

The appeal is allowed on Article 8 ECHR grounds.

ANONYMITY

No anonymity order was sought nor is one required.

Signed Dated 20 August 2018

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

The material before the Judge on evidence that perhaps was not in the same form before the Secretary of State. It seemed to me in the light of the Judge's findings and the conclusions that this is a case where any fee award is not appropriate.

Signed Dated 20 August 2018

Deputy Upper Tribunal Judge Davey