



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/00414/2015
OA/00415/2015
OA/00417/2015

THE IMMIGRATION ACTS

Heard at Field House
On 14th June 2018

Decision & Reasons Promulgated
On 26th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

TTN
HTN
TMN

(ANONYMITY DIRECTION MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER - BANGKOK

Respondent

Representation:

For the Appellants: Ms Asma Nizami of Rahman & Company Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Vietnam. They appeal against the dismissal of their appeals from the decision of the Entry Clearance Officer in Bangkok to refuse their applications for entry clearance as the dependent children of their mother who is

present and settled in the United Kingdom. I shall hereafter refer to their mother as “the Sponsor”.

2. The applications were considered by the Entry Clearance Officer under paragraph 301 of the Immigration Rules. In addition to the relationship and financial eligibility requirements, there are two alternative tests for succeeding in an application for entry clearance to the United Kingdom in this category. One is that the applicants are able to demonstrate that the parent who they are seeking to join has sole responsibility for their upbringing. Alternatively, they can gain entry clearance by showing that there are “serious and compelling circumstances” making their exclusion “undesirable”.
3. The matter came before Judge Kinnell at Hatton Cross on 31st August 2017 and, in a decision promulgated on 11th September 2017, he dismissed their appeals. Because the applications were made as long ago as 22nd December 2014, the judge was required to consider the appeals not only under Article 8 (as is now the case) but also under the Immigration Rules. The judge adopted the logical approach of considering their applications under the Immigration Rules first, and thereafter considering them under Article 8. Many of the findings made by the judge under the Immigration Rules, and which have not been challenged, were also relevant to the issues that arose for consideration under Article 8.
4. The judge firstly considered whether the Sponsor had sole responsibility for the Appellants’ upbringing. He however concluded that this was shared with the Sponsor’s parents: that is to say, the Appellants’ maternal grandparents. The judge also considered the alternative route to entry clearance under the Rules and concluded that there were not serious and compelling circumstances making their exclusion from the United Kingdom undesirable. Neither of these findings is challenged in the Grounds of Appeal to the Upper Tribunal.
5. The judge then turned to consider the appeals under Article 8 of the Human Rights Convention. The analysis begins at paragraph 46 and ends at paragraph 51. I quote it in full:-
 - “46. The Appellants’ family life is primarily in Vietnam with grandparents and great grandparents. I take the point that Article 8 recognises the right to develop a family life, but the fact that the Appellants are living in a stable, loving home environment cannot be overlooked in spite of the positive obligation referred to in the skeleton argument quoting from **SS (Congo) [2015] EWCA Civ 387**.
 47. There is family life between the Sponsor and the Appellants because, although they have not been living together there has been some communication, particularly of late and the Sponsor has accepted some financial responsibility for the children.
 48. I accept that the Sponsor cannot reasonably be expected to return to Vietnam in spite of Ms Islam’s argument to the contrary. It would not be

reasonable to expect S, a British national child, to reside in Vietnam and she has no other carer in the United Kingdom. But for S's existence the answer to the question of whether it would be reasonable for her family life to take place in Vietnam would be different.

49. The consequence of the decision keeps the Appellants from the Sponsor, though visits and remote communication can continue, but that is a sufficiency (sic) grave situation to engage Article 8.
50. The decision is in accordance with the law and in pursuit of a legitimate aim namely the maintenance of immigration controls.
51. As to proportionality, I accept that the Sponsor can house and support the Appellants. On the other hand, they are housed and supported in Vietnam and they reside in a family unit in which they have grown since birth. They are in education which will be disrupted if they emigrate to the UK. Their grandparents are capable of looking after them and the sole responsibility and exclusion provision in the Immigration Rules does not apply. It is intended by the Sponsor that the children uproot themselves from their stable home environment in order to join their mother in a foreign country, which has been her intension since she came to the UK in 2010, but there is no particular feature about this case justifying departure from the requirements of the Immigration Rules on Article 8 grounds. I find the decision to refuse entry clearance is not disproportionate."

I should explain that 'S' is the Sponsor's very young daughter. The father of 'S' is a British national from whom 'S' takes her nationality. He enjoys regular contact with her in the UK.

6. There are two grounds of appeal. The first is that in considering whether the United Kingdom was under a positive obligation to reunite the Appellants with the Sponsor in the United Kingdom, the judge failed to consider whether there was "a direct and immediate link between the measure requested ... on the one hand and his private and/or family life on the other". That was a test to which Sales LJ referred in the decision of **SS (Congo)** (above). As I understand it, it was a test intended to emphasise the distinction between cases involving applications for leave to remain (LTR) on the one hand and those for leave to enter (LTE) on the other. Whereas Article 8 will be readily engaged if the alternative to a grant of LTR is removal of the applicant from the host state, something more will be required for engagement of the positive duty where the requested measure is a grant of LTE. Whilst it is true that the judge did not refer to this additional hurdle for engaging Article 8 in LTE appeals, I have concluded that this was not material to the outcome of the appeal given that the Appellants could not in any event establish such a link.
7. In my judgement, the requirement under Article 8 for there to be an 'immediate and direct link' between family life and the granting of LTE is similar (if not identical) to the requirement under the Rules for there to be "serious and compelling

circumstances” making exclusion “undesirable”. Both require there to be weighty reasons why family life cannot take place outside the country of residence of the family member whom the applicant is seeking to join. Contrary to the submission of Ms Nizami, neither test is in my judgement confined to the situation where the applicant is residing in a country suffering from a humanitarian crisis. It may also extend, for example, to a lone child suffering from a medical condition for which treatment is unavailable in the country of origin. Each case will of course be fact sensitive. However, given the absence of “serious and compelling circumstances making exclusion undesirable” in the present appeals, it does not seem to me possible to argue that there was nevertheless an immediate and direct link between the Appellants’ family life and a request for it to be enjoyed in the UK.

8. The second ground of appeal is that the judge failed to make an explicit finding about the best interests of ‘S’ on the one hand and the three Appellants on the other. Miss Nizami, whose submissions were both attractive and realistic, did not suggest that any particular form of words is required when undertaking an assessment of the welfare and best interests of a child. Were it otherwise, the judge would be reduced to carrying out a prescriptive box-ticking exercise. So long as the Tribunal demonstrates that it has adequately considered the best interests of each of the children affected by the decision under appeal, it may do so in words of its own choosing. In considering whether that exercise has been undertaken fully and properly, it is important for the Upper Tribunal to remind itself that it is the substance rather than the form of the decision that matters. For my part, I cannot see any way of interpreting paragraph 48 other than as a conclusive finding that the best interests of ‘S’ were served by her remaining in the United Kingdom with her mother. Tellingly, Miss Nizami was unable to put forward a rival interpretation. I thus have no doubt that the judge not only considered the best interests of ‘S’, but also reached a settled conclusion as to where those interests lay. It is also clear that whilst the judge did not use the words “best interests” when considering the position of the Appellants, those interests lay at the heart of his decision. I am unable to see any way of interpreting paragraph 51 other than as a finding that it would be contrary to their best interests for their education and settled home life with their grandparents to be disrupted by the Appellants being “uprooted” from Vietnam to join their mother in the United Kingdom. Put another way, the judge found that their best interests were served by them remaining in Vietnam.
9. Miss Nizami also argued that the judge failed to consider the effect upon all four children, and S in particular, of them growing up in different households: that is to say, with S in one household in the United Kingdom and the Appellants in another household in Vietnam. I am told (and have no reason to doubt) that there was evidence before the First-tier Tribunal that the Sponsor took S with her to Vietnam on a month-long visit when S was 12 months old and the Appellants were respectively aged 14, 11 and 7 years. S would not however, at that time and in those circumstances, have developed particularly strong, emotional ties to her half-siblings. Whilst the Appellants are no doubt fond of their infant half sister, it is unlikely that in so short a space of time they would have been able to develop an attachment that was

significantly greater than the affection they would naturally feel for any 12-month-old infant. The judge was in any event entitled to find that the best interests of S on the one hand and the Appellants on the other were not identical, and that it was accordingly in the best interest of S to live in the United Kingdom with her mother and the best interests of the Appellants to live in Vietnam with their grandparents. There are occasions when it is simply not possible to reconcile the best interests of siblings and half-siblings in a way that involves them living together in the same household. The judge was entitled to conclude that this was one of them.

10. I am therefore satisfied that whilst the Article 8 assessment was capable of being expressed more clearly, the judge made findings about the best interests of all the children affected by the decision (including but not limited to those of the appellants) and that each of those findings were reasonably open to him on the evidence.

Notice of Decision

11. The appeals are dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 25th June 2018

Deputy Upper Tribunal Judge Kelly

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeals and therefore there can be no fee award.

Signed

Date: 25th June 2018

Deputy Upper Tribunal Judge Kelly