Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09036/2017
& HU/09037/2017

THE IMMIGRATION ACTS

Heard at Bradford **Decision & Reasons Promulgated**
On 4 March 2019 **On 12 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

DD and TD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person (First Appellant)
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Vietnam. The first appellant is the father of the second appellant. The firs appellant was born in 1979 and the second appellant in December 2010. They are living in the United Kingdom with the first appellant's wife (the second appellant's mother) and a younger child who are also both citizens of Vietnam. Neither of the parents have a right to live in the United Kingdom beyond the completion of this litigation in the Upper Tribunal. The first appellant claims to have entered the United Kingdom in 2006. By a decision dated 11 August 2017, the Secretary of State refused the human rights applications of both appellants. They appealed to the First-tier Tribunal which, in in a decision promulgated on 1 February 2018, dismissed the appeals. The appellant is now appeal, with permission, to the Upper Tribunal.

2. Granting permission, First-tier Tribunal Judge Bennett refused permission on the third ground of appeal This concerns the alleged failure of the judge to take into account recent jurisprudence concerning Article 3 ECHR as regards the first appellant's medical condition (he is HIV-positive). The first appellant attended the hearing in Bradford on 4 March 2019. He was not represented. I was careful to explain the procedures of the Tribunal to the appellant. Given that permission had not been granted on ground three, I did not touch upon this in my discussions at the hearing with the first appellant and this decision addresses only the remaining grounds which, as Judge Bennett observed, are linked. They concern the relevance of the first appellant's health in an Article 8 EC HR context and the correct test as regards removal which should have been applied given that the second appellant has been living continuously in the United Kingdom for more than seven years.

3. I find that Ground 1 has merit. As the judge had recorded at [22] the test under Appendix FM, EX1 (a) (ii) as whether or not it would be reasonable to expect a child who has lived in the United Kingdom continuously for at least seven years to leave the United Kingdom. The judge noted that the second appellant had not completed seven years continuous residence immediately preceding the date of the application to the Secretary of State. However, he appears (correctly) to have assessed the evidence on the basis that EX1 did apply; as at the date of the hearing second appellant had completed seven years continuous residence. The difficulty, however, is that in his concluding paragraph [27] the judge does not make reference to the reasonableness of the second appellant leaving United Kingdom. Instead, whilst noting strong links which the family has forged in Doncaster in the Vietnamese and the wider community, he has discussed the strength of contacts with relatives in Vietnam and, as regards the effect of removal on the second appellant, says only that 'whilst I recognise that children would be exposed to some considerable upheaval when they relocate with their parents as one family unit to Vietnam, nevertheless this will be tempered by some knowledge and experience of Vietnamese culture, their ability to already speak Vietnamese being able to develop close and meaningful relationships with relatives in Vietnam.' The reasonableness of removal is not mentioned and, indeed, the reference to 'some considerable upheaval' reads more like an application of a test of significant obstacles to reintegration than it does to an assessment of reasonableness.

4. I consider the judge may have fallen into error. However, I need to consider whether it is necessary for me to set aside the decision. I am reminded of the guidance provided by the Supreme Court in *KO (Nigeria)* 2018 UKSC 53 in particular at [18-19]:

> "On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is

> only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245, [2017] ScotCS CSOH_117:
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> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"
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> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, para 58:
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> > "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?""

5. Asking the question addressed by Lord Boyd in *SA*, 'Why would the child be expected to leave the United Kingdom?' The answer in the instant appeal is 'because the parents have no right to remain here.' The 'the ultimate question' so-described by the Court of Appeal in *EV (Philippines)* [2014] EWCA Civ 874, 'is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?' is, in respect of these appellants, met with the same answer. Even if I were to remake the decision having set aside the judges determination, the facts in the present appeal would be no different; I would have to consider whether it is reasonable to expect a child who is not a citizen of this country but who has lived here for more than seven years to return with his parents and his sibling to Vietnam, their country of joint nationality. Even taking into account the first appellant's medical condition (which I find the First-tier Tribunal judge addressed correctly) and the strength of the ties which all members of the family may have forged whilst living here, the fact remains that they do not meet the requirements private life and family life under Appendix FM whilst the conclusion that it would be reasonable for the second appellant to return to Vietnam with the remainder of his family is irresistible. In the circumstances, whilst I am not satisfied that the judge had in the forefront of his mind the correct test of reasonableness, I have decided not to set aside the decision since the outcome of any remaking would be the same.

Notice of Decision

6. This appeal is dismissed.

Signed Date 9 March 2019

Upper Tribunal Judge Lane