Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22151/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th February 2019	**On 12th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MR TRUNG NGUYEN NGUYEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss C Record, Counsel
For the Respondent: Mr Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Vietnam, appeals with permission against the decision of the First-tier Tribunal (Judge Geraint Jones QC) dismissing his appeal against the Respondent's decision of 7th September 2016 refusing his application for leave to remain in the UK on the basis of his Article 8 family/private life.

Background

2. The Appellant was born on 25th June 1992. He arrived in the United Kingdom in February 2011 in possession of a student visa valid until 21st October 2013. On 10th October 2013 he made an application for further leave to remain as a student, with that application being refused. The Appellant then made a fresh application for leave to remain as a student which was granted on 28th November 2013 and remained valid until 29th February 2016. However on 23rd June 2015 the Appellant's extant student visa was curtailed on account of the Respondent being informed that the Appellant had completed his course. The curtailment took effect from 22nd August 2015. He remained without leave.

3. On 7th April 2016 the Appellant made a further application for leave to remain based upon his Article 8 private/family life. He had married Mr [TC] on 9th March 2016 at a ceremony in the Newham Registration District. That application resulted in a refusal by the Respondent dated 7th September 2016 and it is this application and refusal which forms the basis of the appeal before me.

4. The Appellant's case is based upon his relationship with Mr [C]. It was accepted by the Respondent that the Appellant is in a genuine and subsisting relationship with him, but nevertheless the Respondent said that it was proportionate to expect the Appellant to return to Vietnam either to live there with Mr [C] or to apply for entry clearance through the proper channels.

FtT HEARING

5. The FtTJ judge heard oral evidence from both the Appellant and his husband Mr [C]. He noted that the Respondent had refused the decision because the Appellant did not meet the Immigration Rules and had not demonstrated that there were "insurmountable obstacles" to such family life as exists between the Appellant and his husband continuing outside the United Kingdom that is in Vietnam (or elsewhere).

6. In analysing the oral evidence the FtTJ set out that the Appellant had said that his father who resides in Vietnam reacted angrily to the fact that he had married a man. He did not contend however that upon return to Vietnam he would of necessity have to have contact or reliance upon his father or indeed any other family member. The judge also recorded, that the Appellant made a "bald assertion" that "there is bullying, name calling and harassment in Vietnam for gays" [10]. The judge noted that in cross-examination the Appellant accepted that gay marriage was legal in Vietnam and that the country hosts one or more gay pride marches each year, albeit it was said that such marches were not attended by very many people [11].

7. So far as the Appellant's husband's evidence is concerned, the judge recorded that he referred to his relationship with the Appellant, his own

employment and to "not wanting to be separated" from the Appellant. When cross-examined he gave several reasons for not wanting to leave the United Kingdom, asserting that he could not live in Vietnam but acknowledging that the prospect of doing so had not even been discussed between him and the Appellant [14].

8. The FtTJ concluded that the Appellant had not demonstrated that he could meet the requirements of the Immigration Rules because it had not been shown that there were compelling or exceptional circumstances in his case such as to amount to insurmountable obstacles within the Rules.

9. So far as a consideration under Article 8 is concerned, the judge recorded that there was nothing to justify proceeding to an Article 8 assessment but nevertheless at [23] did go on to say that had an Article 8 assessment been undertaken, the Appellant would have undoubtedly failed at that hurdle. He dismissed the appeal.

The Grounds of Application

10. The Appellant sought permission to appeal on the grounds that the FtTJ had failed to properly assess the background evidence concerning same sex marriages in Vietnam, had failed to appreciate the discrimination and stigma the Appellant (and his husband) would face on return and had failed to properly factor those matters into an Article 8 proportionality assessment outside the Rules.

11. Permission was granted in the following terms:

> "It is arguable that the Judge has attached insufficient weight to the available background material in relation to the question of recognition of same sex marriage in Vietnam. It is arguable that the evaluation of the consequences of the lack of recognition of same sex marriage is capable of playing a more significant role in the proportionality exercise. It is arguable that the approach to the definition and scope of insurmountable obstacles has been affected. It is arguable that the Judge has attached insufficient weight to the degree of discrimination and stigma referred to in the permission application."

12. Thus the matter comes before me to determine whether the decision of the FtTJ contains such error that it requires it to set aside and re-made.

Error of Law Hearing

13. Before me Miss Record appeared on behalf of the Appellant and Mr Duffy for the Respondent. Miss Record's submissions followed the lines of the grounds seeking permission. She pointed out that the core ground centred on the judge's finding at [20] that the Appellant had come nowhere near to making out his case on the issue of whether or not he would face insurmountable obstacles on a return to Vietnam. She emphasised that although same sex marriage was no longer illegal there,

nevertheless there is no framework put in place to support those who are in such a marriage. There is bullying and stigma and discrimination against gay people. The FtTJ had failed to give sufficient consideration and weight to these factors. If looked at and weighed properly, these factors would amount to insurmountable obstacles sufficient to bring the Appellant within the Rules.

14. In support of this she referred me to several background documents including those contained in the Respondent's own bundle. The documents included extracts from the USSD reports dated 2014 and 2017, together with a "World Vietnam" article dated 18th January 2016 (this article was also referred to in the Respondent's Reasons for Refusal letter). Those documents set out that there is discrimination and bullying in respect of same sex marriages. This is material which the judge had in front of him and which he should properly have considered but which he had not. She continued her submissions saying that the above point in turn impacted on the Article 8 assessment. She pointed out that a reading of [23] shows that the judge has simply not turned his mind to undertaking the proportionality balancing exercise. Indeed he has closed his mind to an Article 8 assessment, focusing instead on Section 117B (iv) of the 2002 Act. The decision should be set aside and reheard.

15. Mr Duffy in response relied on a Rule 24 response opposing the application. He submitted that the grounds were not made out. A reading of [10] and [11] demonstrated that the FtTJ had turned his mind to the issue before him and had kept in mind that the Appellant's claim was one of insurmountable obstacles. The FtTJ had analysed the evidence before him including some documentary evidence, but nevertheless concluded that the Appellant's case was not made out. The judge is not obliged to list every piece of evidence before him provided he has demonstrated that he has kept the issues in mind. The findings made by the judge were clear and reasoned and were ones which were open to him to make. The evidence referred to by Miss Record simply does not go far enough to undermine the judge's decision.

16. Mr Duffy acknowledged that the judge could be said to be in error in the way he had framed matters re the Article 8 assessment [23], but the error was not material. A reading of the decision showed the judge had in any event reviewed the evidence that would have formed the basis of any proportionality assessment. This was a matter of form over substance. The judge had given adequate consideration to the Article 8 proportionality test, and had correctly identified that the Appellant was in the UK without leave and thus any private life built up here whilst without leave could only be afforded little weight. The judge's findings were open to him on the evidence. Altogether the decision was sustainable and it should therefore stand.

17. In a final response Miss Record urged upon me to look closely at the documents that she had referred to in her main submissions and reiterated that there was a failure to take into account relevant factors in

the Article 8 assessment. At the end of submissions I reserved my decision which I now give with reasons.

Error of Law Consideration

18. Both representatives were in agreement that the issue before me centres on a consideration of whether there are significant difficulties/ insurmountable obstacles to such family life as exists between the Appellant and his husband continuing outside the United Kingdom, that is in Vietnam (or elsewhere). The same factors pertain to both S.276 ADE and EX. 1 of the Rules.

19. The FtTJ did not accept that the Appellant had made out his case. His reasons for this are set out at [17] where he says as follows:

> "… It was urged upon me that the appellant and his husband would be subjected to bullying and harassment if they resided in Vietnam, by reason of their homosexuality; a proposition which I do not accept. That proposition is based solely upon an assertion made by the appellant in the course of his evidence, which is, undoubtedly, self-serving. If the appellant had wished to make good that assertion by reference to reputable and reliable objective evidence, he has had every opportunity to do so. The fact that he has adduced none, speaks volumes. Indeed, it suggests to me that the information provided by Lonely Planet is likely to be tolerably accurate and reliable. It is for the appellant to prove, on the balance of probabilities, each factual assertion that he makes and, in respect of this assertion, his evidence comes nowhere near satisfying me to that standard."

20. As Miss Record pointed out there was evidence in the form of USSD reports and an article dated 18th January 2016 (an article which is also referred to in the Respondent's own bundle). I agree at first sight it seems that the judge may have side stepped evidence which was before him. Certainly the USSD reports cannot be characterised as not being reputable sources. However on a full reading of [17] it is clear that the judge did keep the documentary sources in mind because he specifically makes reference to a Lonely Planet article which he considered to be to "likely to be tolerably accurate and reliable" [17].

21. The difficulty for the Appellant is that whilst it could be said that the judge was in error in failing to give weight to the USSD reports, I find I am in agreement with Mr Duffy that even if I accepted this contention, the error is not materially sufficient to vitiate the decision. I have looked carefully at the USSD reports and I agree with Mr Duffy that an examination of these reports shows they are not sufficiently detailed in themselves to further the Appellant's case. On the contrary what they say is that societal discrimination exists and remains pervasive but there was "no reported official discrimination". The same reports go on to acknowledge that same sex marriages are now legal and that Gay Pride marches take place.

22. The judge found that the Appellant had come *"nowhere near"* demonstrating that there would be insurmountable obstacles to him and

Mr [C] enjoying family life outside the UK [20]. Whilst the language used may be described as overstatement, nevertheless I am bound to agree that in substance the evidence falls short of that required to show that insurmountable obstacles /significant difficulties exist. Thus the FtTJ cannot be said to have fallen into legal error in the making of his decision.

23. That being so, I look finally at the concern raised over the Article 8 assessment. As Mr Duffy acknowledged, the judge was wrong in the way he approached Article 8 outside the Rules. However once again, I am bound to agree with Mr Duffy in that the whole of the Appellant's case is predicated upon him and his husband not being able to enjoy their Article 8 family life rights outside the UK because they would face discrimination and bullying on account of their sexuality. Article 8 outside the Rules cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm. In my judgment there is essentially nothing further in this appeal other than that which has already been considered within the Rules. The Appellant does not meet the Rules.

24. Further and in any event in deciding whether an Appellant ought to succeed in relation to Article 8 outside the Rules, as the FtTJ correctly identified, it is necessary to take into account the factors set out in paragraph 117B of the 2002 Act.

25. The maintenance of effective immigration controls is in the public interest. The Appellant's immigration history is that, having arrived lawfully as a student, he overstayed after his leave was curtailed. Little weight should be given therefore to either his private life or his relationship with his husband because it was established at a time when he was in the UK unlawfully. There is nothing further of an exceptional nature. Therefore the consideration given to the factors in [23] is sufficient to demonstrate that the judge has given adequate reasons for arriving at a conclusion that the Respondent's decision is not a disproportionate one in the context of an Article 8 assessment.

26. For the above reasons, I find no legal error in this decision sufficient to vitiate the decision. The decision therefore stands.

Notice of Decision

This appeal is dismissed. The decision of the First-tier Tribunal promulgated on 14th September 2018 discloses no material error of law. The decision stands

No anonymity direction is made.

Signed C E Roberts Date 09 March 2019

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

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

Signed C E Roberts Date 09 March 2019

Deputy Upper Tribunal Judge Roberts