



IAC-AH-CJ-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11183/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 3rd November 2015**

**Decision & Reasons Promulgated
On 10th November 2015**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR DUC VAN TRAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms R Pettersen (Home Office Presenting Officer)

For the Respondent: Ms Manning (Counsel)

DECISION AND REASONS

1. I shall refer to the Appellant in this appeal to the Upper Tribunal as the Secretary of State and the Respondent as the Claimant. This is the Secretary of State's appeal to the Upper Tribunal, with permission, against a decision of the First-tier Tribunal (Judge Ford) to allow the Claimant's appeal against a decision of 2nd December 2014 refusing to vary leave to remain.
2. By way of background, the Claimant is a citizen of Vietnam. The First-tier Tribunal recorded his date of birth as being 5th June 1996. He entered the

UK on a date in June 2011 and, on 11th October 2011, he claimed asylum. However, his application was refused on 4th May 2012 but, in view of his young age, he was granted discretionary leave until 4th December 2013. He did appeal the decision refusing to grant asylum, notwithstanding the grant of discretionary leave, but that appeal was dismissed on 21st June 2012. He subsequently applied for further discretionary leave to remain, within the currency of his previous leave, and that application was refused on 2nd December 2014 (see above).

3. The appeal to the First-tier Tribunal concerning the decision of 2nd December 2014 was heard on 2nd February 2015. The Claimant, in pursuing that appeal, said that he had had an unhappy life in Vietnam, had been abused by family members, and would have nothing tangible to return to in that country. However, he said that he had done well since coming to the UK and was a talented student who excelled at mathematics. He had made many friends and had been looked after by a foster family to whom he remained close.
4. The First-tier Tribunal found that the Claimant, if returned to Vietnam, would not have any family or social support there. However, he would be able to maintain links with his foster family and his friends in the UK and might be sent some money from the UK. He had been aged 14 years when he arrived in the UK and had applied himself consistently and conscientiously to his studies. He had achieved a high level of integration. The First-tier Tribunal decided that he did not meet the requirements of any of the Immigration Rules, its having considered paragraph 276ADE in particular, but found it appropriate to go on to consider whether he might benefit from the provisions contained within Article 8 of the European Convention on Human Rights (ECHR) outside the Rules. In this context, it said this;

“34. The real issue in this case is whether the Appellant’s return to Vietnam at this point in his life will lead to disproportionate damage to his emotional and mental health and consequently his personal integrity. I have looked at the reality of what the Appellant will face if removed to Vietnam as at the date of the appeal hearing. He would be denied the opportunity to complete his A-level studies. This would come as a severe blow to the Appellant who would, in the words of his head teacher, not only be denied the qualification that he has worked so hard for, but lose the benefit of the four years of education he has undertaken in the United Kingdom. He was given the benefit of this education as part of the grant of discretionary leave and I was surprised that the Secretary of State had undertaken no consideration of the impact on the Appellant of denying him the opportunity to complete his secondary education, especially when the reasons for refusal letter makes express reference to his studies at paragraph 65.

35. I have no doubt that this young but able Appellant will be able to secure employment on his return to Vietnam sufficient to meet the necessities of life. But the impact on him of denying him his A-level qualifications will be severe. I accept given the background evidence, that he will be unable to pursue further education in Vietnam as he will not have the money to do so. I accept that he will be unable to pursue

third level education there. Unless he is sponsored to study elsewhere (and this may be a possibility), I find that he will be unable to finance third level studies.”

5. And then;

- “40. I agree with the decision of the Secretary of State that the Appellant does not enjoy family life in the United Kingdom for the purposes of Article 8 human rights. His level of dependency on his foster family is not such as to create such family life. They care for him a great deal and he for them. But he is an adult and the dependency that does exist between him and his foster family has arisen by reason of his being granted discretionary leave and placed with them. I am not satisfied that this young man is incapable of living independently. He travelled on his own from Vietnam at the age of 14. He coped with the loss of his father and his mother and has shown the ability to establish strong social ties in the UK. He has established a strong private life here. He has shown a willingness and ability to integrate fully in the UK despite his natural reticence.
41. Following the five steps set out in **Razgar**, whilst I am satisfied that the Appellant does not enjoy family life for the purposes of Article 8, I am satisfied that he has established a strong private life in the United Kingdom encompassing his foster family, his school and his friends. I am satisfied that the decision impacts on that private life to an extent that engages Article 8. This is particularly so in the area of education. I am satisfied that the decision is justified by the fact that the Appellant was granted discretionary leave as a minor and he is now an adult and no longer in need of protection as a child. But I am not satisfied that this decision goes no further than is necessary to protect the public interests engaged. Those public interests are the need to maintain effective immigration control, as well as the need to protect the public purse. Education is not free. Neither is foster care. The Appellant has learnt to speak English well and write English well. He has made remarkable progress in his education. Although I am satisfied that the Appellant could survive and get on his feet if he was returned to Vietnam at the present time, I am also satisfied that this decision is not justified. No consideration was given to granting the Appellant a short period of further leave to enable him to complete his secondary education. I have borne in mind that the Immigration Rules were approved by parliament and this Tribunal should be very reluctant to depart from the Rules. But in this particular case I am satisfied that the decision is unduly harsh on this Appellant.
42. I have applied the amended Section 117A and B of the Nationality, Asylum and Immigration Act 2002 but this does not alter the outcome. This decision does not involve a proper balancing of the competing public and private interests and I have concluded it amounts to a disproportionate interference with the Appellant’s established private life in the UK. It would not have been disproportionate in my view if the Appellant had been granted a short period of further leave in order to complete his A-level studies.
43. With those qualifications, I would be satisfied that the Appellant is able to reintegrate in Vietnam, secure the necessities of life, maintain his own moral and psychological integrity and with the ongoing emotional

and psychological support from his foster family and friends in the UK make a good life for himself. He is a capable young man. But to deny him his A-level qualifications is in my view unduly harsh and serves no useful public purpose. I accept that this will entail some additional public expense but that additional expense is limited and is in my view proportionate. Having allowed the Appellant to form a strong private life in the United Kingdom through a grant of discretionary leave, this decision does not in my view give sufficient respect to that private life, in particular the educational aspect of it. I am satisfied that the decision is disproportionate and there is a breach of the Appellant's protected Article 8 private life in this decision."

6. The Secretary of State, when applying for permission to appeal, contended that the First-tier Tribunal had failed to have proper regard to the content of Section 117B and, in that context, had not considered the Claimant's financial independence or lack of it and had attached significant weight to his private life whereas it was required, by that Section, to attach little weight to it. Further, it was contended that it had erred by using Article 8 as a "general dispensing power". Permission was granted by a Judge of the First-tier Tribunal who said;

"It is arguable that the judge has not properly factored into the decision the public interest factor set out in the 2002 Act and has not given effect to the approach set out in the authorities regarding persons who are not British citizens. The grounds are arguable."

7. Before me, Ms Pettersen relied upon the grounds as drafted. There had, she said, been a failure on the part of the First-tier Tribunal to take into account the public interest in a firm immigration policy. The Claimant could never have had any expectation that he would be allowed to remain beyond his initial grant of leave. It had overstated matters in his favour concerning what it found to be potential damage to his emotional and mental health and personal integrity which would flow from his not being permitted to remain in the UK to complete his A-level studies. It had used Article 8 as a general dispensing provision.
8. Ms Manning, for the Claimant, submitted that the First-tier Tribunal had properly taken into account financial aspects and had accepted there would be some public expense in his being permitted to remain to complete his studies. It had carried out a proper proportionality balancing exercise. This was a fact-specific case and all matters had been taken into account.
9. The First-tier Tribunal's determination is most certainly a careful and thorough document. It is apparent that it has looked closely at the competing arguments and all aspects of the case. It was not persuaded by arguments to the effect that paragraph 276ADE of the Rules was met or that the Claimant should be permitted to remain in the UK indefinitely in reliance upon Article 8. It had simply concluded, in effect, that the decision to refuse further leave, with the obvious risk of a removal decision being made at a later date, was disproportionate only because it would deny the appellant the opportunity of completing his A-level studies. I

was, in fact, informed by Ms Manning that he has now completed those studies, albeit, that he now wishes to pursue some further studies in the UK.

10. As to Section 117B, it is very clear that the First-tier Tribunal had that provision in mind. It expressly indicated it had applied that and Section 117A in reaching its decision (see paragraph 42 of the determination). As to 117B(3) it did not make a specific finding regarding the Claimant's financial independence but it seems to me it clearly did appreciate that he was not able to stand upon his own feet financially. It noted that he was not financing his own studies and that, therefore, there would be some cost to the public purse in his so doing. It said so at paragraph 38 of the determination. It clearly knew, since it accepted that he was a student, he was not in full-time employment. As to Section 117B(5) it was not, on my reading of the determination, the case that it was, in general terms, attaching significant weight to the private life he had built up in the UK but, rather, it was focusing upon the discrete point that his education might simply, in effect, be wasted and that this, in turn, would have a strong emotional impact upon him. Against that background, therefore, and bearing in mind the specific reference to Section 117B, I would conclude that it did have the relevant provisions of that Section in mind and that it did not err in failing to properly apply them as has been suggested.
11. The second point is the one regarding its alleged use of Article 8 as a general dispensing power. In this context reliance is placed, by the Secretary of State, upon the judgment in **Patel [2013] UKASC 13**. Also relevant in this context is the decision of the Upper Tribunal in **Nasim and Others (Article 8) [2014] UKUT 00025 (IAC)**. In this context, it is certainly right to recognise that Article 8 of the ECHR does have limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity. So, applications by students and others here for short purposes, where an extension is sought and the requirements of the Immigration Rules are not met, will face significant obstacles in succeeding under Article 8.
12. The decision in **Nasim**, though, does not shut out the possibility in certain circumstances of Claimants successfully relying upon Article 8 in the context of further studies. At paragraph 41 of its decision in that case the Upper Tribunal made reference to the judgment in **Patel** and its earlier decision in **CDS (PBS "available" Article 8) Brazil [2010] UKUT 305 (IAC)** and made this observation;

"It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate. But what is clear is that, on the state of the present law, there is no justification for extending the obiter findings in **CDS**, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else."

13. Of course, unlike many of the litigants in **Nasim**, this Claimant had not come to the UK for the purposes of study and had not obtained an initial grant of leave on that basis. Nevertheless, he was engaged in studies and the basis of the First-tier Tribunal's decision was that he had not yet completed what were then his current A-level studies. The First-tier Tribunal had decided, in effect, that if he was not able to complete those current studies his previous hard work would come to naught. It had also decided that abandoning his studies would make things significantly more difficult for him in seeking to make a life for himself in Vietnam (see paragraph 38 of the determination) and would have a detrimental effect on his moral and psychological wellbeing. Ms Pettersen was critical of the latter finding but it seems to me that, in light of the Claimant's evidence, it was open to it to reach such a conclusion and that it was not perverse or irrational for it to do so.
14. I do not doubt that, viewed from some perspectives, the First-tier Tribunal's decision might seem a surprisingly generous one particularly bearing in mind what is now a somewhat tougher climate for persons seeking to rely upon Article 8 in non-family situations, than was once the case. I can readily accept that many differently constituted First-tier Tribunals might well have reached a different view on the same evidence. However, that is not the test I have to apply. Putting everything together my conclusion is that the First-tier Tribunal did properly apply the relevant legislation, did not simply use Article 8 as a general dispensing power and did reach a decision which was open to it. Accordingly, I conclude that it did not err in law and that its decision shall stand.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no order.

Signed

Date

Upper Tribunal Judge Hemingway

TO THE SECRETARY OF STATE FEE AWARD

I make no fee award.

Signed

Date

Upper Tribunal Judge Hemingway