



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13082/2019(P)

THE IMMIGRATION ACTS

Decided under rule 34  
On 20<sup>th</sup> August 2020

Decision & Reasons Promulgated  
On 25 August 2020

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

VU DANG VAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Directions were sent to the parties on 3 July 2020, indicating a provisional view that in light of the need to take precautions against the spread of Covid-19 and the overriding objective, it would be appropriate in this case to determine the issue of whether the First-tier Tribunal's decision involved the making of an error of law and if so whether the decision should be set aside, without a hearing. There has been no response at all by or on behalf of the Appellant to these directions, but written submissions have been received on behalf of the Respondent who does not object to the procedure of determination without a hearing proposed.
2. In circumstances where although the Appellant has not responded, the Respondent, in her written submissions, concedes that the First-tier Tribunal has made a material error of law and further, that the appeal should be allowed without any further hearing or submissions; it is in the interests of justice to proceed to determine the error of law issues on the papers in light of the written submission available and the full appeal file.

3. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Loke promulgated on 4 March 2020, in which the Appellant's appeal against the decision to refuse his human rights claim dated 17 July 2019 was dismissed.
4. The Appellant is a national of Vietnam, born on 19 April 1981, who first entered the United Kingdom as a visitor on 14 August 2018 and with leave to remain as such until 14 February 2019. On 4 February 2019, the Appellant made a human rights claim on the basis of his relationship with his partner and her children in the United Kingdom.
5. The Respondent refused the application on the basis that the Appellant could not meet the definition of a partner in Appendix FM to the Immigration Rules as the Sponsor only had limited leave to remain and in any event had only cohabited since August 2018; such that he could not meet the requirements for leave to remain on family life grounds. Further, the Appellant did not meet the requirements in paragraph 276ADE of the Immigration Rules in relation to private life and there were no exceptional circumstances to warrant a grant of leave to remain.
6. Judge Loke dismissed the appeal in a decision promulgated on 4 March 2020 on all grounds. In relation to Appendix FM, although it was found that the Appellant was in a genuine and subsisting relationship with the Sponsor, he could not meet the definition of partner as they had not cohabited for long enough, nor were they married and in any event the Appellant could not meet the financial requirement. The First-tier Tribunal referred to the Sponsor's children as British citizens but the Appellant could not meet the requirements of Appendix FM for leave to remain as a parent because of his relationship with the Sponsor and because he did not have sole responsibility for the children.
7. The First-tier Tribunal then considered Article 8 outside of the Immigration Rules, finding that family life had been established between the Appellant, the Sponsor and her children and expressly considered the factors in section 117B of the Nationality, Immigration and Asylum Act 2002. In relation to the children, the First-tier Tribunal found that the Appellant assists with their care and has done since August 2018; that they call him 'dad' and have no contact with their biological father and that it was in their best interests to continue to be cared for by their mother with additional care from the Appellant. However, the First-tier Tribunal went on to find that none of the children are qualifying children for the purposes of section 117B(4) of the Nationality, Immigration and Asylum Act 2002 and all are young enough to adapt to life outside of the United Kingdom. Overall, it was found that the Appellant's removal would not create an unjustifiably harsh result for him and is proportionate.

### **The appeal**

8. The Appellant appeals on four grounds as follows. First, that the First-tier Tribunal materially erred in law in failing to consider the Appellant's claim outside of the Immigration Rules under Article 8 of the European Convention on Human Rights, by requiring the Appellant to establish an unjustifiably harsh result before considering whether the decision is proportionate. Secondly, that the First-tier Tribunal

materially erred in law in failing to take into account the extent to which family life (upon which positive findings had been made) would be ruptured. Thirdly, that the First-tier Tribunal materially erred in law in finding that the Appellant's children were not 'Qualifying Children' for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 when there was evidence that all three were British citizens (with the copy of a British passport available for the eldest and by virtue of section 1(3) of the British Nationality Act 1981 for the younger two). Finally, that the First-tier Tribunal materially erred in law in failing to give due regard to the factors in section 117B of the Nationality, Immigration and Asylum Act 2002.

9. As above, no further written submissions were received by or on behalf of the Appellant pursuant to the directions issued on 3 July 2020.
10. Written submissions were received on behalf of the Respondent on 9 July 2020 in which the Respondent did not oppose the appeal. The Respondent expressly accepted that the First-tier Tribunal found that there was a parental relationship between the Appellant and the children but failed to treat the children as qualifying children, rendering the decision unsafe. In these circumstances, the Respondent invited the Upper Tribunal to find an error of law, set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeal under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 based on the parental relationship with qualifying children.

### **Findings and reasons**

11. The Respondent has entirely appropriately conceded an error of law in the First-tier Tribunal's decision given that in the decision it was expressly stated that the children were not qualifying children; contrary to the express finding that the Appellant had a genuine and subsisting parental relationship (and had established family life with them) and that they were British citizens (with evidence before the First-tier Tribunal of the eldest child's British passport). This error led to the First-tier Tribunal failing to consider whether it would be reasonable to expect the children to leave the United Kingdom in accordance with section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and is therefore a material error of law and as such it is necessary to set aside the decision. In these circumstances, it is unnecessary to consider the remaining grounds of appeal.
12. Although the evidence before the First-tier Tribunal focused on the impact of separation on the Sponsor and her children of the Appellant being removed to Vietnam, there was some evidence of the children's personal and family circumstances, in particular their relationship with the Appellant from a very young age which supports the view, in particular in light of their British citizenship and mother's indefinite leave to remain in the United Kingdom, that it would be unreasonable for them to leave. On this basis, the Respondent's invitation to substitute the decision under appeal to allow it on human rights grounds as the requirement in section 117B(6) of the Nationality, Immigration and Asylum Act 2002

is an appropriate one which I follow, without the need for any further hearing, evidence or submissions.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remake the decision as follows.

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed *G Jackson*

Upper Tribunal Judge Jackson



Date 20<sup>th</sup> August 2020