Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10408/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 December 2014	**On 19 December 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR QUANG DUNG PHAM
(No Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Mr M Shilliday a Senior Home Office Presenting Officer
For the Respondent: Ms S Iqbal of counsel instructed by FLK Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State). The respondent is a citizen of Vietnam who was born on 4 November 1984 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Lobo ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 6 February 2014 to refuse to grant him indefinite leave to remain in the UK.

2. The claimant arrived in the UK on 2 July 2006 on a student visa valid until 31 July 2010. He was granted further leave as a Tier 4 Student until 31 May 2011. He was then granted leave as a spouse from 29 June 2011 until 29 June 2013.

3. On 28 June 2013 the appellant informed the Secretary of State that his marriage had broken down and on 16 August 2013 he applied for indefinite leave to remain. This was followed by the refusal decision of 6 February 2014.

4. The claimant appealed on Article 8 human rights grounds. The FTTJ heard his appeal on 4 September 2014. Both parties were represented, the claimant by Ms Iqbal who appears before me. The claimant and his mother gave evidence.

5. The FTTJ found that the claimant's mother suffered from ill-health but the evidence did not indicate that she could not live in this country without him or that he was needed as her carer. When he was eight the claimant's parents' marriage broke down. His mother suffered domestic violence. He went to live with his paternal grandparents. His mother came to the UK but the claimant was not allowed to come with her.

6. The claimant came to the UK legally as a student in 2006 when he was 22 and his leave was extended until 2011. He then obtained further leave to remain as a spouse but subsequently his marriage to a person settled here broke down and he informed the Secretary of State.

7. The claimant had lived in the UK for eight years between the ages of 22 and 30, studied and been employed. Whilst employed he paid income tax and national insurance contributions. Whilst his formative years were spent in Vietnam he had spent a substantial part of his adult life in the UK, a country to which he had become accustomed. The FTTJ found that "he had lost connection with life in Vietnam".

8. The claimant's relationship with his mother was severed when he was eight and they lost touch with each other. After she came here and acquired British citizenship she went back to Vietnam in 2012 and tried to find him. She discovered that he was studying in the UK and on her return they were reunited.

9. The claimant and his mother had developed a stronger and deeper relationship than that which would normally be expected between a mother and son because of the circumstances of their separation and being reunited.

10. The FTTJ set out the requirements which the claimant needed to meet if he was to obtain leave to remain on the basis of his private life under Paragraph 276ADE of the Immigration Rules. He found that under paragraph 276ADE (vi) the claimant was over the age of 18, had lived in the United Kingdom for less than 20 years but had no ties (including social, cultural or family) with Vietnam. He made reference to the principles set out in Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 60 (IAC) as to the meaning of "ties".

11. In the alternative the FTTJ found that if the claimant did not meet the requirements of paragraph 276ADE there were compelling circumstances not sufficiently recognised under the Rules which provided arguably good grounds to consider the claimant's position outside the Rules. He was in an unusually strong and compelling relationship with his mother, had strong connections through family and business established in the United Kingdom "giving the expectation that he will be entitled to settle at the end of the probationary period as a spouse." He had no connections to his home country and had clearly integrated himself within the UK. He had no criminal convictions and had never claimed public funds. He did not have a bad immigration history and the refusal by the Secretary of State did not arise out of any criminal offending.

12. The FTTJ went on to find that the claimant had established a family life with his mother and a private life in the UK over a period of eight years. Removal would be an interference with his private and family life of sufficient severity to engage Article 8. It is would be within the law and have as its objective the preservation of immigration control. Consideration of proportionality required striking a fair balance between the rights of the claimant on the one hand and the interests of the community on the other.

13. The FTTJ concluded that it would be a disproportionate interference with the claimant's Article 8 human rights not to grant him leave to remain in the UK. The appeal was allowed on human rights grounds under the Immigration Rules and on human rights grounds outside the Rules.

14. The Secretary of State applied for and was granted permission to appeal. There are two grounds of appeal both of which submit that the FTTJ erred in law. Firstly, there was a misdirection as to the test of "no ties" in the light of Ogundimu. The conclusion that there were no ties was either not open to the FTTJ on his findings of fact or, in the alternative, irrational. Secondly, the FTTJ misdirected himself in the balancing exercise which was part of the proportionality test. Furthermore, the FTTJ failed to take into account the provisions of section 117B (5) of the Immigration Act 2014 given that the claimant's presence in the UK had always been "precarious".

15. I have a Rule 24 response from the claimant's representatives.

16. Mr Shilliday submitted that the correct "no ties" test was set out in paragraphs 122 to 125 of Ogundimu. It was an exacting test. Paragraph 276ADE was Article 8 compliant and on the facts of this case did not lead to an unjustifiably harsh outcome. However, he accepted that it might now be the case that if it was necessary to go beyond consideration of Article 8 human rights grounds under the Rules then there was a single stage rather than the two-stage test. Little could be said in favour of the claimant except for a period of not very long residence and his relationship with his mother. He had not shown that if he had to leave the country he would suffer more than what Mr Shilliday described as

"mere hardship or inconvenience". I was asked to find that there were errors of law, set aside the decision and then re-make it without the need for further evidence or submissions.

17. Ms Iqbal relied on her Rule 24 response. The claimant's status in this country was never precarious. He was always here legally. He came as a student, remained as a spouse and, when his marriage came to an end, informed the Secretary of State.

18. Ms Iqbal took me to what was said in paragraphs 122 to 125 of Ogundimu and submitted that the FTTJ dealt with all criteria except possibly for the question whether Vietnamese was his first language as he used an interpreter at the hearing. The FTTJ had properly taken into account all relevant factors and in particular the special relationship between the claimant and his mother. She relied on MM, (Lebanon) v Secretary of State for the Home Department [2009] EWCA Civ 382 at paragraph 128. It was a one stage rather than a two-stage test which had to be applied when moving from Article 8 human rights grounds under the Rules to consideration of them outside the Rules.

19. Ms Iqbal submitted that the FTTJ did not refer to a "legitimate expectation" but only an "expectation". He made a proper rounded assessment and there was no error of law. If, on the other hand, I was against her and found that there was an error of law and set aside the decision she accepted that I could remake the decision without hearing further evidence or submissions.

20. I reserved my determination.

21. Paragraphs 122 to 125 of Ogundimu state;

> "122. We take note of the fact that the use of the phrase "no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK" is not exclusive to paragraph 399A of the Rules; it is also used in paragraph 276 ADE, in the context of the requirements to be met by an applicant for leave to remain based on private life in the United Kingdom when such person has lived in the United Kingdom for less than 20 years.
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> 123. The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.

124. We recognise that the test under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support to the appellant in the event of his return there. Unsurprisingly, given the length of the appellant's residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean that the consequences for him in establishing private life there at the age of 28, after 22 years residence in the United Kingdom, would be 'unjustifiably harsh'.

125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members."

22. I find that the FTTJ properly applied Ogundimu principles in considering whether the claimant had no ties to Vietnam. There is an appropriate self-direction and reference to Ogundimu in paragraph 26. In paragraph 25 (e) the words "the consequence is that he has lost connection with life in Vietnam" are a finding of fact not an application of the test. This comes later, in paragraph 26. The claimant came to the UK when he was 22 and has been here for approximately 8 years. He has studied and been employed here. He has paid tax and National Insurance. The FTTJ accepted that he had spent his formative years in Vietnam but most of his adult life in the UK. He had become accustomed to life here especially because of his marriage to a person settled in the UK. His only close relative in Vietnam was his father but the appellant had no contact with him except at the Chinese New Year. His mother is living here and is a British citizen. The circumstances of their separation and being reunited are significant. At paragraph 22 the FTTJ stated that the claimant and his mother gave evidence through a Vietnamese speaking interpreter. Whilst there is no further mention of this in the conclusions I am not persuaded that the FTTJ would have failed to take this into account. There are a number of reasons why the claimant might have preferred to give evidence through an interpreter although I accept that at the least it indicates that the claimant still speaks Vietnamese.

23. I find that the conclusion that there were "no ties" was not irrational. Irrationality is a test with a high threshold. The conclusion is arguably generous but, I find, within the spectrum of what was open to the FTTJ on all the evidence. In this respect there is no error of law.

24. The second ground of appeal is based on a misconception arising from a misquotation. The FTTJ did not say that the claimant had a legitimate expectation that he would be entitled to settle in the UK at the end of his probationary period as a spouse. In paragraph 26 (c) (ii) he said that the claimant had an expectation that he would be entitled to settle at the end of the probationary period as a spouse. "Legitimate expectation" is a legal test. The FTTJ was not applying a legal test but an assessment of what the claimant would reasonably have thought after he obtained probationary leave as a spouse. Whilst leave as a student would not normally lead to an expectation of long-term or indefinite stay the claimant would have been entitled to expect that his marriage would continue and that probationary leave would grow into indefinite leave.

25. The FTTJ was entitled to take into account the lack of any criminal offending, that the claimant had paid tax and national insurance and had never claimed public funds. He did not give these factors inappropriate weight.

26. It was not necessary for the FTTJ to consider the provisions of section 117B (5) of the Immigration Act 2014. The claimant's status in the UK was always legal and not "precarious".

27. I have not been asked to make an anonymity direction and can see no good reason to do so.

28. I find that the FTTJ reached conclusions open to him on all the evidence. There is no error of law. I dismiss the Secretary of State's appeal and uphold the determination of the FTTJ.

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Signed Date 13 December 2014

Upper Tribunal Judge Moulden