Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00783/2014**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision and Reasons Promulgated**
On 2nd November 2015	**On 5th November 2015**

Before

UPPER TRIBUNAL JUDGE COKER

Between

VIET HONG SAM
(aka Viet Man Sam; Viet Nam Sam)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: M C M Fielding, counsel, instructed by Victory@law solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. First-tier Tribunal Judge Levin granted the appellant permission to a decision of a First-tier Tribunal Panel sitting in Birmingham dismissing his appeal against the decision that s32(5) UK Borders Act 2007 applies.

2. Permission had been sought on the grounds that:

   (a) The panel erred in finding that Exception 1 of s117C of the Nationality Immigration and Asylum Act 2002 did not apply and failing to consider whether there are very compelling circumstances over and above those described in Exception 1.

(b) The panel erred in failing to consider all the factors relevant to the appellant as referred to in *MF (Nigeria)* [2013] EWCA Civ 1192 and in particular that there had been no consideration of the relevant factors in striking the appropriate balance; no consideration of the probation report; the steps taken by the appellant to rehabilitate himself.

3. Permission was granted on all grounds.

4. Before me it was submitted by Ms Fielding that the basis of the grounds upon which permission was granted went to the heart of the findings of the FtT that there were no very compelling circumstances over and above those described in Exceptions 1 or 2. Ms Fielding acknowledged that the FtT decision set out the evidence before it and that there was nothing before the FtT that had not been referred to in the decision, so far as she was aware. Although she initially submitted that it would be important to hear oral evidence she subsequently accepted that there was nothing that appeared to have been given in oral and/or documentary evidence that had not been accurately recorded in the decision and that could not be taken into account by me if required. There had been no application under Rule 15(2) of the Procedure Rules to admit further evidence.

5. The appellant has the following convictions:

   i. 12th October 1995 – wounding with intent to do grievous bodily harm: 30 months imprisonment
   ii. 4th January 1999 – criminal damage: 12 month conditional discharge
   iii. 16th August 1999 – assault occasioning actual bodily harm: 8 months imprisonment
   iv. 18th October 2006 – common assault: 4 months imprisonment
   v. 2nd July 2007 – persistently soliciting a woman for prostitution or cause annoyance to others: fine and costs
   vi. 6th August 2010 – possession with intent to supply class B drugs: 5 years imprisonment.

6. The appellant is a citizen of Vietnam, born 15th November 1975. He arrived in the UK in 1992 aged 17, accompanying his mother and brother who were joining his father who had been recognised as a refugee. On 7th `November 2000 he was issued with a travel document stating he was a refugee. On 12th May 2003 he applied for leave to remain as the spouse of a person settled in the UK and he was granted indefinite leave to remain on 5th June 2003. On 22nd January 2013 he was notified of the respondent's intention to 'cease' his refugee status; he made no representations in response. On 20th May 2013 his status as a refugee ceased. He did not appeal the deportation decision on international protection grounds.

7. The appellant is separated from his spouse (who has now naturalised as a British Citizen). He has a daughter who is British by birth and was born in the UK on 27th December 2004. The appellant's mother, father and brother live in the UK.

8. The unchallenged and thus preserved, findings of the First-tier Tribunal panel are as follows:

a. The appellant has a degree of contact with his daughter, aged 10
b. The child's best interests would be served by being brought up by both parents
c. If he is deported the child will continue to be brought up and live with her mother with a degree of continued support and contact from the appellant's parents and brother
d. The child will be disappointed to lose contact with her father but she has managed without him for extended periods before and will adapt and do so again.

9. Reference is made in the decision to other evidence given, on none of which was there a specific finding but appears to be undisputed:

a. The appellant's mother has been suffering from diabetes for some years and has to go to hospital. When the appellant was in prison either her other son or other people would take her to hospital when needed.
b. The appellant's brother has family of his own.
c. The appellant's parents see the child
d. The appellant has no family in Vietnam and has not been to Vietnam since his arrival in the UK aged 17.
e. The appellant's father was born in China.
f. A letter from the National Probation Service states that the appellant is currently assessed as "a low risk of harm and he remains stable currently. There are no concerns in relation to an escalation in risk or his current behaviour."

10. Given the length of the appellant's sentence, even if he were to meet Exception 1 or 2, there would have to be very compelling circumstances over and above those in the Exceptions to enable the appellant to succeed in his appeal (see paragraph 398 Immigration Rules and s117C(6) Nationality Immigration and Asylum Act 2002).

11. In so far as the child is concerned the appellant submits that the First-tier Tribunal Panel failed to have adequate regard to the child's British citizenship, that she has a right to be with her father, that the child having renewed contact with her father would be devastated by future loss of contact such as to amount to detrimental effects over and above the usual consequences of deportation and would seriously jeopardise her best interests. It was submitted that these matters were, in line with *MF (Nigeria) [*2013] EWCA Civ 1192, required to be taken into account in assessing the proportionality of deportation.

12. The Immigration Rules provide for a complete code for the assessment of Article 8 in deportation proceedings – see *MF.* Although Ms Fielding identified matters that she asserted had not been considered in the panel's decision this is plainly a misreading of the FtT decision and the context within which *MF* is to be considered. It is plain that the Rules are a complete code and that the weight to be attached to the public interest is as recorded in the Rules and, when assessed by the Tribunal, the legislation. The weight to be attached to various factors is a weight to be considered within the context of the Immigration Rules and, in this case, the circumstances connected with the child. The FtT

considered whether the deportation of the appellant would be unduly harsh for the child and reached a fully sustainable conclusion for the reasons advanced that it would not. The panel then went on to consider whether there were other very compelling circumstances such as would displace the public interest in deportation and found there were not. In so far as the child and her relationship with the appellant is concerned there is nothing else recorded that could have resulted in any other outcome.

13. The Panel stated in paragraph 22 of the decision "Exception 1 does not apply to this appellant". The panel gives no reasons for this finding. Plainly such a finding without consideration of the factual matrix, is an error of law – as acknowledged by Mr Whitwell. In terms of Exception 1, as acknowledged by Mr Whitwell, the appellant has been lawfully resident in the UK for most of his life (he arrived aged 17 and has been lawfully in the UK for 22 years) and he is socially and culturally integrated in the UK. Mr Whitwell submitted that there were not 'very significant obstacles' to the appellant's integration into Vietnam where it is proposed he was to be deported: the appellant had spent the first 17 years of his life in Vietnam; he spoke Vietnamese; he is a Vietnamese national; he had the benefit of working in the UK and had attended college and obtained qualifications that would be of use to him there. Mr Whitwell submitted that even if there were very significant obstacles to integration such as required to meet Exception 1, there was no evidence of any very compelling circumstances over and above this such as to displace the public interest in deportation.

14. Ms Fielding submitted that not only were there very significant obstacles to the appellant's integration in Vietnam but there were very compelling circumstances over and above those described in Exceptions 1 and 2, in particular the appellant's parents were dependent upon him; he was needed to assist his mother in her medical and other needs; his daughter needed him and it would be devastating for her if the resumed contact were displaced; he was at low risk of re-offending; he had only been in Vietnam as a child and had never been back; his background was more Chinese than Vietnamese because his father and his wife were of Chinese origin; *LC (China)* [2014] EWCA Civ 1310 could be distinguished on the facts.

15. The obstacles to the appellant integrating into Vietnam are likely to be challenging. He has been away from the country for many years and his departure was occasioned under family reunion because his father had been recognised as a refugee. He himself was subsequently recognised as a refugee although that status ceased and he made no appeal on international protection grounds. Nevertheless it is only reasonable to recognise that he is likely to find any return to Vietnam challenging – the country will have changed considerably since his departure over 22 years ago and he does not have friends or relatives there. However he has advantages in terms of language, knowledge of culture together with work experience and qualifications gained in the UK. His family will no doubt provide him with some assistance given they have supported him throughout his life. The fact that he is likely to find integration challenging if not difficult initially does not begin to amount to very significant obstacles. There is nothing identified in the evidence that amounts to such a high test. He doesn't meet Exception 1.

16. Even if there were very significant obstacles to his integration, the nature of the appellant's offence and the length of sentence mean that there must be very compelling circumstances over and above such very significant obstacles.

17. The additional such factors averred to by Ms Fielding amount to the combination of the probation report and the combination of the whole factual matrix including his child, his mother and father and his low risk of further offending. These do not by any stretch of the imagination amount to very compelling circumstances over and above the matters in Exceptions 1 and 2, taking those matters at their highest.

18. Although the factual basis of *LC (China)* was different – the appellant in that case was an illegal entrant and had been sentenced to two terms of five years to run concurrently for robbery – the *ratio* that where a person has been sentenced to a period of imprisonment in excess of four years the public interest in deporting such criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children remains. In this case it is difficult to see what other rational decision could have been reached by the FtT other than that the appeal was dismissed.

19. Although the FtT erred in law in failing to provide reasons for finding that Exception 1 did not apply, the error of law was not material and I therefore do not set aside the decision of the FtT dismissing the appeal.

20. Even if I had found the error to be material such that the decision is set aside, the outcome on re-making would have been the same namely the appeal would be dismissed for the reasons set out above.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision is set aside.

The decision of the First-tier Tribunal stands.

Date 3rd November 2015

Upper Tribunal Judge Coker