IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003505

First-tier Tribunal No: HU/14017/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:

1st February 2024

Before

UPPER TRIBUNAL JUDGE KEITH

Between

QUY VAN TU
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Allison, Counsel, instructed by Rahman & Co, Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on 8 January 2024

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim.

2. The appellant is a citizen of Vietnam. His appeal relates to whether he can return and integrate in Vietnam, in the context of having lived in the UK since 2006 aged 22, although he entered and remained in the UK illegally. He has been in a relationship with his partner, a dual British/Vietnamese dual national since 2012. This Tribunal had previously set aside the judgment of Judge Rothwell, promulgated on 7th June 2022 in a decision which is annexed to these reasons, but we preserved the Judge's findings at §§34 to 40 of his decision in relation to the insurmountable obstacles to the couple's family life continuing in Vietnam. I set out later in these reasons the preserved findings and my analysis of the additional evidence

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adduced by the appellant. I start with the discussion of the legal issues with the representatives.

The issues

Background

3. The appellant's contention is that whilst his previous claim of statelessness has been rejected, it is not feasible for him to return to Vietnam, because he cannot get documentation to travel or to stay there. The Vietnamese Embassy in London has declined to issue him with a passport, despite his previous attempts to do so and it no longer issues emergency travel documents. The respondent no longer contends that the appellant deliberately obstructed the process of being issued with a passport or emergency travel document, either during previous Embassy interviews which the appellant had attended or otherwise, but the respondent does say that the appellant has not done all that he could to prove his identity, which is only within his power, and not the respondent's. This is because the appellant does not want to return to Vietnam. The appellant also says that even if his partner were to travel to Vietnam, as she has done in the last few years to visit her relatives, or if somehow the appellant were returned, neither would be able to obtain either a birth certificate or an identity document, by which the appellant could obtain a passport, or, on return to Vietnam, to access a whole range of government and private services (e.g. a bank account or hiring a car), all of which require an identity document. He could not obtain a copy of his birth certificate without a passport or identity document, and he could not get a passport without an identity document. The appellant's claim is circular that those without those three documents or a living parent to attest to their identity can never be redocumented in Vietnam as a recognised citizen.

4. Within this context, I identified and agreed the following issues with the representatives.

5. Issue (1) - whether the appellant meets the Immigration Rules. In light of the preserved findings, Mr Allison placed particular emphasis on the appellant's right to respect for private life. Although the appeal was on the basis of human rights rather than under the Immigration Rules, it was agreed that if the appellant were able to meet the Immigration Rules, this could be dispositive of the appeal. The representatives agreed that the relevant provisions of the Immigration Rules, in the context of the accepted genuine relationship between the appellant and his British partner, are Sections EX.1 and 2. of Appendix FM, which pose the question of whether there are insurmountable obstacles to family life with the appellant's partner continuing outside the UK. Insurmountable obstacles mean very significant difficulties which would be faced by the appellant or his partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the appellant or his partner. I bear in mind that Sections EX.1 and 2 are not

free-standing provisions, but the representatives have not taken me to any other requirements which are said not to have been met. In addition, there are also the provisions relating to "Exceptional Circumstances" (GEN.3.2), namely whether refusal of leave to remain would result in would result in unjustifiably harsh consequences for the applicant or his partner. Mr Allison also relies on the respondent's Policy: Family life (as a partner or parent) and exceptional circumstances, version 19.0, dated 15 May 2023. He relies particularly on the section (page 55) which concerns a person's ability to lawfully enter and stay in another country. The relevant provisions of the Immigration Rules for the purposes of the appellant's private life are either under previous provisions at the time of his application, paragraph 276ADE(1)(vi), or since October 2022, Appendix Private Life (Leave to Remain) – PL5.1(b) although there is no difference in substance between the two provisions.

6. Issue (2) - whether the respondent's ability (or inability) to remove the appellant is relevant to his Article 8 claim, in the context of his being stuck in 'limbo' in the UK. The following cases were relevant, which I discuss later in these reasons: RA (Iraq) v SSHD [2019] EWCA Civ 850, and the earlier cases of Saad & Ors v SSHD [2001] EWCA Civ 2008; and JM v SSHD [2006] EWCA Civ 1402.

7. Issue (3) - if I assume that removal would take place for the purposes of considering the appellant's human rights appeal, would removal breach the appellant's right to respect for his family or private life for the purposes of Article 8 ECHR, even if he does not meet the Immigration Rules? The appellant relies on his inability to get a Vietnamese identity document as an obstacle to his integration as an insider.

The hearing

8. The appellant did not give witness evidence but relied upon the report of Dr Tran. I summarise Mr Allison's legal submissions on behalf of the appellant and those of Ms Everett on behalf of the respondent.

The appellant's submissions

9. Dr Tran's report sets out the basis for the appellant's argument that he or his partner would be unable to obtain an identity document for the appellant, even if they were to attend in person in Vietnam, and the consequences of the lack of documentation. Even if he were not destitute, because he was accompanied by his British citizen partner, the appellant argues that his ability to integrate would be severely hampered because of his inability to access various aspects of Vietnamese society, including (but not limited to) being able to drive, renting a property or getting a job. He was even at risk of arrest in public for not having his identity document. Where the respondent's policy pointed to a grant of leave in such circumstances, it should be followed.

10. The respondent had not disputed Dr Tran's expertise or independence. While Ms Everett argued that Dr Tran had not considered all potential

means of redocumentation, (by analogy to getting statutory declarations from witnesses who had known the appellant before he left Vietnam aged 22, or some form or local authority or school records), the respondent could have asked to call Dr Tran as a witness and to cross-examine her or to adduce evidence of its own. Dr Tran's report was based not only on published authorities, but her experience in trying to assist people in making applications. State authorities may not always act consistently, and it was never possible for an expert to give a definitive view, but I should place significant weight on Dr Tran's practical experience. In response to Ms Everett's argument that it could not be right that a hypothetical Vietnamese business person in the UK, who had lost all of their documents, would never be able to redocument themselves in Vietnam, Mr Collins said that the appellant was far removed from the example of a hypothetical business person, who may have money and sufficient connections. The appellant had no family members and no obvious connections other than via his partner and had left Vietnam 18 years ago. Dr Tan could not be expected to have addressed all potential scenarios or "work arounds", in the absence of documentation, for example of obtaining some kind of statutory declarations from those who had known the appellant when he had lived in Vietnam up to the age of 22.

11. On the issue of whether I should consider the appellant being in "limbo", (issue (2)), without making any formal concession, Mr Allison accepted that the excerpt from the well-known practitioner's book, Macdonald's Immigration Law and Practice, to which I had referred him, (§19.13) suggested that I needed to consider the circumstances if the appellant were removed on a hypothetical basis, as per the cases cited. It was otherwise difficult to reconcile RA (Iraq) with the earlier authorities including JM other than in the context that RA (Iraq) considered a different version of the right of appeal under section 84 of the Nationality, Immigration and Asylum Act 2002, as was clear from §32 of RA (Iraq).

12. On the issue of delay by the respondent in progressing the appellant's case, (relevant to issue (3) and the proportionality of refusal), which had featured in Judge Rothwell's decision, Mr Allison now accepted that the period of delay was for a far shorter period than Judge Rothwell had considered and was in fact from the date of the respondent's final decision to refuse the appellant's statelessness application on 16 August 2018, until 31 July 2019, the date of the respondent's decision to refuse leave to remain, but this was still of some significance. In that context, any sense of impermanence fading due to that delay was still relevant, by reference to EB (Kosovo) (FC) v SSHD [2008] UKHL 41.

The respondent's submissions

13. For the respondent, in relation to issue (2), Ms Everett submitted that RA (Iraq), and its decision about the effect of someone being in "limbo," was not relevant. The Court of Appeal had considered section 84 of the 2002 Act as it had applied before 20 October 2014. That had included,

specifically, sections 84(1)(c) (whether a decision breached a person's human rights), and 84(1)(g) (consideration of an individual's human rights only in the context of their removal as a consequence of an immigration decision). From 20 October 2014, the only relevant basis of appeal was under a redrafted section 84(1)(c), namely that "removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention)." The provision assumed removal. The passage from Macdonald was correct, and I must assume hypothetical removal. She accepted that the provisions of the Immigration Rules nevertheless remained relevant for Article 8 purposes, i.e. whether there were insurmountable obstacles, or unjustifiably harsh consequences; or very significant obstacles to integration.

14. In relation to issue (1), while the respondent did not challenge Dr Tran's expertise, her report was simply not detailed enough in answering the question of how someone who may have lost all of their relevant documents (birth certificate, ID card and passport) could redocument themselves. On the basis of Dr Tran's opinion that possessing an ID card was central to Vietnamese life, even if one were cautious in not applying UK standards or other countries standards to Vietnam, or in not speculating, the report did not consider or analyse alternative routes to redocumentation. To pick the more obvious examples, these included statutory declarations or witness statements by those who had known the appellant up to the age of 22. Whilst the respondent did not now allege that the appellant had deliberately frustrated the redocumentation process, it was clear that he had no desire to return to Vietnam and he had not done everything he could have done, for example, by formally instructing Vietnamese lawyers in an attempt to pursue redocumentation. In that context, the practical difficulty was that it was not in the respondent's power to pursue those alternative routes to redocumentation, which the appellant had not pursued.

Discussion and conclusions

Issue (2)

15. I deal first with issue (2) and the question of whether the appellant's inability to return to Vietnam because he cannot obtain a passport or an emergency travel document is relevant to his article 8 appeal and if so, how it is. I accept Ms Everett's submission that the discussion in RA (Iraq) of the effect of someone stuck in "limbo" is no longer relevant now that the relevant right of appeal clearly assumes removal – this consistent with the appeal relating to a decision "that removal....would breach the UK's obligations."

16. The Court of Appeal's analysis in RA (Iraq) depended on the earlier (pre 20 October 2014) word of section 84 of the 2002 Act, which is clear at §32, and which states:

> "Sections 84(1)(c) and (g) are relevant to this case. Section 84(1)(c) required the Tribunal to consider whether the decision breaches an individual's human rights. Section 84(1)(g) on the other hand required the Tribunal to consider the individual's human rights only in the context of their removal as a consequence of an immigration decision".

17. The Court also considered at §64 that "threshold" questions of whether the public interest justifies making or sustaining a decision to deport, or issuing a deportation order, is whether the person is in actual or prospective limbo. The answer in this case is that under the current form of section 84(1(c), the decision under appeal is not a decision to deport or to make a deportation order. It is a refusal of the appellant's application for leave to remain based on his human rights and his appeal rights are based on a hypothetical assumption of removal. That is also consistent with the Court of Appeal's decision in Saad, at §58, also cited by the same Court in JM at §25:

> "… all asylum appeals under section 69 of the 1999 Act (and thus under section 8 of the 1993 Act) are hypothetical in the sense that they involve the consideration of a hypothesis or assumption, which is reflected in the wording of each of the subsections of section 8, namely that the applicant's removal or requirement to leave (as the case might be) 'would be' contrary to the United Kingdom's obligations under the Convention' (our emphasis)."

18. There is no distinction on the basis that Saad was a protection claim (see §27 of JM). I therefore do not accept that the question of whether the appellant would, or would not be removed, i.e. a 'limbo' analysis is relevant in this case.

Issue (1)

19. It is trite law that although the appellant no longer has a right of appeal on the basis that the respondent's decision is not in accordance with the law, including the Immigration Rules, if the appellant satisfies me that he meets the Rules, that is decisive in a human rights appeal. I also accept that, as outlined by the respondent's policy to which I have referred at §5 above, an inability to lawfully enter or stay in a country of origin is likely to constitute an obstacle to family life (or for that matter, private life). The issue here, in the context of the preserved findings which I set out below, is the obstacle to a family life continuing, and private life being re-established by the appellant as an insider in Vietnam. I take as my starting point Judge Rothwell's findings, although I have accepted the appellant's application to adduce the further evidence of Dr Tran. Judge Rothwell's preserved findings are as follows:

> "34. There has been a decision by the Tribunal when on 25/09/2008 Judge Axtell did not find him credible in his asylum claim. Although this application is completely different from that

application, it is an indication that another Tribunal have [sic] not found him to be truthful.

35. I accept that at the date of the application and before me the appellant cannot fulfil Appendix FM, because of his immigration status and because of the English requirement. I do not find that the appellant meets the requirements of Appendix-FM and the five-year partner route.

36. I now consider the ten-year route. I have applied the case of *Agyarko* which held that the requirement of 'insurmountable obstacles' imposed a stringent test and was to be interpreted in a sensible and practical way rather than as referring solely to obstacles which make it literally impossible for the family to live together in the applicant's country of origin.

37. The appellant and the sponsor state that there are insurmountable obstacles to their continuing their family life in Vietnam. The respondent states that the appellant and Ms Nguyen have sufficient links to Vietnam to continue their family life there. I agree with the respondent that the appellant and Ms Nguyen do have sufficient links with Vietnam. The appellant stated in his asylum appeal that his father was politically involved, which was not accepted, and his mother had passed away due to a heart attack. There was no indication before me that the appellant is in contact with his parents, and he states that he left Vietnam in March 2006, and so I accept that he has no contact with any direct family members.

38. But Ms Nguyen has her mother and her stepfather in Vietnam, and she visits them regularly. She has set up a successful business in the United Kingdom, which has enabled her to buy a property. This is an indication to me that she could work or set up a business in Vietnam. I agree that there are no insurmountable obstacles from Ms Nguyen's side that would prevent her from returning to live in Vietnam, except that she would prefer to remain here. This is a matter of choice for the appellant and Ms Nguyen.

39. The appellant and Ms Nguyen rely upon the appellant's inability to obtain a passport, because he does not have the required identity documents. I have seen documents, which have not been disputed that in 2015, 2016 and 2019 he tried to obtain a passport so that he could marry Ms Nguyen and also to make an application on the basis of his being stateless, which was not accepted by the respondent.

40. It appeared to me from the evidence, that the reason the appellant has not been issued with a passport, is because he does not have documents to prove his identity, such as a birth

certificate or an identity card. The appellant has stated that he needs to go to Vietnam to be issued with these documents in person. He states that his identity and family book have been lost. Neither the appellant nor the respondent provided any evidence that the appellant can or cannot obtain these documents remotely from Vietnam, by contacting the Vietnamese authorities from the United Kingdom, and requesting a copy of his birth certificate, or asking Ms Nguyen or a member of her family to try and obtain a copy of this document. The burden of proof is upon the appellant. I do not find that on the facts of this case there are currently 'insurmountable obstacles' within the test set out in *Agyarko* which would cause the appellant or the sponsor very significant difficulties or very serious hardship."

20. I turn to the report of Dr Tran Thi Lan Anh. I do not recite all of the report but summarise the gist, which I have considered it in full. Dr Tran's expertise is accepted. As well as legal qualifications, she works as a consultant for a company trying to assist those who have been victims of human trafficking, and vulnerable people. She has produced a number of in-depth reports on Vietnam, having graduated with a degree in law from Vietnam as well as holding qualifications in the UK. She worked as a senior official for the Vietnamese government for ten years. She worked as a chief of division and was authorised to sign official letters. She has examined numerous Vietnamese documents, for the purposes of authentication, including various warrants. She conducted a brief interview by telephone (an hour and a half) with the appellant. She confirmed her independence as an expert. She was asked to answer three substantive questions:

    a. Is there any route through which the appellant could obtain an ID card or other document either directly or indirectly?

    b. If so, please describe how [the appellant] or others acting on his behalf might make such an application or enquiry?

    c. Please express an opinion on the prospects of the Vietnamese authorities issuing the appellant with an ID card or other document which might be used for them to obtain a passport?

21. In summary Dr Tran concluded that the appellant would be unable to obtain either a birth certificate; or an identity document; or a passport, even if he were to attend in Vietnam in person. The Vietnamese embassy in London is currently no longer issuing emergency travel documents. To obtain or renew a passport, the appellant would need to provide the original and a copy of a valid Vietnamese identity card or an original ID document; or an original and copy of a residence permit. The appellant had neither. To obtain a new identity card, the appellant would need to attend in person at the registration office of his local authority, Ho Ch Minh City. He would need to have either his original family registration

document (called a ‘Ho Khau’ booklet) and his old identification card or birth certificate. A Ho Khau document was needed to buy or rent a house, buy a vehicle, to enrol someone at school, to register for healthcare, to open a bank account, to apply for a job, to apply for a national ID card, to apply for national insurance, to register a birth, marriage or death, to apply for a personal profile approval from a local authority, to adopt children, to apply for a mortgage, to borrow money, to apply for a state benefit, to apply for a phone or fax contract, to register a business, to contract with an electricity, gas or water company, to apply for a driving licence and many other daily activities. Since 2021, a new ID card can be used in instead of a Ho Khau.

22. In answer to the second question, to obtain a birth certificate, only the appellant’s parent or he could ask for a copy. To do so, they would need a copy of their identity card or passport. In answer to the third question, it was highly unlikely that the appellant would be able to obtain an identity card, even if he attended in person in Vietnam.

23. The consequence of the appellant not having an identity document was that the appellant would risk homelessness and re-trafficking if he returned without his partner. Moreover, police and local officials had the right to check identity documents at any time, and citizens have been fined for failing to produce identity documents.

24. Finally, Dr Tran commented on the couple’s desire to continue receiving IVF treatment, which they had begun in the UK in 2013. Medical services in Vietnam were expensive. These typically either had to be fully paid for without those with health insurance or at the very least, partly paid. As a result, Dr Trian believed that the appellant’s partner would face significant obstacles in accessing health care in Vietnam.

My findings on the appellant’s ability to obtain a birth certificate on return to Vietnam and consequently an identity document

25. I do not make any adverse findings in respect of Dr Tran’s independence or her expertise, which are unchallenged. Dr Tran cannot be expected to provide a view based on certainty and the standard of proof is only to the balance of probabilities. Nevertheless, I accept Ms Everett’s submission that elements of the analysis in the report are thin and there are important gaps.

26. I accept and find that the Vietnamese Embassy in the UK currently does not issue emergency travel documents and that to obtain a passport, the appellant would need an identity card, which he does not currently have. I further accept Dr Tran’s evidence at §1.4 of her report, for which she cites source evidence, that someone applying for an identity document has to go in person to the registration office in Vietnam, (in the appellant’s case, Ho Chi Minh City) as their photograph and fingerprints must be taken digitally. I further accept Dr Tran’s evidence (§1.5) that to get a new identity document, the appellant must have “some other compulsory

identification papers", which might include his birth certificate or his old Ho Khau, which she repeats at §1.9.

27. The issue because circular as a consequence of Dr Tran's view in §2.2, where she states to obtain a birth certificate, one must have either an identity card or a passport. In contrast to other statements, Dr Tran does not cite any law or code for this. To return to Ms Everett's example, that of the Vietnamese business person who may be in the UK, who has lost their identity documents (ID card, Ho Khau and birth certificate) for whatever reason, the logic of Dr Tran's conclusion is that such a person could never be redocumented in Vietnam. While Dr Tran has expressed a clear view, I accept Ms Everett's submission that for such an serious consequence to be accurate, one would expect some detailed source for this and, in her analysis, for Dr Tran to have analysed and explained (or ruled out) alternative routes to redocumentation if a person has lost the primary documentary evidence.

28. While I have not assumed that similar processes apply across different jurisdictions to Vietnam, as someone who also has UK legal expertise, Dr Tran will be aware of processes such as statutory declarations or witness statements, backed up other official documents. I do not regard it as impermissible speculation to conclude that for such an obvious gap in an ability to ever redocument, Dr Tran's report is not sufficient evidence, on the balance of probabilities. As Ms Everett points out, other than attempts to obtain a passport from the Vietnamese Embassy in London, which, unsurprisingly, states that the appellant is ineligible for a passport as he does not have current or previous passports, identity documents or birth certificates, there are no documented attempts to get these documents or pursue alternative routes to redocumentation in Vietnam, for example via correspondent lawyers there. This is only within the appellant's power to adduce this and it is plain that he does not wish to return. This is not a scenario where, for example, the appellant left Vietnam as a small child. Even if he has no current direct contact with any family members, he had lived in Vietnam until the age of 22. It is not suggested there is no record of his having ever lived in Vietnam. I also accept Ms Everett's submission that whilst the appellant has not positively obstructed the attempts to obtain a passport, the gap in Dr Tran's report and the lack of evidence about attempts at alternative steps to redocumentation means that the appellant has not discharged the burden of proof of showing that he could not be redocumented, on return, first to get a birth certificate, and then an identity card. It is the latter document which would then enable the appellant to integrate into Vietnam with his partner.

<u>Issue (1)</u>

29. Based on these findings I am satisfied first that the appellant does not meet the Immigration Rules for the purposes of Appendix (Private Life), because he has not shown that there would be very significant obstacles to his integration. Assuming that he returns to Vietnam and could redocument, and with the financial support of his partner, who continues

to visit Vietnam and has family there, despite the period of his absence from Vietnam, I am satisfied that he could integrate into Vietnam as an insider.

30. I am also satisfied that there is no reason to depart from Judge Rothwell's findings in relation to family life, that there are no insurmountable obstacles from Ms Nguyen's side in reestablishing herself on Vietnam, where she has recently visited and has friends and family. While Dr Tran's report opines on access to IVF treatment and its cost, it is unclear to me whether Ms Nguyen is continuing to have IVF treatment, having commenced this ten years ago and also what current savings and assets, if any, she has to be able to obtain further IVF treatment in Vietnam. Whilst the report refers to the average earnings versus the cost of obtaining IVF treatment in Vietnam, this ignores Ms Nguyen's financial means in the UK and the fact that she has established a successful business. I conclude that the appellant has not demonstrated that refusal of the appellant's leave to remain would result in unjustifiably harsh consequences for the applicant or his partner.

31. I do not accept that the respondent's policy, 'Family life (as a partner or parent) and exceptional circumstances, version 19.0, dated 15 May 2023', is inconsistent with this conclusion. On the assumption that the Vietnamese Embassy in the UK changes its recent embargo on issuing emergency travel documents, the appellant has not shown that he could not stay in Vietnam with his partner.

Issue (3)

32. Turning then to the appeal beyond the lens of the Immigration Rules, I have considered section 117B of the Nationality, Immigration and Asylum Act 2002. The appellant is now able to speak English, without the need for an interpreter. There is no evidence that the appellant has claimed benefits so as to be a burden on the taxpayer, and I assume (perhaps a generous assumption) that the couple have been entitled to free IVF treatment on the NHS despite the appellant never having had legal status in the UK. Nevertheless, the appellant's private life and his family life with his qualifying partner were established at a time when he was in the UK unlawfully, having originally entered the UK on a false Russian passport. As a consequence, in the overall proportionality assessment, I attach little weight to both, when weighed against the public interest in the maintenance of effective immigration controls. I place very limited weight on the delay between the respondent reaching its decision to refuse leave to remain in 2019 and the earlier statelessness decision in 2018. Considering the analysis under EB (Kosovo) I do not accept that during this additional eleven and a half month period, the appellant's family and private life was strengthened to any material extent (or that there is evidence of such a material change in that period) or that the absence of a decision in that period has given the appellant hope that

somehow his presence was any more permanent. The length of the delay is not evidence of a dysfunctional system in the sense of EB Kosovo. The delay itself is also not unduly long or inexplicable.

33. In conclusion, in relation to the proportionality assessment, the clear public interest in the maintenance of effective immigration control is not outweighed by the limited weight attached to the appellant's right respect for his private and family life in the UK. Refusal of leave to remain is proportionate.

Notice of Decision

34. The appellant's appeal on human rights grounds fails and is dismissed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **29 January 2024**

Annex – Error of Law Decision

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003505

First-tier Tribunal No: HU/14017/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

QUY VAN TU
(NO ANONYMITY ORDER MADE)

Respondent/Claimant

Representation:

For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer

For the Respondent/Claimant: Mr M Allison, Counsel, instructed by Rahman & Co Solicitors

Heard at Field House on 7 August 2023

DECISION AND REASONS

1. These written reasons reflect the oral decision and full reasons which I gave to the parties at the end of the hearing. I refer to the parties as the Secretary of State and the claimant for the remainder of these reasons.

2. The hearing was previously adjourned on 23rd February 2023 because of the Secretary of State's concerns that the claimant may in fact be a Chinese rather than a Vietnamese national as he claimed. The Secretary of State subsequently applied on 2nd March 2023 to adduce new evidence under Rule 15(2A) and on 23rd March to amend her grounds of appeal. The Secretary of State also applied for an extension of time to serve a Rule 25 reply. In my decision with full reasons dated 5th June, I refused the first two applications, namely the Rule 15(2A)

application and the application to amend the grounds of appeal but permitted the extension of time to rely on the Rule 25 reply. I do not recite here my full reasons, which can be read separately, except to say that in her application, the Secretary of State no longer contended that the claimant's claimed nationality was in dispute. She accepted that he is a Vietnamese national.

The Judge's decision under challenge

3. I turn to the Judge's decision under challenge and do no more than summarise its gist. In a decision promulgated on 7th June 2022, Judge of the First-tier Tribunal Rothwell allowed the claimant's appeal on human rights grounds against the respondent's decision of 31st July 2019 to refuse him leave to remain. The Judge considered the claimant's immigration history. He had had entered the UK illegally in 2006, claimed asylum in 2008 and that claim was refused under the Fast Track scheme in September 2008. He appealed and his appeal was dismissed on 25th September 2008. His appeal rights were exhausted on 6th October of that year.

4. The claimant then applied for leave as a stateless person in November 2016, which the Secretary of State refused in June 2018. Administrative review of that decision was completed in August 2018.

5. The claimant subsequently applied for leave to remain on the basis of family life with his partner, a British citizen albeit of Vietnamese national origin, in July 2019. The Secretary of State refused that application. The claimant appealed and his appeal was initially dismissed, but the Tribunal decision was later set aside and remitted back for re-making to the First-tier Tribunal, which was why the appeal came to be considered by Judge Rothwell.

6. At the core of the claimant's case was that he and his sponsoring partner, whom he had sought to marry but did not have the relevant documents to do so, could not relocate to Vietnam, having met in July 2012. It is said that they had been trying to conceive and two IVF attempts had failed. They claimed that there were no medical facilities in Vietnam, the sponsor had sufficient income to meet the income requirements of the Immigration Rules, relevant accommodation and the claimant had lived without recourse to public funds. The claimant claimed to have no family or friends in Vietnam and could not return to Vietnam to then reapply for entry clearance to the UK as the Vietnamese Embassy had refused to issue him with a passport or a travel document, because he did not hold relevant identification documents. He relied on correspondence from the Vietnamese Embassy in support of this part of his claim.

7. The Secretary of State for her part contended that the claimant did not meet the requirements of the Immigration Rules; there were no insurmountable obstacles to family life continuing in Vietnam; he could not meet the requirements in respect of private life and there were no exceptional circumstances.

8. The Judge went on to make findings and in particular the Judge considered whether there were insurmountable obstacles to the couple's relationship continuing in Vietnam, noting that the sponsor was now a British citizen but also from Vietnam, and had family in that country, whom she had apparently visited as recently as 2019. At §37 of his decision, the Judge found that the claimant and his partner had sufficient links with Vietnam, even if, as here, the Judge accepted that the claimant himself had no contact with his own family members.

The Judge found that the partner had a mother and a stepfather in Vietnam whom she visited regularly. She had set up a successful business in the UK, which had enabled her to buy property. This was, in the Judge's view, an indication that she could work or set up a business in Vietnam. The Judge concluded that there were no insurmountable obstacles from the partner's side that would prevent her from returning to live in Vietnam, except that she would prefer to remain in the UK. That was, the Judge described, a matter of choice for the claimant and his partner.

9. The Judge then went on to note at §39 that the couple relied on the claimant's inability to obtain a passport, because he did not have the required identification documents. The Judge referred to correspondence from the Vietnamese Embassy and on which Mr Allison placed a particular emphasis before me in his submissions that the Judge had not erred in law, that in 2015, 2016 and 2019. The claimant had tried to obtain a passport so that he could marry his partner. The Vietnamese Embassy had refused to issue him with a passport. The claimant had then applied for leave to remain on the basis of statelessness, which the Secretary of State rejected.

10. The Judge found at §40 that the claimant had not been issued with a passport was because he did not have documents to prove his identity, such as a birth certificate or an identity card. The claimant had stated that he needed to go to Vietnam to be issued with these documents in person. He stated that his identity and family book had been lost. The relevant passage of the Judge's reasons continues:

> "Neither the appellant nor the respondent provided any evidence that the appellant can or cannot obtain these documents remotely from Vietnam, by contacting the Vietnamese authorities from the United Kingdom, and requesting a copy of his birth certificate, or asking [his partner] or a member of her family to try and obtain a copy of this document. The burden of proof is on the appellant. I do not find that on the facts of this case there are currently 'insurmountable obstacles' within the test set out in *Agyarko* which would cause the appellant or the sponsor very significant difficulties or very serious hardship".

11. The Judge went on to consider the Article 8 claim by reference to a classic proportionality assessment under Article 8 ECHR. The Judge considered whether there was family life and private life and accepted both, see §41. At §42, the Judge considered whether the decision to remove was proportionate, including by reference to Section 117B of the Nationality, Immigration and Asylum Act 2002. The Judge considered at §43 whether there were any exceptional circumstances and for reasons within that proportionality assessment, concluded that there were. The Judge considered what were, in essence, negative factors against the claimant at §44, namely residence without leave, his lack of credibility in his asylum claim; not meeting the Immigration Rules; and the absence of insurmountable obstacles to the claimant returning to Vietnam. At §44, she considered neutral factors, the claimant's ability to speak English and his lack of reliance on public funds. However, at §46, the Judge considered that the claimant had met his partner at a time when he did not have leave to remain in the UK, so the Judge placed little weight on his family life. Two other relevant paragraphs of the Judge's decision are §§47 and 48:

> "47. When I balance the rights of the appellant and the sponsor against the public interest requirements. I find that the scales are just tipped in

the appellant's favour, because the issue with the passport or emergency travel document is an exceptional circumstance. The appellant's asylum claim was decided under the Fast-track process, which was a scheme by which asylum claims were decided quickly to enable the respondent to remove appellants very swiftly after their asylum claims failed, and all appeal rights were exhausted.

48. The appellant's asylum claim failed, and he became appeal rights exhausted on 06/10/2008. It was open to the respondent to remove the appellant to Vietnam since that date and in line with that Fast-track process, I assume that the respondent made efforts to remove the appellant. There is no evidence before me that the appellant has failed to comply with any requirements put on him by the respondent to assist in obtaining an emergency travel document to return to Vietnam. There is considerable force in the argument put forward by Mr Allison that this is an indication that the Vietnamese authorities have not, will not or cannot issue the appellant with an emergency travel document or a passport".

As a result of those findings the Judge concluded that refusal of leave to remain was disproportionate.

The Secretary of State's Appeal

12. In her appeal dated 16th June 2022, the Secretary of State refers to the Judge's findings that there were no insurmountable obstacles to the couple's relationship continuing in Vietnam (see §30). In the circumstances, the Judge had either misdirected herself in law or alternatively and in addition failed to give adequate reasons for concluding that the claimed issues or difficulties in obtaining identification documents amounted to exceptional circumstances, given that there was no evidence of any attempts to approach the Vietnamese authorities to obtain such documents, which would in turn enable the claimant to obtain a passport or emergency travel document. The Secretary of State also argued that the Judge arguably erred in placing particular weight on the lack of evidence of any attempts to remove the claimant to Vietnam. The claimant had remained unlawfully in the UK and had failed to establish that he would be unable to obtain documents either to return to Vietnam and/or from there then to apply for entry clearance to the UK.

13. Judge Handler of the First-tier Tribunal granted permission on all grounds on 30th June.

The hearing and submissions before me

14. Without any discourtesy to either representative, I do no more than summarise the gist of the Rule 24 and Rule 25 replies and the helpful and focussed submissions of both representatives.

The claimant's submissions

15. In relation to the claimant's Rule 24 response, the claimant says that the Judge had carried out an Article 8 compliant balance sheet assessment as per Hesham Ali v SSHD [2016] UKSC 60. I was reminded that the existence of exceptional circumstances did not require the identification of any highly unusual or unique factor (see GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630). There was no

inconsistency, as the Secretary of State contended, between the reasoning at §40 on insurmountable obstacles and §§47 to 48 in respect of exceptional circumstances. The Secretary of State's challenge was a veiled perversity challenge. The Judge had been clear that the scales were tipped in the claimant's favour because of his difficulty in obtaining a passport or emergency travel document was an exceptional circumstance. Any suggestion that the claimant ought to have made further enquiries of the Vietnamese authorities in Vietnam either himself or through his partner's family was not relied on in the Secretary of State's decision dated 31st July 2019.

16. The Judge had concluded that the claimant had not discharged the burden of proof in order to establish insurmountable obstacles, but there was a wider issue as to exceptional circumstances. The focus in the latter case, as per §§47 to 48, was on the lack of effective action by the Secretary of State to enforce the claimant's removal since 2008, in circumstances where such enforcement could be reasonably expected. In that context, the findings at §40 did not undermine the adequacy of the reasons at §§47 to 48.

17. In terms of the Secretary of State's contention that the Judge had given undue weight to a material factor, this relied on the false contention that the respondent's inaction was excused or neutralised by the claimant's failure to take any steps to obtain Vietnamese identification documents. No authority was cited in support of this proposition, which was inconsistent with Agyarko v SSHD [2017] UKSC 11. That in turn reiterates the well-known authority on the potential three aspects of how delay might affect a proportionality assessment, EB (Kosovo) v SSHD [2008] UKHL 41, and in particular the second strand where a relationship initially entered into with a sense of impermanence, may gain a greater sense of permanence if months or years pass and the respondent takes no action.

18. When I discussed with Mr Allison the extent to which the issue of delay featured strongly in his submissions to the Judge below and how the Judge resolved those submissions, he referred me to the claimant's supplementary skeleton argument, which had referred expressly to EB (Kosovo) and his closing submissions at §33 of the Judge's reasons. These had reiterated that the claimant's asylum claim was over 14 years ago and since 2016 the Secretary of State had been aware of the issue regarding the passport and had provided no evidence to show that she had tried to remove the claimant. The issue of delay was therefore squarely before the Judge. Mr Allison reiterated that there need to be no express reference to a particular line of authorities, provided that the reasoning was tolerably clear that the Judge had engaged with the legal issues on the principles of how delay could affect a proportionality assessment.

The Secretary of State's submissions

19. Ms Ahmed confirmed that there was no perversity challenge. It was an adequate reasons challenge and in particular, an explanation of how, if matters and findings were relevant to insurmountable obstacles at §40, they then did not feature in the assessment of proportionality at §§47 to 48. In simple terms, it was no answer to say that the two particular findings were in relation to different questions when they potentially crossed over. In these particular circumstances, it could not be right that the issue of the claimant being unable to obtain his relevant identification documents resulted in a different outcome in the "insurmountable obstacles" consideration from the "exceptional circumstances" decision, particularly where the Judge found the claimant had provided no evidence that he could not obtain these documents remotely from Vietnam and

the Judge reiterated that the burden of proof was on him. Moreover, any findings on insurmountable obstacles, which were relevant to the Immigration Rules, necessarily informed an assessment of proportionality, see the authority of TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109. Ms Ahmed also relied on Alam & Anor v SSHD [2023] EWCA Civ 30, at §112, for the reminder that where there were no insurmountable obstacles to family life abroad, that was a powerful factor militating against Article 8 claims. Moreover, she relied on MA (Ethiopia) v SSHD [2009] EWCA Civ 289 for the proposition that a Tribunal should, in normal cases, require an applicant to act in a bona fide way and take all reasonably practical steps to seek to obtain requisite documents to enable him to return. There might be cases where it was unreasonable to require this (such as a risk of persecution) but in this case it was not.

20. In relation to the question of delay, whilst Ms Ahmed did not suggest that it had not been raised before the Judge, she said it had not been answered i.e., whether the delay was something for which the Secretary of State was blameworthy and whether the claimant had contributed to that delay. At §48, the Judge had assumed that the Secretary of State had made efforts to remove the claimant but then considered there was considerable force in the claimant’s argument that the Vietnamese authorities would not or could not issue an ETD. From that it did not appear that the Judge had concluded that the balance was tipped in the claimant’s favour due to a delay in the Secretary of State removing him, as argued by the claimant in his Rule 24 reply. In any event, EB (Kosovo) was not a trump card and was not dispositive of an appeal, see the authority of ZI (Bangladesh) & Ors v SSHD [2014] EWCA Civ 98 at §18, for the proposition that when considering overall proportionality, it required judgment in the round. Where there was egregious delay by the Secretary of State, the importance attached to the maintenance of immigration control must, to some extent, be diminished, but if so, that conclusion had to be explained clearly.

Discussions and Conclusions

21. I am conscious first of all of not taking references out of context and I accept Mr Allison’s submission that the Judge will have had the benefit of considering evidence in detail which I have not, in particular the references to correspondence with the Vietnamese authorities. I am also conscious that there is no perversity challenge or a suggestion that the Judge could not have reached the decision that she did. Instead what is said is that one is left wondering why in circumstances where the appeal failed by reference to insurmountable obstacles at §40 the claimant then succeeded by references to §§47 and 48 and key to this is the extent to which the issue of delay and its operative effect impacted on the Judge’s ultimate conclusions on proportionality. It is clear that much that there was an element that tipped the balance, but the question was what that issue or element was.

22. I accept Ms Ahmed’s submissions that the reasons are not adequate in the sense that the reader is left considering how the delay, which in fairness and in credit to Mr Allison clearly featured in his skeleton argument and his submissions, is ultimately resolved in the proportionality assessment. I accept that there may be some circumstances in which the question of insurmountable obstacles and the facts which answer that question may be irrelevant to the question of a proportionality assessment but I also further accept that in this case, where the Judge has concluded that the claimant has not proven why he could not obtain identity documents from Vietnam, so as to be able to obtain a passport or ETD,

why the factor or not having a passport or ETD would tip the scales in the proportionality assessment.

23. While I accept Mr Allison's submission that the Judge did not need to refer expressly to EB (Kosovo) when considering the impact of delay, I do not accept that §§47 and 48, when read in context, can be seen as having applied EB (Kosovo) in any clear way. Practically, it is unclear why the issue of delay featured as a factor in the claimant's favour and the extent to which the Secretary of State could be seen as blameworthy. I do not reiterate or recite the findings §47, but I note that on the one hand there is a reference to the asylum claim being decided under a Fast Track process which would enable the Secretary of State to remove appellants very quickly. The reasoning continues that it had been open to the Secretary of State to have removed the claimant since 2008 and the Judge assumed that the Secretary of State had made efforts to do so. I accept Ms Ahmed's submission that this could be read as not counting against the Secretary of State, because the Secretary of State has done all she could in attempting to remove the claimant, but these efforts have been frustrated by the claimant's failure to attempt to obtain identification documents. I do not say that that is the ultimate conclusion that a Judge would have reached but the reasoning in relation to the delay and the impact on how that could therefore tip the balance in the claimant's favour is unresolved. I am satisfied that whilst the Judge's decision was in other respects clearly and carefully reasoned, her final conclusion in relation to the proportionality assessment is not safe and cannot stand.

Disposal of the appeal

24. I canvassed with both representatives the issue of any preserved findings on the one hand, and on the other, the question of whether re-making should be retained in this Tribunal or remitted back to the First-tier Tribunal in the context of paragraph 7.2 of the Senior President's Practice Statement and the Court of Appeal's decision in AEB v SSHD [2022] EWCA Civ 1512. There is no suggestion that the Secretary of State was deprived of a fair hearing, nor given the potential narrowness of the extent of the necessary fact-finding, is it such that remaking such should be remitted to the First-tier Tribunal. In discussing and agreeing this with the representatives, I record briefly the following. First, Ms Ahmed confirmed that the Secretary of State does not take any issue with the claimant's claimed Vietnamese nationality. Second, in contrast to what had otherwise been contended for in the Rule 25 response, the Secretary of State does not contend that the claimant somehow deliberately obstructed the process of being issued with a passport or emergency travel document, either during the interviews (because he spoke a language other than Vietnamese) or otherwise. In the circumstances, Ms Ahmed invited me to retain re-making in the Upper Tribunal but to preserve the Judge's findings in relation to the insurmountable obstacles.

25. Third, Ms Ahmed indicated that the Secretary of State may apply to adduce evidence of the claimant's failure to comply with reporting requirements. However, she confirmed (as otherwise Mr Allison would have sought remittal back to the First-tier Tribunal) that this was not for the purpose of showing that the claimant did not meet the suitability requirements of the Immigration Rules, as to which no issue is taken for the purposes of this appeal. Rather, it was to show what steps, if any, the Secretary of State had taken (or had been frustrated in taking) to remove the claimant.

26. Mr Allison confirmed that separately, the claimant may apply to adduce expert evidence on the issue (as to which the Judge had found that there was no evidence) of whether the claimant could obtain identity documents from the UK, by contacting the Vietnamese authorities from here and requesting a copy of his birth certificate; or his partner or a member of her family trying to obtain a copy of the same, the burden of proof being on the claimant. In the absence of new evidence as I explored with Mr Allison inevitably the Judge's conclusion on the lack of evidence would be preserved but it remains open to the claimant to apply to adduce relevant evidence under 15(2A).

27. In the circumstances, I regard it as appropriate to retain re-making in the Upper Tribunal. I do so, preserving expressly the Judge's findings at §§34 to 40 but noting that on the question of an ability to obtain identification documents, the claimant may seek to adduce further evidence. The Judge's findings in relation to insurmountable obstacles are therefore preserved, at this stage. The remaining issues for re-making in any proportionality assessment are likely to be very significant obstacles and how the issue of delay impacts on the proportionality assessment; and whether it does either alone or in conjunction with other matters tip the balance in favour of the claimant or not, as the case may be.

Directions

28. The following directions shall apply to the future conduct of this appeal:

a. The Resumed Hearing will be listed at Field House on the first available date, time estimate 3 hours, in person, with a Vietnamese Interpreter, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

b. The claimant shall no later than 4 PM, 21 days before the Resumed Hearing file with the Upper Tribunal and serve upon the Secretary of State's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only. An electronic version of the bundle shall be filed in compliance with relevant UTIAC guidance.

c. The Secretary of State shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the claimant's evidence; provided the same is filed no later than 4 PM, 14 days before the Resumed Hearing.

Notice of Decision

The decision of the First-tier Tribunal contains errors of law and I set it aside, subject to preserved findings.

I preserved the Judge's findings at paragraphs 34 to 40.

The Upper Tribunal shall remake the decision on the claimant's appeal at a Resumed Hearing.

No anonymity directions are made.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21st August 2023