CO/3771/2006

Neutral Citation Number: [2008] EWHC 1192 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 14 May 2008

B e f o r e:

MR JUSTICE BLAKE

The Queen
on the application of

HUY QUOC VU
Claimant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr Gavin Merrylees (instructed by Barnett Solicitors, London E8 4DN) appeared on behalf of **The Claimant**

Mr Jeremy Hyam (instructed by the Treasury Solicitor) appeared on behalf of **The Defendant**

Judgment
As Approved by the Court

Wednesday 14 May 2008

MR JUSTICE BLAKE:

1. This is an application for judicial review of decisions of the Secretary of State refusing the claimant permission to continue to reside in this country with his wife and child and stating that his application to do so did not amount to a fresh claim that would give rise to an in country right of appeal.

2. The brief chronology is as follows. In the summer of 2003 the claimant's wife of originally Vietnamese nationality came to this country seeking refugee status. She was granted that status forthwith upon interview and, in accordance with the then policy, was granted indefinite leave to remain as a recognised refugee from Vietnam. Because that had been a simple decision she was issued on 12 September 2003 with a travel document issued by the immigration authorities of this country confirming her status as an internationally recognised refugee. That travel document is endorsed with the familiar terms applicable to recognised refugees, that it was valid for travel throughout the world (save for Vietnam, the country in respect of which she had been recognised to have a well-founded fear of persecution). The background appears to be (although this has not been a matter of investigation) that both the claimant and his wife are of Chinese ethnicity at a time when that gave rise to real difficulties in Vietnam. The claimant's wife also appears to have suffered from health problems in the form of tuberculosis.

3. The next relevant fact is that in January 2005 the claimant arrived irregularly in this country and claimed asylum. His application was also dealt with speedily. It was refused on 7 March 2005 and an appeal was heard on 5 May 2005. In the meantime the claimant had been on temporary admission in this country and had met the lady he was to marry. The couple decided rapidly that they wished to marry, but because of the claimant's immigration status he was unable to undertake a ceremony of marriage without the prior consent of the Secretary of State under legislation passed precisely to restrict those who have no immigration status marrying and remaining on the grounds of marriage.

4. On 3 March 2005, whilst his claim was still under consideration, the claimant applied to the Secretary of State for permission to marry.

5. On 23 May 2005 an immigration judge dismissed the claimant's asylum claim and concluded that, despite some evidence of injury, he was not satisfied that there was anything more than discrimination in Vietnam and that it did not amount to a well-founded fear of persecution.

6. Before the adjudicator there was a comparable claim that removal would violate article 3 of the European Convention on Human Rights. As is so often the case, asylum and article 3 go hand in hand and so that claim was dismissed. The adjudicator must have known that the claimant had met his future wife, but nothing more than that. That fact did not found any submission; nor could it have done since the mere fact of meeting a woman whom an applicant wants to marry whilst here irregularly for a short period pending an asylum decision is incapable of forming the basis for any submission about respect for family life. The appeal was therefore dismissed.

7. On 12 September 2005 the Home Office granted the claimant permission to marry his wife. Although the reasoning behind that is not before the court, there is a reference in the papers to it having been granted on compassionate grounds. By that stage the wife was pregnant and would give birth to her first child, Daniel, in January 2006. For reasons to which I shall later refer, in my judgment the fact that the Home Office granted permission to marry is a significant fact in this case.

8. On 13 October 2005 the parties were lawfully married, although the claimant had no leave to enter or remain.

9. Shortly after Daniel was born on 28 January 2006, the wife had to resume treatment for TB and mediastinal lymphadenopathy. The medical information now before the court indicates that her TB and the problems with her lymph glands in her chest and thorax had been long-standing. They had been addressed by prophylactic medication, but she had had to stop taking that medication whilst she was pregnant and that had made her health weak. From 2006 onwards she was on a significant course of treatment at hospital for her underlying long-term health problems in relation to her TB and her lymph glands. There was concern as to whether her child might have inherited the TB or been affected by it. However, despite some reference in the correspondence of that being a possibility, it appears that there is no evidence that the child has TB. However, he has been given prophylactic medication to prevent him becoming susceptible to the infection and catching it from his mother.

10. The claimant's wife was self-supporting. She was in business as a beautician. Following her marriage she sought to acquire a home and business premises to support herself and her family, as she was entitled to do.

11. On 3 March 2006 the claimant applied for further leave to remain on the basis of his marriage to his wife, who had indefinite leave to remain here, and the birth of his son. That application was refused. On 4 April 2006 his claim to remain was refused and an order was made authorising his removal to Vietnam. He was then detained but released on bail.

12. The decision letter of 4 April makes the point that the claimant could have raised his human rights claim earlier but had not done so. It concludes that there is no fresh claim within the meaning of paragraph 353 of the Immigration Rules HC395. Those rules identify the meaning of a fresh claim by reference to the asylum case law of this court and the Court of Appeal. The rule says:

> "The submissions will amount to a fresh claim if they are significantly different from material that has previously been considered. The submissions will only be significantly different if the content had not already been considered; and taken together with the perviously considered material, created a realistic prospect of success, notwithstanding its rejection."

It was pointed out in the decision letter that because the claimant and his wife had not married

for more than two years before the refusal of leave to enter and removal directions, they did not have an expectation of being permitted to remain under the then policies of the Secretary of State. The decision letter concludes that because of the claimant's precarious immigration position at the time of the marriage they did not consider his removal to Vietnam would violate article 8. It correctly observes that article 8 does not extend to a general obligation on the United Kingdom to respect the choice by married couples of a country for their matrimonial residence. It says that there would therefore be no interference with family life and that the wife and child could remain in the United Kingdom whilst the entry clearance application is made. There is then reference to R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, to which I will turn later in this judgment.

13. The decision letter continues:

> "The remaining points raised in your submissions, taken together with the material previously considered in the letter and determination, would not have created a realistic prospect of success."

The application was then dismissed.

14. The consequence of that decision is that there is no pre-removal right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 when taken together with section 92 of that Act. Section 92 makes plain that pre-removal rights of appeal are limited to cases arising within the Act. Section 92(4) provides:

> "This section also applies to an appeal against an immigration decision if the appellant --
>
> (a) has made an asylum claim or a human rights claim while in the United Kingdom."

15. There has been debate elsewhere as to whether, properly construed, that section refers to any human rights claim, or whether it requires a fresh claim; but it is not disputed in the proceedings before me (and for the purpose of this application I am prepared to assume without deciding) that section 92(4) only applies to a human rights claim which is a fresh claim: see the decision in R (Etanne and Anirah) v Secretary of State (handed down on 23 May 2008). Accordingly it can be seen how the statutory scheme of appeal, the Immigration Rules and the learning on what constitutes a fresh claim all interconnect. The claimant contends that a reasonable Secretary of State properly directing himself could not have concluded that this was not a fresh claim within the meaning of the rules.

16. Although there is extensive guidance from the Court of Appeal on what is a fresh claim and

how it should be approached, notably WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495, that case and most of the other guidance is in the context of repeat asylum claims. After an asylum claim has been considered and rejected on an appeal, the problem that usually occurs in that context is whether, if fresh material that may be reliable and capable of belief has been presented, and whether it might have altered the adverse decision of the adjudicator, giving rise to the question of whether there are reasonable prospects of success.

17. I am content to assume, without any further examination, that the asylum jurisprudence passes readily over to human rights claims, although it has a peculiarly odd application in the context of the present case where what is being considered is an article 8 case which has never in fact previously been considered on appeal by an adjudicator or previously by the Secretary of State in an administrative decision until the representations made in 2006 and the ensuing decisions. On any common sense view this was a claim that had never been made previously and was therefore a fresh claim. It is founded on material that came into existence since the previous opportunity to appeal and could not have been ventilated before. It can only fail to be a fresh claim within the meaning of the rules if the evidence relied on was so fragile as to be incapable of affording a realistic prospect of success on appeal. In a case where the evaluation does not depend on the intrinsic cogency of the material, this is a test akin to whether a claim is manifestly unfounded for the purpose of section 94(2) of the Nationality, Immigration and Asylum Act 2002.

18. Following the application for permission to seek judicial review, an acknowledgement of service was lodged in May 2006. The summary grounds recognised that it would not be practicable for the wife to return to Vietnam (either short term or long term), if for no other reason than she was a refugee who had recently been granted refugee status and whose travel document would have prevented her from travelling to Vietnam. That is a helpful and sensible recognition of reality and in my judgment, for reasons to which I will turn shortly, is a second very important issue of fact in this case.

19. In granting permission on the papers on 9 August 2006 Keith J observed:

> "The question is whether the new contention that the claimant's removal from the UK would infringe his right to respect for his family life under article 8 -- bearing in mind that his wife could not accompany him to Vietnam -- had a realistic prospect of success. It is arguable that it did."

20. Before me, realistically, Mr Hyam appearing for the defendant Secretary of State recognises that this is not a case which looks at whether there is a difference from a previous claim or whether the material is capable of belief since there is no dispute about the factual foundations of the article 8 case. He therefore submits that the Secretary of State can only conclude that this was not a fresh claim if taken at its highest it had no realistic prospect of success, which in this context must mean not that the Secretary of State happens to think he will win or lose, but whether any properly self-directing immigration judge could have allowed this appeal on human

rights grounds. That is a high test for the Secretary of State to ask himself. It is, of course, for him to ask himself that question. If he asks the right question, the court will supervise that decision by judicial review, applying the familiar concept of anxious scrutiny of the decision. The guidance in WM (DRC) points out that it is a fairly modest threshold for a claimant to surmount; and secondly, that the courts will anxiously scrutinise the Secretary of State's reasoning process of the decision.

21. What essentially is relied upon in this case as preventing this application from having any prospects of success at all is the fact that the claimant could, it is said, return to Vietnam for a period and apply for entry clearance as a spouse under the Immigration Rules that regulate the admission of spouses. As the claimant has not been recognised as a refugee, he is not in the same position as his wife.

22. The matter was reconsidered by the Secretary of State following the grant of permission in this case in a decision dated 25 October 2006. It is that decision that is defended in this application, although to the extent necessary the earlier decision of April 2006 must be read with it. At paragraph 9 of the fresh decision it is accepted that the claimant has established a family life "as he is the father of a child born in January 2006 in the United Kingdom. Furthermore, he is married to a recognised refugee from Vietnam". That clearly is a recognition that something has changed since the previous appeal had been dismissed when it would not have been recognised that he had established a family life in the absence of those two significant factors. The question then is whether it was justified to interfere with the right to respect for family life. At paragraph 12 the decision letter quotes the well-known decision of the Court of Appeal in Huang and Others v Secretary of State for the Home Department [2005] EWCA Civ 105. The decision letter summarises a part of the reasons of the Court of Appeal in that case by saying:

> "It expressly confirmed that, save for truly exceptional cases, the balance struck by the Immigration Rules will generally dispose of proportionate issues arising under article 8."

23. The House of Lords delivered its opinion on the Secretary of State's appeal in Huang [2007] UKHL 11 on 21 March 2007, after the date of the Secretary of State's decision in this case. Two matters should be brought to attention. First, the test of whether an interference with family life is justified as proportionate and necessary is not whether the case is truly exceptional, but whether the interference is a fair balance between the competing interests. That has been well recognised in subsequent cases. If that was all that the House of Lords said, there is a danger that this debate becomes a sterile control of vocabulary. But it is not all that the House of Lords said. At paragraph 17 of Huang their Lordships expressly rejected the proposition relied upon by the Secretary of State that the Immigration Rules and supplementary instructions promoted by the Home Office from time to time had struck the proper balance for the purpose of article 8(2). It points out that the rules are not like primary legislation governed by democratic consideration of both houses such as has happened in the field of housing and landlord and tenant law. Their Lordships said:

> "This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of

> active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented. It must be remembered that if an applicant qualifies for the grant of leave to enter or remain under the Rules and is refused leave, the immigration appeal authority must allow such .... appeal.... It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8."

24. The significance of this aspect of the House of Lord's decision has not always been brought to the fore in subsequent argument debate. But this provides at least one reason why exceptionality cannot be the test because the rules do not strike the balance. That does not mean that the balance struck by the rules is irrelevant. It means that any aspect of the immigration rules, when brought to bear upon a particular factual set of circumstances, will have to take into account the particular facts and the fact that, although there is no general right of persons who have no leave to enter to require the United Kingdom to recognise their place of residence, in certain circumstances the removal of a family member from his spouse (and particularly minor children) could be disproportionate.

25. In the present context this court is not concerned with deciding this appeal, but only with deciding whether the Secretary of State could have concluded that there was no reasonable prospect of success in the appeal. I have no doubt that, applying the judicial review test to the decisions in this case, that this decision cannot stand. It must be set aside because no properly self-directing Secretary of State could have concluded other than that this is a fresh claim that, if rejected, required exploration by the adjudicator. I reach this conclusion for the following reasons. First, the actual decision itself is unhelpful in that the October 2006 decision letter merely goes through a process of reasoning applying the entry clearance principles identified in Mahmood and concludes:

> "It is not accepted that removal of your client to Vietnam will breach article 8 of the ECHR."

That may well be an honestly held opinion of the Secretary of State, but it is not the question to which he had to respond in this judicial review claim, which is whether there was a reasonable prospect that anyone else might consider that removal would be disproportionate. Secondly, as already indicated, that decision in October 2006 is significantly vitiated by misdirection in paragraph 12 (already quoted) in suggesting that the rules had struck the balance when the House of Lords have pointed out that they had not. Thirdly, that letter does not give any separate consideration to the impact of removal (even for a limited period) upon the welfare of the claimant's son. It is well established that, in performing the article 8 balance under the ECHR (incorporated into our law by the Human Rights Act and the references to it in the 2002 Nationality, Immigration and Asylum Act), regard must be had to the welfare of the child. If proposition is needed for that, there is Singh v Entry Clearance Officer for New Delhi [2004]

EWCA Civ 1075, [2005] QB 608, where the Court of Appeal points out that Strasbourg requires that under the Convention regard must be had to the rights of the child and that a prime consideration is the welfare of the child in the article 8 balance. The domestic court must also have regard to those rights. The only reference to the child in the two decision letters is in the letter of October 2006 where the decision in Mahmood is cited to the effect that knowledge on the part of one spouse at the time of the marriage that the rights of residence of the other were precarious militates against finding that an order excluding the latter spouse violates article 8. The letter continues:

> "It is considered that the same principle applies in respect of your client's son who was conceived at a time whilst your client was in the United Kingdom without leave to remain."

26. Mr Hyam is constrained to point out, as he helpfully has done, that by referring back it can be seen from the April decision that there was some reference to a fresh claim. The letter said:

> "Some points raised in your submissions were considered when the earlier claim was determined .... The remaining points when taken together with the material previously considered in the letter and determination would not have created a realistic prospect of success."

In my judgment those remarks were very much in the context of the previous asylum claim and before it was accepted that the wife could not be expected to go to Vietnam.

27. In the light of my conclusion it is not appropriate to go in any great detail into the debate about the application of the entry clearance principle in reliance upon the decision in Mahmood (previously referred to in this judgment). That has been the subject of substantial litigation over the past few years. In my judgment the cases show that there is a distinction between those who may be called truly voluntary migrants, where a state is entitled to control its frontiers by its own laws, policies and practices, and should expect people who want to come here voluntarily to obey those laws and practices, and those who have established family life when there is little alternative but for them to live together as a family in the United Kingdom. In varying degrees their situation is involuntary in that they have no choice of relocation to enjoy family life. Mahmood was a classic case of voluntary migration of an applicant from Pakistan entering illegally, marrying a woman who was a British citizen but who came from Pakistan, and where there was not the slightest indication of any reason why the couple could not go back to Pakistan and make their matrimonial home there, or go back to Pakistan for the purpose of applying for entry clearance to come in under the rules. It was important that they should not be able to undermine immigration control simply by ignoring entry clearance rules which are part of the regime for controlling our frontiers.

28. However, once it is recognised, as the Secretary of State has in this case, that the wife is

unable to return to Vietnam and would therefore be unable to accompany the claimant for any period of time, short or long, this is immediately a case in which the decision will disrupt and rupture the family life enjoyed in this country for the last two years at least, and now involving a wife, who is still quite seriously ill, and a 2 year old child. So there are, in my judgment, four strong factors which an adjudicator hearing this appeal would be bound to take into account:

(1) Although the Secretary of State did not grant leave to remain, he granted the claimant permission to marry and therefore the family life was established with the express consent of the Secretary of State. That is not a conclusive factor in itself, but a factor to which some weight must be attached.

(2) The claimant's wife is a refugee. That takes the case out of the Mahmood category completely, where there were no obstacles to the family as a whole returning, either temporarily or indefinitely, to their mutual country of origin. That is not possible on the Secretary of State's realistic acceptance of this matter. This is not a historic claim which might no longer have potency, but a comparatively recent recognition of the wife. That therefore makes this not a case of purely voluntary migration, but a case in which there are insurmountable obstacles to the family enjoying family life in Vietnam, and it is that very factor that the case law of the European Court of Human Rights requires states to modify the measures they take to protect their borders in order to give respect to family life.

(3) This is not simply a case of an able-bodied woman who can expect to await a period whilst her partner goes to Vietnam. She has a serious long-term illness and, as the medical letters suggest, she receives some support from her husband which is important to her health and mental well-being.

(4) The wife is the mother of a 2 year old child, and juggling a business, parenthood, health, and maintaining a home single-handed would be difficult; and in circumstances where the option of returning to Vietnam temporarily or for an enduring basis does not exist. That is a factor that requires full weight and assessment.

(5) This is not a case of queue jumping. There is no queue reserved for those who cannot live together elsewhere. The immigration rules including the rules requiring prior entry clearance do not strike the balance as they apply indifferently to those who can live together as a family and those who cannot, the voluntary and involuntary alike. As Lord Phillips MR said in R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840 at [55] "removal will not necessarily infringe article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin" and Baroness Hale of Richmond repeated in Razgar v Secretary of State for the Home Department [2004] 2 AC 368 at [50] "the Court is unsympathetic to actions that will have the effect of breaking up marriages or separating children from their parents". It might well be considered what pressing social need is met by requiring a person who otherwise qualifies from admission as a spouse to leave his family and apply for abroad. It is no answer for reasons previously

> given that the rules generally require it. When a human right to respect for family life is admittedly engaged as here, it may even be that an immigration judge considering this case in the future would be entitled to obtain guidance as to proportionality from the European Court of Justice decision of Case C-459/99, MRAX v Belgium [2002] 1 ECR 6591 [2003] 1 WLR 1073 at 61-62, although the present is not a case concerned with Community law rights of entry.

29. In my judgment, therefore, it is manifestly apparent that, applying the proper principles of proportionately to a case where it is accepted that there is well-established family life, this is a case in which there are realistic prospects of success and to which any Secretary of State directing himself in accordance with the law could not have concluded that there were no realistic prospects of success. In any event this Secretary of State in both decision letters has misdirected himself as to the overall balance and the prospect that, on the particular facts of this case, someone else may reach a different conclusion. There may well be article 8 cases which are raised for the first time late in the day in order to defer an inevitable removal and which are so lacking in any form of substance that they can be rejected. I conclude that the statutory scheme would suggest that those cases would be certified as unfounded under section 94 rather than being squeezed into the proposition that they are not a fresh claim under section 92(4) because it is remarkable that a claim that was not ventilated could not have been ventilated and at least engaging article 8(1) could be considered not to be a fresh claim, but that is not a matter which needs further exploration in this application for judicial review.

30. However, for the reasons I have endeavoured to give, this application is allowed. I will hear counsel upon relief, but I have gone beyond the misdirections which I have identified in the letter and concluded that there is only one course open to the Secretary of State in this case. Mr Hyam, it is a question of whether you need me to order any formal relief or whether you want to take instructions for a moment from your client in the light of that judgment?

MR HYAM: The consequence is, in the light of your Lordship's judgment, I think the sensible thing is that we certify it as a fresh claim and move on from there.

MR JUSTICE BLAKE: Yes. Normally if there is any room for error one would say, "We set aside this decision and it goes back for a fresh decision" and another two years pass. That is not going to do anyone any good, is it?

MR HYAM: It is not. I think it is the only possible answer to the court's decision.

MR JUSTICE BLAKE: I have certainly gone beyond just picking holes in the October decision letter.

MR HYAM: You have.

MR JUSTICE BLAKE: I wanted to make clear the basis for my reasoning.
MR HYAM: On the basis of that, how would you like me to deal with it? Can I indicate that the Secretary of State --

MR JUSTICE BLAKE: Yes, if the Secretary of State undertakes to generate the decision,

making sure that it is a fresh claim which is capable of appeal. That is really what one needs.

MR HYAM: Yes. My solicitor has asked for a couple of minutes.

MR JUSTICE BLAKE: I certainly will give you that, otherwise it is a rather complicated form of mandamus. I am just anxious that everyone knows where they stand today.

MR HYAM: My Lord, yes.

MR JUSTICE BLAKE: It may be that I will be here at two o'clock on other matters. So if you can agree an order, that will be extremely helpful. If you cannot, I will invite written submissions and I will see what I can do, but I hope you have a steer from me.

MR HYAM: More than a steer, my Lord. I think the sensible thing to do is to pause now and between ourselves we will agree an order. If there is a problem, we will come back to you by way of written submissions. Otherwise the order will come to your associate probably be e-mail.

MR JUSTICE BLAKE: Yes, right.

MR HYAM: With a heading something along the lines of: "Upon the Secretary of State undertaking to issue a certificate, or certificating this as a fresh claim".

MR JUSTICE BLAKE: Right. Thank you very much. Any other matters?
MR MERRYLEES: The question of costs. I seek my costs.

MR JUSTICE BLAKE: Yes. I think you are entitled to have those.

MR HYAM: That is not resisted.

MR JUSTICE BLAKE: I direct that the defendant pay the claimant's reasonable costs of the application, to be taxed if not agreed. Are you privately funded?

MR MERRYLEES: Yes.

MR JUSTICE BLAKE: Yes, very well. Thank you very much for your assistance.
