Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21659/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 March 2014	**On 25 March 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MS QUYNH TRUC TRAN
(No Anonymity Direction Made)

Appellant

and

ENTRY CLEARANCE OFFICER - BANGKOK

Respondent

Representation:

For the Appellant: Miss A Seehra of Counsel instructed by Sparrow and Trieu
For the Respondent: Mr Whitwell a Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Vietnam who was born on 27 March 1996. She has been given permission to appeal the determination of First-Tier Tribunal Judge Molloy ("the FTTJ") who dismissed her appeal against the respondent's decision of 10 October 2012 to refuse her entry clearance for settlement in the UK as the dependent of her mother under the provisions of paragraph 297 of the Immigration Rules.

2. The respondent was not satisfied that the appellant had been financially supported by her mother or that her mother had sole responsibility for her upbringing. At the least responsibility had been shared with her grandmother.

3. The appellant appealed. At a preliminary hearing before the FTTJ on 2 August 2013 at which both parties were represented the appellant was permitted to amend her grounds of appeal to argue that she could bring herself within paragraph 297(i)(f) on the basis that she was suffering domestic violence at the hands of her uncle and that there were serious and compelling family or other considerations which made her exclusion undesirable. Suitable arrangements had been made for her care. The full hearing before the FTTJ took place on 7 November 2013. Both parties were represented, the appellant by Miss Seehra who appeared before me.

4. The FTTJ heard oral evidence from the appellant's mother and two other witnesses all of whom gave evidence through an interpreter. At the end of the evidence and it being late in the day the FTTJ directed that submissions should be made in writing. Those from the respondent should be submitted no later than 5 pm on 14 November 2013 and those from the appellant's representatives no later than 5 pm on 21 November 2013.

5. The FTTJ concluded that the appellant had not established that she could bring herself within the provisions of paragraph 297 of the Immigration Rules. He dismissed the appeal under the Immigration Rules. He went on to consider the Article 8 human rights grounds concluding that balancing the factors in favour of the appellant against the public interest it would not be a disproportionate interference with her right to respect for family life to refuse her entry clearance.

6. The FTTJ prepared his written determination which he signed on 6 December 2013. In an addendum to that determination dated 11 December 2013 he recorded that within an hour of his signing the determination on 6 December 2013 he was handed the appellant's representatives written submissions prepared by Miss Seehra. These were dated 20 November 2013 and had been sent with a letter of the same date although it appeared that the letter had been delayed because of inadequate prepaid postage.

7. Having studied the appellant's submissions the FTTJ wrote an addendum to his determination which was signed and dated 11 December 2013. The addendum maintained the decision in the earlier determination to dismiss the appeal under the Immigration Rules and on Article 8 human rights grounds. The original determination and the addendum were promulgated together on 17 December 2013

8. The appellant applied for and was granted permission to appeal. The grounds argue that the FTTJ erred in law in a number of ways. Firstly, by failing to consider relevant evidence or to give any or sufficient reasons when assessing sole responsibility. Secondly, by giving undue emphasis to the interview with

the appellant's grandmother, failing properly to assess that evidence or to give clear and sufficient reasons. Thirdly, by failing to consider relevant evidence as to the violence which the appellant claimed to have suffered at the hands of her uncle. Fourthly, failing to consider the best interests of the appellant who was a child as a primary consideration. Fifthly, failing to take into account admissible post decision evidence. Sixthly, making a flawed assessment of the Article 8 grounds. Seventhly and finally, making a procedural error by effectively determining the appeal without first considering the appellant's written submissions.

9. There is a Rule 24 reply from the respondent dated 20 February 2014. It is unfortunate that all or most of the large number of documents which were before the FTTJ had disappeared from the Tribunal file by the time it came to me. Between them Miss Seehra and Mr Whitwell provided me with copies of some of the important documents at the beginning of the hearing. Subsequently the appellant's solicitors have sent me duplicates of the appellant's two bundles (333 and 76 pages respectively) which were before the FTTJ. I believe that I now have all the material that was before the FTTJ.

10. Miss Seehra relied on the grounds of appeal. She added that her instructions were that the appellant's mother did not have dual nationality. She only had a British passport. The COIR report indicated that Vietnamese citizens were not allowed to have dual nationality. This was not a point raised by the FTTJ at the hearing. Had it been it would have been addressed. Furthermore, the appellant's mother had a long-term partner in this country who was a British citizen of British origin. Ground five was not addressed in the Rule 24 reply. In relation to ground six Miss Seehra submitted that on receipt of the appellant's submissions the FTTJ should either have rewritten the determination so that what emerged was a single coherent determination or, if he considered that there were issues which needed to be addressed, adjourned for a further hearing.

11. Mr Whitwell relied on the Rule 24 reply. He argued that it was not incumbent on the FTTJ to chase up the appellant's representatives submissions. To deal with these in an addendum was a permissible and appropriate approach. The FTTJ directed himself properly and in the addendum made it clear that he was addressing the best interests of the appellant as a primary consideration.

12. In her reply Miss Seehra submitted that the addendum was not a proper holistic approach. All the evidence was not reassessed in the light of the submissions as it should have been. There were material differences between the grounds of appeal and the submissions reflecting the submissions made by the respondent's representatives. The best interests of the child were not mentioned until the addendum.

13. I reserved my determination.

14. I find that the FTTJ erred in law by failing to make a clear finding in relation to the issue of financial support. Whilst, in line with TD (Paragraph 297(i)(e) "sole responsibility") Yemen [2006] UKAIT 00049 financial support is not, as the grounds concede, a conclusive factor it is an important one. There was evidence before the FTTJ of financial support provided by the appellant's mother on which finding should have been made.

15. The FTTJ erred in law by failing to address the issue of sole responsibility in the light of the appellant's mother's evidence which was referred to in the respondent's written submissions of 13 November 2013; that there was only one school in the area where the appellant was living so that there was no real choice made by her grandmother. It was not sufficient to reject this evidence by saying that there was no further evidence from the grandmother to support what the mother was saying (paragraph 103).

16. I will address the fourth ground of appeal in conjunction with the last.

17. I find that in paragraphs 19 and 124 of the determination the FTTJ erred in law by excluding consideration of all post decision evidence. He should have considered the circumstances appertaining at the time of the decision which, in the light of the starred determination in DR (ECO: post decision evidence) Morocco [2005] UKIAT 00038 and Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) established that whilst evidence of post decision facts was precluded neither the admission of further evidence to establish what the true picture was at the time of the decision nor post decision evidence adduced to demonstrate the reliability of an assessment of future intentions was precluded.

18. I find that the FTTJ erred in law because there is a real perception of unfairness amounting to a procedural impropriety arising from the way in which he dealt with the late receipt of the appellant's representatives submissions. It is clear that these were received after the FTTJ had signed his determination but before that determination had been promulgated. Once he accepted that there had been a sufficient explanation for the delay in the submissions reaching him and that he was going to consider them the FTTJ should have rewritten his observations on both sets of written submissions, his assessment of the evidence in the light of those submissions and his reasoning and conclusions. To issue the determination in the original form in which he had addressed only the written submissions from the respondent and dismissed the appeal followed by an addendum addressing the submissions made on behalf of the appellant and then reaching the same conclusion gives the strong impression of seeking to justify conclusions already reached and not making a balanced assessment in the light of both sets of submissions. The perception is exacerbated by a factor arising from the fourth ground of appeal. The FTTJ did not deal with the best interests of the appellant as a primary consideration in the original determination, only addressing it in the addendum.

19. I find that the errors of law as such that the determination falls to be set aside. The question of how the decision should be remade presented Miss Seehra and those instructing her with a dilemma. On the one hand the appellant and her mother wants the Tribunal to consider all relevant evidence whilst on the other there are the factors of delay and additional expense. Miss Seehra's final instructions and submissions were that if I found there to be errors of law and set aside the decision then the appellant would wish to call evidence relating to the appellant's mother's relationship with her partner, evidence as to her lack of dual nationality and to recall the witnesses who gave evidence before the FTTJ where it was thought that there were no sufficiently clear findings in relation to their evidence as to financial support.

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

21. In all the circumstances and taking into account the directions of the Senior President I conclude that the appellant has not had a proper hearing before the First-Tier Tribunal and I direct that this appeal be reheard in the First-Tier Tribunal by a judge other than First-Tier Tribunal Judge Molloy.

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Signed Date 17 March 2014

Upper Tribunal Judge Moulden