IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13485/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 March 2015	**On 23 March 2015**

Before

MR JUSTICE MALES
DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAU THI PHAM
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Home Office Presenting Officer.
For the Respondent: Ms E King of Counsel, instructed by Elder Rahimi

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Wilsher promulgated on 28 November 2014 allowing the appeal of Ms Hau Thi Pham against the decision of the Secretary of State for the Home Department dated 28 February 2014 to remove her from the United Kingdom.

2. Whilst before us the Secretary of State for the Home Department is the appellant and Ms Pham is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal we shall refer to Ms Pham as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Vietnam born on 2 February 1960. She arrived in the UK clandestinely in 2004. She took no steps to regularise her immigration status until she made an application in July 2013 which was initially rejected for failure to pay the appropriate fee. A subsequent application was accepted as duly made on 4 December 2013, but was refused by the Respondent on 22 January 2014, and the decision to remove the Appellant was made in consequence on 28 February 2014.

4. The Appellant's application was based primarily on her relationship with her daughter, Thuy Phuong Thi Nguyen (date of birth 18 February 1989) and her granddaughter, Megan (date of birth 18 January 2008).

5. The Appellant appealed to the Immigration and Asylum Chamber. The First-tier Tribunal Judge allowed the Appellant's appeal on human rights grounds with reference to Article 8 of the ECHR for reasons set out in his determination.

6. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Parkes on 15 January 2015.

7. The Appellant has filed a Rule 24 response settled by Ms King and dated 18 February 2015.

Consideration

8. At paragraph 9 of the First-tier Tribunal's decision it is recorded that before the First-tier Tribunal "the Presenting Officer did not argue that any of the facts alleged by the appellant or her two witnesses were untrue". The Secretary of State's case is set out at paragraph 9 of the decision as being one essentially arguing that the circumstances did not warrant the Appellant being allowed to remain in the United Kingdom pursuant to Article 8 where she did not otherwise qualify to remain under the Immigration Rules.

9. To a very significant extent the Respondent's representative's acknowledgement of the primary facts being as advanced in the evidence before the First-tier Tribunal, undermines those aspects of the grounds of challenge to this Tribunal which seek to re-open issues of fact. For example: at paragraph 1(b) of the Respondent's grounds in support of the application for permission to appeal, issue is taken with the factual circumstances surrounding the care of Megan and the extent to which Megan's father might undertake care obligations; and at paragraph 2(c) of the Respondent's grounds criticism is made of the absence of up-to-date corroborative medical evidence.

10. Be that as it may, for the present purposes it is unnecessary to rehearse the entire factual history which is set out in some detail at paragraphs 9 onwards in the decision of the First-tier Tribunal. It is sufficient to emphasise certain of the salient features that informed the outcome of the appeal before the First-tier Tribunal. In particular the Judge has noted the unusual family history in that the Appellant whilst on a business trip was injured in a car accident and in those circumstances became stranded in China. When she was able to return to Vietnam she learned that her mother, who had been looking after her daughter, had passed away and that the daughter had been sent to the United Kingdom. That was in 2004. It is in consequence of those circumstances that the Appellant herself made her way to the United Kingdom hoping to be able to locate and reunite with her daughter. It was not until 2009 that the Appellant was able to find her daughter. After that she became unwell, suffering from high blood pressure and headaches and indeed there is a history of surgery for an aneurism. The Appellant in due course moved in with her daughter who had by that time, in January 2008, herself had a daughter, the Appellant's granddaughter. The Appellant's daughter and granddaughter are both British citizens. The Appellant is also in a relationship with a gentleman who is a British citizen.

11. We note that the First-tier Tribunal Judge directed himself to the applicable law including those aspects of the Immigration Rules that might possibly be engaged in a case of this sort (see the decision at paragraphs 4 and 5); also to Article 8 and recent jurisprudence (paragraphs 6 and 7); and to Part 5A of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014 – indeed setting out section 117B (paragraph 7); as well as case law relevant to the existence of family life between adults (paragraph 8). Further, at paragraph 14 the Judge set out the five questions in the **Razgar** test, and also reminded himself of the significance of section 55 of the Borders, Citizenship and Immigration Act 2009 in respect of children together with the decisions in **Beoku-Betts** and **ZH (Tanzania)**. In our judgment those self-directions do not disclose any misunderstanding of, or misdirection on, the applicable legal principles - and we do not understand the Respondent to contend otherwise.

12. From paragraph 15 of the decision the Judge evaluates the nature and the quality of family life, necessarily taking the primary facts that were undisputed as his starting point. Paragraphs 15 and 16 seek to answer the first and second of the **Razgar** questions, and do so in particular with reference to the Appellant's relationship with her granddaughter, and the Appellant's relationship with her own daughter. The Judge also gives consideration to the Appellant's relationship with her partner, but rejects that as not one that can avail the Appellant in the context of Article 8.

13. At paragraph 17 the Judge determines that the removal of the Appellant would constitute an interference with the family life that he has identified in the preceding paragraphs, and then goes on to answer the third and fourth **Razgar** questions uncontroversially.

14. From paragraph 19 the Judge embarks upon an evaluation of the fifth **Razgar** question, that of proportionality.

15. At paragraph 19 the Judge identifies "*important factors pointing against the Appellant*". Although there is no express reference to section 117B of Part 5A of the 2002 Act at paragraph 19, as already noted the Judge had directed himself to section 117B at paragraph 7 of his decision. He also makes reference at paragraph 14 to the factors set out in section 117B and their importance as 'public interest' considerations. Although there is no express reference to section 117B at paragraph 19, in our judgment the Judge essays a successful traverse of the relevant factors within that paragraph.

16. Thereafter the Judge sets out his conclusions at paragraph 20 and determines that the Appellant's removal would constitute a disproportionate interference with her Article 8 rights. In doing so he had reference to the circumstances of both the Appellant's granddaughter and the Appellant's daughter. We note in particular the following:

> "For these reasons I have concluded that it would be in her [that is Megan's] best interests for the Appellant to be allowed to remain in the UK and that it would be disproportionate to require her [that is the Appellant] to leave because of the damage this would cause to the overall family unit and Megan's best interests which outweighs the public interest considerations that I have given careful consideration which are set out above."

17. We pause to note there that it is clear the Judge is not simply deciding this case by reference to Megan's best interests, but is having regard to the overall family unit which necessarily includes the relationship between the Appellant and her daughter which was the subject of some detailed analysis in the body of the decision.

18. The Respondent's challenge to the decision of the First-tier Tribunal is essentially in four parts: that the Judge erred in his approach to each of the best interests of the child, the medical circumstances, the public interest, and also in respect of Article 8 - although perhaps this latter ground is more by the way of summation of the preceding grounds.

19. So far as the best interests of the child is concerned, as already noted to some extent the grounds seek to argue matters of fact that were the subject of agreement before the First-tier Tribunal. More fundamentally however it seems to us that the ground in this regard is wrongly premised in as much as it proceeds on the basis that the Judge allowed the appeal solely by reference to the best interests of Megan. We reject that premise: as already identified the Judge has had regard to all relevant factors in the round and has not determined this case by reference to any single factor.

20. For essentially the same reason we reject the observations made at paragraph 3(b) of the grounds in respect of the best interests of the child having being considered by the Judge as "a trump card".

21. As regards the challenge in respect of the medical evidence, again this rests to some extent on an attempt to challenge those matters that were the subject of agreement before the First-tier Tribunal. In this context what was pertinent was not so much the continuing medical treatment that the Appellant was undergoing, but the assistance with care and attention that she was receiving from her daughter. This was not a 'medical case' in the sense that it was argued that the Appellant could not access medical treatment in her own country; rather the medical circumstances were advanced as an element of the dependency between mother and daughter and the care provided by Ms Nguyen as an important aspect of the family life shared between mother and daughter. To that extent the absence of any up-to-date medical evidence in respect of underlying conditions that were accepted is not pertinent, and we find no substance to this particular ground of challenge.

22. In respect of the public interest, the Respondent has identified the First-tier Tribunal Judge's references to the Appellant as being in a joint parental role in respect of Megan as a matter not germane to a consideration of section 117B(6) of the 2002 Act as amended.

23. We observe that the Judge reminded himself that a grandparent did not meet the definition of a 'parent' within the Immigration Rules (paragraph 14 of the determination). However the Judge identified that the statutory provisions relevant in this case embodied the best interests of the child, and that a grandparental relationship – particularly with cohabitation over a lengthy period and acting *in loco parentis* – could be relevant to a consideration of best interests.

24. At paragraph 20 the Judge referred to the Appellant having "adopted a joint parental role in the life of Megan" which had "been sustained over the past five years", was within the home, and was one "borne of genuine love and affection", adding that the Appellant "has essentially been there for Megan for all of her living memory".

25. If there is any criticism to be made of this particular decision it does seem to us to be potentially in this area. It is not the case that the Appellant can have, as it were, the direct benefit of section 117B(6) because the sub-section is not directly engaged: the Appellant is not a parent and so does not have a parental relationship. However it seems to us that on the unusual facts of this case the Judge was entitled to accord some weight to the close relationship between the Appellant and Megan as a relevant matter in the overall considerations. In this context we remind ourselves that section 117B does not constitute a complete and exhaustive list of relevant factors in any Article 8 appeal.

26. In all of the circumstances therefore we also reject this aspect of the Respondent's challenge.

27. The only remaining point that is raised by the Respondent is that the Judge was wrong to equate the unusual circumstances of the family history with

the concept of 'exceptionality'. We accept that 'unusual' is not inevitably congruent with 'exceptional'. However, neither are the concepts mutually exclusive: something unusual may also be exceptional. In our judgement there is no particular weight or substance to the challenge made in this regard given the overall careful consideration of all relevant facts and the appropriate identification and emphasis by the Judge on the facts as he found them as to the nature of the relationship between the Appellant and her daughter - particularly in circumstances where that relationship had been severed at an earlier stage for circumstances beyond either of their control and had only relatively recently been resurrected. This was an unusual feature, and in the particular circumstances it was open to the Judge to conclude that something exceptional arose in respect of the mutual family life.

28. For all these reasons we do not accept that there is any material error of law in the decision of the First-tier Tribunal Judge. The Respondent's challenge is dismissed.

Notice of Decision

29. The decision of the First-tier Tribunal Judge contained no material error of law and stands.

30. No anonymity order is sought or made.

The above represents a corrected transcript of an ex-tempore decision given at the hearing on 17 March 2015.

Signed Date: **20 March 2015**

Deputy Upper Tribunal Judge I A Lewis