Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/18508/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & reasons Promulgated**
on 14 May 2015	**On 13 July 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MISS THI HUONG TRAN
(Anonymity directions not made)

Appellant

and

THE SECRETARY Of STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Singer of Counsel
For the respondent: Mr A Fujiwala, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Vietnam, born on 6 June 1985 appealed against the decision of the respondent dated 1 April 2014 to refuse to issue her a Derivative Residence Card under Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (hereinafter the 2006 Regulations) and pursuant to Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Flynn dismissed her appeal in a determination promulgated on 10 February 2015.

2. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 9 April 2015 stating that it was arguable that the Judge made a material

error of law in respect of his assessment of the best interests of the child. The appellant's child was a qualifying child under section 117B (6) and yet there was no proper assessment of whether it would be reasonable to expect the child to leave the UK. The Judge's use of the words (strong reasons) when assessing Article 8 on Conventional grounds makes it difficult to know what standard of proof was actually applied.

The First-Tier Tribunal Judge's Findings

3. The Judge gave the following reasons for dismissing the appellant's appeal which I summarise. The judge stated that he has listened very carefully to the evidence of the appellant and did not find her to be a credible witness. Evidence about how her friend took her daughter to Vietnam and left her there with the appellant's mother is not credible. The core of the claim relates to the involvement of the father of the appellant's child. She claimed that she had no contact with her former partner apart from his assistance with registering their daughter's birth and obtaining a passport. However she acknowledged that she had not tried to make any contact with him after this.

4. "Given my conclusions about the lack of credibility that the daughter has no contact with the child's father. I have taken note of the GPs letter (A8). Whilst it states that the appellant looks after her daughter "round-the-clock", I do not regard this evidence as independent: it is clearly based on what the appellant told the doctor. I accept that the appellant has taken her daughter to the surgery and I find it more likely than not that they live together. However, I do not accept that doctor is able to provide any details of their living arrangements. I have also considered the letter of 12 November 2014 from Dr Hossein. This states that the appellant is a single-parent family and I am satisfied that this statement is also based on the appellant's account of the circumstances and cannot therefore be regarded as independent".

5. "There is no evidence as to the circumstances of the child's father and I am not satisfied on a balance of probabilities that he would be unable to look after the child if the appellant were to be removed from the UK. I appreciate that it is generally very damaging for a young girl to be separated from her mother but, as this has already occurred, I do not consider there is any basis upon which I can conclude that such a separation would breach Section 55, particularly as there is no evidence as to the child's welfare".

6. "For all the reasons, I find that the respondent's decision was properly based on the evidence and in accordance with the law I dismiss the appeal. I have also considered the appeal in accordance Miss Radford submissions regarding Article 8. I agree with Miss McCreath that the appellant did not provide the respondent with sufficient evidence to show that her removal would be contrary to the U.K.'s obligations in respect of her and her child. There is a similar lack of evidence before me. I am unable to conclude that there are strong reasons for believing that

removal would give rise to a breach of Article 8." The judge also dismissed the appeal on human rights grounds.

Appellant's Grounds of Appeal

7. The appellants' grounds of appeal state the following. The first ground of appeal states that the First-tier Tribunal Judge has materially erred in law by failing to properly or adequately assess Article 8 of the ECHR with reference to the best interests of the child. The appellant's child is a British citizen and that should have been taken into account. The comments made at paragraph 47 of the determination do not amount to a proper assessment of the best interests of a British citizen child. The Judge just made a bald assertion that there would be no breach of s55 without proper reasoning.

8. In **JO and others (section 55 duties) Nigeria [2014] UKUT 00517 (IAC)** it was held that the duty imposed by section 55 of the Boarder's Citizenship and Immigration Act 2009 requires "the decision maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all the relevant information and factors". It continues in the headnote of **JO** that "being adequately informed and conducting a scrupulous analysis of the elementary prerequisites to the inter-related tasks of identifying the child's best interest and then balancing them with other material considerations. The question whether the duties imposed by s55 have been duly performed in any given case will inevitably be an intensely fact sensitive and a contextual one. In the real world of litigation, the tools available to the Court or Tribunal considering this question will frequently be confined to the application or submissions made to the Secretary of State and the ultimate letter of decision. The Judge did not conduct a careful examination of all relevant information and factors as required".

9. The second grounds of appeal states that the judge did not conduct a proper or adequate Article 8 ECHR assessment with reference to the considerations in s117B of the Nationality, Immigration and Asylum Act 2002.

10. The third ground of appeal states that at paragraph 38 of the determination the Judge correctly noted that the standard of proof was on a balance of probabilities. However at paragraph 49 of the determination it appears that the Judge did not apply this to her factual findings on Article 8 of the EC HR. He assessed the case and asked herself whether there were "strong reasons for believing that removal would give rise to a breach of Article 8". The Judge should have considered whether it was more likely than not that the removal of the appellant would amount to an unjustified interference with the appellant's Article 8 EC HR rights. For the Judge to require the presence of "strong reasons for believing" in a breach of Article 8 case it appears that the judge has imposed a different and, it is submitted a stricter test.

Findings on Error of Law

11. I have considered the submissions and the appeal made by the parties at the hearing the full notes of which are in my Record of proceedings.

12. The Judge has materially erred in his assessment of the appellant's case in every respect. I agree with the grounds of appeal and the permission Judge that the Judge has failed to make a fact sensitive and contextual examination of the appellant's child's circumstances in this country who is a British citizen. The duty imposed by section 55 of the Boarder's Citizenship and Immigration Act 2009 requires the decision maker to be properly informed of the position of a child affected by the discharge of an immigration function. The Judge has not conducted a careful examination of all the relevant information and factors in this appeal.

13. The Judge did not take into account paragraph 117B in his assessment and has failed to appreciate that the appellant's child is a qualifying child. There is no mention of paragraph 117B in the determination, much less an analysis of whether the appellant as the main carer of the British citizen child should be given leave to remain in the United Kingdom with her child.

14. The Judge appeared to be preoccupied about the appellant's child's father. Having said that it is there is no evidence as to the circumstances of the child's father, he goes on to say that he is not satisfied on a balance of probabilities that he would be unable to look after the child, if the appellant were to be removed from the UK. This is a perverse conclusion given that he said that there was no evidence about the appellant's father and his finding that the appellant's child's father would be able to look after the child if her mother left the country, is not sustainable. This is a material error of law as there is a perversity in the conclusion of the Judge.

15. The Judge also stated that he appreciates that "it is generally very damaging for a young girl to be separated from her mother but, as this has already occurred, I do not consider there is any basis upon which I can conclude that such a separation would breach s55, particularly as there is no evidence as to the child's welfare. The judge after finding that it is very damaging for a young girl to be separated from her mother concluded that the mother can leave the country. The judge failed to consider and analyse that the appellant is a mother of a British citizen child who is her main carer in this country. The evidence before the Judge was that the appellant is a single parent home and she is the one who takes the child to the doctor and with whom she lives. The Judge did not take into account all the evidence in this appeal and come to a sustainable conclusion.

16. The Judge has further applied the wrong standard of proof when he said that he there are no "strong reasons for believing that removal would give

rise to a breach of Article 8". It is not clear from this utterance, what standard of proof that the Judge did apply.

17. I find that the Judge fell into material error in his determination and I set it aside in its entirety and preserve no findings of fact.

18. I direct that the file be placed before the first-tier Tribunal Judge with the exception of judge on the first available date for findings of fact to be made.

Signed by,

Dated this 9th day of July 2015

A Deputy Judge of the Upper Tribunal

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Mrs S Chana