IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32381/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th November 2015	**On 18th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

PING SUI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Daykin (Counsel)
For the Respondent: Ms A Everett (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Hussain, promulgated on 29th April 2015, following a hearing at Richmond on 23rd March 2015. In the determination, the judge dismissed the appeal of Ping Sui, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of China who was born on 27th January 1949. She arrived in the UK on 1st October 2013 on a visa issued on 16th September 2013 which expired on 16th March 2014. On 5th March 2014, the Appellant applied for indefinite leave to remain. That application was refused on 29th July 2014 and is the subject matter of this appeal.

The Appellant's Claim

3. The Appellant's claim is that she is dependent upon her daughter, Vivian Sui, a British citizen, who came to the UK in 2002, and who works as a station manager assistant at China Eastern Airlines, and has a British citizen son. Vivian Sui is the only child of her parents and since the death of her father, in 2001, she has been living alone. The Appellant's claim is that she has been visiting her daughter on numerous occasions, but her health is now deteriorating and she needs her daughter to help her with day to day living. She cannot live alone because she has cervical and lumbar spondylosis and is suffering from depression.

The Judge's Findings

4. The judge held that the Appellant could not have been in receipt of financial assistance from her daughter, Vivian Sui, in the UK, because her earnings were such, that with a modest income of some £22,500, she would need this amount to herself manage economically in this country. The judge considered whether it would be proportionate to exclude the Appellant from the United Kingdom (paragraph 35).

5. There was medical evidence that the Appellant suffered from ischaemic heart disease and degenerative bone disease, but,

> "There is nothing in the evidence to show that the Appellant requires at the present time any assistance with her personal care such a bathing, going to the toilet, walking etc. What the evidence shows is that the Appellant suffers from medical conditions which are gradually going to deteriorate from which there is no cure" (paragraph 36).

6. The judge went on to hold that whilst the Appellant's daughter clearly wanted to support her mother, both practically as well as emotionally, what Vivian Sui really wanted was for her mother here "to assist her with childcare" because both "reluctantly admitted that the mother played a role in the care of the Sponsor's child" (paragraph 38).

7. The judge went on to say that family life obviously existed between the Appellant and her daughter and that "she has been part of the same household since arrival in this country in October 2013" (paragraph 39).

8. The judge considered the position in the round and concluded that this did "not present any exceptional features" (paragraph 40). The application was then rejected under Article 8 grounds, having earlier been rejected under the Immigration Rules.

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that at paragraph 33 of the determination, Judge Hussain had held that "there was no Immigration Rule that catered for her situation", and then proceeded to consider Article 8 outside the Immigration Rules. However, this was problematic because Article 8 claims are now considered within the Immigration Rules, only if the Article 8 claim within the Rules fails does one need to go on to consider Article 8 outside the Rules. The entire approach of the judge, accordingly, had been on a wrongful basis.

11. On 10th August 2015, permission to appeal was granted by the Tribunal on the basis that the judge had approached the matter wrongly and had also failed to consider the public interest considerations under Section 117 in the appropriate manner because this provision is not exhaustive in terms of the factors that can be taken into account.

12. On 24th August 2015, a Rule 24 response was entered to the effect that the Appellant arrived in the UK most recently in 2013 and whilst it is the case that she has made numerous visits to the UK, it is difficult to see how this evidence could support a contention that she had lost all ties with China. The judge had taken into account the fact that Section 117 could not come to the assistance of the Appellant.

The Hearing

13. At the hearing before me on 27th November 2015, Ms Daykin, submitted that the judge fell into the following errors. First, he stated (at paragraph 33) that there was no Immigration Rule applicable to the Appellant's situation and that, "as a result the Appellant's application should have been considered outside the Immigration Rules" and added that, "that consideration should have taken place under Article 8 of the Human Rights Convention". This was simply not the case, submitted Ms Daykin, Article 8 rights are considered first within the Immigration Rules and then outside the Rules, and in this case the judge had given no consideration to paragraph 276ADE of the Immigration Rules, in the context of which the Article 8 consideration could have been undertaken. It is only if there is an arguable case to take the matter outside the Immigration Rules can the judge then venture to consider freestanding Article 8 jurisprudence.

14. Second, in this case, paragraph 276ADE(vi) applied because the applicant was aged 18 years or over, and had lived continuously in the UK for less than twenty years, and her case was that she did not have any ties left in China.

15. Third, the Appellant's claim that she had no ties in China were based on the fact that she was a widow, and was an adopted child herself, and had no contact with her biological family, and had no relatives left upon whom she could rely in China. In fact, since 2003 the Appellant had visited her daughter in the UK eight times. The case of **Ogundimu [2013] UKUT 60**, confirmed that the concept of ties involved "something more than merely remote or abstract links to the country of proposed

deportation or removal", but did involve "a connection to life in that country". The Appellant's case was that she had no such connection in that country. She relied upon the case of **Bossadi [2015] UKUT 42** which required there to be a rounded assessment as to whether a person's familial ties could result in support to him in the event of his return, and this required both a subjective and objective consideration.

16. Fourth, the judge also erred at paragraph 41 when stating that, "if the Appellant is permitted to remain then she would undoubtedly have recourse to the National Health Service which though not prevented by the Immigration Rules is obviously a factor that must come into the equation", as the sole question in this respect before the judge was whether the Appellant had ties to China, and the reference to having recourse to NHS facilities was entirely irrelevant to that assessment.

17. Finally, the judge's reliance upon Section 117B of the 2002 Act (at paragraph 40) was an error because the judge had regard to irrelevant considerations, since that provision is only relevant to the assessment of a "public interest question", which was an issue of "proportionality", and this did not apply in the consideration of whether the Appellant had ties to China. This was a case where the Appellant's ties with her daughter were established at a time when her status was not precarious and was longstanding. The judge had given regard to irrelevant considerations and inevitably reached the wrong conclusions.

18. For her part, Ms Everett submitted that she would rely upon the Rule 24 response. This was an attempt, she claimed, by the Appellant to bring herself into the dependent relative category, but the judge had given clear reasons for why this could not happen at paragraphs 20 to 26 of the determination. It was simply not plausible that the Appellant had no remaining relatives in China given that she had been living there permanently and had only visited the UK on numerous occasions. The judge looked at all the evidence and came to the conclusion that he was entitled to. There was no error of law.

19. In reply, Ms Daykin submitted that Article 8 was engaged in any event because the judge had already stated (at paragraph 35) that if the judge was wrong about the financial dependency and the remittances of the Sponsor's monies to the Appellant, "the ultimate question to ask is, is it proportionate to exclude her from the United Kingdom?" In these circumstances the judge should have given proper regard to the **Razgar** steps and a consideration of these steps is entirely missing from the determination.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are essentially those that have been clearly and succinctly put before this Tribunal by Ms Daykin. First, the judge has erred fundamentally in neglecting to consider Article 8 within the context of paragraph 276ADE, rather than looking at freestanding Article 8 jurisprudence in its own right.

21. Second, even where the judge does so (and especially given the judge's reference to whether it was "proportionate to exclude her from the United Kingdom" at paragraph 35), there is no application of the **Razgar** steps.

22. Third, the analysis of whether the Appellant has any ties left to China is muddled and confused and confusing. Regard is had to irrelevant considerations in the form of the Appellant's reliance upon the NHS facilities and the public interest consideration. Relevant considerations are not taken into account in the sense prescribed by the Tribunal decision in **Ogundimu** where what is required is an appreciation of whether the Appellant has a connection to life in the home country.

23. Finally, not enough consideration has been given to the Appellant's medical condition in the form of her ischaemic heart disease and degenerative bone disease which is a deteriorating situation for her and for which there is no cure in the future. These are matters, however, which cannot be determined by this Tribunal.

Remaking the Decision

24. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted to the First-tier Tribunal, to be heard by a judge other than Judge Hussain under Practice Statement 7.2(b) because the nature or extent of the judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal to be determined again.

Notice of Decision

25. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Hussain at the first available opportunity.

26. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th December 2015