IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001322
HU/58134/2023

THE IMMIGRATION ACTS

Decision and Reasons issued:
On the 25 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

TUO THI TRAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chorico KC, Counsel instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

Heard at Field House on 29 May 2024

The appellant is not granted anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

DECISION AND REASONS

1. This is an appeal by Tuo Thi Tran against the decision of First-tier Tribunal Judge Courtney to dismiss her appeal against the Secretary of State's decision, dated the 20th June 2023, to refuse her human rights claim.

2. I do not make an anonymity order. No such order was made by the First-tier Tribunal, and it would thus serve no useful purpose to make an anonymity

order at this stage. I am not in any event satisfied that there is an applicable exception to the general rule of 'open justice'.

Background

3. The appellant is a citizen of Vietnam who was born on the 1st October 1955. Her human rights claim had been made on the 2nd May 2023 by way of an application for entry clearance to the United Kingdom as the adult dependent relative of her daughter, Thu Xuan Thi. The respondent therefore considered the application under paragraph E-ECDR.2 of Appendix FM to the Immigration Rules prior to considering whether there were "exceptional circumstances" that rendered refusal of the application a breach of the appellant's right to respect for private and family life under Article 8 of the European Convention of Human Rights and Fundamental Freedoms. The judge essentially adopted the same analysis in considering the respondent's refusal of her application. There is no suggestion that either of them were wrong in adopting this approach.

The decision of the First-tier Tribunal

4. In giving reasons for their decision, the judge began by considering the appellant's Article 8 claim through the prism of paragraphs ECDR.2.1 to 2.5 of the Immigration Rules. It will be recalled that this requires the applicant to demonstrate (amongst other things) that (a) as a result of age, illness or disability, they require long-term personal care to perform everyday tasks such as washing, dressing, and cooking, and (b) they do not have access to the required level of care in the country where they are living, even with the practical and financial help of the sponsor in the UK. In respect of the first requirement, the judge noted that the appellant relied on a psychiatric report from Dr Malcolm Cameron concerning her mental health, for which she was being prescribed medication as well as receiving prescribed medication for hypertension [11, 12]. The judge further noted that, whilst the sponsor stated that the sponsor also suffered from, "chronic joint pains and thus has mobility issues", there was, "no substantiating evidence from a medical profession to this effect" [12]. Whilst noting that a doctor in Vietnam had advised that, "a caregiver is required because she cannot take care of herself", the judge did not consider that, "a single line from her doctor … suffices to ground a claim that, as a result of age and illness, the Appellant requires long-term personal care to perform everyday tasks". In respect of the second requirement, the judge referred to an unreported case (**Osman v ECO** [OA/18244/2012]) in which Upper Tribunal Judge Grubb (as he then was) opined that this, "undoubtedly imposes a significant burden of proof upon an individual to show that the required level of care is not available and no one can reasonably provide it in the individual's country" [22]. The judge thereafter concluded that the appellant's evidence did not prove either that the required level of care was incapable of being provided by a family member in Vietnam [24 to 25] or that, with the benefit of financial assistance from her daughter in the UK, such care could not be provided by a state-run Care Home in Vietnam [27 to 31].

5. In considering the appellant's Article 8 claim outside the rules, the judge noted that "the correct approach" was that articulated by Lord Bingham of Cornhill in **R (Razgar) v SSHD** [2004] UKHL, "in the 5-stage test" [32]. The judge further noted that the public interest was represented by the requirements of the immigration rules (which the appellant had failed to meet) and that the appellant would moreover be able to maintain "the *status quo"* by modern means of communication and by her family members in the UK visiting her in Vietnam [34]. The judge accordingly concluded that refusal of the application did not result in "unjustifiably harsh consequences for the Appellant or her family" [35].

The grounds

6. The grounds of appeal are extensive and detailed. They nevertheless fall into three broad categories. These can be summarised by saying that the judge fell into error by:

   (1) making findings that were either unsupported by or contrary to the evidence;
   (2) acting in a way that was procedurally unfair in relying upon the reasoning of an unreported tribunal decision without having given the parties notice of its intention to do so; and
   (3) failing to, "conduct the mandatory structured assessment of A's Article 8 claim, as required under R (Razgar) v SSHD [2004] UKHL 27" [23(a)].

7. Whilst the above summary does not follow the precise enumeration of the original grounds, I shall nevertheless adopt it for convenience when explaining my decision.

The hearing

8. The main focus of the parties' submissions was upon the second ground. Whilst Ms Everett did not expressly concede that this was an error law, she nevertheless acknowledged that it gave rise to legitimate concerns that the judge may have applied an elevated threshold of proof in relation to the medical evidence. They each agreed that in the event of the appeal being allowed upon this ground, the appropriate course would be to remit the appeal for rehearing in the First-tier Tribunal.

Legal analysis

9. For reasons that will become clear, I shall consider the grounds of appeal in reverse order.

10. The third ground is principally argued upon the basis that the judge's analysis of the appeal under Article 8 of the Human Rights Convention was infected by the allegedly flawed fact-finding as detailed in the first two grounds. However, insofar as it is also claimed that the judge failed to carry out a proper analysis in accordance with the approach suggested by Lord Bingham in Razgar, I have no hesitation in rejecting this ground. Contrary to what is stated in the grounds, Lord Bingham's

suggested approach in Razgar is not "mandatory". Rather, as Lord Bingham himself noted, 'the five questions' he identified are simply those that are "likely" to arise in any given case. Thus, whilst it is no doubt advisable to consider each question in turn until a determinative conclusion has been reached, there are bound to be cases, of which this may well have been one, where it is plain that the answer to the first four questions inexorably leads to consideration of the proportionality of the impugned decision when set against the legitimate objectives within Article 8(2). There will be other cases, however, where it will be unnecessary to consider the issue of proportionality at all. An example of the latter is where Article 8 is found to be engaged but there is no public interest to set against the right to respect for private and family life given that the requirements of the relevant Immigration Rule have already been found to be met. It cannot in any event be assumed that the Tribunal did not consider the relevant question(s) simply because it did not expressly refer to each and every 'Razgar' question during the course of its analysis. Here, the judge expressly referred to having considered the "5-stage test". I have no reason to doubt that they did so.

11. However, the judge's approach to the matter raised in the second ground is, as Ms Everett fairly acknowledged, problematic. An unreported decision, whether it be of the First-tier or the Upper Tribunal, is not authoritative. At best, its reasoning may be persuasive; but, then again, it may not. It is for this reason that, as Mr Chorico KC pointed out, the relevant procedure rules and practice directions require a party to give notice to the other of their intention to rely upon an unreported decision. This procedure is designed to ensure that each party has an opportunity to argue that the reasoning in the unreported case is erroneous and ought not to be followed. The parties in this appeal were not given that opportunity. Moreover, an established irregularity that directly impinges on the fairness of the proceedings will not generally require the adversely affected party to go on to establish that the outcome would have been materially different had it not occurred. This is because everybody is entitled to a fair hearing regardless of what may at first blush seem to be the likely outcome. There is nevertheless reason to believe in this case that the judge's adoption of the reasoning of Judge Grubb may have led them to apply an elevated standard of proof concerning the availability of suitable care in Vietnam, as well as in respect of the medical evidence more generally. This is because by referring to, "a substantial burden of proof", Judge Grubb (and thus Judge Courtney) arguably conflated (a) the burden and standard of proof necessary to establish the primary facts, and (b) the stringency of the requirements under the Immigration Rules that are to be applied to those facts. So far as the former is concerned, the burden and standard of proof in 'adult dependent relative' cases is the same as that which applies to every immigration appeal, namely, the standard of 'a balance of probabilities'. There is accordingly a legitimate concern (I put it no higher) that the judge may have applied a higher standard of proof than this when reaching their factual conclusions. At all events, the judge erred in failing to provide the parties with an opportunity to address the Tribunal upon the merits (or otherwise) of adopting Judge Grubb's approach. I therefore conclude that

the decision of the First-tier Tribunal should be set aside for this reason. Both parties agreed that the appeal should be remitted to the First-tier Tribunal for rehearing in this eventuality. Mr Chorico KC nevertheless invited me to preserve the finding of the First-tier Tribunal that 'family life' was established as between the appellant and her daughter in the UK. However, this would in my view complicate the task of the First-tier Tribunal, in that it would force the Tribunal to accept certain aspects of the evidence when it might otherwise have had good reason to reject them having considered the evidence in the round.

12. Nothing that I have said in the previous paragraph should be taken to imply that I either uphold or reject the first ground of appeal. Subject to the application of the correct standard of proof and an appropriate line of evidence-based reasoning, the Tribunal could (I do not say should) reach the same conclusion as did Judge Courtney in respect of the same evidence. This must however remain a matter for the First-tier Tribunal to decide.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal to dismiss the appeal is set aside and the matter remitted for re-determination by a differently-constituted First-tier Tribunal. None of the original findings are preserved.

David Kelly
Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber) 10th
June 2024