Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/08354/2013
OA/08358/2013
OA/08362/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 14th August 2014	**On 9th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MRS LEE PHENG LIM
(2) JIAN WEI KIAM
(3) ROWAN JIAN HAN KIAM
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, MANILA

Respondent

Representation:

For the Appellants: Mr N Wray (Counsel)
For the Respondent: Mr I Richards (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Stott, promulgated on 9th April 2014, following a hearing at Birmingham on 8th April 2014. In the determination, the judge allowed the appeals of Mrs Lee Pheng Lim, aged 49 years, Jian Wei Kiam, aged 15 years, and Rowan

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Jian Han Kiam, aged 13 years. The Respondent, Entry Clearance Officer, applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a mother and her two children. All are citizens of Malaysia. They made applications under paragraphs 18 and 19 of the Immigration Rules to enter the UK on the basis of their status as returning residents, and by a decision dated 25th February 2013, their applications were turned down on the basis that they had been living out of the United Kingdom for more than two years, and in any event had only lived in the UK since 1999, and then relocated back to Malaysia in 2006.

The Appellants' Claim

3. The Appellants' claim is that they are dependent upon the head of the household, Mr Kiam Nim Hon, who is the husband of the First Appellant and the father of the Second and Third Appellants. He entered the UK in 1999. He settled here. In 2004, all three Appellants, along with Mr Hon, were granted indefinite leave to remain. In 2007, however, Mr Hon obtained employment as a financial controller, working in Qatar, for the Qater Investment Authority, and he went to live in Qatar in that year. Before he left, the three Appellants had all returned to Malaysia in 2006, due to Mr Hon's relocation. Their grandmother was most unwell in that country. The three Appellants have sought to retain their residence status in the UK by returning as often as they could. They have returned to the UK in 2008, in 2009, and in 2012. However, they have only done so for a weekly or fortnightly basis. Mr Hon, however, has returned every year since 2007. He has recently started returning twice a year. The third child, Kiam Jian Shen, is studying at King's College London for a medical degree since 2012. He is not one of the Appellants. The three Appellants now wish to return to the UK to continue their residency.

The Judge's Findings

4. The judge had regard to the evidence before him. He noted the Respondent's concerns that all three Appellants left the country in 2006 due to the First Appellant's husband relocating to Qatar, and although the youngest child had been born in the UK, no attempt was made to register her as a British citizen. This was because Malaysian law forbids the adoption of two nationalities. The three Appellants had only lived in the UK for a period of seven years before the return to Malaysia and they have now spent longer in Malaysia than they have in the UK. It was accepted that Kiam, the First Appellant's eldest child is now studying medicine at King's College, London and has been in this country since 2012. However, they were not entitled to residence status.

5. The judge also considered the case for the Appellants. He noted that Mr Hon and the three Appellants have visited the UK regularly since they left

in 2006. They did so deliberately to maintain their links with this country. Mr Hon has a house in Norwich and also owns two apartments in London. The Second and Third Appellants have been accepted at a private school in Norwich. Mr Hon is a highly paid financial controller earning in the region of 500,000 US dollars per annum. When the First Appellant's mother fell ill with cancer in 2009 the three Appellants were unable to visit from Malaysia between 2009 and 2012, and then the First Appellant's mother died in 2011.

6. The judge's findings were that, although the Appellants had been out of the UK since 2006, they had made short visits in 2008, 2009 and 2012. It is accepted that Mr Hon owned properties in Norwich and in London. The appeal was allowed for two reasons. First, the judge accepted that the illness of the First Appellant's mother, who suffered from cancer, which eventually led to her death in 2011, was the reason "why there is a gap in the visits made between 2009 and 2012 by the three Appellants although Mr Hon continued his visits" (para 15). Second, Mr Hon had purchased properties in this country "which is indicative of his intention to return to live here in due course. To this end I accept also that he has been endeavouring to maintain his status by making his trips as too have the three Appellants" (para 16). The appeal is allowed.

Grounds of Application

7. The grounds of application state that the judge erred in law because he exercised discretion and paragraphs 18 and 19 do not allow for the exercise of discretion. Once it was clear that the Appellants had ceased to live in the UK from 2006 onwards there was no discretion but to follow the Rules and to reject the appeals.

8. On 25th April 2014, permission to appeal was granted on the basis that the judge failed to demonstrate why it was appropriate or competent to go on to consider the Appellants' intentions, when they could not comply with the Immigration Rules.

Submissions

9. At the hearing before me, Mr Richards, appearing on behalf of the Respondent Entry Clearance Officer, relied upon the Grounds of Appeal. He submitted that the judge had accepted at paragraph 14 that none of the three Appellants had lived in the UK for most of their lives and therefore could not avail themselves of paragraph 19 of the Immigration Rules. He was wrong to have allowed the appeal on the basis of what is said at paragraph 18, namely, that "it has always been the parties' intention to return to this country and to this end they have been maintaining as best as they can links with the country making periodic visits."

10. For his part, Mr Wray, appearing on behalf of the Appellants, submitted that the judge was correct in allowing the appeal because of the guidance

with respect to paragraphs 18 and 19 of HC 395 set out at "returning residents: SET 09" (published 25th August 2011) which contains at paragraph 5 "exception to the two year Rule for those who have strong ties to the UK." These contain seven specific sets of considerations to which regard may be had with a view to establishing that the two year Rule had exceptions to it under the returning resident provisions of the Immigration Rules. For example, the first one was "the length of the original residence in the UK" and Mr Wray submitted that Mr Hon had been in the UK from 1989 to 2007. During this time in 2004 he had acquired ILR in this country. Second, there was the consideration of "the time the applicant has been outside the UK" and the Appellants had been out of the UK since 2007, for a period of some seven years. Third, there is a consideration, "the reason for the delay beyond the two years – was it through their own wish or no fault of their own (for example, having to care for a sick or elderly relative)?" Mr Wray submitted that there was evidence that the judge had accepted that the care of the sick relative was the reason why the principal Appellant could not return with the children to the UK. In the same way, the last consideration was "do they have a home in the UK and, if admitted, would they remain and live there?" and it was clear that Mr Hon had a home since 2004 in Norwich which was still available to him, together with two apartments in London.

11. For his part, Mr Richards submitted that even if this guidance applied, the fact was that Judge Stott did not have any regard to this guidance. Indeed, the Grounds of Appeal, and the skeleton argument, make no reference to them at all. This is the first time that Counsel, Mr Wray, has turned up with a copy of this guidance and placed reliance on it. Therefore, the judge had wrongly used his discretion to allow the appeal. The guidance played no part in the judge's decision. Therefore, there was an error of law.

No Error of Law

12. I am satisfied that the decision of the judge did not involve 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 and re-make the decision). It is true that the judge makes no reference to the guidance. This is no fault of the judge. There were no submissions before the judge with respect to the guidance. Indeed, as Mr Richards correctly points out, there was no reference to the guidance whatsoever even in the Grounds of Appeal to this Tribunal.

13. Nevertheless, the question before this Tribunal is whether, such error as the judge has made, is a "material" error, and in that regard, it cannot be an irrelevant consideration that the Rules at paragraphs 18 and 19 have to be read in the context of the guidance that has been issued with respect to them.

14. This guidance makes it clear at paragraph 7 which refers to "SET 9.5 exception to the two year Rule for those who have strong ties to the UK" that exceptions do exist. The question then is whether the judge, in giving

his reasons, had regard, whether advertently or inadvertently, to these exceptions.

15. A careful analysis of the determination shows that he did. First, in allowing the appeal (at para 15), the judge states that, "I am prepared to accept however the evidence that has been given regarding the illness of the First Appellant's mother namely that she suffered from cancer and eventually died in 2011 ..." Second, the judge also states (at para 16) that, "I also take account of the fact that Mr Hon has purchased properties in this country which is indicative of his intention to return to live here in due course ....," which the judge finds that Mr Hon did do, "endeavouring to maintain his status by making his trips as too have the three Appellants" (para 16).

16. These are considerations that directly go to the guidance at SET 905 of the guidance. Another judge may have decided the matter differently. However, this judge, who heard the evidence before him, came to the conclusion that he did, and he was entitled to so do, on the basis of the evidence that was before him. Accordingly, there is no error of law.

Decision

17. There is no material error of law in the original judge's decision. The determination shall stand.

18. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th September 2014