Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05755/2014

THE IMMIGRATION ACTS

Heard at Belfast	**Decision Promulgated**
On 25 June 2015	**On 17 September 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LING CHEN

Respondent

Representation:

For the Appellant: Mr M. Matthews, Home Office Presenting Officer
For the Respondent: Mr S. McTaggart, Counsel, instructed by John Fahy & Co Solicitors

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of China born on 12 November 1989. She arrived in the UK in May or June 2012 and claimed asylum on 27 February 2014. That claim was refused and a decision taken on 22 July 2014 to remove the appellant under Section 10 of the Immigration and Asylum Act 1999.

3. She appealed against that decision and her appeal came before First-tier Tribunal Judge S.T. Fox at a hearing on 20 November 2014. He dismissed the appeal under the Refugee Convention, under Articles 2 and 3 of the ECHR and under the Immigration Rules. However, the appeal was allowed under Article 8 of the ECHR.

The decision of the First-tier Tribunal

4. The appellant and her husband gave evidence before the First-tier Tribunal. There was evidence that the appellant and her husband have a child, born in September 2014 who is a British citizen by reason of the appellant's husband having indefinite leave to remain.

5. It is implicit from the determination at [14] that Judge Fox found that the appellant's husband runs a successful business, and has done for some years. He found that the appellant's brother, the appellant and their child and her husband's family all live together.

6. He rejected the appellant's claim to fear persecution on account of her Christian religion if she were to be returned to China. His findings in this regard have not been challenged on behalf of the appellant by way of cross-appeal.

7. In relation to Article 8 it was found that the appellant is in good health, as is her husband and child. Account was taken of the relatively short period of time that the appellant had been married and living in the UK as well as what was stated to be the "precarious nature of their relationship". He noted that the appellant's husband had confirmed that he did not recommend that the appellant should claim asylum when the issue of her illegal status in the UK first became known to him.

8. It was found that the appellant's husband's immediate family currently live in the UK although he has extended family still in China whom he visits regularly, that family consisting of uncles, aunts and cousins. In addition, the appellant has family in China.

9. It was further concluded that the appellant's husband would have difficulty relocating his business to China if he had to return with the appellant, and difficulty securing accommodation "and starting over again". It was also found that the appellant may have support from family in China "but there is no guarantee of this".

10. Again, referring to her husband's business it was noted that it had taken at least three years to establish it.

11. So far as the appellant's child is concerned, it was accepted that he is a British citizen and that his best interests are to remain with both parents. He concluded that the child has a "legitimate expectation" of receiving an education in the UK as well as having access to the medical and social benefits that citizenship brings with it.

12. Ultimately, it was concluded that the appellant's removal would be disproportionate to the legitimate aim of maintaining immigration control.

The grounds and submissions

13. In summary, the respondent contends in the grounds that the First-tier Tribunal Judge was wrong to allow the appeal on the basis of the decision in *Zambrano* [2011] EUECJ C-34/09, which was seemingly the determinative factor. The grounds rely on the decision in *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ 1736. There was no reason why the appellant's child would be unable to remain in the UK with his father whilst the appellant returned to China to seek entry clearance as a spouse. The grounds assert that 92% of settlement applications are decided within 30 days.

14. In the absence of any legitimate basis for reliance on *Zambrano*, inadequate reasons were given for finding that the appellant's removal would be disproportionate. A number of factors at [26] of the determination actually point to the opposite conclusion.

15. Furthermore, there is no reference in the determination to Section 117B(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") in terms of little weight to be given to a private life or a relationship formed with a qualifying partner established at a time when the person is in the UK unlawfully.

16. Elaborating on those grounds, Mr Matthews submitted that in fact there was no basis for the judge to consider Article 8 outside the Immigration Rules in any event. A consideration of paragraph EX.1. would have dealt with the Article 8 issues.

17. There was no basis for the judge at [25] to conclude that the decision to remove the appellant is "not in accordance with the law". That error would have coloured the judge's view on proportionality. *Zambrano* was an exceptional case and quite different from the one that was before the First-tier Tribunal here. In this case the child would not be forced to leave the UK. Paragraph EX.1. is a suitable basis on which to resolve the proportionality issue. It is also relevant to take into account that the relationship with her husband was established when the appellant was in the UK unlawfully.

18. Mr McTaggart submitted that although there was reference to *Zambrano* in the determination, this was not in fact a case where the decision was made applying the *Zambrano* principle. The proportionality balance was therefore not affected by that consideration.

19. Although there is no reference to s.117B(4) in the judge's conclusions, at [10] s.117B is referred to and the judge said that he had regard to it and the other relevant sections of the 2002 Act. At [26] the judge took into account the circumstances in which the appellant's family life was established in the UK.

20. In reply, Mr Matthews submitted that if the decision is to be re-made, it can be done within the Immigration Rules. The appellant's husband is a Chinese national and although he has ILR, he has relatives in China, as the judge found. The fact that he has a business here is no basis from which to conclude that family life could not continue in China. The child's best interests would not be affected if he had to return

to live in China. He would be able to have contact with extended family there. Nationality is in any event not a trump card.

21. It is also important to bear in mind the fact that the appellant had no basis of stay in the UK and her relationship was established in those circumstances.

22. Mr McTaggart submitted that if the decision requires to be re-made, the appeal should be allowed under the Immigration Rules as set out in the skeleton argument which was before the First-tier Tribunal. There was a need to consider the best interests of the child. I was referred to the decisions in *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 00640 (IAC) as well as *MK (best interests of child) India* [2011] UKUT 00475 (IAC) and *ZH (Tanzania)* [2011] UKSC 4. The appellant's child nationality, as a factor in itself, must be taken into account. China does not recognise dual nationality, which would cause problems for him. It is also relevant to take into account the appellant's husband's business in the UK.

23. So far as the Immigration Rules are concerned, the appellant would not be able to meet E-LTRPT.2.3. There are good grounds to consider the case outside the Rules and it would be disproportionate to require the appellant to leave the UK in all the circumstances.

Conclusions

24. Although Judge Fox stated in the determination at [25] that the appellant has raised an arguable case for consideration outside the Immigration Rules, as a "freestanding Article 8 appeal", there is no consideration of the Article 8 Immigration Rules. That should have been the first step to a consideration of Article 8. The failure to give consideration to the Article 8 Rules has in my judgement, led the judge into error.

25. Had there been a consideration of the Rules first, as should have been done, the judge would then have been in a position to explain why the Rules did not cater for the appellant's situation such that a wider Article 8 enquiry was required. Allied to this is the fact that although it is said in the determination that an arguable case for consideration outside the Rules has been established, there is no explanation as to why that is the case. The later assessment of factors under Article 8 proper is no substitute for an analysis, however brief, of why the Rules do not cater for the appellant's circumstances.

26. In addition, although it may be simply no more than a technical error, there was no basis for the conclusion at [25] that the determination is not in accordance with the law, when it plainly is in the sense that there is 'legal colour' to the decision remove. That is a separate consideration from the proportionality assessment.

27. Furthermore, there is no consideration in the judge's decision of the possibility of the appellant returning to China to apply for entry clearance. Whilst a conclusion was reached that it would in the child's best interests to remain with both parents, that finding would not be undermined by a period of temporary separation whilst entry clearance was sought. Arguments based on the decision in *Chikwamba* [2008] UKHL

40 do not absolve a judge from an explicit assessment of whether it would be possible and proportionate for an entry clearance application to be made.

28. Furthermore, although the judge relied on the decision in *Zambrano*, there does not appear to be any recognition of the principle that the British citizenship of a child is not to be regarded as a 'trump card'. The conclusion that the child is "entirely dependent" on his mother does not appear to be based on any evidence.

29. Although at [10] it is stated that regard has been had to ss.117A-117B and 117D of the 2002 Act, there is no apparent factoring in of those considerations within the assessment of Article 8. Thus, nothing is said about whether or not the appellant is able to speak English (s.117B(2)). Although at [26] there *appears* to be recognition of the uncertain immigration status of the appellant at a time when she formed a relationship with her husband, there is no express reference to s.117B(4) which mandates that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.

30. I am satisfied that the First-tier Tribunal Judge did err in law in the respects to which I have referred. Those errors of law are such as to require the decision to be set aside. I indicated to the parties that if I came to that view, the re-making of the decision was appropriately dealt with in the Upper Tribunal, and to that effect I heard submissions from the parties as reflected above.

31. In re-making the decision, the first matter to consider is the application of the Article 8 Immigration Rules. So far as the relationship with her husband is concerned, under E-LTRP.2.2. the appellant must not be in the UK on temporary admission or in breach of immigration laws unless paragraph EX.1. applies.

32. For leave to remain as a parent, on the facts of this appeal, the appellant would have to satisfy the requirements of E-LTRPT.2.3 which provides as follows:

> "E-LTRPT.2.3. Either-
>
> (a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK); or
>
> (b) the parent or carer with whom the child normally lives must be-
>
> (i) a British Citizen in the UK or settled in the UK;
>
> (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
>
> (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

33. It was accepted on behalf of the appellant that she is not able to meet those requirements. To summarise, she does not have sole responsibility for her child and the child does not normally live with only her husband. Under E-LTRPT.2.4. the appellant would have to provide evidence that she has sole responsibility or access rights. That does not apply in this case.

34. Accordingly, whilst the appellant is not able to rely on paragraph EX.1 in terms of her relationship with her child, it arguably does come into play in terms of her relationship with her partner. In that regard, EX.1. applies if:

> "(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

35. Paragraph EX.2. provides that:-

> "For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

36. There is no dispute but that the appellant has a genuine and subsisting relationship with a partner who is in the UK and settled. Her husband has ILR. The question then is whether there are "insurmountable obstacles" to family life with her husband continuing outside the UK.

37. Although I have found an error of law in the First-tier Tribunal's decision, there are certain findings of fact which are unaffected by the error of law. Thus, it was found by Judge Fox that the appellant's husband runs a business in Londonderry, which he has done for some years, and that it is a successful business run with his brother. He found at [26] that if he were forced to accompany the appellant to China he would have difficulty in relocating his business to China.

38. He found at [15] that the appellant lives with her husband and child "and his family" in the same household.

39. Further findings at [26] are that the appellant, her husband and their child are in good health and that the appellant's husband has extended family in China whom he visits regularly, having uncles, aunts and cousins there. It was also concluded that the appellant has family in China.

40. So far as the Immigration Rules are concerned, as already explained the appellant is not able to meet those Rules in terms of her relationship with her son. So far as her husband is concerned, I cannot see how on the evidence before me it could be said that there are "insurmountable obstacles" to family life between the appellant and her husband continuing outside the UK. Both the appellant and her husband have family in China. For the appellant's husband China is plainly not an alien country. He visits and has extended family there including uncles, aunts and cousins. Whilst

he also has family in the UK and is running a business, his primary family life is with the appellant and their child.

41. Even if his business in the UK would have to close, about which there is no evidence, there is no reason to suppose that he would not be able to start a new business in china, realising whatever assets there are in the business in the UK. Even if he would not be able to establish himself in business in China, it is not suggested that either he or the appellant would be unable to find employment, even assuming that lack of employment would amount to insurmountable obstacles to their return.

42. I accept that there would be difficulties in their relocating to China but I am not satisfied that the evidence establishes that there would be very significant difficulties to their continuing their family life together in China, or that if there are, they could not be overcome. I cannot see that within the meaning of insurmountable obstacles in EX.2, there are very significant difficulties which would entail very serious hardship for the appellant, her partner or incidentally their child.

43. I refer to their child within a consideration of the applicability of EX.1. because in principle one could see that the circumstances of a child of a relationship could inform the assessment of whether there are insurmountable obstacles. The fact of their child's British citizenship does not in my judgement reveal any insurmountable obstacles, even accepting that living in China their child would be deprived of the immediate benefits of British citizenship. The mere fact of a child's citizenship does not, under the Rules or indeed under Article 8 proper, rule out relocation to another country. This can be seen for example, within EX.1. that an appellant would have to establish that it would not be reasonable to expect the child to leave the UK, even accepting that the child is a British citizen or has lived in the UK continuously for at least seven years preceding the application.

44. I have considered whether there are circumstances requiring consideration outside the Rules, under Article 8 proper. I cannot see that there are such circumstances. However, if I am wrong about that, for example because of the fact of the appellant's husband's business, and the need for a more wide ranging Article 8 consideration, I adopt the five-stage approach set out in the decision in *R (Razgar) v SSHD* [2004] UKHL 27.

45. It is plain that the appellant has family life in the UK. If the appellant left the UK without her husband and child there would of course be an interference with her family life with them. If she left with her child there would nevertheless still be an interference with her family life with her husband. In either case, that interference will have consequences of such gravity as potentially to engage the operation of Article 8.

46. The decision is in accordance with the law however, and pursues the legitimate aim of the economic wellbeing of the country expressed through the maintenance of effective immigration control.

47. In assessing proportionality the best interests of the appellant's son is a primary consideration. Those best interests are plainly served by his remaining in a stable and

loving relationship with both parents. However, their child's best interests whilst a primary consideration are not the only consideration.

48. I proceed on the assumption that it would not be in the child's best interests to leave the UK with the appellant to live in China, on the basis that he would be denied the advantages of British citizenship, for example in terms of education and access to health care, although in fact there is no basis for a conclusion that the education he would receive in China or the health care that he would receive there would be in any way inferior to that in the UK. As I say however, I nevertheless proceed on the footing that a child should ordinarily be entitled to grow up in the country of which they are a citizen.

49. It is important to consider the provisions of ss.117A-B of the 2002 Act as follows:

> "117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases:
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and (b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom"

50. Under s.117B(2) it is in the public interest that the appellant should be able to speak English. There is no evidence before me that the appellant can speak English.

51. I am prepared to accept that the appellant is financially independent on the basis of the evidence that her husband owns and runs a successful business. The fact that the appellant and her husband established their relationship at a time when she was in the UK unlawfully, means that under s.117B(4) little weight should be given to her relationship with her husband, or indeed to her private life in the UK, such as it is.

52. Under s.117B(6) the issue is whether it would be reasonable to expect the appellant's child to leave the UK, that provision indicating that the public interest does not require a person's removal where the section applies. Plainly, the mere fact that a qualifying child is a British citizen or has lived in the UK for a continuous period of seven years or more is insufficient to establish that it would not be reasonable to expect the child to leave the UK. A "qualifying child" is a child who in fact already possesses either of those characteristics. Thus, something more is required.

53. What is relied on on behalf of the appellant is, it seems to me, nothing more than the fact of the child's citizenship, reliance being placed on the decision in *ZH (Tanzania)*. The child having to leave the UK with the appellant would undoubtedly mean that he would not be able to take advantage of the benefits that British citizenship has to offer. On the other hand, if he were to leave the UK with the appellant and her husband, he would be able to live with both his parents, a matter which is undoubtedly to his advantage.

54. I cannot see on the facts of this case that it could be said that it would not be reasonable to expect him to leave the UK with the appellant and her husband. There is nothing to indicate that his circumstances in China would be particularly difficult, cause particular hardship to him or mean that either or both his parents would have difficulty caring for him. That is not to say that there may not need to be some period of adjustment whilst his parents find their feet, but as already stated China is not a country that is unknown to them.

55. The question arises as to whether the appellant could reasonably be expected to leave the UK and seek entry clearance as a spouse from China. This is not remote from the provisions of s.117B(6) because of the potential for the appellant's child to leave the UK with her whilst she sought such entry clearance. Of course, her son would not himself need entry clearance, being a British citizen. There would be a period of temporary separation between the child and his father, but there is nothing to indicate that that would be for a prolonged period. In the meantime, the appellant's husband would be able to continue with his business.

56. Looking at Article 8 more widely, and in the context of the appellant making an application for entry clearance, leaving her husband and child behind, I have considered the decision in *Chikwamba*. This is not a case however, where the *Chikwamba* principle applies. It is not a case of simply requiring the appellant to leave the UK to make an application for entry clearance purely for the technical reason of making the application. In such an application there would need to be an assessment of the extent to which the appellant is able to meet the requirements of the Immigration Rules for entry clearance as a partner, for example the financial requirements and the English language requirement. Furthermore, given that there is nothing to indicate that the period of separation would be a lengthy one whilst an application for entry clearance was sought, I am satisfied that it is proportionate to expect the appellant to leave the UK to apply for entry clearance as a partner.

57. On any of the scenarios that I have considered, namely the appellant and her partner and child leaving the UK as a family, the appellant and her child leaving the UK to apply for entry clearance, or the appellant leaving the UK on her own to make such an application, I am satisfied that the respondent's decision is a proportionate response to the legitimate aim of the maintenance of effective immigration control.

58. In these circumstances, the appeal under the Immigration Rules and Article 8 of the ECHR is dismissed.

Decision

59. The decision of the First-tier Tribunal involved the making of an error on a point of law. That decision is set aside and I re-make the decision, dismissing the appeal under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 21/08/15