Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10448/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 April 2015	**On 5 May 2015**

Before

UPPER TRIBUNAL JUDGE SOUTHERN
UPPER TRIBUNAL JUDGE FINCH

Between

KAN WAH CHHOI
(No anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. J. Kirk, counsel instructed by Wilson Solicitor LLP
For the Respondent: Ms A. Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 19th October 1962, is a national of Malaysia. He arrived in the United Kingdom on 25th February 2002, as a work permit holder, with a visa which was valid until 25th February 2007. On 13th March 2007 he applied for further leave to remain as a work permit holder but his application was refused on 23rd March 2007, as he had used a form which was no longer in use. A further

application on the same basis was refused on 8th May 2007 for the same reason. On 8th March 2011 the Appellant applied for leave to remain relying on his rights under Article 8 of the European Convention on Human Rights. This application was refused on 8th April 2011 without a right of appeal.

2. Meanwhile, the Appellant's wife and older daughter had arrived in the United Kingdom as visitors on 13th March 2003 and were subsequently granted leave to remain which also expired on 25th February 2007. On 12th February 2014 the Respondent decided to remove the Appellant, his wife and his younger daughter from the United Kingdom. All three of them appealed against this decision but on 6th March 2014 First-tier Tribunal Judge Herlihy held that the Appellant's wife and younger daughter did not have any right of appeal.

3. The Appellant's appeal was heard by First-tier Tribunal Judge Talbot on 29th August 2014 and he dismissed the appeal in a decision promulgated on 16th September 2014. The Appellant then sought permission to appeal to the Upper Tribunal. The Appellant asserted that the Judge had failed to consider adequately, or at all, the expert evidence on the impact of removal on the Appellant's younger daughter and had also failed to give sufficient reasons for his apparent conclusion that she could adapt to life in Malaysia. In addition, he asserted that the Judge had failed to apply section 117B of the Nationality, Immigration and Asylum Act 2002 properly or at all and that he also failed to consider relevant factors in his Article 8 assessment.

4. First-tier Tribunal Judge Pirotta refused him permission to appeal on 30th October 2014. She found that the Judge had taken into account the fact that the Appellant's older daughter had leave to remain in the United Kingdom until September 2015 and that she wished to embark on an independent life and that, therefore, separation from the rest of her family was inevitable. She also noted that the Appellant had had no leave to remain in the United Kingdom since February 2007 and that he had worked illegally and breached the laws of the United Kingdom. She also found that the Appellant's and his family's rights to family life would not be breached as they would return to Malaysia as a family unit and the elder daughter only had limited leave to remain and could join them at will.

5. The Appellant renewed his application for permission, relying on the same grounds of appeal but added that the contention was that the Judge had failed to consider the expert's comments on the many other ways in which removal would be damaging to the younger daughter. He denied that he was relying on any "near miss" principle but asserted that the Judge should have diminished the weight that he attached to the legitimate aim pursued by the Respondent because the Immigration Rules recognised the importance of seven years residence by a child and because the Appellant met most of the requirements of Appendix FM. He also asserted that First-tier Tribunal Judge Pirotta had not engaged with his grounds of appeal. On 13th February 2015 Upper Tribunal Judge Eshun simply said that all three grounds raise an arguable error of law for the reasons given.

Error of Law Hearing

6. At the hearing the Appellant's counsel submitted that the Judge's consideration of the Independent Social Worker's report had been limited to her comments on the

impact on the younger child of separation from her older sister. In addition, he submitted that the Judge's conclusion in paragraph 25 of her decision that the Appellant's younger daughter could adapt to life in Malaysia was at odds with the expert evidence. He also confirmed in answer to a question from us that no CV was available for the independent social worker. Counsel also submitted that the Judge had failed to take into account the fact that the Appellant's younger daughter was a "qualifying child" as defined in section 117D of the Nationality, Immigration and Asylum Act 2002 and asserted that, therefore, the Judge was required to undertake a discrete assessment as to whether it was reasonable to expect her to leave the United Kingdom. He also submitted that this should precede any consideration of the proportionality of any breach of Article 8. Finally, he submitted that the Judge had failed to take into account the Article 8 rights of the Appellant's wife and older daughter when considering proportionality.

7. In her reply, the Home Office Presenting Officer submitted that the Judge had been alert to the entirety of the independent social worker's report and had referred to a number of its paragraphs. She also asserted that it had been purely speculative for her to say that the younger child would become depressed in Malaysia. She said that this was particularly the case as the Judge had found in paragraph 25 of her decision that the younger child was a relatively normal well-adjusted 7 year old child living with her parents and older sister, attending primary school and with an appropriate social life for a child of that age. She also noted that the Judge had taken into account the fact that the younger child had spent all her life here and was well integrated but had found that it did not tip the balance in favour of it being disproportionate to remove the Appellant. She also submitted that the factual matrix of the case did not render her removal unreasonable and referred to the cases of *EV (Philippines) & Others v Secretary of State for the Home Department* [2014] EWCA Civ 874 and *MK India (Best interests of the child)* [2011] UKUT 00475 (IAC). In addition she noted that the older daughter had been granted leave in her own right under paragraph 276ADE of the Immigration Rules. She then noted that Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 stated that the public interest "does not require" the removal of a qualifying child if it would not be reasonable for her to leave but submitted that the other public interests considerations in Section 117B of the Nationality, Immigration and Asylum Act 2002 still applied, including the Appellant's immigration history and his level of integration into society here.

8. In the Appellant's renewed application for permission to the Upper Tribunal the Appellant clarified his first ground of appeal and said that he accepted that the Judge did consider the expert's comments on the damage to the Appellant's younger daughter of separation from his older daughter. Instead, the Appellant asserted that the Judge had failed to take into account the other ways in which removal would be damaging and the expert's conclusion that the overall impact of removal would be severely damaging to her psychological, social and educational development. However, in paragraph 24 of his decision the Judge had confirmed that he had carefully perused the independent social worker's report. We accept that he had concentrated on the high degree of interdependence which existed between the Appellant's family members, which was in keeping with their cultural heritage. She also commented on the close bond between the Appellant's two daughters. We did not have the advantage of a copy of the independent social worker's CV but consideration of family relationships was clearly within her

experience and role as a social worker. But we find that the independent social worker's comments in relation to the risk that the Appellant's younger daughter would suffer emotional harm if removed to Malaysia, that she would experience a bereavement by the loss of all that was familiar and that her parents would find it difficult to support her were speculative given her present emotional and psychological stability and the fact that she would be travelling to Malaysia to live there with both of her parents. It is also our view that it was speculative to conclude that she would suffer a level of depression which would most likely to result in apathy and withdrawal from trying to achieve at school. We also note that there was no medical evidence to support this view. As a consequence, we are not satisfied that the manner in which the Judge considered the independent social worker's report gave rise to an error of law.

9. The Appellant's second ground of appeal was that the Judge had failed to take into account the fact that the Appellant's younger daughter was a "qualifying child" for the purposes of Section 117D of the Nationality, Immigration and Asylum Act 2002. This was clearly the case as she had lived in the United Kingdom for a continuous period or seven years or more since her birth here on 1st July 2007. As a consequence, and because the Appellant was not liable to deportation, section 117(6) did apply in the Appellant's case.

10. At paragraph 24 of his decision the Judge had found that the Appellant enjoyed a close family life with his younger daughter. He did not specifically consider whether the Appellant had a genuine and subsisting parental relationship with her or whether it would be reasonable to expect her to leave the United Kingdom for the express purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 but this presumption could be read into his decision in its totality. He also did not specifically consider whether it would be reasonable to expect her to leave the United Kingdom with reference to this particular sub-section. However, when he considered Section 55 of the Borders, Citizenship and Immigration Act 2009 in paragraph 25 of his decision and return to Malaysia in paragraph 26, he referred to factors which were relevant to any consideration of the reasonableness of expecting her to leave the United Kingdom with her parents. For example, he noted that she was a relatively normal well-adjusted 7 year old and would be travelling to Malaysia with parents who had been born and brought up there. At the hearing, counsel was not able to point to any factor which the Judge had failed to address in the totality of his decision which would have been relevant to a consideration under sub-section 117B(6).

11. In *EV (Philippines) & Others v Secretary of State for the Home Department* [2014] EWCA Civ 874 the Court of Appeal observed that the best interests of a child who was in education here would depend on a number of factors. In the current case the Appellant's younger daughter is in the earlier years of her primary education and her parents still speak a language which is spoken in Malaysia. She also had other relatives who may be able to assist her to adapt to education there. We have also taken into account that in paragraph 36 of *EV Philippines* the Court of Appeal suggested that it was likely to be in cases where a child was at a more advanced or critical stage of her education that this would outweigh other factors in a proportionality consideration.

12. The Home Office Presenting Officer submitted that the Judge's failure to give discrete and prior consideration to sub-section 117B(6 did not give rise to a material error of law as Section 117B(6) said no more than that removal was "not required" if the requirements of this sub-section were met. As a consequence, the other public interest considerations in the other sub-sections of section 117B were not rendered of no account because of sub-section 118B(6) and the Judge was still entitled to consider the Appellant's immigration history and the extent to which he was integrated into society here. In this case the Appellant had not had any leave to remain since 2007 but had continued to live and work here since that date. It was also clear from the witness statements that he and his wife had not become fluent in English and depended on their daughters to translate and interpret for them. For all of these reasons we find that the second ground of appeal did not identify any material error of law in the Judge's decision.

13. In addition, the Appellant asserted that the Judge had not given sufficient weight to the effect on his wife and older daughter of the decision to remove him from the United Kingdom. However, there was nothing in the evidence provided by the Appellant's wife which suggested that she had developed a family and private life here that was distinct from his. Her statement was mainly concerned with her concerns about the well-being of her two daughters. We accept that she suffered a bereavement here when a further daughter was still-born but it would be possible to find ways of commemorating her death once a year even if they returned to live in Malaysia. In addition, in paragraph 21 of his decision the Judge had considered the effect on the Appellant's removal on the Appellant's older daughter and had taken into account the fact that she was now an adult, had obtained leave to remain here in her own right and had decided to leave home and study at university in Manchester, while the family proposed to remain in London. Therefore, in our judgment the third ground did not give rise to any material error of law.

14. For all of these reasons we are satisfied that there were no material errors of law in the First-tier Tribunal Judge's decision and that his decision should stand.

Conclusions:

1. The Appellant's appeal to the Upper Tribunal is dismissed and the First-tier Tribunal Judge's decision is to stand.

Upper Tribunal Judge Finch Date: 27 April 2015