IAC-HX-MH/11-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/13047/2013
VA/13053/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2014	**On 27 February 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

ENTRY CLEARANCE OFFICER, BANGKOK

Appellant

and

MISS CHIT SNOW TUN
MR NAY WIN TUN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr Jarvis
For the Respondents: Ms Nasim

DECISION AND REASONS

1. Mr Nay Win Tun and Miss Chit Snow Tun are citizens of Burma born in 1984 and 2010 respectively. They are father and daughter. They applied for entry clearance as visitors. Their applications were refused on 14 May 2013 because the

Entry Clearance Officer was not satisfied that they met the requirements of paragraph 41 and 46A of the Immigration Rules.

2. They appealed.

3. Following a hearing at Hatton Cross on 21 August 2014 before Judge of the First-tier Turquet she dismissed the appeals under the Immigration Rules, but allowed them under Article 8 (ECHR).

4. The ECO sought permission to appeal which was granted by a judge on 15 October 2014.

5. Although in proceedings before me the ECO is the Appellant and Miss Chin Snow Tun and Mr Nay Win Tun the Respondents, for convenience I will maintain the designations as they were before the First-tier namely Miss Chin Snow Tun and Mr Nay Win Tun are the Appellants and the ECO is the Respondent.

6. The basis of the refusal by the Respondent was as follows: neither Appellant qualified as family members under the Immigration Appeals (Family Visitor) Regulations; they had applied to visit their mother/wife who held limited leave to enter the UK. Miss Chit Snow Tun, the first Appellant stated that she was to visit her grandmother and she had been listed as Sponsor by the second Appellant. However, in an interview he said that the primary focus of the visit was to be with his wife and (another) daughter and to stay with them in the UK. As the Appellants' mother/wife being not settled did not qualify as a family member under the Regulations they had not been granted a full right of appeal.

7. In addition, the second Appellant had stated that he had been employed as a sales manager since June 2007 earning 3,000 dollars a month. Although he had submitted a personal bank statement there was no independent or substantiating evidence of a regular income or employment as claimed. The bank account was opened in December 2011, four years after he claimed to have begun his employment and there were no regular deposits in the nature of salary evidence in the account. It was noted that funds increased at the time of the first application and then the funds were removed following the refusal, and then the funds increased prior to the current application. Such indicated that the account was artificially inflated to bolster the application. The ECO was not satisfied that it represented a true reflection of his financial circumstances.

8. Further, he had provided evidence of a business licence for a firm. Whilst this indicated that he had paid licence fees he had not provided evidence of an operational business from which he derived any income. The ECO was not satisfied that the second Appellant's circumstances were as described which led him to question why he was coming to the UK and that he intended to leave at the end of his stay (paragraph 41(i) and (ii)).

9. The first Appellant's father with whom she intended to travel did not hold a valid entry clearance and therefore could not accompany her. She did not have permission from her legal guardians to travel unaccompanied. Thus she did not meet the requirements of paragraph 46A(a) or (b). The concerns over her father's circumstances were also relevant to her application. The ECO was not satisfied that the first Appellant was genuinely seeking entry as a child visitor for a limited period. She did not satisfy paragraph 46A (1)(i) as well as 41(ii) as encompassed by 46A (1) (ii).

10. Having heard evidence from the second Appellant's wife and his sister-in-law the judge made her findings at paragraph [19] ff. She did *'not find that the Appellant has satisfactorily addressed the issues raised in the refusal letter'*. She noted that at date of decision the Appellants' mother/wife was not settled in the UK. She had applied for ILR which was not granted until after the decision.

11. Although the Sponsor, the mother-in-law, was settled in the UK at date of application she had stated that the Appellants would live with her daughter. Also, in his interview the second Appellant stated that he wished to travel to the UK to see his wife. The judge concluded that the purpose of the visit was for the Appellants to visit their mother/wife and not someone who is settled in the UK.

12. In addition the judge was not satisfied that they would be visiting the Sponsor, the grandmother. Although it was stated in the Grounds of Appeal that the grandmother was desperate to see them and in particular the first Appellant for the first time and could not go to Burma, this was not consistent with the Sponsor having been in Burma in 2011 as indicated in the second Appellant's interview. Nor was it consistent with the oral evidence of a witness that the grandmother lived in Burma but visits the UK. At date of hearing she had been in Burma for eight months.

13. The judge went on to consider the second Appellant's finances and found (at [22]) that he had not satisfactorily addressed the issues raised by the ECO about these. In particular, he had not addressed the issue of the increase in funds before a previous application and their withdrawal after refusal. Nor had the issue of a lack of independent or substantiating evidence of a regular income or employment been satisfactorily addressed.

14. The judge dismissed the case under the Rules.

15. She went on at [24] to state as follows:

> 'Although there was no submission in respect of Article 8 it had been raised in the Grounds of Appeal. Although it is rather an academic exercise at this time as the Appellants' mother and wife has now been granted ILR and the parties have all been living together in Burma from January to August this year, I find that the decision was not proportionate. The first Appellant at the date of decision was aged three years old and had not seen her mother

> for about eighteen months. Her sister was born in the UK in 2012 and neither Appellant had seen her. The mother was in the UK with leave and had applied for ILR. In the event that the visit visa applications were refused, I am satisfied that, had the mother had access to her passport she would have returned to Burma which was what she did when she was granted ILR. There is no suggestion that the family has breached Immigration Rules in the past. To separate a father from his wife and new born child and a young child from her mother for a lengthy period due to administrative delays in considering the mother's ILR application is not proportionate to the interests of maintaining effective immigration control. I find that the balancing exercise falls in favour of the Appellants.'

16. The judge concluded by dismissing the appeals under the Immigration Rules but allowing them on human rights grounds.

17. At the error of law hearing before me Mr Jarvis submitted that the judge had erred in law in her approach to the Article 8 assessment. She had taken account of factors which postdated the ECO's decision. Also, the judge had not made reference to exceptional circumstances which applied. Further, she had failed to take into account as a factor against the Appellants that they could not satisfy the Rules.

18. In reply Ms Nasim submitted that the judge had considered the circumstances as at date of decision in particular that the mother/wife was not settled. It was clear that there was family life between the parties. She had considered compelling circumstances, in particular, that they had been separated for a long time especially the child from her mother and that the mother could not travel. This was thus not a normal family visit. The judge was entitled to conclude as she had.

19. In considering this matter the judge's reason in allowing the appeal on human rights grounds is that it was disproportionate to separate a father from his wife and a new born child, and a young child from her mother for a lengthy period due to administrative delays in considering the mother's ILR application. The judge also noted there had been no breaches of the Immigration Rules in the past.

20. In this case the judge considered the application under the Rules and concluded that they could not succeed under them not least because this was not a family visit as the wife/mother was not settled in the UK as she was required to be. The use by the second Appellant of the mother-in-law/grandparent was, in the judge's view, effectively a device to circumvent the requirements of the Rules, the clear intention being that the Appellants would live with the wife/mother. It was also noted that the second Appellant's claimed financial circumstances had been disbelieved which went to intention.

21. The problem in my judgment with the judge's approach is that having clearly found, albeit without specifically saying so, that there was a family life between the Appellants and the wife/mother and that the decision amounted to interference with the right to respect with that family life, her

consideration of proportionality is inadequate. In particular she failed to consider as an adverse factor in the balancing exercise that the Appellants could not satisfy the Immigration Rules in that they were not seeking to visit the family member claimed and that the second Appellant's financial circumstances gave cause for doubt that there was incentive to leave at the end of the stay. Further, I see no basis for the judge's conclusion as a factor in favour of the Appellants that the period of separation had been '*due to administrative delays'* in considering the wife/mother's application for ILR. The fact that she has not breached immigration laws adds nothing.

22. The judge showed material error of law in failing to give relevant reasons in support of her decision to allow the appeal on human rights grounds. The decision is set aside. The findings stand.

23. I proceed to remake the decision. As the appropriate date is date of decision there is no further evidence to consider. The parties had nothing to add.

24. Article 8 is not to be used to circumvent the Rules. Therefore a person who could not satisfy the Rules should not benefit from a liberal interpretation of Article 8. In this case, as indicated the Appellants could not meet the requirements.

25. On the evidence the Appellants clearly have family life with the mother/wife. In the circumstances of this case, however, I do not see that refusing a visit interferes with the right to respect for that family life which can, as it has been for years, be carried by other means, such as phone calls and online. In that regard at date of decision separation was likely to be temporary. The mother/wife's application for ILR was pending. With the decision she would get her passport back.

26. Even if I am wrong in that regard and the interference is severe enough to engage Article 8, the issue of proportionality has to be considered.

27. In this case the wife/mother chose, as she was entitled to do, to reside in the UK from May 2012 separate from her husband and child. It was her choice. She was able if she wished to return to see her family. She chose to seek ILR for which she submitted her passport. If the application was successful such would allow her to travel to her family when she wished and if she chose to remain in the UK, for them to make application under the Rules to join her which if they met the Rules would be successful. In the meantime as indicated there is nothing to stop family life continuing by modern means of communication.

28. Under Section 117 of the Nationality, Immigration and Asylum Act 2002 as introduced by the Immigration Act 2014 I am required to consider public interest considerations. The maintenance of effective immigration controls is in the public interest (117B(1)). Also, it is in the public interest, and in particular the interests of the economic wellbeing of the UK, that persons who seek to enter the UK are able to speak English, because

persons who speak English are less of a burden on taxpayers and are better able to integrate into society (117B(2)).

29. There is no information before me as to whether the two Appellants can speak English.

30. Further, it is in the public interest, and in the interests of the economic wellbeing of the UK that persons who seek to enter the UK are financially independent, because such persons are not a burden on taxpayers and are better able to integrate into society.

31. The claimed financial circumstances of the second Appellant were doubted by the ECO. The First-tier Judge found such concerns to be merited. There is nothing before me to show that the Appellants are financially independent.

32. For the reasons stated I find there to be no compelling or exceptional circumstances in this case. Any interference with the right to respect for family life is proportionate to the legitimate public end sought to be achieved.

33. The appeals fail on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal shows a material error of law. That decision is set aside and remade as follows:

The appeals are dismissed on human rights grounds.

No anonymity direction is made.

Signed Date **19 November 2014**

Upper Tribunal Judge Conway