



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01312/2017

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2018

Decision & Reasons Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

QIYONG [W]
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam, Counsel

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of China born on 9 August 1976. He appeals against a decision of Judge of the First-tier Tribunal Burns sitting at Taylor House on 26 March 2018 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 5 January 2017. That decision was to refuse to grant the Appellant's application dated 13 December 2016 for leave to remain as a partner/parent and

pursuant to Article 8 (right to respect for private and family life) of the Human Rights Convention.

2. The Appellant, who is now forty-two years of age, was born and brought up in China where his parents and siblings still live. He entered the United Kingdom on 4 June 2006 at the age of thirty with the assistance of an agent using a false passport. He claimed asylum which was refused and his appeal was dismissed. He absconded in 2006 and evaded the Respondent for the next six years and nine months. He finally made contact with the Respondent in March 2013 making further representations for leave to remain which were also refused.
3. In 2014 the Appellant met his partner Ms [X] who was born on 9 December 1974 also in China. She had come to the United Kingdom as a student in 2000 and has been living here since. She was naturalised as a British citizen. She undertakes annual visits back to China to visit her parents and siblings who still live there. The couple became engaged in May 2015 and on 29 July 2016 Ms [X] gave birth to [F] a daughter who is a British national. The Judge accepted that the Appellant and Ms [X] were in a genuine and subsisting relationship and that the Appellant had a genuine parental relationship with his daughter, [F].

The Decision at First Instance

4. At [15] the Judge stated that Ms [X] and [F] would have to renounce their British nationality if they wished to become citizens of China. If they did not wish to do so but wished to live in China, they would have to obtain residence visas.
5. The Appellant could not satisfy the relationship requirements for leave to remain as a parent because the [F]'s other parent Ms [X] was the partner of the Appellant. The Appellant could not therefore satisfy section E-LTRPT.2.3(b)(ii) of Appendix FM of the immigration rules. Section EX.1 did not apply because the Appellant could not meet the eligibility requirements. The appeal fell to be decided outside the Rules under Article 8.
6. The Appellant had argued that it was in [F]'s best interest that she remained in the United Kingdom because she could obtain the benefits of English life and education and avoid the disadvantages of life in China. The Judge considered [F]'s best interests at [28] to [30] of the determination. [F]'s parents were both from China and all her relatives apart from her parents were living there. [F] was only twenty months old and would have established no roots in the United Kingdom. She could easily go back with both her parents to live in China where she would be able to establish closer ties with her Chinese grandparents and relations and with her parents' cultural heritage. Her best interests would be served at least as well by going to live in China as they would be by remaining in the United Kingdom. It was reasonable to expect [F] to leave the United Kingdom.
7. The Judge continued at [32] that there were no insurmountable obstacles to family life between the Appellant and Ms [X] continuing in China. They had both spent all of their formative years there. Ms [X] was a highly qualified teacher who would have

good prospects of being able to find a suitable teaching job in China even if it was not as well-paid as a United Kingdom job. Both she and the Appellant spoke Mandarin and would have their parents and families living within a reasonable travelling distance. The refusal to grant leave did not cause interference of sufficient severity to engage Article 8 as family life could be continued elsewhere.

8. Section 117B (6) of the Nationality Immigration and Asylum Act 2002 provides that in the case of a person who is not liable to deportation the public interest does not require that person's removal where they have a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect that child to leave the United Kingdom. [F] was a qualifying child by reason of her British citizenship, but the Judge found it reasonable to expect her to leave the United Kingdom with her parents and therefore the subsection would not apply. The Appellant had a poor immigration history having entered the United Kingdom on a false passport, presented a bogus asylum claim and then evaded the Home Office for six years and nine months. To grant the Appellant leave would reward him for this bad behaviour. It would also be unfair to other migrants who do respect the Immigration Rules. It would undermine the maintenance of immigration control and set a bad example.
9. The Judge directed himself on the definition of insurmountable obstacles since it was argued by the Appellant that he and Ms [X] would meet such insurmountable obstacles. He cited the Supreme Court decision in Agyarko [2017] 1 WLR 823. Insurmountable obstacles meant very serious difficulties which could not be overcome or which entailed very severe hardship. Only where that stringent test was satisfied would a non-settled migrant in breach of immigration control (as was this Appellant) obtain leave to remain under the rules. Where that test was not met it was not incompatible with Article 8 to refuse leave to remain. Family life which had been established in the full knowledge of the unlawfulness or precariousness of the immigration status of one party was to be given less weight when balanced against factors weighing in favour of removal. In such cases a very strong claim was required to outweigh the public interest in immigration control. The Judge could see no compelling circumstances in this case which made refusal disproportionate. The facts were far removed from those in a case like Chikwamba.

The Onward Appeal

10. The Appellant appealed against this decision arguing that it was unreasonable, irrational or unlawful for the Judge to find that the interference with the Appellant's family life was proportionate. The Judge had been given a copy of a printout on the Nationality Law of the People's Republic of China and in particular Article 3 of that law which had also been referred to in counsel's skeleton argument. Chinese law did not allow for dual citizenship. Article 3 stated "the People's Republic of China does not recognise dual nationality for any Chinese national". For the family to enjoy a full and proper family life in China both Ms [X] and [F] would have to renounce their British citizenship and become Chinese. Section 117B(6) was said to be limited to the reasonableness of a British child relocating abroad but remaining British who could return to the United Kingdom when they become 18. To place [F] in a position where

she would lose her British citizenship (and thus by implication not be able to return) would be unlawful.

11. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Grimmett on 17 May 2018. In refusing permission to appeal she noted that as the Judge had concluded family life could continue in China and the Appellant had never been in the United Kingdom lawfully section 117B (4) of the 2002 Act applied (little weight to be given to a relationship formed while a person's status was unlawful). There was no arguable error. The Judge had considered section 55 of the Borders, Citizenship and Immigration Act 2009.
12. The Appellant renewed his application for permission to appeal to the Upper Tribunal in grounds which expanded on the previous grounds. The renewed grounds referred to Article 5 of the Chinese nationality law which states that a child born abroad to Chinese parents does not have Chinese nationality if they acquired foreign nationality at birth. This exclusion, it was argued, applied to [F] who was British at birth because her mother was naturalised. It would not be reasonable to expect [F] to relocate to China since, not being Chinese, she would not be allowed to register in the Hukou household registration system and would not have access to the state education and healthcare systems.
13. The Judge had found that Ms [X] and [F] would have to renounce their British nationality but had downplayed the difficulty of living in China without acquiring Chinese citizenship. It would not be easy for [F] or one of her parents to live in China. The grounds continued that Ms [X] was not a Chinese citizen, I comment on that point in more detail below, see paragraphs 24 and 25. The amended grounds did not deal with the point made by the Judge that Ms [X] returned to China annually to visit her parents and relatives.
14. The renewed application for permission to appeal came on the papers before Upper Tribunal Judge Allen on 11 July 2018. In granting permission to appeal he wrote: "The grounds identify an arguable issue of challenge with regard to the consequences of relevant provisions of the Nationality Law of the People's Republic of China".

The Hearing Before Me

15. In consequence of the grant of permission to appeal the matter came before me to determine in the first place where there was a material error of law in the Judge's determination such that it fell to be set aside and the decision remade. If there was not the decision at first instance would stand.
16. Counsel for the Appellant referred to the skeleton argument that he had submitted for the hearing in the First-tier. The skeleton noted that China did not recognise dual nationality. It would be difficult or impossible for [F] to live in China without renouncing her nationality. Ms [X] has British citizenship which she would have to give up. If one was not a Chinese national one would not be able to register. That was documented at section 6.8 in the Country of Origin Information Report prepared by

the Respondent. In order to apply for a child household registration the parents would be required to provide certain documentation listed in the Report.

17. While the test for the parents was whether there were insurmountable obstacles to their family life continuing elsewhere, counsel made clear that the main weight of the Appellant's case rested on [F]'s best interests. I queried with counsel whether there was any evidence that Ms [X] had lost her Chinese nationality for example whether it had been revoked because she had acquired British citizenship. Counsel replied that because she had acquired British citizenship she was no longer a Chinese national. [F] would not be able to live in China unless she renounced her British nationality. That would not be in her best interests. The Judge had not considered the reasonableness test in section 117B (6) properly.
18. In reply the presenting officer stated that the Judge had set out the relevant section of the 2002 Act in full and applied it. He had found it reasonable to expect [F] to leave the United Kingdom. There was no evidence that Ms [X] had revoked her nationality. She had gone back to China on visits but had not produced which passport, Chinese or British, she had used for those visits. If one interpreted Article 5 of the nationality law correctly [F] was entitled to acquire Chinese nationality. There were no material errors of law in the determination. It might be difficult for the family to relocate but that was not the test. The case of **Zambrano** did not apply because if the Appellant returned on his own there would still be someone left in the United Kingdom to look after [F]. The Appellant would not be required to return to China to apply from there if his application was bound to succeed but such an obviously meritorious case was not the position here.
19. In response, counsel stated that the test in this case was whether it was reasonable to expect [F] to leave the United Kingdom. The decision had to be based on reasonableness.

Findings

20. The Appellant puts his appeal on the basis that because he has a genuine parental relationship with his young daughter and because he argues it is not reasonable to expect her to leave the United Kingdom with him his appeal should succeed. Permission to appeal in this case was granted specifically on the issue of nationality and its effect on the reasonableness test. It was not argued before me that the Appellant could bring himself within the immigration rules. He cannot meet the eligibility requirements and the appeal is therefore brought outside the rules under Article 8. Even if EX.1 had applied the test of reasonableness of expecting [F] to leave the United Kingdom would be the same as under section 117B(6).
21. The Judge was clear that family life between the Appellant and Ms [X] could be continued elsewhere. He also considered that it was reasonable to expect [F] to relocate with her parents to China. He gave his reasons for that decision. [F] as a British citizen is a qualifying child and strong reasons are therefore required before she can be expected to leave the United Kingdom. Those strong reasons can include the poor

immigration history of the parent because the test of reasonableness can encompass the wider public interest.

22. In assessing the proportionality of the interference with the family life of the Appellant, Ms [X] and [F] the Judge was obliged to refer to the statutory provisions contained in the 2002 Act which he duly did. Given her young age and that the focus of her life would be on her parents the Judge found it reasonable that [F] could be expected to adapt to life in China and relocate there with her parents.
23. The objections to this are firstly that Ms [X] is a British citizen and for her to relocate she would have to renounce her British citizenship. Reliance is placed on the provisions of the nationality law effective from September 10, 1980. In the extract which was given to me it states that Article 3 provides that China does not recognise dual nationality for any Chinese national. That however is not the end of the matter as far as Ms [X] is concerned since there appears to have been no evidence before the Judge that Ms [X]'s Chinese nationality had been revoked. It is reasonable to have expected some evidence before the Judge as to how Ms [X] was making her annual trips to China to see her family and whether she was using Chinese documentation or a United Kingdom passport. If the latter what problems if any did she encounter with the Chinese authorities?
24. The burden of proof of establishing insurmountable obstacles rested on the Appellant and Ms [X]. It is difficult to see how in the absence of the evidence I refer to in the preceding paragraph the Judge could have concluded that Ms [X] had already lost her Chinese nationality since such evidence as there was (the frequent visits to China) pointed to her still having her Chinese nationality. The Judge commented at [15] that Ms [X] would have to renounce her British nationality if she wished to become a citizen of China. If, however, she was already a citizen of China it would not be necessary for her to take any further steps.
25. Chinese law would not recognise her British citizenship. That is clear from Article 3 but that does not mean that Ms [X] would have to renounce her British citizenship in order to live in China. Since she was already Chinese she would be in the position of a returning citizen. It might of course be inconvenient for her to relocate given that she has established a career in this country as a teacher, but it has been well settled since the Court of Appeal decision in Agyarko that the personal preferences of the other partner are not a decisive factor in Article 8 appeals.
26. The Appellant also relies on Article 5 of the nationality law. This allows a person born abroad whose parents are both Chinese nationals to have Chinese nationality. There is thus no difficulty in [F] acquiring Chinese nationality. The reference to a person acquiring foreign nationality at birth not having Chinese nationality only applies where both the Chinese parents are settled abroad. Whilst as a British citizen, Ms [X] can be said to be settled abroad, the same cannot be said about the Appellant for the cogent reasons given by the Judge who outlined the Appellant's poor immigration history. Thus Article 5, as I understand the position, would not apply to [F] and would not prevent [F] from acquiring Chinese citizenship. If the position is different from that

expert evidence would have been needed but there was no such expert evidence before the Judge who was simply given a copy of the extract from the nationality law.

27. I understand Upper Tribunal Judge Allan's concern that the issue of nationality needed to be further ventilated but nothing was given to me that was not before Judge Burns. My reading of the nationality law is that in the absence of revocation Ms [X] is still a Chinese citizen and that [F] is entitled to apply for Chinese citizenship. Neither I nor the Judge saw any expert evidence to indicate that that is wrong.
28. The question really is: if the Appellant, Ms [X] and [F] returned to China but [F]'s United Kingdom citizenship would not be recognised by the Chinese authorities would that represent an insurmountable obstacle? Since [F] could not be refused Chinese nationality, the only consequence would be that they would not treat her as a British citizen. It is difficult to see how that situation could be described as an insurmountable obstacle for the adults. It would not be a very serious difficulty which could not be overcome nor one which would entail very serious hardship. [F] would live in China with her parents. The Judge considered the point but found that it would not be unreasonable for [F] to relocate.
29. I remind myself that the Judge had the benefit of seeing and hearing the witnesses and that he was entitled to come to the view he did on the evidence before him. Where I disagree with the Judge is his comment that it would be necessary for Ms [X] and [F] to renounce their British citizenship. I do not understand the nationality law to require that. The nationality law states that the Chinese authorities will not recognise Ms [X] or [F] as British citizens but only as Chinese citizens. That is a citizenship which Ms [X] already has and which [F] is entitled to. [F] would be living in an environment which would reinforce her cultural heritage assisted by her parents. At a later date she could if she so wished return to the United Kingdom using her United Kingdom passport.
30. It is by no means unknown for British citizens to live during their childhood years with one or both parents in their parents' country of origin. I do not see that that situation is of itself to be so unreasonable that it would infringe the provisions of the 2002 Act. I do not find that the determination demonstrates any material error of law on the Judges part. Whilst I consider there is an error in the Judge's statement that Ms [X] and [F] would have to renounce their British nationality, I do not find that is a material error. The Judge had no expert or other evidence before him to suggest that was the case. The limited evidence, such as it was, that was before the Judge indicated that [F] would be entitled to Chinese citizenship and Ms [X] would not have to lose her existing Chinese citizenship.
31. [F] would then be eligible for household registration and could access the benefits of living in China. As the Judge pointed out it was not for him to determine whether life was better in the United Kingdom or China. The issue was whether it was unreasonable to expect [F] to travel to China with her parents and the Judge gave cogent reasons for finding that was not the case. I therefore dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 10 September 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 10 September 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge