Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34986/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 5 January 2018 **On 29 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS X Z
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Smyth, Kesar & Co Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of the People's Republic of China born on 11 March 1990. She came to the United Kingdom on 9 June 2013 as a Tier 4 Student and this leave was further extended until 19 October 2015. Two days prior to the expiry of her leave on 17 October 2015, the Appellant applied for leave to remain on the basis of her relationship and family life. This was due to the fact that the Appellant had met and married a British citizen, CHF, DOB 2 February 1980. The human rights application was refused by the Respondent on 1 December 2015 on the basis that the Appellant could not demonstrate that the financial requirements of Appendix FM

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were met and the Respondent considered there were no insurmountable obstacles to family life continuing in China.

2. On 6 February 2016, the Appellant gave birth to a daughter of the marriage, C, who is a British citizen by birth due to her father's nationality.

3. The appeal came before First-tier Tribunal Judge Herwald for hearing on 14 March 2017. In a decision and reasons promulgated on 22 March 2017 he dismissed the appeal and made *inter alia* the following findings: that the Appellant and Sponsor are in a genuine and subsisting relationship and so the Appellant met the suitability requirements in S-LTR but she was unable at the date of application to show that the eligibility requirements R-LTRP1.1(c)(ii) were met *viz* the relevant income requirement as her husband had not been working for long enough to show the necessary wage slips and bank statements. At 18(b) of his decision the judge accepted in respect of the ten year route that the suitability requirements and eligibility requirements were met. The judge accepted at 18(f) that the Appellant has a genuine and subsisting parental relationship with a child who is a British citizen but concluded it was not unreasonable to expect the child to leave the UK. The rationale for this finding is at 18(i) and that is:

> *"In this case the mother is Chinese. The father was born in this country but his parents are from Hong Kong and he has close relatives in Hong Kong. The child has his maternal grandparents in China. Both parents speak Cantonese to each other at home and presumably to the child who is now 1 year of age. The child, though a British citizen, will be fully accustomed to Chinese culture given the interest therein of his parents. No evidence was put before me to suggest that the child could not benefit from or acquire Chinese nationality nor that the child could fail to be admitted to China. No evidence was put before me to the effect that the mother is breastfeeding and although it is not desirable for a mother to be separated from her child, there are no reasons put before me as to why the child could not go with his mother to China, albeit temporarily, to await his mother's entry clearance. It might be said it would be an ideal opportunity for the child to get to know his maternal grandparents and to attach to and bond to them, something which is at present denied her. I note that the Appellant has in the past visited China to see her parents with her husband and there is nothing to prevent the husband from visiting his wife and his child or alternatively making arrangements for the child to stay in this country with him and/or his extended family*
>
> *(j). On balance given the requirements of the Immigration Rules I would not have found it unreasonable to expect the child to leave the UK at this stage."*

4. In relation to Article 8 and consideration of Article 8 outside the Rules the judge concluded at {25}:

> *"I am not persuaded on the evidence presented that there are compelling circumstances not sufficiently recognised under the Rules for granting leave to remain … "I should add that even if I had found the answers to the first four Razgar questions to be in the affirmative I would have found such interference to be proportionate here despite the fact that there is a qualifying child given my findings above."*

5. Permission to appeal was sought in time to the Upper Tribunal on the basis that the judge had erred materially in law in his assessment of the reasonableness of expecting the Appellant's daughter to leave the UK. It was submitted at [5] that the test is whether or not it will be reasonable to expect the child to leave the UK, not whether it will be reasonable to expect the child to temporarily leave the UK in order for her mother to apply for entry clearance nor even whether or not it will be reasonable for the child to remain in the UK while her mother applied for entry clearance.

6. Reliance was placed on the decision of the Upper Tribunal in SF and Others (guidance post 2014 Act) [2017] UKUT 120 (IAC). At [7] where the Tribunal noted the Immigration Directorate Instruction on Family Migration Appendix FM Section 1.0B "*Family life as a partner or parent and private life ten year routes August 2015*" at 11.2.3 provides as follows.

> "*Would it be unreasonable to expect a British citizen child to leave the UK?*
>
> *Save in cases involving criminality the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano. Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer. In such cases it will usually be appropriate to grant leave to the parent or primary carer to enable them to remain in the UK with the child provided that there is satisfactory evidence of a genuine and subsisting parental relationship. It may however be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU. The circumstances envisaged could cover amongst others:*
>
> * *Criminality falling below the threshold set out in paragraph 398 of the Immigration Rules.*
>
> * *A very poor immigration history such as where the person has repeatedly and deliberately breached the Immigration Rules. In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation.*"

7. Permission to appeal was granted on 3 November 2017 by First-tier Tribunal Judge Alis on the following basis:

> "*It is arguable that the judge did not give sufficient weight to the Respondent 's August 2015 policy on when it is reasonable to require a British child to leave the United Kingdom and by implication of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The principles of MA (Pakistan) [2016] EWCA Civ 705 also should be applied.*"

Hearing

8. At the hearing before me, I heard submissions from Mr Smyth on behalf of the Appellant who, drawing attention to the Home Office policy cited at [6] above, submitted it was not reasonable for a British citizen child to leave the UK permanently in the absence of countervailing factors. In this case the Appellant had been lawfully resident and there were no countervailing factors.

9. Mr Bramble submitted that the judge had considered the competing factors and that at the date of the Respondent's decision the child had not yet been born. He further sought to persuade me that the Home Office policy related to sole parents or primary carers only.

10. Mr Smyth submitted that nowhere in the Rules is it required that an Appellant seek entry clearance in order to qualify under the ten year route and that the references within the decision to temporary separation are simply wrong and have no basis in law. He submitted the sole requirement is that contained in EX1(a) *viz* whether or not it was reasonable for the child to leave the United Kingdom.

Findings

11. I find a material error of law in the decision of the First-tier Tribunal Judge, in that it is apparent from the decision that no consideration was given to the relevant Home Office policy ([6] above) which makes clear the Respondent's position in respect of the reasonableness of expecting British children to leave the United Kingdom. It was apparent that there were no countervailing factors in this particular case that would justify not providing leave to the Appellant within the terms of that policy. However due to the fact that the Appellant's daughter was born after the refusal decision but before the hearing, the Respondent did not, when refusing the application, take into account the fact there was a British child.

12. Moreover, despite directing himself at [11] that pursuant to section 85(4) of the NIAA 2002 the Appellant may adduce and the Judge may consider evidence about any matter relevant to the decision, even if the requirements of the Rules were not met at the date of decision, the Judge went on 18(a) to rely on the evidence of income at the date of decision rather than that before him, which showed that the income requirements of the Rules were met by the date of hearing. Had he not fallen to error on this point it would have been open to him to consider allowing the appeal with reference to R-LTRP 1.1.(c) of Appendix FM of the Rules, given that the requirements at (a) and (b) were met.

13. I decided to remake the decision myself and gave the parties the opportunity to make further submissions. One issue arose from [18] of the decision of the First-tier Tribunal and that was the assertion by the judge that the child could benefit from or acquire Chinese nationality. I gave Mr Smyth the opportunity to provide evidence in rebuttal, which he did so and produced a copy of the Nationality Law of the People's Republic of China which provides at Article 3 that the PRC does not recognise dual nationality for any Chinese national.

14. I then heard submissions from Mr Smyth and Mr Bramble. Mr Smyth submitted that there was no requirement under the Rules for the Appellant to return to the PRC for the purpose of applying for entry clearance given that the judge accepted that she met the requirements of the Rules except for Appendix FM-SE. He submitted that the Appellant's daughter is British and is not entitled to Chinese nationality by virtue of Article 3 of the National Law of the PRC and that removal of her mother in order to apply for entry clearance will clearly be contrary to her best interests see ZH (Tanzania) (2011) UKSC 4.

15. In relation to the Appellant's husband, he was born and brought up and has lived his entire life in the UK and his family are from Hong Kong rather than mainland China. He submitted it will clearly be disproportionate for the family to be separated given it was accepted that they are a genuine and subsisting family unit and there were no countervailing factors and that in light of section 55 of the BCIA 2009, the only reasonable and proportionate outcome will be for the family to remain in the UK. He submitted in respect of the Home Office policy that even if it was primarily envisaged as addressing the situation for lone parents it clearly gives guidance as to the factors therein that are relevant.

16. In his submissions, Mr Bramble acknowledged that the Respondent's refusal had been before the birth of the child of the marriage. He submitted that the child was not expected to leave the United Kingdom but there was no reason why their child could not remain with her father whilst the Appellant returned to the PRC in order to obtain entry clearance and there was no evidence that it was not possible for her to do this. Alternatively, the family could return to the PRC or go to the PRC as a family unit, the father and daughter as visitors, while the Appellant made her application. He acknowledged, however, that given the age of the child who remains under 2 that it was debateable whether it will be proportionate for her to be separated from her mother whilst an entry clearance application was being made.

17. Mr Smyth in his reply submitted if it was not reasonable for the child to live in China permanently then the requirements of the Rules were met.

Decision

18. I find that it would not be reasonable to expect the British child, who was born on 6 February 2016, to leave the United Kingdom. She is under 2 years of age and I consider that she is too young to be separated from her mother so would have to accompany her to make an application for entry clearance to re-enter the United Kingdom. Thus in light of the fact that the requirements of the Rules were met, there being no dispute as to the fact that the Appellant met the eligibility and suitability requirements of the Rules, this is a classic Chikwamba case as the only reason the Appellant would be required to leave the United Kingdom would be to apply for entry clearance.

19. It is also now clear that, contrary to the finding of the First tier Tribunal Judge, it will not be open to either the Appellant's husband or her child to acquire Chinese nationality as both are British citizens and Chinese law precludes dual nationality: [13] above refers.

20. It is further clear from the Home Office policy cited at [6] above moreover that, given that the Appellant has resided in the UK with lawful leave until 19 October 2015 and since that time she has resided pursuant to the extant application and appeal process and there is no suggestion of any criminality on her part, that there are no countervailing factors that would justify refusing leave to her. I also bear in mind the fact she is the mother of a British child and that the effect of Section 55 of the Borders, Citizenship and Immigration Act 2009 means that although the child's best interests are not paramount they are a primary consideration and inform the Home Office policy.

21. There was also evidence before the First-tier Tribunal that the Appellant's husband at the date of that hearing earned £20,800 per annum, which meets the income requirement of the Immigration Rules and it was accepted that the relationship between all parties were genuine and subsisting. Thus the appeal falls to be allowed under the Immigration Rules with reference to R-LTRP 1.1.(a)-(c) (the five year route) or (d), EX1(a)(i) and (ii) of Appendix FM of the Rules. In these circumstances there is no requirement for me to go on to consider Article 8 outside the Rules.

Notice of Decision

I find material errors of law in the decision of First-tier Tribunal Judge Herwald. I remake the decision allowing the appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *Rebecca Chapman* Date: 25 January 2018

Deputy Upper Tribunal Judge Chapman