Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01617/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2019	**On 16 July 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MRS FENG LIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H. Kannangara, Counsel, instructed by Lisa's Law Solicitors
For the Respondent: Ms S. Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Fen Lin, is a citizen of China, born 20 November 1990. She appeals against a decision of First-tier Tribunal Judge O'Rourke promulgated on 24 April 2019 dismissing her appeal against a decision of the respondent dated 16 November 2018 to refuse her human rights application.

Factual background

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2. The appellant is the wife of a naturalised British citizen of Chinese descent, Tom Zi Lin ("the sponsor"). Together they have two children, E, who was a born on 5 November 2013, and a second child born shortly before the hearing. E is a British citizen, as is their second child. The appellant arrived in the United Kingdom in July 2007 with a visa valid for six months. She did not leave, and during her time as an overstayer, met and married the sponsor, and gave birth to E. In April 2014, she made an application for leave to remain on human rights grounds, which was granted from June 2015 to December 2017. Shortly before the expiration of that visa, she applied for further leave to remain on human rights grounds. That application was refused, and it is that refusal decision which was challenged before Judge O'Rourke.

3. The application was refused on suitability grounds, on account of an English-language test certificate which had been fraudulently obtained by the appellant. An additional ground of refusal, not pursued by the respondent before the First-tier Tribunal, was that the relationship between the appellant and the sponsor was not genuine and subsisting. As noted at [8] of Judge O'Rourke's decision, that issue was no longer in dispute before First-tier Tribunal. The refusal letter did not consider the impact of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

4. Judge O'Rourke accepted the respondent's evidence that the appellant had used deception to obtain an English-language certificate from Queensway College, London. It was common ground that the appellant had not sat the test; her evidence was that she attended the test premises expecting to do so, but was dismissed shortly afterwards. Her solicitor had arranged the process, and although she was surprised by what happened, she trusted her solicitor and chose not to pursue matters further. Judge O'Rourke rejected this innocent explanation, at [19], and there is no challenge to that finding.

5. Judge O'Rourke considered the impact of section 117B(6) of the 2002 Act. The judge noted that, pursuant to MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705, the immigration misconduct of the appellant was a factor which went to the "reasonableness" of expecting E to leave the United Kingdom. At [26], Judge O'Rourke considered the public interest factors militating in favour of the removal of the appellant, noting at [26(iv)] that the appellant's poor immigration history, her "flouting" of the immigration rules, and the minimal weight which could be attached to her family life in this country were all factors which were capable of outweighing the best interests of E, to the extent they were to remain in the United Kingdom.

Permission to appeal

6. Permission to appeal was granted by Judge Nightingale of the First-tier Tribunal, on the basis that it was arguable that the judge erred in holding the immigration misconduct of the sponsor against E, for the purposes of assessing whether it would be reasonable to expect him to leave the

United Kingdom. Further, Judge Nightingale noted that Judge O'Rourke had not referred at all to the leading Supreme Court authority of KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, and, as such, had failed to have regard to the "real world" context in which the question of reasonableness should be assessed.

Legal framework

7. This appeal was brought under Article 8 of the European Convention on Human Rights. The essential issue for the judge's consideration was whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be removed, in the light of the family and private life she claims to have established here. This issue is to be addressed primarily through the lens of the respondent's Immigration Rules and by reference to the requirements of Article 8 directly, see Razgar [2004] UKHL 27 at [17].

8. In addition, a number of statutory public interest considerations are set out in part 5A of the 2002 Act, to which regard must be had. Of significance for present purposes is section 117B(6):

> "(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."

9. As a British citizen child, E is a "qualifying child" (section 117D(1), 2002 Act).

10. It is settled law that the best interests of the child are a primary consideration when considering whether removal of an appellant under Article 8 would be proportionate, see ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge.

Discussion

11. Judge O'Rourke correctly approached his analysis by reference to whether removal of the appellant would have entailed an interference with her Article 8 ECHR rights, such that Article 8 will be engaged: see [22]. The judge answered the remaining questions pertaining to the lawfulness of removal under Article 8 in the affirmative (see [23] and [24]). The judge then rightly identified that the remaining question is whether the appellant's removal would be proportionate. That was a question to be answered by reference to Part 5A of the 2002 Act.

12. Judge O'Rourke correctly noted that section 117B(6) of the 2002 Act was engaged, and that it would be potentially dispositive of the proceedings. As the appellant has a genuine and subsisting relationship with E, a

"qualifying child", the public interest would not require her removal from if it would not be reasonable to expect E to leave the United Kingdom. As the judge correctly identified, therefore, everything turned on what was "reasonable" for these purposes.

13. It was common ground at the hearing that Judge O'Rourke had erred by initially directing himself that it was necessary to treat the immigration misconduct of the appellant as a factor which contributed to the assessment of the "reasonableness" of expecting E to leave the United Kingdom. While that was a correct application of the previous leading authority, MA (Pakistan) (upon which the judge initially relied), the judge erred in law by not following the Supreme Court's approach in KO (Nigeria). In KO, the Supreme Court held that the assessment of "reasonableness" is not to be conducted by reference to the (mis)conduct of the parents of the child. At [15], Lord Carnwath, with whom the other justices agreed, stated the provisions in Part 5A of the 2002 Act,

> "...are intended to be consistent with the general principles relating to the 'best interests' of children, including the principle that 'a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent' see Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690, para 10, per Lord Hodge JSC."

At [17], His Lordship noted that there is nothing in section 117B(6),

> "to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B (6) is on its face freestanding, the only qualification being that the person relying on it is not liable to deportation..."

14. Judge O'Rourke made no reference to the above judgment, nor to any of the reported cases from this tribunal or the Court of Appeal subsequent to it.

15. The question then arises as to whether the judge's error of law was material.

16. Although the grounds of appeal sought to impugn the judge's assessment of the best interests of E, nothing in the submissions advanced before me highlighted any error of law in the approach the judge took when performing that assessment, in [26(iv)]. The judge noted that E, at five years old, would have only very limited integration in this country; his existence would be focused almost entirely on his parents. Any friendships that he does have that this early stage in his life could be easily replicated in China, found the judge. Both the appellant and sponsor have close family links in China, in the same province, with their respective families living in sufficient proximity for the sponsor to be able to stay upon his return (on the assumption that the sponsor will choose to remain in this country, with the appellant and E leaving China). The judge noted that there had been no evidence as to other family members in this country, and whether the sponsor decided to follow the appellant would be a

matter for him. The child would be too young to be aware of his nationality. He speaks some Mandarin, which is the language of the home he shares with his parents, who would be able to provide him with language tutoring in the future. He would be returning to a country with a buoyant economy, a good education system, and would be able to be brought up among his extended family, into the culture and ethnicity into which he had been born. To the extent the medical conditions of E required some treatment, there is no evidence that such treatment would not be available in China.

17. Although the judge did not address in express terms the criteria enunciated in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 and endorsed in KO for assessing the best interests of the child, namely the "real world" context of the parents, it is clear that that was the operative background against which the judge performed his assessment. See, for example, the judge's references to the possibility of the sponsor continuing to live in this country. Those references demonstrated the awareness the judge had of the sponsor's British nationality, and his ability, if he chose to do so, to remain in this country. Further, the judge addressed the possibility of the sponsor returning to visit the appellant and his son, in the event the family choose for only the appellant and the children to leave this country. Plainly, the references to the appellant herself relocating to China were mindful of the expectation that she be removed to that country, against the backdrop of the possibility of the sponsor remaining here. This was a "real world" assessment in all but name.

18. Although the judge referred at the end of [26(iv)] to the possibility of E's best interests being outweighed by the cumulative impact of other public interest considerations, including the immigration misconduct of the appellant, it is clear from the analysis which proceeds in that paragraph that the judge did not hold the immigration misconduct of the appellant against E in order to determine what E's best interests were. This is because the judge's free-standing best interests assessment in relation to E was conducted without reference to the immigration misconduct of the appellant; his stand-alone conclusion was that it would be consistent with E's best interests for him to return to China with his mother, and his father if he chose to accompany them. The judge had not, for example, concluded that the best interests of E were for him to remain in this country, finding that they were outweighed by the immigration history of his mother. On the contrary, the thrust of the judge's analysis was that it would be consistent with E's best interests for him to accompany his mother upon her return to China. The only sense in which the judge mentioned the immigration misconduct of the parents as being a relevant factor in this paragraph was towards the end of his assessment, when addressing the fact that the British children would temporarily (that is, until they reach the age of majority) be unable to enjoy their British citizenship rights. There was no question of the appellant's immigration misconduct weighing against the child's best interests, for, by definition, on the judge's analysis, it was consistent with the child's best interests for him to return to China with his mother.

19. It follows, therefore, that the judge's assessment of the best interests of E was sound.

20. Turning to the next issue of whether, in light of those best interests, it would be "reasonable" to expect E to leave the United Kingdom, I consider the approach taken by the judge to be entirely consistent with that which was required by KO (Nigeria). In that case, at [10], Lord Carnwath quoted the Immigration Directorate Instructions ("the IDIs") in force at the relevant time in those proceedings. His Lordship included the following extract in his quotation,

> "…it is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK."

21. His Lordship was later to say at [17] that those factors were "wholly appropriate and sound in law".

22. Against that background, Judge O'Rourke's operative conclusion that it would be reasonable to expect E to leave the United Kingdom was entirely consistent with the best interests assessment required by EV (Philippines) and KO (Nigeria), in particular the "real world" assessment required by those cases. The overall conclusion of the judge was consistent with the approach taken by the IDIs quoted at [10] of KO, which the Supreme Court described as "wholly appropriate…"

23. Although, of course, the sponsor in the present matter is a British citizen, which is a factor to embed within the "real world" assessment, he is a naturalised British citizen of Chinese descent, who arrived in this country from China as a student in 2002. He would be entitled to remain in this country, should he choose to do so, and would be able to visit his son and wife in accordance with the findings of fact made by Judge O'Rourke. Alternatively, he would be able to rely on his knowledge of Mandarin, his background as a Chinese citizen, his Chinese ethnicity and his family links in order to be able to return to China with the appellant.

24. For these reasons, although Judge O'Rourke erred by referring to the immigration misconduct of the appellant when initially directing himself as to the concept of "reasonableness", I find that that did not infect his ultimate analysis and so did not feature a material error of law. His overall assessment that it would be reasonable to expect the appellant and E to leave the United Kingdom was consistent with the approach taken by the Supreme Court in KO (Nigeria) and did not, in operative terms, count the immigration misconduct of the appellant against him.

Conclusion

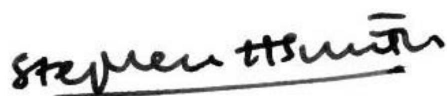
25. It follows that the judge did not err materially, and this appeal is dismissed. The judge erred in his initial self-direction concerning what amounted to reasonableness, but that was not a material error, as on the facts of this case it is reasonable to expect E to leave the United Kingdom.

Postscript

26. At the hearing, I was encouraged by both parties to remake the decision for myself. As will be seen from the preceding analysis, I did not consider that it was necessary to do so. Adopting that approach would have entailed setting aside judge O'Rourke's decision. The focus of my consideration is whether Judge O'Rourke materially erred in law by reference to the facts as they stood when the matter was heard by him. In the absence of a material error of law in his decision, it was not necessary to do so.

Notice of Decision

This appeal is dismissed on human rights grounds.



Signed Date 10 July 2019

Upper Tribunal Judge Stephen Smith