IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10914/2019(V)
HU/10917/2019(V)
HU/10919/2019(V)
HU/10920/2019(V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2020	**On 27 January 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS JING [Y] (FIRST RESPONDENT)
MR LIHONG [L] (SECOND RESPONDENT)
[ZH] (THIRD RESPONDENT)
[LL] (FOURTH RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondents: Ms E Rutherford, Counsel instructed by TRP Solicitors

This has been a remote hearing to which all parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and none of the parties expressed any concern, with the process.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

Background

2. The appellants are citizens of China. They are a family unit.

3. The second appellant entered the UK in November 2014 as a Tier 1 (Investor) with leave until January 2018. The other appellants came with him as his dependants.

4. The first appellant is the second appellant's wife. The third appellant is his eldest child, born on 20 February 2008. She is not his biological child, but nothing turns on this. The fourth appellant is his youngest child, born on 2 August 2013.

5. In December 2017 the appellants applied to extend their leave. They then varied the application to apply for leave to remain on the basis of their family and private life. On 10 June 2019, the application was refused.

6. They appealed to the First-tier Tribunal where their appeal was heard by Judge of the First-tier Tribunal Anthony ("the judge"). In a decision promulgated on 25 September 2019, the judge allowed the appeal. The respondent is now appealing against that decision.

7. This appeal was previously considered by the Upper Tribunal, in a decision made without a hearing pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. That decision was set aside under Rule 43 as the judge making the decision had not been aware of, and therefore had not had regard to, written submissions made on behalf of the appellants. I have not had regard to – or even read - the decision that was set aside.

Decision of the First-tier Tribunal

8. It was common ground before the First-tier Tribunal that the appellants did not meet the requirements of the Immigration Rules for leave to remain in the UK on the basis of their private or family lives.

9. It was also common ground that, as they had not lived in the UK for seven years or more, neither the third or fourth appellant was a qualifying child as defined in Section 117D(1) of the Immigration, Nationality and Asylum Act 2002 ("the Act") and therefore Section 117B(6) was not applicable.

10. The judge found that the first and second appellants are well educated, own at least one property in China, and would be able to find employment, or start a business, in

China. She expressed a firm conclusion that they would not face very significant obstacles integrating into China.

11. The focus of the judge's decision was on the third appellant. The judge found that the third appellant speaks Mandarin, has visited China, and has loving and caring Chinese parents who provide a safe environment and who own a property - and would be able to secure employment - in China. Despite this, the judge concluded that (a) it is in the best interests of the third appellant to remain in the UK (paragraph 27); (b) it would be unreasonable for her to be expected to leave the UK (paragraph 48); and (c) it would be harmful to her to leave the UK. The finding that the third appellant will suffer harm as a consequence of leaving the UK is expressed unambiguously. The judge stated:

    (i) "a return to China is likely to cause permanent harm to her welfare" (paragraph 48);

    (ii) returning to China would be "hugely disruptive for her and would decimate the friendships, relationships and activities that form the core of her private life" (paragraph 45);

    (iii) "emotionally, [returning to China] would undoubtedly be highly stressful and potentially damaging to her health and welfare" (paragraph 45).

12. At paragraph 48 the judge stated:

> "The factors to which I give **determinative weight** are the following: her deep emersion in all aspects of life in this country and her minimal connections with her country of origin. I conclude that it would be unreasonable for the third appellant to return to China. I find that a return to China is likely to cause permanent harm to her welfare". [emphasis added]

Grounds of Appeal

13. A single argument is advanced by the respondent in the grounds of appeal, which is that the judge approached the appeal as if the relevant issue to determine was the reasonableness of the third appellant's removal when she was not a qualifying child under Section 117D of the 2002 Act.

Submissions

14. Mr Kotas, in his submissions, elaborated on the argument in the grounds. He submitted that the judge misdirected herself in law as, despite recognising and acknowledging that the third appellant was not a qualifying child under Section 117D of the 2002 Act, the judge focused exclusively on the question of whether it would be reasonable for her to leave the UK. He stated that the judge looked at her circumstances "in a vacuum" and treated them as determinative.

15. Ms Rutherford argued that when the decision is considered as a whole it is apparent that the judge took into consideration, and balanced, all relevant factors. She argued that the judge conducted a careful fact-finding exercise where all material parts of the evidence were addressed and that clear findings of fact were made, including as to the best interests of the children. She observed that the judge correctly recognised that neither child was a qualifying child under Section 117D and addressed factors other than the question of whether it would be reasonable to expect the third appellant to leave the UK.

Error of Law

16. Section 117B(6) of the 2002 Act provides that:

> (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.

17. The term "qualifying child" is defined in Section 117D as a person who is under the age of 18 and who is a British citizen or has lived in the UK for a continuous period of seven years or more.

18. Section 117B(6) must be read as a self-contained provision in the sense that parliament has stipulated that where the conditions specified therein are satisfied, the public interest will not justify removal. Meeting the conditions of Section 117B(6) will therefore normally be determinative of an appeal. See *R (MA Pakistan and Ors) v Upper Tribunal* [2016] EWCA Civ 705. On the other hand, where the conditions of Section 117B(6) are not met, it is necessary for a judge to take into consideration all material matters when assessing proportionality under Article 8(2) ECHR. In such cases the reasonableness of a child leaving the UK will be a material consideration, to be weighed alongside other factors, but it will not be determinative.

19. The judge fell into error by treating her finding that it would not be reasonable for the third appellant to leave the UK as determinative of the appeal even though the third appellant was not a qualifying child and therefore Section 117B(6) was not applicable. I reach this conclusion not only because the judge used the word "determinative" in paragraph 48 of the decision but also because, reading the judge's analysis as a whole, it is apparent that the judge looked in isolation (or in a "vacuum" to use the phrase adopted by Mr Kotas) at the circumstances of the third appellant and then decided that because it would not be reasonable for her to leave the UK the family unit should not be removed. The judge, therefore, fell into error because even though she recognised that the third appellant was not a qualifying child for the purposes of Section 117B(6) she nonetheless approached the appeal as if she was. This was a material error and as a consequence the decision cannot stand.

Remade Decision

20. After delivering my decision in respect of the error of law, I asked the parties to make submissions on (a) whether the findings of fact made in the First-tier Tribunal should be preserved and (b) whether I should proceed to re-make the decision without a further hearing.

21. Ms Rutherford and Mr Kotas agreed that the findings of fact should be preserved and that I should proceed to re-make the decision.

22. I drew to Mr Kotas's attention that the judge made a finding at paragraph 48 that a return to China would be likely to cause the third appellant "permanent harm to her welfare". I asked if this was accepted by the respondent. He stated that as this finding was not challenged in the grounds of appeal he was not in a position to challenge it now. Ms Rutherford expressed the same view: stating that, it having been agreed by the parties that the findings of fact should be preserved, I could not now go behind them.

23. I pause to make the observation that I do not understand how the judge reached the conclusion that the third appellant would be likely to suffer permanent harm as a consequence of moving to China, and it is certainly not a finding I would have made. The third appellant, if returned to China, will be moving to the country of her citizenship, where she speaks the language, with both parents; and her parents will not face difficulties obtaining employment and accommodation. Whilst she may experience some challenges adapting to a new school and environment, it is difficult to see how this would cause her permanent (or indeed any) harm. That said, as this finding has not been challenged, I proceed on the basis – as I must - that returning to China is likely to cause permanent harm to the welfare of the third appellant.

24. The appellants have lived in the UK for six years and during this time have developed connections and relationships, including, in the case of the third and fourth appellant, through their attendance at school. I am satisfied – and it was not questioned at the hearing – that they have established a private life that meets the threshold of Article 8(1) ECHR.

25. I now turn to consider whether removal will be disproportionate under Article 8(2) ECHR.

26. I approach this issue by adopting the "balance sheet" approach recommended by Lord Thomas in *Hesham Ali Iraq v SSHD* [2016] UKSC 60. In so doing, I have regard to the relevant considerations listed in Section 117B of the 2002 Act, as well as all other considerations that are material.

27. Weighing against the appellants is that there is a public interest in the maintenance of effective immigration controls. I attach significant weight to this because the appellants do not qualify for leave to remain under the Immigration Rules and have

never had any reason to believe that they are, or ought to be, entitled to settle in the UK.

28. The public interests in immigrants speaking English and not being a burden on the taxpayer do not weigh against the appellants as they speak English and are financially independent for the purposes of Section 117B(3) of the 2002 Act.

29. Apart from the finding that there is likely to be permanent harm to the third appellant's welfare arising from a move to China, there is very little weighing on the appellants' side of the scales in the proportionality assessment. They have only ever had precarious immigration status in the UK and therefore little weight attaches to their private lives (section 117B(5) of the 2002 Act). Removal will not negatively impact the family life they enjoy with each other as they would be removed together as a family unit. Nor will they face obstacles (and certainly not "very significant obstacles", which is the test under the Immigration Rules) integrating in China as the evidence indicates not only that they are familiar with the society and culture but that they will be able, with relative ease, to find accommodation and employment.

30. With respect to the third and fourth appellants, the conclusion I would have drawn from the evidence – had no findings of fact been preserved - is that it is in their best interests to remain with their parents, whether in the UK or China; and that it is no more in their best interests to be in the UK than to be in China. I would also have found that it is reasonable for them to move to China with their parents. However, it is not for me to draw such conclusions because, as explained above, the findings of fact in the First-tier Tribunal were not challenged and the parties agree they are to be preserved. The preserved findings include that (a) it is in the best interests of the third appellant to remain in the UK and (b) moving to China is "likely to cause permanent harm to her welfare".

31. Constrained by the preserved findings of fact about the third appellant, I find that the balancing exercise under Article 8(2) falls in favour of the appellants. I reach this conclusion because of the significant weight I attach to the finding that the third appellant would be likely to suffer permanent harm to her welfare as a consequence of a move to China. This is not determinative, and could be outweighed by other factors, but it is a matter of significant weight, and I am of the view that the public interest in the maintenance of effective immigration controls (in circumstances where a family have complied with immigration rules and there are no issues of criminality or poor conduct) is outweighed by a likelihood of permanent harm to a child.

Notice of Decision

32. Error of Law decision: The Secretary of State's appeal is allowed and the decision of the First-tier Tribunal is set aside.

33. Remaking of the decision: I allow the appeal of the four respondents (who, as explained in paragraph 1 above, have been referred to as the appellants in this decision).

34. No anonymity direction is made.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan 13 January 2021