Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26105/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 April 2013	**On 12th August 2013**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MISS WEI FENG LIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam, Counsel, instructed by Fletcher Day LLP
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 1 October 1975, is a national of The People's Republic of China. She appeals, with permission, against the decision of First-tier Tribunal Judge Walker, who in a determination dated 17 January 2013 and

promulgated shortly thereafter, following a hearing at Hatton Cross on 14 January 2013, had dismissed her appeal against the respondent's decision refusing her application for leave to remain outside the Rules and under Article 8. As summarised by Judge Walker at paragraph 2 of his determination, the appellant claimed to have arrived in the UK either in 2006 or 2007 concealed in the back of a lorry. It is her case, which does not seem to be disputed, that in China the appellant had had a relationship with a Mr Fenglin He, by whom she had had two children, a son born in 1994, and a daughter born in 1996. Mr He then came to this country in May 2000, where he claimed asylum, which claim was refused. It was accepted before Judge Walker that it could not properly be argued now that Mr He could not return to China for the reasons put forward in support of his asylum application.

2. As already noted, in about 2006, the appellant also travelled to the UK, leaving her children in the care of Mr He's parents in China. At no time did she have any legal right to be in this county.

3. Shortly after arriving in this country the appellant became engaged in persistent criminal offending, and has amassed a number of convictions. It seems she earned her living by selling counterfeit DVDs, and persisted in this conduct in breach of conditional discharges and community orders and also following prison sentences. Despite amassing a number of convictions before this date, it was not until 14 March 2009 when the appellant was served with an IS151A notice as a person liable to detention and removal as an illegal entrant. On the same day, she claimed asylum, but her application was treated as withdrawn on 31 March 2009 after she failed to attend an interview. It would appear that she failed to attend this interview because she feared that if she did she would be removed from this country. As recorded by Judge Walker at paragraph 12 of his determination, she failed to report as required.

4. Despite being arrested subsequently, it seems that the respondent did not appreciate, or was not notified, that the person subsequently arrested was the same person who had failed to honour her requirement to report, because no further steps were taken to remove her. This may be because, as found by Judge Walker at paragraph 45, she had given a false name when arrested or interviewed.

5. Even though Mr He was considered not to be entitled to asylum, under the policy then operated by the respondent, he was granted indefinite leave to remain on 13 September 2010. The couple then almost immediately had another child, because a little after nine months later, on 25 July 2011, their son, Junxian was born. Because his father by this time had ILR, and was accordingly settled here, this child is entitled to British citizenship, and he was registered as a British citizen very shortly after.

6. Almost immediately following the birth of Junxian and his registration as a British citizen, on 29 September 2011 this appellant made the application which is now the subject of this appeal.

7. The application was refused by the respondent on 30 October 2012. The refusal letter is dated the same date, and was served the following day. The appellant was also

notified that subsequent to the service on her of the notice of her liability to detention and removal on 14 March 2009, a decision had been taken to remove her from the UK.

8. The appellant appealed against this decision and it is this appeal which was dismissed by Judge Walker.

9. Judge Walker made a number of adverse findings of fact and credibility against the appellant, which will be discussed below.

10. As I indicated during the hearing, the findings which Judge Walker made were open to him, and there is no reason why this Tribunal should set them aside. However, Judge Walker's consideration of the appellant's claim that her removal would be in breach of her Article 8 rights was founded upon his finding, at paragraph 38, that "as far as her youngest child is concerned, I find that it would be quite reasonable to expect such a young child to leave the UK with the appellant". It is the challenge to this aspect of Judge Walker's determination which is the foundation of this appeal.

The Hearing

11. At the hearing, I heard submissions on behalf of both parties. As these submissions are set out fully in the Record of Proceedings in which I attempted to record contemporaneously everything said during the course of the hearing, I shall only set out below what is necessary for the purposes of this determination. I have, however, considered fully everything which was said to me during the course of the hearing as well as all the documents contained within the file. I should also record my thanks to both Mr Lam and Mr Wilding for their eloquent, concise and persuasive submissions, which have greatly assisted me.

Error of Law

12. At the outset, I found, as accepted on behalf of the respondent, that Judge Walker's failure to consider the effect of *Ruiz Zambrano (European citizenship) [2011] EUEC Case c-34/09OJ [2011] C130/2*, *Omotunde (Best interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 00247*, and *Sanade and Others (British citizen – Zambrano – Dereci) [2012] UKUT 00048*, was a material error of law, such that his decision must be remade. I record that it was agreed on behalf of both parties that I did not need to hear any further evidence, and that I also told the parties that I intended to retain the findings of fact which had been made by Judge Walker. Neither party dissented from this approach.

Respondent's submissions

13. On behalf of the respondent, Mr Wilding agreed that in light of the authorities (which had not been referred to in Judge Walker's decision) the Tribunal could neither expect nor require that the appellant's youngest child, Junxian, would go to China. The respondent's case was very narrow, and it was that, in all the circumstances of this case, separation was appropriate. The appellant was clearly not

entitled to remain under the Rules; the suitability criteria were not satisfied as there had been no challenge to what was said about the criminality findings. Accordingly the sole basis of appeal was that the removal of this appellant would be in breach of her Article 8 rights.

14. The respondent did not seek to persuade the Tribunal that it was not in the best interests of this child that he should be brought up with his mother. (In this regard, I note that Judge Walker had so found, albeit in the context that there was no legitimate reason why all the family could not return to China together.) Mr Wilding accepted that this was a primary consideration, but it was not the only consideration.

15. The issue in this appeal was whether or not the separation which would follow if the mother but not the child was removed was proportionate or not. Judge Walker had made unimpeachable findings with regard to the appellant's criminality, and it was quite extraordinary that it was now argued on behalf of the appellant that she did not present an ongoing risk when not only did she have a lengthy criminal record but she and her partner had given discrepant evidence before the Tribunal. One glaring example was the failure to disclose until these proceedings that the couple had two children in China, which ultimately Judge Walker had found was an attempt to deceive the Tribunal; otherwise, why should this have been hidden? (see paragraph 26 of Judge Walker's determination).

16. The reason why there was this discrepant evidence was because the two children in China had applied for entry clearance. There was still no decision on their appeal but the hearing was apparently listed for May. The applications had presumably been made when both the children were under 18; the oldest had been born in 1994. The failure to disclose this application begged the question of what else the appellant had not disclosed, but it was accepted that this was a case where, if the appellant was removed, she would be separated from her young son here.

17. When considering the effect of the decision in *Sanade*, it was important to note that although that was a deportation case, this also was a case where removal was justified by the risk of further offending. Although the respondent had not made a deportation order, it was a factor which was relevant. The removal was not just for the purpose of maintaining the economic wellbeing of this country by maintaining a fair and effective system of immigration control. It was important to note also that in *Sanade*, two of the three appeals had failed, and removal of two of the applicants found to be proportionate, even though these would involve separation from their families. In other words, there were circumstances where the weight of public interest could outweigh the Article 8 rights of an appellant, and in this case the Article 8 rights of her child aswell.

18. In this case, removal would be proportionate, because of the appellant's immigration history, coupled with her criminality. Also, she knew the precariousness of her status when her relationship was rekindled with her partner. Other than for the interests and rights of her child, there was absolutely no reason why she should be allowed to remain. The child was British but had a primary carer, the father, and so

this was on all fours with the two applicants whose appeals had been dismissed in *Sanade*. There was no suggestion here that without the appellant being present the ongoing circumstances of the child would be so degraded that he would descend into poverty. There was no reason to think that the child would be disadvantaged in terms of education by his mother not being here. Ultimately, the strength of public interest in removing her outweighed the Article 8 rights of the child.

19. The interests of the children in China were a relevant factor, because although Section 55 would not directly apply to a child overseas, when considering the effect of the UN Convention, these factors were of some significance, although it was accepted that the interests of the child present in this country had much more weight.

20. It was also relevant that after the appellant had been served with removal directions, she had absconded.

Appellant's submissions

21. On behalf of the appellant, Mr Lam reminded the Tribunal that the interests of the appellant's child was a weighty consideration, albeit not the only consideration, and although it would probably have counted in her favour had the fact that she had had two children in China been disclosed earlier, the Tribunal should note that it was the sponsor who had disclosed the existence of these children. Also, the Tribunal should not come to the conclusion that they had had a child simply in order to improve their immigration position. The Tribunal should also note, as stated in *ZH (Tanzania),* that the child should not be blamed for the mother's poor immigration history. If the Tribunal accepted that the child's best interests was to be with his mother, he could not be blamed for her bad behaviour. If one looked at the criminal behaviour of the two applicants in *Sanade* who had lost their appeals, their criminal behaviour had been much worse than that of this appellant. Very strong reasons would need to be shown to justify the separation of a child from his mother. Although one could not approve of selling counterfeit DVDs, this criminality was much less serious than the kind of cases contemplated in *Sanade* or *Omotunde*.

22. It would be difficult for this Tribunal to take any consideration of the position of the two other children in China, because their position was currently uncertain. In any event, the interests of the very young child had to be given much greater weight. The Tribunal must also have in mind that current EU Regulations provided that third country national carers of British children must be allowed to stay if the children would otherwise have to leave the territory of the EU, although Mr Lam did not seek to argue that in this case the child could not stay here with his father.

23. The question the Tribunal had to consider in this case was whether the appellant's behaviour, coupled with her immigration history outweighed the interests of her child in her remaining. Also, although this had less weight, the Tribunal should also take account of the interests of the appellant's partner, who was a British resident, with a stable job. Also, if the appellant was granted leave to remain, this was likely to be discretionary, and it might be difficult to argue against her removal were she to

offend again. But at the present time, the Tribunal had just enough room to allow her appeal.

Discussion

24. The principle to be derived from the cases of *Omutunde* and *Sanade* is that a Tribunal cannot expect a British child to leave this country as a result of a removal decision made in respect of that child's parent. The family as a unit cannot be required to relocate outside of the European Union and nor can the Secretary of State submit it would be reasonable for the family so to move.

25. I also take account of the various authorities, in particular the House of Lords decision in *Chikwamba v SSHD [2008] UKHL 40* and the Court of Appeal decision in *Hayat v SSHD [2012] EWCA Civ 1054*, from which it is clear that where the main reason for removal is because an applicant should make the application under Article 8 from his or her home state, that reason will usually not be sufficient on its own to justify removal. I set out the summary of the principles involved (following analysis of previous decisions) from the judgment of Elias J at paragraph 30 of *Hayat* as follows:

> "30. In my judgment the effect of these decisions can be summarised as follows:
>
> (a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.
>
> (b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.
>
> (c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in *Chikwamba*. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.
>
> (d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.

(e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. *Chikwamba* was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.

(f) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and *Huang*.

(g) Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise."

26. It is clear from this decision that if the only or main reason for requiring this appellant to leave this country now was because it was considered more appropriate for her to make her application from outside the country, there would have to be a sensible reason for so requiring, especially bearing in mind the disruption which would inevitably be caused to the family life of the appellant and her family, including her young son, as a result.

27. Accordingly, my primary function must be to consider the appellant's Article 8 claim on its merits, in accordance with usual principles. I consider the appeal on the basis, as it was put to me on behalf of the respondent, that if this appellant is removed, she will be separated from her partner and young son, and they will be separated from her. They cannot be either required or expected to leave this country with her.

28. Obviously, the interests of Junxian, the appellant's young son, is of primary importance, to which great weight must be attached. However, as was made clear by the House of Lords in *ZH (Tanzania) [2011] UKSC 4*, while the interests of a young child are primary, in that these must be considered first, those interests are not necessary determinative of the appeal. Baroness Hale put it this way at paragraph 33 of *ZH (Tanzania):*

> " In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created."

29. In *ZH (Tanzania*) itself, the facts were, as subsequently stated by Baroness Hale in the same paragraph, that "the inevitable result of removing [the children's] primary carer would be that that they had to leave with her", and, "as the Tribunal rightly pointed out, the children were not to be blamed" for the actions of their mother (as this Tribunal was reminded by Mr Lam, as noted above). However, the situation in this case is different, because there is no suggestion here that in consequence of the removal of this appellant, her son would have to leave with her. As Mr Wilding put it, there was no suggestion in this case that without the appellant being present the ongoing circumstances of the child would be so degraded that he would descend into poverty. The evidence from Junxian's father is that he has £20,000 in savings, and it is not suggested that he would not be capable of looking after the child. Nor is it suggested that there would need to be any involvement from social services. In this case, on the evidence before me, I find that while the best interests of the child would be better served if his mother remained in this country, because it will almost always be better for a child to grow up in a family with both parents, there is no reason why apart from this separation, he should not be able to enjoy his rights as a British citizen fully if he is brought up by his father. Obviously this is not an ideal situation, but it is not disastrous, in the sense that it would have been for the children being considered by Baroness Hale in *ZH (Tanzania)*. Whereas in that case the children would have had no real alternative other than to leave with their mother, who was their primary carer, that is not the situation here.

30. Although I indicated during the hearing that it was my provisional view that I would be unlikely to find that the appellant's motive in having her son, Junxian, was to bolster her claim to be allowed to remain, having considered the evidence fully in the round, I have been forced to conclude that it was. Having kept out of the way of the authorities as best she could, and not having had any more children during the entire time when neither she nor Mr He had any right to remain here, almost immediately after Mr He had been granted indefinite leave to remain, she became pregnant with Junxian, who was then registered as a British citizen without any delay at all. Then, immediately following Junxian's birth and registration as a British citizen, the appellant made the present application. The overwhelming inference from the timing of these events is that the primary purpose of the appellant in becoming pregnant was in order to enable her to make a stronger application to be allowed to remain and I so find, on the balance of probabilities.

31. When considering the effect on Junxian of separation from his mother, I take account also of the fact that the appellant's previous behaviour as a mother has been reprehensible. Even though she had absolutely no legal right to be in this country, the appellant, as noted above, travelled to this country leaving her older children, then aged about 10 and 12, in the care of their grandparents. At that time, she was their primary carer, Mr He having come to this country when the children were respectively aged about 4 and 6, and having remained even after the failure of his asylum claim. In my judgment, the actions of the appellant, first in abandoning her older children and then in having another child for the primary purpose of improving her immigration position, have shown that she has regularly been

prepared selfishly to put her own interests first, and those of her children some considerable distance behind.

32. I have to take account also of the appellant's appalling immigration history, coupled with her persistent offending. This is a case where the public interest in removing this appellant would be not just for the purpose of the economic wellbeing of the country, through the maintenance of immigration control, but also for the prevention of crime and disorder. In light of her immigration record and history of persistent offending, I find that this appellant is likely to continue offending and that this aspect of the public interest is accordingly also made out.

33. In my judgment, having considered all the factors in the round, this is one of those relatively rare cases where the best interests of a young child are outweighed by other factors and where removal will still be proportionate despite those best interests. This appellant has persistently chosen to break the law and cynically done everything she can in order to evade proper immigration control. Not only did she commence her family life in this country in the knowledge that her situation was precarious, but as I have found, the decision to have her most recent child was taken specifically because her position was precarious and she considered it likely that it would thereby be improved.

34. Although this is a relatively minor factor and my decision that removal would be proportionate has been made without taking this factor into account, it can also be noted that one effect of removing the appellant to China is that she can be re-united with her other children, now aged about 17 and 19, whom she had abandoned in the hope of enjoying a better economic future for herself in this country.

35. Asking myself the questions posited by Lord Bingham in *Razgar*, I find that the appellant does enjoy family life in this country, and that there would be a disruption to her family life, and the family life of her partner and child who are here, such that her Article 8 rights are engaged. Nonetheless, her removal would be both lawful and necessary for the purposes as set out above, and, for the reasons I have given, would also be proportionate. It follows that her appeal must be dismissed, and I so order.

Decision

I set aside the decision of the First-tier Tribunal as containing a material error of law, and substitute the following decision:

The appellant's appeal is dismissed, on human rights grounds, Article 8.

Signed: Date: 27 July 2013

Upper Tribunal Judge Craig