Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00699/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 16th June 2014	**on 19th June 2014**
	……

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

YHY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr M D Templeton, of Quinn Martin & Langan, Solicitors
For the Respondent: Mr A Mullen, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a citizen of China, arrived illegally in the UK in 2006. He was later convicted of being concerned in supply of cannabis, money laundering offences, and possession of false documents with intent. He was sentenced to eight years' imprisonment and recommended for deportation, with a further sentence of 25

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months' imprisonment for failure to make payment of a confiscation order of £125,000. The Respondent on 22nd August 2012 made a deportation order against him as a foreign criminal, for reasons explained in a decision dated 18th and served on 20th September 2012.

2. The Appellant appealed to the First-tier Tribunal, basing his case on his family life interests and those of his wife and two children. A panel comprising Judge McGavin and Mrs Morton dismissed his appeal by determination promulgated on 24th December 2012. The First-tier Tribunal did not accept that there had been significant family life until relatively recently. One reason was that it had not been explained why, if the Appellant was the biological father of the older child, he had never been registered as such.

3. Seeking permission to appeal to the Upper Tribunal, the Appellant's solicitors contended that the First-tier Tribunal erred in law by not accepting that family life existed from August 2006 until the date of the hearing. The FTT refused permission to appeal. The UT also refused permission, considering the proposed grounds to be no more than a disagreement with the findings reached by the panel.

4. The Appellant petitioned the Court of Session for judicial review of the UT's refusal of permission – [2014] CSOH 11. In those proceedings, the Respondent accepted that the FTT erred in fact in respect of the Appellant not having been registered as the father of the older child, but argued that the error was "utterly unexceptional" and in any event would have made no difference to the outcome of the appeal (see paragraphs 18 and 19 of the opinion of Lord Jones). Lord Jones, however, in his opinion dated 29 January 2014, thought there had been such procedural irregularity that the Appellant did not have a fair hearing before the FTT, and reduced the decision of the UT.

5. On 1st April 2014 the Vice President of the Upper Tribunal made the following decision:

> Permission is granted in light of the decision of the Court of Session … The parties are reminded that the UT's task is that set out in section 12 of the 2007 Act.

6. In correspondence the solicitors for the Appellant asked the UT simply to adopt the findings of Lord Jones and remit the case to be heard *de novo* by the FTT, without any hearing in the UT. However, the UT pointed out that its statutory obligation is firstly to decide whether there was any error of law and, if so, whether the decision of the FTT requires to be set aside and remade. Only in that event would the UT decide whether to remake the decision itself or remit to the FTT. There was no jurisdiction for the UT to accede to the course proposed by solicitors without error of law having been found. The case then came before me.

7. Mr Mullen indicated that he would take the line that the FTT made no error of law, and its decision ought not to be set aside; or alternatively, as the Appellant had not

sought to introduce fresh evidence, the UT should proceed to substitute a fresh decision on the basis of the evidence already led.

8. Mr Templeton pointed out that the Appellant had applied to rely upon further and updating evidence, if the FTT decision were to be set aside. As to error of law, Mr Templeton adopted the observations of Lord Jones, in particular at paragraphs 6, 20 – 21 and 26. He said that the error into which the FTT had fallen was clearly not a misunderstanding of one aspect of the evidence with no significant impact on the outcome, as the Respondent had argued in the Court of Session, but an error which contaminated the entire Article 8 assessment to such an extent that it could only be remedied by an entirely fresh hearing. He pointed out that the Respondent had not sought to challenge Lord Jones' decision in the Inner House.

9. Mr Mullen accepted that there had been no further challenge to the decision of Lord Jones, but submitted that the setting aside of the refusal of permission simply opened the gateway to a challenge in the Upper Tribunal. It did not determine that there been error of law. The credibility of the relationship between the Appellant and the older child was not central to the outcome. The family life from 2006 until the Appellant's release in 2012 had on any view been very limited. The Appellant and his wife married only in 2011. The family lived together only for a period of weeks, from the Appellant's release to the date of the FTT hearing. His immigration and criminal history was highly adverse. Family life was established only on a precarious and fragmented basis, and did not come close to outweighing the public interest in his deportation. The description by Lord Jones of the FTT proceedings as a collapse of fair procedure went too far. There had been no such collapse, because there were ample other reasons to justify the outcome of the case. The determination should stand.

10. Mr Templeton had nothing to add.

11. I indicated that in my view there had been an error of law such that the case required to be reheard in the FTT.

12. There may of course be cases where Court reduces the refusal of a grant of permission, but nevertheless it is found that the UT should not set aside the FTT determination. It may be that the proportionality assessment in this case, once fully carried out, goes against the Appellant. A finding of paternity of the older child would not by itself enable him to succeed. The Respondent did not accept before me that the Appellant did not have a fair hearing in the FTT, but has not elected to reclaim to the Inner House. Given the observations of Lord Jones, the determination of the FTT cannot safely stand. It must be **set aside** and remade. The Appellant has applied to lead further evidence, and the fresh decision should be based on current circumstances.

13. No findings of the FTT are to stand. Under section 12 (2) (b)(i) of the 2007 Act and Practice Statement 7.2, the nature and extent of judicial fact-finding necessary for the

decision to be remade is such that it is appropriate to **remit the case to the FTT**. The members of the FTT chosen to reconsider the case are not to include Judge McGavin or Mrs Morton.

14. (The FtT made no anonymity direction, and none was requested in the UT. The opinion of Lord Jones does not mention anonymisation, but refers to the appellant as adopted herein.)

17 June 2014
Judge of the Upper Tribunal