IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/03212/2014
AA/03215/2014
AA/03218/2014
AA/03219/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower Birmingham	**Decision & Reasons Promulgated**
On 20th March 2015	**On 15th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) LIANG JIE LI
(2) YOU LE WANG
(3) MINA WANG
(4) ANNI WANG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J Kirk (Counsel)
For the Respondent: Mr N Smart (HOPO)

DECISION AND REASONS

1. The Appellants comprise a mother and her three children. The mother, the first Appellant, was born on 8th February 1986. The children were born consecutively on 13th August 2006, 25th May 2009, and on 17th August 2011. All are citizens of China.

2. This is an appeal against the determination of First-tier Tribunal Judge Graham, promulgated on 5th September 2014, following a hearing at Birmingham Sheldon Court on 29th July 2014. In the determination, the judge dismissed the appeals of the said Appellants. They subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants' Claim

3. The Appellants' claim is based upon that of the mother, the first Appellant, who alleges that she would face mistreatment in China due to her religion, and the fact that she is a follower of the Dong Sang Shan Dian cult. In January 2006, the first Appellant discovered she was pregnant. The first Appellant went to her boyfriend's friend's house in Fuqing City, where she lived for a month before leaving China with the assistance of an agent. The first Appellant's asylum claim was dismissed because it was not accepted she was a member of this cult. In her interview she was unable to answer basic questions regarding the cult's beliefs. Her biblical knowledge was inconsistent with the claim to be a follower. However, on 9th August 2010, her solicitors made a further application claiming that she had established a family life in the UK as her parents-in-law had recently been granted indefinite leave to remain and her husband was present in the UK, although it was accepted that he was without status. The Appellant submitted a foreign marriage document confirming the date of her marriage to Xiu Ming Wang, a Chinese national, on 6th April 2005, in China. She claims to have three children by her husband, and these are the remaining three Appellants in this appeal. Mr Wang is the illegal entrant in the United Kingdom and he remains without status.

The Judge's Findings

4. The judge observed how,

> "The children were aged 7 years and 8 months; 4 years and 3 years. They were all born in the UK. The Secretary of State took into account that it was generally accepted that the children should grow up with their families in their own cultural identity where possible. It was noted that the oldest child had integrated well into school in the United Kingdom …" (Paragraph 24)

5. Nevertheless, the Secretary of State was satisfied that the eldest child would be able to resume educational skills that he has acquired during his stay in the United Kingdom in China.

6. The judge also noted how the Secretary of State had accepted that the principal Appellant was,

> "Of good character but she had never been given valid leave to remain in the United Kingdom, her claim for asylum being refused on 23rd October 2006 was not appealed; she therefore should have left the United Kingdom at this stage. Although the Appellant had been in the United Kingdom for a period of eight years, she had never had any valid leave to remain …" (Paragraph 26)

Another feature of this claim was that,

> "The Secretary of State considered the nearly four year delay in dealing with her submissions and acknowledged the time delay, but it was considered that this was outweighed by the illegal residence she [the principal Appellant] had accrued during her failure to leave the United Kingdom when her claim had ended." (Paragraph 27)

7. The judge weighed the public interest in the balancing exercise. There was the public interest in requiring the Appellants to return to China. He observed that the case of **EB (Kosovo)** had long ago established that "the weight to be attached to the public interest is reduced because of the delay in deciding the application" and that "the Section 117 of 2014 Act requires me to consider the public interest factors listed in Section 117B" (see paragraph 57).

8. The judge concluded that the decision to remove the Appellant from the United Kingdom was not disproportionate. He decided that,

> "I find therefore that Article 8 is not engaged. I am satisfied that even though this finding means that the three children in the UK will return to China has not altered this finding. I am satisfied that given the ages of the children, it is in their best interests to continue to live with the Appellants."

9. The judge came to this conclusion on grounds that the children were not British citizens despite their lengthy stay in the UK. They were all without status. They could speak the local dialect upon return. They could also attend schools in China. They had extended family there. As far as the grandparents of the children were concerned, it was noted that they now had leave to remain in the UK, but there was nothing stopping them from visiting the children in China or moving there to live with their son and grandchildren (paragraph 15). The appeal was dismissed.

The Grounds of Application

10. The grounds of application state that the judge misdirected herself by failing to consider and apply authority on the significance of a seven day period of residence for a child. In this case, the second Appellant, the child by the name of You Le Wang, had lived in the UK for almost eight years, but the judge failed to adequately consider the significance of this

period in accordance with the well-known authority in **Azimi-Moayed v SSHD [2013] UKUT 00197**.

11. In this case the Appellant had expressly relied upon **Azimi-Moayed** where the Upper Tribunal had made it clear (at paragraph 13(iii)) that, "lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary". The judge had made no reference whatsoever to this principle. It was plain that it had been ignored.

12. Secondly, the judge failed to apply Section 117B(6) of the 2002 Act which provides that there is no public interest in removing the Appellant of a child who has lived in the UK for seven years in circumstances in which it would not be reasonable to expect the child to leave the UK. Whereas the judge states (at paragraph 46) that she has taken into account "the relevant provisions of Section 117B" she plainly excludes consideration of Section 117B(6) from the list of considerations that she expressly has regard to.

13. On 9th January 2015, permission to appeal was granted expressly on the basis that the judge erred in law in failing to take into account paragraph 117B(6) of the NIAA 2002.

14. On 22nd January 2015, a Rule 24 response was entered to the effect that the judge had given regard in substance to Section 117B(6) at paragraphs 55 to 56, and that this provision was not a standalone provision, in any event.

Submissions

15. At the hearing before me on 20th March 2015, Mr Kirk, appearing on behalf of the Appellants, as he did in the Tribunal below, relied upon the Grounds of Appeal. He made the following two submissions. First, at the date of the hearing before Judge Graham, the eldest child, namely, You Le Wang, was just under 8 years of age. He was a "qualifying child". He potentially stood to satisfy the requirements of Section 117B(6). The judge failed to give any consideration to this provision.

16. The judge referred to factors (4) and (5) but deliberately omitted any reference to factor (6) and this must be an error of law. Second, the judge failed to take into account the import of the determination in **Azimi-Moayed**. It was expressed and brought to the attention of the judge. But there is no consideration of this in the determination.

17. For his part, Mr Smart relied upon the Rule 24 response. He submitted that Section 117B(6) had in terms been taken into account if one looked at paragraphs 55 to 58 of the determination. Second, the judge gave consideration to the Supreme Court judgment in **Zoumbas [2013] UKSC**

74, where the Supreme Court had held that where things are not all equal different considerations apply, such as the absence of any of the children being British citizens (see paragraph 52 of the determination).

18. In reply, Mr Kirk submitted that whatever the import of Section 117B, it had not supplanted the jurisprudence in **Azimi-Moayed**, which still applied. The eldest child was just under 8 years old at the time of the hearing. He was now aged 8 years and 7 months. The simple fact was that Section 117B(6) was just not considered at all by the judge.

Error of Law

19. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. This was on account of a failure to consider that which ought to have been considered and to have regard to matters relevant to the decision. High amongst these matters is Section 117B(6), which expressly makes it clear that the public interest "does not require the person's removal where" a person has "a genuine and subsisting parental relationship with a qualifying child" and it is the case that "it would not be reasonable to expect the child to leave the United Kingdom". The plain fact here is that the eldest child, You Le Wang, was a "qualifying child" in that he had been in the UK for seven years.

20. The only other question for the judge was whether it would be reasonable to expect the child to leave the United Kingdom. Given that the children have not lived in China, are integrated into the educational and social fabric in this country, and given that the jurisprudence in **Azimi-Moayed** is clear in emphasising the importance of a lengthy period of stay for children amounting to seven years in the UK, it was important for the judge to give express consideration to, whether in the context of the position of a "qualifying child" as defined in Section 117B(6), it could be said that it would not be reasonable to expect the child to relocate to China. The complete absence of any reference to Section 117B(6), in circumstances where other factors are mentioned, is an error of law.

21. Second, and no less importantly, the complete absence to reference to **Azimi-Moayed**, amounts to an error of law, given that it was made clear in that case that, "what amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period". This is a compelling statement.

Re-Making the Decision

22. I have re-made the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the following reasons. First, the Appellant children have plainly developed social, cultural, and educational ties with the UK which it would be inappropriate to disrupt in the absence of compelling reasons to the contrary. Second, the fact that the eldest

child, You Le Wang, was just under 8 years of age, having lived all his life in the UK, is such that his seven years in this country must be treated as a relevant period of lengthy stay that cannot be easily ignored.

23. Mr Wang gave evidence before the judge (see paragraph 41) to say that "his children were all born here they cannot speak Chinese and all their friends were here". The Section 55 duty under the BCIA 2009 requires there to be an enquiry into what is in the child's best interests, with a proper regard to the children's own wishes in respect of determinations from the president of the Tribunal, such as **Ugo** and **JO**, have confirmed the importance of this duty. It cannot be overlooked.

24. Finally, the dicta in **Azimi-Moayed** with respect to the significance of a period of seven years' residence in the UK, which in this case is practically the entire duration of the second Appellant's life, means that, on the facts of this case, the decision can only go one way. This appeal is allowed.

Notice of Decision

25. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th April 2015

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 11th April 2015