Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02390/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Determination Promulgated**
On 24 September 2015	**On 30 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
~~**ANONYMITY DIRECTION NOT MADE**~~

Appellant

And

LOI TUCK LIM

Respondent

Representation:
For the Appellant: Mr Smart, Senior Home Office Presenting Officer
For the Respondent: Mr A Pipe, Counsel, instructed by Ian Henery, Solicitors.

DETERMINATION AND REASONS

Claim History

1. Although the Secretary of State is the applicant before me, I will, for ease of reference, refer to the parties as they were before the First-tier Tribunal; the Secretary of State will be referred to as the Respondent and Mr Lim will be referred to as the Appellant.

2. The Appellant, who is a citizen of Malaysia, applied for leave to remain in the UK under Article 8 ECHR relying on his private and family life with his partner, Ms Lam and her four children. At the First-tier Tribunal hearing before Judge Ghaffar, Mr Pipe, who also represented the Appellant at that hearing, submitted a s 120 notice of additional grounds relying on para 276ADE (1) (iii) of the Immigration Rules because by the date of hearing, the Appellant had been in the UK for a period in excess of 20 years. Judge Ghaffar allowed the appeal under para 276ADE (1) (iii) and therefore did not consider the grounds previously relied on in the grounds of appeal (these being that the decision is not in accordance with the Immigration Rules, that the decision is otherwise not in accordance with the law, that a discretion under the Immigration Rules should have been exercised differently and that the decision resulted in a breach of the Appellant's rights under Article 8 ECHR).

3. The Respondent sought, and obtained, permission to appeal on the basis that it is arguable that the Judge erred in allowing the appeal under para 276ADE (1) (iii) because those provisions were framed so that length of residence was measured at the date of application and the Appellant had not resided in the UK for a period of 20 years at the date of application.

4. A Rule 24 response was submitted on behalf of the Appellant in which the stance was maintained that the statement of additional grounds pursuant to the s 120 notice, which was served at the hearing, should be taken as the date of application, and that the Judge had therefore not erred in law. However, at the hearing, although Mr Pipe did not formally concede that the statement of additional grounds could not be taken as the date of application, he accepted that this point was considered in **Ragu [2013] EWCA Civ 754** and he would have difficulty in maintaining his position.

5. As submitted by Mr Smart, **Ragu**, at paras 13 – 17, makes it quite clear that the date on which the statement of additional grounds is served cannot be taken to be the date of application. I find therefore, that there was a material error of law in the decision of Judge Ghaffar; he allowed the appeal under para 276ADE (1) (iii) when the Appellant had not been in the UK for a continuous period of 20 years at the date of application. I therefore set aside his decision. However, the Respondent did not dispute the Judge's findings of fact and these are preserved.

6. As to whether or not I should remake the decision following the setting aside of the decision, both representatives stated that as the findings of fact were preserved, and all the evidence that was before the First-tier Tribunal was also before me, there was sufficient material before me to remake the decision.

7. As to the documentary evidence before me, I had:

a. The Respondent's bundle (RB), submitted for the purposes of the First-tier Tribunal hearing, which comprised annexes A – R, and the letter detailing the reasons for refusal of the Appellant's application dated 16 December 2013 (RL), and the decision dated 20 December 2013; and

b. The Appellant's bundle (AB), pp 1 – 236, and a copy of the Appellant's driving licence. Mr Pipe also submitted a copy of the skeleton argument (SA), which was provided to the First-tier Tribunal.

Submissions on behalf of the Respondent

8. Relying on the RL, Mr Smart submitted that the Judge had found that the relationship between the Appellant and the Sponsor was genuine and subsisting and that was not challenged. He submitted that the partner route fell at E-LTRPT.2 because the Appellant is an overstayer. His appeal would therefore have to be considered under para EX.1.

9. Under para EX.1 (a), there was no finding that there was a genuine parental relationship between the Appellant and his partner's children; there was written evidence but this was insufficient to establish that there was a genuine parental relationship or that it was unreasonable to expect the children to join the Appellant and his partner in Malaysia.

10. As to the relationship between the Appellant and his partner, under EX.1 (b), it had not been established that there would be insurmountable obstacles to family life continuing with the partner outside the UK. **Agyarko [2015] EWCA Civ 440**, at para 21, provided that the 'insurmountable obstacles' test was 'significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the UK'. The facts of **Agyarko** were similar to the facts in this case; in that case the appellant was married to a British citizen who had lived all his life in the UK and had a job here and it was held that the difficulties of relocating did not constitute insurmountable obstacles. The Appellant therefore could not succeed under the Immigration Rules. Mr Smart submitted that **SS (Congo) EWCA Civ 387** provided that 'compelling circumstances' would need to be identified if the Appellant's appeal was to be allowed under Article 8 outside the Rules.

Submissions on behalf of the Appellant

11. Mr Pipe accepted that this was a paragraph EX.1 case. It was accepted by the Respondent that the Appellant met the suitability requirements. As EX.1 was parasitic on the Immigration Rules, the EX.1 ten-year partner route was available to the Appellant because he was in a genuine and subsisting relationship with his partner, as found by the Judge, and he had been residing with his partner since 2010. He was an overstayer, which brought him within the provisions of EX.1.

12. Under EX.1 (a), Mr Pipe asked me to find, on the basis of the evidence before me, that there was a genuine and subsisting relationship between the Appellant and his partner's children. Two of the children had given statements which confirmed their relationship with him and it would not be reasonable for the Respondent to expect them to live in Malaysia as had been conceded in **Sanade and others (British children – Zambrano – Dereci) [2011] UKUT 48 (IAC)**. They had lived here all their lives. There would be insurmountable obstacles to family life continuing with the partner outside the UK because the partner had four British Citizen children and it would cause her significant hardship. Although it was accepted that in **Agyarko** the Court of Appeal had stated that the insurmountable obstacles test was a higher test than whether it would be reasonable to expect the partner to leave the UK, it was also held that it must be construed in a practical and sensible way rather than a purely literal way.

13. In the alternative, Mr Pipe submitted that the Appellant was entitled to succeed under Article 8 ECHR, applying the provisions of s 117B of the Nationality, Immigration and Asylum Act. Although there was no need for the Appellant to satisfy the financial provisions of Appendix FM, the Appellant's partner ran a business and supported the Appellant. Although this could not count in favour of the Appellant, it lessened the importance of s 117B (4). There was a genuine and subsisting parental relationship between the Appellant and his partner's children, who were qualifying children, and it was unreasonable to expect them to leave the UK. Whilst little weight could be given to a relationship built up with a qualifying partner during the period the Appellant was in the UK unlawfully, this did not apply to the relationship between the Appellant and his partner's children.

14. It had been held that the factors set out in s 117B are not exhaustive. The Appellant had been in the UK for a period of 20 years at the date of decision, his ties with Malaysia had been extinguished and he had significant ties in the UK. This is a factor that should be taken into account in the proportionality assessment. He asked me to allow the appeal under the Immigration Rules and under Article 8.

Decision and reasons

15. I rely on the following findings of fact:

    a. Judge Ghaffar found that the Appellant had been in the UK for a continuous period of 20 years at the date of hearing. This finding was not challenged before me by the Respondent. However, for the reasons set out in para 5 above, the 20 years continuous residence provisions apply to residence prior to an application. The Appellant does not meet the provisions of paragraph 276ADE (1) (iii) because he had not been in the UK for a continuous period of 20 years before the date of application.

b. Judge Ghaffar found that the Appellant and his partner are in a genuine and subsisting relationship and that he lived with Ms Lam in the same household with her and her four children.

c. I note from the decision of Judge Ghaffar at [12] that both of Mrs Lam's children (who attended the hearing today) had been present at the First-tier Tribunal hearing and had given oral evidence of their relationship. There is nothing before me to confirm that their evidence was challenged or that Judge Ghaffar was asked to find that their evidence could not be relied on.

d. The unchallenged evidence before me, as at 24 September 2015, was that Ms Lam's children were now aged 18, 17, 16, and 14. Statements were provided by the 18 and 17 year olds. It is clear from these statements that the Appellant had been a part of their lives since 2010 (they would have been approximately 13, 12, 11 and 9), and that prior to that time there had been significant difficulties between their mother and their biological father which had resulted in emotional difficulties for them. The 18 and 17 year old confirmed within their statements their initial natural reluctance to accept the Appellant because they wanted to protect their mother from experiencing again the pain and hardship she suffered when her relationship with their father broke down. They described how life for them and their mother became easier due to the Appellant and how they have all benefited from his presence in their lives. They assert that he means more to them than their biological father and they describe the ways in which he supports them. I accept, on the basis of the evidence before me, that the Appellant has a genuine and subsisting relationship with the Appellant's children.

e. It was not disputed before me that Ms Lam ran a business, although the income from the business was not established. I find that she does run a business in the UK.

16. Under EX.1 (a) would it be reasonable to expect the children to leave the UK? It is not reasonable to expect these British national children to leave the UK by following the Appellant to Malaysia. In so deciding, I bear in mind that the eldest is now over 18. However, attaining the age of 18 is not a bright blue line; all the children still live at home with the Appellant and their mother, and they have all experienced some emotional turmoil following the breakdown of the relationship between their biological father and their mother and have experienced the strain that their father's conduct has placed on their relationship with him. They have started to trust the Appellant and their lives are now on an even keel. It is not reasonable to expect them to uproot and try to establish their lives in Malaysia when their ties and roots are in the UK. I find that the Appellant is entitled to succeed under the provisions of EX.1 (a).

17. Would there be insurmountable obstacles to the Appellant and Ms Lam continuing their family life in Malaysia? I accept that the insurmountable obstacles test is more stringent than mere hardship and inconvenience and the fact that Ms Lam has a business here would not of itself establish that there are insurmountable obstacles to family life continuing in Malaysia. Therefore, absent the children, I would be minded to find that there are no insurmountable obstacles to family life continuing in Malaysia. However, in the Appellant's case, there is the need to consider the children; they are part of the family life of his partner. On the evidence before me, I have found that the children have experienced emotional turmoil in their lives and it is not in their interests to be uprooted from all that they know so soon after they have achieved a degree of stability following the breakdown of their father's relationship with their mother. I find, therefore that the Appellant is entitled to succeed under the provisions of EX.1 (b).

18. In the alternative, taking the facts as found, following the approach in **Razgar [2004] UKHL 4**, applying the provisions of Article 8, my assessment is as follows: there is family life between the Appellant and Ms Lam and between the Appellant and Ms Lam's children, and the decision to remove will have consequences of such gravity as to potentially engage the provisions of Article 8. If the Appellant did not qualify for leave under EX.1 (a) and (b), the decision would be in accordance with the law. Then applying the provisions of s 117B of the 2002 Act, my proportionality assessment is as follows:

    a. The evidence of the children was that life was very difficult for their mother when their biological father left; she had two jobs to make ends meet and they did not see much of her because either they were asleep when she returned from work or she was asleep or busy when they were at home. The Appellant had contributed to family life in such a way that it had freed their mother to spend more time with them; he had helped their mother with chores and helped the children with emotional difficulties and their homework. On the evidence that I have of the children of Ms Lam, bearing in mind the particular circumstances of this case, it is in their best interests to remain with the Appellant and their mother. Whilst their relationship with their biological father is currently strained, this does not mean that they will not wish to be in touch with him at a later date.

    b. The Appellant stated during the First-tier Tribunal hearing that he did speak English but it is not clear whether his spoken English is sufficient to assist with integration.

    c. There is some evidence that Ms Lam has a business and can maintain the Appellant. As submitted by Mr Pipe, although this cannot be counted positively in favour of the Appellant, the public interest in the economic wellbeing of the UK is less affected by lack of self-sufficiency.

d. The Appellant's relationship with his qualifying partner was built up whilst he was in the UK unlawfully and I can give little weight to it. However, the provisions of s 117B (4) do not require me to give little weight to relationships formed with qualifying children during this time; they see him as being more important in their lives than their biological father. I give weight to those relationships; his presence in the household has contributed significantly to the wellbeing of Ms Lam's children.

e. As to S 117B (5), the Ms Lam's children are British nationals and therefore qualifying children. I have already found, for the reasons set out at para 16 above, that it is not reasonable to expect them to leave the UK.

f. I give little weight to the private life formed by the Appellant during the time that he has been in the UK unlawfully. However, as submitted by Mr Pipe, it is to be remembered that the Appellant can now make an application for leave to remain under 276ADE (1) (iii) because he has been in the UK for continuous period of over 20 years and the Rules do not require him to have been here lawfully; therefore there is some tension between 276ADE (1) (iii) and the requirement under 117B (5), particularly as I have to consider the circumstances before me as at the date of decision.

19. Having applied the provisions of s 117B, I find that the decision to refuse to grant leave is disproportionate when balanced against the various factors that need to be considered on the public interest side of the proportionality exercise.

Decision

20. The decision of Judge Ghaffar contains a material error of law as set out above. His decision is set aside but the findings of fact are preserved.

21. I remake the decision to allow the Appellant's appeal under the Immigration Rules and under Article 8 ECHR.

22. There was no application for an anonymity order before the First-tier Tribunal or before me. In the circumstances of this case, I see no reason to direct anonymity.

Signed Date
M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

In light of my decision, I have considered whether to make a fee award under Rule 9(1) (a) (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Appellant's appeal has been allowed, I confirm the fee award of Judge Ghaffar.

Signed Dated

M Robertson
Sitting as Deputy Judge of the Upper Tribunal