The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16281/2014
IA/16271/2014
IA/16277/2014

THE IMMIGRATION ACTS

Heard at Manchester
On February 9, 2015

Promulgated
On February 16, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MRS GUISONG SU
MS QIANPING HUANG
MS QIANHUA HUANG
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance and unrepresented
For the Respondent: Ms Johnstone (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellants are citizens of China and are mother and daughters. The appellants entered on a transit visa in June 2003 when the second and third appellants were aged 14 ½ years old. They had all lived in Guyana since 1995 and returning there

after a three-month visit to China. They overstayed beyond the terms of their visa, which gave them leave to remain until August 2003.

2. In December 2004 the first appellant's husband (and the other appellants' father) entered the United Kingdom as a work permit holder and in March 2005 the first-appellant's son (second and third appellant's brother) joined him. The first-appellant's husband and son were granted indefinite leave to remain in November 2009 and in 2012 they became British citizens. No application for indefinite leave was made for these appellants.

3. On March 7, 2013 these appellants applied for leave to remain outside of the Rules under article 8 ECHR but the respondent refused their applications on May 8, 2013. In February 2014 questionnaires were sent requesting details of the appellants' relationships with persons in the United Kingdom and March 19, 2014 decisions to refuse human rights claims and claims under the Immigration Rules were made and a decision to remove pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006 was issued in respect of all three appellants.

4. The appellants appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on April 2, 2014.

5. The matter came before Judge of the First-tier Tribunal Taylor (hereinafter referred to as the "FtTJ") on July 22, 2014 and in a decision promulgated on August 4, 2014 he dismissed the appellants' appeals under both the Immigration Rules and article 8 ECHR.

6. The appellants lodged grounds of appeal on August 13, 2014. Judge of the First-tier Tribunal Saffer refused permission to appeal on August 26, 2014 finding that the FtTJ made findings that were open to him.

7. The appellants renewed their grounds to the Upper Tribunal and on December 16, 2014 Upper Tribunal Judge Lane granted permission finding it was arguable the FtTJ had erred by firstly, not adequately addressed the possibility and consequences of the first appellant's husband being compelled to give up his British citizenship in order to re-acquire Chinese citizenship and secondly, the analysis of "insurmountable" obstacles at paragraph [24] of the determination did not consider that aspect of the matter.

8. The respondent filed a Rule 24 response dated January 7, 2015 and on January 15, 2015 a notice of hearing was sent by first class post to both the appellants and their representatives.

9. The matter came before me on the date set out above and on that date there was no appearance by either the appellants or their representatives. Rule 5(3)(h) of the Tribunal Procedure (Upper Tribunal) Rules 2008 allows me to adjourn or postpone a hearing. Rule 36 of the 2008 Rules provides that notice of a hearing is properly served if at least 14 days notice of the hearing date has been given. The notice of hearing was

sent on January 15, 2015 and therefore the notices are deemed served in accordance with the Rules. None of the notices have been returned.

10. The appellants' representatives were contacted and in response to my clerk's request as to why neither they nor their clients were in attendance they faxed a letter. The representative wrote saying,

> "… In the last forty-five minutes I have been able to ascertain that Mrs Su most certainly wishes to pursue the appeal.
>
> Unfortunately I have been unable to locate the file-although it may be with Counsel-who is presently in Court. Certainly if I has sight of the Notice of Hearing I would have acted upon it although I cannot rule out the possibility of an administrative error which frankly I need more time to investigate.
>
> I hope in the circumstances the Tribunal will be persuaded to grant a brief adjournment and I will look into all the necessary enquiries"

11. In considering the adjournment request I have had regard to the fact both notices of hearing had been properly served on both appellants as well as their representatives. The representative's letter did not assert the appellants were unaware of the hearing or that the representatives had not actually received the notice of hearing. The letter stated the file was missing and an administrative error could not be ruled out.

12. This was the appellant's appeal and their grounds were fully argued in the grounds. Taking into account the notices were properly served, the content of the representative's letter and the fact I have the appellants' grounds of appeal I was satisfied it would be just and reasonable to proceed with the hearing.

ERROR OF LAW SUBMISSIONS

13. The appellants argued that the FtTJ had erred in his approach because:

    a. The FtTJ erred in his approach to paragraph 276ADE HC 395 in the way he approached the issue of whether the appellants had any ties including social, cultural or family with the country to which they would have to go. The appellants had only visited on three occasions between them and this could not constitute "continued connection to life in that country".

    b. The FtTJ failed to give sufficient weight to the fact the first-appellant's husband was now a British citizen and no longer had Chinese citizenship when considering "insurmountable obstacles". The FtTJ also failed to take into account that the first-appellant's husband and son were British citizens with no right to Chinese citizenship and who had resided in the United Kingdom for eleven years.

c. The FtTJ should have had more regard to the fact that the second and third appellants were both heavily pregnant and unable to travel and were not physically removable.

d. There was no reliance no public funds by any of the appellants.

14. Ms Johnstone relied on the Rule 24 letter dated January 7, 2015 and submitted:

a. The submission on "ties" was an extraordinary simplification of the test in Ogundimu (article 8-new rules) [2013] UKUT 00060. It was not accepted the absence of physical presence was sufficient.

b. The appellants did argue Article 9 of China Nationality Law 1980 before the FtTJ but in any event at paragraph [24] of his determination the FtTJ considered firstly whether the first-appellant's husband had lost his Chinese citizenship and secondly if he had whether he would experience any difficulties being admitted as the spouse of a Chinese citizen. The FtTJ found there would be no insurmountable obstacles and in reaching that conclusion he had regard to the above.

c. The first-appellant's immigration history is far less than exemplary.

d. The practicalities of removal are not relevant to considering the issues under appeal.

15. I reserved my decision.

ERROR OF LAW ASSESSMENT

16. The FtTJ had before him applications from three Chinese citizens. The first named appellant had arrived legally in June 2003 with leave to enter until August 2003. She failed to leave and at the time of the hearing before the FtTJ she had been here illegally. The second and third named appellants are twins and they came to the United Kingdom with the first named appellant in June 2003 and they too had remained here illegally. When they arrived they were fourteen years of age but they have been living as adults since November 2006.

17. The husband/father arrived on a work permit in December 2004 and the son/brother was admitted as a dependant in March 2005. They are now British citizens having originally been granted indefinite leave to remain in 2009 (after the husband/father worked here for five years). The FtTJ noted that when an application for indefinite leave was made the appellants were not included in the application.

18. The FtTJ properly considered the applications under the Immigration Rules namely paragraph 276 ADE and Appendix FM of the Immigration Rules as well as under article 8 ECHR.

19. The FtTJ carefully set out the evidence given and had regard to the written documentation that was before him and from paragraph [21] of his determination he set out his findings. It is these findings that the appellants have challenged and they were given permission to appeal as set out above.

20. In paragraph [21] the FtTJ reminded himself of the correct test to apply when he wrote "… in any event it is clear the test I have to apply … is whether there are "no ties", this to be taken in the Ogundimu sense of continued connection."

21. In other words the FtTJ did not apply the test suggested in the refusal letter but instead had regard to what was the leading case at that time on this issue and he made clear that his assessment had to be a "rounded assessment of all the relevant circumstances".

22. The FtTJ then proceeded separately to consider the first appellant's position as well as the second and third appellant's position. In paragraph [21] the FtTJ found the first appellant had not lost ties and gave his reasons. In paragraph [22] he considered the remaining appellants' positions and concluded for good reason that they it could not be said they had "no ties including social, cultural or family" in China.

23. I therefore reject the ground of appeal raised in paragraphs [4] to [6] of the grounds of appeal.

24. The FtTJ then considered Appendix FM and in particular Section EX.1 in so far as it was relevant. In paragraph [23] the FtTJ set out factors he believed to be relevant. At paragraph [24] the FtTJ acknowledged the point raised in paragraph [7] of the grounds. The appellants' representatives did not provide any evidence that demonstrated the first-named appellant's husband had lost his citizenship albeit reference is made in the grounds of appeal to Article 9 of China Nationality Law 1980. The respondent properly makes the point this was not raised at the hearing and this must be correct because the FtTJ made the point in paragraph [24] that the there was "no direct or persuasive evidence before me that the husband has actually lost his citizenship". However, the FtTJ did not stop there because he then went onto consider the alternative scenario that he had and concluded there was nothing to show he could not be admitted as the spouse of a Chinese citizen and he then considered "insurmountable obstacles".

25. The grounds of appeal contained in paragraph [7] are nothing but an attempt to re-argue the point and for the reasons I have given above in paragraph [24] I find there was no error in law in his approach to insurmountable obstacles. If the appellants truly wish to argue that ground then the onus is on them to put before the respondent evidence that supports their contention.

26. The FtTJ then gave his reasons why he felt the case should be considered outside of the Rules and whilst he had little sympathy with the first-named appellant's position he accepted the second and third appellant's cases should be considered outside of the Rules.

27. At paragraph [28] he identified that the principal issue in the appeals was the issue of proportionality. He reminded himself correctly that great weight has to be attached to the failure to meet Appendix FM or paragraph 276ADE and the fact that this was much more than a starting point. He applied what is now embodied in Section 117B of the 2002 Act and found all of the parties had developed private lives whilst here unlawfully. He remarked that the husband/father failed to disclose their presence despite his numerous applications after 2004. He concluded in paragraph [29] that refusing the first-named appellant's application was not disproportionate.

28. The FtTJ had full regard to the remaining appellants' situations both of whom had boyfriends and were expecting their first child. He accepted that no blame should be attached to them whilst they were minors but he found they had built up their current private lives (boyfriend and the fact they were expecting) not only when they were over the eighteen but also after their applications had been refused in April 2013. In other words they established their current statuses whilst their immigration status was precarious. The FtTJ attached weight to this factor.

29. The FtTJ considered their cases on the facts before him and found their removal, on those facts, was not disproportionate.

30. I see nothing wrong at all in the FtTJs approach and these appeals are dismissed.

31. My decision may be academic because of course the second and third appellants circumstances may have changed due to their developing relationships and circumstances but those are matters for a fresh application.

32. In conclusion I find there is no error in law.

Decision

33. The decision of the First-tier Tribunal did not disclose an error in law and I uphold the original decision and I dismiss the appellants' appeals.

34. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier and I see no reason to amend that order.

Signed: Dated: **February 13, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the original decision on fees.

Signed: Dated: **February 13, 2015**

Deputy Upper Tribunal Judge Alis