Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/37794/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and reasons Promulgated**
On: 31 October 2014	**On: 19 January 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR NANTHA KUMAR AL SUPRAMANIAN
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Bayati, Counsel
For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Malaysia born on 6 February 1983. His application for further leave to remain in the United Kingdom and to give directions under section 10 of the immigration and Asylum act 1999 to remove him from the United Kingdom. The appellant appealed against the respondent's decision and First-tier Tribunal Judge Swanker dismissed the appellant's appeal. Permission to appeal to the upper Tribunal was granted by first-tier Tribunal Judge Osborne on 2 October 2014 who stated that it is arguable that the Judge failed to consider

section 117 of the 2014 Immigration Act which came into effect on 28 July 2014. He noted that the determination is promulgated on 19 August 2014 so it is at least arguable that the Judge should have considered section 117 of the 2014 Act.

2. The First-tier Tribunal's findings were as follows which I summarise. The appellant has had no leave to remain in the United Kingdom since he withdrew, on 24 February 2006, his appeal against the respondent's decision of 8 December 2004 to refuse to grant him further leave to remain in the United Kingdom. The appellant claims that he sought to regularise his stay by instructing a Mr Aaron to make an application on his behalf in 2007. He is however not able to recall the basis of that application, a position which the Judge found find lacking in plausibility. There is no credible evidence to indicate that the appellant made any attempt to regularise his stay prior to Linga and Company submitting his application on his behalf on 6 July 2012. It is not credible that the appellant would make a formal claim against Mr Aaron one month before his appeal hearing given that he instructed them in 2007. The appellant's overall credibility is undermined as he failed to make any attempt to contact the Home Office directly when Mr Aaron failed to give any concrete information as to the progress of his application or otherwise. The Judge found that the appellant's application on 6 July 2012 was the time that the appellant attempted to regularise his status and said and that it is within this background his instant appeal is considered.

3. The appellant contends that he has established a family life with his wife in the United Kingdom and that his removal would occasion a disproportionate interference with this family life under Article 8 of the ECHR. It is noted that the appellant does not meet the requirements of the Immigration Rules for leave to remain on the bases of his family life is a spouse. There is no evidence before the Judge relating to the appellant being a parent of a British citizen child. While the Judge accepted that the appellant and his wife are likely living together as spouses and have established a family life here, there is no credible evidence to indicate that it would be unreasonable for them to return to Malaysia and conducted their family life there.

4. Both the appellant and the sponsor confirmed that the sponsor was aware of the appellant's immigration position from an early stage of their relationship. Therefore both parties were aware of the precariousness of the appellant's immigration situation and underlying risk on being removed or being required to leave the United Kingdom. As per the established jurisprudence, a State is under no general obligation to respect the choice of residence of a couple. The appellant and his spouse entered into and progressed their relationship in full knowledge of the risk of the appellant being removed or required to leave the United Kingdom as a person without leave. The appellant's spouse is partly of Malay dissent her mother having been born in that country. Her evidence is to the effect that she had regularly visited Malaysia in the past and last visited in 2012. She also attested to having extended family there. While the evidence before the Judge was that she does not speak the language she is nevertheless likely to have a good knowledge of life and culture in Malaysia given her mother's background and her own regular trips to the country and that the environment in Malaysia would in no way be alien to her. She would be able to settle into life in that country with the appellant who himself lived most of his life in Malaysia and continues to have close family ties including his mother.

5. The Judge attached no weight to the appellant's evidence that he presently does not speak the language in Malaysia fluently. He came to the United Kingdom at some 18 years of age and spent his formative years in Malaysia. Therefore the appellant would have spoken the local language fluently and the Judge rejected as implausible that the appellant would have lost his ability in the language during his time in the United Kingdom given he came here as an adult. The appellant would be able to assimilate into life and the culture of Malaysia with the assistance and support of her husband and his family as indeed the sponsor's own extended family is in Malaysia, her aunt at her uncle.

6. The appellant's wife is in employment in the United Kingdom and in a position likely to be able to find some employment in the Malaysia. While the couple may well experience a drop in the standard of living upon relocating to Malaysia they would however be able to re-establish themselves and it would not be unreasonable to expect them to set up their lives in the appellant's home country. The appellant's evidence was that his father-in-law wanted to help him to start a business in this country. There is no credible reason for why this offer should not extend to assisting the appellant to do the same in Malaysia. The appellant and his wife would likely to have family support if they were to relocate to Malaysia.

7. It was claimed that the appellant would not be able to sponsor his wife to join him in Malaysia because of the immigration requirements for sponsorship in that country. There is no objective evidence provided regarding the claimed immigration requirements in Malaysia which the appellant would not be able to satisfy. The absence of such evidence undermines the appellant's evidence in this regard.

8. Weight was also attached by the Judge to the appellant's spouse's claim regarding her mother's failure to register her own marriage in Malaysia so that she, the appellant's spouse, would be regarded as illegitimate there. Apart from the fact that the appellant provided no evidence of this the Judge failed to see why her alleged legitimacy would prevent her from living a normal life with her husband in Malaysia. There is no credible evidence pointing to any negative consequences for the appellant's wife in Malaysia, even if she were to be regarded in that country as illegitimate. The appellant spouse is an adult living with her husband independently even though she has family here. She and her family can continue to communicate through modern means of communications. It would be therefore reasonable and proportionate to expect the appellant's wife to join him in Malaysia where they can enjoy family life and therefore the respondent's decision to remove him would not constitute an interference with the appellant and his wife's family life.

9. The appellant's private life is considered by reference to paragraph 276 ADE of the Immigration Rules. The Judge found no reason to depart from the respondent's conclusion in this regard, which he found to be in accordance with the requirements of the Immigration Rules. The appellant has not lived continuously in the United Kingdom for 20 years but has lived the majority of his life in Malaysia and has not severed all ties to Malaysia. The Judge took into account the case of **Gulshan** and found no arguably good grounds for granting

the appellant leave to remain outside the Immigration Rules and to proceed to consider whether there are compelling circumstances not sufficiently recognised under the Immigration Rules.

Grounds of appeal

10. The appellant's grounds of appeal in summary are the following**.** The appeal was heard on 1 July 2014 and the decision is dated 19 August 2014 which was promulgated on the same day. The commencement date of the Immigration Act 2014 is 28 July 2014 without any transitional provisions. The judge had a statutory obligation to consider Section 117 of the 2014 Act.

11. The appellant's wife is a British national and the appellant asserts that his removal would be in breach of their private and family life as protected by Article 8 of ECHR. The Judge in determining the appellant's appeal made no reference at all to the fact that the appellant gave evidence in English. The Judge was under a statutory obligation pursuant to article 117B (2) to have regard to this and the failure to demonstrate that she had regard amounted to an error of law. This must be a material given the importance that Parliament has placed upon this factor.

12. The appellant is economically independent and neither he nor his wife have any recourse to public funds. The Judge failed to have any or any adequate regard to this factor when determining the appeal despite the statutory obligation pursuant to section 117B (3). This was an error of law.

13. It was not reasonable for the Judge to find that the appellant's spouse who is a British national to leave the United Kingdom in order to remain with her husband. In the case of **Senade and others v SSHD [2012] UKUT** it was stated that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality in the decision of the Supreme Court in **ZH Tanzania**. If interference with the family life is to be justified, it can only be in the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.

14. The Judge failed to have any regard to the fact that the appellant's wife is a British national and therefore a citizen of the European Union when determining whether it would be reasonable to expect her to leave the United Kingdom. Failure by the Judge to do so amounted to a material error of law.

The Hearing

15. At the hearing I heard submissions from both parties as to whether there is an error of law in the determination of the first-tier Tribunal Judge.

16. Mr Melvin in his submissions said that there were no submissions made after the hearing to the judge to take into account the 2004 Act. It is not the position of the

2004 Act that English and financial independence is enough. The Judge has assessed the Immigration Rules and found the precarious nature of the relationship and the appellant's lack of leave in this country since 2004. The appellant's spouse in her evidence said that she will return to Mauritius if the appellant returns. The appellant is trying to circumvent the Immigration Rules of the United Kingdom because the appellant's wife is not able to sponsor him from outside the country.

17. It was submitted by Miss Bayati that in paragraph 117 (b) the public interest has two factors. One is that the appellant speaks English the second is that he is financially independent. The appellant speaks English because he gave evidence in English before the Judge of the first-tier Tribunal. These factors should have been taken into account. He argued that there are statutory obligations for the Judge to fulfil whether counsel pointed it out are not. She submitted precariousness of the appellant's immigration status in this country was not taken as an issue by the respondent.

Discussion and findings as to whether there is an error of law

18. The Judge found in his determination that the appellant has had no leave to remain in the United Kingdom since he was last refused his leave to remain application in 2006. The Judge found that the appellant had made no attempts to regularise his immigration status in this country. He correctly found that the appellant made no attempts to regularise his immigration status in this country.

19. The Judge was right to find that the appellant's immigration status was precarious in this country. He was also entitled to point out that the appellant and his wife were aware that the appellant's immigration status was precarious but they still progressed their relationship knowing that the appellant has no status in this country and maybe removed when detected as an over stayer. The Judge was also entitled to find that the precarious nature of the appellant's leave to remain in this country is highly relevant to the appellant's claim under Article 8.

20. The complaint against the Judge is that the appellant spouse of the British citizen should not be required to leave the country. The Judge did not require her to leave the country but said that given her profile and the fact that she was of Malaysia heritage who visited their often could return with the appellant to Malaysia. The Judge also made this finding in light of the evidence before him which was that the appellant's wife said that she would return to Malaysia with her husband if he had to go. I do not consider the Judge stating that the appellant's wife must leave this country and live in Malaysia with the appellant. The Judge was entitled to find that the appellant has no right to live in this country and he must be removed notwithstanding that he has a wife and that it will be her choice whether she follows him to Malaysia or decides to live in this country.

21. It is also argued on behalf of the appellant that the Judge failed to consider section 117 of the 2014 Immigration Act which came into effect on 28 July 2014. The appellant's appeal was heard before the Act came into effect and the decision was made after the Act came into force. There are no transitional provisions. Therefore the question to decide is whether the Judge materially erred in law in not taking into account the 2014 Act in his decision.

22. The answer is yes the Judge ought to have considered the 2014 Act but in his determination he covered all the criteria relevant of the public interest consideration I do not accept the reasoning put forward by the appellant that had the Judge considered that the appellant speaks English and is not a burden on the taxpayer, this would have entitled him leave to remain. This argument would be cancelled out by paragraph 117B (5) of the 2014 Act which states at that little weight should be given to a private life established by a person at the time with the person's immigration status is precarious. The Judge found that the appellant's immigration status was precarious and was entitled to come to the conclusions that he did.

23. I do not accept that all the appellant has to do is to prove that he speaks English and is not a burden on the taxpayer for him to succeed which is essentially what is being argued.

24. Therefore I find that failure by the Judge to specifically consider the 2014 immigration act is an error of law but it is not a material error in the context in the circumstances of this appeal because even if he had considered it, on the facts of the case, the decision would remain the same.

25. The Judge has given cogent and proper reasons for why the appellant should not be granted further leave to remain pursuant to Article 8. It is implicit in his determination that he found there were no exceptional circumstances in this case that the appellant should be granted leave to remain pursuant to Article 8 when he cannot fulfil the requirements of the Immigration Rules. I therefore maintain the first-tier Tribunal's decision.

DECISION

Appeal dismissed pursuant to the Immigration Rules

Appeal Dismissed pursuant to article 8 of the European Convention on Human Rights

Signed by

A Deputy Judge of the Upper Tribunal

This 14th day of January 2015

Mrs S Chana