Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40898/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 31 March 2015	**On 15 June 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No representative

ANONYMITY ORDER

I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) to protect the privacy of the appellant and sponsor given the nature of some matters raised in the evidence of this appeal. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure in breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Britton) allowing the appeal against the Secretary of State's decision on 18 July 2013 refusing to vary YH's leave as the partner of a British citizen ("SB") under the Immigration Rules (HC 395 as amended).

2. For convenience, I will refer to the parties as they appeared before the First- tier Tribunal.

Introduction

3. The appellant is a citizen of China who was born on 20 June 1980. On 9 December 2014 she was granted limited leave to enter the UK as a visitor valid until June 2013. On 10 December 2014 the appellant arrived in the UK. On 3 June 2013, the appellant applied for leave to remain on the basis of her relationship with a British citizen, SB.

4. That application was refused on 18 July 2013 under Appendix FM, para 276ADE and Art 8 of the ECHR.

5. The appellant appealed to the First-tier Tribunal. In a determination dated 18 April 2014, Judge Trevaskis allowed the appellant's appeal under the Immigration Rules. That decision was successfully appealed by the Secretary of State. In a determination promulgated on 22 August 2014, the Upper Tribunal (UTJ Hanson) set aside the decision on the basis that Judge Trevaskis had wrongly applied the Immigration Rules under which the appellant could not succeed. However, as the appellant's claim under Art 8 had not been determined by Judge Trevaskis, the Upper Tribunal remitted the appeal to the First-tier Tribunal to make a decision in respect of Art 8.

6. That remitted appeal was heard by Judge Britton on 17 October 2014. In a determination promulgated on 5 November 2014, Judge Britton allowed the appellant's appeal under Art 8. The respondent again sought permission to appeal. On 16 December 2014, the First-tier Tribunal (DJ I Murray) granted the Secretary of State permission to appeal.

7. Thus, the appeal came before me.

The Judge's Decision

8. Judge Britton heard oral evidence from both the appellant and SB. He found both to be credible witnesses and accepted their evidence. The appellant and SB had lived together in Abu Dhabi for over two years. Their relationship had begun in March 2009. They had both worked for Etihad Airlines. Following a medical check-up in March 2012, SB was diagnosed as HIV positive. SB lost his job and was arrested and detained before being deported to the UK on 1 April 2012. Since coming to the UK, the appellant and SB have had a son who was born on 8 September 2013. The appellant is tested for HIV every six months but, like her son, she is not infected with the virus.

9. The evidence of SB and the appellant was that he could not live in China because he was HIV positive. The appellant relied upon documentary evidence (referred to by the judge at para 15 of his determination) that for stays of over six months HIV tests were required and also that even those travelling on a tourist visa or short-term business trip (in other words not for employment or study or otherwise for over six months) could be denied entry if they truthfully declared their status (see "China – Regulations on Entry Stay and Residence for PLHIV" (undated but printed on 1/8/2013)).

10. Having set out the evidence, which he clearly accepted, the judge set out Art 8 and the five-stage test in Razgar v SSHD [2004] UKHL 27 and then at paras 19-23 set out his conclusion that removal would not be proportionate under Art 8 as follows:

> "19. I find that the appellant and [SB] are in a genuine and subsisting parental relationship with a child [E] born on 8 September 2013. [E] was born in the United Kingdom. [SB] and [E] are British citizens. I find the appellant would not be a burden on the British taxpayer and has had no difficulty integrating into society. Under paragraph 117B(6) of the Immigration Act 2014 it states 'In the case of a person who is not liable to deportation, public interest does not require the person's removal where – (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.
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> 20. Under Section 55 of the Borders, Citizenship and Immigration Act 2009 (2009 Act) [E]'s best interest is to be raised by both parents, unless there are good reasons to the contrary. The Immigration Act 2014 at section 71 under the heading Duty regarding the Welfare of Children, it states, for the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by section 55 of the 2009 Act. If [E] went to live in China it would normally be in his best interest to live with them in China. It is not automatically in a child's best interest to live in the UK rather than in another country, even if the child is British.
>
> 21. However, I find that [SB] will have a very significant obstacle to integrating in China because of his HIV medical condition. It would not be reasonable to split the family and for [E] to have to live in China without his father or [E] to live in this country without his mother. Further it would not be reasonable to expect the appellant to return to China to make an application to settle in this country.
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> 22. I find, taking into consideration all the evidence before me, the appellant has established there would be a very significant obstacle to [SB] living in China. I consider this appeal is exceptional and is to be considered outside the Immigration Rules.
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> 23. I find it is proportionate for the appellant to be allowed to remain in this country with [SB] and their child."

This Appeal

11. On behalf of the Secretary of State, Mr Richards relied upon the grounds of appeal upon which he expanded in his oral submissions.

12. First, he submitted that the judge had failed properly to apply the civil standard of balance of probabilities in finding in the appellant's favour, first in relation to SB's HIV status in the absence of a doctor's letter corroborating that diagnosis, and secondly in relation to the difficulties that SB would face in securing a visa and living in China as a result of his HIV status in the absence of "independent, corroboratory evidence".

13. Secondly, Mr Richards submitted that the judge's decision under Art 8 was inadequately reasoned. Mr Richards submitted that the judge had failed properly to have regard to s.117B(1) of the Nationality, Immigration and Asylum Act 2002 (as inserted by s.19 of the Immigration Act 2014) that the maintenance of effective immigration control was in the public interest.

14. Thirdly, based on the grounds, it was submitted that the judge had also failed to give any reasons for concluding that the appellant could not return to China and apply for entry clearance.

Discussion

15. Dealing first with Mr Richards' first Ground, SB gave evidence to the judge, which is set out at para 12 of his determination, that his doctor was unwilling to write a letter concerning his medical condition although he could be contacted by telephone. The judge expressed some astonishment that a doctor would not write a letter to support SB's medical condition. SB told me that, in fact, he now had a letter from a nurse (which he showed me) confirming his diagnosis. That was, however, not before the judge.

16. Whilst it might be common to have supporting medical evidence, as a matter of law such evidence is not essential. A judge has to apply the civil standard of proof and determine whether on a balance of probabilities an appellant has established his or her claim, including any necessary facts to that end. Here, the judge heard evidence from both SB and the appellant and he found them to be credible witnesses and accepted their evidence. The evidence of both of them was that SB was HIV positive; he had been dismissed from his job in Abu Dhabi and arrested and deported as a result of his HIV status. The appellant gave evidence concerning her own status and that of her son and that she was being tested. In addition, SB gave evidence of medication, Atripal 500mg, which he was prescribed for his HIV condition. There was no evidence before the judge, and none was suggested to me by Mr Richards, that ran counter to the evidence given by the appellant and SB. The assessment of their evidence was quintessentially a matter for the judge having heard them give evidence. In the absence of any basis for doubting the veracity of their evidence, the judge was, in my judgment, entitled to accept what he was being told, namely that

SB was HIV positive even in the absence of supporting medical evidence – for which, of course, SB gave an explanation.

17. The judge was, therefore, entitled to find that SB was HIV positive.

18. In relation to the difficulties which SB would face in travelling to and remaining in China, he gave evidence that he had looked into living in China and that he would be unable to obtain a visa given his medical condition (see para 11 of the determination). But that was not the only evidence before the judge concerning the difficulties faced by an HIV positive individual in travelling to and living in China. The judge referred to the evidence at para 15 of his determination as follows:

> "15. … I have taken into consideration the written evidence of the appellant's friends and family. I also take into consideration that it would not be easy for the appellant to remain in china and receive adequate medical attention for his HIV. The respondent's document China from Gov.UK refers to staying longer than 6 months. It states 'If you are entering China for employment, study or private purposes for a stay over six months, you must produce a health certificate, which includes a blood test for HIV, legalised by the Chinese Embassy'. A document entitled 'UK Coalition' produced, states although the Chinese government issued a press release claiming they would no longer discriminate against HIV positive individuals the practice of issuing visas to folks with HIV is something entirely different. Unfortunately there is no date on the document. The printout is dated April 2014. Others documents produced clearly show that [SB] will have difficulty working and living in China permanently."

19. At the hearing I was not taken to the background evidence relied upon. Although, SB informed me that the guidance was, so far as he was able to tell, the same today. There are a number of documents in the bundle which were before the First-tier Tribunal and which clearly demonstrate difficulties for individuals travelling to and, in particular, living in China when they are HIV positive.

20. The document to which I have already referred states that: "No restriction for people with HIV/Aids for stays of up to six months". But then goes on to say: "HIV test required for work and study visa applications for more than six months."

21. The document goes on to state that:

> "China no longer restricts tourists living with HIV from visiting the country, but will not issue them with residence permits. Please verify the restrictions with the Embassy of the People's Republic of China before you travel.
>
> According to the website of the Chinese Embassy in Switzerland, an HIV test is required when applying for a work or study visa for more than six months. We are receiving reports from people being rejected work visa due to their HIV status."

22. Although those provisions appear to differentiate between those wishing to work and stay for more than six months and others, the document also provides support for the view that admission itself may be problematic. So, the document states:

> "The website of the Chinese Embassy in the United States still lists HIV infection as a ground for non-admission. This information is outdated.
>
> We are receiving many enquiries from China visitor applicants. In many cases, people seem to be confronted with outdated visa forms still asking for HIV status. If confronted with such a visa form, it is important that applicants do not admit their status."

23. That warning appears to be based on the fact that a person admitting their HIV status may have difficulties with admission. The document continues:

> "If travelling to China on a tourist visa or short-term business trip: do not declare your status on the visa application form. Historically, people declaring their status truthfully have been denied entry."

24. In his submissions, Mr Richards did not take me to any evidence to suggest that SB's HIV status would be irrelevant or ignored, even on a short visit to China. But, the evidence clearly supported the view that SB's HIV status would prevent him settling in China with the appellant and (if he travelled with her) their son.

25. It was, in my judgment, open to the judge on this evidence to conclude in paragraph 21 that there would be "very significant obstacles" to SB integrating into China because of his HIV status. Nothing in the evidence contradicts that and, taken together with SB's own evidence, it was entirely open to the judge to make that factual finding.

26. Consequently, I reject Ground 1.

27. Turning now to Ground 2, although the judge's reasoning is relatively brief it was, in my judgment, adequate and sufficient to justify his finding that the appellant's removal would be disproportionate.

28. The judge was clearly alive to s.117B of the 2002 Act. In para 19 of his determination, which is set out above, he specifically refers to the fact that the appellant would not be a burden on the British taxpayer and would have no difficulty in integrating into society which must be a reference to s.117B(2). At para 18, the judge sets out the five-stage test in Razgar including the legitimate aims at stage 4. Whilst the judge could, perhaps, have more explicitly referred to the requirement in s.117B(1) that the "maintenance of effective immigration control is in the public interest", reading the judge's determination as a whole, I am unable to say that this experienced judge failed to have regard to that obvious aspect of the public interest engaged in this appeal.

29. The Judge's assessment of proportionality was not, in my judgment, inadequate and flawed and I reject Ground 2.

30. I turn now to Ground 3.

31. Having considered the best interests of the appellant's child, the judge was entitled, in my view, to conclude at para 21 of his determination, that it would not be

reasonable to "split the family" so that the appellant lived in China and SB in the UK with their son living with one or other of them. The grounds do not, in my view, specifically challenge that finding which in any event was properly open to the judge on the evidence. Instead, it is said that the judge failed to give any reason for stating that:

> "It would not be reasonable to expect the appellant to return to China to make an application to settle in this country."

32. It is not clear to what extent the Secretary of State relied upon this point before the judge. There was, however, as I have already indicated, evidence showing potential difficulty for the appellant being accompanied by SB even for a visit including one in order for her to obtain entry clearance. The judge was clearly aware that the appellant could not succeed under the Immigration Rules because she was in the UK with leave only as a visitor. In criticising the judge's finding that the appellant could not reasonably be expected to return to China to obtain entry clearance, the grounds do not assert any "good reason" apart, implicitly, from the fact that entry clearance is generally required in situations such as the appellant's. The appellant was, of course, lawfully in the UK. Apart, therefore, from merely requiring procedural compliance, I fail to see what "good reason" would justify a conclusion that it was proportionate to expect the appellant to seek entry clearance given the other positive findings concerning the appellant's relationship and her circumstances including her young child and immigration status. In the absence of a "good reason", requiring an individual merely to comply with the procedural requirement of seeking entry clearance is not justified (see SSHD v Treebhowan and SSHD v Hayat [2013] EWCA Civ 1054 at [30(b)] and MA (Pakistan) v SSHD [2009] EWCA Civ 953 at [9]).

33. Consequently, I do not accept Ground 3: despite the brief reasoning of the Judge, his conclusion was inevitable.

Decision

34. For these reasons, I am satisfied that it was open to the judge properly to conclude that the appellant's removal (whether permanently or temporarily in order to obtain entry clearance) was disproportionate and to find that the Secretary of State's decision breached Art 8 of the ECHR.

35. Thus, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of a material error of law. The decision stands.

36. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

~~37. No anonymity order was sought.~~

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

The judge made a fee order in the sum of £140 which, in the circumstances, I consider to be the appropriate fee order also.

Signed

A Grubb
Judge of the Upper Tribunal

This determination has been amended on 12 June 2015 under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) to include an anonymity order and, as necessary, to anonymise the text of the determination.

Signed

A Grubb
Judge of the Upper Tribunal