IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01736/2015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 12th April 2016	**On 21st April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

D Q Z
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Bircumshaw of Coventry Law Centre
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Kershaw of the First-tier Tribunal (the FTT) promulgated on 14th April 2015.

2. The Appellant is a male Chinese national born [ ] 1980. The Appellant appealed against refusal of his asylum application, but before the FTT, confirmed that he wished to withdraw his asylum appeal, and the only issue to be decided by the FTT related to the Appellant's wish to remain in the United Kingdom, based upon his family life.

3. In brief, the Appellant had been in the United Kingdom since February 2003. He met his wife, also a Chinese citizen, in June 2008. The couple have two children, the eldest born on 31st May 2009, and the younger child born on 25th December 2011. Both children were born in the United Kingdom but are not British citizens. The FTT was informed that the Appellant's wife and children had been granted discretionary leave to remain in the United Kingdom until 12th June 2015.

4. The FTT heard evidence from the Appellant, and accepted that he had established family life in the United Kingdom. The FTT concluded that notwithstanding that the Appellant's wife and children had limited leave to remain, it would not, in the circumstances, be unreasonable to expect the family to return to China. The FTT therefore concluded that the Respondent's decision to refuse the Appellant's application for leave to remain was proportionate and did not breach Article 8, and his appeal was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds may be summarised below.

5. Firstly it was contended that the FTT had erred when considering the best interests of the children, by not considering the actual situation that the children would find themselves in. This was because it had been made clear to the FTT that if the Appellant's appeal was refused, his wife and the children would remain in the United Kingdom, and therefore the family would be separated. The Appellant would be unable to apply for entry clearance to the United Kingdom from China, because his wife is not a British citizen, and does not have settled status, neither has she been granted refugee status or humanitarian protection.

6. Secondly the FTT had erred by finding that the immigration status of the Appellant's wife and children was precarious. It was contended that this was wrong, as the wife and children had limited leave to remain, and would be entitled to settlement in due course.

7. Thirdly the FTT had erred by not considering and making findings upon the submission made that the Respondent had acted irrationally, in refusing to join the Appellant's case with that of his family. If his case had been joined, it was submitted that he would have been granted limited leave to remain.

8. Permission to appeal was initially refused, but subsequently granted on 16th July 2015 following a renewed application.

9. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

10. Mr Mills provided the Tribunal and Mr Bircumshaw with the Respondent's Asylum Policy Instruction dated May 2014, which gave guidance as to when applications should be considered as a dependant. Mr Mills had been unable to obtain the policy in force prior to May 2014, but did not believe that policy to be significantly different.

11. In relation to the ground contending that the Respondent had been irrational in failing to join the Appellant as a dependant in the application made by his family, Mr Bircumshaw stated that he was no longer pursuing this, and he abandoned this ground, accepting that the Respondent had not breached her own policy.

12. Mr Bircumshaw relied upon the remaining grounds contained within the application for permission to appeal. I was asked to find that the Appellant's case could be distinguished from cases such as EV (Philippines) as in this case the Appellant's family had leave to remain. Mr Bircumshaw submitted that the FTT had erred by failing to consider the practicality of the situation, which was that if the Appellant was not granted leave to remain, he would have to return to China, and his wife and children would remain in the United Kingdom and the family would be separated.

13. Notwithstanding the decision in AM Malawi [2015] UKUT 0260 (IAC) Mr Bircumshaw argued that the immigration status of the Appellant's wife and children should not be regarded as precarious, as it was clear that they were following a route which would lead to settlement once they had acquired six years' residence.

14. Mr Mills did not address me in relation to the Respondent's refusal to join the Appellant as a dependant in the claim made by his family, as Mr Bircumshaw had abandoned this ground.

15. In relation to the meaning of precarious, Mr Mills placed reliance upon AM Malawi, and in particular paragraphs 4 and 5 of the headnote, contending that it was clear that the Appellant's wife and children had a precarious immigration status and the FTT had not erred in so finding. Mr Mills added that the FTT could have gone further, and found that both the Appellant and his wife were in the United Kingdom unlawfully when they met and formed a relationship.

16. Mr Mills submitted that the FTT had not erred in considering the best interests of the children, and had been correct to note that neither of the children were British citizens, and neither had seven years' continuous residence in the United Kingdom prior to the applications being made. The

FTT was entitled to take into account the young age of the children and was entitled to conclude that the weight to be attached to immigration control, outweighed the weight to be attached to the wishes of the family to remain in the United Kingdom. I was asked to find no error of law in the FTT decision.

Conclusions and Reasons

17. It is only necessary for me to consider two of the grounds of appeal, the third having been abandoned.

18. I do not find that the FTT erred when considering the best interests of the children and I do not accept that the FTT declined to take into account the practicality of the situation.

19. The FTT referred to appropriate case law when considering the best interests of the children in paragraphs 32, 34, 38 and 40. The FTT applied the guidance given in that case law, and considered the relevant factors when considering the best interests of the children, as is demonstrated by paragraphs 41 and 42.

20. The FTT noted that the children were born in the United Kingdom, and took into account their ages, and that they were at an extremely early stage of their education, and that there would be no significant linguistic difficulties, and only limited difficulty in integrating into life in China, a country of which both their parents are citizens.

21. The FTT concluded at paragraph 44 that it would not be unreasonable to expect the family to return to China. The FTT was therefore finding that the best interests of the children would be to remain with their parents.

22. The FTT was well-aware that the Appellant‘s wife had stated that she and the children would remain in the United Kingdom if the Appellant lost his appeal, and therefore there would be a separation of the family. In my view the FTT correctly pointed out in paragraph 36 that this was a matter of choice. The FTT considered all the relevant factors in relation to the best interests of the children, and took these into account as a primary consideration, but not the only consideration. The FTT also took into account that significant weight must be attached to the importance of maintaining effective immigration control. The FTT found that the Respondent’s decision was not disproportionate, and that was a decision that was open to the FTT to make on the evidence provided. I do not find that the FTT has made any irrational or perverse findings, nor do I find that the FTT has given weight to any immaterial matter, or failed to take into account any material factor.

23. This ground of appeal, amounts to a disagreement with the decision made by the FTT, but does not disclose any error of law.

24. Dealing with the second ground, I find that the FTT cannot be criticised for making the point that the immigration status of the Appellant's wife and children is precarious. For ease of reference I set out below paragraph 4 of the headnote to AM Malawi;

> "(4) Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is 'precarious' if their continued presence in the UK will be dependent upon them obtaining a further grant of leave."

25. The Appellant's wife and children have limited leave to remain, and were therefore dependent upon obtaining a further grant of leave to enable them to stay in the United Kingdom. The FTT did not err on this point.

Notice of Decision

The making of the decision of the FTT did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision. The appeal is dismissed.

Anonymity

An anonymity order was made by the FTT, presumably because the appeal involved consideration of the best interests of minor children. I continue that order pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Deputy Upper Tribunal Judge M A Hall 13th April 2015

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date

Deputy Upper Tribunal Judge M A Hall 13th April 2015