Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/10254/2015**

IA/10262/2015

IA/10265/2015

IA/10272/2015

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision Promulgated**
On 12 March 2016	**On 29 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

YO YONG HUANG

XI WEN HE

[K H]

[J H]

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Timson counsel instructed by Sandbrook Solicitors

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Heynes promulgated on 17 June 2015 which dismissed the Appellants appeals against decisions to remove them from the UK following refusal of their applications for leave to remain in the UK on family and private life grounds on all grounds .

Background

4. The first and second Appellants (dates of birth 21.7.71 and 12.10.76) are partners and parents of the third and fourth child Appellants and all are national of China. The two child Appellants were both born in the UK and at the time of their applications in in July 2014, the relevant date for the purpose of consideration under paragraph 276ADE, the third Appellant was 7½ years old and the fourth Appellant was 3½ years old.
5. In March 2000 the first Appellant entered the UK as a visitor and after his six months' entry clearance expired he remained in the UK unlawfully.
6. The second Appellant claims to have entered the UK, presumably unlawfully, sometime in 2003.
7. The third Appellant was born in the UK on 12 January 2007 and the fourth on 24 December 2010.
8. On 17 July 2007 the first Appellant submitted an application for an EEA residence card with his family as dependents. This application was refused.
9. On 6 June 2013 the first and second Appellants were encountered by Immigration Officers working illegally (the first Appellant was later convicted of an offence relating to this) and served with notices as overstayers.
10. On 21 June 2013 the first Appellant made an application for leave based on family and private life which was refused on 13 August with no right of appeal.
11. On 7 July 2014 a further similar application was made and refused as no fee was paid.

12. On 30 July 2014 a further similar application was made and refused with no right of appeal.
13. On 5 December 2014 following a PAP letter the Respondent agreed to reconsider the application and issue an appealable decision.
14. 14 January 2015 an application for Judicial Review was lodged in the second Appellants name.
15. On 27 February 2015 the Secretary of State refused the Appellants applications. The refusal letter considered the applications by reference to the Immigration Rules under Appendix FM and paragraph 276ADE and then whether there were circumstances outside the Rules which warranted a discretionary grant of leave. The reasons for refusal can be summarised as follows:
    (a) Neither the first or second Appellant could succeed under the partner route as they were not British citizens.
    (b) Neither of the first or second Appellant could meet the eligibility requirements for leave as a parent or under EX.1.
    (c) In relation to the parents the relevant provision of the private life requirements was 276ADE(vi) and it could not be said that there would be very significant obstacles to them re integrating into China as they had lived the majority of their life in China.
    (d) The third Appellant was considered by reference to paragraph 276ADE(iv) but given that her parents were not entitled to leave and her younger sister did not meet and of the private life requirements of 276ADE(i) it was considered reasonable for them to return to China as a family unit.
    (e) The case was also considered under the heading of exceptional circumstances none of the maters advanced in support of that argument were accepted to render the decision to refuse leave unjustifiably harsh.

<u>The Judge's Decision</u>

16. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Heynes ("the Judge") dismissed the appeals against the Respondent's decision. The Judge found :
17. In relation to the first and second Appellants he did not accept that they had lost all ties to China (paragraph 24)

18. He did not accept that there would be very significant obstacles to them reintegrating back into China as they spoke the language and also English which would help them find employment and he did not accept that there would be such obstacles arising out of them having two children.
19. In respect or the proportionality of removing them he found that the balance was heavily in favour of removal (paragraph 25)
20. In relation to the two children he found that their best interest was to remain with their parents and asked whether they overwhelmed all their factors.
21. He noted the ages of the children and that neither were British citizens. He noted that they both enjoyed good health and education would be available to them in China. He did not find that it was in the best interests of the third Appellant to remain in the UK.
22. He found that the decision to remove was proportionate.
23. Grounds of appeal were lodged arguing that the Judge did not address paragraph 276ADE(iv) in relation to the third Appellant; and that the Judge did not address paragraph 117B(6) of the Nationality Immigration and Asylum Act 2002; the Judges findings at paragraphs 19-23 were inadequately reasoned; the Judge failed to properly address the position of the minor Appellants.

24. On 17 September 2015 First-tier Tribunal Judge Ford gave permission to appeal.

25. At the hearing I heard submissions from Mr Timson on behalf of the Appellants that:

    (a) The Judge did not consider paragraph 276ADE(iv) and paragraph 117B(6) and the gaps could not be filled.

    (b) While there was a reference to paragraph 276ADE (vi) in paragraph 4 there was none to 117B(6)

    (c) The test applied by the Judge in relation to paragraph 276ADE(vi) in relation to the children

26. On behalf of the Respondent Mr Mc Vitie submitted that :

(a) He relied on the Rule 24 notice.

(b) He relied on the decisions in Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) and AM (S 117B) Malawi [2015] UKUT 0260 (IAC) where the courts stated that it is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.

(c) This case was, he suggested, a straightforward one where a couple had come to the UK, overstayed , then used the services available until they tried to regularise their status.

(d) There was only one qualifying child for the purposes of either paragraph 276ADE(1) (iv) or 117B(6) and that was the third Appellant. But she had only just been here for 7 years, some of that period in education, it was reasonable for her to return.

27. In reply Mr Timson on behalf of the Appellant submitted:

(a) The issue was not as simple as set out by Mr Mc Vitie: the Judge had not engaged with the circumstances. The reasons given were inadequate.

The Law

28. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

29. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment

of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him.

30. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

31. Guidance was given as to the general approach in cases involving children in Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 197(IAC) (Blake J) where the Tribunal held that (i) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions: (a) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary; (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong; (iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period; (iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable; (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to

give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.

Finding on Material Error

32. Having heard those submissions, I reached the conclusion that the Tribunal made no errors of law that were material to the outcome in this case.

33. I am satisfied that albeit the decision in this case was relatively brief and rather unhelpfully unstructured when read as a whole it is clear that the Judge had in mind all of the issues that he was required to assess in the decision.

34. The starting point in the case, the background against which the decision in relation to the children was made was that the parents could not succeed under the family or private life requirements of the Rules. The Judge made a concise but well-reasoned decision setting out why he did not find that there would be 'very significant obstacles' to them reintegrating to China the test he properly identified at paragraph 26 and I do not find the reasons given are inadequate. Thus he found at paragraph 24 that given the level of resourcefulness they had shown in coming to the UK they would be capable of reintegrating in China particularly given that he found they were not credible as to their claim that they had no family or ties there to assist them in that endeavour (paragraph 24); he did not accept that having had more than one child would, by reference to the case law of AX (family planning scheme) China CG [2012] UKUT 00097 (IAC) , present such obstacles and set out the reasons for that conclusion (paragraph 27); he suggested that no other matters had been placed before him in support of the argument that there were very significant obstacles but noted that the first two Appellants were Chinese nationals, could speak the language, were resourceful, and the English language skills could assist in finding employment(paragraph 28) I am therefore satisfied that the Judge gave adequate reasons for his conclusions under paragraph 276ADE(1) (iv) for the parents.

35. The Judge then went on to consider the position of the parents under Article 8 outside the Rules at paragraph 25 and identified that the issue was one of proportionality. Against the background of his findings about them being overstayers, working illegally and accessing services they were not entitled to, he was entitled to find that the balance fell in favour of the Respondents legitimate interest in immigration control (paragraph 25).

36. The decision is challenged in relation in relation to the position of both child Appellants generally but specifically in relation to the third Appellant who had been in the UK for 7 years at the time of the application and therefore potentially could meet the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules or paragraph 117B(6) of the Nationality Immigration and Asylum Act 2002. I remind myself that in determining whether this was an error of law that in AM the court found:

"(6) When the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv) it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin; EV (Philippines). It is not however a question that needs to be posed and answered in relation to each child more than once."

37. I note that as his starting point the Judge identified that the best interests of the children was a primary consideration (paragraph 29) I am satisfied that the Judge was entitled to approach this issue on the basis that a determination of what was in the best interests of the children also incorporated what was reasonable.

38. The Judge therefore was entitled to conclude in accordance with all of the relevant case law that the starting point was that the best interests of the children was to remain with their parents who in this case had no right to remain in the UK (paragraph 29). He recognised against a factual matrix which included his previous findings about the family having family in China and access to healthcare and education that the children in this case were only 7 and 4 that neither child were British citizens but were Chinese Nationals who speak both English and Cantonese and both were in good health there was insufficient

evidence to conclude that their best interest were to remain in the UK (paragraph 31) . There was no persuasive evidence before the Judge from any other source to suggest that it would not be in the best interests of the children to return with their parents to China and he would have been entitled to note in accordance with Azimi Moayed that particularly given their ages, other than the fact that the third child was in the early years of their education in the UK there was little evidence to suggest close social and cultural ties outside their family.

39. Once the Judge found that it was in the best interests of the children to remain with their parents and therefore it reasonable for them to be returned to China section 117B(6) did not apply but the other provisions under section 117B could be part of the overall assessment none of which assisted the Appellants. The Judge was entitled to take into account all of his findings to conclude that it was proportionate for the family to be returned together to China.

40. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

41. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

42. **The appeal is dismissed.**

Signed Date 13.3.2016

Deputy Upper Tribunal Judge Birrell