Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/30213/2015
IA/30214/2015
IA/30215/2015
IA/30216/2015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 25th July 2017	**On 7th September 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

L Y
C Y N
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(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Edwards instructed by Saifee Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellants. This direction applies to both the appellants and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellants are citizens of the Republic of China. The first and second appellants are the parents of the remaining appellants. The dates of birth of the third and fourth appellants are respectively 11 January 2008 and 13 December 2013. Consequently, at the date of the First-tier Tribunal's decision they were 8 and 2 years old respectively.

3. On 24 August 2015, the Secretary of State refused each of the appellants leave to remain in the UK based on their private and family life under the Immigration Rules (HC 395 as amended) and outside the Rules under Art 8 of the ECHR.

4. The appellants appealed to the First-tier Tribunal. In a decision promulgated on 4 November 2016, Judge L Murray dismissed each of the appellants' appeals.

5. On 4 April 2017, the First-tier Tribunal (Judge M J Gillespie) granted the appellants permission to appeal to the Upper Tribunal.

6. On 20 April 2017, the Secretary of State indicated that she could not file a rule 24 response in the absence of a determination which was not attached to the grant of permission.

The Appellants' Case

7. Mr Edwards, who represented the appellants, indicated that he had sought to focus the somewhat discursive grounds in his skeleton argument which he elaborated upon in his oral submissions.

8. First, he submitted that the judge had failed to give sufficient weight to the third appellant's long residence in the UK and to the children's best interests. He submitted that the third appellant had lived in the UK for at least seven years at the date of application and over eight years at the date of the judge's decision. Applying the decision in MA (Pakistan) and others [2016] EWCA Civ 705, in determining under para 276ADE(1)(iii) and s.117B(6) of the Nationality, Immigration and Asylum Act (the "NIA Act 2002") whether it was reasonable for the children to leave the UK, Mr Edwards submitted that the judge had failed to accord the required "significant weight" to the third appellant's best interests. The judge had failed to have proper regard to the third appellant's private life developed at a time when it was significant. He relied upon the Upper Tribunal decisions in Azimi-Moayed and others (decisions affecting children; onwards appeals) [2013] UKUT 197 (IAC) and E-A Nigeria [2011] UKUT 315 (IAC).

9. Secondly, Mr Edwards submitted that the judge had failed properly to consider the issue of whether there were "very significant obstacles" to the first and second appellants living in China, including their social and economic circumstances and the difficulty for the second child who would not be registered and would therefore lose privilege including access to, for example schools, housing, and free medical treatment.

Discussion

10. The appellants' claims based upon their private life rely on para 276ADE(1)(iv) and (vi) of the Rules. Those provide as follows:

> "**Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276ADE (1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> ….
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> ….
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

11. Likewise, when considering Art 8 outside the Rules, s.117B(6) of the NIA Act 2002 provides that:

> "(6) In the case of a person who is not liable to deportation, the 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."

12. In MA and others, the Court of Appeal held that whether it is reasonable to expect a child (having been in the UK for seven years or, in the case of s.117B(6) alternatively is a British citizen), in assessing "reasonableness" (at [45]):

> "… the court should have regard to the conduct of the applicant and any other matters relevant to the public interest …"

13. The courts recognise that where the 7-year rule is satisfied that is "a factor of some weight leaning in favour of leave to remain being granted" (at [45]) or "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary" (at [49]). The court also recognised that the child's "best interests" were not determinative and, in assessing reasonableness, could be outweighed by the public interest reflected in, for example, the parents' circumstances and their immigration history (at [42] and [57]).

14. Mr Edwards' first submission is that the judge failed to give appropriate "significant weight" to the fact that the third appellant had lived in the UK for seven years (at the date of application) or eight years (at the date of hearing).

15. Judge Murray dealt with the best interests of both children, but in particular the third appellant, in a number of passages in her determination as follows:

> "22. The third Appellant was born in the UK on 11 January 2008 and has spent 7 years in the UK at the date of the application and 8 at the date of the hearing. It is argued that it would be in her best interests to remain here because the family has nothing left to return to in China and she is doing well here in education and has established friendships. The Appellants additionally stated for the first time in oral evidence that they could not return as the children were not registered with the Chinese authorities. They have neither produced case law nor background evidence in support of this claim."

16. Then, having cited at length the head note in AX (family planning schemes) China CG [2012] UKUT 00097 (IAC), Judge Murray continued at paras 24-25 as follows:

> "24. The Appellants have not sought to present evidence or argue their case in relation to the Chinese family planning laws and any effect this may have on the best interests of the third Appellant. They also have clearly not considered registering the birth in the UK. I conclude therefore that no risks or adverse treatment have been demonstrated in their case. I did not find the first and second Appellants to be witnesses of truth. Initially they maintained that the second Appellant had not worked in the UK but it became apparent through cross-examination that he did work in return for accommodation and food and the payment of their living expenses and they lived above a Chinese restaurant. I find that the Appellants are prepared to change their evidence to suit their needs. I do not accept that the first and second Appellants have lost all contact with China. They clearly have considerable financial support in the UK as the second Appellant has not worked officially since 2009. They have mobile phones, pay for child care and insurance as evidenced by the documents in their bundle. Both first and second Appellants are fit, capable of work and the second Appellant has worked as a chef. There is no reason to assume that he would not be able to find work in China to support his family. No evidence has been presented to show that he would not be able to or that the family would face destitution. It is also reasonable to assume in the light of the financial support that are currently receiving if they had initial difficulties those friends may help if they to return to China.
>
> 25. I assess the best interests of the third Appellant therefore against the background that the family would return together as a unit and I conclude that the likelihood is that the family would be able to support itself on return. There is no doubt that the first and second Appellant are loving parents and so it would be in the best interests of the second Appellant to live with them. The third Appellant has not yet reached a critical stage of her education and at the age of 7 at the date of the application her focus would be on her parents and her immediate family. The courts have consistently said that 7 years from the age of 4 is more significant in terms of a private life than the first 7 years of life. Further, the second Appellant stated that Mandarin is the language of the household and the first Appellant said they spoke to their children in basic English. I find that the third appellant is likely to speak fluent Mandarin and as she is in the early stages of schooling would be able to learn to write without difficulty. Further, her parents have a renewable

> connection with China and therefore her adaptation to life there is unlikely to be problematic. She has no health or other problems which would present difficulties. The Appellants have also not presented evidence in relation to the education system in China to show that she would suffer educationally. The basis advanced in the letter with the application for remaining here was the quality of the education. I accept that she is doing well and enjoying school on the basis of the reports provided. However, here is clearly a functioning education system in China and even therefore according appropriate weight to the length of her residence here I find that it would be in her best interests to return to China with her parents. Even if I were to conclude it were in her best interests to remain, I would consider it only to be marginally so."

17. Then, having cited a passage from MA (Pakistan) (at [103]), Judge Murray continued at para 27:

> "The first and second Appellant arrived in the UK in 2001 and were granted successive periods of leave as students until 30 April 2008. Since that point they have been overstayers. I recognize the significance of seven years residence but taking account of the relevant factors in the proportionality exercise, the third Claimant would return as part of a close and loving family unit to a country which has been the first and second Claimant's home for over 25 years. Both have been students in the UK which is likely to benefit them on return and I have found there would not be financially or other issues on return. The consequences of return are unlikely to be deleterious as she is not at a critical stage of her education and remains of an adaptable age. The Court of Appeal acknowledged at paragraph 46 that the disruption will be less when the children are very young because the focus of their lives will be on their families. I consider in the light of these cogent reasons and in the light of the weight that must be accorded to immigration control it would be reasonable to expect the third Claimant to return under paragraph 276 ADE (1) (iv)."

18. At para 28, having concluded that the third appellant could not succeed under para 276ADE(1)(iv), the judge dealt with s.117B(6) at para 28 as follows:

> "As confirmed by **MA (Pakistan)** the assessment outside the Rules under Article 8 requires the same test in relation to reasonableness to be addressed under s 117 (B) 6. I accept that both first and second Appellant have a genuine and subsisting parental relationship with a qualifying child but I find that it would be reasonable to expect her, at the age of 8 at the hearing, to return to China for the reasons given."

19. I have not set out the judge's earlier citation from MA (Pakistan) at paras 18 and 19 of her determination.

20. It is plain that the judge correctly directed herself in accordance with the requirements of para 276ADE(1)(iv) and s.117B(6) of the NIA Act 2006 as interpreted by the Court of Appeal in MA (Pakistan). She clearly recognised, as she said in para 27, that there must be "cogent reasons" to outweigh the circumstances of the third appellant who had been in the UK for at least seven years.

21. Not only did the judge not misdirect herself in law, she clearly – as the extracts above make plain – considered all the relevant evidence. I do not accept Mr Edwards' submission that she in "some way, failed properly to give appropriate or due weight to the circumstances of the children, in particular the third appellant." She was

entitled to find, as the family would be returning to China together, that it was in the children's best interests to be with their parents. I do not accept that the judge failed to have regard to the integration of the third appellant in the UK at the age of 7 (or 8 for the purposes of s.117B(6)). She noted that the third appellant was not at a critical stage of her education and she did not accept, given that it was the language of the household, that the third appellant could not speak Mandarin. Whilst Mr Edwards' reliance upon cases such as Azimi-Moayed and others does recognise a 'sliding scale' reflecting a child's integration, particularly through education, as the child ages, it does not create any hard and fast rule. Thus, as Blake J noted at [13(iv)] in Azimi-Moayed:

> "… seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable."

22. In his skeleton argument, Mr Edwards submitted, in effect, that the third appellant is not a "very young child" within the meaning given by Blake J. There is a danger of seeking to elevate the illustration given by Blake J to a yardstick by which to judge the significance of any interruption to a child's private life. He was simply observing that a child between the ages of 4 and 11 (covering primary school and entry into secondary education) was likely to form a deeper integration and social ties than a child, for example, under the age of 4. The third appellant, of course, falls almost midway on that spectrum. Common sense would suggest that she would have a greater level of private life and integration than a 4-year old child but, perhaps (as it can be put no higher than that) not as great an integration as an 11-year old or a teenager who has been in the UK for seven years. All must, necessarily, turn on the individual child's circumstances and be fact-sensitive.

23. I see, therefore, no basis for Mr Edwards' submission that Judge Murray failed to have full regard to the third appellant's (and also the fourth appellant's) circumstances and the nature and depth of her private life in the UK. The judge did not place the appellant, in effect, in the same category as a 4-year old child. Further, there is no reason to believe that the judge was not aware that the third appellant could not be said to understand written Mandarin language. It is far from clear that this point was specifically relied on by the appellants' (then) Counsel, nevertheless I do not accept that it, in itself, would tip the scales in the third appellant's favour.

24. Finally, on this aspect of the appellants' case, as I understood Mr Edwards' submission it was that the judge was wrong (presumably irrational) in finding that the parents' immigration history was a cogent or powerful reason to outweigh the circumstances of the third appellant and therefore lead to a conclusion that it was reasonable to expect her to leave the UK. Mr Edwards submitted that there must be something to take it out of the "paradigm" case which he postulated to be where the parents were overstayers or illegally here. He gave by way of an example where the parents had perpetrated fraud.

25. On behalf of the respondent, Mr Mills did not accept Mr Edwards' categorisation of the 'paradigm case'. He submitted that the paradigm case when applying para 276ADE(1)(iv) or s.117B(6) of the NIA Act 2002 could be a student studying with leave in the UK whose leave ran out and who then relied upon Art 8.

26. There is nothing in MA (Pakistan) and others to temper the application of the "reasonableness" test in para 276ADE(1)(iv) and s.117B(6) of the NIA Act 2002 so that powerful reasons must fall outside a 'paradigm case'. The balancing exercise is inherently fact-specific. Equally, any attempt to identify the paradigm case will necessarily, as the competing submissions before me demonstrated, falter on the altar of uncertainty. I was shown no material to suggest that the Secretary of State or Parliament had in mind a 'paradigm case' and, more importantly, those which were beyond that sufficient to provide "strong reasons" when applying those provisions. Of course, it is easy to see how in carrying out the balancing exercise the public interest may be greater in, for example, a fraud case than one where, to borrow Mr Mills' example, the parent is a student whose leave simply expires. Overstaying or illegality may, perhaps, fall somewhere between the two. But, as I have already emphasised, everything turns upon an assessment of the individual's circumstances and the public interest and balancing them against each other.

27. In this case, having directed herself in accordance with MA (Pakistan) and others, Judge Murray recognised the public interest on the basis that the parents have not had leave since 2008/2009. It is simply not possible, in my judgment, to conclude that the judge's balancing of the public interest against the circumstances of the appellants', in particular the third appellant, was irrational.

28. As regards Mr Edwards' submission that in applying s.117B(6) the judge had failed to take into account properly that the third appellant was aged 8 at the date of the hearing, that submission cannot stand with the clear words in para 28 of the judgment where Judge Murray specifically took into account in assessing whether under s.117B(6) it was reasonable to expect the third appellant to leave the UK that she was "at the age of 8 at the hearing". Mr Edwards submitted that the extra year and ten months that was reflected in the third appellant's age at the date of hearing was a significant time in her life. That may well be the case. However, the difficulty with the submission is that the judge considered the evidence concerning the third appellant that was before her, including the up-to-date evidence. Having done so, I see no basis upon which it could be said that, even having regard to the third appellant being a little older, was sufficiently significant that the judge's finding that the public interest outweighed the circumstances of the third appellant was irrational.

29. Turning now to Mr Edwards second submission, which was that the judge had failed properly to consider the issue of whether there were "very significant obstacles" to the first and second appellants returning to China. Mr Edwards relied upon changes in Chinese society since they were last living there fourteen years ago. However, as I pointed out to him during his submissions, any such contention would have to be

supported by background evidence and Mr Edwards did not rely upon any particular evidence either that was before the judge or me to support that submission.

30. Mr Edwards also criticised the judge for taking into account in para 24 of her determination that financial support which was currently being received in the UK would be forthcoming if the family returned to China. He submitted that the support received in the UK was tied, at least in part, to the work carried out by the second appellant as a chef.

31. I have already set out the judge's reasons in para 24 of her determination above. In para 24, the judge found that the appellants were not witnesses of truth. That is unchallenged and is, in any event, legally beyond challenge. She also recognised that they worked in return for accommodation and food together with payment for their living expenses. The judge, however, noted that they had mobile phones, paid for child care and insurance and that the first and second appellants were "fit" and "capable of work". Whilst it may be that the support in the UK was tied to the work carried out by the second appellant in the UK, the essence of the judge's reasoning in para 24 is that the first and second appellants have the ability to be self-reliant on return to China. That was a finding entirely open to the judge on the evidence and, in my judgment, the reference to financial support from the UK was not material to that reasoning.

32. Mr Edwards also relied upon the impact of returning to China with an unregistered second child. Judge Murray dealt with this in paras 22-24 of her determination. Mr Edwards did not seek to argue any risk to the appellant based upon any "one-child" policy. As Judge Murray pointed out in para 24, that was not part of the appellants' case before her. As regards the impact of having an unregistered child, Judge Murray noted in para 24 that the first and second appellants had not considered registering her birth in the UK. Indeed, it is plain from para (viii) of the head note in AX that:

> "There are hundreds of thousands of unauthorised children born every year. Family planning officials are not entitled to refuse to register unauthorised children and there is no real risk of a refusal to register a child."

33. Judge Murray's rejection of the argument that there would be adverse consequences or risks due to the second child being unregistered is entirely consistent with the country guidance that unauthorised children would be registered on application.

34. Mr Edwards' submission went no further in challenging the judge's finding that the appellants could not succeed under para 276ADE(1)(vi).

35. Having rejected Mr Edwards' submissions, I am satisfied that it was properly open to the judge and not irrational for her to conclude that the family would be able to establish itself in China and would not face destitution. Despite the length of absence of the first and second appellants from China, they clearly retain ties (not

least in respect of language) and even without any extended family it was not irrational to conclude that there were not "very significant obstacles" to their integration in the country in which they had both lived until they were 25 years old.

36. For these reasons, Judge Murray did not err in law in concluding that the appellants could not succeed on the basis of their private and family life under the Rules and under Art 8 of the ECHR.

Decision

37. Accordingly, the decision of the First-tier Tribunal stands.

38. The appellants' appeals to the Upper Tribunal are dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 6 September 2017

TO THE RESPONDENT
FEE AWARD

Judge Murray's decision, having been upheld, there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 6 September 2017