



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/14092/2017
HU/14094/2017
HU/14095/2017
HU/14096/2017

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Centre
On 17th January 2019**

Decision & Reasons Promulgated

On 6th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**LINGLING [Z] (FIRST APPELLANT)
BO [W] (SECOND APPELLANT)
[J W] (THIRD APPELLANT)
[G W] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Wilford, instructed by Janes Tsang & Co Solicitors
For the Respondent: Mr C Howells, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellants, born on 5th November 1982, 25th February 1982, 16th November 2010 and 20th November 2014, are all citizens of China. The third and fourth Appellants are children of the first and second Appellants. The Appellants were represented by Mr Wilford. The Respondent was represented by Mr Howells, Senior Presenting Officer.

Substantive Issues under Appeal

2. The second Appellant was granted entry clearance to the United Kingdom as a student on 23rd June 2006. He entered the UK on 21st September 2006. On 28th November 2006 the first Appellant was granted entry clearance as a student dependant. In October 2007 the Appellants made application for further leave to remain and that was granted until May 2009. On 13th May 2009 both Appellants made application for further leave to remain which was refused.
3. On 6th June 2012 the first Appellant made a human rights application which was refused in July 2013. On 24th March 2016 a Statement of Additional Grounds was submitted, and on 18th October 2017 the Respondent refused the Appellants' application for leave to remain.
4. The Appellants appealed that decision and their appeals were heard by Judge of the First-tier Tribunal Vernon sitting at Newport on 28th February 2018. The judge dismissed all the Appellants' appeals. Application for permission to appeal was granted and the matter came before the Upper Tribunal firstly to decide whether an error of law had been made in this case. The matter came before me in accordance with those directions on 16th October 2018. At that hearing Mr Howells on behalf of the Respondent accepted that the judge had not applied the correct law or test when considering the case of the third Appellant and it was conceded that a material error of law had been made. I therefore set aside the decision of the First-tier Tribunal and by agreement proceeded to rehear the matter in the Upper Tribunal on 17th January 2019.

The Proceedings - Introduction

5. Both parties in this case agreed that no further evidence was required, nor would any further evidence be provided. I therefore heard submissions from both parties.

Submissions on behalf of the Respondent

6. It was submitted there were two issues; firstly, as to whether the third Appellant was a qualifying child within the terms of the Immigration Rule, and secondly, an examination of the Appellants' cases under Article 8 outside of the Rules. The third Appellant was born on 16th November 2010 and therefore was 8 years and 2 months old at the date of hearing. It was said that the third Appellant was not a qualifying child at the time of the Respondent's decision. It was further noted that the Appellants had

immigration history as noted by the First-tier Tribunal Judge at paragraph 9 in that the mother had been an overstayer since 2009 and the father an overstayer since 2010. It was submitted that both parents spoke English and Mandarin and that both children could understand Mandarin. There was still extended family in China and there was contact with that family and both the adult Appellants had contact with family in China. It was said that both the adult Appellants had a home and business in the UK. It was submitted the best interests of the two children were to stay with their parents, whether that was in the UK or China. In terms of return to China and a consideration of the best interests of the children, it was submitted that both children were Chinese citizens and had relatives in China, the adult Appellants could raise money to reintegrate into China, and there was no real difficulty in terms of that reintegration as there were no health issues, free education was available in China, and that the third Appellant was in year 3 and not therefore at any critical stage of education. There was a basis that both understood or spoke some Mandarin and that school reports demonstrated that they were above average students and could therefore learn to write Mandarin. There was no reason to doubt the parents would not provide their children with a good education in China. It was submitted that following the cases of **MA** and **KO [2018]** it would not be unreasonable to expect the child to leave, even where the child's best interest was to remain in the UK when looking at the case in the round. I was referred to specific paragraphs within **KO**, in particular paragraphs 17 and 18 and 46 onwards. It was submitted that it was found reasonable for the child to leave the UK, it was submitted that the balance in respect of immigration control was strong, and little weight should be given to private life particularly of the adult Appellants as they were overstayers and therefore their private life was either precarious or unlawful.

Submissions on behalf of the Appellants

7. It was accepted that the Respondent's submissions accurately set out the position in **KO [2018]**. It was submitted that the sins of the parent should not be visited on children in the assessment of the best interests of a child. It was accepted the starting point in **KO** was that it would be reasonable to expect a child to accompany the parents if they left. It was submitted that **KO** did not address paragraph 46 of the case of **MA** where there had to be strong reasons given for requiring a qualifying child to leave the UK under the terms of Section 117B(6). It was submitted it was unreasonable for the child to leave the UK. It was said that the child had been born in the UK and had been at the present school for some four years. It was submitted that they would have problems in terms of education in China and I was referred to the Appellants' supplementary bundle in terms of the teaching of children in China in years 4 and 5 to underscore the uphill struggle that would be faced by the third Appellant. It was submitted that a consideration of the third Appellant's case would demonstrate it would be unreasonable for her to leave the UK and therefore all four should succeed in this case.

8. At the conclusion of the hearing I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

Decision and Reasons

9. In this case the burden of proof lies on the Appellants and the standard of proof for both immigration and human rights issues is a balance of probabilities.
10. I have carefully considered all the evidence in this case. The Appellants' appeal is brought under Section 82(1)(b) of the 2002 Act on the basis that the Respondent has refused the Appellants' human rights claim under Article 8 of the ECHR.
11. If the Appellants came within the terms of the Immigration Rules then that factor is strong evidence that removal would be disproportionate under Article 8. If the Appellants do not come within the Immigration Rules then their cases need to be considered under Article 8 of the ECHR outside of the Rule which includes the statutory duty to examine all aspects of Section 117B of the 2002 Act. In a case such as this where a child or children may be affected directly or indirectly by removal, there is an obligation to consider that child's best interests in accordance with Section 55 of the Borders Act. As a matter of good practice, the examination of the child's best interest which is a primary consideration is usefully conducted first.
12. None of the Appellants come within the Immigration Rules including the third Appellant who is not a qualifying child (seven years' residence or more at the appropriate date). It is accepted in both the Grounds of Appeal and the skeleton argument that their case falls for consideration outside of the Rules.
13. I deal first with the best interests of the children. The third Appellant, born in the UK on 16th November 2010, is now 8 years old and in year 3 at primary school. The fourth Appellant who is younger was born in the UK on 20th November 2014 and therefore is now 4 years old.
14. The evidence strongly points to both parents being caring and supportive who seek to achieve the best for their children. It is easy to establish that the children's best interests lie by being with their parents. Beyond that obvious and perhaps overwhelming factor, there are a few other factors disclosed by the evidence. Firstly, both children are Chinese citizens, as are their parents, and have potentially right to grow up within their own country and the knowledge of their own culture and people. There is extended family in China with whom the Appellants are in regular contact. It is a not insignificant factor in a child's best interest to have contact and a relationship with members of their extended family. Both children have not lost or are unaware of their Chinese culture and heritage and the

evidence was that the third Appellant spoke some Mandarin, although English is her first language. Whilst the third Appellant has been at school in the UK she has been at primary full-time for less than four years and is not at a critical point in her education.

15. Accordingly, the schooling and education that has been gained by the third Appellant is a factor but not in the dynamics of this case a particularly significant factor. I accept that she is an above average student and gets on well with others. I find no reason to suggest that that would not continue in China. I accept there may be a period potentially relatively short, where settlement into a new school in China and being required to read/write Mandarin as a first language may present some difficulty but I find that difficulty has been exaggerated and I find nothing to suggest that the third, and indeed fourth Appellant would experience any real problems in writing and communicating in Mandarin. Children are resilient and adaptable. Moving to new schools is something almost all children experience and moving to a new school in a different country is also something that is not particularly uncommon.
16. There are no educational, health or mental issues with either child, or indeed their parents. The parents have financial resources additional to family support in China. They are resourceful individuals. I find therefore when considering all of the evidence that the best interests of the children are balanced in favour of residence in China rather than in the UK.
17. In terms of proportionality under Article 8 of the ECHR I have moved to the final stage test in **Razgar** finding evidence to indicate the first four stages are met. I have carefully considered Section 117B of the 2002 Act. The maintenance of effective immigration control is in the public interest. The adult Appellants may speak English and may be considered financially independent and those factors in Section 117B(2) and (3) do not go against the adult Appellants. Their private lives in the UK have been continued extensively whilst they have remained as overstayers and therefore unlawfully. Their private lives therefore count for little. Finally, in terms of Section 117B(6) I accept Appellants 1 and 2 have a genuine and subsisting relationship with their children, namely Appellants 3 and 4. However, having found the best interests of the children lie in a return to China and that being a primary consideration in this case, I do not find that it would be unreasonable to expect the parents to relocate to China from the UK. I further do not find that it would be unreasonable to expect the children to go to China, that being in their best interests.
18. For the sake of completeness I have considered the recent case of **KO [2018] UKSC 53** which would have a relevance if I found the best interests of the third Appellant were to remain in the UK and concluded therefore that it would be unreasonable to expect her to leave the UK under the terms of Section 117B(6). **KO** with reference to the case of **NS (Sri Lanka)** found that “reasonableness” is to be considered in the real

world context in which the child finds themselves. The parents' immigration status is a relevant factor to establish that context. If a child's parents are both expected to leave the UK, the child would normally be expected to leave with them unless there is evidence that that would not be reasonable. I find the rationale in **KO** such that even if I had found the third Appellant's best interests lay in remaining in the UK that would not be the conclusion of the matter and **KO** does not suggest that Section 117B(6) should be considered in isolation. I would find, having regard to **KO** that both parents are expected to leave the UK and it would not be unreasonable in those circumstances to find both the third and fourth Appellants should leave the UK in company with their parents. However, as I have indicated, I have concluded the child's best interests lie in relocating to China when considering all of the relevant evidence and I find that a removal of all of the Appellants as a cohesive family unit to China is not disproportionate under Article 8.

Notice of Decision

19. I dismiss this appeal under the Human Rights Act.


No anonymity direction is made.

Signed 
Deputy Upper Tribunal Judge Lever

Date 5.13.17

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed 
Deputy Upper Tribunal Judge Lever

Date 5.13.17