Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27250/2010

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 3 December 2013	**on 17 December 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KONG YOKE CHYE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms N Loughran, of Loughran & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant applied on 11 April 2008 for leave to remain in the UK, outside the Immigration Rules, on the basis of private and family life in the UK. The respondent refused that application for reasons explained in a letter dated 10 June 2010. First-tier Tribunal Judge Scobbie dismissed the appellant's appeal by determination promulgated on 9 August 2010. At a hearing in the Upper Tribunal on 3 February 2011 before Designated Judge Murray parties agreed that the determination of the First-tier Tribunal erred materially in law. The case comes before me following a transfer order made for administrative reasons, to avoid further delay.

2) The history of delay is a long one, due initially to the respondent, and later mainly to the appellant, in respect of matters such as change of

representation, adjournment to obtain an expert report, and non-availability of representatives. Nothing turns on the various delays.

3) There was before the FtT judge a question, then based only on a passage in the US State Department Report 2009, whether the appellant's child would be treated in Malaysia as stateless and thereby deprived of health, education and other facilities. Error thereon was the original ground of appeal to the UT. It is not clear from the record whether on 3 February 2011 error was thought to arise from lack of reasoning on that question, or from failure to take account of the principles explained (subsequently to Judge Scobbie's decision) in ZH (Tanzania) [2011] UKSC 4 regarding the best interests of the child. Perhaps it was both. No error of law decision was issued. The question is not now important, because it is common ground that an entirely fresh decision must be reached, on all evidence now available.

4) The personal circumstances and immigration history of the appellant, his partner and child in the UK are not in dispute. He is a Malaysian citizen and passport holder of ethnic Chinese origin, born on 18 April 1980. His partner is Pei Nam Tsi Thow, also a Malaysian citizen and passport holder of ethnic Chinese origin, born on 5 October 1980. Both are non-Muslims - he describes himself as of no religion, and she describes herself as Buddhist. He says that he entered the UK unlawfully in 2002 and has been here ever since. She entered the UK in or around 2001, initially on some form of visa, and then remained unlawfully. They say they met in 2002 and have lived together since 2003. They have one child, Shen Hei Kong, born in the UK on 2 July 2010. Both parents are named on his birth certificate. Since 2010 they have lived with a sister of the appellant's partner and her husband. The sister has indefinite leave to remain in the UK, and the husband is a UK citizen. Those relatives have a son, born on 20 April 2010. The boys are constantly together.

5) The appellant and his partner have been legally free to marry in the UK for some time, the respondent's agreement no longer being required. They made enquiries at the registrar's office with a view to marrying, and were told they would need their passports as evidence of identity. The passports were in the hands of the respondent, and matters were taken no further.

6) The appellant now puts his case on (a) risk arising from his child being treated as stateless and (b) the close links he, his partner and their child have with extended family in the UK, and in particular the best interests of the two children, whose bond is closer than usual with cousins, more akin to brothers or even twins.

7) There was before the First-tier Tribunal the US State Department Report 2009. Ms Loughran referred also to the US State Department Report 2011, but did not identify any difference between the passages referred to in the two reports. There does not appear to be any. At section 6 of the report under the heading "Children", the following appears:

> Citizenship is derived from one's parents (see section 2.d). Parents must register a child within 14 days of birth. The authorities require citizens to provide their marriage certificate and both parents' Malaysian Government multi-purpose card … parents applying for late registration must prove the child was born in the country. The authorities do not enter the father's information for a child born out of wedlock unless there is a joint application by the mother and the person claiming to be the father … Marriages between Muslims and non-Muslims were officially void. Couples in such marriages had difficulty registering births that recognise the father due to the invalidity of the marriage. Children without birth certificates are stateless and denied entry into both public and private schools. Stateless children … were required to pay higher medical fees, which caused hardship in many cases.

8) The passage marked in the appellant's bundle in the US State Department report at 2.d reads:

> Citizenship is derived from one's parents (*ius sanguinis*). NGO estimates that the number of stateless persons range from several thousand to as many as 30,000. A foreign government estimated that approximately 10-20% of the 60,000 illegal immigrants and persons of concern living in Sabah were stateless children born in Sabah. Government officials denied stateless persons access to education, health care, and the right to own property.
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> Some persons were stateless because the government refused to register their birth due to inadequate proof of their parents' marriage. Interfaith marriage is not recognised by the government sometimes resulted in undocumented *de facto* stateless children.

9) There is an excerpt of information from the UNHCR Refugee Agency *Refworld*, in turn sourced from information provided by the Immigration & Refugee Board of Canada, dated 16 November 2007:

> The constitution of Malaysia governs the issue of Malaysian nationality … However, children born in wedlock abroad to a Malaysian mother and a foreign father are considered to have received the father's citizenship. Children born out of wedlock, abroad, to a Malaysian mother are not considered citizens, but may enter Malaysia with permanent resident status, with the mother, and may apply for citizenship …
>
> Applications for confirmation of citizenship status and applications for citizenship are made to the National Registration Department of Malaysia … the documents required will vary …

10) There was also produced an excerpt from the National Registration Department of Malaysia website on "special circumstances" regarding application for citizenship under Article 15A of the Constitution. This, however, is not enlightening as to the circumstances under which such an application may either be required or granted.

11) E-mails between the respondent and the Malaysian High Commission in the UK run as follows:

> From Home Office to High Commission, 24/6/13:
>
> *Please can you confirm if UK born child is entitled to Malaysia citizenship if both their parents are Malaysian nationals but are unmarried.*
>
> From High Commission to Home Office, 25/6/13:

… A child born to Malaysian parents is entitled to a Malaysian citizenship.

From High Commission to Home Office, 27/6/13:

For unmarried couple, as long as the mother is a Malaysian the child can apply for a Malaysian citizenship.

12) The appellant produces a report from Dr D K Brown, Reader in International Development and Head of the International Development Group at the University of Bath. He is an expert on the politics of ethnicity and citizenship in Malaysia, and has discussed this case " … (although not the specific details) with a number of practising lawyers and civil rights activists in Malaysia." He says at paragraph 1:

> Following Malaysian citizenship law, an application to *register* the citizenship of the applicant's child (*rather than seek naturalisation*) is permissible insofar as the child meets the formal criteria laid out in the constitution. Under part II of Schedule 2 of the Constitution, however, the child is entitled to citizenship by operation of law on the basis that the father is a Malaysian citizen and was born in the Federation. Article 15(2) of the Federal Constitution, however, *permits* the Federal Government to register the child of a citizen irrespective of place of birth, but does not *oblige* it likewise. It is outside of my competence to comment on the legal implications of these provisions.

13) Dr Brown comments on widespread discrimination by government bodies and agencies against non-Malays and non-Muslims. He goes on:

> 4. Registration of citizenship requires demonstration of "elementary knowledge of the Malay language, but neither the law nor any publicly available official guidelines determine what constitutes "elementary" knowledge nor how this regulation be applied to children … an additional area of ambiguity and uncertainty for the citizenship applicant's child.
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> 5. There is ambiguity in Malaysian legal practice over the status of children born out of wedlock outside the country. It may be that the child is required to seek naturalisation rather than registration because of the marital status of the applicants at the time of the child's birth. I have been unable to ascertain how far this has been applied in practice. Naturalisation is clearly a much more difficult process …
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> 6. In the event that the child is denied citizenship registration, the child will not be entitled to attend state school … couples without the appropriate marital certificates can find it impossible to enrol their child into schools … The risk of the child being denied a basic education is hence two-fold, both on the basis of the risk to his citizenship and the risk that the applicant's marriage is not recognised.
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> 7. … While the applicant's child appears to fulfil the technical requirements for registering citizenship … there is a very realistic chance that the child will be denied citizenship registration … the administration of citizenship status in Malaysia is arbitrary and discretionary and tends to look disfavourably upon non-Muslims, upon unmarried couples, and upon those without a strong command of the Malay language. The applicants fall into all three of these categories; I would hence conclude on the balance of probabilities that there is a strong chance that the child would be denied registration and … consequently be denied his fundamental rights for education.

14) Mr Mullen relied upon MA (Ethiopia) v SSHD [2009] EWCA Civ 289, where the outcome depended upon whether the Ethiopian authorities would allow the appellant to return to Ethiopia. Elias LJ said that it was not for the Asylum & Immigration Tribunal simply to determine that question to the usual standard of proof:

> It is a question which can … be put to the test. There is no reason why the appellant should not herself make a formal application to the Embassy to seek to obtain the relevant documents …
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> 50. In my judgment, where the essential issue before the AIT is whether someone will or will not be returned, the Tribunal should in the normal case require the applicant to act *bona fide* and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return.
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> 52 … *Bradshaw* is an example of such a case. The issue was whether the applicant was stateless. Lord MacLean held that before a person could be regarded as stateless, she should make an application for citizenship of the countries with which she was most closely connected.
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> 53 Any other approach leads, in my view, to absurd results.

15) Stanley Burnton LJ discussed the same question at paragraphs 77 to 85, finding no good reason why the appellant should not be required to take reasonable steps such as applying to the Embassy for recognition of her Ethiopian nationality.

16) On that evidence and authority, is the appellant's case (a) established?

17) None of the terms of the Constitution, or other citizenship law of Malaysia, has been produced for direct reference.

18) The appellant and his partner could marry if they chose. There is no reason to think the respondent would not make the passports available for that purpose. I do not regard this as a critical point, but if they were to marry that could only tend to help the child's situation.

19) Some misconceptions appear to have arisen from the passages in the US State Department Report. If citizenship is derived from the parents, this child qualifies. The requirement to register a child within 14 days is a requirement to register the birth, not to make a citizenship application. The present case is not one of late registration of birth, but of a child born out of the country and whose birth has duly been registered abroad. He has both parents on his birth certificate. Although Ms Loughran drew attention to the passage on void marriages, this is not a relationship between a Muslim and a non-Muslim. It is between two non-Muslims, a very common situation in Malaysia. The concerns over stateless children expressed in the passages quoted (and elsewhere in the US State Department Report and other background material) relate to the children of illegal immigrants and refugees from countries outside Malaysia, not to children with two Malaysian citizen parents.

20) The Immigration & Refugee Board of Canada information is not explicit about citizenship of a child born out of wedlock to two Malaysian citizens abroad. It tends to suggest that citizenship would either be automatic, or readily granted. Ms Loughran drew attention to the sentence, "A child born in Malaysia does not automatically obtain Malaysian citizenship". I am satisfied that concerns not a child of Malaysian parents, but a child of non-Malaysian parents. It is well known that birth in the national territory by itself in some countries confers citizenship, but in many it does not. That is why the sentence appears.

21) There has been no reference to any evidence that any child of two Malaysian citizen parents, of whatever ethnicity or religion, and wherever born, has ever been regarded by the Malaysian state as stateless. If such a practice exists, there might be some reported examples, and criticism from sources such as *Refworld* and the US State Department.

22) Neither party referred to any principle of private international law, or of evidence. While the private international law of Scotland and that of England and Wales are distinct, there are no differences for present purposes, and citizenship law is UK law. It is presumed that the foreign law coincides with the UK position unless the contrary is established. A child born abroad to two UK citizen parents is a UK citizen. (It would be rather surprising if the law of most countries does not recognise citizenship of a child born abroad of two citizens.) The burden of proof is on the party who maintains that foreign law is different. Where foreign law is relevant, it is to be established as a matter of fact. A common way of establishing it is by a report or opinion from a lawyer qualified in the relevant jurisdiction. That is not the only way, and this jurisdiction has no strict requirements of evidence, but it would have been the obvious course.

23) I make no criticism whatsoever of Dr Brown, who has tried to answer the questions put to him as best he can, but, as he recognises at the outset, he is not an expert on the law of Malaysia. There is confusion in his report and in the appellant's presentation of the case arising from the distinction which obviously exists in Malaysia between registration of birth and registration of citizenship. It is by no means clear, on any view of the evidence, that the child in this case has to register or apply for citizenship, as distinct from being automatically entitled to it without any process.

24) Ms Loughran asked me to prefer a detailed expert report to "a one line e-mail from an unidentified person in the High Commission". However, the expert report is, for the reasons given above, well short of conclusive, and I see no reason not to accept the information provided by the High Commission, which is in a position to know, and has no axe to grind.

25) In any event, there was no answer to the Presenting Officer's point based on MA. It is in the appellant's power to apply on the child's behalf to the High Commission for further informal confirmation or for a passport.

Without taking that course, the question cannot be answered in favour of the appellant.

26) The case for the appellant so far as based on the alleged risk of his child being regarded as a stateless person in Malaysia is not established.

27) It is not necessary to go further than that; but on all the evidence, I think it is overwhelmingly likely that there would be no problem of non-recognition of citizenship of the appellant's child, and that a passport would be forthcoming without any difficulty.

28) On the correct approach to the interests of the children, I was referred to the summary agreed in Zoumbas [2013] UKSC 74 at paragraph 10:

> (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
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> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
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> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
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> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
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> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

29) The Article 8 considerations on the appellant's side are as summarised above, derived from witness statements from the appellant, his partner and her relatives in the UK. I accept that there is an intimate network among the three immediate family members and other near relatives, the most important aspect of which is the relationship between the two three year old boys, brought up closely together. To disrupt that is unfortunate, and no doubt each would miss the other, but it cannot be said to have any long term adverse impact on their well-being and prospects in life. Many people do not live in the same neighbourhood or country as all their close relatives. The appellant and his partner have close family also in Malaysia.

30) There was some evidence, although Ms Loughran did not give it any emphasis, going to whether or not the appellant and his partner have a

wider family network capable of providing economic support in Malaysia. I do not find it a matter of any importance. They are both young and capable of working. Even if their relatives are elderly and not capable of providing financial support, there is no reason why the appellant and his partner should not be able to provide for themselves and their child.

31) The immigration history of the appellant and his partner is, as Ms Loughran pointed out, nothing like as bad as Mr Zoumbas and his wife, but there is nothing in the appellant's immigration history to his credit, and little in hers, other than arriving lawfully in the first place. As Mr Mullen observed, their situation in terms of family and private life has been built up entirely while they have remained for many years without any entitlement. As to the general considerations relating to immigration control, guidance is in Huang [2007] UKHL11 at paragraph 16:

> The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.

32) This is not a case of crime or fraud but it is one of abuse, and there is a public interest in maintaining an effective system according to the Rules.

33) There is no significant detriment to the two children or to anyone else which would render removal a disproportionate step.

34) By concession of the respondent, the determination of the First-tier Tribunal is **set aside** for error of law. The following decision is substituted: The appeal, as brought to the First-tier Tribunal, is **dismissed**.

6 December 2013
Judge of the Upper Tribunal