IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/19394/2013
OA/19396/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower Birmingham	**Decision & Reasons Promulgated**
On 10th April 2015	**On 17th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) JIANCHUN CHEN
(2) XINYAO CHEN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, BEIJING

Respondent

Representation:
For the Appellant: Mr A Pipe (Counsel)
For the Respondent: Mr N Smart (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge D S Borsada, promulgated on 17th September 2014, following a hearing at Birmingham Sheldon Court on 8th September 2014. In the determination, the judge dismissed the appeals of Jianchun Chen and her daughter Xinyao Chen. The Appellants subsequently

applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are mother and daughter. The first Appellant, the mother, Jianchun Chen, was born on 30th March 1981. The second Appellant, the daughter, Xinyao Chen, was born on 19th October 2001. Both are citizens of China. They appealed against the decision of the Respondent to refuse their application for leave to enter the UK as the partner and child respectively of the Sponsor, Yuehua Gao, a British citizen, settled in the UK.

The Appellants' Claim

3. In the refusal letter dated 20th September 2013, the applications of both Appellants were initially refused on two grounds. First, that the Sponsor Yuehua Gao, "not show earnings of £22,400 as required for the preceding year in order to meet the financial requirements as defined in paragraph E-ECP3.3. Second, that the issue could not be satisfied that there was adequate accommodation available for both the Appellants without recourse to public funds. The refusal letter also stated that

> "… no final determination has been made at this stage as to whether you meet the income threshold. This is because of course I have not yet decided the outcome of the Secretary of State's appeal in a legal challenge to the income threshold requirement …"

Following a review by the Entry Clearance Manager subsequently, however, it was accepted that accommodation was indeed available, and so the only issue outstanding before the judge in the appeal was the financial requirement.

4. The judge held, however, that, "… The Sponsor's income is probably sufficient to meet the maintenance requirements of the Rules …" (paragraph 7), although it appeared that the pay slips provided by the Sponsor, Yuehua Gao, the mother of the second Appellant, and the wife of the first Appellant, were for July and August 2013 which predated the date of the application. Although she submitted a P45 this did not show how much income was earned. A P60 from the Sponsor for the year ending 5th April 2013 showed an income of only £15,600. The proper evidence had not been submitted and the judge observed that, "The failure to do so is entirely one of the Appellants' own making and any perceived harshness in the outcome of the decision was entirely one that could have been avoided by them i.e. there is no need to consider the case outside the Rules" (paragraph 7). Nevertheless, the judge did go on to consider Article 8 of the ECHR but held, "It is not my view that the appeal can succeed for that reason and this is even accepting that the matter comes down to one of proportionality in the decision making (**Razgar**)" (see paragraph 7).

5. The appeals were dismissed.

Grounds of Application

6. The grounds of application are as follows. First, that the judge failed to consider that the Sponsor, Yuehua Gao, had a young daughter, namely, the second Appellant, Xinyao Chen, who was a minor, born on 19th October 2001, who at the date of the

decision by the ECO in 2013, was 12 years old. The reasoning provided at paragraph 7 simply does not deal with the position of the second Appellant, Xinyao Chen, who should have been considered under freestanding Article 8 jurisprudence. Second, the Sponsor, Yuehua Gao, was eights months pregnant at the time of the decision and has now given birth to a British citizen child, and the fact that she was pregnant should have been taken into account under the principles of **Beoku-Betts** with respect to the Article 8 rights of Yuehua Gao, the Sponsor, herself as the British citizen in the United Kingdom.

7. Second, the judge misdirected himself because the extent of the Appellants' compliance with the Immigration Rules was relevant in the assessment of proportionality: see **Patel [2013] UKSC 72**.

8. On 19th November 2014, permission to appeal was granted on the grounds that it was arguable that the best interest of the minor Appellant had not been considered by the judge.

9. On 5th December 2014, a Rule 24 response was entered to the effect that, as the second child had not yet been born it was not a material consideration for the judge. The judge was entitled to conclude as he did in holding that the requirements of the relevant Rules were not met.

Submissions

10. At the hearing before me on 10th April 2015, Mr Pipe, appearing on behalf of the Appellants, relied upon his Grounds of Appeal and his skeleton argument. He submitted that the Sponsor had earnt the necessary amount of money for the financial requirements under the Rules and this was accepted by the judge. Therefore, the only issue was in relation to Article 8. Given that the accommodation had been conceded as an issue by the Entry Clearance Manager, the only issue before the judge was in relation to the financial requirement. Indeed, the judge began his analysis (at paragraph 7) with the words that, "I note that there were no other reasons under the Immigration Rules that the Respondent considered had not been met and there were no factual disputes …" (paragraph 7). Where the judge erred was in then moving on to the consideration of the relevant issues before him because the use of the words, "turning therefore to the case outside the Immigration Rules and whether there should be such a consideration on Article 8 grounds …" (paragraph 7) did not lead to the judge considering the "best interest" of the child, the second Appellant in this case. Moreover, whereas the birth of the second child is not directly relevant, what is relevant is the pregnancy of the Sponsor British citizen which was in its eighth month, as this was clearly relevant to the Article 8 rights of the Sponsor herself. A British citizen child was then born to her.

11. Mr Pipe also drew attention to the case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112**, which makes it clear that the extent of compliance with the Immigration Rules is directly relevant to the way in which the Article 8 ECHR balance of considerations falls to be applied. **Mostafa**, submitted Mr Pipe, builds on long established authority because (at paragraph 16) reference is made to the case of **Shamin Box [2002] UKIAT 02212**, and it is said that this "is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by

the decision". Plainly, in this case, the Sponsor, Yuehua Gao, was affected in her family life by the decision in question.

12. Finally, as far as Section 117B(b) of the 2014 Act is concerned, the balance of considerations here would have been in favour of the Appellants because there was no financial dependency on anyone, and certainly not the state, so that the public interest considerations did not militate against the Appellants. Mr Pipe asked me to make a finding of an error of law and to proceed to remake the decision on the evidence before the original judge.

13. For his part, Mr Smart relied upon the Rule 24 response. He submitted that Section 55 of the BCIA was not relevant because the relevant child here is with the parent in China. The unborn child was not relevant to any consideration under Article 8. It did not go to the question of proportionality. The main question was how near to achieving the Immigration Rule the Appellants came. They were not near achieving the requirements of the Rules. What was needed for the financial requirement consideration was evidence of the claimed income in terms of "specified evidence" and this was not forthcoming. There was nothing preventing the Appellants from applying again with the "specified evidence" in the correct format.

14. In reply, Mr Pipe made two points. First, that the essence of Article 8 is that family life must be promoted and protected. The Sponsor was eight months pregnant. This was relevant to the family life of the parties concerned. Second, and even more importantly, the second Appellant child was not considered at all by the judge in the determination in relation to Article 8. The case of **Beoku-Betts** requires the decision maker to look at the rights of the family as a whole. There was, however, an additional third point, in the submission of Mr Pipe. The third point was that the financial requirement was satisfied.

15. This is because if one looks at the Appellant's case, which is set out at paragraph 4(1), it is made clear, from the Appellants' point of view, that as the judge described in his words,

> "I was referred to all the evidence that was now available and to the Sponsor's employment history and this clearly demonstrated that in the two jobs that the Sponsor undertook during the course of 2012 and 2013 she had in total earned more than the required sum i.e. £23,200 and this was over the twelve month period prior to the date of the decision (see wages slips page 57 and 60 to 61). It was notable that none of this information had been challenged by the Respondent. It was acknowledged that there were further pay slips provided which were provided for a period after the date of decision and that these could not be taken into account".

16. Accordingly, the judge was satisfied that the evidence did meet the requirements of the Rules as far as financial standing was concerned. It is this that led the judge in his "findings of fact" to state that "the Sponsor's income is probably sufficient to meet the maintenance requirements of the Rules" (see paragraph 7). Given that this was so, it was entirely wrong to then suggest that there was still a remaining question of the evidence being presented in the "specified form". It was clear that the parties were financially independent. The judge accepted this as so. Accordingly, the constellation of these facts should have gone to the proportionality of the decision with respect to Article 8.

Error of Law

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set the decision aside and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows. This is a case where the Sponsor, Yuehua Gao, is a British citizen settled in the UK. She is in a committed relationship with the first Appellant, Jianchun Chen. She is also the mother of the second Appellant Xinyao Chen. At the time of the hearing before the judge below the Sponsor was expecting another child. Pregnancy notes were put before the judge with further documentation, although these have not been referred to by the judge. In point of fact, however, neither has there been any reference in the "findings of fact" to the second Appellant, the child aged 12, in terms of her "best interest". The second child has now been born and is also a British citizen. **Beoku-Betts** establishes that there is a right to respect for family life, and that family life has to be treated as a whole because the sum is larger than the separate parts. These are the basic facts.

18. It remains true, nevertheless, that at the time of the application by the Appellants to join the Sponsor, Yuehua Gao, there was a case for saying that they could not meet the financial requirements in the Immigration Rules for the period of six months prior to the application because the Sponsor had not been in employment for the full twelve months preceding the application. She began her employment in September 2012. The application was submitted on 21st June 2013. She had been employed by Xing Da Trading Interior Decorations Limited from September 2012 to March 2013. Her gross annual salary was around £23,400. Her gross annual salary from both employers where she worked, was above the threshold required under the Rules. However, she could not submit pay slips prior to September 2012 because she only began working from September 2012 onwards. The issue of her being able to meet the financial requirements of the Rules was the only issue before the judge because accommodation was conceded by the time that the matter had been reviewed by the Entry Clearance Manager.

19. When the judge approached this matter, he did so by recognising that, "There were no factual disputes" but that, interestingly, "the Sponsor's income is probably sufficient to meet the maintenance requirements of the Rules" (paragraph 7). However this statement was subject to what was said in the preceding paragraph (at paragraph 6) that "The failure to provide necessary documentary evidence with the applications necessarily means that the applications fail" (paragraph 6). In this case, it was accepted that the Appellant could not produce the pay slips for the period of six months preceding the application. No issue, therefore, arises in relation to the judge having misunderstood or misapplied the Immigration Rules. The approach of the judge here was manifestly correct.

20. The judge, however, had to then move on to consider the position outside the Immigration Rules. He observed that, "Turning therefore to the case outside the Immigration Rules and whether there should be such a consideration on Article 8 grounds" the position was that "The decision of the Respondent is a fair one in that the Appellants ought to have been in a position to provide the necessary documentary evidence with the applications and the requirements to do so are very

clear" (paragraph 7). It is here that the judge fell into error. To suggest that the Article 8 claim fails simply because if the application fails under the Rules, then a consideration of Article 8 must mirror the decision made under the Immigration Rules, is incorrect. It is incorrect for two reasons.

21. First, the case of **MM [2014] EWCA Civ 985**, saw Aikens LJ in the Court of Appeal clarify that,

> "If a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. …. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim" (paragraph 129).

22. In this case, the Rules, upon the proper construction, are not a "complete code" for dealing with a person's Convention rights (as they are in relation to deportation cases) which Aikens LJ also made clear (see paragraph 135).

23. Second, however, it was plain that in this case there was "an arguable case that there may be good grounds for granting leave to remain outside the Rules", and these good grounds were in relation to the second Appellant, the child aged 12 years, who was the child of the British citizen sponsoring mother in the UK. The failure of the judge to give any consideration to this child in terms of an Article 8 evaluation was an error of law.

24. Accordingly, there has been an error of law in the determination.

Remaking the Decision

25. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today.

26. I am allowing this appeal for the following reasons. First, Section 55 of the BCIA 2009 imposes an obligation upon the responsible party, and not least because there is statutory guidance issued under Section 55 which has to be taken into account, that, "An action concerning children … undertaken by … administrative authorities" must have regard to Article 3 of the Convention on the Rights of the Child 1989 so that "the best interest of the child shall be a primary consideration". It is true that the Section 55 BCIA 2009 duty applies only to children within the UK, but established cases now make it clear that the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under Section 55: see **Mundeba [2013] UKUT 88** and the early case of **T (Jamaica) [2011] UKUT 00483**.

27. The case of **Mundeba** makes it clear that once an immigration decision engages Article 8 rights, due regard must be had to the Convention on the Rights of the Child 1989. The child's welfare includes her emotional needs. The reference to "other considerations" means a reference to other aspects of the child's life (see **Mundeba**). It is now well established that where the interests of the child are under consideration appropriate enquiries need to be made in entry clearance cases with regard to the age, and the care arrangements of the child (see **JO (Section 55 duty) Nigeria [2014] UKUT 00517**). The decision maker must be properly informed of the

position of the child. Being properly informed and conducting a scrupulous analysis is a prerequisite of identifying the child's best interest, and then balancing them with the other essential consideration. Performing these duties will be an intensely fact sensitive and contextual exercise.

28. In this case, it is plain that a 12 year old girl must as a question of "best interest" be in an environment where she is looked after by both her parents, and not least by her mother. It is equally plain, that if she has a sibling, which she now has and who is also a British citizen, then the right to family life must imply a family that is able to live together in the ordinary manner of things as is common place. The case of **Mundeba [2013] UKUT 88** is clear in stating that the focus in Section 55 cases is on the circumstances of the child in the light of her age, social background and development history. This requires an enquiry into whether there is

    (a) evidence of neglect or abuse;

    (b) there are unmet needs that should be catered for; and

    (c) whether there are stable arrangements for the child's physical care.

29. Second, Section 55 BCIA also has a bearing on the consideration of Article 8 rights. This was made clear by Blake LJ when he stated that, "It is difficult to contemplate a scenario where a Section 55 duty was material to an immigration decision and indicated a certain outcome but Article 8 did not" (see paragraph 29 of **T (Jamaica) [2011] UKUT 00483**). In this case, the second Appellant is a young girl in her formative years of life. She is being looked after by a father when the most appropriate person for her at that age is her mother. The mother is clearly desperate to have her child reunite with her, just as she is for her husband, the first Appellant, to be reunited with her. The Sponsor is a person who, on the express findings of the judge below, is able to meet the financial requirements, and has been able to cross the threshold, such that the Appellants would not be a charge on public funds when admitted, and there is a clear desire on the part of everyone to be together in the UK. In these circumstances, the requirements of Article 8 are plainly met. This is so for the following reasons.

30. If one applies Lord Bingham's tabulation in **Razgar** (paragraph 17), the following emerges. First, it is plain that the continued exclusion of the Appellants is an interference by a public authority, namely, the Secretary of State, with the exercise of the Appellants' right to respect for their family life. This family life is qualitatively different with the one that the Appellants are currently enjoying in a foreign country, as against one that they would enjoy when they are all reunited with the sponsoring wife and mother respectively, of the two Appellants.

31. Second, the interference here does have consequences of such gravity as to potentially engage the operation of Article 8 (bearing in mind that this is a low threshold). Third, and on the other hand however, the interference is in accordance with the law because the Appellants cannot meet the Immigration Rules applicable. Fourth, the interference is not necessary in a democratic society, because it is not necessary for the economic wellbeing of the country, or for the prevention of crime, or for the protection of the rights and freedoms of others. There is no hint

whatsoever of any wrongdoing or illegality by any of the parties concerned. In fact, all the evidence is that the Sponsor is able to satisfy the one requirement that she had to in the appeal before the judge below, namely, the financial requirement test by showing that funds are available for the purposes of their maintenance. Fifth, all in all, the interference here is not proportionate to the legitimate public end that is sought to be achieved.

32. It is well established that the material question engaging the proportionality of an administrative decision that threatens to break a family is whether it is reasonable to expect the Appellants to remain separately from a Sponsor, which in this case means a 12 year old daughter from her British citizen mother, just as much as it means a husband from his British citizen wife in the UK, who is now with legitimate status in this country and is settled. On the facts of this case, it is not reasonable.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 16th April 2016

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a whole fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 16th April 2015