



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16147/2014

THE IMMIGRATION ACTS

Heard at Newport
On 7 December 2015

Determination & Reasons Promulgated
On 4 January 2016

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHEUK LAM YIN

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Lai Har Tsang, the Sponsor

DETERMINATION AND REASONS

1. On 7 March 2014, the Secretary of State refused Cheuk Lam Yin (hereafter "the claimant") indefinite leave to remain on the basis of his long residence in the UK under paras 276A-D of the Immigration Rules (HC 395 as amended).
2. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 2 January 2015, Judge A E Walker allowed the claimant's appeal on the basis that the Secretary of State's decision was unlawful and a breach of the claimant's Art 8 rights.
3. The Secretary of State appealed to the Upper Tribunal with permission.
4. The appeal was initially listed before me on 6 October 2015. In a decision dated 16 October 2015, I concluded that the judge's decision involved the making of an error

of law and set her decision aside. I adjourned the appeal in order that the claimant could have an opportunity to produce any further evidence in support of his claim under Art 8.

5. The resumed hearing was before me on 7 December 2015.
6. The sole issue was whether the claimant had established that the Secretary of State's decision breached Art 8.

The Hearing

7. The claimant was not legally represented but was assisted by his mother, the sponsor who spoke on his behalf. In response to a question from me, the claimant and sponsor provided up-to-date information about the claimant's circumstances. In addition, I was provided with a number of documents including photographs, an offer of employment for the claimant and a schedule of the periods of his residence in the UK since he first arrived. Following the hearing, the claimant e-mailed to the Tribunal a number of further documents in support of his claim.
8. In addition, the claimant provided me, through his mother, with a copy of the Court of Appeal's decision in Singh and Singh v SSHD [2015] EWCA Civ 630.

The Facts

9. The claimant is a British Overseas Citizen and a holder of a Hong Kong Special Administrative Region passport. He was born on 17 August 1991. He is, therefore, now 24 years old.
10. The claimant first arrived in the UK on 9 September 2003 with leave as a student valid until 30 July 2004. He was 12 years old when he came to attend school. At that time, both his parents continued to live in Hong Kong where his father was a police officer.
11. The claimant attended school in the following years and subsequently attended Swansea University where he obtained an undergraduate degree and in September of this year obtained a masters degree in mechanical engineering.
12. Prior to 2010, the claimant lived during holidays with his relatives in South Wales, in particular an uncle who lived in Caerphilly. However, during the summer periods the claimant returned to live in Hong Kong with his parents.
13. In 2010 that position changed. The claimant's mother came to live in the UK and the claimant lived together with her in accommodation in South Wales. The claimant's father remained in Hong Kong until 2 October of this year when, following retirement as a police officer, he came to live in the UK. Both the claimant's parents are British citizens.
14. During his period of study since he first arrived in September 2003, the claimant has had leave to remain as a student. That leave was due to expire on 30 October 2013. However, on 18 October 2013 he made an application for indefinite leave to remain

on the basis of his long residence, in particular that he had been continuously lawfully resident in the UK for ten years. Before the judge, it was accepted that during that period the claimant had been absent from the UK for a total of 763 days in the ten year qualifying period between 2003 and 2010 attributable to the claimant returning at the end of an academic year to live with his parents in Hong Kong, to accompany his mother who needed to consult doctors in Hong Kong and in order for him to obtain appropriate visas which he would be unable to do from outside Hong Kong. The judge found that the claimant could not succeed, as a result of these absences, in establishing ten years' continuous lawful residence and so was not entitled to indefinite leave to remain under para 276B of the Immigration Rules. That finding is no longer challenged but, as I shall return to shortly, the claimant now says that he can establish ten years' continuous lawful residence dating back from January 2016.

15. The current situation is that the claimant lives in South Wales with his mother and father. In September of this year he completed his Masters degree and he is working part-time as a waiter and searching for a job more appropriate to his qualification. He provided me with an offer of a job as a sales associate in Cambridge contingent on him obtaining permission to carry out that work.
16. Apart from the claimant and his parents, the claimant's two uncles together with his granduncle and his wife live together in Caerphilly. A third uncle who used to live with them is currently living abroad.
17. The evidence of the claimant and sponsor was as to the closeness of their relationship. The sponsor told me that the claimant was emotionally and financially dependent upon them when he was a student. He remained so. She told me that when she was apart from the claimant living in Hong Kong she was affected by that. She told me that it was part of her culture that two generations should live together. The claimant is her only son and he would look after her. The expectation was that his family and any grandchildren would live with them.

The Appellant's Claim

18. The appellant's claim can be put simply. He argues that he has "family life" with his parents in the UK. He also has private life with an established lifestyle and friends in the UK. If removed, his family and private life will be interfered with. His parents are getting older, they cannot travel as much and they are now retired and do not have so much money to travel. It is important to them, not least because of their culture, that the claimant be allowed to live with his parents.
19. In addition, based upon the grid of periods of residence with which I was supplied, the claimant argues that he will meet the ten years' continuous lawful residence requirement in January 2016 when he will not fall foul of the requirement that he not be absent, in effect, for more than 540 days over that ten year period.

The Respondent's Case

20. Mr Richards did not challenge the factual basis of the claimant's claim. He submitted, however, that the claimant had not established he had "family life" for the purposes of Art 8. He submitted that the claimant is a 24 year old man and the evidence did not establish that there was more than a normal emotional tie between him as an adult child and his parents particularly given the period of time he had been absent from them being educated in the UK.
21. In any event, Mr Richards submitted that any interference with the claimant's family and private life was proportionate. He did not qualify under the Immigration Rules. As regards his claim that he met the ten year requirement in para 276B, Mr Richards submitted that that point had not been reached and, at an appropriate time, within 28 days of his leave running out the applicant could make a fresh claim on that basis. As I understood Mr Richards' submission, he argued that to take this matter into account would, in effect, be to take the claimant's case as a "near miss" which was improper. Mr Richards submitted that carrying out the balancing exercise weighing the public interest against the Appellant's circumstances, given that his private life was established when his status was precarious it should be given "little weight" under s.117B(5) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002") and the public interest outweighed the claimant's circumstances such that any interference with his private and family life was justified.

Discussion

22. The applicable law is well-known and not a matter of contention. I can, as a result, set out as briefly as possible.
23. The claimant relied exclusively upon Art 8 of the ECHR. Art 8 provides as follows:
- "8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 8.2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law AND is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In applying Art 8, I apply the five stage approach set out in R (Razgar) v SSHD [2004] UKHL 27 at [17] as follows.

- (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?
- (2) if so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) if so, is such interference in accordance with the law?

- (4) if so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? and
- (5) if so, is such interference proportionate to the legitimate public end sought to be achieved?
24. Where an individual cannot succeed under the Immigration Rules, there must be “compelling” circumstances to outweigh the public interest such that there would be unjustifiably harsh consequences (see, e.g. SS(Congo) and others v SSHD [2015] EWCA Civ 387 and Singh and Khalid v SSHD [2015] EWCA Civ 74).
25. In assessing whether a breach of Art 8 is established the rights of all the family must be considered (see Beoku-Betts v SSHD [2008] UKHL 39).
26. I turn now to consider each of the questions in Razgar.
27. First, has the claimant established family and/or private life in the UK?
28. The claimant relies upon the closeness of his relationship with his mother and father as establishing family life despite the fact that he is an adult.
29. Whilst family life will usually exist between a parent and child (offspring under the age of 18), and indeed will be presumed to exist, no such presumption exists between an adult child and his or her parents. In Kugathas v SSHD [2003] EWCA Civ 31, the Court of Appeal, applying the Strasbourg jurisprudence, held that “something more exists than normal emotional ties” (*per* Arden LJ at [25]). Sedley LJ stated that without evidence of further elements of dependency, involving more than the normal emotional ties a relationship between an adult child and a parent would not fall within Art 8 (at [15]-[19]).
30. Arden LJ said at [24]:
- “There is no presumption that a person has family life, even with the members of a person’s immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.”
31. That approach has been applied both by the Strasbourg Court (see e.g. AA v UK [2012] INLR 1) and our domestic courts (see, e.g. JB India & Others v ECO [2009] EWCA Civ 234). However, it is recognised that simply because a child reaches majority, any family life that previously existed will not necessarily cease to exist simply because the child has reached the age of 18. The case law is conveniently drawn together in the case of Singh and Singh to which the claimant referred me at [19] – [23]:
- “19. In Etti-Adegbola v Secretary of State for the Home Department [2009] EWCA Civ 1319, the Court of Appeal held that the Tribunal had been correct to follow and to apply

the decision of this Court in *Kugathas*. Pill LJ referred to what Sullivan LJ had said in *JB India*, but continued:

22. The facts in the present case, as accepted by the tribunal, are of a mother who has been living for many years now with two young adult sons in the same household. They have been, and are, helping and supporting each other in the way members of a family living together usually do. They are not financially dependent on each other but there are undoubtedly emotional ties. Some of the expression to which reference has been made in the Strasbourg jurisprudence, “committed relationship”, and “real and effective family ties”, would appear to cover the present situation. However, I accept that the Strasbourg jurisdiction does not all point in that direction. Moreover, I regard myself as bound by the decisions of this court to which I referred, in particular the approval in the case of *Kugathas* of the Commission’s decision in *S* and the approach to that decision of Sedley LJ. The test is that applied by the tribunal, as appears from the expression in the determination. The behaviour is ‘no way exceptional or beyond the norm’ (at paragraph 24), an expression repeated in paragraph 26.
23. I follow that a distinction between underage children and adult children may for many purposes properly be drawn. It is, however, common knowledge that many children, both in this jurisdiction and possibly in other member states, do remain in family homes beyond the age of majority and at least until they are well into their twenties. Having regard to the ordinary use of words, I find it difficult to say that family life determines, subject to exceptional circumstances, when the child or children attain their majority.
20. Nonetheless, on the facts as found by the Tribunal, the appellant did not have a family life for the purposes of Article 8. Arden LJ agreed, and stated:
35. Whether family life exists for the purposes of Art 8 as between a parent and an adult child must depend on the facts. I do not think it necessary automatically determines on obtaining majority, but I am satisfied that the appellant failed to establish family life before the immigration judge and that there is no basis on which this court can interfere with that decision.
21. Etherton LJ also agreed:
37. On the basis *Kugathas*, particularly paragraphs [14] and [16] in the judgment of Sedley LJ and paragraph [25] in the judgment of Arden LJ, the Judge was correct to conclude that there was no family life engagement of Article 8 of the Convention.
22. In *Secretary of State for the Home Department v HK (Turkey)* [2010] EWCA Civ 583, Scott Baker LJ said, in a judgment with which the other members of the Court of Appeal agreed:
16. Normal emotional ties will exist between an adult child and his parent or other members of his family regardless of proximity and where they live. Scrutinising the relevant facts, as one is obliged to do, it is apparent that the respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority.

23. *AP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 89 was decided without reference to Article 8. However, in the course of his judgment, McCombe LJ said:

45. It seems to me that adult children (male or female) who are young students, from most backgrounds, usually continue to form an important part of the family in which they have grown up. They attend their courses and gravitate to their homes during the holidays, and upon graduation, while (as the FTT put it) they seek to “make their own way” in the world. Such a child is very much part of the on-going family unit and, until such a child does fly the nest, his or her belonging to the family is as strong as ever. The proportionality of interference with the family rights of the various family members should receive, I think, careful consideration in individual cases where this type of issue arises.”

32. In *Singh and Singh*, Sir Stanley Burnton said at [24]:

“I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existences or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.”

33. At [25], Sir Stanley Burnton pointed out, referring to the Strasbourg Court’s decision in *AA*, that whether an applicant had established family life for the purposes of Art 8 was likely to be “arid and academic” as, in any event, the relationship would likely give rise to private life and that the real issue would be the proportionality of any interference.

34. Turning to the circumstances of the claimant, I accept that the claimant has a close relationship with his parents, in particular his mother. I accept that there is an emotional tie between them and some financial dependency although the claimant has now begun working. The claimant and his mother have lived together in the UK since 2010 and with his father since October of this year. The closeness of the relationship is, perhaps, illustrated by the fact that the claimant has in the past returned to Hong Kong to accompany his mother to the doctors. I bear in mind what the sponsor told me about the importance and context of family in the claimant’s culture. Of course, the fact that family is important to the claimant – something which would be common in many cultures – would not necessarily entail the existence of “family life” under Art 8. Article 8 is not concerned with the simple issue of whether individuals are “family” but, as Arden LJ pointed out in *Kugathas*, taking all the facts into account whether the substance of the relationship entails such closeness that it goes beyond the normal relationship between an adult child and parents. It may well be thought not to be unusual for some adult children to be close to their parents; just as some might be, by contrast, estranged from them.

35. I also bear in mind what is said in the case law, helpfully summarised in Singh and Singh that an adult child does not necessarily cease to have family life with his parents simply on attaining majority.
36. In this case, the claimant reached the age of 18 before his mother came to the UK in 2010. Whilst the claimant continues to live with his parents, he has studied at university to both undergraduate and graduate level. He is currently working part-time and contemplating, if permitted by the Home Office, to work full-time in Cambridge which is, of course, the opposite side of the country.
37. Although the sponsor spoke of her wish to have the support of the claimant as she and her husband grew old, there was no evidence before me (and certainly nothing I could discern by looking at the sponsor and her husband) to show that she required that support presently. Any future need is necessarily speculative.
38. Despite the fact that the claimant lives with his parents, the evidence does not establish in my judgment the more than normal emotional bonds or dependency that would exist between parents and an adult child aged 24. The claimant is, in fact, striking out on his own both in terms of his tertiary education and employment.
39. Despite the fact that this is a close-knit family, I am not satisfied on a balance of probabilities that the evidence establishes that the relationships amount to "family life" for the purposes of Art 8.
40. However, bearing in mind what was said by Sir Stanley Burnton at [24] of Singh and Singh, I have no doubt that the relationships amount to private life for the purposes of Art 8 and any interference with that private life must be proportionate.
41. I also note other aspects of the claimant's private life which were addressed in the evidence before the judge including his friendships, work and study in the UK (see especially para 34 of Judge Walker's determination). He also has other family in South Wales - two uncles, a granduncle and his wife - with whom I accept private life exists. It was not suggested before me that any family life existed with his other relatives and there is no sound evidence, given the claimant's circumstances, that could support such a finding.
42. Turning then to the second question in Razgar, if the claimant is removed to Hong Kong there will, in my judgment be a sufficiently serious interference with his private life (in the sense of his relationships and other matters I have described above) so as to engage Art 8.1.
43. Turning to the third question, there is no doubt that any such interference will be in accordance with the law. The claimant cannot succeed under the Immigration Rules as Judge Walker found and, at best, he may be able to meet the requirements of para 276B in the future.
44. Fourthly, any such interference will be necessary in a democratic society for the economic wellbeing of the country or for the prevention of disorder or crime.

45. The crucial issue is whether any interference is established to be proportionate.
46. The answer to that question (see Lord Bingham at [20] in Razgar):

“involve[s] the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.”
47. In determining the issue of proportionality, I must also “have regard” to the considerations listed in s.117B of the NIA Act 2002.
48. First, the maintenance of effective immigration control is in the public interest (s.117B(1)). Secondly, it is in the public interest that the claimant speaks English. Although no evidence was led on this issue; I see no reason not to accept that the appellant is able to speak English having obtained undergraduate and postgraduate degrees from Swansea (see s.117B(2)). Thirdly, it is in the public interest that the claimant is financially independent. Again, no evidence was led on this issue apart from the evidence that the claimant was dependent on his parents financially and had a part-time job currently and intended to obtain further employment. For the purposes of s.117B(3) I am prepared to accept that the claimant will be financially independent. Fourthly, the claimant’s private life has been established when his immigration status is “precarious” and, consequently, by virtue of s.117B(5) “little weight” must be given to that private life.
49. Further, in carrying out the balancing exercise, since the claimant cannot succeed under the Immigration Rules, the public interest is entitled to such weight that only “compelling” circumstances can outweigh it.
50. Although I accept that the relationships between the claimant and his mother and father are close, the claimant is an adult with significant qualifications in order to seek employment in Hong Kong. Before the judge, the evidence was that the claimant’s parents owned a flat in Hong Kong. Despite the fact that the claimant’s father had recently come to the UK to live, I was shown no evidence that they no longer own that flat. If that is the case, it would be available to the claimant in which to live. In any event, given that I am satisfied of his employment prospects, I see no reason to doubt that he would be able to accommodate and live in Hong Kong as a result of his own income and, if necessary, any supplementary financial support from his parents.
51. Although I fully acknowledge the sponsor’s evidence concerning the cultural context of family, and the fact that she does not want to be without the claimant, the evidence does not establish that if the claimant had to live in Hong Kong there would be unjustifiably harsh consequences for the sponsor and the claimant’s father. Nothing in the evidence establishes that the claimant’s parents are elderly or are unable to look after themselves satisfactorily without the claimants being present. The claimant’s father is a retired Hong Kong police officer and, I have no evidence that their financial means would not allow visits to Hong Kong by them or visits by the claimant to the UK. Art 8 does not confer a right upon an adult child to live with his family in the UK. Skype has revolutionised the ability to have, in effect, face-to-face contact with friends and relatives over great distances. Taken together with

visits, this allows the claimant and his family to remain in close contact even if he lives in Hong Kong.

52. Finally, although it was said that he claimant will be able to succeed on the basis of 10 years residence in January; that is an application yet to be made and circumstances which do not presently pertain. Neither by reference to the previous application based upon long residence or any future application can the applicant gain any sound purchase based upon a 'near miss' or like argument to support his Art 8 claim (see Patel and others v SSHD [2013] UKSC 72).
53. In my judgment, the claimant's circumstances (taken together with those of his parents and relatives) do not amount to "compelling" circumstances so as to outweigh the public interest. I am satisfied that the claimant's removal is proportionate under Art 8.2.
54. For these reasons, the applicant has failed to establish a breach of Art 8 of the ECHR.

Decision

55. For the reason set out in my decision dated 16 October 2015, the decision of the First-tier Tribunal to allow the claimant's appeal under Art 8 involved the making of an error of law. In my earlier decision, I set aside the First-tier Tribunal decision.
56. I now remake the decision dismissing the claimant's appeal under Art 8 of the ECHR.

Anonymity

57. The sponsor invited me to make an anonymity order in order to protect the privacy of the family. This is not a claim involving children or of any risk to the individuals concerned. Any order must be proportionate have regard to the public interest in open justice. Weighting all the circumstances, I am not satisfied it would be proportionate to grant anonymity in the circumstances of the claimant and his family. Accordingly, no anonymity direction is made.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT **FEE AWARD**

As I have dismissed the appeal no fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal