



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: HU/19986/2018

HU/11987/2018

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THE IMMIGRATION ACTS

**Heard at Field House
on 25 July 2019**

**Decision & Reasons Promulgated
On 09 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**OYF and
ZBO and ZHO
(ANONYMITY DIRECTION MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara of Counsel instructed by Lisa's Law,
solicitors

For the Respondent: Mr T Lindsay of the Specialist Appeals Team

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure
(Upper Tribunal) Rules 2008**

Unless and until a Tribunal or Court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any member of the Appellant's family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

The Appellants

1. The Appellants are father (the Appellant) and his two minor children. The father was born in 1985 and he and the children are citizens of the People's Republic of China. They live with their wife and mother who is also a Chinese citizen. The Appellant and his wife have a third child born last year. I was informed that there is neither any pending application to the Secretary of State for the Home Department for the grant of leave for either or both the wife and the youngest child nor any appeal or other proceedings against refusal of leave.
2. The Appellant claims that he arrived on 15 July 2009 using a false passport. On 6 January 2011 he claimed asylum. The claim was refused and his appeal to the First-tier Tribunal was dismissed. Following the grant of permission to appeal the Respondent (the SSHD) granted him discretionary leave expiring on 13 October 2014. In time he applied for further leave which was refused. By a decision promulgated on 16 June 2016 Judge of the First-tier Tribunal Grimmatt dismissed the appeal and his appeal rights became exhausted on 23 December 2016.

The Original Decision of the SSHD

3. On 5 April 2018 the Appellant with his two elder minor children applied for leave on the basis of private and family life in the United Kingdom, in the case of the Appellant over the preceding 10 years and in the case of the eldest child over a period of at least 7 years. On 17 September 2018 the SSHD refused all three applications.
4. The SSHD noted that each of the appellant children was said to have had no contact with their mother since July 2014. The Appellant could not claim the benefit of Section EX1 of Appendix FM to the Immigration Rules because of his initial illegal entry. In any event it was in the best interests of the children to be in China, the country of origin of their parents and the Appellant and the appellant children would be removed as a family unit. The children were young enough to adapt to life in China and integrate, building on their cultural background as children of Chinese citizens.
5. The Appellant did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and neither he nor his children would face very significant obstacles on return to their integration into life in China where they had extended family. The minor children could go with their father to China, even if the oldest child had been in the United Kingdom for at least 7 years at the date of the application leading to the decision under appeal and had started to develop an individual private life. There were no exceptional circumstances making removal to China unjustifiably harsh for any of them.

The Proceedings in the First-tier Tribunal

6. On 26 September 2018 the Appellant and the appellant children lodged notices of appeal. The grounds refer to Article 8 of the European Convention and the length of time each of them has lived in the United Kingdom. No other particulars are given
7. By a decision promulgated on 3 April 2019 Judge of the First-tier Tribunal G Wilson dismissed all three appeals on human rights grounds. On 21 June 2019 Judge of the First-tier Tribunal Swaney granted the Appellants permission to appeal because it was arguable the Judge had erred in his assessment of the best interests of the eldest child by failing to take into account relevant case law and guidance which, if so, would have infected his proportionality assessment.

Proceedings in the Upper Tribunal

8. On 3 July 2019 the SSHD lodged a response under Procedure Rule 24 which asserted the Judge had taken into account that the oldest child was “a qualifying child” within s.117B(6) Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act) and the rights and best interests of a qualifying child were not “a trump card”. The grounds for appeal were no more than a disagreement with the outcome of the First-tier Tribunal’s decision.
9. Only the Appellant attended the hearing. Mr Kannangara explained that he had virtually no English at all. He confirmed there were no pending applications or proceedings in relation to the immigration status of the Appellant’s wife or their third child who remained in the family home.

Submissions for the Appellant

10. Mr Kannangara relied on the grounds for appeal which challenged the Judge’s treatment of the best interests of the children and the reasonableness of their China. The relevant findings were at paragraphs 45-51 of the Judge’s decision. They were not in accordance with the SSHD’s guidance for caseworkers which provided that a child who had been in the United Kingdom for 7 years or more would not normally be required to leave. Mr Lindsay handed me a copy of the latest version of this guidance entitled ‘Family Migration: Appendix FM Section 1.0b - Family Life (as a Partner or Parent) and private life: 10 Year Routes of 11 April 2019 and explained that so far as relevant to these appeals this edition, subsequent to the First-tier Tribunal hearing made no material changes to the previous edition.
11. Mr Kannangara submitted that the Judge should have found that it was in the best interests of the minor appellants to remain living in the United Kingdom with their parents and that he should then have gone on to assess the proportionality of the SSHD’s decision, whether it was reasonable, separately by reference to paragraph 276ADE(1) of the

Immigration Rules and to s.117B(6) of the 2002 Act. It should be noted that at the hearing before the Judge the eldest child was over 8 years of age. The Upper Tribunal in *Azimi-Moayed and others (decisions affecting children; onward appeals) Iran [2013] UKUT 197* had considered that a child would develop a private life from the age of 4, so at the hearing before the Judge the eldest child had developed a distinct private life. The Judge had erred in considering such a child to be at an age that it would not be unduly difficult to adapt to life on removal to China. Such a child will already have an independent integrated life in the United Kingdom.

Submissions for the SSHD

12. Mr Lindsay relied on the SSHD's response under Procedure Rule 24 that the Judge had taken note of the fact that one of the Appellant's children was a qualifying child. Indeed, the SSHD took the view that this was the only factor in the appeal of any substance. The judge had not overlooked this and the rights and best interests of a qualifying child are not a "trump card".
13. In its decision in *JG (s.117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)* and make clear that the reasonableness of removal was a matter which had to be addressed. The Judge had considered all the relevant issues and had not taken into account any irrelevant considerations. The Appellant had not shown that his decision was perverse.
14. The Appellant had baldly claimed that it was in the best interests of any child to remain in the place where the child is but had cited no authority for the proposition. The grounds for appeal essentially were nothing more than several selective quotations from decisions and the SSHD's own Guidance.
15. The SSHD's Guidance provided that if it was the case that both parents had no right to stay in the United Kingdom and should leave then the starting point was that it was reasonable for their children to accompany them. The Appellant had not shown any evidence that it would be unreasonable to expect his children to leave. Mr Lindsay referred to paragraph 13 of the determination in *Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)* which provides: -

"13. It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

The Judge at paragraph 45 of his decision had considered the best interests of the children and had gone on to make findings as to their adaptability and the proportionality of their removal from the United Kingdom to China. His conclusion that it would be reasonable for them to go to China was sound.

16. Turning to the ground for appeal based on the view expressed in *JO and Others (s. 55 duty) Nigeria [2014] UKUT 00517 (IAC)* evidence of the children's wishes could have been given at the hearing before the Judge at which the Appellant was represented. He referred me to the headnote which stated that

"In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to the SSHD and the ultimate letter of decision."

17. The relevant criteria identified in paragraph 276ADE(1) of the Immigration Rules and s.117B(6) Nationality, Immigration and Asylum Act 2002 as amended were effectively the same and so there was no need for the Judge to conduct separate assessments under the

Immigration Rules and under the 2002 Act. Ground 15 disclosed no arguable error of law.

18. Mr Kannangara confirmed he had nothing further to add by way of response.

Findings and consideration

19. There was no challenge to the Judge's finding that the Appellant with his wife now have three children and that the Appellant had used false documentation to enter the United Kingdom and had been willing to use it again and to conceal material facts when it suited him. The grounds did not challenge the Judge's conclusions on issues relating to the elements of the claim based on the issues of China's population, family planning and sterilisation laws and practices and also financial penalties.
20. Other than the fact of their continued presence in the United Kingdom and the fact of their schooling there was little, if any, evidence of the private life in the United Kingdom of the children beyond their immediate family. There was no evidence of the wishes and preferences of either of them.
21. The Judge noted the elder child, the second named appellant, had been lawfully resident for more than 7 years and so was a qualifying child for the purposes of s.117B of the 2002 Act and that neither of the children's parents had a lawful right to remain in the United Kingdom: see paragraphs 56 and 54. Given the Judge's finding that the elder child was a qualifying child, references to the decision in *Azimi-Moayad* would have been otiose, given the development of the relevant statute law.
22. At paragraph 57 the Judge noted the issues which the children would face on China and concluded, in the light of his findings at paragraphs 45-49 that it would be in their best interests to remain with their parents and indeed in all the circumstances to start integration into life in China at the earliest opportunity. He concluded there were no very significant obstacles to the parents' reintegration into life in China with their children.
23. The Judge referred to *KO and Others* as well as a part of the judgment of Elias LJ in *R (MA (Pakistan) and Others) v SSHD [2016] EWCA Civ. 705* which was not criticised in *KO and Others. JG (s. 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)* was reported 3 days after the hearing before the Judge. There was no subsequent communication from either party to the First-tier Tribunal that the Judge should consider re-convening or further submissions on *JG*. The decision was promulgated some 3 weeks after *JG* had been reported.

24. Neither the grounds for permission to appeal nor the submissions made to the Upper Tribunal referred expressly to *JG* or even suggested that had the Judge had the decision in *JG* been before him his conclusions would have been any different.
25. The Judge's decision criss-crosses between the best interests of the children and the relevant public factors to be considered in relation to the Appellant, their father, under s.117B of the 2002 Act and the assessment of the proportionality of the SSHD's decision with regard to the legitimate objectives identified in Article 8(2) of the European Convention. This does not make for an easy understanding of the decision. Nevertheless, I am satisfied that having noted the Tribunal's decision of 16 June 2016 and the principles of jurisprudence enunciated in *Devaseelan* and decided the Appellant and his wife had no lawful leave the Judge assessed the circumstances and best interests of the children without regard to the failure of the parents to obtain leave. If the parents were entitled whether within or outside the Immigration Rules to remain in the United Kingdom, it would not have been necessary for the Judge to have considered the possible removal of the children to China.
26. I find the decision of the First-tier Tribunal does not contain any material error of law such that it should be set aside and conclude the grounds for appeal amount to no more than disagreement with the Judge. Accordingly, the decision of the First-tier Tribunal shall stand.

Anonymity

27. An anonymity direction was made by the First-tier Tribunal. The second Appellant is a teenage child and although no submissions were made on the point at the hearing, I consider it appropriate to continue the anonymity direction.

SUMMARY OF DECISION

**The decision of the First-tier Tribunal does not contain an error of law and shall stand.
The substantive appeal of each of the Appellants is dismissed.
Anonymity direction continued.**

Signed/Official Crest

Date 01. 08. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal