



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/07608/2013
OA/07606/2013
OA/07605/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11th July 2014

Determination Promulgated
On 5th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS XIUZHU CHEN (FIRST APPELLANT)
MR XIE KAILIANG (SECOND APPELLANT)
MR XINYI XIE (THIRD APPELLANT)
(No Anonymity Direction Made)

Appellants

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr M Adophy instructed by Saintta International Lawyers
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The application for permission to appeal was made by the Secretary of State on behalf of the Entry Clearance Officer but I shall refer to the parties as they were before the First-tier Tribunal that is Miss Xiuzhu Chen, Mr Xie Kailiang and Mr Xinyi Xie as the appellants and the Entry Clearance Officer as the respondent.

2. The appellants are wife and children of the sponsor Xie Xiaojang and they appealed against the decision dated 28th February 2013 of the respondent who refused to grant them entry clearance to join the sponsor further to Appendix FM of the Immigration Rules.
3. The appeal was refused under the Immigration Rules as the appellants could not comply with the financial requirements. The sponsor earned £21,600 per annum and then there was a shortfall of £3,140 under the Rules.
4. Following an application for permission to appeal I found an error of law and I therefore set aside the decision made by First-tier Tribunal Judge Adio who allowed the appeal on human rights grounds considering the matter under **Razgar v Secretary of State for the Home Department [2004] UKHL 27**.
5. The respondent had previously filed grounds for permission to appeal on the basis that Judge Adio had failed to follow **Gulshan [2013] UKUT 00640** and **Nagre [2013] EWHC 720**. The judge had followed **MM and Others [2013] EWHC 1900** but this did not dispute the Secretary of State's entitlement to set a minimum income threshold. It established that those who wished to set up family life in the UK should have the financial ability to support themselves such that the migrant partner did not become a burden on the tax payer.
6. I found that the requirements as set out in **Shahzad (Article 8 Legitimate Aim) [2014] UKUT 85 IAC** and **Gulshan** required that arguably good grounds in the circumstances must be set out as to why it is necessary to consider the matter outside the Rules.
7. At the hearing there was no interpreter but Mr Adophy confirmed that he was content to proceed and indeed took his instructions from his client via the solicitor's interpreter who also confirmed that he wished to proceed on the day.

The Hearing

8. The parties proceeded on the basis of submissions. Mr Walker submitted that it was not contested that the appellant could not succeed under the Immigration Rules because they had insufficient earnings. There were no compelling circumstances as to why the wife and children should join him in this country. The crucial stage of their childhood was over and at the time of the application the appellants were 16 and 17 years old. The sponsor had now attained indefinite leave to remain and had subsequently been granted British citizenship but this was on 17th April 2014. There was no further evidence to show that, at the date of the decision, the sponsor could not return to China and his Article 8 application was without merit.
9. Mr Adophy referred to his skeleton argument and submitted a signed copy of a witness statement which was already before the First-tier Tribunal. He submitted that the appellant had failed because his gross annual income fell short by £3,000. He was working and had two jobs. It was agreed that he earned below the stated sum and yet he had savings of over £4,000 and his wife had £3,000 in a bank in China. It

could not be argued that the economic wellbeing of the UK would be imperilled if the appellants were allowed to join the sponsor. The appellants had been separated from their father for eleven years and he wished them to be present physically with him. He supported them regularly with payments of over £800 a month. He only earned a low wage and he would be unable to achieve the sum of £24,800. It is likely that his family would thus be permanently excluded on the basis of the Rules and this was disproportionate. The fact that he could not meet the Rules constituted an exceptionality.

10. The appellant produced his passports which showed that he had been back to China at least four times in 2011, 2012 and 2013. He had returned on his Chinese passport.

Conclusions

11. The sponsor first met the first appellant in January 1994 in Fuqing China and they married in May 1995. The couple continued to live together until the sponsor Mr Xie left China for the United Kingdom on 14th February 2003. The appellant has the two children who are the second and third appellants and who were born in 96 and 97. The decision was made by the Entry Clearance Officer on 28th February 2013 and it is this date that I need to take into account when I am considering the matter. The second and third appellants were 17 and 16 at the date of the decision. The sponsor entered the UK in 2003 and thus has been in the UK for eleven years and had been granted indefinite leave to remain on 7th October 2010 under the asylum legacy case policy. It is clear that he was not actually granted asylum and I note that there is no bar on him returning to China and indeed he stated that he had already returned four times since he was granted indefinite leave to remain in October 2010.
12. At the point of the decision of the Entry Clearance Officer the sponsor was not a British citizen.
13. The sponsor made a conscious decision to come to the UK and the starting point is that there is no obligation on the part of the UK to support the sponsor and appellant's decision to establish their family life wherever they choose. At the time of their separation the appellant and his wife knew that they had children.
14. The couple and the children undoubtedly have a family life as they are man and wife and the children are biologically related to the sponsor in the UK but they are able to contact each other through telephone calls and video chat.
15. Although Section 55 applies specifically to children within the UK I have taken into account the best interests of the children in accordance with the UN Convention on the rights of the child but identify that they are living with their mother and are being supported financially by their father in the UK. The witness statement of the sponsor, which I read carefully, indicated that his children were students studying at Fuqing Haikou Middle School and Fuqing City Jiang Jing Junior High School respectively. They are living with the first appellant and therefore there is no indication that they would be separated from their parents. They are clearly housed,

engaged in education and no doubt with their friends and other relatives. I accept that their father is in the United Kingdom and there will of course be a protected right to have a relationship with their biological father, but these are now children approaching adulthood, who have entrenched their lives in China and will have formed strong bonds there. There was no indication that they could speak English and their cultural and social and linguistic ties are with China.

16. The children have spent the majority of their developing lives away from their father and the decision would merely maintain the status quo.
17. The Immigration Rules are a reflection of the Secretary of State's position in relation to Article 8 claims and the legitimate aim which is to be pursued in this matter is the economic wellbeing of the country and the protection of the rights and freedoms of others. The matter has been extensively explored and Appendix FM paragraph GEN.1.1 states that the provision of the family route "*takes into account the need to safeguard and promote the welfare of children in the UK*" and secondly there is no legal requirement that the Immigration Rules should provide the best interests of the child should be determinative. Section 55 is not a trump card to be played. **MM Lebanon and Others R on the Application of the Secretary of State for the Home Department [2014] EW Civ 985** confirms that it is reasonable to require for the child's best interests that there be adequate financial provision for the unit of which the child will be part of.
18. As stated at paragraph 148 **MM [2014]** appropriate weight has to be given to the position of the Secretary of State as expressed through the Immigration Rules, particularly where, as in the assessment of maintenance, she acted on the results of independent research and wider consultations.
19. It was considered in **MM Lebanon** that it is not the court's job to impose its own view in respect of what constitutes the minimum income requirements unless the levels chosen were irrational or inherently unjust and it is concluded in that case that they were not.
20. I find that there are no arguably good grounds for consideration of this matter outside the scope of the Immigration Rules. Weight should be attached to the public interest and the position of the Secretary of State as set out in Appendix FM. The sponsor has demonstrated that he is able to return to China on a regular basis and although it was submitted that his children would be permanently excluded because he would never be able to earn appropriate income it is open to the appellant to do so.
21. I have taken into account the savings totalling £4,741 but bearing in mind the shortfall of £3,140 under the Rules which was accepted by the appellants I am not persuaded that this would be sufficient income to allow the appellants to be maintained in the UK even over the short period of which they would initially be given leave.

22. I cannot agree with the point put forward by Mr Adophy that whenever a case falls outside the Immigration Rules that it can be considered to be exceptional. I have made it clear that I am not resurrecting the exceptionality test but merely have considered whether further *to R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin), Gulshan and Shahzad whether there are any arguably good grounds to consider the matter outside Appendix FM and I find that there are not. This is not a case where one or other party is to be removed and although the sponsor is now a British citizen this was not the case as at the date of decision and the sponsor has chosen to remain in the UK between 2003 and 2010 when he had a precarious status and during the time when his children's lives were developing. They are now at the stage of almost adulthood and the status quo can be preserved whereby the appellants and sponsor can still remain in contact and experience visits from the sponsor as they have done to date.
23. I therefore dismiss the appeals of Mrs Ziuzhu Chen, Mr Xie Kailiang and Mr Xinyi Xie under the Immigration Rules and on human rights grounds.

Signed

Date 4th August 2014

Deputy Upper Tribunal Judge Rimington