



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/12802/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 26th January 2015**

**Determination
Promulgated
On 3rd June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MASTER YOUWEI HUANG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr C Lam (Counsel)

For the Respondent: Mr T Wilding (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Colvin, promulgated on 11th November 2014, following a hearing at Taylor House on 8th October 2014. In the determination, the judge allowed the appeal of Master Youwei Huang. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of China, who was born on 19th October 1995, and who appeals against the decision of the Respondent dated 31st May 2013, to refuse him entry clearance to settle in the United Kingdom as a dependant of his parents, in accordance with paragraph 297 of HC 395.

The Appellant's Claim

3. The Appellant's claim is that he is dependent on his father, Mr Yanxing Huang, who is his Sponsor. The father arrived in the UK on 6th June 1996, and his wife joined him from China on 28th May 2003. The father was granted ILR on 13th August 2009 under the Legacy Programme. His wife made an application for leave to remain as a spouse soon after he was granted ILR. Her application, however, was refused but was allowed on appeal which was heard on 8th March 2013, on human rights grounds on the basis of the family relationship. She was issued with a residence card on 30th July 2013.
4. The Appellant's wife looked after the Appellant when the father left China in 1996, though he has financially supported the entire family. When his wife came to the UK in 2003, the Appellant was looked after by his wife's sister-in-law, although the father continued to make all the immediate decisions in his son's life. This included decisions with respect to his education and medical treatment. The father went to China in May 2010. This was the first opportunity after having been granted ILR.
5. The judge records that, "it was an emotional reunion with his children and he stayed for six weeks. Since then he and his wife have returned to see the Appellant on many occasions with the last time being in July 2014" (paragraph 6).
6. In cross-examination before the judge, the father confirmed that his son, the Appellant, had been living with his wife's sister-in-law for the last ten years.

"He has been to see him in China four times since 2010. He is now nearly 19 years old and is attending university studying a teacher training course for which he is paying. If the application is successful he will complete his education in the UK and he will support him. He [the father] takes money for his maintenance when he visits China. The Appellant does not speak English. He accepts that his wife has limited leave to remain in the UK" (paragraph 7).

7. The Appellant's mother, Mrs Yougin Yu, also gave oral evidence before the judge, and she stated that

"her husband has always been the head of the household and made all the major decisions affecting their son's life. He made the decision for their son to join them in the UK. She won her immigration appeal on the basis of being the spouse of her husband who has ILR in the

UK. It is unreasonable to conclude that her leave would not lead to settlement” (paragraph 8).

8. The main question before the judge was whether the Appellant could satisfy the requirements for indefinite leave to settle in the UK under paragraph 297 and his mother only had “limited leave”. The representative for the Respondent Secretary of State, submitted that the Appellant could not satisfy this provision, but that the requirements of paragraph 301 should also be considered.
9. The judge accepted that the Appellant could not meet the requirements of paragraph 297 for indefinite leave to remain in the UK because the Appellant’s mother only had limited leave following the determination of her appeal of human rights grounds in 2013. At the time, however, the judge had made the comment in her determination that, “given my findings of fact, mainly that the Appellant is a spouse in a subsisting relationship, it seems clear that she would in due course, by reason of Mr Huang’s status, obtain a right to settlement in the UK”. (see paragraph 15 of the determination of Judge Colvin)
10. The judge held that the Appellant was entitled to rely on the alternative of paragraph 301 of the Immigration Rules for limited leave to enter and remain in the UK with his parents. This had not been addressed by the Respondent either in the refusal letter or in the ECM review. The judge went on to allow the appeal under paragraph 301.

Grounds of Application

11. The grounds of application state that the judge was wrong to allow the appeal in the manner that he did, on grounds that the Appellant’s mother has limited leave “with a view to settlement” because she was granted limited leave outside the Immigration Rules in respect of Article 8. In fact, the Appellant’s mother would not be eligible for settlement until she has completed a total of ten years in the UK. In the meantime she would need to reapply for leave in this category every two and a half years until the total of ten years is reached.
12. On 30th December 2014, permission to appeal was granted on the basis that the definition of “a view to settlement” needed for the consideration.

Submissions

13. At the hearing before me on 26th January 2015, Mr Wilding, appearing on behalf of the Respondent Secretary of State, submitted that there were two issues. First, whether the Tribunal could properly look at paragraph 301. Second, if the Tribunal could properly look at paragraph 301, was the Appellant’s mother’s leave granted with a view to settlement.
14. Mr Wilding drew my attention to paragraph 301. This appears at page 787 of Phelan’s Immigration Law and Practice (2013). It is said “requirements for limited leave to enter or remain in the United Kingdom with a view to

settlement as a child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement". The judge had allowed the appeal under paragraph 301(i)(a), and this viewed with the situation where one parent is present and settled in the UK (the Appellant's father) and the other parent is being, or has been given limited leave to enter or remain in the UK with a view to settlement (allegedly the Appellant's mother). The question of "with a view to settlement" arose in these circumstances, as is plain to see.

15. However, Mr Wilding took me to page 764 of the handbook. This deals with the requirements to be met under part 8 after 9th July 2012 after Appendix FM came into operation. At paragraph 8 to 80, there are "additional requirements" and sub-paragraph (f) makes the point that

"paragraphs 301-303(f) continue to apply to applications made under this route on or after 9th July 2012 and are not subject to any additional requirement listed in (b) above, by a child of a person to whom those paragraphs relate who has been granted limited leave to enter or remain or an extension of stay following an application made before 9th July 2012".

16. The difficulty here, submitted Mr Wilding, is that the Appellant's mother made her application on 28th August 2012. This was after 9th July 2012. Her discretionary leave was then granted only after she won her appeal. Therefore, paragraph 301 was not available to the Appellant for use.

17. Second, and in any event, paragraph 301 was not available for use because the Appellant's granted leave was not "with a view to settlement". Mr Wilding asked me to compare this with paragraph 281 for settlement of spouses which reads

"requirements for leave to enter the United Kingdom with a view to settlement as the spouse with a view to settlement as a spouse [also a partner] of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement".

18. Mr Wilding submitted that this was a different Rule with respect to a different purpose compared to paragraph 301. The Appellant's mother would require various extensions of stay before she could apply for permanent resident after ten years in the UK.

19. Mr Wilding asked me to find an error of law and remit the matter back to the First-tier Tribunal.

20. For his part, Mr Lam submitted that the first ground argued today, namely, that paragraph 301 had a different purpose, was not set out in the Respondent's Grounds of Appeal. The only issue there was the meaning of "with a view to settlement" and this is how permission had been granted. No application had been made to amend the grounds. In any event, Mr Lam would resist a late application on this basis.

21. Second, paragraph 301 was not applied to any Immigration Rule. It was a freestanding provision. It has not been abolished. It remains in place. Therefore the Appellant could avail himself of it. Mr Lam had to accept that the application in this case by the Appellant was made on 28th August 2012.
22. Finally, if this Tribunal was not with Mr Lam on any of these matters, then the judge should have allowed the appeal under Section 55 of the BCIA, as this being in the best interests of the child, as this was a matter that was raised before the judge, and is set out clearly in the skeleton argument before the judge, but was not considered at all by the judge. Mr Lam asked that this Tribunal remake the decision, were it to make a finding on an error of law.
23. In reply, Mr Wilding submitted that if a ground of appeal had not properly been put before the Tribunal, he would make an application now to amend the grounds. However, paragraph 301 was an obvious issue that should have been apparent from the outset. He submitted that I make a finding of an error of law and remit the matter to the First-tier Tribunal.

Error of Law

24. 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 aside the decision. I am also satisfied that I should remake the decision because the general Rule is that wherever the Upper Tribunal is able to do so, it is enjoined to remake the decision, rather than remit the matter back to the First-tier Tribunal. This is a case where findings were made on the core aspect of the Appellant's claim, such that it would enable this Tribunal to remake the decision. I make a finding of an error of law because this is a case where the appeal could not have been allowed under paragraph 301 because the Appellant's application was made after 9th July 2012, it being made on 28th August 2012, so that the benefits of paragraph 301 were not available to the Appellant. I now proceed to remake the decision.

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. I am allowing this appeal for the following reasons.
26. There is the skeleton argument of Mr Lam before the First-tier Tribunal during the hearing at Taylor House. He refers to family life under Article 8 with an expressed reference to **Beoku-Betts [2008] UKHL** (see page 6 of the index bundle of 35 pages. The judge did not deal with Article 8. The skeleton argument before this Tribunal from Mr Lam refers to the failure of the judge to deal with Article 8 and draws attention to the principle in **T (Section 55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483**, as a matter that should apply with respect to the

child's welfare. In remaking the decision, I can have regard to these matters.

27. In this respect, it is clear that the judge made findings with respect to the Appellant's case, such that Section 55 considerations should have been brought to bare all these facts. Paragraph 6 of the determination makes it clear that the Appellant's father supported the entire family in China. He "made all the major decisions in his son's life such as his education and medical treatment" and that "he went to China in May 2010 which was the first opportunity after being granted ILR".
28. Since being granted ILR, he and his wife have returned to "see the Appellant on many occasions with the last time being in July 2014" (paragraph 6). Paragraph 7 makes it clear that even though the father "takes money for his maintenance when he visits China" and that "he will support him".
29. Paragraph 8 is the most important finding which makes it clear that the evidence in the written statement by the mother is accepted that the father was "the head of the household and made all the major decisions affecting their son's life. He made the decision for their son to join them in the UK".
30. In these circumstances, the developing case law on Section 55 of the BCIA, now makes it clear, that even if Section 55 was not expressly raised, where there are children concerned, and the matter is obvious, regard must be had to the obligations that are attached to a decision maker where the "best interests" of the child are an issue. 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, 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 interests, and then balancing them with the other essential considerations. Performing these duties will be an intensely fact-sensitive matter and a contextual exercise. In this case the ECO did not do this. The judge below did not do this. This was a failing of an administrative responsibility. It was a failure of a legal obligation. This leads to the following result.
31. First, the facts of this case clearly indicate that the Appellant's welfare will be jeopardised by exclusion from the United Kingdom. This is a matter set down not only in the skeleton argument before me, it is also based upon the findings of fact made by the judge, which show that with the Appellant's mother and father both in the UK, arrangements have thus far had to be made for the Appellant's care through a family relative, yet the Appellant remains dependent completely upon his father in the UK. It is possible that if one has regard to the "exclusion undesirable" provisions of the Immigration Rules, and the extra statutory guidance for Entry

Clearance Officers to apply the spirit of the statutory guidance in circumstances where children are involved, that the balance is in favour of the Appellant (see **T (Section 55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483 (IAC)**). It is clear that the best interest consideration is not irrelevant to an Article 8 evaluation.

32. Indeed, the case-law makes it clear that, “it is difficult to contemplate a scenario where the Section 55 duty was material to the immigration decision and indicate a certain outcome that Article 8 did not” (see paragraph 29 of **T (Section 55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483**). When the facts of this case are considered, it is plain that whereas there is no moral or physical danger to the Appellant, he is young, in his formative years, and has been looked after by someone, other than his two parents, both of whom are now in the UK. The wishes of the Appellant are to be with his mother and father in the UK. The mother and father are in a position to look after the Appellant, provide maintenance and accommodation for him, and have a clear desire to care for him. In these circumstances the requirements of Article 8 are plainly met. This is so for the following reasons.
33. If one applies Lord Bingham’s tabulation as established in **Razgar** (at paragraph 17), the following emerges. First, it is plain that the continued exclusion of the Appellant is an interference by a public authority, namely, the Secretary of State, with the exercise of the Appellant’s right to respect for family life. The family life is qualitatively different with one that the Appellant is enjoying in his country of origin, as against the family life that he will enjoy with his mother and father in the UK, both of whom are keen and able to look after the Appellant, and this especially given that the Appellant’s father has played such a pivotal role in his upkeep throughout his life. 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, however, the interference is in accordance with the law because the Appellant cannot comply with the Immigration Rules at paragraph 297 of HC 395. Fourth, though, 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 Appellant’s parents are in the UK and that his care through his sister-in-law is not ideal. Fifth, all-in-all, the interference here is not proportionate to the legitimate public end that is sought to be achieved.
34. It is well accepted 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 Appellant to remain separately from his natural parents, which in this case means both his mother and father, both of whom now have an legitimate legal status in the UK. On the facts of this case, it is not reasonable.

35. On the totality of the evidence before me, I find that the Appellant has discharged the burden of proof and the reasons given by the Respondent do not justify the refusal. Therefore, the Respondent's decision is not in accordance with the law and the applicable Immigration Rules.

Notice of Decision

The appeal is allowed.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

29th May 2015