



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00941/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2016

Sent to parties on:
On 01 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

X F G
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Dieu instructed by Gloucester Law Centre
For the Respondent: Mr Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of China. He applied for asylum in the United Kingdom and the Respondent refused to grant asylum for the reasons given in a Reasons for Refusal Letter (RFRL) dated 19 December 2014. The Respondent made a decision to remove the Appellant as an illegal entrant by way of directions under paragraphs 8-10 of schedule 2 to the Immigration Act 1971. The Appellant appealed against that

decision and his appeal was dismissed by First-tier Tribunal Judge Y J Jones in a decision dated 17 June 2015. The Appellant sought permission to appeal that decision and permission was granted by Deputy Upper Tribunal Judge Saini on renewal of the application to the Upper Tribunal on the basis that all the grounds as originally pleaded and emphasised on renewal were arguable.

The Grounds

2. The Grounds of appeal to the First-tier Tribunal contend that the First-tier Tribunal erred in finding at paragraph 43 that there was no DNA evidence in relation to the Appellant's parentage of his children. It is submitted that the Judge appeared to doubt the parentage of the children despite the fact that the Respondent had accepted that he was the father of the three children and did not challenge any of the evidence in respect of the relationship. It is said to be of particular significance as the Judge specifically checked with the Presenting Officer whether this was in issue during the hearing. It is asserted therefore that the Judge went on a frolic of her own and this had tainted the whole approach to Article 8. These issues had not been raised at the hearing thereby failing to give the Appellant a fair trial as he had no opportunity to address the concerns. She had made further and inconsistent and confused findings as to whether or not she accepted that he was her father or not.
3. It is also concluded that the Judge made an error of law in that she found that she was not satisfied that Ms W (the Appellant's partner) would accompany the Appellant to China. It is submitted that this amounts to an error of law in circumstances where it was the Respondent's case that they would be returned as a family unit and the potential for the Appellant's partner and child to remain (which was highly unlikely as she was a failed asylum seeker) was never raised by either of the parties. It is asserted that the Article 8 assessment was flawed and based on an incorrect assumption for which there was no evidence and was contrary to the agreed position.
4. It is further submitted that the Judge incorrectly applied **Omotunde (best interests - Zambrano applied - Razgar) Nigeria [2011] UKUT 00247(IAC)**, a deportation case, when considering proportionality. It is further submitted that the Judge erred in law in concluding that if the children went to China it would be the choice of their mother. It is also asserted that the Judge failed to consider whether it was reasonable for the children to live in another country or consider the evidence that they would be subjected to substantial fines. The Judge failed to make a finding as to whether they would be able to access essential services. It is also asserted that the finding that the family would help is also perverse and contrary to evidence. It is contended that the Judge appeared to have disregarded the fact that the bond between the Appellant and his children would be severed as a result of the decision and had failed to engage with this issue. It is asserted that the Judge in finding that it was proportionate for the Appellant to make an application from China if his partner obtained status had misunderstood the basis of his Article 8 claim and that it was not a matter raised at the hearing. It is submitted that the Judge had not applied her mind to the prospects of the

Appellant being permanently denied the opportunity of a relationship with his children.

5. It is submitted therefore that the whole consideration of Article 8 and proportionality was inadequate and amounted to an error of law. It is argued that all of the above failures amount to material errors of law in that there is a real possibility that a tribunal properly directed would decide the matter differently.
6. The grounds on renewal re-emphasise the points made in the grounds to the First-tier Tribunal and assert that First-tier Tribunal Judge Astle, in granting permission, was wrong to refuse to grant permission.

The Rule 24 Response

7. The Respondent opposes the Appellant's appeal on the grounds that the First-tier Tribunal directed itself appropriately. It is argued that the Judge addressed all the competing factors and was entitled to come to the conclusion she did.

The Hearing

8. Mr Dieu relied on the initial detailed grounds of appeal which were drafted by Counsel who appeared at the hearing. He also relied on the second set of grounds.
9. Mr Richards relied on the Rule 24 response and asked me to find that the First-tier Judge looked at matters on the basis that the Appellant was the father and accepted that he established family life. She looked at the situation both in terms of the Appellant going to China alone and the family remaining here and the children and their mother going to China and that is what she had to do given the facts of the case that the mother was here without status and covering any eventually that she might acquire status in the future. Particularly in paragraph 60 and 61 she dealt with the situation of the children going to China and also at 70 and 71 the situation of them remaining in the UK and took account of the relevant evidence. She took herself through all the competing interests in s117B and reached a conclusion that was properly open to her. There was no material error of law and it ought to stand and he invited me to dismiss the appeal.
10. Mr Dieu said that Mr Manley had dealt with the points raised.

Discussion and Findings

11. The Appellant's challenge is in relation to Article 8 only. The Respondent did not take issue with the Appellant's paternity of his three children in the RFRL or in submissions. The First-tier Tribunal raised the issue of the paternity of the children at paragraph 43 of the decision. She considered in that paragraph, in relation to the asylum claim, whether there was a genuine relationship between the appellant and the mother of his "claimed" children. She noted that the birth certificates were in the name

of both parents but that there was no DNA evidence and no statement from his partner that she would accompany him to China if he left the UK. She noted that the partner had made submissions to the Home Office, but there was no joint application and that those submissions were outstanding. At paragraph 44, she found that there was insufficient evidence before her to be satisfied that the children named on the birth certificate produced by the Appellant were his children and even if they were, she was not satisfied that the Appellant's partner would accompany the appellant to China if he was refused asylum. She then found at paragraph 45 that it would be in the best interests of the children to remain with their mother who resided at present in the UK and that on the evidence before her it was unclear whether the Appellant resided with them. These findings were made in relation to the Appellant's asylum claim.

12. She then considered the Appellant's claim under Article 8 ECHR at paragraphs 55 to 73 of the decision. At paragraph 56 she considered whether he had established family life in the United Kingdom. She again referred to the fact that there was no DNA evidence to prove that the Appellant was the father of the children and the fact that there was no evidence that they had been living together save for the address on the birth certificate. She nevertheless found on the basis of the birth certificates that family life existed for the purposes of Article 8. She then considered the best interests of the children and concluded that in the light of their ages, the eldest child being 4 and the youngest 9 months old, that they had not enjoyed a substantial period of residence here. She then found that for this reason, if the children went to China with the Appellant it would not breach their Article 8 rights and if they did not, that would be the choice of their mother and the Appellant could apply from China to join them. She also considered that whilst they may find it difficult to obtain medical help and education, the Appellant had family in China and it did not appear that the family had suffered as a result of the one child policy. After finding that it was in the public interest to remove the Appellant from the UK, she commented that it was a matter for his partner and him whether she and the children return to China. She stated that in coming to the conclusion that it was proportionate for him to be removed and for him to make an application to join his partner if she obtained status, she had considered the importance of not burdening the children with the culpability of their and the children could remain in the UK for the time being until the parents decided whether the Appellant should apply to come here legally or return to China where both parents were found not to be at risk.
13. I accept the Appellant's submission that the question of paternity was not in issue between the parties. It was not raised in the Refusal Letter or in submissions. In **R (on the application of Ganidalgı) v SSHD** [2001] INLR 479 it was held that where a question of fact was conceded by the Respondent, either in its decision letter or at a hearing before the Tribunal, the concession must be accepted by the Tribunal (subject to withdrawal). In **SSHD v Balasingham Maheshwaran** [2002] EWCA Civ 173 the Court of Appeal held that that it was going too far to say that, if the Secretary of State does not challenge an assertion of fact made by the appellant and if the adjudicator does not raise with the appellant any doubts about his veracity, then the adjudicator is bound to accept that assertion as true, although fairness may sometimes require the

adjudicator to put an inconsistency to the appellant, for example if an adjudicator had in mind to go behind an express concession. In **AM (fair hearing) Sudan** [2015] UKUT 00656 (IAC) it was held that fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing. In **YHY (China) AP Petition for JR** 2014 CSOH 11 it was held that there was procedural unfairness amounting to an error of law where points were taken against the appellant that were not in the original decision and notice of the additional points had not been given to the appellant. Specifically it had never been suggested that the appellant was not the father of a child but the judge found that to be the position.

14. The Tribunal is not obliged, as a matter of natural justice, to point out all inconsistencies in respect of which adverse credibility points are taken in respect of matters not raised at the hearing. However, in this case paternity was clearly not in issue and the Judge did not reach her conclusion that she was not satisfied that the Appellant was the father of the children as a result of inconsistencies, but rather due to the lack of DNA evidence which was point not raised either before or at the hearing by the Respondent. Further, Mr Manley asserted in his grounds that this was a matter that was clarified by the Judge as not being in issue during the hearing. I conclude therefore that the Judge did err by going on a frolic of her own.
15. It is asserted that this amounted to a material error of law as it tainted her whole approach to Article 8 and that because it was not raised at the hearing the Appellant did not have a fair trial because he had no opportunity to address the findings. I have therefore considered whether as a result of the fact that the matter was not canvassed at the hearing, the hearing was rendered unfair. I have also considered in assessing whether the procedural irregularity was material what effect the error had on the exercise of proportionality.
16. Notwithstanding the fact that she went on a frolic of her own regarding the issue of paternity she accepted, on the basis of the birth certificates, that the Appellant had established family life in the United Kingdom. She proceeded therefore to consider the proportionality of removal on the basis that the children would accompany the Appellant to China.
17. She referred to **Omotunde (best interests - Zambrano applied - Razgar) Nigeria** [2011] UKUT 00247(IAC). This case was not on point as it deals with the question of the application of the judgment of the Court of Justice of the European Union in Ruiz Zambrano (European citizenship) [2011] EUECJ Case C-34/09 OJ 2011 C130/2 and that of the Supreme Court in ZH (Tanzania) [2011] UKSC 4; [2011] 2 WLR 148, in relation to the proposed administrative removal or deportation of one or both of the non-national parents of an EU citizen child. That was not the situation here.
18. However, I do not consider that the mistaken reference to **Omotunde** was material to the proportionality exercise. She considered the relevant factors relating to the best

interests of the children. In **EV (Philippines) and others v SSHD** [2014] EWCA Civ 874 the Court held at [34] to [38]:

34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

19. There was little evidence before the Judge regarding the children but she considered the length of residence of the children, their age, the fact that they were not yet in education and the circumstances they were likely to face on return to China. It is clear from the reasoning in paragraphs 59 and 61, that the First-tier Tribunal found that it would not be contrary to the children's best interests or disproportionate to go to China with the Appellant. Although the Judge may have found that she was not satisfied of paternity, she accepted he enjoyed family life with the children, considered the best interests of the children and conducted a proportionality exercise on the basis that the partner and his children would accompany him to China.

20. However, in concluding that it would not be contrary to the children's best interest to return with their father to China, she did not engage with the Appellant's arguments recorded in paragraph 31 of the decision, that the family would be subjected to substantial fines and would have no access to health, education and housing unless

they could pay them. She concluded at paragraph 70 that the neither parent was at risk in China. However, because she had found at paragraphs 42 to 46 that she was not satisfied that the children were the Appellant's or that Ms W would accompany the Appellant to China if he was refused asylum, she had not assessed the risk of return to the whole family and considered the country guidance case of **AX (family planning scheme) China CG [2012] UKUT 00097 (IAC)** in relation to access to education, housing and fines. These matters were clearly relevant to an assessment of the best interests of the children and proportionality and they were not taken into account by the First-tier Tribunal.

21. I consider that it was open to the First-tier Tribunal to conclude that the Appellant's partner and children would not necessarily return with him even though they had no status here. Whilst the Respondent may not have argued that the Appellant would be returned alone, the Judge considered this scenario on the basis of the facts as she found them to be. The grounds assert that it was accepted by both parties that the partner and the children would return to China with the Appellant. However, it is not set out how or where it was agreed. Whilst the Refusal Letter did not take issue with the fact that the Appellant was in a relationship and had three children with his partner, a failed asylum seeker, the First-tier Tribunal was entitled to take into account the evidence before regarding that relationship. She was clearly aware that the Appellant's partner was a failed asylum seeker but that she had further submissions outstanding for consideration before the Respondent. In his interview in November 2013 in answer to question 94 he said that he had never lived at the same address as his partner. She considered this evidence at paragraph 42 of the decision. The Appellant's partner did not attend to give evidence or produce a witness statement. In the circumstances I find that she was entitled to find, in the alternative, that they would not return together.
22. However, I consider that in concluding it was proportionate for the Appellant to be removed and make an application from China to join his partner in the UK if she obtained status, the First-tier Tribunal did not address her mind to the prospect of the Appellant being permanently denied the opportunity of a relationship with his children. On the evidence before the First-tier Tribunal the Appellant's partner had no status, and hence any application for entry clearance would have been bound to fail. She had accepted that the Appellant enjoyed family life with his children and hence the consequence of his removal would have meant separation from his children. Proportionality was not considered in this context.
23. I therefore find that the assessment of proportionality was flawed because the First-tier Tribunal failed to take relevant matters into account and failed to give adequate reasons for her findings.
24. Having regard to Part 7.2 (a) of the Practice Statements for the Immigration and Asylum Chamber of the First-tier Tribunal and Upper-Tier Tribunal, the extent of judicial fact finding is such that this matter should be remitted to the First-tier Tribunal for rehearing.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in relation to Article 8 ECHR.

I set the decision aside in relation to Article 8 ECHR.

I remit it to the First-tier Tribunal for rehearing.

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 him or any member of their 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.

Signed

Date **01 July 2016**

Deputy Upper Tribunal Judge L J Murray