Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
OA/05525/2014

OA/05521/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2016	**On 13 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

Z W
&
S W
(ANONYMITY ORDER MADE)

–

Appellant

V

ENTRY CLEARANCE OFFICER

Respondent

DECISION & REASONS

Representation:

For the Appellant: Ms J Heybroek, counsel instructed by Kothala & Co, solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

1. This appeal came before me on 16 December 2015 as an error of law hearing, where I found that First tier Tribunal Judge Baldwin had materially erred in law and I adjourned the appeal to hear submissions in respect of Article 8 of ECHR. This decision is appended.

Hearing

2. At the hearing before me, Ms Heybroek pointed out, correctly, that although I had made findings in respect of the application of paragraph 301 of the Immigration Rules and had found that the First tier Tribunal Judge materially erred in respect of his Article 8 consideration, there was no finding as to whether or not the First tier Tribunal Judge had erred in respect of paragraph 297(i)(f) of the Rules. She submitted that, given that the test for whether or not Article 8 was engaged overlapped with paragraph 297(i)(f), this meant that I should also consider whether paragraph 297(i)(f) of the Rules applied. The reason I did not make findings in the error of law decision is because paragraph 297(i)(f) was neither directly pleaded in the grounds of appeal nor was it the focus of the oral submissions by the parties. However, it is the case that the second ground of appeal, which concerned the manner in which the First tier Tribunal Judge had applied section 55, asserted that the Judge's erroneous approach to section 55 had infected his approach to paragraph 297(i)(f). In these circumstances and given that the appeal concerns two minor children (at the date of decision) who remain separated from their parents and sibling, I agreed to hear argument in respect of paragraph 297 of the Rules in addition to argument in relation to Article 8 outside the Rules. Mr Bramble accepted that paragraph 297(i)f) would stand or fall with Article 8 and it was appropriate to hear argument on both in respect of whether or not there were compelling circumstances on the facts.

3. The appeal proceeded on the basis of submissions only with the only additional evidence being a statement from the Sponsor's sister, Ms. W, as to the hoped-for admission of the Appellants' grandmother to the United Kingdom. The statement further confirmed that Ms. W had resided in China until 2013 and had assisted in caring for the Appellants until that time, when she was admitted to the United Kingdom. Clearly this statement post dates

the entry clearance decision, however, in light of the principles in DR (Morocco) [2005] UKAIT 00038 it is admissible on the basis that it sheds light on the circumstances prevailing at the date of decision. Moreover, the contents of her statement are reflected in the Sponsor's detailed statement submitted as part of the entry clearance application. Mr Bramble did not object to its admission in evidence.

4. Ms Heybroek submitted that the compelling circumstances were that
care of the Appellants can no longer be provided by their grandmother on her own and this was the case at the date of decision. The Appellants and their grandmother were and are living in a property that is precarious, in circumstances where it was envisaged that the grandmother would be joining the rest of the family at some stage. The sufficiency of care is simply not there for the children to be adequately looked after. She submitted that it was not sufficient to say that the older sibling could look after the younger as a way of addressing this. Nor could one split the family further by saying that the youngest child can be given entry clearance and the oldest child left in China.
She submitted that, with regard to paragraph 297(i)(f) that there are suitable arrangements for their care and no issues in terms of accommodation or maintenance.

5. Ms Heybroek further submitted that this went to the article 8 point as well in that the effect of the ECO's decision is unduly harsh *cf. SS Congo* and that met the very compelling circumstances test. In relation to section 117B(6), she submitted that there was a British child who has a long distance relationship with his siblings at the moment and he cannot be expected, in order to continue the relationship with them, to relocate to China. She submitted that this was not a matter of choice for the British child and it placed the Appellants' parents in an impossible situation. It was not reasonable to expect the British child to live in China *cf.* Zambrano C34-09 [2011] ECR 1-0000 8 March 2011.

6. In response, Mr Bramble asked me to bear in mind the factual matrix, at [22] of the First tier Tribunal's decision where it states that the Appellants are living in China in a 4 bedroom, 4 floor house with their grandmother, who has cared for her granddaughter since she was a baby and her grandson since he was 9 years of age. Whilst it was accepted that their grandmother was 69 years of age, her condition cannot be described as "grave". It was not unreasonable to expect her grandchildren to provide some assistance given their respective ages. He submitted that the Appellants were a good deal closer to her than their parents who they have not seen for many years. He pointed out that there was no medical evidence regarding the grandmother. Mr Bramble then

withdrew this submission in light of an intervention by Ms Heybroek to the effect that there is medical evidence at U127-134. He submitted that her condition is not grave and the evidence goes to her mobility. There is no evidence regarding her mental state or capability to look after the children or up to date medical evidence.

7. In respect of the witness statement from Ms W, the sister of first Sponsor, he submitted that it reiterates what was clearly before the First tier Tribunal. In those circumstances, it is not in dispute that the Sponsor is in conflict with his brother but the grandmother is choosing not to move herself, depending on the resolution of the circumstances of the grandchildren. It all comes down to the health of the grandmother. He submitted that the relationship between the grandmother and children has grown up through the choice of the sponsors and that when one looks at “serious and compelling family or other considerations” – at the date of decision there are two children who had a greater relationship with their grandmother and there is no reason that needs to change. Therefore, the appeals cannot succeed under the Rules.

8. In respect of Article 8 of ECHR, Mr Bramble relied upon Razgar [2004] UHL 27 - is the interference with family life proportionate and [33] of SS Congo [2015] EWCA Civ 387 as to whether or not there are compelling reasons. He submitted that if I was not with the Appellant under the Rules, then greater weight should be given to the fact that the Appellants do not succeed under the Rules because this is one of the factors to be considered. He also drew my attention to section 117B (1) and the fact that maintenance of effective immigration controls is in the public interest. Mr Bramble acknowledged that against that one has to consider the best interests of the children. The Respondent accepts that it is preferable that children are brought up in a family unit but the onus is on the Sponsors in creating that set of circumstances, in that they chose to have a further child and a split family. He acknowledged that the third child has rights as a British Citizen, but the Sponsors do not need to remove the third child from the UK and can maintain the status quo. They have kept a separated life from their other two children and there is a functioning unit in China.

9. In response, Ms Heybroek submitted that, in relation to the medical evidence, this was described as degenerative. In respect of the issue of a
matter of choice, she submitted that this was not the case for the British child and arguably not a matter of choice for the parents, who are now established in the UK, running a business. She relied upon VW Uganda [2009] EWCA Civ 5 and submitted that there were very real obstacles as to why care of the children could not be resolved by “upping sticks”, primarily the youngest child and her best interests, which were not paramount but a primary

consideration. She submitted that disruption is more of an obstacle as the child lets go of more of the parents' cultural background and that under paragraph 276ADE(iv) of the rules the British child has 7 years private life of her own to justify the grant of leave to remain.

Decision

10. I reserved my decision, which I now give with my reasons. The issue which arises in this appeal is whether there are: "*serious and compelling family or other considerations which make exclusion of the child undesirable"* it having been accepted that the remaining requirements of paragraph 297 of the Rules are met. Alternatively with regard to Article 8 of ECHR, the parties submitted that the test set out in SSHD v SS (Congo) [2015] EWCA Civ 387 applies *viz* whether "*compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave" cf.* Lord Justice Richards at [40]. Two points emerge: firstly, paragraph 297 remains unchanged by the new Rules by virtue of the transitional provisions at A280(b) and it remains to be seen whether this makes any difference to any Article 8 assessment outside the Rules and secondly, if the SS (Congo) test does apply, the two tests are not identical in that paragraph 297(i)(f) requires serious and compelling considerations whereas the Article 8 test requires compelling circumstances.

11. In respect of the first issue, I consider that, where the new Rules are not in play, that the test as set out at [40] of SS (Congo) is not the applicable test. I so find on the basis of the judgment in that case, where at [36] Lord Justice Richards considers this issue and holds: "*First, cases involving someone outside the United Kingdom who applies to come here to take up or resume family life may involve family life originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls (as in the type of situation discussed in Nagre). Thus the ECtHR jurisprudence addressing the latter type of case, which was the foundation for the approach in Nagre, will not always be readily applicable as an analogy."* Whilst his Lordship at [39]-[40] goes on to make findings in respect of the distinction between leave to enter and leave to remain cases, it is clear that this is through the prism of the new Rules as encapsulated in Appendix FM. It is also clear that the new Rules were expressly drafted so as to encompass as much as possible the Strasbourg jurisprudence in respect of Article 8 and as Mr Bramble correctly submitted, the fact that an appeal does not succeed under the new Rules is a relevant factor when considering the application of Article 8 outside the Rules. However, in my judgment, given that the Secretary of State has seen fit not to amend paragraph 297, the correct approach to Article 8 in such circumstances is to apply the jurisprudence pre July 2012

viz the judgments in Razgar [2004} UKHL 27 and Huang [2007] UKHL 11. I am fortified in my approach by the recent decision of the President in Abbasi and another (visits – bereavement – Article 8) [2015] UKUT 00463 (IAC) where the test applied at [12] was the structured, sequential approach set out by their Lordships in Razgar. Consequently, there is no requirement to show exceptional or compelling circumstances in order to render the decision of the Entry Clearance Officer disproportionate. Section 117 of the NIAA 2002 does, of course, apply because it is a statutory provision binding on the Tribunal in all appeals relating to Article 8 of ECHR.

Paragraph 297 – the facts

12. There are two Appellants in this case, born on 8 January 1997 and 22 July 2003. Consequently, at the date of the ECO's decision of 13 March 2014 to refuse them entry clearance they were aged 17 and 10 years. Their father and Sponsor left China in October 2003 and their mother in September 2006. Since that time the children have been cared for by their paternal grandmother, their paternal grandfather until his death in 2004 and until December 2013, by their paternal aunt, Ms W. The Sponsor was granted ILR in November 2011 and his wife was granted DL for 3 years in January 2012. Their third child, a son born on 2 April 2010 has been registered as a British citizen, as has the Sponsor. The applications for entry clearance for the two Appellants were made on 21 February 2014. A letter from the Sponsor dated 17 February 2014 and submitted with the application sets out the background to the application. The material facts set out therein, which are not disputed by the Respondent, are:

(i) the Sponsor fled China and claimed asylum in the United Kingdom. This application was unsuccessful. He was subsequently granted ILR under the provisions of the Legacy Programme;
(ii) the Sponsor's wife also fled China in fear of persecution. It is unclear whether or not she made an asylum application but she was subsequently granted 3 years DL as a spouse, after her husband had been granted ILR;
(iii) the Sponsor and his wife visited the Appellants between 10 January and 21 February 2013 and in February 2014;
(iv) the application for entry clearance was delayed because the household book and the Appellants' birth certificates had been misplaced by the Sponsor's mother and replacements had to be obtained from the Chinese authorities and it did not prove possible to do this by virtue of the fact that the Sponsor no longer has a PRC identity card. DNA tests were carried out in February 2014 to prove the relationships;
(v) the Sponsor and his wife have financially supported the Appellants by payments of money to the Sponsor's mother's bank account;

(v) the Sponsor and his wife have maintained contact with the Appellants by telephone and since 2012 by skype and an internet messaging service: QQ;
(vi) the Sponsor's mother was no longer suitable to look after the Appellants and there are no other suitable carers. The reason she is no longer suitable is that her health has deteriorated. She has arthritis and leg pain; she has problems with her eyes and has become forgetful;
(vii) the Sponsor's younger sister is unable to help because she has joined her husband in the United Kingdom;
(viii) without the help of the Sponsor's younger sister the Sponsor's mother cannot go to the bank to withdraw the money sent by them; she has difficulty shopping for the household and can only do basic cleaning;
(ix) their son, the elder of the Appellants is rebellious and his grandmother no longer has any influence over him and the younger Appellant is only 10 years of age and is too young to look after herself.

13. The additional material evidence before the First tier Tribunal, both orally and in the form of statements from the Sponsor and his wife, was that the Sponsor's mother is illiterate and that the property in which she lives with the Appellants is owned by the Sponsor's elder brother, who resides in the United Kingdom and wishes to sponsor his mother to join him in the United Kingdom where she can be cared for, but he is unable to do this because she has to remain in China to care for the Appellants. The Sponsor's mother's deteriorating health was supported by a medical report at U127-134 although it is the case that this does not comment on her ability to care for the Appellants.

Serious and compelling family or other considerations

14. In Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC) the Upper Tribunal held:

i) The exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.
ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by...administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration".
iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless

explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.
iv) Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come in to play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-
a there is evidence of neglect or abuse;
b. there are unmet needs that should be catered for;
c. there are stable arrangements for the child's physical care;
The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.
v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939 .

At [34] the Upper Tribunal held:

“34. In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.”

My findings

15. I find that the application for entry clearance was made on behalf of the Appellants was prompted by (i) the fact that the Sponsor had been granted ILR in 2011 and was thus in a position to make the application and his wife was granted DL in 2012; (ii) the Sponsor’s sister was admitted to the United Kingdom in December 2013, the consequence of which was (iii) the Sponsor’s mother had to care for the Appellants on her own, in circumstances where her health was deteriorating. I do not find, however, that the Sponsor’s mother was incapable of caring for the Appellants at the date of decision but rather than the fact that she was obliged to continue to do so was not ideal, given her deteriorating health and the fact that

her arthritis is described in the medical report as “degenerative.”

16. It is necessary in light of Mundeba to consider the welfare and best interests of both Appellants. The starting point is that it is in their best interests to be cared for by both parents. However, continuity of residence is also important and it is the case that both Appellants have always resided in China. Whilst the eldest Appellant was brought up by his mother until the age of 9, the youngest was only 3 years of age when her mother left China. However, I find that the Sponsors have financially supported the Appellants and contact has been maintained with them – by telephone and skype and in the form of two visits. I find that there is no evidence of abuse of neglect nor that the Appellants’ needs are not being met by their grandmother. However, I find that the arrangements for the physical care of the Appellants are not stable, in that it is clear that their grandmother’s health is deteriorating and that will impact negatively on her ability to continue to look after the Appellants. I accept the Sponsor’s evidence and find that pressure is being brought to bear by his elder brother for their mother to accede to his request to apply for entry clearance to join him in the United Kingdom, however, the provisions for entry clearance for elderly dependent relatives set the threshold very high and I do not find that such an application would be bound to succeed. Nevertheless, I find that it was foreseeable that the circumstances would materially alter over time such that the Appellants would need to support and care for their grandmother. Whilst the eldest Appellant is of an age where this would not be unreasonable, I find that the youngest Appellant who was 10 years of age at the date of decision, is too young to both lose a carer and take on the burden of caring for her grandmother. The evidence in respect of the elder Appellant, aged 17 at the date of decision, is that he is rebellious and I find that he would be reluctant either to take on the burden of caring for his grandmother or for his younger sister. I find that, in light of her age, there are serious and compelling family or other considerations that render the exclusion of SW from the United Kingdom undesirable. It is clearly in her best interests for her to be reunited with her parents and younger brother in the United Kingdom. Her appeal succeeds under the Immigration Rules. In respect of her brother, ZW, I find that the test is not met on his particular facts, in light of the fact that he was 17 at the date of decision and can, to a large extent, care for himself.

17. I now turn to a consideration of ZW’s case with regard to Article 8 of ECHR, in light of my findings as to the correct test to be applied, set out at [11] above. I find that he has established family life with both parents, particularly his mother who cared for him until the age of over 9 years and with his sister, SW, with whom he has lived in China. I find that he has also established family life with his grandmother, who has cared for him since the age of 9 years. I find

that the decision of the Entry Clearance Officer to refuse entry clearance constituted an interference with his right to family life. Whilst that decision was lawful, the question is one of proportionality.

18. The Sponsor and his youngest son are British citizens. I find that, in light of the decision in Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC) at [95] that, in respect of the child: "*it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so*." I find that there is no country other than the United Kingdom where the right to family life of this family as a whole can be exercised, bearing in mind also the judgment of the House of Lords in Beoku Betts [2008] UKHL 39.

19. I have also had regard to the judgment of the Court of Appeal in AP (India) v The Secretary of State for the Home Department [2015] EWCA Civ 89, a case which involved the a decision to dismiss the appeal against a decision refusing entry clearance in respect of a young man who was over 18, in circumstances where the appeals of his mother and younger sister succeeded. At [26] Lord Justice Elias held:

"The Tribunal must have regard to all relevant circumstances when considering the issue of proportionality, and in my view that includes in an appropriate case having regard to likely future events. That is not taking into consideration later events but assessing matters in the round at the point when the decision is made. Moreover, in my view the Tribunal must in an appropriate case be entitled to make common sense inferences about what is likely to happen in the future based on the facts as they were before the entry clearance officer. It does not necessarily require specific evidence on the point."

At [45] Lord Justice McCombe held as follows:

"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."

20. Z was a minor at the date of decision and thus, whilst he is not a

child within the United Kingdom, it is clear from Mundeba that his best interests are engaged and that the principle that his best interests are best served by being brought up by one or both parents also applies. The fact that he has always lived in China must also be considered in respect of whether it is in his best interests to interrupt his continuity of residence there.

21. Section 117B of the NIAA 2002, as amended by section 19 of the Immigration Act 2014 provides:

117B Article 8: public interest considerations applicable in all cases
(1) The maintenance of effective immigration controls is in the public
interest.
(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to
enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to
enter or remain in the United Kingdom are financially independent, because such persons-
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4) Little weight should be given to-
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person
at a time when the person's immigration status is precarious.
(6) In the case of a person who is not liable to deportation, the public
interest does not require the person's removal where-
(a) the person has a genuine and subsisting parental relationship with
a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom."

22. The relevant evidence is that the Appellant has been learning English as a foreign language since November 2013 and that, whilst not personally financially independent, he would be financially supported by his parents, who both work. No question of removal

arises as the Appellant is seeking entry clearance on the basis of his family life and thus the remaining requirements are not material. Consequently, there are no negative factors arising from the section 117B mandatory considerations that indicate that the public interest at section 117B(1) should prevail.

23. Therefore, for the reasons set out at [18]-[22] above, I find that the best interests of ZW would be met by his admission to the United Kingdom in order to live with his parents, younger brother [and sister]. The decision of the Entry Clearance Office to refuse entry clearance thus represents a disproportionate interference with the Appellant ZW's right to family life. His appeal falls to be allowed under the section 6 of the Human Rights Act 1998.

Decision

24. The appeal of SW is allowed under paragraph 297 of the Immigration Rules.

25. The appeal of ZW is allowed under section 6 of the Human Rights Act 1998 (Article 8 of the European Convention on Human Rights).

Deputy Upper Tribunal Chapman 25 April 2016