Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11330/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 13 August 2013	**on 16 August 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HEONG CHIN HEW

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Katani & Co., Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Malaysia, born on 4 December 1983. He is married to Cai Lin, a citizen of China. They have 2 children born on 18 April 2008 and 18 January 2010 in the UK.

2) The respondent refused the appellant's claims on asylum and all other grounds for reasons explained in a letter dated 6 December 2012.

3) First-tier Tribunal Judge Agnew dismissed the appellant's appeal for reasons explained in her determination dated 15 February 2013.

4) These are the grounds of appeal to the Upper Tribunal:

Ground 1: Appellant's Wife's credibility

The appellant's wife was present at the hearing in order to provide evidence in support of the appellant's Article 8 rights. The IJ questioned the appellant's wife with regards to her own asylum claim.

At paragraph 9 of the determination the IJ has stated that she has found the appellant's wife to have made a false claim as to why she cannot be removed from the UK. The IJ also comments on the appellant's wife's claims at paragraphs 22-25 of the determination.

… the appellant's wife's asylum claim was irrelevant to the Article 8 issue before the court. The respondent accepted that the appellant and his wife were married and in a relationship. The appellant's wife has leave to remain n the United Kingdom and was present purely to support her husband in terms of the arguments presented in relation to Article 8 ECHR. The IJ has erred by taking the past credibility findings into account and forming her opinion on the matter.

Ground 2 – Appellant's Credibility

At paragraph 27 of the determination the IJ has stated that the appellant attempted to address the credibility points within his statement: but that she finds the discrepancies have not been addressed by the appellant. It is submitted that if the IJ was open to question the appellant on any matter which she felt required clarification or which she needed further information on. By not asking these questions and making this finding she has acted unreasonably and as such has erred.

Ground 3 – Objective Evidence

The IJ at paragraph 32 considers the possibility of the appellant registering his children at the Malaysian Embassy and states the documents the appellant would require to do this … the IJ has not taken fully into consideration the other requirements as stated within the objective evidence (such as they must also produce the original Malaysian Marriage Certificate of the child's parents, the original Malaysian identity card of both parents and the passports of both parents) and the ability of the appellant in providing this information. By failing to consider the objective evidence fully the IJ has erred.

Ground 4 – Best Interests of the Child

This ground relates to the best interests of the appellant's children.

At paragraph 46 the IJ states that the appellant and his wife have abused the immigration system and that this justifies any short term interference in family life should the appellant be removed. The IJ at paragraph 40 states that the best interests of the children are served by being with their parents … the IJ has failed to take into consideration the case of ZH Tanzania in this regard as the immigration failings of the parent should not be visited upon the children. By removing the client from the UK due to his apparent abuse of the immigration system, it is depriving the 2 children of their father. By failing to take this into account the IJ has erred.

The IJ stated at paragraph 48 that the needs of the children shall be met in Malaysia. This is speculation. There was no evidence before the IJ regarding education, child health etc in Malaysia for her to come to this conclusion. Therefore the IJ has used speculation and in doing so has erred.

5) On 8 March 2013 First-tier Tribunal Judge Mailer granted permission to appeal, on the view that the judge arguably did not have proper regard to the fact that the appellant's

wife and children had leave to remain in the UK until June 2015, and arguably failed to consider the reasonableness of their contemplated return with their father in the light of that leave (ground 4).

6) The appellant renewed his application for permission to appeal to the Upper Tribunal on the first 3 grounds. On 15 April 2013 Upper Tribunal Judge Kebede for the avoidance of doubt granted permission on all grounds, "…albeit with regard to the limited merit in the first 3 grounds".

7) Mr Winter submitted in relation to the first ground that although the appellant's wife had not been found a credible witness in her own asylum claim, the refusal letter in the presented appeal accepted her relationship with the appellant and their 2 children. He said that the judge erred by going behind those agreed facts, and by treating the past unreliability of the appellant's wife as a witness as in any way relevant to the Article 8 assessment.

8) I observed that the judge made no further adverse finding on the credibility of the appellant's wife beyond what had already been established. I also commented that it might be difficult to find that her past unreliability as a witness and her past adverse immigration history were completely irrelevant when it came to proportionality.

9) Mr Winter accepted that the judge made no further adverse findings, and that little might turn on this ground.

10) On ground 2, Mr Winter submitted that paragraph 27 of the determination made an adverse finding based only on the appellant's delay in making his claim. The appellant responded in his witness statement to the points made against him in the refusal letter. The judge acted unfairly by failing to put her doubts about these responses to the appellant for further explanation. He accepted that reasons might be brief, but more had to be said. The appellant was entitled to know why his responses had not been accepted. Mr Winter founded upon Koca [2005] CSIH 41.

11) I pointed out that this case was not similar to Koca in that (a) both parties were represented in the First-tier Tribunal and (b) all the points which the appellant had to answer were known in advance from the refusal letter and did not arise from the determination itself. I doubted whether this ground disclosed any point analogous to Koca. If there were any error, it might be lack of reasoning.

12) Mr Winter had nothing further to add in support of ground 2. He indicated that ground 3 was not to be relied upon.

13) Turning to ground 4, Mr Winter relied upon what the judge said when granting permission to appeal. The appellant's wife and children had discretionary leave to June 2015 [not indefinite leave as erroneously stated at paragraph 1 of the determination]. The family could not meet the requirements of the Immigration Rules, but their situation amounted to a "good arguable case" for leave under Article 8

outwith the Rules. Mr Winter accepted that the judge was clearly aware that the appellant's wife and children had leave, but he said that she failed to consider the reasonableness of the appellant's return in that light. The appellant is a citizen of Malaysia of Chinese origin. His wife is Chinese. It was the period of likely separation which gave rise to the interference. I enquired whether if it was reasonable to expect the appellant's wife and children to join him in Malaysia in June 2015, why it might not be reasonable to expect them all to return there now. Mr Winter said this would deprive them of enjoyment of the leave they currently have, and of the opportunities of applying for further exceptional leave to remain and eventually for indefinite leave to remain. The appellant's wife had failed in her claims. The basis on which discretionary leave was granted had not been disclosed by the respondent. Mr Winter referred next to the evidence of discrimination and disadvantage suffered by Malaysians of Chinese origin. It was submitted that this case raised a question similar to that in ZH (Tanzania) v SSHD [2011] 2AC166 of whether it was reasonable to expect the children to live in another country. At paragraph 37 of the determination the judge found that the level of discrimination against the Chinese minority would not "*seriously affect* the access to employment, services and education for the appellant, his wife or children". That was not the correct test of the best interests of the children. There appeared to be universal discrimination against ethnic Chinese in admission to public universities, so that private universities had come into existence to cater for the Chinese. That would involve expense and discrimination which could not be in the children's interests. The Tribunal was bound to look at the long term and not only the short term interests of the children. The background evidence showed that there could be an adverse impact upon them, especially when they came to the level of higher education.

14) As to the outcome, Mr Winter submitted that if ground 2 were made out, there should be a fresh hearing. If grounds 1 and 4 were made out, the Upper Tribunal should reach a fresh decision based on the evidence which has so far been made available. There was no application to produce further evidence, but the appellant sought the opportunity to make further written submissions.

15) Finally, Mr Winter said he would invite me to consider Qui Yun Chen, 5 Sept 2013, United States Court of Appeals for the Seventh Circuit, Case 12-2563. He said that this case showed that Chinese family planning policy might have wider adverse effects than the Upper Tribunal found in AX China CG [2012] UKUT 97 and might place obstacles in the way of the wife obtaining a Chinese passport for herself (or for the children). She would have to provide a Chinese passport to obtain documentation to enter Malaysia. (If I understood the submission correctly, this was a reversion to ground 3.)

16) I queried what relevance this could have. Neither side presented the case as involving removal to China. Without any evidence that risk would arise to the appellant's wife by applying for a passport from the Chinese Embassy in London I did not see how the US case could begin to bear on this one. Mr Winter did not wish to take the matter any further.

17) Mr Mullen submitted on ground 1 that the judge simply took the history of the appellant's wife into account in relation to proportionality, as she was entitled to do. Ground 2 did not correctly identify any point analogous with Koca, and there was no lack of reasoning. Prior paragraphs in the determination set out the appellant's adverse immigration history, his previous removal and return, his significant delay in making the claim, and the opportunistic stage at which it arose. Nothing adverse had happened to him when he returned to Malaysia in 2007. The respondent's case was fully set out in the refusal letter and the judge was entitled to consider that it had not been answered. Reading the determination as a whole, it was plain why his asylum case had been rejected. On ground, 4 Mr Mullen submitted that it was fanciful that the case might have succeeded based on the children's best interests far in the future through differential access to universities. The children were 3 and 5 years of age, with university some 12 years off, if they ever reached that stage. The wellbeing of the children was plainly best served by being with their parents. There was no reason to think that they would suffer any significant adverse consequences through removal. Nothing was disclosed which might render their removal disproportionate in terms of Article 8. They had discretionary and limited leave to remain, only recently granted, and there had clearly been a change of circumstances since - the decision in the present case. They were not UK citizens or permanent residents. The weight to be given to their residence here to date was relatively small, particularly given their young age. The determination should stand.

18) Mr Winter in response referred to evidence in the respondent's Country of Origin Information Report that educational difficulties or differences arise not only at university level. It appears that primary schools teach in Malay and not in Chinese, which has led to the Chinese community setting up private schools teaching in Mandarin.

19) I reserved my determination.

20) Grounds 1 and 3 disclose no error of law, for reasons sufficiently mentioned above.

21) Ground 2 might have been better expressed as a complaint of lack of reasoning rather of unfairness. However, it is plain that the asylum (or Article 3) case was not advanced with any real enthusiasm in the First-tier Tribunal. Reading the determination fairly and as a whole, and under reference to the refusal letter and the appellant's witness statement, the allegation that the appellant was at risk on return from a crime lord was a futile story. No other outcome could reasonably have been expected, and no more needed to be said.

22) Ground 4 is seriously overstated. Removal of the appellant from the UK does not necessarily deprive two children of their father. There is no reason to think that the family cannot readily travel to Malaysia together. It is correct that the best interests of children have to be assessed separately from the adverse immigration histories of their parents, but there is no evidence that the best interests of these children would be

adversely affected to any significant extent by their living in Malaysia with their parents. There was no dearth of evidence, as suggested in the ground; and if there had been, that would have been against the appellant's case not in his favour. It was for him not for the respondent or the judge to cite evidence on which interference with article 8 rights might arise. Despite discrimination the Chinese minority thrives and achieves educational standards at least as high as the rest of the population. The judge was aware of the leave granted to the other family members. The ground is little more than an expression of dissatisfaction with a proportionality decision which was open to the judge and which did not leave any material factor out of account.

23) Alternatively, to the extent that this factor may have been overlooked, and making all due allowance for it, I would have come without difficulty to the same view on the proportionality of the outcome.

24) The appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal, dismissing the appeal on all grounds, shall stand.

25) No anonymity order has been requested or made.

15 August 2013
Judge of the Upper Tribunal