Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08620/2015
HU/08623/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 November 2017	**On 11 December 2017**

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CHALKLEY

Between

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Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Gill QC, instructed by Stephen & Richard, Solicitors
For the Respondent: Ms Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with leave against a decision of FtT Judge Hall promulgated on 19 December 2016 in which he refused their appeal against a decision of the Secretary of State refusing their application for leave to remain in the UK based on family and private lives. Both appellants are Chinese citizens and are married to one another. The first appellant is a female born 20 September 1947. The second appellant is a male born 20 October 1947.

2. The first appellant arrived in the UK on 11 April 2000 with a visitor's visa valid until 25 August 2000. She has remained in the UK unlawfully since the expiry of her visa. The second appellant arrived in the UK on 6 July 2004 with a visa valid until 11 December 2005. On 1 December 2004 the second appellant applied for leave to remain on the basis of work

permitted employment. That application was refused on 21 April 2005. The second appellant has remained in the UK unlawfully since then.

3. On 11 April 2015 the first appellant was served with a notice of liability to remove from the UK. The second appellant was served with a similar notice on 5 June 2015. The appellants made the current application for leave to remain on 23 July 2015.

4. The first appellant was born in China and lived there until 1998 when she moved to Trinidad before coming to the UK in 2000. The second appellant was born in China and lived there until 1990. He worked in Peru for two years and then worked in Trinidad from 1993 to 2001. Thereafter he worked in the United States before moving to the UK in 2004.

5. The appellants have four adult children, all of whom are British citizens. One son is currently in Peru. The others live in the UK. The appellants live with their eldest daughter and her family and have done so since arriving in the UK. Her daughter's date of birth is [ ] 1972. She is married and they have three children who at the date of hearing were aged 16, 12 and 10. All are British citizens.

6. Another daughter born [ ] 1978 is married with three children and lives 30 minutes' drive away from the appellants. They are British citizens. There is a son in Peru. The youngest son is married and at the date of the hearing was in the process of moving to London. Again, he and his wife are British citizens.

7. The reason given by the appellants for overstaying is that their eldest daughter suffers from paranoid schizophrenia for which she is prescribed anti-psychotic medication. She struggles to cope with looking after the children and doing housework. Her husband runs a takeaway food shop and spends little time with his wife and family. The appellants support their daughter by undertaking the housework and looking after the grandchildren.

8. In his decision Judge Hall found that the appellants had established a private life in the UK since their arrival in 2000 and 2004 respectively. Article 8 was therefore engaged on a private life basis. He found that they had not established a family life with the adult children with whom they did not reside. However they had established a family life with the eldest daughter and with the three grandchildren with whom they live. Accordingly Article 8 was engaged with the daughter and grandchildren on a family basis.

9. The appellants accepted that they could not satisfy the requirements of paragraph 276ADE(1) of the Immigration Rules. Accordingly the issue was whether they could succeed in the appeal outside the rules. The Judge considered whether or not the appellants were in a 'parental relationship' in terms of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). Applying the guidance in **R (RK) v SSHD**

(s117B(6): parental relationship IJR [2016] UKUT 31 (IAC) he determined that neither appellant had 'stepped into the shoes' of the parent and accordingly that section did not apply. The Judge accepted that it would be in the best interests of the children that the appellants remain in the country. While noting that the best interests of the children were a primary consideration they were not paramount and could be outweighed by other considerations. He considered that he required to find 'compelling circumstances' to justify a grant of leave outwith the rules: **SS (Congo) [2015] EWCA Civ 387**. The Judge considered the criteria in s 117B of the 2002 Act. He found that there were no compelling reasons to justify a grant of leave outwith the rules. The weight that must be given to the public interest in maintaining effective immigration control outweighed the weight to be given to the best interests of the grandchildren and the daughter.

Grounds of Appeal and Submissions for Appellants

10. The appellant submitted lengthy grounds of appeal. There are six in number and can be summarised as follows. The first is to the effect that the judge erred in law in his approach to s117B(6) of the 2002 Act. Secondly it was submitted that the Judge erred in failing to hold that the decision under challenge was not in accordance with the law because the Secretary of State had failed to consider the provisions of section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act). He had further erred in not considering it himself. Thirdly the judge had failed to assess the best interests adequately. Fourthly he failed to assess public interest properly. Fifthly he acted unreasonably in holding that the appellants had not shown that they fell within para 276 ADE(1)(vi). Finally the Judge erred in law in failing to strike a fair balance under Article 8(2) ECHR.

11. Mr Gill QC submitted that the Judge had taken too narrow an approach to the term 'parental relationship' in s117B(6). It was not the same as parental responsibility which was a term of art; see Children Act 1989 section 3. The term parental relationship had to be interpreted in a manner which was consistent with the welfare principle and in accordance with Article 8; **ZH (Tanzania) 2011 UKSC 4**; In **Re G [2006] UKHL 43, [2006] 1 WLR 2305** Baroness Hale examined the different ways in which a person could become a natural parent of a child including social and psychological parenthood (para 35). In **Re B [2009] UKSC 5** Lord Kerr giving the judgement of the Supreme Court said that in private law disputes about residence the child's best interests were the paramount consideration. In **RK** Judge Grubb had asked whether the claimant had 'stepped into the shoes' of the parent. While that was fine as far as it went a parental relationship did not require the natural parent to play no role in the upbringing of the child; grandparents could form a parental relationship along with the parents themselves. Article 8 had to be interpreted in a manner consistent with the UN Convention on the Rights of the Child which amongst other things placed a duty on member states to consider the best interests of the child as a primary consideration.

12. On ground 2 it was submitted that neither the Secretary of State nor the FtT had made any reference to section 55 of the 2009 Act. The importance of this provision was emphasised in **ZH (Tanzania)** at paras 23 and 24. Any decision taken without regard to the need to safeguard and promote the welfare of the children involved will not be in accordance with law.

13. Turning to ground 3 Mr Gill submitted that too often lip service was given to the best interests of the child. At paragraph 62 the Judge finds that the best interests of the children would be served by the appellants remaining in the UK. But it does not deal with the possible effects on the children if the appellants were removed. In this case the best interests appear to be easily overcome by the need to maintain effective immigration control without fully considering the impact on the children. In **Zoumbas v SSHD [2013] UKSC 74** Lord Hodge noted that although the best interests of the children can be outweighed by the cumulative effect of other considerations no other consideration can be treated as more significant.

14. On ground 4 Mr Gill submitted that the Judge erred in failing to properly assess the public interest. There was not just a private interest in play but a public interest in British children growing up in the best possible circumstances in the UK. The public interest in the removal of the appellants was extremely low for the reasons given by Lord Bingham in **EB (Kosovo) [2008] UKHL 41** at paragraphs 13 to 16. There had been a great delay by the Secretary of State as a result of which a strong bond had been established between the appellants and the children. Even if the appellants had not established a parental relationship for the purposes of section 117B(6) they were the main carers of the children. The public interest in removing the appellants was thus extremely low.

15. So far as ground 5 was concerned Mr Gill relied on the grounds of appeal and did not make any further submission.

16. On ground 6 Mr Gill submitted that by relying on the guidance in **SS (Congo)** that compelling circumstances were required before a grant of leave to remain could be made outwith the rules the Judge had fallen into error. **SS (Congo)** had been overturned in the Supreme Court; **MM (Lebanon) 2017 UKSC 10**. The position was as it always was in **Huang [2007] UKHL 11**. The failure to properly address the best interests of the children meant that the Judge had failed to realise that there was such a strong interest in protecting their welfare that a very strong set of countervailing considerations were required to outweigh these best interests. The only countervailing consideration was the fact of overstaying. The Judge had placed little weight on the private life because he felt mandated to do so by the provisions of section 117B(4). But this provision was not a definitive statement of the public interest; **Rhuppiah [2016] EWCA Civ 803** at para 52. This error was compounded by the failure to take into account the delay on the part of the Secretary of State. The decision was unreasonable and disproportionate because in addition to the above factors the interests of all the family looked together was extremely high; the best interests of the children cared for by the

appellants amounted to an extremely strong and primary consideration the strength of which had not been understood by the Judge; the public interest in protecting the best interests of the children was high but ignored; the Judge unreasonably considered that contact could be maintained by means of modern communication; the public interest in ensuring that the appellant's eldest daughter was cared for and assisted by her own family members was ignored; and there was no relevant public interest in the economic well-being of the country favouring expulsion.

Submissions for Respondent

17. Ms Isherwood submitted that there was no material error. While she accepted that Article 8 was engaged the two appellants had arrived in the UK in 2000 and 2004 respectively. They had been here illegally. The second appellant had put in an appeal to remain but that had been refused. He was expected to leave but had elected to stay. He had been in receipt of NHS treatment which had not been paid for. The two biological parents had not abdicated responsibility. The mother was not incapable of looking after the children. There was no evidence that the appellants had taken any major decision in the lives of the grandchildren. **RK** was the correct approach. The appellants had not stepped into the shoes of the parents. There was no difference between the phrases 'parental responsibility' and 'parental relationship'. Both phrases were used by Judge Grubb in **RK**. While it was true that there was no mention of section 55 of the 2009 Act in the decision letter the focus of the appeal had changed. It was clear that the Judge had fulfilled the obligations in section 55 without actually referring to its terms.

Discussion and Decision

18. In **RK** Judge Gibb considered whether or not a grandparent who cared for her grandchildren, her daughter suffering from multiple sclerosis and Lupus, could be in a parental relationship for the purposes of section 117B(6). He considered that it was not necessary for an individual to show that they had parental responsibility before a parental relationship could be said to exist. What was important was whether they had taken on the role that a parent usually plays in the life of the child. He considered that in order to establish a parental relationship the individual must 'step into the shoes of the parent'. Where a non-biological parent caring for a child claims such a relationship its existence will depend upon all the circumstances including whether or not there are others (usually the biological parents) who have such a relationship with the child. He considered that it would be unlikely that that a person would be able to establish such a relationship where the biological parents continue to be involved in the child's life as the child's parents. In those circumstances it will be difficult, if not impossible, to say that a third party has stepped into the shoes of the parent.

19. We consider that Judge Grubb's analysis of the argument cannot be faulted. The difficulty with Mr Gill's submission is that it concentrates on

the quality of the relationship rather than on the parental part of the phrase. In **Re G [2006] UKHL 43** Baroness Hale examined the, at least, three ways in which one could become the natural parents of a child. The first two can be described as biological but the third way she termed social and psychological parenthood. She described it as the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving and later at the more sophisticated level of guiding, socialising, educating and protecting. She quoted with approval the definition of "psychological parent" from the influential work of *Goldstein, Freud and Solmit, Beyond the Best Interests of the Child (1973)* as follows

> "A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent."

20. Many people may be involved in the upbringing of a child. These may include family members such as aunts and uncles, siblings and step siblings depending on the age difference, grandparents and others. It may also extend to others outside the family such as family friends, neighbours or teachers. The strength of the relationships between such individuals and the child will vary greatly. But for the relationship to take on a parental character it will be necessary to demonstrate that it has the qualities averted to by Baroness Hale. We agree with Judge Grubb that it will be very difficult to demonstrate the existence of such a relationship when the biological parent is exercising parental responsibility on a day to day basis. Moreover it seems us patronising to suggest that simply because the biological parent has health problems which necessitate a greater involvement in the care of children by other family members than might otherwise be the case that the parent is less able to fulfil that parental role.

21. In any event the evidence accepted by the Judge in this case falls some way short of establishing that relationship. At paragraph 51 the Judge finds that while the appellants have been of considerable assistance to their daughter and son in law they have not stepped into the shoes of a parent. He did not accept that they took important decisions in the well-being of the children. There was no evidence from the schools they attend that the grandparents are regarded as the parents and it was the son in law who attended schools parents' evenings. In those circumstances we consider that there was no error of law in the conclusion that the appellants did not have a parental relationship for the purposes of section 117B(6).

22. That said the relationship between the appellants and the children is particularly strong. As the Judge found, and Ms Isherwood rightly conceded, Article 8 is engaged because of the family relationship between the grandparents and children. Such a relationship was not found to exist with the grandchildren of their other children. The appellants live with their daughter, son in law and children in a family setting and they are

intimately involved in the running of the household and the care of the children. The first appellant has lived in the family since about the time the first of the grandchildren was born. The second appellant came to this country when the first child was 4 and about the time of the birth of the second grandchild. The third was born in 2006. Accordingly the appellants have been a constant presence in the lives of the grandchildren throughout their lives.

23. The appellant's role in the upbringing of their grandchildren and the strength of the relationship is demonstrated by the evidence of the children. The oldest describes how they have helped him develop from an early age and eased his transition from a young child to teenager. He said that their mother has been ill mentally and physically since he could remember but his grandparents had prepared meals, done laundry, shopping and keeping the house clean. The middle child described his grandparents as the most important people in his life. His happiest memories were of them. He described how his mother's illness impacted on her; she was amongst other things temperamental but his grandparents were there to calm her down and remind her to take her medicine. They taught him to work and study hard. He said he could not imagine life without them and he had cried a lot in secret since the people from immigration had come to their house. The third child, who is now 10 years old says that she fears that there will be no one to look after them. All of them demonstrate a deep love and affection for the appellants. It is clear that the effect of removal of the grandparents on the children would be substantial.

24. Mr Gill submitted that the Judge had viewed the best interests of the child from an adult perspective; he had not sought to analyse the effect on the children of removing the appellants from their lives. Nor had he examined the effect on the daughter and subsequent consequences for the children. We consider that there is substance to these submissions. While Judge Hall acknowledges that the best interests of the children are a primary consideration it is not clear how that translates in the balancing act. It is easy to say that the best interests of the children are a primary consideration and then pass on to considerations which are said to outweigh them. In doing so however it is necessary to consider the full impact of a decision which is not in accordance with the children's best interests before concluding that they are outweighed by other considerations.

25. The Judge applied the guidance in **SS (Congo)** to look for compelling circumstances to grant leave outwith the rules. The decision in **SS (Congo**) was overturned by the Supreme Court in **MM (Lebanon).** Mr Gill submitted that the position is now as it had been in **Huang**. That is perhaps a simplification of the position as articulated in the judgement of Lady Hale and Lord Carnwath. Nevertheless it appears to us that the central issue in considering the appellants Article 8 claim is whether a fair balance has been struck between the personal interests of the family and the public interest in controlling immigration; see paragraphs 43 and 44 of

the judgement in **MM (Lebanon)** drawing on **Jeunesse v The Netherlands (2015) 60 EHRR 17**.

26. In striking that balance it is of course necessary to consider, as the Judge did, the provisions of section 117B of the 2002 Act. He was correct to find that neither appellant can speak English and that neither is financially independent. Accordingly the criteria in subsections (2) and (3) are not met. It is also correct that the appellant's private life in this country has been established while they were in this country illegally. Accordingly, applying subsection (4) little weight should be given to this aspect. However this is not a statement of the public interest; **Rhuppiah** para 52.

27. While these are factors to be taken into account in the overall assessment they do not in themselves have the same weight that needs to be accorded the best interests of the children. At paragraph 71 the Judge finds that the weight that must be given to the public interest in maintaining effective immigration control outweighs the weight to be given to given to the best interests of the appellant's grandchildren. It is accordingly the fact that both that both appellants have, as the Judge finds at paragraph 70, blatantly disregarded the Immigration Rules that tips the balance against the appellants.

28. It is of course true that the appellants have been in the UK unlawfully. Section 117B(1) of the 2002 Act provides that the maintenance of effective immigration control is in the public interest. However the weight to be given to that must depend on the circumstances. In this case the first appellant had been in the UK as an overstayer for 15 years before the Secretary of State sought to remove her. The second appellant has been here 10 years since his application to remain in the UK was refused. Again no attempt was made by the Secretary of State to enforce immigration control against him until 2015.

29. In **EB (Kosovo)** Lord Bingham noted the effect of delay as a factor in the decision making process. He said that a relationship entered into at a time when the applicant's immigration status is precarious may be imbued with a sense of impermanence, "But if months pass without a decision to remove being made, and months become years, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal." This observation is clearly directed to adult relationships where both parties may be assumed to know of the precarious nature of the applicant's status. In this case however the delay has allowed a strong family relationship with children to be formed. They will have had no understanding of the fact that their grandparents had no right to be in the country. They will have seen them as the people who loved them, nurtured them, played with them, ensured they attended to their homework and assisted their ill mother with household tasks. In those circumstances it seems to us that the weight to be given to the

public interest in ensuring effective immigration control is less than it would normally be if the Secretary of State had enforced immigration control earlier.

30. The grandchildren are British citizens as are their parents. They have a strong bond with the appellants which goes beyond that which usually exists between grandparents and grandchildren. Because of their mother's illness they have relied on them on a daily basis throughout their lives. That is emphasised in the evidence before the FtT. A letter from a Dr Khayyatt, a psychiatrist treating the appellant's daughter, dated 21 September 2016 notes that she is well supported by her parents husband and family to maintain her mental well-being. A letter from a psychiatric nurse, Jane Morgan dated 10 October 2016 noted that she had been visiting the appellants' daughter for the last 11 years. During this time she had had a number of relapses which appeared to have been brought on by stress. She had got to know the appellants. One of them usually opened the door to her. They had a strong bond with their daughter. They helped with household chores and cooking as well as looking after the children. The daughter relied upon the appellants for physical and emotional supported. She concluded that if the appellants were to be deported she would lose this support and the stress would be detrimental to her condition.

31. Accordingly the impact of the removal of the appellants would be twofold. First there would be a direct impact on the children who would lose a mainstay of their physical and emotional support and which has been there all their lives. Secondly there would be an impact on their daughter who would also lose the physical and emotional support that her parents have given her throughout her time as a mother and be detrimental to her condition. That would have a knock on effect on the children who, as well as having to deal with the stress of losing their grandparents would have to deal with the stress of their mother's illness exacerbated by the loss of her parents.

32. The Judge notes that if the appellants are removed to China contact can be maintained through modern means of communication. No doubt that is true but we agree with Mr Gill when he said that it was unrealistic to expect family life to be conducted by Skype.

33. For these reasons we consider that the Judge erred in his assessment of the balance to be struck between the rights of the family and the public interest. We agree with the Judge that the best interests of the children are served by the appellants remaining in the UK. However we consider that by not considering the impact on the children both directly and indirectly he did not give sufficient weight to their interests. We further consider that in the circumstances of this case too great a weight was placed on the need to maintain effective immigration control. The public interest does not always require removal. Section 55 of the 2009 Act requires that immigration decisions have regard to the need to safeguard and promote the welfare of children in the UK. In this instance we are

satisfied that the public interest favours the appellants remaining in the UK.

34. We find that the removal of the appellants would be contrary to Article 8 ECHR and section 6 of the Human Rights Act.

Notice of Decision

The appeal is allowed on human rights grounds.

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 11 December 2017

Rt Hon Lord Boyd of Duncansby
Sitting as a Judge of the Upper Tribunal