Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08475/2012

THE IMMIGRATION ACTS

Held at UT (IAC) Hearing in Glasgow	**Determination Promulgated**
On 17th July 2013	**On 2nd August 2013**

Before

UPPER TRIBUNAL JUDGE A L McGEACHY
DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MASTER JUNJIE CHEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Price, Solicitor
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant was born on 15th February 2002 and is a citizen of China. He sought entry clearance to join his parents in the United Kingdom. The application was refused by the Entry Clearance Officer (ECO) and his subsequent appeal to First-tier Tribunal Judge Balloch was dismissed in a

determination promulgated on 21st May 2013. The judge found that the Appellant did not qualify for entry clearance under paragraph 297(i)(f) or paragraph 301(i)(c). While there were competing factors in the Article 8 balancing exercise she did not find that any interference in the family or private life would be disproportionate.

2. Grounds of application were lodged. Although the judge had set out the correct standard of proof it was said that she had applied a higher test of proof in her consideration of the case. Some of the Grounds of Appeal relate to the concept of sole responsibility which we need to mention no further as Mr Price for the Appellant placed no reliance on such grounds. It was, however, said to be unclear whether the judge had accepted the medical evidence and if so why she had refused the case under the paragraphs mentioned above. In terms of Article 8 the judge had correctly identified that the starting point was that it would be in the best interests of the Appellant to live with and be brought up by his parents but had failed to give proper reasons why this should not be the position in the Appellant's case, particularly given the evidence produced in respect of the grandparents' health. Before us Mr Price did not rely on Ground 6 in relation to Article 8 ECHR where it was said that the Appellant's sister would have to revoke her citizenship if returned to China. He did however rely on Ground 7 namely that the judge had erred in law in her approach to the leave to remain of the Appellant's father who was clearly on the path to indefinite leave to remain. Finally it was said that the very fact that the Appellant made the application was sufficient to confirm that the Appellant was wishing to come to the UK.

3. Permission to appeal was granted and thus the matter came before us on the above date.

4. Mr Price indicated that there were no maintenance, accommodation or exclusion issues. Firstly, the judge should have concluded that the Appellant's father qualified under paragraph 301(i)(a). This stated that one parent was present and settled here and "the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement". That was the position of the Appellant's father and therefore the Appellant came within that paragraph and the decision should therefore be set aside and the appeal allowed.

5. Secondly, the Appellant did qualify under paragraph 297(i)(f) and 301(i)(c) in that there were "serious and compelling family or other considerations which make exclusion of the child undesirable". The judge had recited the oral evidence given (see paragraphs 13 and 17) but had ignored that evidence when concluding in paragraph 30 that on the basis of the documentary evidence it had not been demonstrated that the criteria of the Rules had been met. The judge had said that it was "not evident" what had changed to make them unable to care anymore for the Appellant. That ignored the oral evidence given. We were referred to paragraph 48 of **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049** where it was said that the purpose of

paragraph 297 was designed to maintain or effect family unity. The judge had failed to take that into account.

6. As set out in the grounds there was a breach of the Appellant's rights under Article 8 ECHR.

7. We were entitled to find an error in the decision, set it aside, and allow the appeal under the sections of the Rules mentioned above and Article 8 ECHR.

8. For the Home Office Mr Matthews said that the Appellant's father had been given discretionary leave for a period of five years – given the normal period was three years it was unclear and unknown why a longer period had been granted. In order to achieve indefinite leave to remain a further application for discretionary leave would have to be made. The outcome of that application would depend on the facts and circumstances. The judge had been correct to say (paragraph 33) that it could only be speculative as to what might happen some years hence. As at the time of the application the Appellant's father did only have discretionary leave to remain.

9. The judge had set out the correct burden and standard of proof and all that she was saying was that the burden of proof had not been discharged.

10. In terms of the judge looking only at the documentary evidence in relation to the health of the grandparents it would be surprising if the judge had forgotten about the oral evidence given that she had recited what that oral evidence had been.

11. In terms of Article 8 the judge had set out the five stage test in **R v SSHD ex parte Razgar [2004] UKHL 27**, had applied well-known jurisprudence and carried out a proper balancing exercise. While there might be an error in the judge saying that there was a doubt about the wish of the Appellant to come to the UK that was not a material matter. We were invited to hold that there was no error in law in the judge's determination.

12. We reserved our decision.

Conclusions

13. Condensing the Grounds of Application there are three limbs to the Appellant's case. Firstly it is argued that the language of paragraph 301(i)(a) is that the Appellant's father does have limited leave to remain in the UK all with a view to settlement. As noted by the judge both parents have lived in the UK since 2006 and 2007 respectively. Both made claims for asylum which were refused. The Appellant's father has limited leave to remain until March 2015 and they have a daughter born here on 17th November 2008 who has a British passport. Does he then qualify as someone who has limited leave to remain "with a view to settlement"? How far along that route does he have to be before he might qualify? As Mr Matthews pointed out to us being settled in the United Kingdom means

that someone is free from any restriction on the period for which he may remain (subject to exceptions). While on one view the Appellant's father had started on the route to becoming settled in the United Kingdom he did have some distance to go in that he only had discretionary leave to remain and a further application would require to be made. In those circumstances we do not think the judge can faulted for concluding that it would only be speculative what might happen some years ahead. We do not think that such a conclusion is unfair to the Appellant's father and as such there can be no error in law in the judge noting the position that at the present time the father only had discretionary leave to remain which did not permit the Appellant to qualify under the rules.

14. Secondly, it has to be said that the judge appears to have confined herself to looking at the documentary evidence presented in terms of the health of the grandparents. While she recited the oral evidence given there is nothing in the reasoning contained at paragraphs 26 to 30 to indicate that the judge took that evidence into account. Indeed the opposite is true as she writes that on the basis of the documentary evidence "alone" the Appellant does not satisfy the rules. That oral evidence was particularly important given that Qiqingmei Chen stated (paragraph 13) that her parents' health was now poor and they "cannot" look after her son anymore. At paragraph 17 Bingyun Ni said that the Appellant "cannot" continue to live with his grandparents because they could not even take care of themselves.

15. There is nothing to indicate that the judge assessed the importance of this evidence and whether she accepted or rejected it. Rather she concluded (paragraph 30) that it was not "evident what has changed". Accordingly it seems to us that the judge did not assess the medical condition of the Appellant's grandparents on the totality of the evidence presented to her. Not to do so was an error in law. It might also be said that at page 339 and 341 of the bundle are statements of the grandparents who say in effect that they are no longer able to look after the Appellant. There is nothing in the determination to say that the judge considered this evidence which does go in the clear direction that there was a change in the circumstances which required the judge's consideration. Not to consider this evidence was an error in law.

16. We therefore consider it necessary to set the decision aside and remake it. Neither party indicated to us that that there was a need to hear further evidence and it was not suggested that we should not accept the evidence of the Appellant's parents as being anything other than honestly given.

17. The judge said in paragraph 30 in relation to the medical documentation "I do not find on the basis of this evidence alone that it has been demonstrated that the criteria of paragraph 297(i)(f) or paragraph 301(i)(c) have been met". As we have said it appears the judge did ignore material evidence in coming to that conclusion. We consider this error was compounded by the fact that as noted in **TD** above the purpose of paragraph 297 is clear namely that it is designed to maintain or effect

family unity. The judge should have looked at the broad picture namely that the Appellant's sister is a British citizen and in the United Kingdom and his parents are in the United Kingdom, one who has indefinite leave to remain and the other who was granted discretionary leave to remain for a period of five years. We can take it from the lodgement of the application itself that the Appellant does desire to come to the United Kingdom. It is clear from the statements provided by the grandparents that they consider they are too frail to continue to look after the Appellant. It is a truism that it is highly desirable that families live together hence the intention behind paragraph 297 as expressed above.

18. Taking into account all the family circumstances surrounding the Appellant and in particular the growing inability of the grandparents to look after the Appellant we consider that, to the appropriate standard, the Appellant has shown that there are "serious and compelling family or other considerations which make exclusion of the child undesirable" both in terms of paragraph 297(i)(f) and 301(i)(c). We would therefore allow the appeal on this basis.

19. For the same reason we would allow the appeal under Article 8 ECHR. The Appellant qualifies under the Immigration Rules. In the light of those findings it would be disproportionate in terms of Article 8 for his application to be refused.

20. For these reasons this appeal must be allowed.

Decision

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

22. We set aside the decision.

23. We remake the decision in the appeal by allowing it under the Immigration rules and on human rights grounds.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald