First-tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/
IA/
IA/
& IA/

THE IMMIGRATION ACTS

Heard at Hatton Cross
on 9th September 2011
Determination prepared
on 20th September 2011

Determination Promulgated

26 SEP 2011
.....

Before

IMMIGRATION JUDGE COPE

Between

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Mr A Berry
For the Respondent: No appearance

DETERMINATION

Introduction

1. The Appellants – and – are citizens of Malaysia (the second to fourth Appellants) and a British Overseas Citizen (the first Appellant). They appeal against the decision by the Secretary of State for the Home Department to refuse an application for further leave to remain in the United Kingdom on the basis of a claim under the Human Rights Act 1998 and the European Convention on Human Rights.

2. It should be noted that whilst the Secretary of State for the Home Department is formally named as the Respondent, she has of course not personally taken the decision to refuse the Appellants' application; in reality they were the decisions of a member of the UK Border Agency staff. The references to the Respondent in this determination should be construed accordingly.

Hearing

3. The Appellants were present at the hearing of the appeals at Hatton Cross on 9th September 2011. They were represented by Mr A Berry of counsel instructed by Maxwell Alves Solicitors of London.

4. The Respondent did not appear and was not represented. On checking the Asylum and Immigration Tribunal file, I was satisfied that notice of the time, date and place of hearing had been given to the Home Office Presenting Officer's unit on behalf of the Respondent and I therefore proceeded to hear the case

5. The first and second Appellants were the only witnesses to give oral evidence; their evidence and the proceedings were translated between Cantonese and English by the interpreter, Mr Jian Hua Xiao. In accordance with the normal practice in Hatton Cross, the oral evidence was given un-sworn and un-affirmed.

6. I should add that in view of the third and fourth Appellants' ages, they being 14 and 11, with the agreement of Mr Berry I did not consider it appropriate for them to give oral evidence or be present during the hearing. However they were present at the beginning and the end of the hearing and I explained to them that I would be taking their views into account through the evidence of her parents and the submissions of Mr Berry.

7. At the conclusion of the hearing I reserved my determination.

8. Although technically there are four appellants, I heard the appeals together and have produced one joint determination under the provisions of r.20(a) and (b) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 as I considered that the decisions related to members of the same family, and that there were common questions of fact and law arising in each of the appeals.

Issues

9. The grounds for refusal by the Respondent of the Appellants' applications to remain in the United Kingdom on human rights grounds under Article 8 of the European Convention on Human Rights were contained in notices of refusal dated 4th July 2011; the reasons for the refusal were set out in accompanying letters dated 12th April 2011. In particular the Respondent was not satisfied that requiring the Appellants to leave the United Kingdom would not give rise to a breach of their rights under Article 8 of the European Convention on Human Rights.

10. The Appellants appealed against these decisions to refuse their applications to stay in the United Kingdom by their notices of appeal dated 21st July 2011. The joint

grounds of appeal took issue in some detail with the objections of the Respondent and made reference to Article 8 of the European Convention on Human Rights.

Legal Framework

11. The Appellants' claim to remain in the United Kingdom relied upon the Human Rights Act 1998 and the European Convention on Human Rights, specifically Article 8, the right to respect for private and family life. This reads:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

12. In this type of case it is initially for the Appellants to show that their case is capable of engaging the protection of the European Convention on Human Rights. The standard of proof is equivalent to the balance of probabilities standard of proof. It is then for the Respondent to show that removal of the Appellants from this country would not be disproportionate.

Evidence

13. In coming to my decision in these appeals, I have taken into account all the oral evidence given by the Appellants.

14. In addition to the oral evidence, there was a very considerable amount of documentary evidence relied upon by the Appellants. I would make it clear have read and taken into consideration all of this documentary evidence when coming to my decision in these appeals.

15. Finally, I have taken into account the oral submissions made at the hearing of the appeal by Mr Berry on behalf of the Appellants together with his written skeleton arguments.

Findings and Reasons

16. I should first of all explain briefly why it is that there is only a Human Rights appeal before me rather than one based on the Immigration Rules.

17. This is because at the time that the applications to stay in this country were made by the Appellants they did not have any current leave to remain; and their applications were in the form of a request to the Respondent to allow them to stay here outside the terms of the Rules.

18. I should also say that during the course of his submissions to me Mr. Berry raised the question of what he termed the limbo policy in relation to the first Appellant. This is a reference to the Respondent's policy in relation to British Overseas Citizens and renunciation of their previous citizenship, and is to be found in paragraph 9 of section 2 of chapter 22 of the Respondent's Immigration Directorate Instructions.

19. The non-application of this policy in relation to the first Appellant could in certain circumstances found the basis of a successful appeal in the sense that if the Respondent had not followed and applied that policy her decision would not be in accordance with the general law.

20. However I am satisfied that this issue does not arise in this case because the first Appellant was not in a position to provide evidence of non-returnability from the Malaysian High Commission which in effect is one of the conditions set down by the Respondent for the potential application of the limbo policy.

Factual basis

21. In general terms there was no particular dispute about the facts of the case.

22. As might be expected from their names, the Appellants are of Chinese ethnicity -- all are or were citizens of Malaysia, although the first Appellant is now a British Overseas Citizen. The second Appellant first came to United Kingdom as a student in October 2002; the first Appellant came here as a visitor in December 2002 before being granted further leave to remain as a dependent spouse of a student. In March 2004 she was refused indefinitely to remain here as a British Overseas Citizen, and in December 2004 her application for registration as a British citizen was refused. In 2008 the third and fourth Appellants, who are the children of the first and second Appellants, came to this country as visitors. Although they were granted leave to enter, they did not return to Malaysia on the expiration of that period of leave. In November 2009 applications were made on behalf of the Appellants to the Respondent for leave to remain on the basis of Article 8 of the European Convention on Human Rights. These applications were refused by notices of decision issued in July 2011.

Human Rights Act

23. Since 2nd October 2000, it has been possible for a person who has been refused leave to stay in this country not only against that decision as such, but also that the refusal or any subsequent removal from the United Kingdom would in itself breach their rights under the European Convention on Human Rights as adopted into United Kingdom law through the Human Rights Act 1998. There can either be a direct appeal on human rights grounds, or the matter can arise through the operation of the "one-stop" appeal provisions.

24. The basis for a claim under the European Convention on Human Rights which was put forward by the Appellants was Article 8, the right to private and family life. It was suggested on behalf of the Appellants that removing them to Malaysia would lead to a breach of their right to family and private life in this country.

25. In approaching my assessment of the Article 8 claim, I have borne in mind the step by step approach set out by Lord Bingham of Cornhill in the House of Lords' decision of **R v SSHD *ex parte* Razgar [2004] UKHL 27, [2004] Imm AR 381** at paragraph 17 – would the proposed removal [or in this case, denial of entry] of the Appellants be an interference in the exercise of the right to respect for family or private life; would such interference potentially engage the operation of Article 8; is such interference in accordance with the law; is such interference necessary in a democratic society; and finally whether any such interference was proportionate to the legitimate public end sought to be achieved.

26. As a general comment, I would accept that it is clearly settled law both under Strasbourg and United Kingdom jurisprudence that a non-national of a state cannot automatically claim the right to settle in a territory where their family member may have rights of residence. The state is entitled to have and to operate an immigration policy within established human rights parameters.

27. On the other hand [and this does sometimes sit rather uneasily with the general proposition about right of the state to operate an immigration control policy that I have just referred to] there is the obligation on the United Kingdom as a signatory to the European Convention on Human Rights to refrain from inhibiting the development of a future family life – see for instance the judicial reminder of this principle in **R (on the application of Ahmadi and Ahmadi) v SSHD [2005] EWCA Civ 1721** at paragraph 18 *per* Moses LJ.

28. Of course, a necessary pre-condition to the approach of Lord Bingham in **Razgar** is obviously that it has to be shown that a family or private life has been established or should be established in the future. It is only where there is such a family or private life that there can be any question of protection of the right to such a life itself, or against any interference with the right.

29. Given that the third and fourth Appellants are the children of the first and second Appellants, I am sure that the Respondent will accept that family life has been established as between all the Appellants who have been living in the United Kingdom for some considerable time. I also consider that private life has been established here by the third and fourth Appellants – if nothing else they are in school in this country, and there will obviously be social relationships developing there.

30. In point of fact the Respondent does accept that there is family life between all four of the Appellants; and that given the length of time in particular that the first and second Appellants had been staying in this country, they have established private life here.

31. I also do not think it would be challenged by the parties that the refusal by the Respondent of the Appellants' applications to stay here in accordance with the law in the sense that they were taken under the relevant provisions of the immigration legislation and Immigration Rules; nor that the Respondent was taking the decisions on the justification of it being necessary to do so in a democratic society in the interests of a fair and just immigration control system.

32. This therefore leaves the question of proportionality – which, in accordance with Lord Bingham's remarks at paragraph 20 of **Razgar**, is a matter for me exercising my own judgment taking into account any material which may not have been before the Respondent.

33. The question of proportionality in Article 8 cases has in recent years produced a flurry of judicial pronouncements from the Immigration Appeal Tribunal and the Asylum and Immigration Tribunal, the Court of Appeal and the House of Lords seeking to explain the concept or attempting to clarify earlier decisions of the Tribunals and the courts.

34. The most authoritative attempt to analyse and explain the adjudicator's/immigration judge's role is the House of Lords decision in **Huang v SSHD [2007] UKHL 11**. There their Lordships made it clear at paragraph 20 of their opinion that the ultimate question for the Asylum and Immigration Tribunal is whether the refusal of leave to enter prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right to family life, where the circumstances are such that that family life cannot reasonably be expected to be enjoyed elsewhere and taking full account of all considerations weighing in favour of refusal of entry clearance.

35. I have also had regard to the Court of Appeal decision in **AG (Eritrea) v SSHD [2007] EWCA Civ 801** in which they made it clear that each case involving Article 8 must be considered on its own particular facts and that no formula can be devised to ensure that any expectation will be realised in practice that only a small minority of cases will succeed under this Article.

36. I have additionally taken into account the opinion of the House of Lords in two very important decisions. In **Chikwamba v SSHD [2008] UKHL 40** their Lordships made it clear, sometimes in forthright terms, that in Article 8 family cases there should not necessarily be a rigid adherence to a system of requiring applicants to leave the United Kingdom in order to apply for entry clearance in their home country. On the same day, their Lordships in **Beoku-Betts v SSHD [2008] UKHL 39** also made it clear that it is the interests of other family members which also have to be taken into account as well as those of the appellant in Article 8 family life cases; at paragraph 20 of the opinion, Lord Browne explains that the family unit as a whole had to be considered as well as its individual members.

37. In addition I consider that the recent trend of judicial authority is very firmly towards taking into account the interests of children and young people when making immigration decisions about them or members of their family – see for instance the decisions of the Supreme Court in **ZH (Tanzania) UKSC 4**, of Blake J in **Mansoor, R (on the application of) v SSHD [2011] EWHC 832 (Admin)**, and the Immigration and Asylum Chamber in the Upper Tribunal of **LD (Zimbabwe) [2010] UKUT 00278 (IAC)**, **EM and Others (Zimbabwe) [2011] UKUT 00098 (IAC) CG** and **E-A (Nigeria) [2011] UKUT 00315 (IAC)**, which have all underlined the importance of the interests of children being taken into account in the making of immigration decisions.

38. In effect therefore I do have to undertake a balancing act between the interests of society, as represented by the Respondent's claim that requiring the Appellants to

leave the United Kingdom is necessary in a democratic society in order to operate a fair immigration control for the economic well-being of the country as against the interests of the Appellants wishing to stay in this country, and having particular regard to the interests of the child Appellants.

39. The starting point it seems to me is the need to give due regard to the interests of the state in the enforcement of an effective and efficient immigration control, and to maintaining public confidence in such a system. I accept as a matter of law that this is a factor to which very considerable weight should be given in assessing whether or not it is proportionate to require the Appellants to leave the United Kingdom.

40. Indeed it is this factor which is almost invariably the only matter relied upon by the Respondent or her representatives in appeals before the Immigration and Asylum Chamber when seeking to show that the proposed removal of an applicant would be proportionate.

41. At the heart of the Appellants' case is the situation of the first Appellant. It is their contention that she cannot be returned to Malaysia because she has no rights to live there despite having been born in that country. This is because she has renounced Malaysian citizenship and taken up British Overseas Citizenship instead.

42. Against this the Respondent sought to rely on a decision of the Asylum and Immigration Tribunal, **AL & Others (Malaysia) [2009] UKAIT 00026**. In that decision the Tribunal decided that a British Overseas Citizen from Malaysia does not lose their Malaysia nationality by a unilateral voluntary act of applying for a BOC passport or from a purported renunciation of nationality; there has to be a formal act of the relation government.

43. The difficulty for the Respondent in this case is that, unlike the situation in **AL & Others** where it is clear that there was no evidence that the appellant in that case had not only renounced their citizenship but that this had been accepted by the Malaysian government, the first Appellant before me has produced evidence to show not only her renunciation of Malaysian citizenship but the acceptance of this by the Malaysian government.

44. Included in the Appellants' bundle of documents is not only a copy of the deed of renunciation of citizenship but also a letter dated 5th December 2006 from the ministry of internal affairs in Malaysia accepting the first Appellant's renunciation.

45. I have also had the benefit of an expert report dated 24th August 2011 from Edmund Bon Tai Soon who is an advocate and solicitor in Malaysia on the situation regarding British Overseas Citizens and their renunciation of Malaysians citizenship.

46. I am satisfied from the evidence before me that the first Appellant has formally renounced her Malaysian citizenship, that this has been accepted by the Malaysian government, and that she no longer has any right to reside in Malaysia. At best she might be granted a one-month social visit pass.

47. I return to the length of time that the first and second Appellants have lived in this country -- some seven years before the application for leave to remain on human rights grounds was made, and now nearly nine years.

48. As such it seems to me that the first and second Appellants have lived a considerable length of time in this country, and have put down social and community roots here.

49. Although they have not been in the United Kingdom as long, the situation of the third and fourth Appellants is in my view similar. I have unchallenged evidence before me both by way of oral evidence from the first Appellant in particular and from various documents contained in the Appellants' bundle of documents that the children have established themselves well at schools in this country, and that they have been taking part in a number of social and community activities on a very regular basis. They have spent a not inconsiderable proportion of their time living in this country.

50. I also return to the principle referred to by Lord Browne in **Beoku-Betts** -- namely that the family unit as a whole must be looked at. In this case I am prepared to accept that the first Appellant has no right of return to Malaysia and as such she could not continue family life with the other Appellant is there.

51. Removal of the second to fourth Appellants without the first Appellant seems to me to axiomatically disrupt the family life with her to a very substantial degree indeed. It also seems to me that it would be very unlikely that they will be granted entry clearance to come back to this country as visitors given their previous immigration history.

52. A further factor that I have taken into account is that that there has been an unexplained delay in the Respondent taking any action at all against the first and second Appellants in particular, despite the fact that applications were made on their behalf to stay here in November 2009.

53. Although it is not a determinative factor in this case it is a matter that I can and do take into account -- it seems to me that such an unexplained delay, particular in a case where young children are involved, does count against the arguments put forward by the Respondent that it is necessary to remove the Appellants to uphold a fair immigration control system.

54. It is furthermore here that the importance of the guidance given by the Supreme Court in ZH and in the other cases that I have listed above becomes apparent. It is absolutely clear that the interests of children in immigration decision-making has to be given considerable weight. This is not to say that the interests of the children in wanting to stay in this country are determinative; but rather that the degree of integration of children into life in the United Kingdom does have to be fully taken into account.

55. Finally I bear in mind particularly the remarks made by Blake J in the Upper Tribunal in LD at paragraph 26 when he made the point that very weighty reasons are needed to justify separating a child from a community in which they have grown up and lived for most of their lives; and at paragraph 27 that substantial residence

as a child is a strong indication for the judicial assessment of what the best interests of the child require.

56. As a result then I conclude that the interests of the society as represented by removing the Appellants in pursuance of a fair immigration control system are outweighed by their individual interests in remaining in this country given their long-standing residence here.

57. To require the second to fourth Appellants to leave the United Kingdom and go to Malaysia without the first Appellant is in my judgement disproportionate, and would lead to a significant breach of their rights to private life under Article 8.

Conclusion

58. For the reasons given above I find that requiring the Appellants to return to Malaysia as a result of the refusal to grant leave to remain in the United Kingdom would breach their human rights under the Human Rights Act 1998 and the European Convention on Human Rights.

DECISION

I allow the appeals on human rights grounds under Article 8.

Signed Date

JUDGE OF THE FIRST-TIER TRIBUNAL