Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/12048/2011
OA/12052/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 August 2013	**On 5 September 2013**
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Before

UPPER TRIBUNAL JUDGE PERKINS

Between

LIU YU YAN
JIE LIN

Appellants

and

ENTRY CLEARANCE OFFICER GUANGZHOU

Respondent

Representation:
for the Appellant: Mr C. Lamb, Counsel instructed by David Tang & Co, Solicitors
For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants in this appeal are mother and son. They are citizens of China. The son was born in October 1996 and so now nearly 17 years old. They appealed against a decision of the First-tier Tribunal dismissing their appeals against a decision of the respondent to refuse them entry clearance to the United Kingdom as the wife and child of a person present and settled there.

2. The respondent was not satisfied that the marriage between the sponsor and first appellant was subsisting or that the appellants could be maintained in accordance with the Rules at the date of decision. When refusing the application the respondent referred to the first appellant's adverse immigration history because she had made an earlier application to enter the United Kingdom as a visitor and had relied on a false document. She had also been irresponsible in connection with an application to visit another country.

3. The First-tier Tribunal judge decided to dismiss the appeal with reference to paragraph 320(11) of HC 395. This is a Rule identifying circumstances in which applications will usually be refused. On 14 March 2011 when the application relevant to these appeals were refused it provided that applications should normally be refused when an applicant "has previously contrived in a significant way to frustrate the intentions of the Rules".

4. This wording, no doubt quite deliberately, is imprecise and its operation has been guided at different times by examples in the rules and policies outside them. I am quite satisfied that it was wrong of the First-tier Tribunal judge to take this point without raising it first with the parties. It is trite immigration law that a person must satisfy each of the requirements of the rules, and it does sometimes happen that judge's hearing cases by way of rehearing are dissatisfied on points about which the respondent was perfectly satisfied, but it is incumbent upon judges in those circumstances to raise their concerns. It is especially important when, as is the case here, the point concerns a Rule involving an exercise of discretion. Often there are policies which may not be known to the Tribunal but which have been considered properly by the respondent who made the considered choice not to rely on a Rule which appeared to be relevant. I am quite satisfied that it was an error of law to apply the rules without asking for submissions from the parties.

5. Mr Deller has assisted me by taking the matter further and saying that, in fact, he was satisfied that the respondent had considered the point and had decided not to take it. He pointed out that the conduct complained of was not obviously analogous to the examples given or described properly as "significant".

6. It follows that the First-tier Tribunal judge erred not merely by taking a point that he did not raise with the appellants but by relying on a point that should not have been taken at all. The appellants clearly succeed to the extent that they satisfy me that the First-tier Tribunal was wrong to dismiss the application with reference to paragraph 320(11).

7. That of course does not end the matter. The appellants also have to satisfy the Rules with regard to maintenance. The way they set out to do that was very straightforward. They said that they would be living with the sponsor above a Chinese restaurant business that he managed and owned, and the business was sufficiently profitable to support them while they did that.

8. The sponsor produced accounts which, on a superficial reading, I am quite satisfied showed the appellants satisfied the requirements of the Rules. They were management accounts for a relevant period of about nine months spanning the date of decision and, if they are reliable documents, show that there was a profit at least in excess of the social security and housing requirements on which the appellants would have relied if they had not been maintained properly. I am therefore satisfied that if the documents had been accepted the appeal should have been allowed.

9. The First-tier Tribunal judge was not impressed by the accounts. He gave two reasons. He did not regard the sponsor as a reliable witness, partly because of the sponsor's own immigration history. The sponsor came to the United Kingdom as a refugee. He was refused recognition as a refugee. He was eventually given

leave to remain and extremely soon after being given leave to remain he returned to the country where he claimed he had been a refugee to be reunited with his wife. Put like that, I understand the First-tier Tribunal judge's reservations, but there is something very important missing from that summary. It is the gap of nearly eleven years between the sponsor arriving in the United Kingdom and claiming asylum, which he did in 1999, and his returning to China after he had been given leave to remain which he did in 2010. Clearly a great deal can happen in a decade. A person's own attitudes might change so that the things that made them a refugee might not be a matter of concern to them any more, or a country might become more liberal or, although this is not what has happened in China, there could be a complete change of regime.

10. It was incumbent upon the First-tier Tribunal judge to have made enquiries about the sponsor's reasons for returning to China when he claimed he was a refugee in that country. Again this was not done, so the Tribunal erred by taking an adverse point without giving the appellants notice. The point was relevant because the First-tier Tribunal judge said at paragraph 20 of his determination:

> "The adverse credibility of both the appellant and her spouse has to be taken into account and it does adversely impact on the quality of their evidence".

11. It follows that I am satisfied that one of the reasons advanced for disbelieving the sponsor was a bad reason.

12. The accounts themselves are management accounts. The First-tier Tribunal judge was perfectly entitled to say that management accounts are recognition in the form of accounts of information coming from the person presenting the accounts about the nature of the business, but they are not audited accounts. They have not been analysed critically by a professional person with an obligation to look for fault, and they have not been accepted by the Revenue, who are required to have a discerning eye on the information given when people make their tax returns. It follows that the First-tier Tribunal judge was perfectly entitled to regard the accounting evidence as somewhat weak.

13. However, the First-tier Tribunal Judge he has written them off as worthless. It is apparent from the face of the document that the accounts were prepared by a firm of chartered certified accountants and statutory auditors, and I am prepared to assume, were prepared on the basis of vouchers, business records and the like which were placed before them. It must follow from this either that the letter from the accountant's firm is itself a forgery or that the firm of accountants is associating itself knowingly with dishonest accounts, or the accountant has been duped by a rather sophisticated set of figures and vouchers to produce accounts which bear no relation to reality. All of things are possible as Mr Lam reasonably conceded, but there is no evidence to support any such explanation.

14. The most likely explanation for a firm of chartered accountants producing a set of accounts is that they were the result of their labours on business records provided.

15. Although I have reminded myself, as Mr Deller very properly insisted that I should, that I must look for error rather than simply a different approach, I am satisfied that the First-tier Tribunal judge was wrong in law to reach the

conclusions that he did about the accounts. He did not in his conclusions give any reasoning at all to explain why he was so willing to dismiss the apparent approval and endorsement of a firm of chartered accountants and he was wrong to say the appellant's and sponsor's credibility was damaged on a point that was not put to the sponsor or investigated in any way.

16. I therefore set aside the decision of the First-tier Tribunal.

17. Perhaps it is not necessary to say but I think the appellants seemed to be very grateful for Mr Lam's persistence because this is not the view I thought I would take when I prepared the case for the hearing but I have been persuaded for the reasons given.

18. I must now ask myself if I need to hear any further evidence before a proper disposal of the appeal. I think the answer is that I do not. The sponsor has produced accounts which, on the face of them, are capable of belief and there is not before me any good reason to regard the sponsor as so unreliable that I can ignore the evidence.

19. There is another point taken by the First-tier Tribunal. The sponsor produced documents showing that the business that he now owned had been in his possession not very long before and sold. That is peculiar, but that was his case, and if he was trying to deceive he need not have introduced the document in the first place. It does not really take anybody very far except possibly open up an explanation that the sponsor had just been extremely stupid. I do not say that disrespectfully. That is what he would have been if he had drawn attention to dishonesty by needlessly introducing a document.

20. I reminding myself that the appellants must prove their cases on the balance of probabilities.

21. The First-tier Tribunal Judge's adverse view of the evidence was clouded by bad points. Having assessed the evidence without that cloud I am persuaded that the appellants have proved their cases and I allow their appeals.

22. It does not follow from this that the appellants will be allowed to enter the United Kingdom because the circumstances have changed so that the First Appellant and sponsor now have a second child who, presumably, will apply to settle in the United Kingdom.

23. These appeals are allowed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 4 September 2013