



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34047/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On 27 November 2014**

**Determination Promulgated
On 31 December 2014**

Before

DESIGNATED JUDGE MURRAY

Between

YI KA JANICE CHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Haji, Fletcher Day, LLP, London

For the Respondent: Ms Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Hong Kong. She is classified as a British national overseas citizen born on 3 September 1988. She appealed against the decision of the respondent dated 23 July 2013 refusing her leave to remain in the United Kingdom, following a decision made on the same day by the respondent to remove her from the United Kingdom. Her application was for leave to remain in the United Kingdom on the basis that she had lawfully lived in the United Kingdom for a continuous period of 10 years. She also claimed that requiring her to return to Hong Kong

would render the United Kingdom Government in breach of Article 8 of ECHR. Her appeal was heard by Judge of the First-tier Tribunal K W Brown on 23 June 2014 and dismissed under the Immigration Rules and on human rights grounds in a determination promulgated on 14 July 2014.

2. An application for permission to appeal was made on behalf of the appellant. Permission to appeal was refused by First-tier Tribunal Judge Simpson on 29 August 2014 but Judge Macleman of the Upper Tribunal granted permission. He found that the appellant had not argued in the First-tier Tribunal that her case should succeed on the basis of the discretion of the respondent within the Rules. The appellant does not say where any relevant discretion may exist in the Rules but seeks to rely on the respondent's discretion outside the Rules, which is not a matter within Tribunal jurisdiction and apart from the vague reliance on discretion, she does not say how there could have been any other outcome under the Rules. Judge Macleman goes on to say that these grounds are only a reassertion of the case and a disagreement with a private life and proportionality assessment in which no arguable error of law is shown, however, permission to appeal was granted by him.

The Hearing

3. The parties agreed that there was a mistake made by Judge Macleman when he granted permission as he found no error in the determination and he has cast out the grounds. As permission has been granted, however, both parties accepted that the error of law hearing should go ahead. The respondent has made a Rule 24 response which states that the judge found that the appellant could not succeed under the Rules and that his findings are reasoned and sustainable and the grounds have no merit and merely disagree with the adverse outcome of the appeal.
4. The appellant's representative submitted that she is relying on the grounds and the skeleton argument and she submitted that there is now another matter. The appellant is in a relationship with a British citizen although that relationship has not been ongoing for 2 years.
5. As this is not mentioned in the grounds, I informed both parties that I would not be considering it.
6. The appellant's representative submitted that the judge has made 2 errors in his determination. She submitted that he did not properly consider or review the respondent's discretion relating to paragraph 276B of the guidance. I was referred to paragraph 7 and 8 of the determination, being the judge's findings of fact. She submitted that the judge accepts the reasons for the appellant's

absences from the United Kingdom, acknowledging that these absences were for medical treatment.

7. The representative submitted that the refusal is under paragraph 276B because of a short period when the appellant overstayed in 2003 and because she spent more than 18 months outside the United Kingdom on one occasion. She submitted that the judge has failed to consider the respondent's exercise of discretion referred to in the guidance. I was referred to page 11 of the guidance (Long Residence on Private Life-guidance of the Home Office valid from 20 May 2013.) This states that the applicant must not be in the UK in breach of immigration laws except for any period of overstaying for 28 days or less or if the application was submitted before 9 July 2012, which will be disregarded. The representative submitted that when she overstayed the appellant was aged 15 and at boarding school. The school had her passport and the appellant did not know that her visa had ended. She submitted that the school was at fault, not the appellant. With regard to the period over 540 days when the appellant was out of the United Kingdom, she directed me to page 17 of the guidance which refers to discretion for short breaks in lawful residence. She submitted that the respondent and the Secretary of State should have used discretion and should have taken into account the appellant's character and her conduct in the United Kingdom. She submitted that the judge of the First-tier Tribunal accepted the appellant's serious illness and I was referred to the medical documents on file. She submitted that based on all of these matters the threshold for exceptional circumstances has been reached.
8. I was referred to pages 34 and 35 of the guidance which states that even if an applicant has not completed the required period of residence and falls for refusal, any reasons for why this has happened, have to be considered and compassionate circumstances have to be taken into account. She submitted that because of the strength of the appellant's connections to the United Kingdom and her domestic circumstances, to grant her indefinite leave would not be against public interest. All the circumstances of the case have to be taken into account. She submitted that in this case compassionate circumstances are a relevant factor.
9. I was asked to consider section 86(3) of the Nationality, Immigration & Asylum Act 2002. This states that where the respondent has considered discretion the Tribunal can review that discretion and make its own decision if it feels that the discretion should have been applied differently. She submitted that the judge did not deal with this in the determination.

10. With regard to Appendix FM and paragraph 276ADE of the Rules, the representative submitted that at paragraph 31 of the determination the judge states that the appellant has not been in the United Kingdom for 20 years. He also states that she has family ties in Hong Kong. The representative submitted that all the appellant's ties are now British ties. She has been in the United Kingdom from age 14 to age 25 and she lives a very British lifestyle.
11. The representative then made reference to Article 8 submitting that if I find that there is no error of law in the judge's determination relating to her appeal under the Rules, I should find that the judge should have considered this claim outside the Rules. She referred to the proportionality test and the case of **Razgar** [2004] UKHL 27. She submitted that what the judge should have decided was whether removal would be reasonable in all the circumstances of this case. At paragraph 32 of the determination the judge considered Article 8 relating to compelling circumstances and found that there were no compelling circumstances. The representative submitted that this is an error and that when proportionality is assessed the judge has used the wrong approach, finding that it would be proportionate for her to go to Hong Kong and work as a freelance graphic designer there. She submitted that the judge has not given proper consideration to Article 8 outside the Rules. What the judge should have done is look at the extent and quality of the appellant's private life in the United Kingdom and find that it would be serious and disproportionate to remove her. She submitted that the judge has not given proper reasons in the light of evidence before him, that the respondent's decision was proportionate and necessary in a democratic society. I was referred to the case of **R** [2012] UKSC 32 at paragraph 44 and the reference therein to discretion. She referred to the wide discretion granted to the Secretary of State and her power to grant leave to enter or remain outside the Immigration Rules. She submitted that the judge should have considered the appellant's study history, her Postgraduate degree, the fact that her breaks from the United Kingdom were to do with her health and to visit her parents and the fact that she came to the United Kingdom as a minor and is now a career woman. She submitted that the appellant has significant ties to the United Kingdom and the judge has not based his proportionality assessment on these. She submitted that if the appellant is removed to Hong Kong she will be in for a culture shock as the only connection she has there is some blood relatives. All her professional and personal ties are in the United Kingdom. She has a significant private life here. She submitted that the interference which would be caused by removal would not be proportionate. The appellant has spent a lot of money building her life in the United Kingdom.

12. With regard to public interest the representative submitted that when the balancing exercise is carried out because of the appellant's connections with the United Kingdom and her strong private life, there would be a serious interference in this private life. She submitted that the judge has not addressed these issues, the only thing he has considered is her ability to work.
13. I was asked to overturn the First-tier determination on an error of law basis and have the claim reheard.
14. The Presenting Officer submitted that she is relying on the permission by Judge Macleman. He found there to be nothing wrong with the determination and found that the claim cannot succeed under the Immigration Rules.
15. The Presenting Officer submitted that there is no error in the Judge of the First-tier Tribunal's Article 8 finding. It is clear that the judge was mindful of all the facts of this case and was entitled to reach his decision.
16. The Presenting Officer submitted that this claim cannot meet the terms of the Rules and having taken into account all the appellant's circumstances, the judge's decision is correct.
17. The appellant's representative referred me to the case of **Ukus** [2012] UKUT 00307 (IAC) relating to discretion. She referred me to paragraphs 20-24 and paragraph 9 of thereof.

Determination

18. The facts of the case are not disputed. It is clear from the determination that the judge had considered all of these facts. This is an appellant who was outside the United Kingdom for 644 days during her qualifying period. The maximum allowed is 540 days. Her appeal cannot succeed under Appendix FM or under paragraph 276ADE of the Rules. She has no family members in the United Kingdom. She cannot meet the basic criterion under paragraph 276ADE. She has not resided in the United Kingdom for half of her life and still has family ties in Hong Kong.
19. All of these points have been considered by the judge and the appellant did not argue before the First-tier Tribunal that her case should succeed on the basis of discretion within the Rules.
20. The judge has taken note of all the circumstances of this appeal and of the appellant's immigration history and her situation in the United Kingdom. All the evidence that was available to him has been considered and he has reached a conclusion open to him,

based on that evidence and the relevant Rules on the balance of probabilities.

21. At paragraphs 32-34 the judge has considered Article 8, referring to the relevant case law and has taken into account the elements of the appellant's private life in the United Kingdom. He does not find that removal would have grave consequences for the appellant. He has considered public interest in that he has found that the removal of the appellant to Hong Kong is consistent with the UK government's legitimate aim of maintaining immigration control in the UK. He has not made any other reference to public interest but I find that if he had, his decision would have been the same. When considering proportionality he finds that removal would be a proportionate response and would be consistent with any Article 8 rights enjoyed by the appellant. He finds there to be no compelling circumstances that would render removal disproportionate.
22. Based on his findings the judge does not require to consider Article 8 outside the Rules. The judge's discretion should not have been applied any differently. The appellant is trying to rely on the respondent's discretion outside the Rules and that is not within Tribunal jurisdiction.
23. Judge Macleman states in his grant of permission that the grounds are only a reassertion of the case and disagreement with the private life and proportionality assessment, and I find that that is the case.

DECISION

24. The decision of the First-tier Tribunal promulgated on 4 July 2014 must stand as there is no material error of law in the judge's determination.

Signed
2014

Date **31 December**

Designated Judge Murray
Judge of the Upper Tribunal