Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05918/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 28 April 2015	**on 14 May 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEILAN WANG

Respondent

Representation:
For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Mr F Latta, of Latta & Co., Solicitors

DETERMINATION AND REASONS

Introduction.

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of China, born on 13 November 1988. She sought asylum in the UK on the basis of her affiliation to the Falun Gong movement.

3. Pages 1-9 of the respondent's letter of 28 July 2014 are concerned mainly with refusal of that protection claim. At pages 9 and 10 the respondent turned to private and family life and to exceptional circumstances under Appendix FM and paragraphs 276ADE-DH of the Immigration Rules. The respondent noted the appellant's immigration and matrimonial history and that she provided evidence of marriage on 20 May 2014 to Mr Colin Tik Shun Ho, a British citizen. The respondent was not satisfied that there was evidence of a genuine subsisting relationship (paragraphs 55 and 57) and found no evidence of insurmountable obstacles "as per EX.1.(b) of Appendix FM of the Immigration Rules that would encumber Mr Ho returning to China … it is considered reasonable to expect Mr Ho to return to China with you, should he choose to do so, to continue married life."

4. The appellant's grounds of appeal to the First-tier Tribunal were vague, but did include nominal reliance on Article 8 of the ECHR. At the hearing before First-tier Tribunal Judge Dennis on 16 September 2014 she abandoned the protection claim and put her case "solely on Article 8 issues with respect to family life shared between the appellant and her present husband and the disproportionate effect should she be compelled to return to China to apply, properly, for entry clearance as a spouse" (paragraph 12 of the judge's determination of 5 January 2015).

5. The judge found that the appellant was an unsatisfactory witness but that Mr Ho was credible and reliable. The judge referred briefly to *Chikwamba* and *Hayat* and said at paragraph 21 that there was "no legitimate state aim … by requiring the appellant to submit to the delay and uncertainty of returning to China to apply for re-entry." At paragraph 22 he went on:

> This analysis has been based on standard principles rather than the all but impossible maze of the present Secretary of State's recapitulation of her understanding of the jurisprudence accruing around this important article of the ECHR. Lest there be any question, I am satisfied that under the *Razgar* analysis there is a family life … between the appellant and her husband, that her involuntary return for a matter of months or a matter of years as is possible to China would constitute a serious interference with that family life. I am satisfied that the procedure … is a lawful one and that the ends sought to be affected thereby in terms of effective immigration control and the protection of the UK's economic interests are legitimate. I would, however, for the reasons set out above have to conclude that the decision to remove her would be a disproportionate interference with the Article 8 rights she shares with Mr Ho. Because the Home Office was not presented with an application … under the Immigration Rules I have not made any attempt to try to thread my way through the all but unworkable provisions of Appendix FM – some may characterise this, perhaps, as laziness – to state that either this decision can be winkled out from the provisions of the Appendix and is thus in compliance with it, or, if it cannot, then on its facts I have concluded there is a good arguable case stated and the bases for that have been established and set out herein.

<u>The grounds of appeal to the Upper Tribunal</u>.

6. The SSHD's complaint is that the judge failed to take account of the statutory considerations in sections 117A and 117B of the 2002 Act. Those provisions, so far as relevant, are:

PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) …

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) ….

…

117D Interpretation of this Part

(1) In this Part—

> "Article 8" means Article 8 of the European Convention on Human Rights;
>
> …
>
> "qualifying partner" means a partner who—
>
> (a) is a British citizen, or
>
> (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

7. On 4 March 2015 First-tier Tribunal Judge Parkes granted permission to appeal to the Upper Tribunal, observing:

> "… The judge had regard to the difficulty that the appellant could face in an entry clearance application having regard to her immigration history.
>
> The grounds argue that the judge had no regard to sections 117A and 117B of the 2002 Act and the reduced weight to be attached to the appellant's relationship formed when her status was precarious. Regard could also be had to ECHR jurisprudence … and the observations of Simon Brown LJ in *Ekinci* that a failure to meet the Immigration Rules does not improve the argument under Article 8."

Submissions for the SSHD.

8. The judge decided the appeal as if there had been no change in the legal scheme since the Rules were amended in July 2012. Since then, any Article 8 assessment should begin by reference to the general striking of the Article 8 balance in the Rules (see Appendix FM, paragraph GEN.1.1, in particular). Since 28 July 2014, that approach has a statutory form, in s. 117B (1). The maintenance of effective immigration controls is carried out by the Rules. In *Dube* [2015] UKUT 90 at paragraph 20 the Upper Tribunal said that part 5A was "not an *a la carte* menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty bound to have regard to the specified considerations." *Dube* acknowledged that the question was one of substance not of form, but the challenge in this case went to the substance of the determination, from which the public interest considerations are absent.

9. The judge did not properly take into account the appellant's precarious status. She entered the UK as a student, sought leave on the basis of a sham marriage, made an asylum claim which she later acknowledged to be of no substance, and sought to remain on the basis of a further relationship. Her leave had long since run out. The closest the judge came to an acknowledgement of the public interest was at paragraph 18 where he mentioned the appellant's "deeply troubling immigration history." He failed to keep in mind that "the maintenance of effective immigration controls is in the public interest". Those controls cannot be considered without reference to the Rules, but at paragraph 22 the judge found himself entitled to do so. Although he referred to the appellant's ability to speak English and her partner's ability to maintain her, those matters were to be resolved through the Rules not by way of sweeping generalities.

10. *Asif Ali Ashiq* [2015] CSIH 31 at paragraph 3 was an example of the correct approach, beginning with Appendix FM paragraph GEN.1.1. *Ashiq* adopted

the opinion of the Court in *MS* [2013] CSIH 52. The principles have been confirmed in a series of cases in the Court of Appeal including *SS (Congo) and Others* [2015] EWCA Civ 387 where at paragraph 32 it is said that even outside the "precarious" and "foreign criminal deportation" cases the respondent had:

> "… sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases … as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interest under Article 8 in making its own decision."

11. *SS* cites *Halemudeen* [2014] EWCA Civ 558 and concurs that a court or tribunal has to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights".

12. Mr Matthews referred to *Khan* [2015] CSIH 29 and *Mirza* [2015] CSIH 28, decisions by the same Division of the Inner House in which the opinion of the Court was delivered by Lord Eassie on 17 April 2015. Mr Matthews said that these cases (*Mirza* at paragraph 20, in particular) found that in the assessment of proportionality it was not appropriate to apply a test of "insurmountable obstacles" to a spouse relocating abroad. Paragraph 22 in *Mirza* refers to "the observations expressed generally and *obiter* by the Court at paragraph 29 of … *MS"* ([2013] CSIH 32). Mr Matthews submitted that *Mirza* and *Khan* are inconsistent with *MS*, with *Ashiq*, and with the line of authority on Article 8 in the Court of Appeal. He observed that *Mirza* and *Khan* include no mention of Part 5A of the 2002 Act, and said that they are no authority for the approach taken by the judge in the present case.

13. Mr Matthews sought to make a further point which he said was not explicit in the grounds but could be derived from them and from the grant of permission. The appellant's character and conduct were such that she was liable to be refused re-entry to the UK in terms of the Rules. That did not enhance her case to be allowed to remain in the UK under Article 8. Those adverse considerations were left out of the assessment. The judge's vague reference to authority did not justify the decision reached. This fell within the grounds as a further aspect of the failure to consider the public interest.

14. There was no need for a further hearing. All the evidence was available and all the submissions had been made. The decision should be set aside and reversed.

<u>Submissions for the appellant</u>.

15. *Dube* recognised that it was no error of law to fail to refer to the Part 5A considerations so long as the correct tests were applied in substance. The grounds of appeal at best identified an error of form. The judge considered all the evidence, including the precarious nature of the appellant's immigration status. At paragraphs 13 and 18 he made correct findings on her husband's ability to support her financially and practically. He applied the *Razgar* principles at paragraph 22.

16. Even if there was an error, it was not material. The judge considered the Article 8 rights of the appellant and of her spouse. His rights were equally important. This case was a good one even on the approach set out in *Ashiq*. At paragraph 24 of *Ashiq* the Court summarised the nature of the circumstances it would be relevant to consider. This case was stronger than *Ashiq*, and met the tests there set out. Moving to China would be significantly worse for the spouse in this case than return to Pakistan would be for the spouse in *Ashiq*. The present spouse is a UK national, whereas the spouse in *Ashiq* was a Pakistani national. In this case there was a question of loss of employment and income. This case involved no recourse to state benefits, as the sponsor had resources adequate to provide for both. There was no difference of approach explained in *Ashiq* which would lead to a different result in the present case.

17. In *Mirza* there had been submissions along the lines that there was in most instances no need to go beyond the Rules, and a very small gap between the Rules and Article 8. The Court disagreed and gave significance to the right of spouses to live together, which was to weigh heavily in the proportionality assessment. The Court found at paragraph 20 that the assumption that one spouse must leave the country to preserve the substance of the marriage was an error of law. That reflected the approach which Judge Dennis had taken. Although Judge Dennis explicitly said that he would not look to the Rules, that arose from the nature of the appeal, which began with an asylum claim and not from an application made under Article 8 of the ECHR.

18. I pointed out that the respondent's decision letter does deal with the Article 8 aspect under reference to the Rules. Mr Latta acknowledged that, and also accepted that the appellant had not attempted to set out her case by reference to the Rules. However, he said that the Rules were not a complete code and there was a requirement in any event to proceed to the second stage outside the Rules. The court in *Mirza* said that the observations in *MS* on that issue were *obiter*. *MS* was a private life case, while this is a family life case. The judge had not gone wrong by treating the interests of the UK spouse in the preservation of the marriage in the UK as a very strong consideration.

19. Summing up, Mr Latta said that the determination should stand. Alternatively, he agreed that the case did not call for further hearing either in the First-tier Tribunal or in the Upper Tribunal. The decision should be remade on the basis of the evidence and submissions.

Reply for SSHD.

20. Mr Matthews acknowledged that the Court in *Mirza* emphasised the weight to be give to the marital relationship. However, he said that the difficulty is that the Court in *Mirza* and in *Khan* took no account of Part 5A of the 2002 Act. That might have been because the decisions under review in those cases were prior to Part 5A coming into force. On any view, the judge in the First-tier Tribunal in this case was bound to have regard to Part 5A. His decision could not be reconciled with those provisions, and with section 117B(4) in particular. The appellant's representative sought

to find a favourable position for the appellant in relation to the factors set out at paragraph 24 of *Ashiq.* However, to find the position slightly more favourable on two of those numerous factors did not justify the First-tier Tribunal decision, or benefit the appellant significantly in a fresh decision. In the same paragraph the Court went on to say that it "would have been very much in accordance with the consistent jurisprudence of the ECHR for an Immigration Judge to have regard to those factors … and to place particular weight on the precarious nature of the petitioner's immigration status when he married". That was the correct approach. Indications to the contrary in *Mirza* and *Khan* were superseded by the statute and were not to be followed.

Error of law.

21. I am satisfied on the basis of the SSHD's grounds and submissions that the First-tier Tribunal Judge failed to take account of the public interest considerations set out in Part 5A of the Act. This encompasses an error of failing to approach family and private life firstly by reference to the Rules. The public interest in immigration controls is maintained primarily through the Rules. The thrust of the case law since July 2012 is that the Rules are not always a complete code, but they are more than a starting point. The Judge in this case went further astray by considering that the Rules hardly needed to be considered at all (paragraphs 20 and 22). It is not enough to refer to matters such as language ability and financial independence in the general way the determination does and in the general language of the statute, because those bare bones are fleshed out by the particular requirements of the Rules.

22. The Judge also fell into the misapprehension that this is a "*Chikwamba* case". (The citation is [2008] UKHL 40, [2008] Imm AR 700.) *Hayat* ([2012] EWCA Civ 1054) confirmed that the principle is not restricted to cases involving children. The issue generally arises when an application may be expected to succeed from abroad, and the question is only whether an appellant should have to submit to a formality. This case is not of that nature.

23. A poor immigration history is the usual reason why an appellant may have to go through that process, even in a case where her application might succeed. If her application is likely to fail that goes further against her, not in her favour.

24. The errors are more than formal. They are material, so the determination of the First-tier Tribunal is **set aside**.

Remaking the decision.

25. All relevant considerations on both sides have been rehearsed. I have also checked against paragraph 24 of *Ashiq*, to which both parties referred, although each case is different and that paragraph is not intended as a standard template.

26. Judge Dennis found nothing to be said in favour of the appellant, considered on her own. No-one could realistically quarrel with that.

27. All that can be said for her appeal is about her husband, as set out by Judge Dennis at paragraph 20. Although the appellant did not relate the evidence to the Rules, he may have the substance to meet financial requirements. The appellant's removal in all likelihood means either long term separation or the sponsor's relocation to China. He speaks Cantonese but not Mandarin and is not literate in Chinese. He is a UK national. If he moves, he loses employment and financial advantage. The prospect of moving is understandably unattractive to him. "Insurmountable obstacles" is not to be taken as a literal and decisive test, but nothing has been shown which amounts to more than inconvenience, difficulty or a degree of hardship.

28. On the other hand, the maintenance of effective immigration controls is in the public interest. The appellant knows some English, but has not sought to establish her ability in terms of the Rules. Her relationship with the sponsor tends to show some financial independence, but again she has not sought to bring her case within the Rules. Article 8 is not for "near misses", but the requirements of the Rules are the starting point. The marriage is of relatively short duration. There are no children to consider. The parties knew at the time of the marriage that her immigration status was precarious. I find that factor to carry particular adverse weight, on the weight of authority.

29. In so far as there may be any conflict, *MS*, *Ashiq* and the line of cases in the Court of Appeal are consistent and ought to be followed, rather than *Mirza* and *Khan*, in which Part 5A of the 2002 Act did not arise for consideration.

30. *Macdonald's Immigration Law and Practice*, 9th ed., vol 1, at paragraph 7.96 and footnote 10 understandably finds unhelpful the recent proliferation of formulae on the tests for the application of Article 8. Whether approached in or out of the Rules, whether through one or two stages, and whatever formula is applied, I find that the public interest question should be answered in favour of the respondent. The situation is of course an anxious one for the appellant and sponsor, but their case presents no feature which is unusual or compelling or not contemplated by the Rules. Rather, the outcome, although unpalatable, reflects exactly how a couple who marry at a time when the immigration status of one party is precarious may expect to be treated. The appellant's removal would interfere with her and with the sponsor's family and private life, but that interference is proportionate and justified.

31. The appeal, as originally brought to the First-tier Tribunal, is **dismissed**.

32. No anonymity direction has been requested or made.

7 May 2015
Upper Tribunal Judge Macleman