



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/35028/2014

THE IMMIGRATION ACTS

Heard at Field House
On 12 October 2015

Decision & Reasons Promulgated
On 28 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**YU KANG
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Unrepresented

DECISION AND REASONS

1. This is an appeal by Secretary of State for the Home Department, hereafter referred to as the Respondent, as she was before the First-tier Tribunal. Miss Kang is therefore the Appellant. The appeal is against the decision of First-tier Tribunal Judge Rothwell (hereafter Judge Rothwell) promulgated on 4 June 2015 by which she allowed the appeal of the Appellant.
2. The appeal was dismissed under the Immigration Rules but allowed under Article 8.

3. The Appellant is a national of China, born on 24 March 1984. She originally appealed against the decision of the Respondent dated 12 August 2014 refusing to grant her indefinite leave to remain on the basis of her long residence in the United Kingdom. The Respondent's decision to refuse to grant leave to remain was considered on the basis of paragraph 276B and 276ADE of the Immigration Rules. It was said first of all that the Appellant had not acquired the requisite ten year continuous lawful residence in the United Kingdom, and therefore did not satisfy the requirements of paragraph 276B of the Rules.
4. In respect of 276ADE of the Rules it was said that there would not be any significant obstacles in respect of the Appellant returning to live in China. Appendix FM to the Immigration Rules was also considered briefly but it was said that the Appellant could not satisfy any of those provisions. In addition the application was considered outside the Rules. However the Respondent declined to exercise her discretion in the Appellant's favour.

Judge Rothwell's decision

5. The matter came before Judge Rothwell on 11 May 2015. Judge Rothwell found that the Appellant could not meet the requirements of the Immigration Rules. In respect of paragraph 276B Judge Rothwell found that the Appellant had not in fact acquired the required ten years continuous lawful residence in this country. In respect of paragraph 276ADE of the Rules Judge Rothwell concluded that there were no very significant obstacles to the Appellant's integration back into Chinese society (see paragraph 24 of her decision).
6. In respect of Appendix FM to the Rules, Judge Rothwell found that the Appellant could not succeed under these provisions either. This was because the eligibility requirements were not met given that the Appellant's partner, Mr Rutherford, was neither her fiancé nor a qualifying partner with whom she had cohabited for two years or more. Judge Rothwell stated that the Respondent had misdirected herself in relation to a discretion outside the Rules based on policy guidance. However, Judge Rothwell found that in this case there were no compelling circumstances in any event.
7. Judge Rothwell went on to consider the application of EX.1B and EX.2 of Appendix FM. She concluded that there were no very significant difficulties in respect of family life between the Appellant and Mr Rutherford continuing overseas. She concluded that Mr Rutherford could, if necessary, accompany the Appellant to China if he chose to do so. Judge Rothwell concluded that the criteria set out in EX.1 and EX.2 were not satisfied.
8. The judge then went on to consider the Article 8 case outside of the Rules. She said that she was entitled to do so because the Appellant and Mr Rutherford had been in a relationship since 2008. Judge Rothwell went on to apply the methodology set out in the well-known case of Razgar. It was accepted that the Appellant was still in a relationship with Mr Rutherford and that the Appellant had a private life given that she had resided in the United Kingdom since 2001.

9. At paragraph 32 of her decision Judge Rothwell concluded that there would not be any interference with the Appellant's private and family life if she were to be removed from the United Kingdom. It was found the Appellant's private life could continue in China and that the Appellant could make an application if necessary from China to return to this country as the spouse or fiancée of Mr Rutherford if their relationship progressed.
10. Notwithstanding the finding that there was no interference Judge Rothwell went on to consider the issue of proportionality. She considered various factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. She found that the relationship between the Appellant and Mr Rutherford could not satisfy the Immigration Rules because although they had been in a relationship since 2008 they were not engaged, they did not cohabit, were not married, and therefore they could not apply for entry clearance under Appendix FM as the situation then stood.
11. Judge Rothwell went on to say that the Respondent had decided not to exercise a discretion in the Appellant's favour. She also took into account the fact that the Appellant's absence from the United Kingdom which had broken her ten years continuous lawful residence here was on the basis of her studies at the University of Leeds and the international experience that she was advised by that institution to obtain. Finally at paragraph 38 of her decision Judge Rothwell concluded that when balancing the rights of the Appellant against the public interest she found that this was a case where unusually the rights of the Appellant outweighed the public interest in removal to China.

The grounds of appeal

12. The Respondent sought permission to appeal on the basis of three grounds. Ground 1 related to a misdirection in law as to the availability of a discretion outside of the Rules which should not have been considered by Judge Rothwell but instead sent back for the Respondent to deal with. Ground 2 relates to the Article 8 claim and in particular to Judge Rothwell's decision to consider the case outside of the Rules. Reliance was placed on the case of SS (Congo) [2015] EWCA Civ 387. The judge, it is said, failed to consider why the case was to be considered outside of the Rules, given the requirements of the Rules and the fact that they had not been met in this particular case.
13. Ground 3 is a challenge to the substance of Judge Rothwell's consideration of the claim outside of the Rules. It is said that although Judge Rothwell had concluded that there was no interference with the private or family life of the Appellant she had then subsequently ignored that selfsame finding when continuing to consider the issue of proportionality. In addition it is said that Judge Rothwell had overlooked previous findings that she herself had made earlier on in her decision when assessing proportionality.
14. Permission to appeal on all ground was granted by First-tier Tribunal Judge Shimmin by a decision dated 10 August 2015.

The hearing before me

15. On reflection, Mr Tufan decided not to rely on ground 1 as he said that it made no material difference to the decision that was being challenged. It is said that the issue of the discretion outside of the Rules had in fact already been considered by the Respondent in her refusal letter dated 12 August 2014. Mr Tufan did rely on grounds 2 and 3.
16. The Appellant, who appeared before me unrepresented, said the following. She confirmed that she was still in a relationship with Mr Rutherford and that she had been in this country lawfully since 2001. She was concerned by the time taken for the resolution of her appeal. She had already been before the First-tier Tribunal in 2014, her case had then been sent back to the Respondent, and this was the second time round for her. She was anxious that final resolution of her case be made as quickly as possible.
17. The Appellant had previously been represented by solicitors. They had ceased to act for her prior to the hearing before me. I confirmed with her at the outset that she was happy to proceed today and she confirmed that she was.

Decision on Error of Law

18. It is clear to me that Judge Rothwell made a number of errors of law in her decision.
19. She considered whether or not EX1 and EX2 applied in this case when in light of the case of Sabir [2014] UKUT 63 (IAC) she had no jurisdiction to do so given that she had already decided that the eligibility requirements of Appendix FM could not be met in view of the nature of the relationship between the Appellant and Mr Rutherford.
20. The second error relates to the judge's decision to consider the case outside of the Rules. Whilst she may have been entitled to consider the case outside of the Rules, she was bound in my view to explain clearly why she was doing so what weight was to be attached to the fact that the Appellant could not meet the Rules as they relate to Article 8 (in this case Appendix FM and paragraph 276ADE). The need to explain why this exercise outside the Rules was being undertaken is clear in light of the Court of Appeal decision SS (Congo) (see for example paragraphs 31 to 48 of the judgment). All that is said by Judge Rothwell at paragraph 30 of her decision is that on the facts of the case before her the Rules did not cover the situation because the Appellant and Mr Rutherford had been in a relationship since 2008 and when she left this country and re-entered the United Kingdom in 2009 she still had leave to remain. In my view that does not adequately address the requirements and the guidance given by the Court of Appeal in SS (Congo). There is certainly no indication of "compelling circumstances" in respect of why the claim should succeed outwith the Rules.
21. The next error of law involves the conclusion at paragraph 32 that there would not be any interference with the Appellant's private and family life if she were to be

removed. Given this conclusion I cannot see how it was then possible for the judge to then go on and consider the question of proportionality. If there was no interference with the private and/or family life then the Razgar methodology would have stopped at that point.

22. Then there is Judge Rothwell's consideration of the proportionality issue, which I will deal with in any event. Although she does deal with a number of the factors set out in Section 117B of the 2002 Act, she does not in my view apply the relevant factors adequately. It appears as though she has failed to reduce the weight accorded to the private life given that this life was established and continued during a time when the Appellant's immigration status was precarious, albeit over a lengthy period of time (see paragraph 35).
23. In addition, the Appellant's obvious ability to speak very good English and her ability to financially maintain herself are, to all intents and purposes, neutral factors. However Judge Rothwell appears to have dealt with them as being factors in the Appellant's favour.
24. Perhaps more importantly, at paragraph 36 Judge Rothwell states that there was no route by which the Appellant could return to China and make an entry clearance application to re-enter the United Kingdom. However, this appears on its face to overlook the findings that she had previously made in paragraph 32 that an application could have been made on the basis that if the relationship with Mr Rutherford progressed, the Appellant could be either the spouse or indeed the fiancée of Mr Rutherford.
25. In paragraph 37 Judge Rothwell makes reference to the decision of the Respondent not to exercise discretion in the Appellant's favour and appears to place weight on this fact when undertaking the balancing exercise. However, again this appears to overlook the fact that earlier on in her decision at paragraph 23 Judge Rothwell herself had found that there not compelling circumstances in the Appellant's favour.
26. For all the reasons given above Judge Rothwell materially erred in law and on this basis I set her decision aside. Urged by the appellant and with no objection by Mr Tufan I decided that I would remake the decision myself based upon the evidence before me.

The remake decision

27. In remaking the decision I have had regard to all the evidence before me including the Appellant's two bundles.
28. Whilst the Appellant has a good immigration record in this country, she has not achieved the ten years continuous lawful residence, as required by paragraph 276B of the Rules. Two judges of the First-tier Tribunal (Judges Cohen (who heard the Appellant's initial appeal in 2014, and Rothwell) have concluded that she was absent from this country in excess of one hundred and eighty days by virtue of the time

spent in China undertaking relevant work experience. This absence is accepted by the Appellant and I find that it in fact occurred.

29. The Appellant therefore cannot meet the requirements of the 'lawful long residence' Rule.
30. I agree with Judge Rothwell that there are no compelling circumstances in this case in relation to the period of absence. It is right that the Appellant undertook the work experience on the advice of her university in the United Kingdom. However, this was done to further her studies and future prospects. It was undertaken freely.
31. In any event, the Respondent in fact addressed the question of discretion outside of the Rules in her reasons for refusal letter of 12 August 2014 (see page 4 of 5). I have no jurisdiction to consider the exercise of a discretion exercised outside of the Rules.
32. In respect of paragraph 276ADE(vi) of the Rules, I conclude that there are no very significant obstacles to the Appellant's reintegration into Chinese society. In fairness to the Appellant, she has not put forward any real assertion to the contrary. She is a highly educated and talented individual who would be readily able to re-establish herself in China. Indeed, she would be a real asset to that country, as she is to the United Kingdom. I note from her witness statements that she has visited China several times since arriving here in 2001. In addition, there is no reason to believe that she does not have family in China.
33. In respect of Appendix FM, the partner route is not open to her because of the definition of "partner": Mr Rutherford, whom I accept is her long-term boyfriend, does not come within the stated definition. As a result, the provisions of EX cannot be applied to her case.
34. Turning to the claim outside of the Rules, I conclude that it must fail. I readily accept that the Appellant has a private and family life in the United Kingdom, based upon her time and ties here, and the relationship with Mr Rutherford. Removal from the United Kingdom would result in an interference with protected rights. However, the decisions to refuse to vary leave and to remove her are, in my view, clearly proportionate from the perspective of Article 8.
35. The Rules have not been met insofar as they cater for Article 8. That in itself represents a significant hurdle to the Appellant. The Rules encompass the issues of time spent away from one's own country, ties established that period, and relationships formed with partners. The gap between the scope of the Rules and a claim outside of them is, in the circumstances of this case, a narrow one indeed. The Appellant has only ever been here on a precarious basis, as that term is currently understood. There are no circumstances in this case which can properly be described as compelling. There is nothing on the face of the evidence before me to show that Mr Rutherford could not reasonably relocate to China. In addition, given the Appellant's admirable qualifications and work experience, an application from abroad for entry clearance in an appropriate category (whether that relates to her

relationship with Mr Rutherford or her employment) would appear to stand a good chance of being successful.

Notice of Decision

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

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

I re-make the decision by dismissing the appeal under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed

Date: 26 October 2015

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date: 26 October 2015

Deputy Upper Tribunal Judge Norton-Taylor