Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27197/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 June 2016	**On 22 July 2016**

Before

Mr H J E LATTER
DEPUTY UPPER TRIBUNAL JUDGE

Between

XUEQIN WENG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Adophy, Legal Representative, Rana & Co Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal issued on 22 October 2015 dismissing her appeal on both immigration and human rights grounds against the respondent's decision made on 20 June 2014 refusing her application for leave to remain and making directions for her removal.

Background

2. The appellant is a citizen of China, born on 23 March 1979. She made an unlawful entry into the UK on 11 December 2006. She did not seek to regularise her status until she made an application for leave to remain on human rights grounds on 28 March 2011. This application was refused on 13 May 2011 and an appeal against that decision was rejected on the basis that there was no valid appeal as no immigration decision had been made to remove her. On 20 January 2014 an immigration status questionnaire was completed on behalf of the appellant and on 28 February 2014 she was served with a notice informing her of her liability to be detained. She was given instructions to report to the Home Office. On 13 May 2014 the respondent wrote to the appellant's representatives requesting information on her current circumstances and a letter in response was received on 11 June 2014. This led to the decision of 20 June 2014 refusing her application for leave to remain and giving directions for her removal.

3. The reasons for the decision are set out in the decision letter also dated 20 June 2014. The respondent was not satisfied that the appeal would be able to meet the requirements for leave to remain as a partner under the Immigration Rules ("the Rules") as amended in 2012. As she could not meet the eligibility requirements of para E-LTRP, her claim was considered under para EX.1(b) but the respondent was not satisfied that there were any insurmountable obstacles to family life with her husband continuing outside the UK. The respondent accepted that the appellant was married to the sponsor, also a citizen of China. He had entered the UK in 2002 and claimed asylum. His application was refused but he was subsequently granted indefinite leave to remain in 2010 under the legacy scheme and was naturalised as a British citizen on 12 April 2012. As his asylum claim had not been accepted, the respondent did not consider that there were any barriers to him returning to China with the appellant to continue their family life together where they had two children living with the appellant's mother.

4. The respondent went on to consider the provisions of para 276ADE setting out the requirements for leave to remain on the grounds of private life based on residence in the UK but she was not satisfied that the appellant could meet any of those requirements. She also considered whether there were exceptional circumstances that would make it appropriate to allow the appellant to remain in the UK outside the Rules but was not satisfied that there would be sufficiently harsh consequences to make removal disproportionate.

The Hearing before the First-tier Tribunal

5. At the hearing of the appeal against the respondent's decision the judge heard evidence from both the appellant and the sponsor. The appellant confirmed that her travel arrangements to the UK had been made by an

agent who had bought her to the UK illegally although she had not been aware of this. She did not know that she was leaving China illegally. Her mother was looking after their two children in China. The sponsor confirmed that he had married the appellant in China in 2000. He had been living with her before he left in 2002. He was now working in Chinatown and was supporting the appellant and their children. He had claimed asylum because he was a Falun Gong practitioner but his claim had been rejected by the respondent. He said he could not live in China with his wife because he would be persecuted by the Chinese government but he accepted that he had returned to China in 2013 and 2015 to see his children, saying that he thought he could return because the British government would be able to protect him because of his citizenship. If he had to return to China, this would affect his employer's business. He accepted that his parents, one brother, five sisters, two uncles and three aunts, all lived in China.

6. At the hearing there were submissions about whether the appellant's application for leave made in March 2011 should be considered under the Rules as they stood at the date of application or under the Rules at the date of decision. The judge was referred to Edgehill v Secretary of State [2014] EWCA Civ 402 and accepted that the old Rules should apply, the Presenting Officer apparently agreeing that this was the case and that there would be no need to consider Article 8 if the appellant in fact met the old Rules, namely para 281 of HC 395.

7. The judge accepted that the appellant was married to a British citizen, the marriage was subsisting, there would be adequate maintenance and accommodation and, therefore, the requirements of the old Rules on marriage were met. However, he went on to consider the provisions of paras 320 and 322 which set out grounds on which applications for leave to remain and variation of leave should normally be refused. The judge found that the application must fail as the appellant had failed to produce a valid national passport or other document satisfactorily establishing her identity as required by para 320(5) or because she had previously breached the Rules by being an illegal entrant.

8. In the light of his finding that the appellant could not meet the requirements of the Rules he went on to consider Article 8. He accepted that the appellant's husband was now a British citizen and was working but said that there was no valid reason why he could not return to China. He had never been granted refugee status and had returned on two occasions to visit his children. He was fully familiar with Chinese customs and culture. He had a large family network in China. He had said that he could not leave his employment in the UK, as it would affect his employer's business but that was hardly a credible reason as, being a chef, it would be possible to utilise those skills in China. The judge found that it would be both reasonable and proportionate to expect family life to continue in China, where the parties were married and where they lived together before the sponsor came to the UK.

9. So far as the appellant was concerned, she had come to the UK illegally to join her husband, thereby circumventing immigration control. She had done nothing to regularise her status until 2011. There was nothing to prevent her returning to China and resuming family life with her children and her husband as hitherto. He found that it was entirely reasonable and proportionate to expect the appellant to return to China where her mother and children lived. Her husband could return with her and there would be a continuation of family life or, alternatively, she could return and make an application for entry clearance in the proper way if able to satisfy the Rules. Accordingly, the appeal was dismissed.

The Grounds and Submissions

10. In the grounds of appeal it is argued that it was common ground that the appeal should be decided according to the pre-July 2012 Rules and the judge had found that those requirements had been satisfied. The appeal should have been allowed accordingly. The judge had erred by dismissing the appeal under the provisions of para 320(7)(b) and (c). These issues had not been raised prior to the decision being made and the decision was therefore flawed and unsupportable. It is further argued that, when considering article 8, there was a need for an independent proportionality evaluation. The substance of the Rules had been met. The appellant had given evidence that the fact of her illegal exit from China would expose her to repercussions from the authorities which could include a period of imprisonment and this would make it unreasonable for her to have to return. Finally, it is argued that the judge failed to make any findings of his own in respect of s.117B of the Nationality, Immigration and Asylum Act 2002 as amended. The sponsor's interests should also be considered as he was affected by the decision and his return as the breadwinner for the family could be neither reasonable nor proportionate as suggested by the First-tier Tribunal.

11. In the Rule 24 response, the respondent refers to the judgment of the Court of Appeal in Singh and Khalid v Secretary of State [2015] EWCA Civ 74 and argues that there was no material error of law in the way the judge disposed of the appeal on Article 8 grounds. It is argued that as the appellant could not meet the new Rules, she could as such obtain no positive benefit under s.117B of the 2002 Act.

12. In his submission Mr Adophy accepted in the light of Singh and Khalid that the old Rules did not in fact apply but submitted that in any event the judge had erred by considering matters under paras 320 and 322 without giving the parties an opportunity of making submissions on those issues. The errors the judge made by applying the old Rules and considering issues not raised by the party were sufficiently serious to vitiate the decision as a whole. This affected not only the decision under the Rules but also under article 8 as his assessment had been coloured by his unlawful approach to the Rules. He had failed to take proper account of

the difficulties on return and, in particular, the fact that the sponsor could only return for visits and not to live and the appellant would be at risk of penalties for making an illegal exit from China.

13. Mr Avery accepted that the judge had erred by considering the matter under the old Rules but his decision on Article 8 grounds was wholly sustainable and the decision had not been tainted by the errors when considering the Rules. There was no evidence that any penalties for illegally exiting China would be disproportionate or that the sponsor could not live in China. The fact remained that he had returned on two occasions after being granted British citizenship.

Consideration of the Issues

14. I must consider whether the First-tier Tribunal erred in law such that its decision should be set aside. The hearing before the First-tier Tribunal took place on 29 September 2015, over six months after the Court of Appeal's judgment in Singh and Khalid was issued on 12 February 2015. In that judgment the Court of Appeal held that save for a brief window between 9 July 2012 and 6 September 2012 when the provisions of HC 565 came into effect, the respondent was entitled to apply the new Rules in reaching decisions. Therefore, whether the application is treated as made on 28 March 2011 or on 20 June 2014 in the light of the information given about the appellant's current circumstances in May 2014, the respondent was acting lawfully by considering the position under the amended Rules. In any event, when considering the application under the old Rules the judge failed to note that the appellant as an illegal entrant could not meet the requirement that she should have limited leave to remain as specified by those Rules. Therefore the application could not have succeeded under the old Rules and would have been considered under article 8 as at the date of the judge's decision. As far as the application of paras 320 or 322, this was a new issue and the judge should have given the parties an opportunity of making submissions. In any event, as I have already indicated, the application could not have succeeded under the old Rules.

15. I referred the parties at the hearing to Koori v Secretary of State [2016] EWCA Civ 552 where the court held that a failure by a party's legal representative to appreciate a matter in his client's favour did not in itself amount to a concession and that the respondent should be allowed to remedy mistakes on appeal. I need not deal with this any further as Mr Adophy did not seek to argue that the respondent's agreement at the hearing before the First-tier Tribunal that the old Rules applied amounted to a concession.

16. In summary, I accept that the First-tier Tribunal's decision under the Rules was made in error and amounted to an error of law but it was not a material error. The appeal could not have succeeded under the old Rules and it has not been argued the appellant could meet the requirements of the amended Rules. However, Mr Adophy sought to argue that the judge's

decision under article 8 was vitiated and tainted by the errors made in his assessment of the Rules. I am not satisfied that this was the case or that there was any unfairness to the appellant. The fact remains that the appeal could not have succeeded under the old Rules, and only under the amended Rules if the appellant could show that there were insurmountable obstacles to family life continuing outside the UK in accordance with para EX.1.

17. On this issue I am satisfied that the judge reached findings properly open to him on the evidence for the reasons he gave. He accepted that the parties were married and that they were able to maintain and accommodate themselves in the UK. However, the appellant was not able to meet the eligibility requirements of the Rules. When assessing insurmountable obstacles to living in China, the judge was entitled to take into account the fact that there were two children of the family living with the appellant's mother. The grounds argue that as the appellant made an illegal exit from China, she would be exposed to repercussions from the authorities which could include a period of imprisonment. However, there was no adequate evidence about the likelihood of imprisonment or its length or that such a consequence would be unreasonable in the appellant's circumstances such as to amount to insurmountable obstacles.

18. So far as the sponsor is concerned, the fact remains that he returned to China after being granted British citizenship for two visits to his children in 2013 and 2015. He has extended family members there. It was asserted at the hearing before me that the appellant could visit but would not be allowed to remain in China but there has been no evidence to support that contention. In any event, as the judge pointed out, there was no reason why the appellant could not return and make an entry clearance application if able to satisfy the Rules. In the grounds it was argued that the judge had failed to give proper consideration to the factors raised in s.117B of the 2002 Act but it is clear that the judge was aware of the relevant provisions, referring to the section in [21] of his decision. When his consideration of proportionality is looked at in the light of the facts before him, I am not satisfied that there is any substance in the assertion made in the grounds that there was no independent consideration of proportionality. The judge's findings on proportionality were properly open to him for the reasons he gave. The appellant could not meet the requirements of the Rules and there were no compelling circumstances to justify a finding that removal would be disproportionate.

19. For these reasons, although the judge erred in law in his consideration of the appeal under the old Rules, that was not material to the outcome of the appeal and caused no unfairness to the appellant such that his findings on the issues of insurmountable obstacles and proportionality should be set aside. His findings under Article 8 were not tainted by the errors in respect of the Rules.

Decision

20. The First-tier Tribunal did not err in law in any way requiring the decision to be set aside and accordingly the decision stands. No anonymity direction was made by the First-tier Tribunal.

Signed H J E Latter Date: 18 July 2016

Deputy Upper Tribunal Judge Latter