Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36080/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 November 2015	**On 9 February 2016**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AH HON HUANG
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr R Singer, Counsel instructed by Adam Bernard Solicitors

DECISION AND REASONS

1. I see no need for and do not make an order restricting reporting about this case.

2. This is an appeal brought by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State on 21 August 2014 to remove him as an illegal entrant. It was the claimant's case that

he is a refugee and that removing him would interfere disproportionately with his private and family life.

3. Before the First-tier Tribunal he abandoned his claim to be a refugee but persuaded the judge that his appeal should be allowed with reference to Article 8 of the European Convention on Human Rights and under the Immigration Rules.

4. The Secretary of State was given permission to appeal by a First-tier Tribunal Judge. The grounds complain of a failure to give adequate reasoning and an alleged material misdirection in law.

5. The grounds (not drawn by Mr Walker) are of varying quality and I have had to ask myself carefully if they do in fact address the real mischief identified by the First-tier Tribunal Judge who gave permission. It was alleged that the First-tier Tribunal Judge did not apply properly paragraph EX.1 of Appendix FM to the Immigration Rules and did not decide rationally that there were "insurmountable obstacles" to the appellant's sponsor returning to China to live their life together.

6. The criticism of the direction at paragraph 32 is that the First-tier Tribunal Judge states "that EX.1 is a sort of fallback position for those who fail to satisfy the eligibility criteria". This is described as a misdirection of the law and a failure "to engage with the fact that there is a route to EX.1".

7. Paragraph 2 contends that the finding that there are "very significant obstacles to reintegration" is unsustainable because the judge:

> "... failed to have regard to the SSHD's guidance ... in relation to what she considers to be insurmountable obstacles'. The fact that the sponsor is now British and may not wish to uproot and relocate halfway across the world, and it may be very difficult for them to do so, does not amount to an insurmountable obstacle. ECHR Article 8 does not oblige the UK to accept the choice of the couple as to which country they would prefer to reside in. A non-exhaustive list of factors can be considered to be insurmountable obstacles have been outlined in the guidance, none of which apply to this case and have not been considered".

8. This I find both muddled and alarming. It is muddled because the grounds complain that the judge did not consider factors which, according to the grounds, could not have led to the appeal being allowed. It is worrying because I can think of no reason whatsoever why an appeal should be *dismissed* because the judge did not consider how the Secretary of State interpreted the Rules. The judge's job is to apply the Rules and make up his or her own mind. The Secretary of State might choose to give guidance which is more generous than the Rules require and that can lead to an appeal being allowed on public policy grounds but a judge does not err in law by interpreting the Rules in a way that does not agree with the Secretary of State's guidance. What matters is whether or not the interpretation was right in law.

9. I am unsure to the target aimed at by points 3 through to 6. I hope it is not being suggested that the Judges of the First-tier Tribunal should follow the increasingly irritating practice of the Secretary of State of considering every aspect of every Rule that might apply and then explaining that it does not when no one ever thought that it did. I do agree that a judge in deciding an appeal on Article 8 grounds must first see if the Rules determine the issue and only if they do not is it then necessary to see if there are still proper reasons to allow the appeal outside the Rules.

10. The core facts are that the appellant was born in 1968. He had certainly entered the United Kingdom by December 1999 because he had applied for asylum on that day but the asylum claim was not processed because he did not attend for interview. There were various spurts of correspondence leading to submissions dated 18 August 2011 and a refusal in August 2014.

11. The claimant is not married but it is accepted that he has married his partner, a British national of Chinese origin who entered the United Kingdom as an asylum seeker and who was eventually given indefinite leave to remain under a policy. She did not prove herself to be a refugee.

12. The appellant had met his partner in 1999 and they have cohabited since June 2007. There are no children in the relationship. The First-tier Tribunal Judge assumed that the claimant was not eligible to satisfy the requirements for leave to remain as a husband because he did not have an English language qualification. Additionally he was not lawfully in the United Kingdom. However although not proved in a way that would be required under the Immigration Rules, it seemed clear that the claimant's partner had sufficient money to satisfy the maintenance Rules and accommodation does not seem to be an issue. When deciding that there were insurmountable obstacles in the path of family life continuing outside the United Kingdom, the judge noted that the claimant and his partner had lived in the United Kingdom for fifteen years which he described as "a very substantial period" and that they had built up ties in the United Kingdom. The claimant's partner had taken advantage of the opportunities of living in the United Kingdom. By her endeavours she had purchased a house and he regarded it as "wholly unrealistic and unreasonable to expect her to abandon all that she had acquired in this country to make a fresh start in China all over again".

13. The judge then said "on the basis of the finding above I would allow the [claimant's] appeal under the Immigration Rules".

14. He then considered Article 8 of the European Convention rights and allowed the appeal under the Convention.

15. Although the description of EX.1 of Appendix FM as "a sort of fallback position for those who fail to satisfy the eligibility criteria" would not impress an examiner, I do not find the judge erred in law in using the phrase. The judge followed the example of the Secretary of State and

moved swiftly to considering EX.1. EX.1 is relevant because the applicant does have a genuine and subsisting relationship with a partner in the UK who is a British citizen but before he can come within the scope of the exception he will have to show that there are ”insurmountable obstacles to family life with that partner continuing outside the UK”. Further the phrase insurmountable obstacles is defined in EX.2 and is said to mean:

> “... the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner”

16. Mr Singer argued strongly that the judge had applied the test and reached a conclusion open to him. I do not agree. The finding is that the claimant and his partner do not want to return to China. There would be some personal frustration for the claimant’s wife but they cannot be described properly as “very serious hardship” or “very significant difficulties”. I have perused the statements provided by the claimant and his wife but they do not take matters any further than were taken by the First-tier Tribunal Judge.

17. I have to say that it is clear to me that the findings do not come within the scope of the Rule and the judge erred in law by finding otherwise. The difficulties identified are just not sufficiently severe.

18. It follows therefore that I must and do set aside the decision of the First-tier Tribunal.

19. It follows from the finding I have made above I cannot accept that the appeal ought to be allowed under the Rules. It will only be in unusual circumstances that an appeal can be allowed properly outside the Rules. This is not because exceptionality is a requirement. Rather, it is because the Rules make a serious attempt to encapsulate and preserve people’s rights and usually achieve that end. It is always possible that they do not which is why the underpinning provisions of the Convention have to be considered. There is nothing here that would support a decision to allow it outside the Rules. There are no special circumstances that are not reflected fully in the Rules. I have no hesitation in saying that removing the appellant would be an interference with the private and family life of him and his partner. The point is that it would be lawful and proportionate. This is not a deportation case where the very strong interest in deporting a criminal applies but the maintenance of effective immigration control is in the public interest. If there were any doubt about that it is made clear by Section 117B of the Nationality, Immigration and Asylum Act 2002. The Act also requires that little weight should be given to a private life or relationship formed with a qualifying partner when the person’s status was precarious. The claimant’s case has always been precarious.

20. Nevertheless a decision maker must always stand back and just ask what is being achieved by breaking up what appears to a happy union between

two people who, requirements of immigration law aside, are living industriously and quietly. The problem is that the requirements of immigration law cannot be set aside. Either there is a free for all or there is a system of control and a system of control has to be enforced.

21. It is entirely open to the claimant to return home and see if he can satisfy the Rules. There are strong reasons to think that many of the points could be satisfied. It is for him to decide if he wants to knuckle down and learn English. There is a suggestion in the papers that he could. Similarly, although there was a suggestion to the contrary, there was no reason to think the authorities in China would prevent him returning to the United Kingdom if that is what he wanted to do. Nothing has been advanced to show that the claimant could not satisfy the Rules, if not immediately in the reasonably near future. This is not a case where the life of a child will be disrupted.

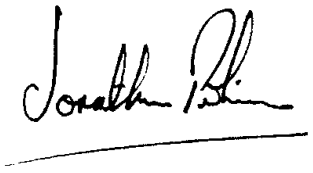
22. With respect to Mr Singer he knew his best point and he pushed it hard I have to come to the conclusion that I have.

23. For all these reasons I set aside the decision of the First-tier Tribunal Judge and I substitute a decision dismissing the appeal on all grounds.

Decision

24. I allow the Secretary of State's appeal. I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 8 February 2016