IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47022/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 April 2016	**On May 6 2016**
Oral Judgment	

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS JING LI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr R Halstead, Counsel instructed by Chan Neill Solicitors

DECISION AND REASONS

1. In this decision I refer to the appellant as the Secretary of State and to the respondent as the claimant.

2. By my decision promulgated on 6 January 2016 (appended to this decision), I set aside the decision of the First-tier Tribunal allowing the claimant's appeal against the Secretary of State's decision to refuse her application for leave to remain under the

Points-Based System as a Tier 1 (Entrepreneur) Migrant and remade the decision by dismissing the appeal under the Immigration Rules.

3. However the claimant also claimed that her removal from the UK would be contrary to Article 8 of the ECHR. As I did not hear submissions on this issue, I adjourned the appeal in order for this aspect of the claimant's claim to be remade at a resumed hearing. Accordingly, I now remake the decision in respect of Article 8.

4. I have been provided with a detailed bundle of evidence from the claimant which I read in full before the hearing and I heard oral evidence from the claimant and her fiancé. Very limited cross-examination was undertaken of them. I found both the claimant and her fiancé to be entirely credible in all respects and I fully accept the evidence that they gave.

5. My factual findings are as follows:

   (a) The claimant is a Chinese national born on 12 May 1988 who entered the UK in 2007 on a student visa. She has been granted further leave to remain on a number of occasions, most recently on 11 September 2012 when she was granted leave as a Tier 1 (Post-Study Work) migrant until 11 September 2014.

   (b) On 9 September 2014 she applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. The application was refused because she failed to provide marketing or advertising material commencing before 11 July 2014, as required under the Rules. The reason she failed to submit the required documents was not that she did not have them (the evidence before me is that she did) but because her then solicitors to whom she supplied the necessary documents failed to include them with the application.

   (c) The claimant has made a complaint to the Office of Immigration Services Commissioner which was upheld in respect of her solicitor's failure to submit the required documents. It has been intimated that she may bring a negligence suit against the solicitors but that is not a matter for this hearing.

   (d) The claimant has established a genuine business which she has invested heavily in and which has the potential to grow significantly. The claimant claims that, if her appeal succeeds, she will engage a full-time and part-time employee and I have no reason to doubt this.

   (e) Whilst in the UK she has developed a business and personal life and lost touch with friends in China.

   (f) She is engaged to a Chinese national who is in the UK on a Tier 2 visa that expires in 2018. He will be eligible to apply for permanent residence later this year. He is well educated and works as a management consultant.

6. I heard submissions from Mr Halstead and Mr Bramble.

7. Mr Halstead did not seek to argue that the claimant could satisfy the Immigration Rules and his case was that the claimant should succeed under Article 8 outside the Rules. He focused on the conduct of the claimant's former solicitors, submitting that if they had acted properly there is every reason to believe that the claimant would have succeeded in her application under the Points Based System. He highlighted the economic benefit the claimant brings to the UK and her ability to speak fluent English. He submitted that the only equitable and fair outcome would be to find that the scales in the balancing exercise under Article 8 tip in her favour and that it would be consistent with the case law on Article 8 to so find.

8. Mr Bramble argued that even though it is clear the claimant cannot satisfy the Immigration Rules, they should be the starting point. The Rule that she is most close to fulfilling is that under 276ADE(1)(vi) whereby there must be very significant obstacles to her integrating into China. It was clear there were no such obstacles. Mr Bramble submitted that the claimant would be able to make a fresh application and that there were no compelling circumstances to allow this matter outside the Rules.

Consideration

9. Having considered the submissions and evidence my findings are as follows.

10. The claimant did not argue that she could satisfy the Immigration Rules and this clearly is correct, as highlighted by Mr Bramble.

11. Recent Court of Appeal case law (see, for example, SS Congo [2015] EWCA Civ 387) makes it very clear that where someone cannot succeed under the Rules there must be "compelling circumstances" to allow their appeal outwith the Rules. The issue before me and to be determined in this appeal, therefore, is whether there are compelling circumstances to warrant the claimant being granted leave to remain outside the Rules.

12. The claimant has lived in the UK for nine years during which time she has integrated into society, made friends, become engaged and built a business. For these reasons I am satisfied that she has developed a private life in the UK and that her removal from the UK would result in an interference with that private life of sufficient gravity for Article 8 to be engaged.

13. I also accept that she has established a family life in the UK with her fiancé. Although he is also a Chinese national, their relationship was formed and has developed whilst they were both living and working in the UK and her fiancé, who is presently entitled to remain in the UK, has no wish to return to China.

14. Having found there to be a private and family life engaging Article 8, the remaining – and determinative – question is whether removal of the claimant is proportionate.

15. The starting point for this analysis is Section 117B of the Nationality, Immigration and Asylum Act 2002 which stipulate a series of mandatory considerations to be

taken into account where the proportionality of removal from the UK is at issue. I apply these to the present case as follows:

(a) Section 117B(1) states that the maintenance of effective immigration controls is in the public interest. Even though the claimant's failure to meet the Rules may well be due to a mistake by her solicitors, the essential fact is that she failed to satisfy the requirements of Rules. Accordingly, this consideration must weigh against her.

(b) Sub-Sections 2 and 3 of Section 117B state that it is in the public interest for an applicant to speak English and be financially independent. I am satisfied that the claimant satisfies both.

(c) Sub-Section 117B(4) is not relevant as the claimant has been in the UK lawfully.

(d) Sub-Section 117B(5) states that little weight should be given to a private life established when a person's immigration status is precarious. The client's immigration status in the UK has at all times been precarious as that term is understood in this area of law and therefore little weight should be given to it.

16. Having regard to the aforementioned considerations, and taking into account all of the claimant's circumstances, it is clear that, although there are factors that weigh in her favour in the balancing exercise under Article 8, there are no compelling reasons (or indeed, reasons that come close to being compelling) that could justify a decision in her favour outside the Rules.

17. The claimant is a successful and educated person who has supportive family in China (for example, they helped fund her business) and there is no evidence before me to show she would have difficulty re-integrating into life in China where she speaks the language, has family and has the benefit of citizenship. Whilst she may not be able to continue the business she has developed in the UK there is no reason she would not be able to find employment or start another endeavour.

18. The claimant's private life was established whilst her immigration status was precarious. She is engaged to a person in the UK but that person is a Chinese national who presently has precarious immigration status himself (their relationship having been established and developed whilst they both had a precarious immigration status).

19. In the claimant's favour is that she speaks English, is likely to be a financial asset to the UK and may well have succeeded under the Rules if she had not been let down by her solicitors. These are relevant factors, and they weigh in her favour, but they fall significantly short of a "compelling reason" that could justify a finding that leave to remain should be granted on the basis of Article 8 outside the Immigration Rules.

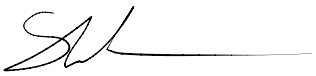
20. Accordingly, I find that although removing the claimant from the UK would interfere with her private and family life, the interference would be proportionate under Article 8 ECHR.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 2 May 2016

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47022/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2015	**On 6 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JING LI
(NO ANONYMITY ORDER MADE)

Respondent

Representation
For the Appellant: Mr Kola, Senior Home Office Presenting Officer
For the Respondent: Mr Singaraja, Counsel instructed by Garth Coates Solicitors

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of China born on 12 May 1988 who entered the UK in 2007 on a student visa. In September 2012 she was granted leave to remain until September 2014 as a Tier 1 (Post Study Work) Migrant. Before her leave expired she applied for leave to remain as a Tier 1 (Entrepreneur) Migrant.

2. The appellant (hereinafter "the Secretary of State") refused her application on the basis that she did not submit with her application the marketing and advertising

material required under Paragraph 41-SD(e)(iii) of Appendix A of the Immigration Rules.

3. At the material time, Paragraph 41-SD(e)(iii) stipulated that an applicant must provide:

> '(iii) one or more of the following specified documents covering (either together or individually) a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of his application:
>
> (1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally, showing the applicant's name (and the name of the business if applicable) together with the business activity or, where his business is trading online, confirmation of his ownership of the domain name of the business's website,
>
> (2) article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,
>
> (3) information from a trade fair, at which the applicant has had a stand or given a presentation to market his business, showing the applicant's name (and the name of the business if applicable) together with the business activity, or
>
> (4) personal registration with a UK trade body linked to the applicant's occupation'

4. In completing the application form the claimant ticked a box (at section G26 of the form) to confirm she was supplying advertising and marketing material. Supplying this information would be in accordance with sub-paragraph (iii)(1). The form makes clear that the material provided must cover a continuous period commencing before 11 July 2014.

5. The reason given by the Secretary of State for refusing the claimant's application was that all of the material she submitted in respect of marketing and advertising material was from after 11 July 2014.

6. The claimant appealed and her appeal was heard by First-tier Tribunal ("FtT") Judge Sweet. In a decision promulgated on 24 June 2015, the FtT allowed the appeal "*to the extent that the Secretary of State should without delay reconsider the application in light of all the documentation now produced*". The reasoning of the FtT was as follows:

   a) The advertising material submitted by the claimant with her application was from after 11 July 2014.

   b) The reason she failed to submit material from before 11 July 2014 was because of an error by her solicitors.

   c) She produced to the tribunal sufficient material to satisfy Paragraph 41-SD(e)(iii)

d) Paragraph 245AA of the Immigration Rules can operate as a mechanism for relaxing the strictness of a particular requirement

7. The FtT then concluded at paragraph [26]:

> "While I cannot conclude the Appellant has met all the requirements of the Immigration Rules on the balance of probabilities, I made a find that the Secretary of State should reconsider the application in light of the further documents produced, because I am satisfied that on the balance of probabilities she is likely to meet he requirements under Appendix A."

8. The Secretary of State's argument, as set out in the grounds of appeal and elaborated by Mr Kola are that (a) this is an application under the Points Based System where only documents submitted with the application can be taken into account; and (b) paragraph 245AA is not applicable because the Secretary of State had no reason to believe the evidence existed.

9. Mr Singarajah argued that paragraph 245AA must be considered in light of *Sultana and Others (rules: waiver/further enquiry; discretion)* [2014] UKUT 00540 (IAC) where the Upper Tribunal stated that paragraph 245AA "operates as a mechanism for relaxing the strictness of a particular requirement or requirements" and confirmed that an error of law can arise from the Secretary of State's failure to exercise its discretion under the paragraph. He argued that this was a case where the Secretary of State should have asked for more documents and that the judge, following *Sultanna*, was not in error to so find.

10. Mr Singarajah also argued that even if the judge erred in relation to the Immigration Rules the appeal should be allowed under Article 8 ECHR. The FtT determined, at paragraph [22], that the UK would be in breach of Article 8 ECHR to return the claimant to China. Mr Singarajah submitted that the Secretary of State's grounds do not raise Article 8 and therefore the FtT's Article 8 finding should stand irrespective of my conclusion about the Immigration Rules.

Consideration

11. Under the Points Based System, the starting point, in accordance with section 85A(4) of the Nationality, Immigration and Asylum Act 2002, is that the FtT is only permitted to take into account material that was before the Secretary of State's decision maker. As summarised in *Ahmed and Another (PBS: admissible evidence)* [2014] UKUT 365

> "... where a Points Based application is made and refused, the assessment by the Judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a different decision, not on the basis that a different way of presenting the application would have produced a different decision."

12. The material before the decision maker in this case was plainly insufficient to find the claimant satisfied the Immigration Rules as by the claimant's own admission – and as

found by the FtT – it was dated after 11 July 2014 whereas the Rules specifically require that it predates 11 July 2014.

13. This appeal therefore turns on whether the Secretary of State's refusal decision was not in accordance with the law by reference to the discretion afforded to it under Paragraph 245AA of the Immigration Rules.

14. Paragraph 245AA, at the relevant time, stated as follows:

> '(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
>
> (b) If the applicant has submitted specified documents in which:
>
> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii)A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
>
> (iii) A document is a copy and not an original document; or
>
> (iv) A document does not contain all of the specified information;
>
> the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.'

15. The Upper Tribunal discussed the scope and purpose of Paragraph 245AA in *Sultana* where at paragraph [25] it stated:

> "... where a decision is challenged on the basis of unlawful failure to exercise a discretionary power of further enquiry or waiver ... Judges will be guided by considering the purpose underlying powers of this kind. We consider that such powers are to be viewed as dispending provisions, designed to ensure that applications suffering from minor defects or omissions which can readily be remedied or forgiven do not suffer the draconian fate of refusal."

16. Paragraph 245AA sets out four categories of defect in material submitted with an application which the Secretary of State may seek to rectify by requesting correct documents. The defect in the claimant's application was a failure to provide marketing or advertising material commencing before 11 July 2014. The FtT has not explained why or how a defect of this nature falls within any of the four categories and I am not satisfied that it does. The application form made clear to the claimant that she needed to provide material from before 11 July 2014. She failed to provide this. This was not a case of there being a defect, or lack of certain information, in documents provided by an applicant. Rather, it is a case where the applicant simply failed to submit the documents she needed to in order to comply with the Rules.

Accordingly, there was no error on the part of the Secretary of State in failing to exercise discretion under paragraph 245AA to give the claimant an opportunity to rectify the deficiencies in her application. I find, therefore, that the FtT has made a material error of law and I remake the decision to dismiss the appeal under the Immigration Rules.

17. The claimant has argued that if the appeal is not allowed under the Immigration Rules it should be allowed under Article 8 ECHR as the Secretary of State failed to appeal the FtT's findings in this respect. I do not accept this argument. The FtT's treatment of Article 8 is very brief. In a short paragraph (paragraph [22] of the decision), without developing reasons, the FtT states that it would be disproportionate to remove the claimant to China and cites in support of this contention the recent entry clearance case *Mostafa* [2015] UKUT 112. It is clear from the reference to Mostafa that the point being made by the FtT is that removal would be disproportionate under Article 8 *because* the claimant meets the requirements of the Immigration Rules. Accordingly, to the extent the Secretary of State's appeal in relation to the Immigration Rules is successful it is also successful in respect of the Article 8 finding by the FtT. In any event, it is not clear what the FtT has in fact found in respect of Article 8 as the Notice of Decision makes no reference to Article 8 and reads as if the appeal has been decided solely under the Immigration Rules notwithstanding the discussion of Article 8 in paragraph [22]. Accordingly, the FtT's decision is set aside in its entirety.

18. As explained above in paragraph [16], I have remade the FtT's decision in respect of the Immigration Rules and dismissed the claimant's appeal. However, given the limited consideration of Article 8 by the FtT and that I have not heard submissions in relation to the same, the making of the decision in respect of Article 8 will need to be adjourned for a further hearing, which will take place in this forum.

DECISION

19. For the reasons explained above, my decision is as follows:

    a) The decision of the FtT contained a material error of law and is set aside.

    b) I remake the decision in respect of the Immigration Rules and dismiss the claimant's appeal.

    c) With respect to the claimant's appeal under Article 8 ECHR, the remaking of the decision will be undertaken within this forum.

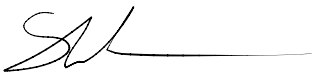
    d) No anonymity order is made.

DIRECTIONS

i. Any further evidence to be relied upon by the parties is to be filed with the Upper Tribunal and served on the opposing party no later than 14 days before the date of the resumed hearing.

ii. The parties are to file with the Upper Tribunal and serve on the opposing party written submissions no later than 7 days prior to the date of the resumed hearing.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 30 December 2015