



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

Appeal Number: HU/05527/2015

THE IMMIGRATION ACTS

**Heard at: Columbus House,
Newport
On: 22 January 2018**

**Decision and Reasons
Promulgated
On: 24 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

XIAOYAN LIU
(no anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: In person

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

1. This is the resumed hearing of an appeal against the decision of First-tier Tribunal Judge Walker in which she allowed the appeal of the Appellant, a citizen of China, against the Secretary of State's decision to refuse to grant further leave to remain.
2. At a hearing on 30 November 2017 Deputy Upper Tribunal Judge Chamberlain allowed the Respondent's appeal against the First-tier

Tribunal Judge's decision and set aside that decision to be remade in the Upper Tribunal. The Appellant was advised to attend the resumed hearing and directions given to the Appellant to serve any further evidence upon which he wished to rely seven days in advance of the resumed hearing. No further evidence has been submitted. The Appellant attended the resumed hearing in person and Mr Richards represented the Respondent.

Background

3. The Appellant is a 34 year old citizen of China. He came to the United Kingdom lawfully as a student arriving on 7 September 2005 and his leave to remain was renewed on various occasions up to 30 August 2011 when he left. He re-entered the UK on 21 April 2012 as a post study migrant remaining until 5 April 2014. The Appellant re-entered for the last time on 16 September 2014 as an academic visitor and was granted leave to remain until 16 September 2015.
4. On 14 September 2015 the Appellant applied for indefinite leave to remain on the basis of long residence. The application was made under the terms of the Immigration Rules which provided for an entitlement to indefinite leave after 10 years continuous lawful residence (paragraph 276B(i)(a)). The application was refused because the Appellant could not show continuous residence as his absence between 30 August 2011 and 21 April 2012 exceeded 6 months (see paragraph 276A(a) of the Immigration Rules).
5. The Appellant appealed the Respondent's decision. By virtue of s.82 Nationality Immigration and asylum Act 2002 there was no right of appeal against the Immigration Rules decision. The only right of appeal was against the refusal of a human rights claim and the Appellant's application for leave to remain on the grounds of long residence was considered as a 'deemed' human rights claim.
6. The appeal came for hearing before First-tier Tribunal Judge Walker. Although this was not an Immigration Rules appeal the Judge considered whether the Appellant met the requirements of the Immigration Rules as this was relevant to the proportionality of the human rights decision. The Judge carefully detailed the relevant law and reached the conclusion (at paragraph 27 of her decision) that the Appellant could not meet the requirements of the Immigration Rules.
7. The Judge went on to consider the appeal on the basis of the Appellant's private life under Article 8 of the Human Rights Convention. The appeal was allowed for the reasons given in the decision. The Secretary of State appealed to the Upper Tribunal and permission to appeal was granted.
8. At the hearing on 30 November 2017 Deputy Upper Tribunal Judge Chamberlain found that the First-tier Tribunal had erred in law. The detailed reasons for this finding are set out in the decision but in summary it was found that the First-tier Tribunal Judge failed to carry out a proper proportionality assessment with reference to the facts as set out in section 117B Nationality Immigration and Asylum Act 2002, with reference to the

relevant caselaw and by making unreasoned findings relating to the Appellant's inability to form a private life in China.

The resumed hearing

9. As the Appellant was unrepresented I explained the nature of the resumed hearing. The Appellant emphasised that his application was based on long residence and not on private life and he could not understand why it was not dealt with on that basis. He said that the appeal did not consider his long residence. He has been in the United Kingdom for 13 years continuously and he has not been back to China. Asked about the absences in 2011 and 2014 he accepted however that he returned to China but only for short periods.
10. I asked the Appellant why he could not go back to China and make his life there. He said that he has been at university here too much and that he is emotionally attached to this country. It would be difficult to change. He is 35 years old and his way of thinking has been formed here. China has changed dramatically since he left. It would not be easy to integrate. He has Chinese friends and they have managed to stay here. Their life is getting better whilst he has exhausted his savings. He has been to the CAB and the Jobcentre, but he cannot get work because he does not have leave to remain. He has finished with his employment in China. The two-year contract of collaboration with the University of the West of England has finished. He is the unlucky one in the company of his friends who have been allowed to stay even though he has a higher qualification.
11. Answering questions from Mr Richards the Appellant said that he had invested financially by spending 10 years studying rather than working. Mr Richards asked why he should not follow the normal expectation of coming here to get qualifications and returning to use them in his home country. The Appellant said that he has a good relationship with his laboratory here and he is integrated. Some of his friends have been here for a long time. He said that he could get a job in China, but he could have done so 10 years ago after his Master's degree. He agreed that he would prefer to live here.
12. I asked the Appellant if he had anything to add. He said that the younger generation have taken over in China. He disagrees with the period that he has spent in this country and he should be allowed to stay on the basis of long residence. He cannot get a job because he does not have leave to remain.
13. I said that it was inevitable that his appeal would be dismissed, and I reserved my written decision.

Decision

14. The background and history of this appeal is summarised above and given in more detail in the decisions of the First-tier Tribunal and the Upper Tribunal.
15. It was very clear at the hearing before me that the Appellant based his application and his appeal on long residence. It was equally clear that he did not meet the requirements of the Immigration Rules relating to long residence because the period of 10 years upon which his application was based was broken by an absence of more than six months between 30 August 2011 and 21 April 2012. Paragraph 19 of the decision of the First-tier Tribunal records

“He accepted that between 30.08.2011 and 21.04.2012 he had been in China with no valid visa for the UK.”

If this has been an Immigration Rules appeal that would have been the end of the appeal, the appeal would have been dismissed.

16. The Nationality Immigration and Asylum Act 2002 does not provide for an appeal against a decision under the Immigration Rules. However certain applications under the Immigration Rules are treated as ‘deemed’ human rights claims and a right of appeal is provided against the refusal of such a claim. A long residence application is one such application, and this is the reason why the Appellant was able to proceed with an appeal against the Respondent’s decision.
17. The First-tier Tribunal’s decision allowing the appeal on human rights grounds has been set aside for the reasons given in Deputy Upper Tribunal Judge Chamberlain’s decision. In remaking the decision, I find the following.
18. The Appellant does not claim to have a family life in the United Kingdom. His parents live in China. The fact that he has spent many years living in the United Kingdom apart from his parents does not mean that he has abandoned his family life with his parents. It is the only potential family life that he has so there is at least a vestigial family life remaining.
19. The Appellant has established a private life in the United Kingdom through his presence and his studies here. The qualitative nature of that private life is however very difficult to ascertain. There is no supportive evidence from friends or acquaintances. Letters from the University of Kent merely record his qualifications, nothing more. A letter from the University of the West of England confirms only an invitation to stay as a visiting researcher for a period of one year from 20 September 2014 at the Appellant’s own expense. There is no witness statement from the Appellant detailing the nature of his private life in the United Kingdom. There is no evidence put forward of his living arrangements here or even his current or recent studying arrangements. The evidence of the Appellant’s private life is, in short, extremely limited. It cannot be said on the evidence before me that his private life is anything more than ‘time served’.

20. So, having found that the Appellant does have a private life in this country it is not a private life to which I can attach significant weight. The Appellant has lived in the United Kingdom for most of the past 13 years. His private life here is evidenced by his studies at the Universities of Kent and West of England. He would prefer to stay in the UK and, if he had known that he was going to have to go back to China to live he would have got a job there after completing his Master's Degree in 2007. The Appellant believed that by completing 10 years lawful residence he, like many of his friends, would be granted permission to remain. However, the continuous nature of his residence was broken by his absences between 2011 and 2012. The Notice of Appeal makes it clear that the Appellant does not believe that this should have been held against him because the length of his absence was due to mistakes made by the Entry Clearance Officer. Unfortunately for the Appellant this is irrelevant to the appeal now before me which is on human rights grounds only.
21. I have taken into account s.117 of the Nationality Immigration and Asylum Act 2002. In doing so I take account in particular of s.117B (5), the Appellant's status in the UK has always been on the basis of limited leave so it has been 'precarious' and in these circumstances, it can be afforded little weight. I have also taken account of Patel v SSHD [2013] UKSC 72 which, in effect, provides that education of itself is not sufficient to merit sustainable grounds of appeal under Article 8. In this case education in this country is all that the Appellant has having provided nothing of substance regarding any other aspect of his private life. I would add that in considering the proportionality of the decision the Appellant has put forward nothing of any substance to suggest that he will have any difficulty in finding employment or reintegrating in China. He was able to spend more than 6 months there a few years ago and puts forward no evidence of any difficulty. I have no reason to believe that he does not speak the language fluently. I have no reason to believe that the qualifications obtained in this country will not be of benefit to him in finding employment in China.
22. My conclusion is that the Appellant has established a private life in this country at a time when his immigration status was precarious, that private life is limited to his education in this country over an extended period and there are no substantial obstacles to him re-establishing his private life in China. He does not meet the requirements of the immigration Rules and the Respondent's decision is proportionate to the interference in his private life caused by requiring him to return.

Summary

23. The decision of the First-tier Tribunal involved the making of a material error of law. I remake that decision by dismissing the Appellant's appeal.

Signed:

Date: 23 January 2018

A handwritten signature in black ink, appearing to read 'J F W Phillips'. The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

J F W Phillips
Deputy Judge of the Upper Tribunal