Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10327/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2019	**On 8 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR YOU-YAN CHEN

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge S.D. Lloyd promulgated on 6 December 2017 allowing the appeal of Mr Chen against the refusal of leave to remain as a spouse under Appendix FM of the Immigration Rules.

2. I shall refer to Mr Chen as 'the appellant' as he was before the First-tier Tribunal.

3. The issue arises from the provisions of Appendix FM. The grant of further leave was conditional upon compliance with the requirements of E-LTRP2.1 which is in the following terms

> 'The applicant must not be in the UK
>
> (a) as a visitor; or
>
> (b) with valid leave granted for a period of six months or less unless that leave is as a fiancé or proposed civil partner or was granted pending the outcome of Family Court or divorce proceedings.'

4. The applicant applied as a visitor and he was granted leave to enter as a visitor. Furthermore, in the decision letter, there is reference to the fact that the appellant e-mailed the overseas post stating that he intended to return to Taiwan after his visit to the United Kingdom. He was applying as a visitor, rather than with leave to enter as a fiancé. He did in fact marry his partner in the United Kingdom on 9 August 2017 and sought leave to remain as a spouse on the basis of that marriage.

5. The vignette in his passport, a copy of which I have seen, shows that he was granted a visit visa in these terms: *C-VISIT-MARRIAGE/CP*, the latter must be a reference to civil partnership. It is not entirely clear to me whether the appellant fell within the categories set out in 2.1(a) or 2.1(b) of E-LTRP2.1. However, the reference to a visit appears to refer to a visit visa and not a fiancé visa. The distinction is of considerable importance. A visit visa is one which prevents an entrant from seeking leave to remain in another capacity, that is, it cannot be switched.

6. The Secretary of State has made a policy that if a person comes in to the United Kingdom as a visitor he may not then apply for further leave to remain. It is clear that the Secretary of State considers that to do so would be open to abuse by those who have acquired a foothold in the United Kingdom, and who would then find it easy to extend their temporary leave by making further applications during the course of which their leave would be statutorily extended. There is a logic in the Rules preventing visitors from switching to another status if their original status was that of a visitor.

7. I would not regard that prohibition against switching as something which is wrong in law or in principle. The judge however disregarded the prohibition against switching in allowing the appellant's appeal by his application of Article 8 of the ECHR.

8. In addition, the requirements of the Immigration Rules set out various financial requirements which must be met and those are supported by evidential requirements. The judge accepted that they had not been met. He did not set out in what respect they were not met. He merely said in paragraph 11 of the determination that pay slips, bank statements and employment contracts were provided which were *consistent* with the level of earnings claimed in respect of the sponsor. The judge acknowledged that the financial requirements of the Rules had not been 'strictly met' suggesting that they had not been met. In so saying, he

appears to have considered that it was possible to treat the requirements of the Rules as, in some sense, optional.

9. The judge's justification for this approach was to say that there did not appear to be any particular benefit in the interests of immigration control in *not* providing the appellant with leave to remain. I am satisfied that this was an error of law. The provisions of the Immigration Rules particularly insofar as they relate to non-switching were an important consideration. They form a central plank in the system of immigration control as it applies to visitors.

10. In those circumstances, the determination of the First-tier Tribunal Judge should be set aside.

11. The appellant was served with a notice of hearing by first class post on 10 December 2018 and did not appear before me this morning. In those circumstances I am not able to have heard argument from the appellant as to why his appeal should be allowed. He conceded that it was possible for him to return to make an application for entry clearance. The judge was not persuaded that he would not be able to live with his family long enough to make a fresh application. A fresh application could now be made on the basis of his marriage on 9 August 2017. He could then put forward all of the evidential requirements of Appendix FM-SE dealing with his financial circumstances and those of his spouse.

12. There is no sufficient evidence to establish that it would be a violation of his human rights to make an application in proper form. I have no reason to believe that such an application would not be successful provided the correct material is submitted but nor do I consider that it would be unduly onerous for the appellant to apply in due form. If that application fulfils the requirements for leave to enter as a spouse or civil partner then he will be granted leave to enter in that capacity. If he fails to meet the requirements for leave to enter because he has not provided sufficient material to establish that the requirements have been met, then there is no reason why he should be granted leave to enter on any other basis, including under the provisions of the Human Rights Act.

DECISION

(i) I allow the appeal of the Secretary of State.

(ii) I set aside the decision of the First-tier Tribunal Judge.

(iii) I re-make the decision dismissing the appellant's appeal against the Secretary of State's decision refusing his application for leave to remain.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL