



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/09221/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 29th October 2013

Determination Promulgated
On 25th November 2013

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR XIAOSONG JIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Hunt-Jackson, Home Office Presenting Officer
For the Respondent: No appearance

DETERMINATION AND REASONS

1. In this appeal the Appellant is the Secretary of State for the Home Department and the Respondent is Mr Xiaosong Jin. For ease of reference however I shall refer to the Secretary of State as "the Respondent" and Mr Xiaosong Jin as "the Appellant".

History

2. The Appellant who was born on 23rd November 1973 is a national of China. He is married to Manting Tao a woman who has indefinite leave to remain in the United Kingdom and is therefore settled and resident here. The couple have one child, who is registered as a British citizen on 21st May 2013.
3. On 28th July 2012, the Appellant applied for leave to remain as the spouse of a person present and settled in the UK. On 12th March 2013 the Respondent refused that application, under Appendix FM of the Immigration Rules because the Appellant did not meet the financial requirements threshold.
4. The Appellant appealed that decision and the appeal was heard by First-tier Tribunal Judge Shimmin on 14th August 2013. The First-tier Tribunal Judge, after hearing evidence from the Appellant, allowed his appeal under both the Immigration Rules and Article 8 ECHR. The Judge took into account the Appellant's salary of £7,800 per annum and net rental income of £10,800. The Judge therefore calculated that the Appellant's total gross annual income amounted to £18,600.
5. Having allowed the appeal under the Immigration Rules the Judge then went on in the alternative to consider Article 8 ECHR, and after consideration allowed it under that provision as well.
6. The Respondent sought and was granted permission to appeal. The grounds seeking permission claimed that the Judge had misdirected himself in law when he had taken into account the rental income put forward by the Appellant. The grounds pointed out that this was an incorrect calculation because, for rental income to count as income for the purposes of the Immigration Rules the person must own the property that is rented. Further there must be specified confirmation of such ownership.
7. In the case before the Judge it appeared that the Appellant herself was renting the property from which he derived the rental income. He was therefore subletting and could not satisfy the conditions of the Immigration Rules.
8. So far as the Article 8 aspect of the Judge's determination is concerned, the grounds seeking permission submitted that for an appeal to be allowed under Article 8 when the Rules are not satisfied, it is necessary for the case to be exceptional. In these circumstances exceptional means circumstances in which although the requirements of the Rules have not been met, refusal would result in an unjustifiably harsh outcome. That was not the case here.
9. Permission to appeal was granted by First-tier Tribunal Judge Nightingale. In granting permission she said,

"The grounds argue that the Judge erred in that the appellant's income was not evidenced in accordance with the requirements of appendix FM-SE and, consequently, the maintenance requirements were not met. It is also argued that the Judge erred in

failing to appreciate that “exceptional circumstances” were required to allow an appeal on article 8 grounds where the rules were not met.

For reasons which are unclear, neither representative addressed the Judge directly with regards to the requirements of appendix FM-SE A1(10) on specified evidence of maintenance. It is therefore, unsurprising that the Judge arguably fell into error, in regard to the permissible sources of income set down in this lengthy part of the rules, and the need for documentation, despite an otherwise careful and full consideration. This ground is arguable, but the respondent must be aware that this appellant and his wife have a British national child and, consequently, EX1 may apply in any event.

Article 8 requires no ‘exceptional circumstances’. Nonetheless, the Judge approached article 8 on the basis that the appellant met the requirements of the rules and, in the alternative, that he did not (paragraph 36 applies). There is little merit in the second ground, but the decision in Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304(IAC) is followed and permission granted on all grounds argued”.

10. Thus the matter comes before me to decide whether the First-tier Tribunal Judge’s determination discloses an error of law, and if it does, whether the decision requires to be remade.
11. The Appellant did not attend. Mr Hunt-Jackson attended on behalf of the Respondent. Mr Hunt-Jackson informed me that he did not expect the Appellant to attend as he has now been granted indefinite leave to remain in any event (under the Long Residence rule). He indicated however that he had been instructed to pursue this appeal nevertheless. Mr Hunt-Jackson made submissions relying on the grounds seeking permission and asked that I allow the Respondent’s appeal and remake the decision of the First-tier Tribunal Judge, dismissing the Appellant’s appeal.

Error of Law and Remaking the Decision

12. I am satisfied that the decision of the First-tier Tribunal Judge discloses an error of law in his approach to the claimed income threshold enjoyed by the Appellant. I am satisfied that the Judge has misdirected himself by taking into account rental income from a property which the Appellant himself was renting and which was not owned by him in the specified manner. I am satisfied therefore that the Appellant cannot meet the financial requirements of the Immigration Rules. I do however endorse Judge Nightingale’s remarks in the grant of permission, it would appear that neither representative addressed the Judge directly with regards to the requirements of Appendix FM on specified evidence of maintenance. I agree also with her endorsement that it is unsurprising that the Judge fell into error in regard to the permissible sources of income set down in this lengthy part of the Rules.
13. So far as the Article 8 consideration is concerned. I accept that the Judge approached Article 8 on the basis that the Appellant met the requirements of the Rules and that resulted in an error. For an appeal to be allowed under Article 8 when the Rules are not satisfied it is necessary to show that there are some circumstances demonstrating that the Respondent’s refusal would result in an unjustifiably harsh outcome.

Nothing demonstrating this was put before the Judge. He did consider, under the proportionality test in **Razgar** that the Appellant and his spouse have a long and stable marriage but there is nothing unusual in that. He also considered the consequences of separation on the family as a whole and stated that it would not be reasonable to expect the Appellant's wife who has a British child to accompany him to China, but there was no evidence proffered to show why this would be unjustifiably harsh.

14. This of course is all academic now in view of the fact that the Appellant has been granted indefinite leave to remain. Nevertheless for the purposes of this determination, the following decision is made.

DECISION

15. The First-tier Tribunal Judge having erred in law, I set aside his decision. The decision is remade. The Appellant's appeal against the Respondent's decision of 12th March 2013 is dismissed.

No anonymity direction is made

Signature

Judge of the Upper Tribunal

Dated