



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07417/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 December 2013

Determination Promulgated
On 12 February 2014

Before

MR JUSTICE MITTING
UPPER TRIBUNAL JUDGE CRAIG

Between

MS HUILI GENG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Raw, Counsel, instructed by Jo & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a 42 year old citizen of the People's Republic of China. She entered the United Kingdom on 9 February 2007 as the spouse of Mark Crowther, a British

citizen. She was granted leave to enter until 31 January 2009. Leave was extended until 25 March 2011 and again to 21 July 2013. A son, now 5 was born to them. We are told and have no reason to doubt that in fact at the date on which her leave to remain had been extended, 25 March 2011, as the spouse of her husband they had in fact separated. He had gone to Manchester, taking their son with him.

2. On 10 November 2011 an application form countersigned by Mr Crowther and signed by her applied for indefinite leave for her to remain as his spouse. In section 11 of the form both of them declared that they were living together as husband and wife and intended to do so permanently. The declaration was false as both knew. By then he had gone to live in Malaga with another woman. He had in fact already told the Home Office in February 2011 that he was divorcing the appellant. He had lived in Spain with their son since June 2011.
3. On 22 February 2013 the Secretary of State curtailed the appellant's limited leave to remain as the spouse of Mark Crowther and notified her of her decision to remove her under Section 47 of the Immigration, Asylum and Nationality Act 2006 on the grounds that she had made false representations and had failed to disclose material facts when applying for indefinite leave to remain and further that she had been convicted of an offence - obtaining credit by fraud on 31 August 2012 - for which she had received either a short community sentence or a short suspended sentence. Further, the Secretary of State concluded that she did not satisfy the requirements of Appendix FM to the newly introduced Rules effective from 9 July 2012. There is no possible challenge to any of those reasons and none were found by First-tier Tribunal Judge Manuell, in his Determination and Reasons promulgated on 22 August 2013.
4. This appeal for which permission has been granted by Judge King is founded on the unusual circumstances of the appellant. She asserts that the decision of the Secretary of State of 22 February 2013 breaches her right to respect for family and private life, both for herself and her son and so infringes Article 8 ECHR.
5. Unsurprisingly, in the light of the facts which we have recited, the relationship between Mr Crowther and her and between her and her son have given rise to proceedings in the Family Court. Judge Manuell was provided with copies of the orders of the Family Court but, as we understand it, nothing else.
6. An important part of the reasons given by Judge King for granting permission to appeal in this case was lack of clarity about what had occurred in the family proceedings and in particular lack of clarity about what the Family Court had been told about the immigration status and situation of the appellant. Mr Raw who appears for her today has been unable to enlighten us, beyond the terms of the orders, about what occurred in the Family Court. Against the background of established fraud in the making of her application for indefinite leave to remain we have examined the orders of the Family Court and what we know about what took place there with care. Our purpose has been to find out if the Family Court and we have been told the full truth about the appellant's circumstances and indeed about

what each of the two courts has been told about what has been going on in the other, the precise target of Judge King's observation when granting permission to appeal. Mr Raw asserts that all of the information requested by Judge King is set out in his skeleton argument of 29 October 2013. It is not.

7. On 23 April 2013, that is to say two months and one day after the Secretary of State's decision letter against which the appellant's appeal to the Tribunal was brought, the following order was made by consent. It was ordered that the husband would make available to the appellant their son for visiting contact in circumstances in which contact could be observed by the guardian. Various consequential orders were made so that when the matter came back before the court, as it did on 5 July before Mr Justice Keehan, a definitive interim order could be made.
8. It is apparent from the recitals to the order before its operative terms that the parties agreed that the Courts of England and Wales should have exclusive jurisdiction in respect of welfare decisions for the child, the court being satisfied that he had a substantial connection with England and Wales by reference to his British nationality but also by reference to "the habitual residence of his mother in England and Wales". Paragraph 9 of the operative part of the order provided, "the mother shall by 7 May 2013 file and serve a letter from her immigration solicitors addressing (1) the basis of the mother's application to remain in the UK; (2) the likely timescales for the determination of her application; (3) whether pending such determination the mother can be given any travel document to enable her to leave and re-enter the UK so that she might travel to Spain for the purposes of any contact with the child".
9. Paragraph 10 went on to provide, "there will be permission to the parties to settle an EX.66 request to the Home Office to provide information if necessary following the receipt of the said letter for further information as to the mother's immigration application". Given that the order was by consent and that we have not been shown any underlying documents presented to Mr Justice Cobb to satisfy him that it was proper to make the order we can only draw inferences as to what he was told from the terms of the order.
10. Paragraph 9 suggests unequivocally that the mother had made an "application" to remain in the UK, determination of which was pending. Subparagraph (3) suggested that her immigration status might be such that she might have been provided by the Home Office with a travel document. In fact she knew that the Secretary of State had on 22 February 2013 made a decision which meant that she had no leave to remain in the United Kingdom beyond that conferred upon her by Section 3C(2)(b) of the Immigration Act 1971 as an appellant whose appeal was pending. Paragraph 9 cannot have been honestly drafted if the draughtsman knew that far from making an application she had appealed against the decision which had removed her status in the United Kingdom. We have no reason to suspect that her family solicitors were doing anything other than to fulfil their duty to the family court. The drafting of that paragraph therefore had to have been founded upon a deception by her.

11. Furthermore, paragraph 10 of the order plainly implies that she was unaware of her immigration status, hence the need to settle a request to the Home Office to provide information about “the mother’s immigration application”.
12. The matter then came back before Mr Justice Keehan on 5 July 2013. Again he made a consent order. The order provided for contact to take place for two hours on a date to be agreed in August and October 2013 in the presence of the guardian ad litem and for three hours in December 2013. Thereafter, in February and in April on dates to be agreed unsupervised contact was to take place of 30 minutes on the first occasion and one hour on the second. The guardian was to prepare a report by 16 May 2014 and the matter was then to be listed for further directions on 21 May 2014. Again we do not know despite Judge King’s order what the court was told on that occasion about the mother’s immigration status. There is no basis upon which we could conclude that the court was told the truth.
13. The next order made by the Family Court was made on 12 August 2013 by His Honour Judge Barnett. It records that a letter was received from the appellant’s solicitors, Wilson LLP and that the respondent, Mr Crowther had not responded to requests for an order by consent. It was ordered that permission be given for the parties to disclose documents relating to the family proceedings to the appellant’s immigration solicitors, Jo & Co and to the allocated Home Office Presenting Officer to assist the First-tier Tribunal in determining the appellant’s immigration appeal. Nothing beyond the orders was provided.
14. The position at which we have now arrived is therefore as follows. We are invited to determine whether or not the First-tier Tribunal made an error of law in its determination and, if so, what decision should be taken in place of its decision to dismiss the appeal. We have been invited to do so in the light of family proceedings about which we have not been told the whole truth. The documents which we have seen satisfy us that the Family Court itself was not told the truth about the appellant’s immigration status and proceedings. If this case had been properly conducted by the appellant the root question which we would have to determine and which we will still address is whether or not the Secretary of State’s decision should be set aside so as to invite her to reconsider whether to grant temporary leave to remain while the appellant’s proceedings in the Family Court in relation to her son are concluded. Such issues are commonplace in marriages between the spouses of different nationality and origin when children are involved. They can sometimes raise difficult questions. The Tribunal is required to treat as a primary concern the interests of the child or children. Those are all matters which in due course we will address.
15. Judge Manuell’s reasoning, strictly analysed, is open to possible criticism. In paragraph 15 of his Determination and Reasons he found that there was no family life in the United Kingdom between the appellant and her son and that it had ended when Mr Crowther and he moved to Spain two years ago. He treated the remote contact which the appellant either had enjoyed or could enjoy from the United

Kingdom as part of her private life and concluded correctly that it was not conditional on her continued residence in the United Kingdom. He then went on to consider, as an aspect of her private life, the conduct of the litigation to which we have referred and concluded, in our judgment correctly that it could be conducted by her remotely from China, albeit with greater difficulty than from within the United Kingdom.

16. The respect in which Judge Manuell's decision may be open to criticism is in his conclusion that, at the time he made his decision the contact which had resumed between the appellant and her son in the United Kingdom was not part of her family life. If we had been presented, as we had every right to expect, with an open and honest account of what had transpired in the family proceedings and if an open and honest account had likewise been given to the Family Court then we would have been faced with a difficult question but a narrow one, namely whether or not the Secretary of State should be required to re-take her decision so as to consider permitting the appellant to remain in the United Kingdom to enjoy the contact ordered by the Family Court and to conduct her family litigation personally in the United Kingdom; but we are not simply faced with such a decision. The appellant lied in her application for indefinite leave to remain. It may well be as she maintains that she did so at the suggestion of her exploitative husband. He may have duped her because he had already told the Home Office that they were divorcing and if she is right, failed to fulfil his part of a bargain to buy out her interest in their matrimonial home for £3,500, but none of that excuses the basic lie. The Secretary of State was undoubtedly entitled to curtail her leave to remain on the grounds that she gave. She is in effect being invited to consider this application outside the Immigration Rules and to exercise the residual discretion which she has to permit the appellant to remain in the United Kingdom for the limited time and purpose we have stated. However she has chosen not only to make a false application but to conduct her appeals in a manner which in our judgment is abusive of the appellate system. That is a factor which we are entitled to take into account in the balance against her in determining whether or not at a re-hearing of her case we should overturn the decision of the First-tier Tribunal. We refuse to do so.
17. On the facts as we have found them the legitimate interests of the United Kingdom spelt out in Article 8.2 ECHR substantially outweigh the right to respect for her family and private life which we have been able to identify. Accordingly, and for those reasons this appeal is dismissed.

Signed

Date

Mr Justice Mitting