



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14045/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 14 July 2014

Determination promulgated
16 July 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHUNG HSEIN HOU

Respondent

For the Appellant: Mrs S Saddiq, Senior Home Office Presenting Officer

For the Respondent: Mr D Stevenson, of McGill & Co, Solicitors

No anonymity order requested or made

DETERMINATION AND REASONS

- 1) The parties are as above, but this determination refers to them as they were in the First-tier Tribunal.
- 2) The SSHD appeals against a determination by First-tier Tribunal Judge Lea, promulgated on 5 November 2013, dismissing the appellant's appeal under the

Immigration Rules, but allowing it under Article 8 of the ECHR. The grounds are that Article 8 provides no general discretion to dispense with the requirements of the Rules; that there is no human right to remain in the UK to work; and that Article 8 is not a means whereby the Rules may be ignored or rewritten because a judicial fact finder regards a person as having only narrowly failed to comply.

- 3) Those grounds disclose error of law by the First-tier Tribunal. The European Charter is “for the protection of human rights and fundamental freedoms.” The ground of appeal under section 84(1)(c) of the 2002 Act is that “the decision is unlawful under section 6 of the Human Rights Act 1998 ... as being incompatible with the appellant’s Convention rights.” It is necessary in a case involving qualified rights to show a real risk of flagrant denial or gross violation, where the very essence of the right will be completely denied or nullified in the destination country. After applying the Rules, only if there are arguably good grounds for granting leave outside them is it necessary to go on to consider whether there are compelling circumstances not recognised under them. If there are no insurmountable obstacles to relocation, it has to be shown that there are particular features such that removal will be unjustifiably harsh. Article 8 cannot be used to excuse near misses.
- 4) The judge at ¶28 found the interference in this case disproportionate because it was not in the public interest, but that was to use Article 8 for a purpose for which the right of appeal under the Convention is not intended, and which goes beyond the case law on the circumstances under which an Article 8 ground outwith the Immigration Rules may be upheld. This might have been a “hard” case (cf *Allam* [2012] EWCA Civ 960 at ¶45 and *Rodriguez* [2014] EWCA Civ 2 at ¶100) but it was not one which entitled a judge to allow it outwith the Rules.
- 5) However, all was not lost for the appellant. Mr Stevenson raised a new point in his written submission received by the Upper Tribunal on 9 July 2014. The application in this case was made on 4 January 2013 and decided on 17 April 2013. The provisions for implementation of HC1039 say that the changes take effect on 6 April 2013, subject to sub-paragraphs (a), (b) and (c). This application fell under paragraph 281. Sub-paragraph (a) of the provisions for implementation applies to paragraph 281, while (b) and (c) do not. Sub-paragraph (a) applies “if an applicant has made an application ... on or after 6 April 2013 using a certificate of sponsorship ... assigned by his sponsor ... before 6 April 2013.” The certificate in this case was assigned before that date, but the application was not made on or after 6 April 2013. This application having been made prior to that date, and there being no other transitional provision applicable, it should have been decided according to the Rules as amended on 6 April 2013, and should have resulted in a grant of leave.
- 6) Mr Stevenson had sent a copy of his submission also to the respondent in advance of the hearing, but unfortunately this had not been received by Mrs Saddiq. I allowed her 20 minutes to consider the new point. Having had an opportunity to do so, she offered no argument against it, but asked for an adjournment to consider the matter further because it was novel and she wished to take instructions. I had some sympathy with her position, but the case has a history of previous adjournments and the point

although novel is essentially a short one, once identified. I was not willing to adjourn further.

- 7) The point is of a nature which should be allowed even although taken late. If the respondent should on a correct reading of the transitional provisions have allowed the application in the first place, then its refusal should not stand. I agree with Mr Stevenson's submission that the application should have been decided with reference to the amended Rules. It is common ground that, if so, it should have been granted.
- 8) The determination of the First-tier Tribunal is **set aside**, and the following decision is substituted. The appeal is **allowed under the Immigration Rules**, but would not have succeeded under Article 8.



16 July 2014
Judge of the Upper Tribunal