



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

Appeal Number: IA/34342/2014

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 2 June and 7 July 2015**

**Determination issued  
On 8 July 2015**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**JING YUN LIU**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

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

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. The appellant is a citizen of China, born on 10 December 1984. On 20 December 2013 she sought leave to remain as a spouse or person present and settled in the UK, Mr Chun Man Lee.
2. The appellant is employed in a business started by her husband not long before the application was made. The respondent's reasons for refusal letter dated 16 August 2014 explains that the application is refused primarily because the evidence provided did not meet the requirements of Appendix FM and Appendix FM-SE of the Immigration Rules in respect of the minimum income threshold. The letter goes on in terms of no

insurmountable obstacles to family life being continued outside the UK under paragraph FM:EX.1, in terms of paragraph 276ADE as to private life, and lastly finds no exceptional circumstances to grant leave outside the Rules. The letter is accompanied by a notice of the same date which contains both a decision to refuse to vary leave and a decision to remove.

3. Judge Blair heard the appellant's appeal to the First-tier Tribunal on 28 November 2014. The appellant presented evidence which the respondent accepted would be likely, if submitted again, to meet the terms of Appendix FM. The respondent argued that as the appellant could submit a fresh application the case should not succeed under Article 8 of the ECHR.
4. The appellant argued that a fresh application was not a sufficient answer, and that in those circumstances there was no real public interest in removal.
5. In his determination promulgated on 17 December 2014 the judge (correctly) found that post-decision evidence was irrelevant to the outcome under the Rules (which require submission of evidence with the application). He did not think that the fact that the appellant could now show that she met the Rules meant that there was a good arguable case for finding a breach of Article 8. He said that it was open to her to make a further application and that *"whilst Mr Vassiliou [her representative in the FtT] sought to argue that the appellant would be breaking the law if she remained in the UK while an application was made and that this would be unreasonable and could in itself be a breach of Article 8 rights, I did not consider that to be so. It did seem to me that a requirement to complete a further application for leave to remain would represent a very minimal interference with those rights, if interference there was."*
6. It is not quite clear from that passage whether the judge thought that it was reasonable to expect the appellant to leave the UK, or that she would not have to do so, or that she would not be breaking the law if she remained, or that it was reasonable for her to be put in that position. Certainly a requirement to apply again without leaving, if that is what was meant, does not seem on the face of it, without more, to be conceivably a disproportionate interference.
7. The appellant's grounds of appeal to the Upper Tribunal say that the appeal was against the decision not only to refuse leave but also to remove; that it was a misdirection to consider the threshold test of a "good arguable case"; that paragraph EX1 is directed only to the difficulty of family life continuing abroad and so is not itself a proportionate disposal in a case where the Immigration Rules would be satisfied at the date of the hearing; that section 19 of the 2014 Act [part 5 of the 2002 Act] required the Tribunal to have regard to public interest considerations, which were not rendered otiose by failure to meet the precise terms of Appendix FM; that overstaying is a criminal offence under section 24(1)(b)(i) of the 1971 Act; and that the ability of an illegal overstayer to make a further

application should not weigh in the balance when deciding if her rights under Article 8 are breached by a decision to remove her.

8. In oral submissions Mr Stevenson argued that if the appellant had proceeded no further with her appeal and had reapplied without leaving the country that would have put her in the position of an overstayer. That engaged the principle in *JM* [2006] EWCA Civ 1402 at paragraph 17 that a person in such a position should be able to ventilate a human rights claim before the Tribunal. If the scheme of immigration law was genuinely intended to give a 28 day opportunity for a further (in country) application, that should have been reflected by amendment of statutes including the 1971 Act at section 24(1)(b) which creates the criminal offence. If the appellant remained and continued working in the business both she and her husband would be subject to criminal sanctions for illegal working and employment. She would remain legally liable to removal. The respondent might be likely in practice to remain from enforcement but that was not a sufficient answer. The respondent had written to the appellant on 26 March 2014 (page 11 respondent's bundle) suggesting that she might withdraw her application and make a fresh one, but that blandly ignored the serious legal disadvantages of doing so. The judge erred in thinking that the ability to make a fresh application was a sufficient answer when it lacked legal protection. Such a situation was stronger than *JM*, where no removal direction was in place. If the Secretary of State intended a further application to be a real remedy, then a removal decision need not have been made. The judge should have looked at the evidence that the Rules were satisfied as at the date of hearing for purposes of the Article 8 decision. It did not make sense in respect of the legitimate aims of immigration control to confine consideration to the date of application. Article 8 was to be decided at the date of decision and the provisions of the Rules were the starting point. There were no guarantees to the appellant that she would not be removed. In the sense of *Chikwamba* and of *Chen* IJR [2015] UKUT 00189 this was a case where there would be no point in requiring an application to be made from abroad.
9. It was identified in course of submissions that the "28 day provision" is in Appendix FM, immigration status requirements, E-LTRP.2.2 :- *the applicant must not be in the UK ... (b) in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less, unless paragraph EX.1 applies.*
10. Mrs O'Brien accepted that the 28 day provision was not intended as a blanket provision to cover all Article 8 arguments. She did not concede all points made by Mr Stevenson, but she said that Article 8 had to be approached on the facts of each case. The particular significance of proceeding by way of a new application had to be analysed. The ability to meet the Rules at the date of the hearing might be significant in the overall proportionality exercise. The test in EX1 was not exhaustive. The judge over-concentrated on one relevant factor. She accepted that the decision required to be **set aside**.

11. By agreement, the remaking of the decision was adjourned.
12. On 7 July 2015, further documentary evidence was filed, the appellant and her husband adopted updated statements and were cross-examined, and further submissions were made.
13. It was common ground again that an application made to the respondent on the evidence before the tribunal would be likely to meet the requirements of the Immigration Rules. I therefore need not consider the specific requirements of the Rules.
14. It was also agreed that an appeal cannot succeed under the Rules, no matter how strong the evidence to show that their requirements are met, when that evidence was not submitted with and did not apply at the date of the application; and that if a further in country application were to be refused, there would be a right of appeal, although on Article 8 grounds only, exercisable from within the UK (unless certified as clearly unfounded, which Mrs O'Brien said appeared to be unlikely).
15. Mrs O'Brien argued that the original application was always bound to fail under the Immigration Rules, which are designed to fix the circumstances at the date of application, and not to give rise to appeals which present an ever moving target; and that Article 8 should not be used a vehicle to succeed on the basis of hopeless applications. She further argued that the appellant has the reasonable options of applying again in or out of country. The in country option did have the disadvantage that it invited overstaying and forfeited the right to work but there was effective protection from prosecution and removal and a right of appeal. The out of country option did not have the drastic consequences for the business which the appellants claimed and was not a disproportionate outcome. This was not a "*Chikwamba* case" because there was an in country alternative.
16. Ms Stevenson did not concede that there would be no insurmountable obstacles to family life being carried on in China, but he did not push the point. One minor matter raised was that the appellant's husband speaks Cantonese but not Mandarin (she speaks both). I was satisfied that the case shows no significant difficulties in the way of the appellant and her husband carrying on their family life in China if they had to, or if they chose to do so. I do not think any other conclusion could reasonably be reached.
17. The appellant's husband works in the business 7 days a week, around 50 to 60 hours. She works around 24 hours a week. A delivery driver is employed at busy times. Her husband primarily cooks, and sometimes delivers. They both answer the telephone, take orders and serve customers. She primarily deals with accounting and ordering. I did not think their evidence was anything less than honest, but they did tend to exaggerate the possible impact of her absence from the business. She is not indispensable or irreplaceable, short or long term. Her husband is

capable of taking responsibility for her area of work if need be. I was not persuaded that the business would be ruined by her absence from work, either because she was legally unable to work pending decision of an in country application, or while she applied from abroad.

18. I indicated that having taken that view of the facts I was also of the opinion that in those particular circumstances and for the reasons advanced by Mr Stevenson the outcome represented a disproportionate outcome with the private and family life of the appellant and her husband.
19. The in country option suggested by the respondent in the letter of 26 March 2014 and in submissions is unattractive. While inability to work is simply an aspect of immigration control with which the appellant must comply if necessary, it is anomalous to expect her to remain legally liable to removal and prosecution while the respondent processes an application. The respondent in my view could only rely on the availability of that option if it was a lawfully structured safe alternative.
20. I see the force of the respondent's point that a hopeless application under the Rules should not be turned over time into a good one by Article 8. To do so undermines the clear (if complex) structure of deciding applications by the evidence presented with them. However I think that the point loses its strength when the respondent herself suggests such an unsatisfactory alternative way of proceeding, without acknowledging the difficulties attached.
21. The out of country alternative is disproportionate in terms of *Chikwamba*. There is no great difficulty about the appellant returning to China, but there is nothing adverse in her immigration history and no significant public interest in requiring her to comply with that formality.
22. The appeal, as originally brought to the First-tier Tribunal, is **allowed** under Article 8 of the ECHR.



8 July 2015  
Upper Tribunal Judge Macleman