



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: AA/06366/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 January 2016**

**Decision & Reasons Promulgated  
On 11 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**Ms LIYUN (o/w LiLi) WENG(or WEN)  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr H Kannangara (counsel) instructed by Anglo-Chinese Law Firm Ltd

For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Wilsher promulgated on 22 October 2015, which dismissed the Appellant's appeal on all grounds.

### Background

3. The Appellant was born on 3 October 1974 and is a national of China. On 27 March 2015 the Secretary of State refused the Appellant's application for asylum and for leave to remain as a partner of a British citizen.

### The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Wilsher ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 16 November 2015 Judge Frankish gave permission to appeal stating *inter alia*

"The appellant was found to be credible her core account of being a mother of two but that she was not thereby at risk; likewise that she is in a genuine relationship exceeding two years cohabitation. It was also accepted that the partner would "have difficulty earning a living" but not that this would amount to hardship. Arguably, not having considered the partner's absence of Mandarin or Cantonese, serious hardship has not been adequately considered. *Zambrano*, as incorporated in Reg 15 A(4A) of the 2006 regulations as amended has not been considered at all. These points amount to arguable errors of law. The findings in respect of asylum are not to be reopened, these not having been challenged in this application."

### **The hearing**

6. (a) Mr Kannangara, counsel for the appellant, told me that the decision is tainted by a material errors of law in relation to the Article 8 assessment. He acknowledged that the permission to appeal prohibits a challenge to the asylum aspect of this case, and told me that despite the fact that the grant permission to appeal with specific reference to the case of the Zambrano and regulation 15A(4A) of the Immigration EEA Regulations 2006 (neither of which are now pursued by the appellant), what is argued for the appellant is that in determining the appellant Article 8 rights within the rules the Judge incorrectly applied paragraph EX.1, and that the Judge's proportionality assessment of Article 8 ECHR out-with the rules is flawed because he conflated the test of "exceptionality" with the test of "insurmountable obstacles", and then imported the result into the assessment of Article 8 ECHR out-with the rules.

(b) Mr Kannangara took me to [8] of the decision and told me that the Judge correctly identified the test set out in EX.1 and EX.2, but that, on the facts as the Judge found them to be, the Judge was wrong to find that there were no insurmountable obstacles to family life between the appellant and her British citizen partner continuing outside the UK. He told me that because the Judge had found that the appellant's partner has some health difficulties, that the appellant's partner would lose his employment, & that the appellant's partner can only speak English and is no longer in the first flush of youth, the

Judge should have found that any attempts to pursue family life outside the UK would cause very serious hardship amounting to insurmountable obstacles.

(c) Mr Kannangara told me that the Judge went on to consider Article 8 outside the rules at [9] and [10] of the decision; that at [10] of the decision the Judge identified the need to take account of section 117 of the 2002 Act, but thereafter (he argued) the Judge applied too high a threshold when attempting to assess proportionality. He noted that the Judge made reference to appendix FM and EX.1, but then imported the reasoning that he applies to “*insurmountable obstacles*” at [8] of the decision instead of separately carrying out a proportionality assessment which should not contain a test of exceptionality. He urged me to set the decision aside.

7. (a) Miss Fijiwala, for the respondent, told me that the decision does not contain errors of law, material or otherwise. She told me that the first ground of appeal amounts to an irrationality challenge, and that the Judge had applied the correct test’s and had made findings of fact which were open to the Judge before reaching the conclusion that the facts and circumstances of the appellant and her partner did not fall within the definition of insurmountable obstacles for the purposes of EX.1.

(b) Ms Fijiwala told me that the Judge’s approach to Article 8 proportionality could not be faulted. She relied on the cases of SS (Congo) and Others [2015] EWCA Civ 387, R(on the application of Agyarko) [2015] EWCA Civ 440 and Chen [2015] UKUT 189, and told me that the Judge had properly followed the guidance contained in those cases. She told me that the Judge’s approach to s.117 of 2002 Act was entirely correct, and that he has applied the correct burden and standard of proof in assessing proportionality. She told me that the Judge weighed every relevant factor carefully before correctly finding that, on balance, the respondent’s decision is a proportionate breach of any Article 8 rights the appellant and her partner might have.

### Analysis

8. The appellant’s first challenge drives at the Judge’s findings at [8] of the decision, and argues that on the facts as the judge found them to be the Judge should have found that there are insurmountable obstacles to family life continuing China.

9. At [8] the Judge correctly identifies the test set out in EX.1, and the interpretation given in EX 2 to assist in correctly applying the test. After doing so the Judge finds “*there is nothing before me to indicate the partner would face insurmountable obstacles in going to China although he would not wish to go.*”

10. At [8] the Judge finds that the appellant’s partner can only speak English, he takes account of the appellant’s partner’s age, his health difficulties, his employment; he finds that the appellant’s partner will have difficulty earning a living in China. It is submitted (for the appellant) that those factors amount to insurmountable hardship.

11. R (on the application of Agyarko) [2015] EWCA Civ 440 considered the phrase "*insurmountable obstacles*" as used in paragraph EX.1 of the Rules. "... *The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the European Court of Human Rights regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).*"

12. At paragraph 26 of that decision "*The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here - and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so.*"

13. In reality appellant's partner finds himself in no different a position to that of Mr Benette in the case of Agyarko. The case-law indicates that the Judge's approach is beyond criticism. The Judge sensitively took account of the difficulties that would be faced by the appellant and her partner, but correctly concluded that those difficulties do not amount to insurmountable obstacles. No challenge is taken to the legal test applied by the Judge (which was correct). The challenge is to his conclusion. As his conclusion is entirely in line with the case of Agyarko, the conclusion is well within the range of reasonable conclusions available to the Judge, and is also well founded in law. There is no merit in the first ground of appeal, which in reality amounts to nothing more than an expression of dissatisfaction with a finding competently open to the Judge to make.

14. The second ground of appeal focuses entirely on the Judge's assessment of Article 8 ECHR out-with the rules. The Judge correctly takes guidance from the case of Agyarko at [9] of the decision. [10] of the decision contains the Judge's proportionality assessment.

15. The judge correctly identifies that little weight can be given to the relationship between the appellant and her partner because of the operation of section 117 of the 2002 Act. As part of the proportionality assessment the Judge finds that the appellant cannot meet the requirements of appendix FM and so, "... *must rely on Article 8 pure and simple*".

16. The Judge then finds that the appellant and her partner are in a genuine, caring relationship but that, because of the lack of compelling medical evidence and in the light of the lack of financial evidence, the decision is not a disproportionate breach of Article 8 ECHR. There is nothing wrong with the Judge's proportionality assessment. The Judge has not imported the test of exceptionality. An holistic reading of the decision indicates that the Judge considers whether there were compelling circumstances to consider Article 8 out-with the rules, and even in the absence of those compelling circumstances correctly weighed the facts as he found them to be, applying the weight that statute permits to each of those factors before concluding that the balance tipped in favour of immigration control.

17. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

18. The Judge carefully considered each strand of evidence placed before him. He carefully records the submissions that were made and then, after correctly directing himself in law, makes reasoned findings of fact before reaching conclusions which were manifestly open to the Judge to reach.

19. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

## **CONCLUSION**

**20. No errors of law have been established. The Judge's decision stands.**

## **DECISION**

**21. The appeal is dismissed. The decision of the First-tier Tribunal stands.**

Signed

Date 8 February 2016

Deputy Upper Tribunal Judge Doyle