



Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: HU/15896/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 23 April 2018

Decision and Reasons Promulgated
On: 22 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR KAI TANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation

For the Appellant: Mr B Bedford, counsel (instructed by Peterson Law Associates)
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of China, born on 19 May 1981. He appeals with permission against the decision of the First-tier Tribunal promulgated on 21 August 2017 dismissing his appeal under Article 8 of the Human Rights Convention, against the respondent's decision to refuse to grant him entry clearance to join his wife and sponsor as her Tier 1 partner.

The respondent's case

2. In refusing his entry clearance application on 30 May 2016 the respondent stated that his application for a visit visa to the UK had been refused. The entry clearance manager noted that the appellant had applied as a Tier 1 partner. Accordingly, the application should have been considered under paragraph 319 of the Immigration Rules.

3. The respondent noted that the appellant had been refused entry clearance on 11 April 2013 under paragraph 320(7A) of the Immigration Rules. He had failed to declare his previous adverse immigration history in the 2013 application. In that application he was asked whether he has ever been required to leave any country, including the UK, and he answered "No." He failed to disclose the fact that he had been served with an IS 151A on 28 November 2008 making him liable to removal from the UK. Whilst he stated in a letter that this was a mistake made due to the visa agency he had used at the time, he had also signed his visa application form in April 2013 confirming that the information given is correct to the best of his knowledge and belief.
4. The respondent was thus not satisfied that he had adequately addressed the reasons for refusal under paragraph 320(7A) of the Rules. The respondent was accordingly satisfied that he used deception in his previous visa application and his application was refused under paragraph 320(7B) of the Rules.
5. With regard to Article 8, he did not demonstrate how a refusal of entry clearance would impact his rights to a private and family life.

The First-tier Tribunal hearing on 1 August 2017

6. The First-tier Tribunal had regard to the appellant's wife's evidence. They married in Beijing on 15 May 2014 having met in 2011. She came to the UK in 2010 to take up a Masters degree which she completed in July 2011. She then met the appellant after she travelled home to China at Christmas and for her birthday in 2011. They are in a close and loving relationship.
7. She was given a post study work visa for two years from February 2012 and was granted a Tier 1 Entrepreneur visa from 21 February 2014 until February 2017 which was then extended until February 2018. She has a business plan to set up a Chinese marketing and PR company in Birmingham. She produced evidence of her businesses which showed considerable initial success. She would wish to have a child shortly with the appellant and if he were not able to join her she would face a difficult choice between her career plans and her marriage [3].
8. The First-tier Judge also had regard to evidence from the appellant in the witness statement containing many of the same matters as his wife and sponsor. He agreed that he had made an error in his application which he deeply regretted. He accepted that he had been served with removal directions after overstaying his student visa. He stated that he would always have a job in China in his father's business and both he and his wife confirmed that they were from respectable and financially stable families.
9. Dr Poon also gave evidence. He confirmed that he knew the appellant's wife as a colleague since 2015 and confirmed her involvement in the core planning group for the Birmingham China Business Forum as well as her involvement in the Chinese community centre. Her contribution was described as invaluable in progressing and ensuring sustainability and success of the project [5].
10. The Judge found that there is no doubt that the appellant's wife and sponsor has made a great success of her involvement in the UK with a student visa and then under the

Entrepreneur visas which she has obtained. She is still lawfully in the UK under the scheme. He did not doubt that she and the appellant are in a genuine and subsisting marriage [8].

11. However, in considering the balancing exercise in accordance with Razgar [2004] UKHL 27 it was necessary to take into account the respondent's legitimate interest in immigration control as well as s.117(6) of the Nationality, Immigration and Asylum Act 2002¹.
12. The Judge noted that the appellant and his wife married in circumstances where he was in China and that she, as a Chinese national, was in the UK in respect of her business. Although she may in due course acquire immigration status in the UK, she remains a Chinese national and the relationship and marriage took place in circumstances where the appellant was aware that their family life would be disrupted by his continuing in China pending the application and her return to the UK [9].
13. He noted that the appellant made a mistake in relation to his application by failing to disclose that he had been required to leave the UK. The Judge stated that whilst he does not suggest that he deliberately chose to deceive the UK authorities, it was clearly his error that brought about the refusal under paragraph 320(7A) of the Immigration Rules [9].
14. The Judge noted that although if the appeal were dismissed there may be interference with the appellant's right to family life under Article 8(2) of the Convention, that interference is apparent in any event, by reason of the appellant's wife returning to the UK as she is entitled to do in accordance with her visa. The difficulties that have arisen were as a result of the appellant not disclosing the true position in relation to his previous immigration history. The appellant's wife accepted that she can travel to be with him in China if she wishes to have a child with him. While that may affect and disrupt her business plans, he did not regard that as an insurmountable obstacle to his wife returning to China to continue her family life with him [10].
15. The Judge found in all the circumstances, '...having carried out the balancing exercise in accordance with Razgar and taking into account the respondent's legitimate interest in immigration control and the circumstances by which the appellant and his wife chose to marry in China for him to remain there and for her to return to the UK to continue their married lives with substantial periods of time apart and the appellant's own mistake in completing his application for entry clearance as a Tier 1 partner', he did not find that there would be a disproportionate interference with the right to family life under Article 8(2) particularly noting that his spouse intends at the present to return to China at the conclusion of her legitimate stay in the UK in accordance with the terms of her lawful presence in the UK under the present extended visa. Should her position change it may well have relevance to the appellant in relation to any future application [11].
16. The Judge stated that by reason of his decision, it is unnecessary to consider the implications of the respondent's failure to consider the application under paragraph 319 of the Immigration Rules as the refusal was only made under s.320(7A),

'...although I wish to indicate that on the evidence placed before me, I did not consider the appellant intended to deceive the immigration officials, albeit that he made a substantial mistake by not disclosing the

¹ It appears that the Judge intended to refer to s.117B of the 2002 Act. However s.117B(6) did not appear to be relevant to the outcome of the appeal. The Judge might have intended to refer to s.117B(5).

2008 Notice of Liability to Deportation and I consider it unfortunate that there was no decision made under paragraph 319 of the Immigration Rules (as noted by the Entry Clearance Manager on review) as no decision was ever made in relation to the requirements under that particular paragraph of the Immigration Rules, although on the evidence placed before me it would appear that the other rules (sic) under paragraph 319 of the Immigration Rules may well have been satisfied were it not for the refusal under paragraph 320(7A) of the Immigration Rules’.

17. He accordingly dismissed the appeal under Article 8.

Permission to appeal decision dated 13 February 2018

18. On 13 February 2018 First-tier Tribunal Judge Osborne granted the appellant permission to appeal. He noted that the grounds asserted that the Judge erred at [10] in deciding the public interest by the absence of any insurmountable obstacles to their continuing life in China whereas the Judge should have considered whether there were exceptional circumstances which permitted the appellant’s entry outside the Rules. He also stated that the Judge erred in failing to direct himself in accordance with the case of **Chikwamba**. He further erred at [11] in recording that his wife’s evidence was that she intended to return to China at the expiry of a Tier 1 visa in 2019 whereas she said that she would return if she did not “win settlement in 2019.”
19. Judge Osborne also stated that the Judge erred in failing to adopt a balance sheet approach to the public interest questions so that it is impossible to know whether he took all relevant matters into account. His wife’s entrepreneurship is of the calibre that the Immigration Rules are intended to reward with a right to settle in the UK. There may be little or no public interest in maintaining the current entry clearance refusals.
20. Judge Osborne went on to state that in an otherwise careful decision and reasons, it was arguable that the Judge erred at [11] where he’ mis-recorded’ the sponsor’s intention to return to China at the conclusion of her legitimate stay in the UK. She intends to apply to remain in the UK. Additionally, having concluded that the appellant made a genuine mistake in not disclosing the 2008 notice of liability to deportation and having found that the appellant did not intend to deceive the immigration officials, it is at least arguable that the Judge failed to conduct an appropriate balancing exercise or failed to reach an appropriate conclusion.

Submissions

21. Mr Bedford, who represented the appellant before the First-tier Tribunal, adopted his grounds of appeal. In particular, he submitted that the Judge erred in finding that the appellant’s evidence was that she intended to return to China at the expiry of her Tier 1 visa in 2019. In fact she had stated that she would return to China if she did not win settlement in 2019. The intention is and has always been to remain in the UK and to apply for settlement in 2019 as expressed in her witness statement dated 23 July 2017.
22. Mr Bedford referred to paragraph 13 of her statement dated 23 July 2017, where she stated that if the appellant cannot join her, she faces a very difficult choice as to whether to divorce her husband and find a new partner to have children with, or continue her life and business in the UK or to give it up, as well as her community work over the last seven years, to return to China.

23. At paragraph 15 she stated that unless her business fails she sees no reason why she will be refused settlement in 2019. She stated that if her business did fail, she would wish to return to China with her child by then, for joint care with her husband.
24. Mr Bedford noted that these matters were also contained in his skeleton argument at [10], [11], [18] and [19].
25. Mr Bedford submitted that the balance sheet favoured the appellant: the risk that he will overstay in the event that his wife is refused settlement in February 2019 is nil. There is no reason to believe that he would flout immigration control if his wife were to be refused settlement in 2019, by which time she expects to be a mother. She would return to China with her child in those circumstances. If he chose to remain here illegally he would abandon his wife and child. He speaks English and is financially independent. He is not a qualifying partner. However, entry clearance is sought under the Rules. He also submitted that in 2019 the parties would clearly meet the minimum income requirement.
26. It was accordingly submitted that the effect of denying the appellant entry clearance to join his wife, when in 2019 he will most likely qualify for settlement, would be to delay or frustrate the parties' desire to have children, which is a disproportionate interference with her right to family life.
27. Mr Bedford also submitted that even if there are no insurmountable obstacles to continuing family life in China, the respondent should have considered whether there were exceptional circumstances warranting entry clearance outside the Rules. He referred to Agyarko v SSHD [2017] UKSC 11 at [48].
28. He also submitted that the Judge should have directed himself in accordance with the Chikwamba principles, by which exceptionally, the fact that family life is established in the full knowledge that a person may not have a right to reside in the UK does not always require the maintenance of immigration control or strict adherence to Immigration Rules – Agyarko v SSHD, supra.
29. He emphasised the Judge's finding that the appellant had made a careless mistake and that there was no deception. Exceptionally in these circumstances there may be little or no public interest in maintaining the current refusal of entry clearance.
30. On behalf of the respondent, Mr Melvin relied on the respondent's response to the grounds of appeal under Rule 24. Reliance on the grounds of Agyarko and Chikwamba was misplaced as they both concerned individuals who are already in the UK and had established a family and private life here.
31. The Judge also recognised at [9] that although the appellant's wife may in due course acquire immigration status in the UK she remained a Chinese national and their relationship and marriage took place in circumstances where she was aware that their family life would be disrupted by his continuing to be in China pending any applications.
32. Mr Melvin submitted that no Tribunal Judge looking at the facts and findings would say that the decision is perverse. The appellant can make another application. They can continue their family life in China. There are no exceptional circumstances.

33. In reply, Mr Bedford submitted that the approach referred to in Agyarko and Chikwamba is still relevant even though the decisions concerned individuals who are already in the UK and had established family life here.
34. He also referred to paragraph 7 of his skeleton before the First-tier Tribunal. The appellant's immigration history exposed him to the charge that he may not comply with immigration control in the future. Paragraph 320(7B) of the Rules imposes a blanket ten year ban on re-entry subject to human rights, whether the mistaken declaration was innocent, careless, deliberate or not².

Assessment

35. The Judge did not consider that the appellant intended to deceive the immigration officials, albeit that he made a substantial mistake in not disclosing the 2008 notice of liability to deportation served on him.
36. He also noted that it was "unfortunate" that there had been no decision made under paragraph 319C of the Immigration Rules and that the application was treated as a visit visa. He went on to find that on the evidence placed before him it would appear that the other requirements under the Rule may well have been satisfied, absent the refusal under paragraph 320(7A) of the Rules.
37. To qualify under that Rule for entry clearance as a partner of a relevant points based system migrant, he must be the spouse of a person who has valid leave to enter or remain as a points based system migrant. The marriage must be subsisting at the time the application is made. (In this case this has at all times been accepted). Further, the parties must intend to live with each other as their spouse throughout the applicant's stay in the UK. They must not intend to stay in the UK beyond any period of leave granted to the further relevant points based system migrant. There must also be a sufficient level of funds available.
38. There is no challenge to the finding that there may not be insurmountable obstacles for continuing their family life in China.
39. However, the Judge ought to have considered whether there were any exceptional circumstances permitting his entry outside the Rules.
40. It is also not clear whether the Judge took into account all relevant matters in adopting "the balance sheet approach" to the public interest question. This would include the sponsor's contention that she had had a great success in the UK and would be likely to obtain settlement in the UK in 2019, the fifth anniversary of her Tier 1 Entrepreneur visa. As already noted, there was also favourable evidence on behalf of the sponsor from Dr Poon. There was evidence relating to her business plans. The Judge noted that she had made a great success of her involvement in the UK under her visa followed by the subsequent entrepreneur visas she obtained.
41. The Judge found that there was no dishonesty on the appellant's part and but for the reliance on paragraph 320(7A) the other requirements relating to paragraph 319C may well have been satisfied.

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However, the appellant would need to have a dishonest state of mind before that Rule is invoked.

42. The Judge however did not consider the likelihood of whether the appellant would return to China with his wife should she ultimately be refused settlement in 2019.
43. It was not disputed that the sponsor's own immigration history was anything other than exemplary. There was no suggestion that should she be refused settlement in 2019 she would not return to China. Nor was there any evidence to suggest that the appellant would remain illegally in the UK, in effect abandoning his wife and the child they hope to have together.
44. As noted by Mr Bedford, the Rules do envisage that successful entrepreneurs will wish to be joined by their spouses. The appellant's wife is blameless. The Judge also found that the sponsor intends at present to return to China at the expiry of her Tier 1 visa in 2019. However, she stated in her witness statement that the intention is to remain in the UK and apply for settlement in 2019. She did state that she would return to China if she did not obtain settlement in 2019.
45. I accordingly find that the Judge did not carry out a full and proper balancing exercise in order to reach an appropriate conclusion. In the circumstances the decision of the First-tier Tribunal involved the making of an error on a point of law. I accordingly set the decision aside.
46. In remaking the decision I have regard to the evidence that I have already set out in some detail.
47. It has not been disputed by the respondent that the Judge in any way erred in finding that the appellant did not intend to deceive the immigration officials, albeit that he made a substantial mistake in not disclosing the 2008 notice.
48. Further, the respondent did not make a decision under paragraph 319C of the Rules as set out by the Entry Clearance Manager on review.
49. I have set out the requirements to be met under the paragraph 319C of the Rules. Having considered the evidence, I find that the relevant requirements have been satisfied, as already noted by the Judge at [12].
50. The Entry Clearance Manager has considered the implications for "the HRA of this decision," stating that no reason had been advanced as to why family life may not continue to be enjoyed with the sponsor visiting the appellant where he currently lives: The decision merely maintained the status quo.
51. In considering Article 8 of the Human Rights Convention, I adopt the five stage approach advocated in Razgar [2004] UKHL 27. Although that is a removal case the guidelines nevertheless are appropriate when considering entry clearance. I accept that the decision in Beoku-Betts [2008] UKHL 39 means that if Article 8 is engaged, I must consider the family life of the sponsor as well as the appellant.
52. I find that Article 8 is engaged on the basis of family life that has been established between the appellant and his sponsor. The respondent's decision is in accordance with the law.
53. With regard to the fourth question, this involves considering the public interest in maintaining effective immigration control, which in turn involves a consideration of whether

or not the appellant can satisfy the requirements of the relevant Immigration Rules. It is for the appellant to prove that they can be satisfied on the balance of probabilities.

54. I find that the relevant requirements under paragraph 319C of the Rules have been satisfied.
55. I consider the fifth Razgar question which concerns proportionality. This involves a balancing exercise. In considering the proportionality of the decision and whether the interference in the appellant's right to respect for family life is justified under Article 8(2), I have regard to the considerations set out in s.117B of the 2002 Act.
56. The maintenance of effective immigration controls is in the public interest. The appellant can speak English. I also find that in seeking to enter the UK, the appellant is financially independent. I also note that he can obtain no positive right to a grant of leave to enter whatever the degree of his fluency in English or the strength of financial resources. This amounts to a neutral factor - AM (Malawi) [2015] UKUT 0260 (IAC).
57. Having considered the evidence as a whole, I find that it is unlikely that if the appellant were granted entry clearance, he would not return to China with his wife in the unlikely event that she is refused settlement in 2019. Nor is there any reason to believe that she would stay in the UK if her application for settlement is refused in 2019. The appellant's wife would wish to be joined by their spouse.
58. Having regard to the evidence as a whole, I find that the respondent's decision constitutes a disproportionate interference with their Article 8 rights. There will accordingly be a breach of Article 8 if this appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Having set it aside, I re-make the decision and allow the appellant's appeal.

Anonymity direction not made.

Signed

Date 14 May 2018

Deputy Upper Tribunal Judge Mailer