



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00168/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House
On 22 March 2021

Decision & Reasons Promulgated
On 30 March 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YING YANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr Whitwell, Senior Home Office Presenting Officer

For the Respondent: Mr Kannangara, Counsel instructed by Lisa's Law Solicitors

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, I will refer to the parties as they were designated in the First-tier Tribunal.

2. The appellant is a citizen of China, born in 1970, who has been in the UK since 2006.
3. The respondent is appealing against a decision of Judge of the First-tier Tribunal White ("the judge") promulgated on 9 January 2020 allowing the appellant's human rights appeal.

Decision of the First-tier Tribunal

4. The judge found that the appellant's removal from the UK would breach article 8 ECHR because there were insurmountable obstacles to the continuation of her family life with her partner in China and therefore she satisfied the conditions of paragraph EX.1 of Appendix FM of the Immigration Rules.
5. The sole reason the judge found there to be insurmountable obstacles was that the appellant has been unable to obtain a Chinese passport or travel document and therefore is unable to return to China.
6. The judge noted that the appellant had on four occasions attended interviews with the respondent to facilitate obtaining an emergency travel document from the Chinese embassy but on each occasion the embassy had rejected the application because they were unable to verify her identity. The judge summarised the respondent's argument as being that the appellant could provide the necessary information/evidence to obtain a travel document but deliberately failed to do so to thwart the process. The judge rejected this contention. At paragraph 20 the judge stated that there was no suggestion that the answers provided by the appellant to the respondent at the four interviews were "ambiguous, clearly incomplete or inconsistent" and at paragraph 21 the judge stated:

"On the face of it the appellant has repeatedly engaged, at the respondent's request, in the redocumentation process. No specific criticism has been made of what she said or did, no error or difficulty has been identified, and no explanation has been obtained from the Chinese authorities about where there are difficulty lies. It is wholly unclear what more she could do...."

7. The judge stated that the appellant's evidence was that she had tried on two occasions to obtain a passport herself from the embassy but was refused. The judge noted that she did not obtain anything in writing from the embassy.
8. The judge rejected the respondent's argument that because the appellant had sold a property in China and transferred the proceeds of sale to the UK, she must (or is likely to) have documents capable of satisfying the Chinese authorities that she is a Chinese citizen. The judge found that there was no evidence before him about the practical requirements for selling a property in China or transferring money abroad and it could not be inferred from the appellant having done this that she has documents which would satisfy the authorities that she is Chinese.
9. The judge concluded at paragraph 22:

“If the appellant cannot obtain a travel document or passport she cannot return to China. Mr Eaton submitted that she had not tried to return, but it is not clear how she is supposed to do that without the documents necessary to pass through immigration control here, let alone on arrival in China. It seems to me on balance that the appellant has shown that she is unable to obtain the necessary documents. If so, I am satisfied that there are insurmountable obstacles to the continuation of family life outside the United Kingdom, because she cannot go to live in China...”

Grounds of Appeal

10. The grounds of appeal make the following submissions:

- a. The judge erred because the appeal should have been considered under Gen 3.2 of Appendix FM rather than section EX.1.
- b. The judge erred because “the mechanics of removal are not for the Tribunal to be concerned with”.

11. Permission was granted on both of these grounds.

Respondent’s submissions dated 18 August 2020 (“the written submissions”)

12. The written submissions state that the respondent is not pursuing the arguments in the grounds of appeal but is contending that the judge erred in his assessment of the appellant’s assertion that she is unable to obtain travel documents via *bone fide* evidence.
13. It is argued that the judge failed to consider the reliability of the appellant’s claim to have visited the Chinese embassy on two occasions when the appellant did not provide any corroboratory evidence of her visit and the onus was on her to prove that she had given *bona fide* evidence to the Chinese authorities and to the respondent during the various attempts to obtain removal documentation.
14. It is also argued that the judge failed to appreciate that the onus was on the appellant to establish that she did not have to prove her identity to transfer the property (and proceeds of sale) in China.
15. A further argument made in the written submissions is that the judge erroneously placed the burden on the respondent to show that the appellant had failed to provide clear and complete information at the four interviews when it was not for the respondent to prove anything.

Respondent's submissions at the hearing

16. Mr Whitwell relied on the written submissions. He also argued that the judge's conclusion that the appellant could not return to China was not open to him based on the evidence because (a) the applications for a travel document had not been made on the appellant's own volition; (b) she had been found to give false information previously; (c) the judge found that her evidence should be treated with circumspection; and (d) the information given to the Chinese embassy was not before the First-tier Tribunal.

Appellant's submissions at the hearing

17. Mr Kannangara argued that the arguments advanced by the respondent in the written submissions and by Mr Whitwell orally were not within the grounds of appeal and that it was too late for the grounds to be amended.
18. With regard to the substance of the respondent's arguments, Mr Kannangara submitted that the judge's findings were open to him based on the evidence, which included documentation showing how the appellant responded to questions posed by the respondent in order to obtain an emergency travel document.

Analysis

19. The arguments advanced in the written submissions and by Mr Whitwell at the hearing are not in the grounds of appeal. Mr Whitwell argued that the arguments stem from the ground contending that the mechanics of removal are not a concern for the Tribunal. I disagree. The argument in the grounds – which, in sum, is that it is irrelevant to the question of whether there are insurmountable obstacles under paragraph EX.1 of Appendix FM that as a practical matter the appellant is unable to obtain a travel document – is entirely different to the argument advanced in the written submissions and at the hearing, which in sum is that the evidence did not support the conclusion that the appellant is unable to obtain travel documents.
20. In my view, it would not be fair to the appellant for the respondent to be able to advance arguments that were not in the grounds of appeal. I keep in mind what was said by Lord Justice Singh in *Talpada v The Secretary of State for the Home Department* [2018] EWCA Civ 841 at [69] about taking a robust approach in these circumstances:

"Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

21. The respondent therefore cannot succeed because (a) she is not pursuing any of the arguments in the grounds of appeal; and (b) I am not prepared to decide the appeal on the basis of arguments that are not in the grounds of appeal.
22. In any event, I do not accept that the judge fell into error as contended in the written submissions and in oral submissions.
23. Firstly, it is clear that the judge recognised that the burden was on the appellant to establish that she could not obtain travel documents to return to China, as at paragraph 16 the judge stated: "I bear in mind also that the burden of proving that she cannot be admitted to China is on her".
24. Secondly, it is plain that the judge took into consideration the negative credibility findings about the appellant. At paragraph 14 the judge stated: "I also bear in mind that her asylum appeal was dismissed on the express basis that her claim was a fabrication".
25. Thirdly, it is misconceived to argue that the judge erred by not requiring corroboration of the appellant's visits to the Chinese embassy when the central reason the judge accepted the appellant's claim to not be able to obtain an emergency travel document was that the respondent had not been able to obtain one on her behalf despite four attempts and the appellant providing information to the respondent that was not ambiguous, incomplete or inconsistent. It is not a valid criticism of the decision to assert that the judge did not know what information was provided to the Chinese embassy (via the respondent) and therefore the judge was not in a position to comment on its consistency and completeness when it is apparent from paragraphs 7 and 20 of the decision that the judge was provided with, and considered, documentation from the respondent's interviews.
26. Fourthly, given the evidence showing that four attempts have been made by the respondent to obtain an emergency travel document from the Chinese embassy and the absence of any evidence indicating what error or difficulty had been identified with the information provided by the appellant, it was open to the judge to conclude that the appellant is unable to obtain an emergency travel document. Many judges might not have reached this conclusion, but it was not irrational to do so.

Notice of decision

27. The grounds of appeal do not identify an error of law and the decision of the First-tier Tribunal stands.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 22 March 2021