



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

Appeal no: **IA/17019/2014**

THE IMMIGRATION ACTS

At **Field House**
on **20.04.2015**

Decision signed: **06.05.2015**
sent out: **13.05.2015**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Ji Weiguo

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Ronan Toal* (counsel instructed by Clarke Willmott, Bristol)

For the respondent: Mr Sebastian Kandola

DETERMINATION AND REASONS

1. This is an appeal, by the respondent to the original appeal against the decision of the First-tier Tribunal (Judge Pathma Lingam), sitting at Taylor House on 11 November 2014, to allow on Article 8 and other grounds a husband's appeal by a citizen of China, born 1 November 1963. The appellant's wife is a British citizen, though she gave her evidence in Mandarin, and has a son of 22.

- 2.** The appellant was refused leave to remain as a husband
under the ‘transitional Rules’
- a.** paragraph 284 because he had produced an English-language certificate from the Academy of Oriental Cuisine, which was not on the list of approved providers;
- under the ‘ten-year route’ because
- b.** (EX.1 (a)) he had no children of his own in this country; and
- c.** (EX.1 (b)) there were no insurmountable obstacles to him and his wife carrying on their family life elsewhere.
- 3.** The appellant did not challenge the paragraph 284 decision: although he later produced another English-language test certificate, that was not as required by the Rules either. His counsel before the judge (not Mr Toal) conceded that he could only succeed under Article 8, and accepted that the EX.1 (a) decision was inevitable; but the judge allowed his appeal under the Rules on EX.1 (b), and in the alternative under Article 8. She referred to paragraph 116 of the Home Office policy guidance at the time (‘Statement of Intent: Family Migration’ June 2012), which provides that someone who:
- “... fails only the knowledge of language and life in the UK requirement at the indefinite leave to remain stage, ... will be granted leave of 30 months to give them more time to meet the requirement ...”
- 4.** The appellant’s solicitors in their covering letter to his application of 12 December 2013 made it quite clear that his current inability to satisfy the English-language requirement made it impossible for him to get the indefinite leave to remain to which he would otherwise have been entitled. So they asked for him to have leave to remain “... for a further period during which time he hopes to sit and complete the test”. While it might have been more helpful to the decision-maker if they had expressly referred to paragraph 116 of the policy, they were certainly asking for something it entitled the appellant to have, since the lack of a valid test certificate formed the only basis for refusal under paragraph 284.
- 5.** Permission was given mainly on the basis that the judge had taken a wrong approach to s. 117B (6) of the Immigration Act 2014:
- In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where—
- (a) the person has a genuine and subsisting parental relationship with a qualifying child,

- (b) and it would not be reasonable to expect the child to leave the United Kingdom.

By s. 117D (1),

“qualifying child” means a person who is under the age of 18 and who

—

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

- 6.** Mr Kandola’s argument on this point was effectively on the basis that *expressio unius, exclusio alterius*: the sponsor’s son was clearly too old to be a ‘qualifying child’, and there was no provision equivalent to s. 117B (6) for a ‘qualifying partner’. In fact s.117B is neutral about ‘qualifying partners’ in the case of an applicant with existing leave, and only provides at (4) that

Little weight should be given to—

...

- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

- 7.** In my view the reason for s. 117B (6) appearing in the form it does is that it is designed to allow someone here without leave to benefit from a relationship with a ‘qualifying child’, where little weight may be given to one with a partner. Clearly the reason is that the child cannot be held responsible for the relationship having grown up while the applicant is here without leave. So there was no error of law on the part of the judge on the basis of s. 117B, as referred to in the grant of permission.

- 8.** The judge’s use of EX.1 (b) is another matter: this applies where

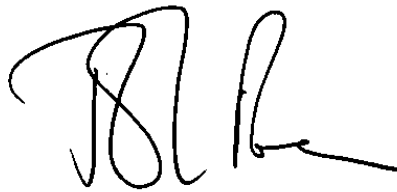
... the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen ... and there are insurmountable obstacles to family life with that partner continuing outside the UK.

The judge considered that provision in the light of what had by then appeared as EX.2, not dealt with in the Home Office grounds or by Mr Kandola. She set out the relevant parts at paragraph 42: ‘insurmountable obstacles’ are defined as including “... very significant difficulties ... which could not be overcome or would entail very serious hardship for the applicant or their partner”.

9. However, even on that basis I consider, in view of the age of the sponsor's son, her clear continuing links with China (see the judge's paragraph 11) and her preference for giving her evidence in Mandarin, that Mr Kandola was entitled to describe the result reached by the judge on 'insurmountable obstacles' as perverse. That means of course, in the legal sense, not one she could reasonably have reached on the evidence before her.
10. On the other hand, I have no doubt that, in dealing with the refusal in hand, the judge did not need to resort to Article 8 at all. The appellant had asked for something to which he was clearly entitled under the policy in force, and at the date of the decision under appeal should have been given what I am about to direct. He should take care to pass an approved English-language test before he next applies, as the policy may change from time to time.

Home Office appeal allowed: first-tier decision set aside

Decision re-made: appeal allowed; direction for appellant to be given 30 months' leave to remain from 27 March 2014

A handwritten signature in black ink, consisting of stylized, overlapping letters that appear to be 'JLR'.

(a judge of the Upper Tribunal)