



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

Appeal Number: IA/39761/2013

THE IMMIGRATION ACTS

**Heard at Columbus House, Newport
On 25th March 2015**

**Determination Promulgated
On 10th April 2015**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BOCHEN LAN
(NO ANONYMITY DIRECTION)**

Respondent

Representation:

For the Appellant: Mr Irwin Richards, Home Office Presenting Officer

For the Respondent: Mr Christopher Lane, Counsel

DETERMINATION AND REASONS

1. In this decision I will refer to the parties in the style in which they appeared before the First-Tier Tribunal.
2. The appellant is a male citizen of China, born 29 July 1980. He entered the United Kingdom in October 2002 with a visa as a student. He subsequently made a number of successful applications for extensions before finally being granted further leave to remain as a post study worker and then again as a student until 26 January 2013. It appears

common ground that the appellant has been lawfully in the United Kingdom between October 2002 and January 2013. On 14 January 2013, he made an in time application for indefinite leave to remain based on long period of residence.

3. On 24 July 2013, the respondent refused the application by reference to paragraph 276B(iii) of the Immigration Rules. This decision was based upon the appellant having an unspent conviction for driving without due care and attention.
4. The appellant appealed against that decision and his appeal came before Judge of the First-Tier Tribunal Eldridge sitting at Hatton Cross on 21 October 2014. Both parties were represented.
5. In a determination dated 24 October 2014, Judge Eldridge stated at paragraph 30 "I allow this appeal on all grounds raised by the appellant".
6. The Secretary of State sought leave to appeal. The first ground alleges an error in the way the judge dealt with the appeal under the Immigration Rules and reference is made in the grounds to paragraph 322(1C)(iv) because the appellant had "within 24 months preceding the date of the application (sic) been convicted.....of a non-custodial sentence.....recorded on their criminal record.....". As such the application fell for mandatory refusal.
7. Ground 2 challenged the decision of the judge with regard to the appellant's human rights and in particular Article 8 ECHR, in that the judge's conclusions were based on "incorrect conclusions".
8. The matter then went before another judge of the First-Tribunal, who in granting leave found, simply, that the "grounds of appeal raise an arguable error of law".
9. Thus the matter came before me in the Upper Tribunal.
10. Just before the commencement of the hearing, I was handed a skeleton argument prepared by Mr Lane. I explained to him at the start of the hearing that I had not had an opportunity to read that document.
11. In his submission Mr Richards relied upon the grounds seeking leave. Judge Eldridge had found that paragraph 322 did not apply, when in fact it did apply. The judge's assessment of Article 8 was infected by this error as can be seen from paragraph 25 of the determination. The judge's error on the question of paragraph 322 of the rules had a knock on effect throughout the decision.
12. Mr Lane led me through his skeleton argument. The Secretary of State's refusal letter was incorrect in its reference to the Immigration Rules that applied and that it was now "slightly hypocritical" to criticise the judge

for missing a provision when the respondent had herself applied a rescinded provision in the decision.

13. Mr Lane indicated that if the respondent had raised at the initial hearing the provision that is now relied upon, it is most likely that Judge Eldridge would have found the decision “not in accordance with the law” and remitted it back for a fresh decision. In essence, the respondent is now seeking to benefit from her own failure and the principles of fairness (**Thakur**) should be applied.
14. As to Article 8, Mr Lane submitted that there was no exceptionality test. It was necessary to consider anything that was not set out in the rules. There would be a low public interest in this particular case, especially bearing in mind that 24 months has now passed.
15. Mr Lane also pointed out that the removal directions mentioned Japan, whereas the appellant is a citizen of China.
16. At the end of the hearing I reserved my determination as I wished to have the opportunity to consider Mr Lane’s skeleton argument in detail.
17. Regrettably the history of this case is littered with errors. The first errors are contained in the respondent’s refusal letter. That purported to base the decision upon paragraph 276B(iii) in that the appellant had an unspent conviction. It is not necessary for me to comment on that conviction, but I do note that it was for driving without due care and attention. The other error was in the decision to remove the appellant to Japan, when clearly the appellant is a Chinese national with no connections with Japan. The respondent’s error with regard to refusing the application under the rules was that as from December 2012 paragraph 276B(iii) had been altered so that it was then necessary to consider if the application fell for refusal under (in this case) paragraph 322 and in particular 322(1C)(iv).
18. The wording of sub-paragraph (iv) as at the time of the application and decision states the following:

“They have, within 24 months, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal that it recorded on their criminal record”.
19. As from the 1 December 2013 and therefore after the application and decision the words “prior to the date on which the application is decided” were added after the words “within the 24 months”. Accordingly I do not consider that those additional words were relevant when Judge Eldridge was considering the decision under appeal.
20. The determination of Judge Eldridge does show that consideration was given as to the dates and the correct rule to be taken into account.

However I fear Judge Eldridge misdirected himself (paragraph 16 in particular) as to which rule, if any, prevented the success of the appellant.

21. I therefore consider that Judge Eldridge did make an error of law in the way that he directed himself with regard to the rules. I accept the submission of Mr Richards that this error then went on to seriously infect the way that the judge dealt with Article 8. Paragraph 25 of the determination clearly shows that judge used his view that the decision was “not lawful” in reaching a conclusion under Article 8. The next error that I must record is in the grounds seeking leave. Paragraph 6 adds the words “preceding the date of the application”. That is both an inaccurate quote and refers to addition to the rules that did not apply at the time. However having pointed that error out it has limited effect on the outcome of this appeal before me.
22. I now have to consider whether the errors of Judge Eldridge are material. I conclude that they are. The judge misdirected himself on a material issue and as a result allowed the appeal both under the rules and Article 8. The second aspect having been seriously infected by the decision under the first.
23. As a result I set aside the decision of Judge Eldridge and then proceed to remake that decision.
24. By reason of the errors contained in the respondent’s refusal letter and in the decision to remove, I consider that the respondent’s decision was not in accordance with the law and the matter thus remains outstanding with the respondent to produce a lawful decision. The appeal is allowed to that limited extent.

Signed

Date

Upper Tribunal Judge Poole