Upper Tribunal
(Immigration and Asylum Chamber Appeal Number: IA/41644/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 21st October 2015

Decision & Reasons Promulgated
On the 3rd November 2015

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MISS LANYING XUE
(Anonymity direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Tan (Solicitor)
For the Respondent: Mr Wilding (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Griffith in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant Indefinite Leave to Remain outside of the Immigration Rules after she had completed a period of 6 years Discretionary Leave to Remain.

Background

2. The Appellant is a citizen of China. She was born on the 8th August 1965. The Appellant first came to the United Kingdom in 1997 with her former husband. Her husband had claimed asylum and the Appellant was a dependent upon that claim. That asylum claim was refused in 2000 and an appeal therefrom was dismissed on the 30th May 2001. On the 4th May 2004, the Appellant applied for Leave to Remain as the spouse of a settled person, but a decision on that application was not in fact made until the 12th March 2008, when it was refused, but the Appellant was granted a period of Discretionary Leave for 3 years from the 12th March 2008 until the 12th March 2011 and thereafter was granted a further period of 3 years Discretionary Leave from the 1st April 2011 to the 1st April 2014. In an Application dated the 25th March 2014 the Appellant applied for Indefinite Leave to Remain, having previously been granted 6 years Discretionary Leave to Remain in the United Kingdom. The Respondent was informed on the 6th August 2014 that the Appellant's marriage was no longer subsisting and in a decision dated the 29th September 2014, the Respondent refused to grant the Appellant Indefinite Leave to Remain in the United Kingdom outside of the Immigration Rules. The Appellant sought to appeal that decision, and that appeal came before First-tier Tribunal Judge Griffith sitting at Taylor House on the 15th May 2015, and he dismissed the Appellant's appeal in a decision promulgated on the 9th June 2015.

3. The full reasons for First-tier Tribunal Judge Griffith dismissing the appeal are a matter of record and are set out within his decision and are therefore not repeated in full here, but in summary, the First-tier Tribunal Judge found that as the Appellant was granted Discretionary Leave initially before the 9th July 2012, the Transitional Arrangements under Section 10 of the Home Office's policy on Discretionary Leave applied. He found at [26] that "However, a reading of the Transitional Arrangements in their entirety leads me to conclude that the grant of any period of further Leave, including settlement after completion of 6 years discretionary for those granted DL before the 9th July 2012, depends upon the circumstances of the applicant remaining the same. If they do not, then the applicant cannot qualify for a further grant of DL".

4. The First-tier Tribunal Judge went on at [28] to find that the Appellant's first grant of DL was on the basis of her marriage and then at [29] the First-tier Tribunal Judge found that, "There has since 2011 been a material change to the Appellant circumstances. The Appellant's relationship with her husband came to an end in 2012 and they are now divorced. In light of the material change of circumstances, and on the basis of my understanding of the condition she had to meet in order to qualify for settlement I am satisfied that the Respondent has complied with her published policy on Discretionary Leave".

5. As a result the First-tier Tribunal Judge did not accept the Appellant's argument that the decision was in breach of the Respondent’s own policy, but he went on to consider whether or not the decision amounted to a

breach of the Appellant's right to a private life under paragraph 276 ADE of the Immigration Rules between [30] and [36], but concluded that the Appellant could not bring herself within paragraph 276 ADE (vi) because she had not established that she had no ties (including social, cultural or family) with China.

6. The Appellant sought to appeal that decision to the Upper Tribunal, and permission to appeal has been granted by First-tier Tribunal Judge Cox on the 21st August 2015. He found that it was arguable that in respect of the first ground of appeal, the Judge had materially erred in his interpretation and application of the relevant policy and that it also may be arguable that the Judge had made mistakes of fact leading to material errors of law when considering the Appellant's private life and the issue of "ties" under paragraph 276 ADE.

Submissions

7. Mr Tan on behalf of the Appellant relied upon his Skeleton Argument contained within the grounds for application for permission to appeal to the Upper Tribunal. I have fully considered that skeleton argument in reaching my decision. Those arguments are a matter of record and are therefore not repeated in full here, but in summary, within the Skeleton Argument it was sought to be argued on behalf of the Appellant that the paragraph at bullet point 3 of Section 10 of the Transitional Arrangements does not apply when an applicant is applying for Indefinite Leave to Remain after completing 6 years of Discretionary Leave. That bullet point reads:

> "Decision makers must consider whether the circumstances prevailing at the time of the original grant of Leave continue at the date of the decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of 3 years DL should normally be granted. Decision-makers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See section 4.4 above".

8. Within the Skeleton Argument it is argued that "In the case where an applicant, as in this case, is applying for ILR, after completing the 6 years of DL, the test of whether the "circumstances remain the same" is no longer applicable, but instead the enquiry is on whether there are "significant changes" as set out in bullet point 4 of Section 10. Bullet point 4 of Section 10 reads:

> "If there have been significant changes or the applicant fails to meet the criminality thresholds (see criminality exclusion section above), the application for further Leave should be refused".

9. It is argued within the Skeleton Argument that the First-tier Tribunal Judge erred in finding at [26] that the "circumstances remain in the same" test applied to any period of further Leave granted, irrespective to whether or not this was Discretionary Leave or Indefinite Leave to Remain. It was

argued that what constitutes significant changes for the purposes of the Transitional Arrangements should now be applied in respect of Article 8 cases to those who have already settled for 6 years under this Discretionary Leave system under the Transitional Arrangements and that the fact that the Appellant had been abandoned by her husband after 8 years of marriage is a significant change to her life, but whether it is a relevant significant change, it was argued, was a matter which was not explained within the determination and that the Appellant was prejudiced without the basis of the Judge's determination. It was argued that the Judge did not state how the Respondent had complied with her published policy when the Respondent had not made reference to the Transitional Arrangements.

10. It was further argued within the Skeleton Argument that when considering the issue of private life the Judge erred in his consideration of the facts, in that the Judge had found that although the Appellant had no family in China, she had made a number of trips to China, but in 2011, when she had made three trips to that country and stayed on one occasion for 3 months, which he took to be evidence that she still had significant social and cultural ties to China. However, it was argued within the Skeleton Argument that the Appellant in her statement said that she travelled to China, Hong Kong and Macau in the past few years, purely for leisure and to Hong Kong and Macau for gambling and that she had been in 2009 for one week in China and Hong Kong, for less than one week for each of the three occasions and in 2010 for gambling and for three weeks in Macau and Hong Kong in 2012, again for gambling and that the Judge was wrong to mistake China, Macau and Hong Kong as being one country in his determination. It was argued that the Appellant is from mainland China and that Macau and Hong Kong are under different legal administrative systems where the Appellant has no right of residence and to which she could not be returned and that the Judge was wrong in law to conclude that the Appellant’s gambling trips to Macau and Hong Kong were relevant to the consideration of her ties with China.

11. In his oral submissions, Mr Tan argued that the First-tier Tribunal Judge had not set out the circumstances prevailing as at the date of the original grant of Discretionary Leave in 2008. He went on to argue that bullet point 3 of Section 10 under the Transitional Arrangements did not apply when the Appellant was seeking Indefinite Leave to Remain and that that bullet point only applied to applications for a further period of 3 years Discretionary Leave. He argued that the second sentence qualified the first sentence. However, somewhat different to the contents of his skeleton argument, he then went on to argue that bullet point 4 equally limited bullet point 3 and was a qualification of bullet point 3 and that if someone was seeking Indefinite Leave to Remain, all that applied were the criminality checks and the application of the criminality thresholds, and not a consideration as to whether or not the circumstances remain the same or whether there had been significant changes.

12. Mr Tan then tried to argue that the First-tier Tribunal Judge's findings at

[28] in relation to the grant to the Appellant of the first period of Discretionary Leave was on the basis of her marriage, was perverse. However, he conceded that this had not been raised previously as a ground of appeal and was not argued anywhere within his Skeleton Argument. It was also apparent that permission to appeal not been granted on this basis. I therefore did not permit Mr Tan to pursue this argument, and he did not seek permission to amend his grounds of appeal in this regard.

13. Mr Tan went on to argue that the Appellant's visits to Hong Kong and Macau should not have been considered by the Judge when considering ties to China as he argued they were not part of the Chinese territory and the Appellant would have no legal right to reside there. He argued they were complete different jurisdiction, but he did agree that they were culturally similar.

14. In his submissions on behalf of the Respondent, Mr Wilding relied upon his Rule 24 response. In that it was argued that the First-tier Tribunal Judge had directed himself appropriately and that the Judge properly concluded that the end of the Appellant's marriage was a material change, which as a result then led to the decision that further Leave would be refused at [29]. It was further argued within the Rule 24 response that it was open to the Judge to conclude that person who spoke Chinese and had made several trips to the country of China had major cultural ties with the country and that it was indicative of the Appellant's ties that she chose to return to China for the purposes of gambling.

15. Mr Wilding argued that First-tier Tribunal Judge Griffith had done nothing wrong. He argued that the Appellant was seeking to read the policy other than in the normal way in which it ought to be read and the policy said what it said and that bullet point 4 was not stated to be inapplicable to settlement cases, nor was it said that the first sentence of bullet point 3 only applied to applications for further Leave. He argued that at best the policy was silent on the issue of Indefinite Leave to Remain, but that did not help the Appellant, as then it was purely at the discretion of the Secretary of State. However, he argued that the policy was in fact clear and that bullet point 3 told decision-makers when the grant of Leave would be appropriate and that bullet point 4 indicated when not to grant Leave but that each case would still be dealt with on a case-by-case basis.

16. Mr Wilding argued that at page 8 of the bundle before the First-tier Tribunal Judge was the case record sheet which he said showed that the Appellant had applied in 2004 as a spouse, but that the decision on that was delayed until 2007. He argued that there is no challenge to the finding by the First-tier Tribunal Judge that her original application was based upon her marriage, and it had not been argued within the Grounds of Appeal that the decision was perverse. He argued that within the case record the Appellant had been asked to prove a subsisting marriage on the 20th July 2007 and that the Appellant had actually applied in 2004 for Leave to Remain as a spouse, but as the Appellant had not met the criteria

under DP3/395 C ,given that enforcement papers were served before her marriage, a period of 3 years Discretionary Leave had been granted under 395C. He argued that the findings made by the Judge in respect of the discretion policy were open to him.

17. He further argued that the argument of the Appellant in respect of paragraph 276 ADE is misconceived and that on the Appellant's own evidence she was familiar with the Chinese language and had given evidence in Chinese at the original hearing. He argued that it was wrong to say that Macau and Hong Kong should be taken to be irrelevant for ties to China, and that the Appellant's own evidence was that she had been to China for 3 months in 2011.

18. In reply Mr Tan argued that the grant of Leave based on paragraph 395C was not exclusively based upon the Appellant's marriage but also on issues such as the strength of her connections to the UK and it was second guessing to consider the reasons for the grant of Discretionary Leave and that there was no evidence to show that the marriage was more important than other factors. He asked me to allow the appeal.

My Findings on Error of Law and Materiality

19. In my judgement, the First-tier Tribunal Judge Griffith, when finding at [26] that, "However, a reading of the Transitional Arrangements in their entirety leads me to conclude that the grant of any period of further Leave, including settlement after completion of 6 years discretionary for those granted DL before the 9th July 2012, depends upon the circumstances of the applicant remaining the same. If they do not, then the applicant cannot qualify for further grant of DL", is wrong. Although I do not accept the argument from Mr Tan on behalf of the Appellant that bullet .3 of Section 10 relating to the Transitional Arrangements of the Respondent's policy relates only to applications for Discretionary Leave, given that the first paragraph of Section 10 states specifically that "those who, before the 9th July 2012, had been granted Leave under the DL policy in force at the time would normally continue to be dealt with under that policy through to settlement if they qualify for it" and the first sentence of bullet point 3 does not state that decision-makers must consider whether the circumstances prevailing at the time of the original grant of Leave continue as at the date of the decision, when considering applications for Discretionary Leave only. It is a general requirement. The second sentence of bullet point 3, simply qualifies that general requirement such that if the circumstances remain the same then and the criminality thresholds do not apply, then a further period of 3 years Discretionary Leave should normally be granted to those who apply for further Discretionary Leave.

20. However, this does not mean that decision-makers should not consider whether or not the circumstances prevailing at the time of the original grant of Leave continued as at the date of decision, when considering applications for Indefinite Leave to Remain. Although decision maker must

consider whether or not the circumstances prevailing at the time of the original grant of Leave continue, I do not accept that if the circumstances do not remain the same, then no further Leave can be granted, it is simply that if the circumstances do remain the same, then a further period of Leave should be granted.

21. There may well be circumstances in which the circumstances do not remain the same, but there have not been significant changes for the purposes of bullet point 4, where it would be down to the discretion of the Respondent as to whether or not to grant the application. In my judgement, bullet point 4 again simply gives guidance that if there have been significant changes or the applicant fails to meet the criminality thresholds an application for further Leave should be refused.

22. In my judgement, the Transitional Arrangements makes it clear that for those who before the 9th July 2012 had been granted Leave under the discretionary policy in force at the time will normally continue to be dealt with under that policy through to settlement. In my judgement all the bullet points under Section 10 actually apply even if the person is applying for Indefinite Leave to Remain, rather than a further extension of Discretionary Leave, and not, in cases of Indefinite Leave to Remain, simply the criminality checks and criminality threshold test under bullet point 2. In my judgement, bullet point 4 clearly does apply in the circumstances in this case when the Appellant had been granted Discretionary Leave under the policy before the 9th July 2012, and was then applying for Indefinite Leave to Remain. Nothing within the wording of Section 10 limits its application in the manner contested for by Mr Tan.

23. In such circumstances, although First-tier Tribunal Judge Griffith was wrong at [26] to find that the grant of any further period of Leave including settlement after completing 6 years Discretionary Leave, dependent upon the circumstances of the applicant remaining the same, I do not consider that his error in that regard was material, given that at [29] the First-tier Judge clearly found that there had been a material change to the Appellant's circumstances since 2011, given that the Appellant's relationship with her husband had come to an end in 2012 and they were divorced. In my judgement, under bullet point 4 of the Transitional Arrangements, which I considered did apply to the application for Indefinite Leave to Remain, there had been a significant change such that the application under the policy failed to be refused. Further, given that the First-Tier Tribunal Judge find that the first grant of Discretionary Leave was on the basis of her marriage, First-tier Tribunal Judge Griffith did adequately explain the basis for the material change in circumstance, given that the appellant was previously married, but she was no longer in a subsisting marriage. The reasoning this regard is perfectly clear and adequate and does adequately explain to the appellant the reason for the decision.

24. Although Mr Tan before me sought to argue that the finding of First-tier Tribunal Judge Griffith at [28] that the first grant of DL was on the basis

that her marriage was perverse, the Appellant had not sought to argue that within her Grounds of Appeal, permission was not granted to appeal on that basis. I therefore did not allow him to pursue that argument, when permission has not been granted for that argument to be run before the Upper Tribunal. Mr Tan did not formally ask for permission to amend his Grounds of Appeal, and in any event, I would not have allowed such amendment, given the lateness of the proposed argument. In any event, even if I am wrong in that regard, I do not consider that the decision of the First-tier Tribunal Judge in that respect could be considered perverse, given that he has fully set out, clear, sufficient and adequate reasons for his finding within [28] and referred specifically to the screenshot of the Respondent's records, to which I was referred, at page 8 of the Appellant's bundle before the First-tier Tribunal, where the Appellant had been requested to provide further evidence to prove a subsisting marriage on the 20th July 2007, before the grant of leave in 2008. It is also relevant in that regard that the Appellant did not meet the criteria under DP3/395 C, as enforcement papers were served before her marriage, and further, as First-tier Tribunal Judge Griffith found, the Appellant would not have met the necessary criteria for a further grant of Discretionary Leave in 2011, had the circumstances changed. He was perfectly entitled on the evidence before him to consider that the first grant of DL was on the basis of her marriage.

25. In such circumstances, the error on the part of the First-tier Tribunal Judge in respect of his interpretation the policy was not material, given that there had been a significant change in the Appellant’s circumstances since the first grant of Discretionary Leave, and that she was now divorced and the relationship with her husband had now ended. Her application would therefore have fallen to be rejected under the policy in any event.

26. Even though the Appellant did not qualify under the policy, consideration was properly given by the First-tier Tribunal Judge as to whether or not she satisfied the provisions under paragraph 276 ADE in respect of her private life. In that regard, at [13] the First-tier Tribunal Judge had recorded the oral evidence of the Appellant at the First-tier Tribunal hearing and at that stage she had said that she had been to China 5 times since 1997 and in 2011 had stayed there for 3 months. He further noted that the Appellant had said that she had no family in China but that she had worked in China before coming to the United Kingdom in 1977. This was the oral evidence given by the Appellant, and the Judge’s reliance upon the same did not amount to an error of law.

27. Further, although in her statement the Appellant had stated that she had travelled to China, Hong Kong and Macau, her specific evidence and the statement in respect of that was "although I had travelled to China, Hong Kong and Macau in the past few years, it was purely for leisure, and in Hong Kong and Macau for gambling. I travelled to those places because I am culturally familiar, and not because my social ties there were stronger than here. My travels to the Far East were mostly for short periods: 2009 for one week in China and Hong Kong; for less than one week for each of

the 3 occasions in 2010 for gambling; and for 3 weeks in Macau and Hong Kong in 2012, again for gambling. In that regard it was the Appellant's own evidence regarding her travelling to Hong Kong and Macau and China, because she was culturally familiar with those places. Although Hong Kong and Macau are under different legal administrative systems, Hong Kong returned to Chinese sovereignty on the 1st July 1999 and Macau returned to Chinese sovereignty on the 20th December 1999. Hong Kong and Macau, although under different legal administrative systems, and to which clearly the Appellant could not be returned and would not necessarily be entitled to go to without a visa or other clearance document, that does not mean that Hong Kong and Macau simply being under different legal administrative systems, are not actually formally parts of China, or that they are not culturally similar to China.

28. Indeed, the Appellant's own evidence was that she went there because they were culturally similar. Therefore, the Judge was perfectly entitled to take account of her trips there, and also her trips to China, Hong Kong and Macau in considering whether or not she actually did have any social and cultural ties to China for the purposes of paragraph 276 ADE (vi). The paragraph in the Immigration Rules related to social and cultural ties, not to a jurisdictional issue as to whether she could actually be returned there.

29. However, in any event, even if I am wrong in that regard, given the evidence before the First-tier Tribunal Judge, that the Appellant had revisited China, and still spoke Chinese, such that she gave evidence through an interpreter at the First-tier Tribunal, there is more than sufficient evidence for him to find that she still did have cultural and social ties to China. The Judge's findings in this regard were open to him on the evidence before him, and there was no material error of law in this regard.

30. The decision of First-tier Tribunal Judge Griffith not disclosing any material error of law, the decision is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Griffith does not contain a material error of law and is maintained;

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed Dated 22nd October 2015

RFMcGinty

Deputy Upper Tribunal Judge McGinty