



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/14367/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at North Shields
On 3 August 2017**

**Decision Promulgated
On 8 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**MEIMEI LI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Ahmed (counsel) instructed by AGI, solicitors
For the Respondent: Ms R Petterson, Senior Home Office Presenting
Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Dearden promulgated on 14/03/2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 07/07/1961 and is a national of China. On 07/11/2014 the Secretary of State refused the Appellant's application for leave to remain in the UK on article 8 ECHR grounds.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Dearden ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 19/05/2017 Judge Gibb granted permission to appeal stating

1. The appellant, a citizen of China, was refused leave as a spouse on 07/11/2014, and her appeal against removal was dismissed by Judge of the First-tier tribunal Dearden (promulgated on 14/03/2017).

2. The grounds, which were in time, complain that the Judge erred in: application of section 117B; failure to consider key caselaw and policies.

3. The grounds are very poorly drafted, failing to mention up-to-date caselaw, and failing to expand any of the legal points briefly referred to. The appellant has, as a result, been placed effectively in the position of an unrepresented appellant.

4. Having read the determination with that in mind I have some concerns that in my view justified examination of whether there may have been errors of law.

5. The first concerns that Agyarko v SSHD [2017] UKSC 11 predated the promulgation of the determination by a few weeks and was widely circulated. This put an end to the compelling circumstances threshold test for considering article 8, and it is arguable that the Judge erred in applying this test at [35(5)]. Following Agyarko the focus of the proportionality assessment should have been on "insurmountable obstacles" and "exceptional circumstances", and it is arguable that the latter was not considered by the Judge. It was in this area that the appellant and her husband had factors at least worthy of consideration.

6. The second point is that the Judge's consideration of section 117B of the 2002 Act (as amended) arguably gives no consideration to points in the appellant's favour (s.117B(3) and (4)), and only considers those adverse (s.117B(1) and (5)). This is hinted at but not identified in the grounds. As with the proportionality assessment as a whole the legal process requires the balancing of competing factors, which requires consideration of factors on both sides, rather than only on one.

The Hearing

6. (a) Mr Ahmed counsel for the appellant moved the grounds of appeal. He took me to page 9 of the decision and told me that at [35(6)] the Judge failed to consider aspects of section 117B of the 2002 Act. He told me that the Judge emphasised the appellant's inability to speak English (s.117B(2)) but misdirected himself in relation to financial independence (s.117B(3)) the Judge went on to attach little weight to a private and family life established when immigration status was precarious. He told me that the Judge was wrong to do so because the appellant's presence in the UK has always been lawful. He told me that the appellant has never been dependent on public funds. He reminded me that the appellant and her husband married in 1982. He told me that the Judge has failed to consider subparagraphs (3) & (4) of section 117B of the 2002 Act.

(b) Mr Ahmed told me that the Judge's proportionality assessment is flawed. He told me that there is no dispute that family life exists, but that the Judge had given inadequate consideration to the effect removal would have on the family life of the appellant and her husband. He told me that the question that should have been asked is whether or not it is reasonable to suggest that family life can continue in China, and that the Judge had not adequately considered that question. He urged me to allow the appeal and to set the decision aside.

7. (a) Mr Petterson for the respondent adopted the terms of the rule 24 note, and took me straight to [35] of the decision. She took me through each of the sub-paragraphs of [35] and told me that the Judge gave full and proper consideration to the immigration rules before turning his attention to section 117B of the 2002 Act in considering article 8 outside the rules. She told me that the grounds of appeal do not attack the Judge's findings, and argued that the second ground of appeal is simply a complaint about the weight that the Judge gave various strands of evidence. Mr Petterson took me to [35(4)] of the decision and told me that there the Judge makes clear findings that there are no obstacles to family life being pursued in China, and that the appellant and her husband can go to China, where they have adult children. She told me that the Judge makes a clear finding that there are no insurmountable obstacles, the appellant's argument is based on a preference to remain in the UK.

(b) Mr Petterson took me to [35(5)] of the decision and told me that there the Judge makes clear findings that there are no compelling circumstances in this case. She asked me to read [35] as a whole. She told me that it is clear that the Judge has adequately considered the appellant's case both within the rules and outside the rules. She told me that the Judge's proportionality assessment is beyond criticism. She asked me to dismiss the appeal and allow the Judge's decision to stand.

Analysis

8. Agyarko [2017] UKSC 11 held that the ECHR intended (in cases such as Jeunesse) that the words “*insurmountable obstacles*” should be understood in a practical and realistic sense, rather than as referring to obstacles which made it literally impossible for the family to live together in the country of origin of the non-national concerned. The definition of “*insurmountable obstacles*” at EX.2 Appendix FM as meaning “*very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner*” was consistent with Strasbourg case law. The IDIs said that leave could nevertheless be granted outside the rules in “*exceptional circumstances*” i.e. “*circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate*”. The rules and IDIs together were compatible with Article 8. A court or tribunal had to decide whether the refusal was proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State’s policy, expressed in the rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are “*insurmountable obstacles*” or “*exceptional circumstances*” as defined. “*The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control*”.

9. It is common ground in this case is that the appellant cannot meet the requirements of appendix FM because she has not passed the English language test. Before the First-tier, counsel for the appellant said that there was no realistic possibility that the appellant will pass the English language test in the near future.

10. Between [25] and [29] the Judge summarises the submissions that were made on the appellant’s behalf. The Judge was asked to find that there are insurmountable obstacles and/or compelling reasons preventing the appellant and her husband from living in China.

11. At [35] of the decision the Judge sets out his consideration of the appellant’s claim under the rules. The facts as the Judge found them to be are

(a) The appellant is a Chinese national who entered the UK legally on 7 November 2011, with leave to enter as the spouse of a British citizen. The appellant cannot speak English and cannot sit the English language test. The application for leave to remain was made before her existing leave expired

(b) The appellant's husband is a British national of Chinese origin. He has lived in the UK for about 29 years. He has two jobs and pays tax and national insurance. At the date of hearing he was 57 years of age.

(c) The appellant has led a blameless life in the UK and is dependent upon her husband. The appellant and her husband married in 1982. In 1989 the appellant's husband came to the UK, while the appellant remained in China. They lived apart for more or less 22 years. The appellant's husband's status in the UK was only regularised in 2009. Since then he has returned to China to visit five times.

(d) The appellant and her husband were only reunited in the UK in 2011. They spent the majority of their married life apart but have lived together as husband and wife in the UK since 2011. The appellant's husband is reluctant to return to China. He wants to retain his employment in the UK.

(e) The appellant and her husband have two adult children who remain in China. The appellant and her husband live in rented accommodation UK.

12. At [35(3)] the Judge finds that the appellant cannot meet the rules. At [35(4)] the Judge considers EX.1, and finds that the appellant has not established any insurmountable obstacles. At 35(5) the judge considers whether or not there are any compelling circumstances in this case, and finds that there are none. At [35(6)] the Judge considers section 117B of the 2002 Act.

13. At [35(6)] the Judge finds that the appellant's presence in the UK has always been precarious because her stay in the UK has always been limited in time and has been dependent upon applications for further leave to remain.

14. In Rhuppiah [2016] EWCA Civ 803 it was held that the concept of precariousness in immigration status in section 117B(5) was distinct from the concept of unlawful presence in the UK in subsection (4). Even if the two concepts could be said to overlap, subsection (5) would be redundant if they were the same. The concept of precariousness extended more widely, to include people who had leave to enter or remain which was qualified to a degree such that they knew from the outset that their permission to be in the UK could be described as precarious. The extension and re-extension of limited leave to remain did not mean that the person's status was not still precarious. In the context of section 117B, the relevance of precariousness of immigration status was the effect it had on the extent of protection which should be afforded to private life for the purposes of the Article 8 proportionality balancing exercise. The more that an immigrant should be taken to have understood that his or her time in the host country would be comparatively short or would be liable to

termination, the more the host State was able to say that a fair balance between the rights of the individual and the general public interest in the firm and fair enforcement of immigration controls should come down in favour of removal when the leave expired (paras 30 - 34)

15. When permission to appeal was granted it was suggested that the Judge only considered the section 117B factors which weighed against the appellant and not those which weighed in her favour.

16. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

17. There is no error of law in the judge's consideration of section 117B.

18. Although the grant of permission to appeal suggests that the Judge applied a threshold test and then declined to consider article 8 ECHR grounds outside the rules, a holistic reading of the decision discloses that that is not the case.

19. The Judge considers whether there are insurmountable obstacles and considers whether there are compelling circumstances. He does so as part of an overall assessment of article 8 within the rules, and then article 8 outside the rules. A fair reading of [36] of the decision makes it clear that the Judge considered this case outside the immigration rules and decided that there were no reasons to grant the case on freestanding article 8 ECHR grounds. The summary of the decision makes it clear that the Judge dismisses the case having considered article 8 ECHR grounds of appeal outside the rules.

20. Paragraphs EX.1(b) & 2 say

EX.1. This paragraph applies if

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be

faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

21. It is not argued that the Judge's finding that the appellant cannot meet the immigration rules is wrong. The focus is on a freestanding article 8 ECHR argument. The Judge considered the immigration rules. He considered whether or not there are insurmountable obstacles in a way which meets the definition contained in EX.2, and which is consistent with the findings in Agyarko

22. The Judge then goes on to consider a freestanding article 8 argument, and finds that the appellant cannot meet the rules, that there are no insurmountable obstacles to family life continuing outside the UK, and that there are no compelling circumstances in this case. The Judge factors those findings into his overall proportionality assessment and takes account of section 117B of the 2002 Act.

23. The Judge clearly considers whether or not it is reasonable for the appellant's British citizen husband to remove with the appellant. At [36] he finds that there are no insurmountable obstacles to the appellant living alone or the couple living together in China.

24. In reality, the grounds of appeal and the grant of permission to appeal focus on the weight that the Judge gave to competing factors, and quality of the proportionality assessment.

25. In R (on the application of Luma Sh Khairdin) v SSHD (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC) it was held where the Upper Tribunal is considering, pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007, whether there is an error of law in the decision of the First-tier Tribunal involving Article 8 proportionality, the task of the Upper Tribunal is confined (at that point) to deciding if the First-tier Tribunal's assessment of where to strike the balance was unlawful, according to the error of law principles set out in R (Iran) [2005] EWCA Civ 982. In R (Iran) v SSHD (2005) EWCA civ 982 the Court of Appeal was taken to have taken the firm view that a decision on proportionality of an Adjudicator or Immigration Judge who has properly directed himself can only be overturned on reconsideration on traditional public law grounds.

26. In Green (Article 8 - new rules) [2013] UKUT 254 (IAC) the Tribunal said that "*Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law*". In the decision promulgated on 14 March 2017, the Judge clearly took account of each strand of evidence and reached conclusions which were well within the range of conclusions available to him.

27. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a

decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

28. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

29. No errors of law have been established. The Judge's decision stands.

DECISION

30. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed
2017

Paul Doyle

Date 7 August

Deputy Upper Tribunal Judge Doyle