



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00168/2018

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2019

Decision & Reasons Promulgated
On 15 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS YING YANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara, counsel instructed by K & G solicitors

For the Respondent: Ms S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of China born on 26 August 1970. She first arrived in the UK on 12 November 2006 unlawfully and was served with illegal entry papers on 18 November 2006.
2. She then made an asylum claim on the basis that she was a Christian, but this application was refused and her appeal was dismissed by the Asylum and Immigration Tribunal on 6 March 2007. The Tribunal found that her claim was a

fabrication designed to gain access to the UK and she became appeal rights exhausted on 22 March 2007.

3. The Appellant subsequently met Mr Buyun Lin who was granted indefinite leave to remain in April 2011. They married on 12 July 2011 and the Appellant made a number of applications for leave to remain on the basis of the marriage. However these seem all to have been refused on the basis that she was unable to provide a valid passport or identity document, having entered the UK without such a document. Ultimately submissions were made on her behalf on 1 September 2017 and these were refused in a decision dated 23 November 2017 with the right of in country appeal.
4. The Appellant appealed against that decision and her appeal came before the First-tier Tribunal for hearing on 18 January 2019 before First-tier Tribunal Judge Cary. In a decision and reasons promulgated on 30 January 2019, the appeal was dismissed.
5. Permission to appeal was sought, in time, on the basis that there was evidence that the Appellant had been unable to obtain an emergency travel document or passport and this was material to the assessment of whether or not there were insurmountable obstacles to family life continuing outside the UK pursuant to paragraph EX2 and EX1(b) of Appendix FM.
6. The second ground of appeal asserted that, in light of Rhuppiah [2018] UKSC 58, there was flexibility inherent in the little weight provisions of Section 117B(4) of the NIAA 2002 and it was at least arguable that a normative approach to this section did require a flexible approach in light of the Appellant's lengthy residence and to the absence of identity documentation.
7. Permission to appeal was granted by First-tier Tribunal Judge Robertson in a decision dated 10 April 2019 in the following terms

“There is some arguable merit in the grounds because in a human rights case whether there are insurmountable obstacles to family life continuing in China has to be considered as at the date of hearing. This would include whether or not the Appellant is able to return to China and with regard to ground 1, it is arguable that the judge failed to make findings of fact on the Respondent's assertion that the Appellant had deliberately given inaccurate information to the Chinese Embassy and whether the Appellant had in fact applied for a passport. If the Appellant had in fact supplied inaccurate information it would strengthen the public interest in removal, if she had not it would strengthen her case. Both grounds are arguable and permission to appeal is granted”.
8. The Respondent subsequently served a Rule 24 response dated 8 May 2019, opposing the appeal on the basis that the claim that the Appellant would have returned to China after her asylum appeal was dismissed in March 2007, but for her lack of documentation, does not withstand scrutiny. The Appellant remained unlawfully before making her first unsuccessful application to remain in 2012. The fact that the refusal mentioned several occasions when the Appellant was interviewed with a

view to being redocumented and the information she gave did not lead to her identity being verified does not mean she would be unable to be documented at some point. There is no evidence the Appellant ever sought to make a voluntary return to China. It was submitted that the fact the Appellant cannot at present obtain a travel document is not sufficient to show insurmountable obstacles to the Appellant and her husband residing in China.

Hearing

9. At the hearing before the Upper Tribunal, Mr Kannangara on behalf of the Appellant clarified that there was no specific documentary evidence emanating from the Chinese Embassy of the Appellant's attempt, referred to in the Appellant's statement at [16] and page 9 of the refusal decision, to obtain a passport or travel document. In the supplementary bundle at page 139 there is reference to the fact there are copies of the applications made and previous refusals, for example on 1 December 2015 the Appellant's application was refused on the basis of invalidity due to the fact that no passport or identity document had been submitted, in a decision dated 2 February 2016 at page 142 and a decision dated 9 August 2016 at pages 146 to 147 and dated 17 November 2016 at page 148 were all refused on the basis of invalidity. Page A1 of the Respondent's bundle which is an extract from representations dated 31 August 2017 also sets out the history of the Appellant's inability to obtain a passport.
10. Mr Kannangara submitted that the grounds of appeal very clearly explain the issue in the case. The judge failed to take account of the fact that the Appellant could not obtain a passport or travel document. The Secretary of State first tried to obtain an emergency travel document for her in 2006 after her asylum application was refused. Three further attempts were also made in 2008, 2009 and 2017 but these were refused on the basis that the Chinese Embassy was unable to verify her identity.
11. The Appellant also states in her witness statement that she attempted to get a passport herself in 2016 but this application was also rejected by the Chinese Embassy.
12. Whilst there was no evidence from the Embassy, it was very clear from the refusal that the Respondent was attempting to get an emergency travel document for the Appellant and her applications were rejected on this basis.
13. Mr Kannangara submitted that the judge should have taken this evidence into account as a material factor. The Appellant cannot go to China in order to pursue family life with her husband because she is unable to travel there at all. Consequently, she cannot be removed and this was a material consideration that should have been taken into account. However at [35] the judge finds that this does not assist the Appellant in her appeal stating as follows

"I note there had been some difficulties in obtaining an emergency travel document for the Appellant as identified in the refusal letter. That cannot assist the Appellant in relation to this appeal. All human rights appeals are hypothetical. They are all concerned with the removal that has not in fact taken

place. The decision facing the Tribunal is the hypothetical one of whether removal would be contrary to the European Convention of Human Rights at the time of the hearing. I have to decide whether the Appellant's Article 8 rights would be violated by a removal. It is neither required nor appropriate to speculate about whether the Appellant can be returned. If there is to be no removal, it is difficult to imagine that a refusal of leave to remain to an illegal entrant could breach any of his human rights, see Maksimovic, Crown (on the application of) [2004] EWHC 1026".

14. In her submissions, Ms Jones on behalf of the Secretary of State sought to rely on the Rule 24 response. She submitted that at [35] the judge was perfectly entitled to reach that conclusion. She pointed out that at A1 of the Respondent's bundle in the representations the Appellant stated she was afraid to approach the Embassy for a passport however and there was no evidence presented to the Tribunal that she has in fact attended and that the Embassy had told her they would not be able to issue her with a passport.
15. Ms Jones pointed out that it had not been submitted that the Appellant was stateless. In her witness statement at [18] and [21] and in the skeleton argument at [20] the Appellant stated she has been interviewed four times with a view to documentation and has been refused because her nationality could not be verified, however, there was an absence of evidence. She submitted that credibility was in issue because the Appellant's asylum claim had been rejected and that there was no material error of law. The judge has taken the position that there have been difficulties but has not gone on to say anything further and that this was the correct approach given the absence of evidence.
16. In reply, Mr Kannangara submitted that even if one disregards what the Appellant has said in her statement, that there is still information emanating from the Secretary of State in a refusal letter plus the subjective fear of going to the Chinese authorities.
17. I sought clarification as to whether the interviews that the Appellant had undertaken were with the Home Office or with the Chinese Embassy. Mr Kannangara sought to seek instructions on this point from the Appellant and Ms Jones was asked to check the Home Office files and was able to confirm that there was evidence the Appellant had had documentation interviews with the Home Office, copies of which were then provided to the Upper Tribunal and to Mr Kannangara. She submitted that the reason for the refusal of the travel documents was due to insufficient information and a failure by the Appellant to attend one interview on 15 December 2008.

Findings and Reasons

18. I reserved my decision, which I now give with my reasons.
19. The primary issue to be determined is whether the First tier Tribunal Judge erred materially in law in finding that the apparent inability of the Appellant to travel to China, because her identity cannot be verified and thus it has not proved possible to obtain either a passport or an emergency travel document is material, can constitute

an “insurmountable obstacle” pursuant to paragraph EX1(b) of Appendix FM of the Rules.

20. I have, in this respect, taken into consideration the Home Office guidance in respect of Article 8, family and private life, 10 year routes dated 11 April 2019. The issue of insurmountable obstacles is addressed at pages 37-39 and provides *inter alia* as follows at page 38:

“Ability to lawfully enter and stay in another country

The decision maker should consider the ability of the members of the family unit (both the applicant and others) to lawfully enter and stay in another country. The onus is on the applicant to show that it is not feasible for them and their family to enter and stay in another country for this to amount to an insurmountable obstacle. A mere wish, desire or preference to live in the UK is not sufficient.

An example of where it might not be feasible for the family to live together elsewhere might be where the sponsor has gained their settled status in the UK through a refugee route, and the applicant is of the same nationality. In the absence of a realistic third country alternative, the settled person’s inability to resume life in the country of origin is likely to constitute an obstacle to family life continuing overseas.

The decision maker should consider relevant country information (but may not seek to go behind any decision to grant refugee status).”

21. I have concluded in light of the above, that the Judge’s finding at [35] that the Appellant’s difficulties in obtaining an emergency travel document cannot assist her does amount to a material error of law, in that the Appellant’s ability to lawfully enter and stay in China is clearly a material factor in the consideration of whether or not there are insurmountable obstacles to family life continuing outside the UK ie. in China. It will be a matter for the First tier Tribunal Judge who hears the remitted appeal as to the weight to be attached to the documents from the Home Office attesting to their efforts to obtain an ETD and that to be attached to the evidence of the Appellant has to her efforts to obtain a passport directly from the Chinese Embassy.
22. As to the second ground of appeal, that at [32] the Judge failed to apply the flexible approach set out in Rhuppiah [2018] UKSC 58 at [49] with regard to the little weight provisions of Section 117B(4) of the NIAA 2002, given the Appellant’s lengthy residence and to the absence of identity documentation, I find that a material error of law has been established. It is clear from [49] of Rhuppiah that in order to succeed “such generalised normative guidance may be overridden (only in) an exceptional case by particularly strong features of the private life in question.” It is at least arguable that, had the Judge properly factored in the length of the Appellant’s relationship with her husband, which is 13 years and her apparent inability to return to China that this would have made a material difference to the weight he attached to that relationship.

Notice of Decision

The appeal is allowed to the extent that it is remitted for a hearing *de novo* before the First tier Tribunal.

No anonymity direction is made.

Signed *Rebecca Chapman*

Date 9 July 2019

Deputy Upper Tribunal Judge Chapman