



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15116/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 7th January 2019

Decision & Reasons Promulgated
On 1st February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS XIAOLAN YANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr C Timson (Counsel)
For the Respondent: Mr A Tan (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Siddiqi promulgated on 30th August 2018, following a hearing at Manchester on 15th August 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of China, a female, and was born on 14th November 1964. She appealed against the decision of the Respondent dated 8th September 2017, refusing her application for entry clearance, as the partner of a person present and settled in the UK, namely, her husband, Mr Yunjuan Lin.

The Appellant's Claim

3. The essence of the Appellant's claim is that she accepts that she entered the UK without leave on 7th October 1999 and then absconded from immigration control. When on 17th October 2008, she was served with immigration enforcement papers, she departed from the UK voluntarily on 12th November 2008, returning back to China. She used a different name and date of birth on an application for assisted voluntary return. The Appellant does not dispute the issues raised by the Respondent, in relation to these matters as a basis for the refusal of her application, but what she maintains is that she "never actively deceived the UK authorities in regards to my false ID, I purely following the instructions of the agent" (see paragraph 12 of the decision of the judge).
4. She maintains that, having now lived separately from her husband in China for the last ten years, she is entitled to enter on the basis that the Home Office's own guidance stipulates that, where the applicant has previously contrived to insignificant way to frustrate the intentions of the Immigration Rules, then a refusal under paragraph 320(1) of HC 395, can only be made after the decision-maker has exercised great care in assessing the aggravating circumstances, that are said to justify the refusal.
5. This had not been the case yet, because the Entry Clearance Officer had not even referred to the Home Office policy in this regard, which was plainly designed to encourage people, who were otherwise unlawfully in the UK, to voluntarily return back to their own countries, so as to then regularise their status by making a lawful application for entry clearance.

The Judge's Findings

6. The judge had regard to the decision of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440**, which was argued on the Appellant's behalf before the Tribunal (see paragraph 13). It was recognised by the judge that in that case, the Tribunal had made it clear that, in exercising discretion under paragraph 320(11) the decision-maker must exercise great care in assessing the aggravating circumstances said to justify refusal, and must have regard to the public interest in encouraging those unlawfully in the UK to leave, and to seek to regularise their status, by an application for entry clearance, from abroad. (Paragraph 15). Indeed, an express reference was made to the Home Office guidance, "frustrating the intentions of the Immigration Rules; RFL07, paragraph 320(1) published on 14th November 2013", even though neither party before Judge Siddiqi had actually provided the Tribunal with a copy of this (see paragraph 16). However, the judge was of the view that, "I am not persuaded that the Respondent's failure to refer to the guidance in the refusal notice does not in itself mean that the guidance was not considered" (paragraph 16). The judge was also not persuaded that the Respondent had failed to address his mind to the relevant question, i.e. whether in the circumstances of the case, the Appellant's breach of the UK Immigration Rules was sufficiently aggravating so as to justify the refusal (paragraph 17). On the other hand, the judge was clear that "the Respondent's consideration of the Appellant's circumstances is brief" (paragraph 18).

7. The judge went on to then consider, that in the event that he was wrong in concluding that the Entry Clearance Officer had misapplied his discretion, the application of the Appellant still fell to be refused under paragraph 320(11) for two essential reasons. First, the judge was not persuaded that the Appellant was unaware of her application form having been incorrectly completed by an agent, because the judge reasoned that the information on the application form must have come from the Appellant, and in any event dishonesty by an agent could still be imputed to the Appellant (paragraph 20). Second, that in “consideration of the proportionality of the decision to refuse the Appellant leave to enter” regard can be had to the fact that, “the Tribunal ought to take the Secretary of State’s guidance into account if it points clearly to a particular outcome in the instant case” (paragraph 21). On this basis, the judge concluded that, “I am not persuaded that the Appellant meets the requirements of the Rules” (paragraph 22). The judge then went on to consider issues in relation to Article 8 (see paragraphs 23 to 30), including the fact that the sponsoring husband of the Appellant was a British national who wished to continue to live in the UK and did not wish to return to China himself (see paragraph 29).
8. The appeal was dismissed.

Grounds of Application

9. The grounds of application state that the judge erred in law because paragraph 320(11) is a discretionary ground for refusal and is not a mandatory ground. In **PS [2010] UKUT 440**, the Tribunal was highly critical of the fact that the Entry Clearance Officer
- “Refers nowhere to the guidance under paragraph 320(11). It is therefore wholly unclear where the Entry Clearance Officer has addressed his mind to the relevant question, namely, whether in the circumstances of this case [the] breach of UK immigration law was sufficiently aggravating such as to justify the refusal” (paragraph 14).
10. Moreover, it was said in that case that,
- “The Entry Clearance Officer should have specifically recognised that [the Appellant] had voluntarily left the United Kingdom more than twelve months ago with a view to regularising his immigration status. There was no question that the marriage was a genuine one” (paragraph 18).
11. Indeed, just as the case of **PS [2010] UKUT 440**, the Entry Clearance Officer in the instant appeal makes no mention whatsoever of considering the appropriate guidance. In fact, the judge himself recognises that the ECO’s findings are brief. Given that the Appellant left the UK as long as nearly ten years ago, and did so voluntarily, insufficient weight was given to these important factors (see paragraph 27) by the judge given the long period of separation between the husband and wife in a genuine relationship.

12. On 19th October 2018, permission to appeal was granted by the judge on the basis that it was arguable that the judge provided no reason for the conclusion that the Appellant's appeal fell to be refused on the basis of there being aggravating circumstances (see paragraph 22). The judge did not in fact address the issue of aggravating circumstances directly at all.
13. On 13th November 2018, a Rule 24 response was entered stating that the judge had given clear and comprehensive reasons (at paragraphs 18 to 20). This was the reason for dismissing the appeal.

Submissions

14. At the hearing before me, on 7th January 2019, Mr Timson, appearing on behalf of the Appellant, relied upon the grounds of application and laid emphasis on the Tribunal decision of **PS [2010] UKUT 440**.
15. In reply, Mr Tan, appearing on behalf of the Respondent stated that the judge had given adequate reasons for his decision and that this was clear in the judge's observation that, "the Appellant claims that she was unaware that her application form had not been completed correctly as it was completed by an agent. I am not persuaded by this explanation" (paragraph 20). Furthermore, if one looks at the Appellant's bundle (at page 87 onwards), there is a statement that the parties have been separated since 1987, when the Appellant's husband left her in China twenty years ago, but this cannot be true. Therefore, there were a number of issues of honesty in this case.
16. In reply, Mr Timson submitted that one had to look at the original Grounds of Appeal to the Tribunal of Mr Siddiqi, dated 13th November 2017. This reads as follows:

"In regards to the statements made in the online and VAF application forms. We confirm that the Appellant's husband was unaware of the proceedings in which his wife left the UK and both the Appellant and the Sponsor were under the impression they had just left the UK voluntarily with no deportation. Therefore they did not disclose this information to our offices when completing the form. This was not an act of deception, it was a lack of understanding and naivety" (paragraph 10 of the grounds).
17. Mr Timson submitted that those acting for the Appellant had not been given the information to enable them to make the VAF application correctly, but this was through no deliberate dishonesty on the part of either the Appellant or her sponsoring husband. If, submitted Mr Timson, it could be said that the Appellant and her husband were acting through an agent, and that misleading information had been provided, although not dishonestly by either of these two parties, then this would not be an "aggravating circumstance". In any event, there has now been a separation of ten years and a continued refusal on this basis would inevitably mean that the parties would never be able to get together in what was a genuine married relationship.

Error of Law

18. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, this is a case where the judge himself had accepted that in the refusal letter, “the Respondent’s consideration of the Appellant’s circumstances is brief” (paragraph 18). Whereas it is, of course, right of the judge to say that there need be no express and explicit reference to a Home Office policy, provided that it is shown that in terms it was demonstrated to have been taken into account, this is a case where this has not happened.
19. In the refusal letter of 6th September 2017, there is copious reference to the fact that the Visa Application Form (VAF) contained references to different identities, by which the Appellant chose to be known, in affecting her voluntary return to China, but there is no consideration whatsoever to, whether, for a person who had voluntarily returned back to China, their continued refusal to enter, could be justified after a period of ten years of separation. There is a section “exceptional circumstances” toward the end of the refusal letter, and there is a reference to the fact that the Appellant and the Sponsor have been married since 28th July 1987, and have four children born to them, but there is no reference to the existence or otherwise of “aggravating circumstances”.
20. In fact, on the third page of the refusal letter, there is an entry in the following terms:-
- “I am satisfied that you were previously an illegal entrant to the UK, and that you absconded and used a false identity in the UK. I therefore refuse your application under paragraph 320(11) of the Immigration Rules”.
21. This is manifestly a refusal based entirely on the two facts of overstaying and of using a false identity. There is absolutely no consideration here of the policy that the Entry Clearance Officer has to apply. Indeed, as **PS [2010] UKUT 440** made clear, “it is therefore wholly unclear whether the Entry Clearance Officer has addressed his mind to the relevant question” and this should have been “specifically recognised” given that the Appellant in that case had “voluntarily left the United Kingdom more than twelve months ago with a view to regularising his immigration status”. In the instant case, of course, the Appellant left ten years ago. It was all the more important that a very detailed consideration was given through the circumstances in relation to the question of whether there were “sufficiently aggravating” reasons to justify the refusal.
22. Second, insofar as the judge did then himself proceed to consider this same issue it is true that he referred to the question of whether the Appellant was unaware of her application having been incorrectly completed (paragraph 20); and it is true that the judge then proceeded to consider the issue of “proportionality”, but the conclusion that, “the Tribunal ought to take the Secretary of State’s guidance into account if it points clearly to a particular outcome in the instant case” (paragraph 21) is wrong. It is for this reason, that the judge proceeded to then decide that, having considered all the evidence he was not satisfied that the Appellant met the Rules (paragraph 22).

Notice of Decision

23. The decision of the First-tier Tribunal involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. I set aside the decision. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be decided by a judge other than Judge Siddiqi pursuant to Practice Statements 7.2(b) because the nature of any fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.
24. No anonymity direction is made.
25. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

24th January 2019