Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09484/2013

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Determination Promulgated**
On 8 August 2014	**On 26 August 2014**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

ENTRY CLEARANCE OFFICER - SHANGHAI

<u>Appellant</u>

and

MRS YING ZHAO

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Respondent: Ms W Targonska of Igor & Co.

<u>DETERMINATION AND REASONS</u>

Introduction

1. The appellant before the Upper Tribunal is the Entry Clearance Officer in Shanghai. I shall refer to Mrs Zhao as 'the claimant' herein.

2. The claimant is a citizen of the People's Republic of China. Her husband, Mr Zhang (the sponsor) lives in the United Kingdom as the holder of a Tier 2 inter-company transfer migrant visa, with leave initially conferred until 6 July 2014, but which has recently been extended so as to be conferred until 9 July 2016. Mr Zhang is also a citizen of China.

3. The claimant applied to join her husband in the United Kingdom. Her initial application was refused on 8 November 2012 in a decision stating as follows:

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"You previously applied to visit the UK for ten days as a tourist. You stated that you did not have any friends or family in the UK (Q8.7) and that you would stay at Peckham Lodge (Q8.7). You provided a flight booking for 26/1/12 – 4/2/12 and hotel reservations for these dates together with an itinerary. During the course of our enquiries you were contacted and specifically asked if you knew anyone in the UK. You said 'no' and that your ex-boyfriend had studied in the UK but was back in China and that you had separated. You also listed your parents as Qizhong Zhao and Yuncai Gao and provided a Hukou confirming these details.

You actually stayed in the UK from 14/1/12 – 5/2/12. In interview you confirmed that you first met your now husband in October 2010 and that the relationship started in December 2010. He went to the UK in July 2011 and you married in 9/10/12. When you visited the UK you stayed with your then boyfriend. You said you thought it was more simple to apply for a tourist visa and your travel agency had told you it was better to apply that way. You said you didn't mention your boyfriend when specifically asked as you were not close at the time and had only known each other a year before he went to the UK. Given that you stayed with him and married shortly afterwards I do not accept this explanation. You did not intend to stay in the hotels and follow the itinerary and these were provided by your travel agency. You also stated that in fact your parents are Zhide Wang and Yunxia Gao and that you had previously lived at your uncles home and used your uncles Hukou in order to study there…

I am satisfied that you employed deception in your previous application. Given this your current application falls to be refused under paragraph 320(7B) of the Immigration Rules. Any future applications will also be automatically refused, for the same reason, until 30/11/21 – a ten year period after the previous refusal in which deception was used...Given that your application has been refused under the general grounds for refusal I am therefore satisfied that you also fall to be refused under paragraph 319C (a) of the Immigration Rules."

4. The claimant then made a further application for entry clearance as a PBS Tier 2 long-term staff partner. This application was refused on 13 March 2013, which is the decision at the heart of the instant appeal, for the following reasons:

"You where [sic] then refused by an Entry Clearance Officer on 08/11/2012 under paragraph 320(7B) for using deception on your previous application. The refusal under paragraph 320(7B) attracted a ten year ban, meaning that any future applications would be automatically refused under paragraph 320(7B) of the Immigration Rules until 18/03/2021.

I am therefore refusing you entry clearance under paragraph 320(7B) of the Immigration Rules for using deception in a previous application...In light of the above I also refuse your application under paragraph 319(C) (a) of the Immigration Rules."

5. The claimant appealed this decision to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Britton and allowed in a determination promulgated on 3 February 2014.

6. The First-tier Tribunal Judge set out the evidence before him, as well as the submissions of the parties, and concluded:

> “26. I am satisfied the appellant knowingly used deception to obtain entry clearance as a tourist to the United Kingdom. She cannot blame the agent as she knew what she was doing, especially in her telephone call with the Visa Officer. In her favour she did leave the United Kingdom in terms of her visa. She also realises now the seriousness of what she has done. The immigration system is based on applicants telling the truth in accordance with the declaration they signed. If they tell lies they can expect severe penalties such as a ten year ban.
>
> 27. The appellant’s husband is in stable employment and not a burden on the state. I have taken into consideration all the evidence before me and the Tribunal decision is Ozhogina. In relation to paragraph 320(7B) I am satisfied the appellant was not attempting to secure an advantage on immigration terms. The applicant’s intention was to obtain admission to be with her husband. He is only able to visit twice a year. She was not obtaining financial gain or an immigration advantage.”

7. The Entry Clearance Officer applied for permission to appeal to the Upper Tribunal significantly out of time. By way of a decision of 13 May 2014 First-tier Tribunal Judge Kamara extended time for lodging the application for permission and then granted the application itself; stating as follows when doing so:

> “The application is out of time and the explanation for the delay is that the Entry Clearance Officer was awaiting advice from the Presenting Officers Unit as to whether to challenge the determination. Nonetheless, in the circumstances, I am satisfied that the aforementioned facts amount to special circumstances which would cause me to admit the application…
>
> …In his determination the judge arguably erred in law in finding that the appellant knowingly used deception in order to enter the United Kingdom as a visitor but that she did not do so to secure immigration advantage...”

8. Thus the matter came before me.

Preliminary Issue

9. In written submissions filed prior to the hearing, and in her oral submissions at the hearing, Ms Targonska asserted that Judge Kamara had erred in granting permission because she had failed to give proper consideration and proper reasons for extending time for the Entry Clearance Officer’s application. She submitted that the Upper Tribunal should set aside the grant of permission and re-make the decision refusing the ECO permission to appeal. Ms Targonska was unable, however, to cite any authority in support of the submission that the Upper Tribunal had jurisdiction to take such a course.

10. In response Ms Isherwood asserted that once permission to appeal had been granted the Upper Tribunal’s function was to determine the appeal

before it. It did not have jurisdiction to re-visit the decision granting permission to appeal.

11. I conclude that Ms Isherwood is correct on this issue. As far as I am aware there is no authoritative decision to guide me on whether or not I have the power that Ms Targonska asserts that I have. The Upper Tribunal alluded to this issue in Wang & Chin (extension of time for appealing) [2013] UKUT 00343 but it was unnecessary for it to go on and determine it.

12. In Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (the President and Upper Tribunal Judge O'Connor), the Upper Tribunal record that it was common ground between the parties that there was no power to revoke a grant of permission to appeal if a judge had power to grant it. It proceeded upon the basis that this agreement was correct, and did not analyse the issue further.

13. A decision granting or refusing permission to appeal to the Upper Tribunal cannot be appealed to the Court of Appeal (see Tribunals, Courts and Enforcement Act 2007, Section 13(8)(c)). This fact, though, does little to assist me in determining whether I have power to set such a decision aside.

14. Whilst the Tribunal Procedure (Upper Tribunal) Rules 2008 give express powers to the Upper Tribunal to set aside "a decision which disposes of proceedings" (Rule 43), again this is of no assistance to the claimant because the decision complained of most certainly did not dispose of the proceedings, permission to appeal having been granted.

15. In the absence of more detailed submissions, and in the absence of being drawn to any provision which it is said gives the Upper Tribunal jurisdiction to take the course suggested, I find that it has not been demonstrated, and neither am I satisfied, that I have power to set aside the decision granting the ECO permission to appeal. For this reason I do not accede to the request to do so.

Error of law

16. I now turn to look at the merits of the appeal brought by the ECO against the First-tier Tribunal's determination.

17. Ms Isherwood maintains the position set out in the ECO's grounds of appeal i.e. that the First-tier Tribunal's decision in relation to paragraph 320(7B) of the Immigration Rules was irrational when considered in the context of the findings made by the Tribunal as a whole and in particular the conclusion that the claimant had employed deception in her, successful, attempt to obtain entry clearance as a visitor in November 2011.

18. In response Ms Targonska submitted that the First-tier Tribunal had given adequate reasons for its conclusions, and that its conclusions were open to it on the evidence available; drawing particular attention when doing so to

the decision of the Upper Tribunal in Ozhogina & Tarasova (deception within para 320(7B) – nannies) Russia [2011] UKUT 00197 (Burton J and UTJ Eshun).

19. Ms Targonska further submitted that it was plain from the evidence that the purpose of the claimant's deception, when seeking to enter the United Kingdom as a visitor, was not to secure an immigration advantage but simply to see her then boyfriend. The deception in 2011, she asserted, was not capable of being material to the decision of whether or not to grant entry clearance on that occasion.

20. Having carefully considered both the written and oral submissions before me I conclude that the First-tier Tribunal's determination does contain an error on a point of law such as to lead me to set it aside. I do so for the following reasons.

21. Paragraph 320(7B) of the Immigration Rules requires refusal of entry clearance in circumstances where the applicant has previously breached UK's immigration laws by:

> "(d) using deception in an application for entry clearance... (whether successful or not)..."

22. In Ozhogina & Tarasova the Tribunal held that where the respondent relies on paragraph 320(7B)(d) to refuse an application for entry clearance it is necessary to show that a false statement was deliberately made for the purposes of securing an advantage in immigration terms.

23. Given (i) the First-tier Tribunal's conclusions in paragraph 26 of its determination that the claimant *"knowingly used deception to obtain entry clearance as a tourist to the United Kingdom"* and (ii) the acceptance by the claimant, as recorded in paragraph 9 of the determination, that *"the travel agency had told her that if she gets a call from the embassy she cannot say she has a boyfriend in the United Kingdom or else she will be refused for sure"*, in my conclusion the First-tier Tribunal's finding in paragraph 27 of the determination that the claimant was not attempting to secure an advantage *"on immigration terms"*, is so devoid of reasoning so as to be unlawful.

24. The First-tier Tribunal conclude that the claimant's intention in misleading the ECO in 2011 was to ensure that she could secure admission to the United Kingdom to be with her, now, husband. This may be so but the fact that the ultimate goal of the claimant was to be with her, now, husband is not determinative of the question before the First-tier Tribunal i.e. whether the claimant intended to secure immigration advantage by producing a false itinerary, a false hotel booking and by misleading the Entry Clearance Officer when asserting that she knows no-one in the United Kingdom.

25. The First-tier Tribunal's determination makes a leap from findings of fact which on there face support a conclusion that paragraph 320(7B) has been

made out by the Entry Clearance Officer, to a conclusion that it has not been made out; without interposing adequate reasoning explaining that leap. Whether the ECO would, in any event, have granted the applicant entry clearance in 2011 had there been no deception is, in my view irrelevant. The relevant issue was the claimant's intention. I accept that the ECO cannot understand, from the reasoning set out by the First-tier Tribunal, why the core issue in the appeal was concluded against her.

26. I therefore set aside the determination of the First-tier Tribunal.

Re-making of decision

27. I directed at the hearing that I would re-make the decision on appeal for myself. Neither party sought to persuade me to take a different course.

28. On all of the information before me, which includes brief oral evidence from the sponsor, and given the conclusions of the First-tier Tribunal that (i) the claimant knowingly used deception to obtain entry clearance as a tourist in 2011; and ii) that she was told by the travel agency in 2011 that she needed to employ deception otherwise her application for admission would be refused, I am satisfied that the Entry Clearance Officer has demonstrated to the required standard that paragraph 320(7B) has been made out and that the claimant previously breached UK's immigration laws by using deception in an application for entry clearance and that she deliberately made a false statement for the purposes of securing an advantage in immigration terms i.e. in order to ensure she gained admission to the United Kingdom so she could see her then boyfriend.

29. The appeal brought in relation to paragraph 319C Immigration Rules is consequently dismissed.

30. I now turn to Article 8 ECHR. At the hearing Ms Targonska submitted that the First-tier Tribunal had allowed the claimant's appeal on Article 8 grounds and that the Entry Clearance Officer had failed to appeal against that decision. I reject this submission.

31. Although (i) in the body of the determination the First-tier Tribunal refer to the submissions made by the claimant in relation to Article 8, as to which see paragraph 24 of the determination, and (ii) under the heading "Decision", the First-tier Tribunal "allow the appeal", there is no reference in the determination itself to findings being made in relation to Article 8 ECHR whether within the Immigration Rules or outwith the Rules. It is clear to me that the First-tier Tribunal judge only allowed the claimant's appeal under paragraph 319C of the Immigration Rules (with reference to paragraph 320(7B)) and that he did not go on to consider as a separate issue the Article 8 ECHR submissions that had been made by the claimant.

32. I now go on to consider this issue for myself.

33. I accept that the claimant met the sponsor in October 2010 and that the relationship between them quickly developed. The claimant met the

sponsor's family at the Spring Festival in 2011 and shortly thereafter, in April 2011, the sponsor was transferred by his company to the United Kingdom. The claimant and the sponsor nevertheless kept a close connection after the sponsor's arrival in the United Kingdom and he called her almost every day during his lunch break. The sponsor returned to China to spend Christmas and New Year with the claimant in 2011/2012. He again returned at the end of September 2012 for two weeks.

34. The marriage certificate in the applicant's bundle was issued on 9 October 2012. I have no doubt from the evidence before me that the claimant and sponsor are in a genuine, subsisting and committed marriage. They engage in regular telephone, Skype and MSN chat contact. The sponsor travels back to China to see the claimant whenever he can, this being roughly twice a year for 2 weeks on each occasion.

35. Of course I am only entitled to take into account evidence which appertains to the date of the Entry Clearance Officer's decision, i.e. 13 March 2013, but nevertheless it seems to me that the post-decision visits reflect on the fact that this was a genuine and subsisting marriage as of the date of the ECO's decision.

36. As to the sponsor, I have already set out above that he remains in the United Kingdom as a Tier 2 inter-company transfer migrant. As of the date of the Entry Clearance Officer's decision he had leave to remain in the United Kingdom until 6 July 2014 (that leave now having been extended as identified above)

37. There is ample evidence before me that the sponsor has a good income and certainly more than sufficient to adequately maintain himself and the claimant without recourse to public funds should she come to the United Kingdom. There would also be adequate accommodation available for the couple.

38. Save for paragraph 319C, my conclusions on which I have set out above, it is not submitted by the claimant that she meets any other of the Immigration Rules. In particular it is not now contended that the claimant meets the requirements of Appendix FM of the Immigration Rules. There is no discretion, whether based on exceptional circumstances or otherwise, arising under the terms of the relevant and applicable Immigration Rules.

39. This, though, is not the end of the matter. I must consider whether the ECO's decision is compatible with the claimant's Article 8 ECHR rights, as is now well established by authority– see for example MF (Nigeria) v SSHD [2013] EWCA Civ 1192, R (Nagre) v SSHD [2013] EWHC 720 and, most recently, MM (Lebanon) v SSHD [2014] EWCA Civ 985.

40. In Nagre Sales J said of the assessment outwith the Rules as follows:

> "29. ...New Rules do provide better explicit coverage of the factors identified in case law as relevant to analysis of claims under Article 8

> and was formerly the position, so many cases the main points for consideration in relation to Article 8 will be addressed by decision makers applying the new Rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of leave...
>
> 30. ...If, after the process of applying the new Rules and finding that the claim for leave to remain under them fails, the relevant official or Tribunal Judge considers it is clear that the consideration under the Rules has fully addressed any family or private life issues arising under Article 8, it will be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. ..."

41. On the facts of the instant case I have no hesitation in concluding that the claimant and sponsor share a family life together. I also have no hesitation in concluding that by refusing the claimant entry clearance there will be sufficiently severe interference with that family life so as to engage Article 8. However, the maintenance of effective immigration control is in the public interest (see Section 117B of the Nationality, Immigration and Asylum Act 2002).

42. Turning to the issue of proportionality, in MF (Nigeria) (paragraphs 44 to 45) the Court of Appeal frame the approach to be taken by a decision maker as follows:

> "44. ...The exceptional circumstances to be considered in the balancing exercise involves the application of a proportionality test as required by Strasbourg jurisprudence..."

43. It is important to recognise that proportionality must be considered in the context of the now particularised public interest as set out in the Immigration Rules, and there is a compelling public interest in refusing permission to enter to those persons who have failed to establish a right to enter under those Rules.

44. I have set out above the nature of the relationship between the claimant and the sponsor. They are in a genuine and subsisting marriage but are currently living in separate countries, with the sponsor being able to visit the claimant on perhaps a twice yearly basis for approximately two weeks on each visit. The claimant is unable to enter the UK under the Immigration Rules to be with her husband.

45. I weigh in the balancing exercise the fact that this situation has arisen because of the claimant's deception of an ECO in 2011. Whilst it is correct to say that the claimant was persuaded to deploy deception in 2011 by a travel agent, the fact remains that she undertook such actions knowingly. I do, however, remind myself and take into account the fact that despite deploying deception in 2011 the claimant in fact left the United Kingdom in accordance with the terms of her entry clearance at that time. She has

also now shown remorse for her actions. In addition I remind myself that the applicant would be adequately maintained and accommodated if she were to come to the United Kingdom to live with her husband.

46. Ms Isherwood submitted it to be of significance that no evidence had been provided to the Tribunal to the effect that the sponsor could not obtain a transfer back to China from his current employer and, in particular, no evidence had been provided of any attempts by the sponsor to secure such a transfer. I agree with Ms Isherwood in this respect. Neither, I observe, is there any evidence before me of consideration having been given by the sponsor to leaving his employment with his current employer and returning to China so that he can live with his wife there; this only being relevant, of course, should the sponsor's current employer not accede to a request for a transfer.

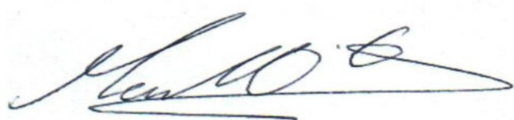
47. Looking at all of the facts of this case in the round, I find, in the absence of evidence to the contrary, that it is reasonable to expect the sponsor to return to China to live with his wife (the claimant), thus alleviating the current difficulties that the couple have in engaging in any meaningful family life. Whilst this is not determinative of the issue of proportionality it is a matter which, in this case, I consider to be of some significance and, when taken in the round with all other relevant features of this case, including, but not restricted to, (i) the fact that the sponsor played no part in the deception, (ii) that the claimant used deception on advice and that she then left the United Kingdom in accordance with the requirements of her leave, and (iii) if the claimant were to move to the United Kingdom there would be adequate maintenance and accommodation for her I, nevertheless, find that in circumstances where it is reasonable to expect the claimant's husband to relocate back to his homeland, it is proportionate to refuse the claimant leave to join her husband in the United Kingdom.

48. Even if it were not reasonable to expect the sponsor to move back to his homeland, I would still find, having looked at all the facts of the case as a whole, that the Entry Clearance Officer's decision to refuse entry clearance to the claimant to be proportionate to the legitimate aim of maintaining effective immigration control. The sponsor has been making, and can continue to make, visits back to China to see the claimant. There is, as yet, no child of the relationship and the marriage took place after the sponsor was transferred to the United Kingdom and after the deception employed by the claimant in order to ensure that she could visit the United Kingdom to be with her then boyfriend.

Decision

For the reasons set out above the determination of the First-tier Tribunal is set aside. Upon re-making the decision on appeal for myself, I dismiss it on all grounds.

Signed:



Upper Tribunal Judge O’Connor
Date: 11 August 2014