Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25820/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th September 2015	**On 22nd December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR XIJIN ZHANG

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Fijiwala (Senior Home Office Presenting Officer)
For the Respondent: Ms H Price (Counsel)

DECISION AND REASONS

1. It will be convenient to refer to the parties as follows: Mr Xijin Zhang is the appellant (as he was before the First-tier Tribunal) and the appellant in the Upper Tribunal is the Secretary of State. In a decision promulgated on 10th March 2015, First-tier Tribunal Judge Blake ("the judge") allowed the appellant's appeal against a decision to remove him from the United Kingdom. That decision followed refusal of an application for leave to remain in the United Kingdom in which the appellant relied on private and family life ties established in the United Kingdom since his arrival here in September 2003 with leave as a student.

2. The judge heard evidence from the appellant and from his wife and found that the couple had used their best endeavours to comply with the

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Immigration Rules ("the rules") and the law. The appellant's studies had come to an end due to his ill-health but the judge found that he would be able to gain employment in the future and would not prove to be a burden on the state. He found the marriage between the appellant and his wife to be genuine and subsisting and accepted that she had never been to China and did not speak the language there. He took into account the possibility that an application for entry clearance abroad, should the appellant return to China for this purpose, might not be successful under the rules. He found as a fact that the appellant could not bring himself within the rules in Appendix FM or paragraph 276ADE.

3. The judge went on to make an Article 8 assessment outside the rules, finding that the application for leave to remain "did not take into account the exceptional circumstances" of the case. These circumstances included the appellant's presence in the United Kingdom since 2003, his studies, the genuine and subsisting relationship with his British citizen wife, the fact that his wife had never been to China and did not speak the language and that when their relationship began, the appellant had leave to remain, albeit limited leave as a student. He found that it would be unduly harsh to expect the appellant's wife to accompany him to China, referred to authorities which included Hayat [2011] UKUT 00444 and Chikwamba [2008] UKHL 40, directing himself that if the only factor weighing on the Secretary of State's side of the balance was the policy of requiring an application to be made from abroad, that objective might be outweighed by factors on the appellant's side of the balance.

4. Overall, the judge concluded that there were exceptional circumstances and that the appellant's case was not fully catered for under the rules and that if he were required to leave the United Kingdom and return to China, the appellant would be unlikely to be able to return as a spouse as a result of the financial requirements of the rules. It would be unduly harsh to expect his wife to give up her rights as a British citizen and travel to a country she had never been to and where she did not speak the language. He allowed the appeal on Article 8 grounds.

5. The Secretary of State sought permission to appeal, contending that the judge erred in law in his approach to Appendix FM of the rules. In particular, the judge made no assessment regarding EX.1 and EX.2 of the rules and did not resolve whether there were insurmountable obstacles to family life continuing outside the United Kingdom, within the meaning of the latter paragraph. The judge could only properly make an Article 8 assessment outside the rules having first found that the appellant could not meet the requirements of EX.1. Secondly, in finding that it would be unduly harsh for the appellant's wife to accompany him to China, the judge did not take into account the particular meaning of EX.2 and did not explain why there would be very significant obstacles to family life continuing, other than mentioning that the appellant's wife did not speak the language and had lived in the United Kingdom all her life. There were no other findings relevant to the assessment.

6. Moreover, even if the judge had properly considered the matter in relation to EX.1 and EX.2 and was able to make an assessment outside the rules, he erred in this context too. He was required as a matter of law to take the failure under the rules into the Article 8 assessment. Instead, the judge identified factors in the appellant's favour which were already dealt with in EX.1. In giving weight to a possible failure in a future entry clearance application, the judge acted inconsistently with guidance from the Court of Appeal in SB (Bangladesh) [2007] EWCA Civ 28. Finally, the judge erred in failing to apply the mandatory requirements in section 117B of the 2002 Act.

7. Permission was granted on 1st May 2015. In a rule 24 response prepared on behalf of the appellant, it was contended first that permission was limited to the section 117B ground, it being accepted that the judge did not expressly apply the provision. Nonetheless, he dealt with the issues adequately, in the light of Dube [2015] UKUT 90 and gave proper weight to the maintenance of immigration control and to the financial position of the appellant and his wife. The appellant was able to show an ability to speak English. The judge was entitled to take into account that the appellant conducted himself responsibly at all times. Overall, the judge properly applied the provision and if there were an error, it was not material.

Submissions on Error of Law

8. Ms Fijiwala said that the grant of permission to appeal was not, in fact, confined to the section 117B point. There were four errors. The first was in relation to EX.1. The judge made a finding that the financial requirements of the rules were not met but should have considered EX.1. The IDIs gave guidance to caseworkers on the "insurmountable obstacles" test. This was different from a "reasonableness" test, as confirmed by the Court of Appeal in Agyarko [2015] EWCA Civ 440, at paragraph 21. Although the judge considered several aspects of the case outside the rules, at no point did he consider EX.1. The lack of knowledge of the language in China on the part of the appellant's wife was not an insurmountable obstacle but the judge gave this factor substantial weight in his assessment outside the rules. He failed to take into account the nature of the failure to comply with the rules or the public interest.

9. The second error concerned the judge's approach to the assessment outside the rules. Again, it was clear from Agyarko that in a case involving precarious family life, as here, it would be necessary to establish that there were exceptional circumstances requiring leave outside the rules. The judge failed to identify exceptional circumstances, referring instead to factors which were simply not exceptional. Completion of his studies by the appellant and future prospects of employment and the circumstances of his wife did not remotely amount to exceptional circumstances. In any event, the judge ought first to have considered EX.1 in the light of EX.2 and, perhaps, to have had regard to the Secretary of State's guidance in the IDIs. He ought to have stayed within the rules.

10. If the judge were able to go outside the rules, then paragraph 44 of the judgment in SS (Congo) [2015] EWCA Civ 387 showed the correct approach. The first step was to consider and apply the substantive content of the relevant rules, which he failed to do in this case, having paid no regard to EX.1. He ought to have assessed and identified the public interest as expressed in the rules but, again, failed to do so. Secondly, if the requirements of the rules were not met substantively, and if there were a reasonably arguable case under Article 8, not sufficiently dealt with by the rules, the proper approach required the individual interests of the appellant and his wife to be balanced against the public interest, including as expressed in the rules. Again, the judge failed to take into account the public interest properly. This approach was also emphasised in paragraph 24 of the judgment in Agyarko.

11. Thirdly, the judge erred in relation to the guidance he derived from Chikwamba. The proper approach required consideration of EX.1 rather than that case but, in any event, important guidance was given in Chen [2015] UKUT 00189, at paragraph 39. If it were shown that an application for entry clearance would be granted and that there would be significant interference with family life by temporary removal, this might reduce the weight to be given to the formal requirement of applying from abroad. The judge was required to assess the proportionality of a temporary separation and whether this would amount to such a significant interference with family life as to be disproportionate. Applying guidance from Chen to the present case, it simply could not be said that an entry clearance application would succeed, on the evidence before the First-tier Tribunal, as the judge himself made clear. In any event, the evidence did not show that a temporary removal would cause any significant interference with family life. Reverting to Agyarko, it was clear that family life was precarious, as it began when the appellant had student leave. There were no exceptional circumstances identified by the judge, justifying the grant of leave,.

12. Finally, the judge erred in relation to section 117B of the 2002 Act. There was no express mention of it and although the judge referred to Razgar [2004] UKHL 27, he simply did not apply the statutory provision. It was clear from his findings of fact that the appellant’s financial circumstances were unclear and his wife relied on benefits. There was no financial independence shown by the evidence, which was a relevant factor. Similarly, the judge took into account private life ties but section 117B required little weight to be given to them as they were established while the appellant was present here precariously.

13. Ms Price relied on the rule 24 response and developed the appellant’s case. She said that there was no material error of law and the Secretary of State’s grounds amounted to a disagreement with the judge’s findings. In any event, the judge could not be criticised for failing to take into account some of the authorities as he heard the case in February 2015.

14. Turning to the Secretary of State’s IDIs, guidance on insurmountable obstacles referred to very significant difficulties and very serious

hardships. The decision showed that the judge had these factors in mind. He focussed on several features: the appellant's wife had never been to China, did not speak the language and had spent her whole life in the United Kingdom. In addition, she was over the age of 40 and things might have been different if she were younger. The Secretary of State had wrongly concluded that the relationship began at a time when the appellant had no leave, whereas in fact it began when he was here lawfully as a student.

15. It was open to the judge to find that it would be unduly harsh for the appellant's wife to accompany him to China.

16. The judge made a clear finding that the requirements of the rules were not met and went on to allow the appeal outside the rules, under Article 8. So far as section 117B was concerned, it was clear from the judge's findings that the appellant was able to speak English, had been able to work lawfully for a long period of time, ceasing only because he had no leave to remain, that he was not a burden on the state and was able to integrate. Even if the judge had expressly considered the statutory provision, the result would have been the same. He was entitled to take into account that the appellant had been present here for eleven and a half years.

17. Ms Fijiwala had nothing to add to her submissions.

18. In a brief discussion regarding the venue for remaking the decision, if an error of law were found, Ms Fijiwala suggested that the Upper Tribunal was the appropriate venue, Ms Price submitting that paragraph 7.2 of the Senior President's practice statement suggested that it ought to be the First-tier Tribunal, so that an up-to-date assessment could be made.

Conclusion on Error of Law

19. The decision has been prepared by a very experienced judge and Ms Price is right to say that when he heard the case, the judgments in SS (Congo) and Agyarko were not available. They are, nonetheless, relevant authorities to be taken into account in considering whether the judge erred in law.

20. EX.1 and EX.2 of the rules, containing exceptions to certain eligibility requirements for leave to remain as a partner were, on the other hand, present and in force. So too was section 117B of the 2002 Act.

21. The decision has the virtues of concision and economy of style and the judge has clearly set out the findings of fact relevant to his assessment. There is no express mention of section 117B and although he clearly has considered the substance of part of that provision, Ms Fijiwala is right to point to material factors not taken into account. These include the clear statement that the maintenance of effective immigration controls is in the public interest and, additionally, financial independence as a factor tending to show that a claimant is not a burden on taxpayers and is better able to integrate into society. In this context, the finding that the

appellant might gain employment in the future, in the light of his successful studies, does not fully resolve the issue. It is also clear, for example from paragraph 90 of the decision, that the judge gave weight to the period of years that the appellant has been present here but section 117B(5) requires that little weight should be given to a private life established at a time when a person's immigration status is precarious. As a person present here with student leave, which in due course expired, the appellant's immigration status was indeed precarious, the decision of the Upper Tribunal in AM (Malawi) [2015] UKUT 260 giving guidance on this point. Again, however, the judge cannot be faulted for failing to take this decision into account as it was not available in February 2015.

22. Overall, the Secretary of State has shown a material error of law in the judge's failure to apply section 117B of the 2002 Act in substance. The decision in Dube certainly bears on his assessment but cannot rescue it as relevant factors were omitted.

23. There is also real force in Ms Fijiwala's submissions regarding EX.1 and EX.2. Having carefully read the grant of permission to appeal, I find that it does not confine the Secretary of State to arguing only the section 117B point. The decision shows that the judge moved from a finding that the requirements of the rules were not met to an Article 8 assessment outside them, without taking with him on that journey the nature of the failure to meet the requirements of the rules, as expressing or illustrating the public interest, and without engaging with EX.1 and EX.2 at all. His finding that expecting the appellant's wife to accompany him to China would be unduly harsh falls a little short of engaging with the Secretary of State's case that there were "insurmountable obstacles" to family life continuing in China. With great respect to the judge, the circumstances he identified regarding the appellant's wife, including the fact that she has never been to China, are of themselves insufficient to show exceptional circumstances or very significant difficulties which could not be overcome or which would entail very serious hardship.

24. In addition, it is clear from SS (Congo) and Agyarko that there is a need to identify compelling reasons, showing why an arguable case exists that leave should be granted outside the rules. The judge's finding at paragraph 75 of the decision that "a straight application of the Immigration Rules did not take into account the exceptional circumstances" required identification of those exceptional circumstances. Again, the findings of fact fall short here as they relate to factors engaged directly by the application of the rules. If the judge were to conclude otherwise, reasons were required.

25. Finally, I accept the Secretary of State's written ground regarding SB (Bangladesh) and Ms Fijiwala's submission regarding Chen. It is very difficult to reconcile the judge's finding that weight should be given to the likelihood that a future application for entry clearance would fail with the judgment in SB (Bangladesh). So far as Chikwamba is concerned, the landscape changed substantially with the coming into force of what are often described as "the new rules" in July 2012 and July 2014. No doubt in

the light of his assumption that a future application would fail, the judge did not consider the proportionality of a temporary separation between the appellant and his wife, for the purpose of making an entry clearance application from abroad. Chen shows that this is the correct approach.

26. For all these reasons, and again with very great respect to the experienced judge, I conclude that the decision of the First-tier Tribunal contains material errors of law and must be set aside and remade.

27. Although the judge did make some clear findings of fact, taking into account the passage of time and the need to engage with the rules, including EX.1 and EX.2, I agree with Ms Price that the appropriate venue for remaking the decision is the First-tier Tribunal at Taylor House. There will be a need for substantial fact-finding and paragraph 7.2 of the practice statement made by the Senior President in 2012 suggests that remittal to the First-tier Tribunal is appropriate.

NOTICE OF DECISION

The decision of the First-tier Tribunal is set aside and shall be remade in the First-tier Tribunal at Taylor House, before a judge other than First-tier Tribunal Judge Blake.

ANONYMITY

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell