IAC-AH-CO-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49065/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8th January 2015	**On 20th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS LINGLING SUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of China born on 23rd November 1981. The Appellant instructed solicitors who had made application on her behalf for leave to remain as the unmarried partner of a British citizen. That application was refused by the Secretary of State by Notice of Refusal dated 18th February 2013. In refusing the application consideration was also given to the Appellant's family life under Article 8 in which it was noted fell since 9th July 2012 under Appendix FM of the Immigration Rules.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Scott-Baker on 24th July 2014. In a detailed determination promulgated on 10th September 2014 the Appellant's appeal was allowed under the Immigration Rules.

3. On 19th September 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds were based on two premises. Firstly the judge had failed to consider Section 19 of the Immigration Act 2014 and secondly that the Tribunal had erred in the interpretation of "insurmountable obstacles" under EX.1.

4. On 26th November 2014 Judge of the First-tier Tribunal Chohan granted permission to appeal. Bearing in mind subsequent arguments by the legal representatives to me it is relevant to set out verbatim part of the judge's reason for decision in granting permission.

> "3. It is true that the judge has failed to consider Section 19 of the Immigration Act which is applicable at the date of hearing. However it is apparent from the determination that the issue for the judge was in respect of paragraph EX.1 of the Immigration Rules. Section 19 of the 2014 Act only comes into play, and in particular Section 117B of the Nationality, Immigration and Asylum Act 2002, when the Tribunal considers Article 8 of the ECHR. That was not the case before the judge. Therefore, it is difficult to see how that was an error on the part of the judge.
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> 4. However as far as paragraph EX.1 is concerned, it may be open to argument that the judge had given inadequate reasons as to why the Appellant could not return to China and whether financial circumstances alone can justify allowing an appeal under the said paragraph. The Respondent points out in the application that the Appellant gave evidence to the effect that '...his family would be willing to visit China...'. Clearly, that needs to be explored further.
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> 5. Hence, I find that there may well be an arguable error of law for the reasons set out above."

5. No Rule 24 apply is served by the legal representatives of the Appellant. I do note that there was a request made for an extension of time over the Christmas period and that that was refused. It is on that basis that the appeal comes before me. For the purpose of continuity throughout proceedings Miss Sun is referred to herein as the Appellant the Secretary of State as the Respondent. The Appellant appears by her instructed Counsel Mr Fripp. Mr Fripp is the author of a most helpful note provided to me on the law on insurmountable obstacles. The Secretary of State appears by her Home Office Presenting Officer Mr Bramble.

Preliminary Point

6. The initial submissions/discussions concentrate on whether or not Judge Chohan granted permission to the Secretary of State to appeal on the basis that the judge had failed to consider Section 19 of the Immigration

Act. The argument concentrated on consideration of when paragraph 3 of Judge Chohan's grant of permission is looked alongside paragraph 5 had he or had he not granted permission on that particular ground. It was Mr Bramble's contention on behalf of the Secretary of State that he had and it was Mr Fripp's that he had not.

7. The three paragraphs are set out above. It is clear that permission was granted on the second ground i.e. that set out in paragraph 4. I acknowledge that more than one interpretation could be put on whether or not permission was granted on paragraph 3. I took the view that it was. My reasons were firstly that had it not been granted then I considered that the judge would have not used evasive words but would have been specific and secondly because the general premise is, and there is case law to support this, that leave will be granted on all grounds unless it is specifically refused.

Submissions/Discussion

8. Mr Fripp took the view that if that were the case it would in any event act in the Appellant's favour. He submits that the First-tier Tribunal Judge applied the Rule properly pointing out that it is wholly a matter of conjecture if the Rules were not found to be a complete code as to what would happen on a freestanding Article 8 assessment. However he points out that the Appellant speaks English, is economically self-sufficient and that when she started her relationship which is the subject of this appeal she had leave to remain in the United Kingdom. He consequently submits that the 2014 Act actually is of benefit to her position.

9. Mr Bramble seeks to rely on the general paragraph in opening to "Appendix FM family members" to be found at page 1031 of the Eighth Edition of Phelan relying on opening paragraph headed "Purpose". He points out that the Appellant's leave expired in 2012, submits the judge should have made a direct reference to Section 117(b) of the Nationality, Immigration and Asylum Act 2002 and that there has been no assessment made of the public interest.

10. Mr Fripp submits that the judge has directed herself appropriately and that whether or not the relevant test is satisfied is a matter of fact and that the judge had to address these issues with care and that the judge's decisions are well reasoned and should only be set aside if they are perverse. He submits that on no possible interpretation could such an analysis be concluded.

11. On the second ground as to whether or not the Appellant can gain relief by meeting the test for "insurmountable obstacles" under paragraph EX.1(b) Mr Bramble contends the judge has not taken into account all the factors when making her fact-finding assessment and that she has not made an assessment as to whether or not the Appellant's partner Mr Murados would or could not travel to China.

12. Mr Fripp submits that the Secretary of State's appeal is a hopeless case. He submits that the judge has looked at paragraph EX.1 and refers me to his skeleton argument on insurmountable obstacles. He submits that the judge has made careful findings of fact at paragraphs 36 and 37 and has applied the appropriate test. The facts that the Sponsor's family are prepared to visit China does not in any way affect the factual position. He submits that this is merely simply argument and disagreement by the Secretary of State and he asked me to dismiss the appeal and to maintain the decision of the First-tier Tribunal Judge.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

15. The statute

    Section 117B

    Article 8: public interest considerations applicable in all cases

    (1) The maintenance of effective immigration controls is in the public interest.

    (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

The Rules

Section EX.1

This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(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.

Findings

16. The determination of Judge Scott-Baker is well constructed and well reasoned. It is debatable looking at the determination where it is specifically stated at paragraph 37 "there was no challenge at the hearing by Miss Dhadda (Home Office Presenting Officer) the evidence and it was accepted by the parties that the only issue was whether paragraph EX.1 was satisfied." As to whether Section 117B was ever argued before the Immigration Judge. That indeed was the view expressed by Judge Chohan when granting permission and he concluded it was difficult to see in such circumstances how a failure to consider it could in anyway be considered an error by the judge. It has to be remembered Section 117B identifies circumstances that are in the "public interest" in Article 8 cases and gives them statutory force. Even allowing whether or not this paragraph should or should not have been considered in this particular instance it has to be remembered that it effectively codifies the previous approach that was expected to be considered by Immigration Judges when addressing issues under Article 8.

17. I am satisfied that so far as it is relevant these issues have been considered by the judge and in any event I am supportive of the approach adopted by Mr Fripp that this is an Appellant who is fluent in English, economically self-sufficient and entered her relationship at a time when she was lawfully within the United Kingdom. In such circumstances I do not consider that the Secretary of State can benefit from Section 117B and that the judge has given general consideration to these factors within her determination albeit that she has not specifically made reference to Section 117. I do not consider that she was obligated to do so and I find that this submission by the Secretary of State to be weak and not sustainable. Failure to make reference to Section 117B does not constitute therefore any material error of law.

18. I turn next to the main submission namely that the Tribunal has erred in the interpretation of "insurmountable obstacles." I find that such contention is totally without foundation. The judge has carried out a detailed factual analysis at paragraph 36 as to the situation of the Appellant's partner Nathan Murados and as to his personal and financial circumstances and what would be required of him if he had to leave the UK to go and live in China with the Appellant. Such analysis is further emphasised at paragraphs 39 and 40. The judge has carried out a full and detailed analysis of the phrase insurmountable obstacles and has reached findings which are not perverse but ones which she is in fact perfectly

entitled to have reached that the Appellant meets the requirements of paragraph EX.1(b) of insurmountable obstacles.

19. The law is very helpfully set out to me in Mr Fripp's note. "Insurmountable obstacles" is not a term apart but rather an indicator that a proportionality analysis is necessary. Requirements for insurmountable obstacles were set out by the Master of the Rolls Lord Dyson in *MF (Nigeria) v SSHD [2013] EWCA Civ 1192*.

> "We would observe that, if 'insurmountable' obstacles are literally obstacles which it is impossible to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paragraphs 53 to 59, such a stringent approach would be contrary to Article 8."

20. I have given due consideration to the relevant paragraph from *Izuazu (Article 8 – new rules) Nigeria [2013] UKUT 45 (IAC).* The approach adopted therein has been considered by the First-tier Tribunal Judge. She has made findings of fact that she was entitled to namely that there would be a very serious hardship for the Appellant's partner in continuing family life outside the UK. The First-tier Tribunal Judge has not only made such finding but at paragraphs 36, 39 and 40 set out detailed reasons as to why she finds there to be insurmountable obstacles in this case. Her conclusion at paragraph 41 is one that the First-tier Tribunal Judge was entitled to make. There is no error of law in the decision of the First-tier Tribunal Judge and the submissions of the Secretary of State merely amount to little more than disagreement in an attempt to reargue issues that have already been fully and most properly aired before the First-tier Tribunal. In such circumstances I find there is no material error of law in the determination of the First-tier Tribunal Judge and I dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge is maintained.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed Date **8th January 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date **8th January 2015**

Deputy Upper Tribunal Judge D N Harris