Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01298/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 September 2019	**On 17 September 2019**

Before

UPPER TRIBUNAL KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MS RUIRONG REN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Kannangara, counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before us for consideration as to whether or not there is a material error of law in the decision of First-tier Tribunal Judge Fowell who dismissed the appellant's appeal against the respondent's refusal of her application for further leave to remain in the UK. Judge Fowell's decision was promulgated on 25 June 2019.

2. No anonymity direction was made in the First-tier Tribunal and none is required now.

Background

3. The appellant is a Chinese citizen born on 1 October 1962. She arrived in the UK on a visit visa in 2004 and remained in the UK as an overstayer.

4. The appellant entered the UK using her own name and date of birth (as in this appeal). She claimed asylum in 2004 using a false name and date of birth: Xue Li, born 1 October 1972.

5. In 2009 the appellant attended the respondent's office in Croydon to apply for an application residence card ("ARC") in the name of Xue Li. She says that, as her fingers were damaged, she was unable to give her fingerprints. An ARC was subsequently issued to the appellant by the respondent in the name of Li Xue Li, rather than Xue Li. Her date of birth on the card was also different: 21 February 1960.

6. The appellant noticed these errors when she left the respondent's building with the card. She says she felt scared and vulnerable; she felt unable to identify the errors to the respondent. She used the ARC to obtain a national insurance number in the name of Li Xue Li and was employed in that name.

7. The appellant was subsequently granted discretionary leave to remain ("DL"), in the name of Li Xue Li, from 9 September 2011 to 8 September 2014. She was granted further leave in that name from 4 March 2015 to 3 March 2018.

8. In the meantime, by way of her solicitors' letter of 29 November 2017, the appellant applied to the respondent for "a new biometric residence permit card as her details on her current card are incorrect". She submitted a transfer of conditions application with that letter, seeking to change her name and date of birth to her genuine name and date of birth. That application was refused on 15 January 2018. The appellant then submitted on 14 February 2018, in her own name, an application for further leave to remain. The respondent refused that application. It was considered the appellant did not meet the suitability criteria in the Immigration Rules, specifically S-LTR.4.2 and S-LTR.4.3, the appellant having made false representations in a previous application. The respondent also concluded that there were not very significant obstacles to the appellant's integration on return to China (paragraph 276ADE(1)(vi)) insofar as her private life was concerned. The respondent also relied, on similar grounds, on paragraph 353.

9. It is that refusal decision which was the subject of appeal before Judge Fowell.

10. Judge Fowell found that, although it had been dishonest of the appellant to give a false name (Xue Li) and not to have corrected it when she had realised she had been issued papers in the name of Li Xue Li, her benefit from the deception had been "unplanned" and that it was not a "suitability issue". Judge Fowell concluded at [28] that neither the "initial or evidential burden of proving dishonesty [had been] made out". Judge Fowell concluded however that the appellant had not demonstrated there were very significant obstacles to her integration on return to China. The judge also found the appeal could not succeed pursuant to the Article 8 jurisprudence outside the Rules, there being no disproportionate interference with the appellant's protected rights.

11. Permission to appeal was granted in the First-tier Tribunal in the following terms:

> "… in the light more especially of judicial findings concerning the respondent's failure to substantiate the initial burden on them to show deception (28) and

> positive findings concerning the appellant vis a vis the suitability grounds and/or her bona fides generally (29), there was arguable [sic] that the Judge misdirected themselves on the law giving rise to material error (9), in confining consideration of the state's requirements to the Immigration Rules, and failing to weigh the respondent's guidance, specifically (HO API 'Discretionary Leave' (V.7.0 18/08/2015) S.10 Transitional Arrangements) in the Art 8 closing proportionality assessment and therein the requisite balancing exercise concerning the competing private interests of the individual appellant and the public interest represented by the respondent, contrary to **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC).**"

12. Hence the matter came before us.

Submissions

13. Mr Kannangara, for the appellant, adopted the grounds of appeal. The nub of his oral submissions is that Judge Fowell should have considered, in the Article 8 proportionality assessment, the respondent's policy, Asylum Policy Instruction, Discretionary leave, version 7.0, published on 18 August 2015, as in the appellant's bundle. No blame attached to the appellant who had contacted the Home Office in 2009 and been issued an ARC in the name of another person. The appellant had not contributed to that mistake; she had noted it immediately but had been too scared to inform the Home Office of it; "her mind was not right". He submitted it was relevant that the name allocated to the appellant on the ARC was similar to that used by the appellant when she had claimed asylum. It was argued that there was no significant change in the appellant's circumstances; she was asking for settlement on the same basis as it had been granted in 2011. In that year she had assumed that her asylum claim had been refused and that she had been granted discretionary leave. It was accepted there was no evidence it had actually been refused.

14. For the respondent, Ms Isherwood submitted that the appeal was being re-argued by the appellant. The respondent had not challenged the findings of Judge Fowell on the alleged deception but, nonetheless, the Judge had found the appellant had used a false name and had obtained a national insurance number in that false name. The appellant's immigration history was relevant to the proportionality assessment, including her use of a different name and date of birth. Section 10.1 of the discretionary leave guidance was applicable to the appellant who had previously been granted discretionary leave on a false premise. The application which had given rise to the refusal under appeal had been made in the appellant's own name. Thus the circumstances of the grant of discretionary leave were significantly different to the appellant's circumstances at the date of application. In summary, the findings were open to Judge Fowell. Furthermore, she submitted, it was not correct to state that the appellant's asylum claim remained outstanding.

Discussion

15. It is not in dispute between the parties that the appellant used a false name to claim asylum in about 2004. The parties also agree that the appellant has used three names: her own name to enter the UK on a visit visa in 2004; a false name and date of birth to pursue an asylum claim; and the identity of another person in whose name an ARC was issued by the respondent in 2009.

16. Ms Isherwood does not challenge the assertion that Judge Fowell should have considered the

respondent's guidance in his assessment of proportionality pursuant to the Article 8 analysis outside the Immigration Rules. We have had regard to that guidance: the Home Office Asylum Policy Instruction, Discretionary leave, version 7.0, published on 18 August 2015. Section 10 deals with transitional arrangements in place following the significant amendments to the Immigration Rules in July 2012. It sets out the guidance for "applicants granted DL before 9 July 2012" as is the case for the appellant who was first granted DL in 2011. It provides as follows:

> "Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing 6 years' continuous DL (or where appropriate a combination of DL and LOTR, see section 8 above)), unless at the date of decision they fall within the restricted leave policy.
>
> Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further period of 3 years' DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See section 5.4.
>
> If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused. …"

17. We agree that Judge Fowell should have taken this policy into account in his assessment of proportionality. The existence of relevant guidance is indicative of the weight to be given to the maintenance of effective immigration control, a public interest factor pursuant to s117b(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). His failure to take that policy into account is an error of law.

18. As regards the remaining grounds of appeal to this tribunal we are unable to find that they demonstrate errors of law for the following reasons.

19. There is some confusion regarding the suggestion in the grounds of appeal to this tribunal that the appellant had been granted five years' leave "under the legacy scheme". It is submitted she had "completed five years at the time of grant of discretionary leave (2004-2009)". However, we also note from her solicitors' letter of 15 February 2018 that "her asylum application was refused". Furthermore, the appellant's solicitors also refer, in correspondence to the respondent, to the appellant's "discretionary leave [being] granted mainly based on her residence in the UK". We give little weight to this submission therefore. In any event, it is something of a side issue.

20. It is also submitted in the grounds that the appellant's "asylum claim is still outstanding and that amounts to breach of her rights under the Refugee Convention". The appellant's own evidence does not support this assertion. In any event, it was not open to the appellant to pursue this claim in the First-tier Tribunal without the consent of the respondent (section 85(5) of the 2002 Act). This is not a ground of appeal which Mr Kannangara raised in his oral submissions and we infer that he accepts it is unsustainable on the evidence before the First-tier tribunal.

21. For the avoidance of doubt we make the point that the decision of the respondent to refuse to transfer the appellant's conditions was not before Judge Fowell. We do not accept there is a material misdirection in the Judge's decision as regards the application of the respondent's transfer of conditions policy. The grounds refer to the findings at [29] of the decision where Judge Fowell found that the benefit to the appellant of using the false name was "unplanned". While another conclusion could have been reached on the evidence, it was one which was open to the Judge to make on the evidence. In any event, for the reasons set out below, the issue of whether or not the appellant received a benefit from her use of the false name attributed to her by the respondent is immaterial.

22. We turn to the issue of materiality and bear in mind the guidance of this tribunal in **IA (Somalia) v Secretary of State for the Home Department [2007] EWCA Civ 323; [2007] Imm AR 685**, at [15], where Keene LJ said:

> "… in public law cases, an error of law will be regarded as material unless the decision-maker must have reached the same conclusion without the error … [A]n error of law is material if the Adjudicator might have come to a different conclusion … "

23. We also bear in mind the decision of this tribunal in **ML (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 844**, at [14]-[17] (Moses LJ) and [20] (Sir Stanley Burnton). The test which was established in that case was that the outcome must be "inevitable" if an error of law is to be regarded as being immaterial.

24. The appellant was initially granted DL in 2011 in the false name which was attributed to her by the respondent in 2009 when an ARC was issued to her in that name. The appellant therefore perpetuated the respondent's error by applying for leave in that name. She then applied for further leave in that false name three years later. While we have regard to the findings of Judge Fowell on the issue of dishonesty (and these are not challenged before us) the appellant misrepresented her identity in those two applications. Leave was granted on the basis of a misrepresentation. Judge Fowell acknowledged as much at [29].

25. Thus even if Judge Fowell had taken into account the terms of the respondent's discretionary leave policy, he would have found that the "circumstances prevailing at the time of the original grant of leave" had significantly changed. At the date of decision, the respondent was aware that the grants of discretionary leave in 2011 and 2014 had been to a person using a false name. The appellant's case is that she did so without blame but she misrepresented her identity by using a false name, albeit attributed to her by the respondent in error, when making two applications for DL. We do not accept that "mere adoption of the name given by the respondent" (as asserted in the grounds of appeal to this tribunal) absolves the appellant. In any event, irrespective of the issue of blame, this is a significant change of circumstances. The policy does not require that the circumstances relate to the applicant personally or that the applicant is somehow blameworthy. It is worded in such a way as to include circumstances, as here, where the respondent had issued the initial and subsequent grants of DL on the basis of error combined with the appellant's misrepresentation of her identity. By the date of decision this had become apparent. We are in no doubt there was a significant change in circumstances as between 2011 (and 2014) and 2018.

26. We find therefore that even if Judge Fowell had taken into account the respondent's policy, the outcome of this appeal would have been no different.

Decision

27. The making of the decision of the First-tier Tribunal did not involve a material error of law and the decision is preserved.

28. This appeal is dismissed.

Signed A M Black Date 13 September 2019
Deputy Upper Tribunal Judge A M Black