Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12179/2019

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 16 July *via Skype for Business*	**On 03 August 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NI YAYUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms L. Brakaj, Solicitor, Iris Law Firm
For the Respondent: Mr S. Walker, Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to are in an application for permission to appeal by the Secretary of State, the grant of permission to appeal, and the decision of the First-tier Tribunal, the contents of which I have recorded. I also had access to the full file from the FTT.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the hearing had been fair in its remote form.

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Bircher promulgated on 11 December 2019 in which she allowed an appeal by the respondent against a decision of the Secretary of State dated 1 July 2019 to refuse her human rights application.

2. I will refer to the parties using the terminology from the First-tier Tribunal.

3. Judge Bircher made an anonymity order in favour of the appellant. Ms Brakaj, who appeared below, informed me that she did not apply for an anonymity order in the First-tier Tribunal, and could not see any reason for one to be made or maintained. I agree. There are no special considerations in this case such that the normal principle of open justice may be displaced. I lift the order.

Factual background

4. The appellant, Ni Yayun, is a citizen of China born on 21 August 1975. She claims to have entered the United Kingdom clandestinely in 2006. Her husband, who was granted indefinite leave to remain by the respondent in July 2010, entered clandestinely some years before that. Together they have two adult children in China who were brought up by their grandparents. On 14 January 2019, the appellant applied for leave to remain on the basis of her private and family life with her husband. That application was refused, and it is that refusal decision which was under challenge before the First-tier Tribunal.

5. The judge outlined the background of the appellant's immigration history and her earlier, unsuccessful, applications to the respondent. She had applied for asylum in October 2013; that application was refused in April 2015, and an appeal brought by the appellant before the First-tier Tribunal was dismissed in July 2016, with the result that the appellant became appeal-rights exhausted on 20 July 2016.

6. Addressing the appellant's family circumstances, the judge noted that the appellant's husband was granted indefinite leave to remain as a result of a legacy programme at the time, and that the appellant had lived here for approximately 14 years. Her husband runs a takeaway, which employs four people. The business has generated enough income to support the appellant and her husband without recourse to public funds. The appellant has some minor health conditions, and stress and anxiety arising from her concern for the future.

7. The judge heard evidence from the appellant and her husband and outlined the reasons for refusal relied upon by the Secretary of State in some depth.

8. At [25], the judge outlined the requirements of the Immigration Rules, insofar as they applied to the appellant: paragraph EX.1(b) of Appendix FM provided that the appellant would only be entitled to leave to remain if there were "insurmountable obstacles" to her and her husband continuing their relationship in China. At [27], the judge directed herself concerning the Supreme Court's approach to what amounts to "insurmountable obstacles", in light of the jurisprudence of the European Court of human rights: see Agyarko v Secretary of State for the Home Department [2017] UKSC 11. At [29], the judge noted that the "ultimate question" was whether a decision concerning an application for leave to remain on human rights grounds struck a fair balance between the interests of the applicant under Article 8 of the convention, and the public interest in immigration control. She noted that:

> "Although leave to remain might be granted outside the rules in exceptional circumstances, such circumstances, while not 'unusual' or 'unique', had to be compelling, such as produced [*sic*] unjustifiably harsh results which would make removal disproportionate."

9. At [31] and following, the judge noted the requirements of Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), and the need to conduct a balancing exercise when deciding whether a proposed interference with a person's article 8 rights would be proportionate. At [35], the judge noted that the maintenance of immigration control is necessary in order to "preserve or to foster the economic well-being of the country" and also to protect "health and morals and for the protection of the rights and freedom of others", reconciling the domestic policy objectives behind controlling immigration with the permitted derogations under article 8(2) of the Convention. At [37], the judge set out the five Razgar questions.

10. The judge accepted that the appellant and her husband were in a genuine marriage, finding that they have two adult children who reside in China. It was "reasonable to conclude" that the appellant had worked illegally alongside her husband. The judge was satisfied that the appellant and her husband suffered from physical and mental health problems. They had each been prescribed with medication to cope with anxiety and stress, and the appellant had been prescribed inhalers and steroid cream due to her asthma and eczema. She found that the couple provided mutual support for each other while working long hours together in their business and living together.

11. At [42], the judge noted that the appellant's husband had been granted indefinite leave to remain, despite being an illegal entrant himself, due (in the words of the respondent at the time) "to the strength of connections in the United Kingdom, length of residence in the United Kingdom and compassionate circumstances".

12. At [45], the judge commenced her analysis of whether there would be "insurmountable obstacles" to the couple returning to China. She found that they would not experience insurmountable obstacles. They have two adult children there and their own elderly parents, and would be able to secure temporary accommodation with them until they were able to secure employment and establish themselves in their own home. Despite the drop in living standards that a return to China would necessarily entail, they would not experience "very significant difficulties" in the event of their return. As such, the judge found that the appellant could not succeed in her appeal by reference to Article 8 as articulated by the Immigration Rules.

13. The judge allowed the appeal because, she stated at [49], she was satisfied that the interference in the Article 8 rights of the appellant and her husband would not be proportionate to the pursuit of a legitimate aim. At [50], the judge noted that the appellant's husband had lived here for 19 years and reiterated the basis upon which the respondent granted him indefinite leave to remain, as outlined at paragraph EX.1, above. She added that the appellant had lived here for 13 years, and that it was reasonable to conclude that she and her husband had connections in this country, formed over the 13 years (at the date of the hearing) for which the appellant had lived with her husband in this country. She considered those factors to amount to compassionate circumstances. She observed that there was a disparity of approach between the appellant and her husband on the part of the respondent, although observed that neither had attempted to disclose the appellant's presence in the United Kingdom at the time her husband's legacy application was successful.

14. The judge noted, and was clearly aware of, the fact that the appellant had a poor immigration history, and, together with her husband, had a long-term plan to re-establish themselves in this country. The high point of the judge's reasoning for allowing the appeal was the length of time the appellant's husband had lived in the country, coupled with the longevity of his relationship with his wife. An application for entry clearance, where the appellant to leave with a view to re-entering, would be unlikely to be successful; although the appellant's husband's business provides a "modest income" which is sufficient to support them both, it is unlikely to generate an income capable of satisfying the requirements of the Immigration Rules. They can manage on the funds they generate in this country, but the appellant's husband would struggle to generate sufficient funds for him to live off, and to remit to the appellant, in the event that she were to return to China without him.

15. At [59], the judge found that the appellant and her husband are integrated into the United Kingdom, having established a takeaway business, which will serve the local community. They have many friends and supporters, as demonstrated by the numerous letters of support included in the appellant's bundle. In the same paragraph, the judge continued with a reference to Chikwamba v Secretary of State for the Home Department [2008] UKHL 40:

> "…the House of Lords had to address the question of: when determining an appeal under section 82 of the 2002 act on the ground that to remove the appellant would interfere disproportionately with his Article 8 right to respect for his family life, when, if ever, is it appropriate to dismiss the appeal on the basis that the appellant should be required to leave the country and seek leave to enter from an entry clearance office [*sic*] abroad? The answer was "comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant reply fully from the board."

16. At [60], the judge outlined her global conclusion that refusal of the appellant's application for leave to remain in this country would result in "unjustifiably harsh consequences" for the appellant and her husband. She allowed the appeal on article 8 grounds, considered outside the Immigration Rules.

Grounds of appeal

17. The Secretary of State appeals on the basis that the judge "failed to apply adequate weight to the public interest in maintaining a fair and just system of immigration [control]", by failing to identify anything exceptional about the appellant's circumstances which would be capable of meriting a grant of leave to remain outside the rules, and that her reliance on Chikwamba was irrational. The judge should not, contend the grounds of appeal, have given the weight to the appellant's case that she did when performing the balancing exercise.

18. Permission to appeal was granted First-tier Tribunal Judge E.M. Simpson.

Discussion

19. I accept that the judge's apparent reliance on Chikwamba at [59] appears to be an error. However, I can deal this point shortly. Although the judge mentioned the authority, and quoted from it, it appears that she did so in a way which had no impact on her operative analysis of the Article 8 balancing exercise, which had primarily been conducted in the preceding paragraphs. It is clear from [55] that the judge accepted that the appellant would be *unable* to meet the requirements of the Immigration Rules, were she to attempt to make an application for entry clearance from overseas, so her discussion of Chikwamba cannot have been intended to apply to the facts of the case. It is also clear from the judge's detailed self-direction, set out in my summary of her decision, above, that the Article 8 principles which lay at the heart of her decision did not relate to Chikwamba reasoning. Nor does the appellant have any minor children, which was the focus of the excerpt from Chikwamba. At the heart of the judge's analysis lay her concerns about the length of the appellant's residence in this country, the (unchallenged) reasons she considered were adopted by the respondent when granting indefinite leave to remain to her husband in similar circumstances, and her operative conclusion, at [60], that it would be "unjustifiably harsh" to expect her to leave the United

Kingdom. The judge's mention of Chikwamba was an unfortunate error, but an error which did not have an operative impact on her overall findings. It is necessary to read the decision as a whole; when read it that way, it is clear that the erroneous reference to Chikwamba did not infect the judge's overall reasoning.

20. That leaves the remaining grounds of appeal advanced by the Secretary of State. They are, in the terms relied upon by the Secretary of State, disagreements of weight. Barring irrationality, weight is a matter for the judge. In Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC), this tribunal held that:

> "(ii) Permission should only be granted on the basis that the judge who decided the appeal gave insufficient weight to a particular aspect of the case if it can properly be said that as a consequence the judge who decided the appeal has arguably made an irrational decision. As the Court of Appeal said at para 18 of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence.
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> (iii) Particular care should be taken before granting permission on the ground that the judge who decided the appeal did not "sufficiently consider" or "sufficiently analyse" certain evidence or certain aspects of a case. Such complaints often turn out to be mere disagreements with the reasoning of the judge who decided the appeal because the implication is that the evidence or point in question was considered by the judge who decided the appeal but not to the extent desired by the author of the grounds or the judge considering the application for permission. Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material."

21. The Secretary of State did not advance a rationality-based challenge to the overall findings of the judge. While the grounds of appeal disagree in strong terms with the judge's overall conclusion, I do not consider that the judge's overall decision was not rationally open to her on the evidence before her. I accept that this was a generous decision, and one which a great many judges would not have reached. However, the judge noted the public interest in the maintenance of immigration control, and the need to consider the public interest factors in Part 5A of the 2002 Act. She was well aware of the defiant attitude to immigration control previously exhibited by the appellant. She took those factors into account. It was, in principle, open to the judge to find that the longevity of the appellant's residence, combined with the reasons the respondent had previously given when granting the appellant's husband indefinite leave to remain in similar circumstances, amounted to exceptional circumstances. The respondent did not challenge the judge's summary of why the appellant's husband was granted indefinite leave to remain in 2010, so those findings are unchallenged findings of fact with which I cannot interfere.

22. Indeed, while not conceding the appeal and maintaining his attack on the weight ascribed by the judge to the public interest in the maintenance of immigration control, Mr Walker did note that he saw the force in the approach of the judge, given the length of her husband's residence here, and that of her own. That Mr Walker realistically accepted that some of the judge's concerns were valid highlights how this was a decision which, albeit it at the most generous end of the spectrum, was nevertheless within the range of decisions that the judge was entitled to reach.

23. While the judge's analysis could have been clearer had it not featured the erroneous citation of Chikwamba, and while it would have aided the parties' scrutiny of her decision had she adopted the frequently-recommended "balance sheet" approach when assessing the public interest in the appellant's removal, I consider that she gave tolerably clear reasons for reaching her findings. The grounds of appeal are a disagreement of weight with a decision which featured the correct self-directions, and which took into account the correct factors. As the Court of Appeal noted in Jose Herrera v Secretary of State for the Home Department [2018] EWCA Civ 412 at [18],

> "Appellate tribunals must always guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors."

24. This appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law such that it need be set aside.

This appeal is dismissed.

The anonymity order made by the First-tier Tribunal is lifted.

Signed *Stephen H Smith* Date 20 July 2020

Upper Tribunal Judge Stephen Smith