



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/22838/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15 November 2019

Decision & Reasons Promulgated  
On 7 January 2020

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LAI HEONG LAO  
(aka YU WAY KIM; aka CINDY)  
[NO ANONYMITY ORDER]

Respondent

Representation:

For the appellant: Mr Ian Jarvis, a Senior Home Office Presenting Officer  
For the respondent: Mr T Aitken, Counsel instructed by UK Migration Lawyers Limited

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against the Entry Clearance Officer's decision to refuse the claimant entry clearance to join her sponsor, a British citizen, under Appendix FM of the Immigration Rules HC395 (as amended).

## Background

2. The claimant is a citizen of the People's Republic of China with a passport issued by the Macau Special Administration Region. She was born on 7 June 1965 and married Kong Wai Hong in Macau on 13 October 1992. They have three children together. The claimant's children are estranged from her by reason of the separation and divorce between their parents. Her mother still lives in Macau and they appear to have a good relationship. The claimant's marriage was dissolved by the Macau Primary Court, Family and Minors division, on 6 October 2017.
3. The claimant came to the United Kingdom unlawfully in 2006. In August 2007, the claimant was arrested and served with removal directions as an illegal entrant, giving her name as Yu Way Kim. She was granted temporary admission, but absconded without reporting as required.
4. In December 2007, she met the sponsor, [SRM], at a New Year party and they began a relationship. The claimant told him her name was Cindy, and later, that it was Yu Way Kim, but did not disclose the identity which she now says is her real name, Lai Heong Lao.
5. The claimant was arrested again three years later, on 2 October 2010, granted temporary admission, but failed to comply with reporting requirements and absconded for a second time. This was when Mr [M] discovered that her real name was Lai Heong Lao.
6. The claimant was next heard of in October 2012, applying for leave to remain on the basis of her relationship with Mr [M]. The Secretary of State refused her leave to remain on the basis of that relationship in October 2013, and the claimant finally left the United Kingdom on 16 February 2015, 18 months after the refusal.
7. The claimant made the present application using a passport issued in Macau on 17 March 2015 in the Lai Heong Lao identity, which did not disclose the two previous visits, nor the fact that she had previously used a different identity, Way Kim Yu. The claimant stated only that she had previously been known as 'Cindy', and asserted that she had not made an application to remain in the United Kingdom in the last 10 years, and also that she had not been deported, removed, or otherwise required to leave any country, including the United Kingdom, in the past 10 years. None of those statements was truthful. The respondent considered that the claimant had failed to disclose material facts and refused the application for entry clearance under paragraph EC-P1.1.(c) of Appendix FM with reference to paragraph S-EC.2.2.(b).
8. The Entry Clearance Officer was not satisfied that Mr [M] had provided evidence of his earnings in excess of £18600 per annum. The specified documents were not provided, although the claimant's application asserted that he, as a self-employed builder, earned £22000 a year. There was no difficulty with the English language requirement but given the failure on financial and suitability grounds, and the lack of

any exceptional circumstances engaging paragraphs GEN.3.1 AND GEN.3.2, the application was refused.

9. The claimant appealed to the First-tier Tribunal.

#### **First-tier Tribunal decision**

10. First-tier Judge Aziz allowed the appeal. He was impressed by the sponsor, whom he assessed as a credible witness. The Presenting Officer did not cross-examine the sponsor and his evidence therefore stands unchallenged.
11. The sponsor said that from 2008 onwards, he supported the claimant financially, but it was not until 2010 that he was made aware of her immigration problems or her dual identity. From that time on, he tried to help the applicant resolve her immigration status. An application for leave to remain was made in December 2012, once all the documents had been assembled, in the name of Way Kim Yu. It was refused in October 2013.
12. Cindy, as the sponsor knew her, was afraid to return to China because she had no relationship with her three sons there, since her separation from her Chinese husband. Her mother lived in China, but the claimant had no income or life in China. In January 2015, the claimant showed Mr [M] her passport in her real name of Lai Heong Lao: she told him that when arrested in 2007, she had panicked and given a false name, to avoid deportation. In January 2015, the sponsor took the claimant to the Chinese embassy in London to get a travel document to return to China in the Lai Heong Lao identity, her real name.
13. The claimant went back to China on 16 February 2015 and obtained a new passport there in the Lai Heong Lao identity. The sponsor went with her, accompanying her to her mother's home, then returning to the United Kingdom on 23 March 2015. Three months later, in June 2015, the claimant returned on a visit visa to the United Kingdom. She went back to China on 2 February 2016, just within the 6 months of her visit visa. In May 2016, the sponsor visited her in China for just under two weeks. In October 2016, he went to China and came back to the United Kingdom with the claimant. On 1 March 2017, within the visit visa period, they both went back to China, the sponsor returning to the United Kingdom on 9 April 2017.
14. Two months later, the claimant came back to the United Kingdom on 8 June 2017. At Gatwick airport, the Immigration Officer told the claimant that she could not keep coming in on visit visas as she was in a relationship. She left the United Kingdom on 14 September 2017 and had not been admitted to the United Kingdom since then, although the sponsor visited her in China from 23 April 2018 to 4 May 2018. The sponsor says that he cannot move to China as he has elderly parents in the United Kingdom and also for financial reasons.
15. On 6 October 2017 the claimant's Chinese marriage was dissolved by mutual consent. The sponsor stands ready to spend the rest of his life with the claimant, and marry her, now that she is free. He has produced evidence of the purchase of wedding

rings from a jeweller's in China, and also a West Sussex Superintendent Registrar's Certificate dated 28 December 2017, certifying no impediment to marriage between these parties. It has not been possible for them to marry in the United Kingdom, since she cannot get entry clearance to come here and do so.

16. The sponsor helped the claimant get a visa to travel to Australia with him in December 2018 and January 2019, then they returned to China together on 11 January 2019, where the sponsor spent another 3 weeks, returning to the United Kingdom on 31 January 2019. Back in the United Kingdom, he investigated alternative visas and applied for a fiancée visa. Local help was provided by JPS Immigration who put in the application and included incorrect dates, also failing to declare the previous application in the claimant's false name. The sponsor has apologised for that omission.
17. The Judge noted that the appellant accepted that she had given different names to the immigration officials with whom she dealt: Way Kim Yu, Cindy, and Lai Heong Lao. Her case was that the identity of Way Kim Yu which she used between 2007 and 2015 was a false identity, and that the identity of Lai Heong Lao, used first on the brand new passport which supported her current entry clearance application, was her real identity.
18. The Judge was presented with expired and current passports, the claimant's travel permit for Hong Kong and Macau residents, a Macau issued certificate, and her parents' identity and divorce papers. He found as a fact that Lai Heong Lao was her real identity, based on that evidence, and found that paragraph 320(3) was not engaged.
19. The Judge noted that the appellant had entered the United Kingdom illegally, used a false name, and not complied with the conditions of her temporary admission. He did not consider that under paragraph 320(11), the claimant's absconding would make a material difference to the outcome of the appeal, given her otherwise poor immigration history and the false representations and false identities she had used.
20. The Judge noted that paragraph 320(11) was discretionary, not mandatory. The claimant had made a number of visits to the sponsor in the United Kingdom since her voluntary departure in February 2015, all on visit visas, and had left before the visas expired. He accepted that she and the sponsor were in a genuine and subsisting relationship: indeed the Home Office Presenting Officer had not challenged that. He considered that the Secretary of State's discretion should not be exercised against the claimant in this instance. He noted that the evidence of the sponsor's finances, which did not accompany the entry clearance application, had subsequently been provided and considered it to be adequate.
21. The Judge noted that the only basis for appealing an entry clearance decision was now that it was in breach of the United Kingdom's international obligations under the ECHR, as implemented by section 6 of the Human Rights Act 1998, specifically her family life rights under Article 8 ECHR. Having satisfied himself that all of the

requirements of the Immigration Rules were met, and that the claimant had family life with the sponsor, he considered the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) and found that all were neutral. There was nothing in the public interest that 'weighs against their intention to live their family life together in the United Kingdom' and the Secretary of State's decision was disproportionate. The First-tier Judge allowed the appeal.

22. The Secretary of State appealed to the Upper Tribunal.

### **Permission to appeal**

23. The Secretary of State relied on paragraph S-EC 2.2 of the Immigration Rules and the failure to disclose the previous identities she had used. She argued that the First-tier Judge's reasoning was inadequate in this respect.

24. Permission to appeal was granted by Upper Tribunal Judge Stephen Smith on that basis, considering it arguable that the Judge should have considered whether paragraph S-EC 2.2 was engaged, making this an application which 'should normally be refused' and what the impact on the present application should be of the false information given therein.

### **Rule 24 Reply**

25. There was no Rule 24 Reply on behalf of the claimant.

26. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

27. At the hearing, Mr Aiken for the claimant argued that the First-tier Judge had applied his mind to the deception and made no material error in his assessment of the proportionality of her exclusion.

28. Mr Jarvis relied on the grounds of appeal and grant of permission.

29. I reserved my decision, which I now give.

### **Analysis**

30. The refusal letter in this appeal is dated 1 September 2018 and was served on the claimant on 17 October 2018. On that date, having regard to the provisions of section 82(2) of the Nationality, Immigration and Asylum Act 2002 (as amended) by the Immigration Act 2014, there was no right of appeal against the substance of the Entry Clearance Officer's decision to refuse entry clearance, but only on human rights grounds.

31. As the First-tier Judge identified, even if the claimant has shown now that she could have adduced evidence at the date of application which would have met the

requirements of the Immigration Rules, the First-tier Tribunal and the Upper Tribunal are not seised of any challenge to the decision under the Rules.

32. The claimant was in the United Kingdom unlawfully from 2006 until 2015, and the relationship on which she relies developed from 31 December 2007 until her departure in 2015, and thereafter was maintained by visits here on visit visas, and Mr [M]'s visits to her in China, as well as a joint trip to Australia. The parties are not married, the claimant not having been free to marry until 2017. They have spent as much time as possible together since they met, both here, in China, and on their visit to Australia. They assert that they have private and family life together.
33. Section 117B is not, as the First-tier Judge thought, neutral to the outcome of this appeal. Having regard to sub-section 117B(4)(b) the Tribunal is required to give little weight to any private life or any relationship established with a qualifying partner (such as Mr [M]) at a time when the claimant was in the United Kingdom unlawfully, which she was for her entire residence from 2006 to 2015.
34. The human rights appeal is therefore bound to fail.

## DECISION

35. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson

Date: 2 January 2020