Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32663/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 23 April 2014	**On 23rd April 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

YING HOU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Morton Fraser, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made.

DETERMINATION AND REASONS

1) The appellant is a citizen of China, born on 15 August 1984. She came to the UK as a student in 2002 and was most recently granted leave until 23 January 2013, to undertake a PhD at the medical school of the University of Dundee.

2) On 18 July 2011 (not 2001 as stated in the First-tier Tribunal determination) the appellant married Wan Ho Fan, a UK citizen of Chinese background. He is a postgraduate student at the Medical Research Council Centre for Virus Research, University of Glasgow.

3) On 21 January 2013 the appellant, through her solicitors, applied for settlement in the UK on the basis of 10 years residence.

4) The respondent refused that application by letter dated 16 July 2013. The appellant could not meet the requirement at paragraph 276B of the Rules for 10 years continuous lawful residence, because she had spent 785 days outside the UK, the maximum absence permitted being 540 days. The respondent referred also to the Rules in relation to family life, but said that the appellant could not meet these because she had not provided evidence that her partner is a British national. (The decision did not deal with other requirements of the Rules in relation to family life.)

5) The appellant appealed to the First-tier Tribunal, on the following grounds:

> The decision is not in accordance with the law or the Immigration Rules. It is unlawful and breaches my right to a private and family life and such interference is disproportionate.

6) In an accompanying statement of additional grounds of why she should be allowed to stay in the UK the appellant said:

> I have a British husband and meet the Rules in that regard.
>
> The decisions interfere with my family life.
>
> No discretion has been exercised in relation to the 10 year rule application.

7) In his determination promulgated on 24 January 2014 First-tier Tribunal Judge Burns observed at paragraph 3 that it ought to have been appreciated that the application based on 10 years residence was doomed to failure. At paragraph 21 he found that the suggestion that the appellant and her husband should return to China to make a new life there was "not sustainable". He considered that there was an insurmountable obstacle to the appellant's husband, as a UK citizen, being required to leave the country to start again in China. He thought that alternatively such an outcome would be disproportionate to the general intentions of UK immigration policy. He concluded at paragraph 23 that the appeal should be allowed:

> … to the limited extent of allowing a fresh and appropriate application to be made by the appellant within a period of 3 months, and that during the same period the respondent reconsider, without prejudice to the foregoing, whether leave outside of the Rules should be granted in the light of what is now known.

8) The appellant's grounds of appeal to the Upper Tribunal are along the following lines. In allowing the appeal only on those "limited grounds – namely to allow the appellant an opportunity to make a new application … it is not clear what type of application she ought to make or why she ought to do so when he clearly finds that there are insurmountable obstacles to her removal from the UK." The appropriate and lawful disposal would have been to allow the appeal "outright", because the finding of "insurmountable obstacles to relocating to China" required the appeal to be allowed under EX.1 of Appendix FM.

9) On 30 February 2014 permission to appeal to the Upper Tribunal was granted, on the view that the judge might have misdirected himself as to the manner of disposing of the appeal, which appeared to be "unusual and questionable".

10) The SSHD filed a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008:

> … the respondent will submit that the judge has clearly erred in law, as he appeared to have no authority for allowing [the appeal] to the limited extent that he did. He does not find that the decision itself was not in accordance with the law … following his acceptance that Article 8 should not be used to circumvent the Immigration Rules and that there is nothing exceptional on the facts of this case, the appeal could not have succeeded on this basis.

11) Mr Mullen accepted that the response does not amount to a dispute with the judge's findings on "insurmountable obstacles" or on proportionality, and that the judge did not find that there was "nothing exceptional". (In fact, the judge found to the contrary.)

12) Mr Winter did not insist on the grounds to the extent that the appeal should have been allowed under EX.1 of Appendix FM, pointing out that it is not a free-standing provision. He said that the appellant accepts that she cannot make her case under any of the Rules. He submitted that it was open to the judge to find as he did that it was unreasonable to expect the appellant's husband to move to China, and that this amounted to an insurmountable obstacle. The respondent had not cross-appealed or responded under Rule 24 so as to dispute the judge's conclusions on that point, or on proportionality. The appeal should have been allowed under Article 8.

13) I am of the view that even if the judge's findings on insurmountable obstacles and on the proportionality of requiring the appellant to leave the UK might have been debatable, the respondent has laid no basis for the Upper Tribunal to displace those findings. I uphold the submission by Mr Winter as to what follows from those findings.

14) The determination of the First-tier Tribunal is set aside, and the following determination is substituted: the appeal is dismissed under the Immigration Rules, and allowed under Article 8 of the ECHR.

Hugh Macleman

23 April 2014
Judge of the Upper Tribunal