



IAC-FH-AR-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/05681/2015

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 24<sup>th</sup> August 2015**

**Decision & Reasons Promulgated  
On 8<sup>th</sup> September 2015**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**TING TAO  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Miss R Peterson, Senior Presenting Officer

For the Respondent: Miss S Sheikh, Counsel, instructed on behalf of Morgan  
Dias Immigration Consultants Limited

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Hindson) who, in a determination promulgated on 13<sup>th</sup> May 2015 allowed the Respondent's appeal against the decision of the Secretary of State to refuse to grant leave to remain under Appendix M of the Immigration Rules HC 395 on Article 8 grounds.

2. The Appellant's immigration history is set out in the determination at paragraph 12 (that the Appellant had entered the United Kingdom in 1999 as a student but that subsequently her leave had expired and there had been unsuccessful applications for leave to remain on human rights grounds in 2008 and 2009). Reconsideration of decisions had been asked for in 2010 and also in 2011. The Appellant had a child aged 5 with a former partner who took no part in the child's life. The Appellant had been in a relationship with a British national since early 2012 having lived together since March of that year and that the Appellant and her partner were in a genuine and subsisting relationship.
3. The decision of the Secretary of State is also set out at paragraphs 9 and 10 of the determination. As the judge recorded at [10] that the issue that he had to decide related to paragraph EX1 and in particular EX1(b) and that "it is common ground that the requirements of the paragraph are satisfied save that the Appellant must show that there are insurmountable obstacles to family life continuing outside of the UK." Thus it was common ground between the parties that that was the issue to decide under the Immigration Rules. Indeed both Miss Peterson and Miss Sheikh agreed before the Upper Tribunal that that was the issue relating to the Immigration Rules which the judge had to consider.
4. The judge set out his Decision and Reasons for allowing the appeal at paragraphs 16 to 22 having reached the conclusion for the reasons that he had given that they amounted cumulatively to "very significant difficulties" which the Appellant and her partner would face if they were to relocate to China and what he described as "very serious hardship" that would flow for both of them. Thus he allowed the appeal under the Immigration Rules. He did not go on to consider Article 8 outside of the Rules having reached that conclusion on the issue of "insurmountable obstacles".
5. The Secretary of State sought permission to appeal that decision and permission was granted on 10<sup>th</sup> July 2015.
6. Before the Upper Tribunal Miss Peterson relied upon the written grounds and that the judge had not come to a balanced judgment in finding that there were "very significant difficulties" which the Appellant and her partner would face if they relocated to China or that they would face serious hardship. In respect of language difficulties, she submitted that the fact that he did not speak Chinese would not in itself result in the couple facing significant difficulties outside of the UK. At [19] the judge made a reference to the family of the Sponsor being deprived of his emotional and practical support but that was not a consideration under EX1(b), found that there was no proper consideration as to whether the family would face dire financial circumstances if they returned to China as it was not supported by any objective evidence and there was no attempt made to explore work opportunities in China or whether the Appellant could work to overcome difficulties. She submitted that the decision was based on an expression of preference and that the parties did not demonstrate insurmountable obstacles. Furthermore, in relation to the Appellant's

child, he was 5 years of age and that his life in the UK was therefore based around his mother and therefore he was at the beginning of his education and there was no evidence he would be unable to learn Chinese and to be able to adapt to life in China with the help and support of his mother.

7. Miss Sheikh made reference to the Rule 24 response provided by previous Counsel. However she identified that the decision of the judge was made under the Immigration Rules, not Article 8 outside the Rules. Her submissions were to the effect that Judge Hindson properly identified the issue at [18] and that it was accepted by the Secretary of State that both parties were in a genuine and subsisting relationship [14]. The judge had the opportunity of hearing the evidence of both the Appellant and her partner and found them both to be credible and reliable witnesses [at 17]. She submitted that the judge properly took into account and assessed the evidence relating to the Appellant's partner's difficulties in relocation and therefore made reference to the evidence that was before the judge, namely the Appellant's witness statement at page 5 [paragraph 7] and references to her partner's relationship with his parents, his established employment for the last sixteen years and this was supported by the evidence from her partner [at page 11 of the bundle] referring to employment since 1998 equated to sixteen years of employment and that he would not be able to find equivalent work in China for the reasons given and also that he had no language skills and would not be able to acquire them at the age of 47 to obtain a similar type of employment. Thus she submitted there was sufficient evidence to support the determination and the finding made by the judge concerning insurmountable obstacles.
8. She further submitted the judge was entitled to consider the impact upon the Appellant's partner by reference to the family members as the impact on the partner is relevant to the issue of insurmountable obstacles. The role he played and importance of the relationship to the Appellant's partner was set out in the evidence (the medical evidence and also a power of attorney) and the inability to provide practical and emotional support to his father was a relevant consideration.
9. As to language, at page 11 the Appellant's partner had given an account concerning the difficulties of speaking the language, not having any language skills, with emphasis upon his age and starting what would be a new life in a country. The judge properly took into account what he described as "substantial cultural differences".
10. She further made reference to the grounds in which the finding at [21] that they would face dire financial circumstances was challenged. In this respect she submitted that his employment opportunities had been set out at paragraph 11 and that the Appellant's partner had given oral evidence about making enquiries about potential job opportunities and whether it was feasible to work in China but that was negative. She submitted the judge did not have to reference every piece of evidence to reach a conclusion on the particular factual circumstances. In any event the judge

recorded that he accepted the Appellant's partner's evidence as reliable. The judge in his findings properly considered the evidence as to relocation.

11. As to the Appellant's son, she made reference to the reports at page 40, and 41 relating to his education and also a letter dated 12<sup>th</sup> March 2015 (not in the bundle) but put before the First-tier Tribunal at the hearing. She emphasised that the judge took into account this evidence confirming his network of friends, that he was ahead of his current stage and that was consistent with the witness statement at paragraph 8 (page 5) and that he had made friends at school, that he did not speak Mandarin and that they would be worried about adapting to Chinese society. Further, she made reference to the grant of permission and that the head note in **MK (Best interests of child) India [2011] UKUT 475**, made reference to a short term disruption being taken into account and that Judge Hindson had considered that and bears this in mind when assessing the circumstances and best interests in relation to children. As to Section 117, as this was a decision under the Immigration Rules, those considerations did not apply. Miss Peterson agreed with that submission. Consequently she submitted that the judge had a proper opportunity to both assess the Appellant and his partner, he accepted their evidence (see paragraph 17) and made positive credibility findings in relation to their evidence and his assessment of the issue of insurmountable obstacles. She made reference to page 178 and the country advice in relation to China and children born out of wedlock. She accepted that the judge did not specifically refer to that in the determination. Furthermore, there was an extract from the COI Report but it was not clear whether that had been pursued before the Immigration Judge relating to difficulties on return.
12. I reserved my determination.
13. The judge identified the relevant issues under consideration at [10] of the determination noting that it was common ground between the parties that the requirements of EX1(b) were satisfied save that the applicant was required to show that there were insurmountable obstacles to family life continuing outside of the UK. He made reference to EX2 as to what the term required. It was further common ground between the advocates before the Upper Tribunal that that was the issue to be decided under the Immigration Rules and therefore Section 117 had no relevance.
14. The grounds essentially assert that the judge failed to reach a balanced judgment when reaching his overall finding that there were "very significant difficulties" which the Appellant and her partner would face if they were to relocate to China and would face "serious hardship" and therefore finding that there would be insurmountable obstacles to family life continuing outside of the UK. Matters identified and relied upon in the grounds relate to language, employment and establishing family life in China.
15. The judge's conclusions are set out at paragraphs 16 to 22 of the determination and there can be no doubt that they are given in short brief terms and they give the reasons for reaching the conclusion that he was

satisfied that there were insurmountable obstacles. However, the judge made a reference at [6] to the evidence before him and that he did not seek to reiterate the evidence before him in any detail. As Miss Sheikh submitted, the judge does not have to set out every piece of evidence that he has had regard to when reaching findings of fact or the decision he ultimately reached. It is further plain from the determination at [17] the judge found both the Appellant and her partner, who gave oral evidence before the Tribunal, to be reliable witnesses upon whose evidence he could place weight and reliance. It had been tested in cross-examination during the hearing. In this context I remind myself of the decision in **Piglowska v Piglowska [1999] UKHL 27** where Lord Hoffmann said:-

“The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge’s evaluation of those facts ...”

There is also a quotation from his decision in **Biogen Inc v Medeva Limited [1997] RPC1:-**

“The need for appellate caution in reversing the trial judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which has been made upon him by the primary evidence. His express findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.”

16. With that in mind, I have considered the conclusions reached by the judge set out in the determination. They can be summarised as follows, that if the Appellant returned to China her son would go with her (his best interests would dictate that he and his mother should not be separated) and that if family life was to continue her partner would have to leave the United Kingdom to ensure family life could remain intact. Therefore he properly took into account the consequences and impact upon the Appellant's partner.
17. Whilst the grounds make reference to the finding at paragraph 19 that the partner’s family members would be deprived of his emotional and practical support and that this was not a consideration and also in any event no detail was provided as to any alternative forms of support, the judge was entitled to take that into account in considering the impact upon the Appellant's partner and the issue of insurmountable obstacles and his particular circumstances in the UK which would give rise to there being an “insurmountable obstacle”. The evidence in this regard is set out in the paragraphs referred to by the judge, who had a medical report setting out the diagnosis of Parkinson's disease and his associated care problems (at page 51 of the bundle). The Appellant's partner held power of attorney over his affairs (pages 49 to 50). As a result of his father's medical

difficulties, both parties moved closer to that home to continue to provide the care and support necessary. Consequently, on that evidence which was unchallenged, it was open to the judge to take into account the impact of the decision upon the Appellant's partner which would require him to leave behind the obligations that he had to his father and the particular circumstances relating to the care and support he provided. Whilst the grounds refer to there being no evidence about alternative support, it was open to the judge to reach the conclusion that he accepted the evidence of the Appellant and the Appellant's partner provided an important part of the care given to his father and by reason of the decision it would deprive him of the ability to continue such care, support and contact with both of his parents, but in particular the nature of the dependency of his father.

18. The grounds also challenge the finding at [21] concerning language difficulties and those of employment. However, those matters were considered by the judge in accordance with the evidence provided by him, even if not referenced in the findings of fact. The Appellant's partner had established employment in the UK of sixteen years and on all accounts had worked hard to realise his ambitions at the university despite having no degree (see letter at page 11). He was 47 years of age and at page 11 of the bundle set out what he described as the very significant difficulties that he considered he would face establishing family life in China. This took into account that he would not be able to find equivalent work in China. It referred to his lack of degree and that he had built his career over a sixteen year period in spite of that and that his ability to obtain employment was very significantly reduced by his inability to speak Chinese, having no language skills and in particular the emphasis on his age. Miss Sheikh also made reference in her submissions to the oral evidence given before the judge as to enquiries made in establishing employment which were negative. There is no reference to that made by the judge and there is no reason to believe that that was not put forward when looking at the determination at [21] where the submission of the Presenting Officer was recorded relating to work opportunities; the fact that the Presenting Officer was saying that there was little done to explore work opportunities does not mean that there was nothing done at all. The judge recorded in any event that he accepted the evidence of the Appellant's partner as reliable.
19. At paragraph 21 the judge took into account the issue of employment. As stated above, it is apparent there was a challenge to this aspect of the appeal at [21] where the judge made reference to the cross-examination although not setting out what evidence was given. However, the judge had the opportunity to hear the evidence that the Appellant's partner be subject to cross-examination and accepted that evidence for the reasons that he gave. Therefore the grounds are not made out in relation to employment prospects which were taken into account by the judge on the evidence before him. Consequently it was open to the judge to find on the particular characteristics of this Appellant's partner; his age, length of employment and in light of the language difficulties and what he described

as the “substantial cultural differences” between the UK and China that the family would face dire financial circumstances. The grounds take issue with that finding on the basis that there was no objective evidence in support and whether there was evidence of attempts to explore work in China. However, the finding at [21] is a composite one, taking into account the partner's age, lack of relevant qualifications, lack of language skills in Chinese and importantly the substantial cultural differences between China and the UK and cumulatively he was entitled to find that they would constitute very significant difficulties and would impact upon their life in China as they would face dire financial circumstances if, as the judge accepted, the Appellant's partner would not be able to find employment for the reasons he gave.

20. The grounds also challenge the finding as to the effect upon the Appellant's son at [20]. There appears to be no dispute as to the circumstances relating to the Appellant's son. He was approximately 5 years of age at the date of the hearing and was at primary school. The reports provided about his progress are set out in the bundle and also a letter dated March 2015 referred to his good attendance, having settled well, working above his level and having a good relationship with his friends. The judge referred to this evidence at [14] that he was well established in school and at [13] that the child's natural father had played no part in his life. The evidence before the judge in the bundle was that the Appellant's son referred to his mother's partner as his father and that they had a strong bond (see witness statement of Appellant) and there was evidence at page 11 of the bundle from the Appellant's partner that he thought of the child as his own son and there was a strong father/child bond as a result of the natural father having no involvement in his life. The judge therefore had evidence before him as to the nature of the relationship between the Appellant's son and partner. The grounds state that the judge's findings at [20] and the effect upon the child of being removed from school were not balanced with the consideration of his age and that his life was essentially based around his mother. Whilst it may be so that a child of 5 years has yet to found a private life beyond that of his mother, it was open to the judge to find that there was some private life established by her son through education, relying upon the reports but also on the evidence that he would face the consequences of being separated from the Appellant's partner whom he considered to be a father figure; his natural father having played no part in his life. As Miss Sheikh submits, the judge was entitled to take into account the disruption to the child even if it could be characterised as short term.
21. The phrase “insurmountable obstacles” as used in EX1 of the Rules has been described as significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside of the UK. The phrase “used in the Rules” is to be interpreted in a sensible and practical way rather than an overly literal way and in the decision of **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640** it was held that the term “insurmountable obstacles” in provisions such as EX1 are not obstacles which are impossible to surmount

and that they concern the practical possibilities of relocation (see **MF (Article 8 - new Rules) Nigeria [2012] UKUT 393** and **Izuazu (Article 8 - new Rules) [2013] UKUT 45**).

22. There is no doubt that the judge's reasoning is in brief terms and he did not set out all the evidence before him that Miss Sheikh referred the Tribunal to which was relevant to the reasons that he ultimately reached. However, he made a point at [6] that he did not seek to set out all of the evidence that was being before him and he did have the opportunity to hear the evidence of both witnesses and found their evidence to be of such quality that he could attach weight and reliance upon it (see [17]). The observations of Lord Justice Sedley in **AB (Jamaica) v SSHD [2007] EWCA Civ 1302** have some relevance although this was a decision that clearly predated the definition of insurmountable obstacles that I have set out above. However, Lord Justice Sedley observed that:-

"19. In adapting this reasoning to a case like the present, the Tribunal will be considering not returning someone to his or her country of origin but forcefully someone lawfully settled here to choose between losing his family or migrating with them to a country which may not be his own. [The Rules], it must be recalled, embraces a wide spectrum of status in the word 'settled': it includes both British citizens living in the UK and nationals of other countries who have indefinite leave to enter or remain here. There can be a world of difference, depending on the particular case, between expecting a foreign national, albeit now settled here, to return with his family to his country of origin or move to another country, and expecting a British citizen who has lived here all of his life and has an inalienable right of abode here to live and work and find accommodation in a foreign country or forfeit his marriage."

Those were, in essence, the circumstances that the judge considered at [19] and in his reasoning thereafter. Consequently whilst the judge gave brief reasons, those reasons were supported by the evidence before the judge which he had accepted and therefore it was open to the judge to reach the conclusion that there were insurmountable obstacles to family life continuing outside the UK and that he did not make any error of law in that conclusion. Even if it could properly be said that it was a generous decision it was not one that disclosed any legal error for the reasons set out above. The decision of the First-tier Tribunal does not demonstrate an error of law; the decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Reeds