Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33004/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 2 June 2015	**On 8 June 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JUNFEI HU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of China, born on 24 October 1973. On 10 March 2014 he sought indefinite leave to remain in the UK on the basis of ten years lawful continuous leave. The respondent refused that application by notice and letter both dated 8 August 2014. The refusal was expressed under the long residence requirements, under paragraph 276ADE of the Rules regarding private life, and found "no factors of a sufficiently compelling or compassionate nature to warrant granting you any period of leave to remain exceptionally outside the Immigration Rules".

2. By determination promulgated on 18 November 2014 First-Tier Tribunal Judge Bradshaw dismissed the appellant's appeal under the Rules. At paragraph 95 the judge recorded Mr Ndubuisi's submission for the appellant that there might be "arguably good grounds for granting him leave to remain in the UK in terms of Article 8, private life". Adopting his other findings, the judge found that there were no such grounds and that he therefore did not need to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

3. The appellant's grounds of appeal to the Upper Tribunal rely on an extract from *MM (Lebanon) & Others v SSHD* [2014] EWCA Civ 985 at paragraph 128 onwards, although they fail to identify the case from which the passage is taken. The grounds argue that the judge has gone wrong by applying an intermediary test.

4. Beyond that, the grounds disagree with the judge's assessment of the facts. They submit that the judge has "simply ignored" the appellant's mental health condition, but that misrepresents the determination.

5. On 16 January 2015 a First-Tier Tribunal Judge granted permission to appeal, expressing the view that paragraph 128 of *MM* "disapproves the use of intermediate arguability tests in Article 8 cases".

6. In a Rule 24 response dated 6 February 2015 the respondent argues that the grounds misunderstand *MM*. In respect of the contention that the judge failed to take into account the appellant's ill health, the respondent says that the appellant fell a long way short of a successful claim.

7. Mr Ndubuisi relied on the grounds of appeal and submitted that the judge failed to carry out the necessary assessment under the ECHR. He said that the concept of a "good arguable case" has now also been disapproved in *Oludoyi* IJR [2014] UKUT 00539; in *Khan* [2015] CSIH 29; and particularly in *Mirza* [2015] CSIH 28 where at paragraph 22 the Court said that the observations at paragraph 29 of *MS (India)* [2013] CSIH 52 were *obiter* and "simply generalised observations and do not elide the need for a specific, individual assessment of the whole facts including the degree to which it may be said that the status of the relevant party was truly precarious."

8. Mr Ndubuisi next rehearsed the facts of the case and submitted that the determination should be reversed.

9. Mrs O'Brien submitted that *MS* remained authoritative. She said that on any approach there had to be some factor to show that the case was not adequately dealt with by the terms of the Rules and there was something unusual or exceptional which required a grant of leave outside the Rules. The determination plainly took everything relevant into account in its resolution of the long residence and private life claims within the Rules, including full consideration of the appellant's medical condition. The judge rightly found that looking at the facts as a whole there was no need to look outside the Rules and it was not disproportionate to expect the appellant to leave the UK.

10. Alternatively, Mrs O'Brien submitted that even if there were any deficiency in the determination, the appellant's case was hopeless on reference to Part 5A of the 2002 Act. The appellant had no expectation of settlement other than by complying with

the Rules. His immigration status was always precarious, being dependent upon obtaining a further grant of leave – see *AM* (S.117B) [2015] UKUT 260. Part 5A at section 117B(5) required that "little weight should be given to a private life established by a person at a time when the person's immigration status is precarious". Other factors such as financial independence were also against him. His medical condition was longstanding and had not prevented his return to China in the past. That matter was fully dealt with in the determination, in particular at paragraphs 47 to 53. There was nothing in his circumstances to suggest that the public interest might be displaced.

11. Mr Ndubuisi in reply said that he was aware of *AM*, but could counter that by reference to *Philipson* [2012] UKUT 00039 at paragraph 20 which held that an appellant had an expectation of permanent residence in the UK if she continued to meet the conditions of her work permit, "a legitimate and reasonable one having regard to the nature of the Rules throughout her stay". As the terms of the Rules changed against her the question arose whether the interference was justified and proportionate. It was wrong to refer to the appellant's travel back to China because the judge misunderstood the circumstances under which he returned, relating to the completion of his degree. He had no option but to do so in order to comply with the requirements of his university and with the Rules. His return did not show that he had become reintegrated in China. It was not possible for him to reintegrate there and he therefore met the requirements of the Rules. There was evidence that his mental condition would relapse if he were to return. His appeal should therefore have been allowed under paragraph 276ADE.

12. I reserved my determination.

13. *Philipson* yields no principle which helps the appellant. It has not been shown that the appellant was disadvantaged by a change in the Rules. Even if he had, his expectation could only be for his case to be decided under the Rules as at the time of decision and under Part 5A of the Act.

14. *Macdonald's Immigration Law & Practice* 9th ed., vol 1, at paragraph 7.96 and footnote 10 remarks that the body of case law on Article 8 ECHR in the immigration context is now "characterised, unhelpfully in our view, by a proliferation of phrases which all simultaneously attempt to find thresholds and legal tests for the application of Article 8". The cases continue to multiply. In *Singh* [2015] EWCA Civ 74 a synthesis is followed at paragraph 66 by comment on how "practitioners in this field can sometimes seek to exploit even the faintest ambiguity".

15. The debate over the formulation of the test, whether it involves one or two stages, and whether it applies in or out of the rules has often turned out to be an empty one with no effect on the outcome of the particular case. Even if Mr Ndubuisi had rightly identified some more recently stated formula which the judge ought with hindsight to have applied, this case in my opinion would amount to a complaint about form and not about substance. The analysis of the case under the Rules does not omit any consideration which might emerge or acquire greater significance in a separate proportionality exercise. An intermediate hurdle is by definition a lesser one. The

judge would not have thought the outcome disproportionate on any further formulation.

16. Judge Bradshaw applied the test stated to him by Mr Ndubuisi. A determination should not lightly be overturned for applying the legal approach taken by the party who later complains. But in any event, I do not think Mr Ndubuisi has shown that the test is no longer authoritative.

17. The appellant relies on paragraph 22 of *Mirza* but that makes a different point, related to paragraph 29 of *MS*, not to paragraph 30 where the Court expressed its conclusions, ending thus:

> "Before it is necessary to embark on that second-stage exercise, however, the application for leave to enter or remain must demonstrate a good arguable case that leave should be granted outside the rules: that a distinct assessment of proportionality should be made to determine whether removal would infringe the applicant's article 8 rights. If that is not demonstrated, it can be assumed that the applicant's article 8 rights will be adequately dealt with by applying the new rules. Finally, the test of exceptionality should not be used any longer; instead, decision-makers should focus on the question of whether the applicant has shown a good arguable case that his or her application should be dealt with outside the rules."

18. In *Upreti* [2015] CSIH 45, 4 June 2015, Lord Brodie, refusing permission to appeal, said at paragraph 22:

> "An individual might fail to secure a right to remain under reference to the rules but might nevertheless succeed under reference to article 8 and a decision-maker must be alive to that possibility. For Scotland the law is as set out in *MS* … "

19. The judge was entitled to decide that there would not be very significant obstacles to the appellant's integration into China, which is his country of nationality and where he has spent most of his life. There is no error in the conclusions that lack of family connections, poor employment prospects and any stigma attaching to mental ill health do not reach that threshold.

20. The Presenting Officer's points on any remaking of the decision had some force. However, that stage is not reached.

21. The determination of the First-Tier Tribunal shall stand.

Upper Tribunal Judge Macleman
5 June 2015