Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05852/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 27th August 2015	**On 22nd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS YAYING HE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe (Counsel)
For the Respondent: Mr I Richards (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Parkes, promulgated on 8th October 2014, following a hearing at Birmingham Sheldon Court on 15th September 2014. In the determination, the judge dismissed the appeal of

Yaying He, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of China, who was born on 15th September 1974. She appealed against the decision of the Respondent Secretary of State refusing her application for asylum, although at the hearing before Judge Parkes the appeal was pursued solely on human rights grounds, the basis being that the Appellant wished to have a family life with her husband in the UK.

The Judge's Findings

3. The judge observed how the Appellant's husband had been granted indefinite leave to remain in 2010 on the basis of exceptional and compassionate circumstances (see paragraph 5). The judge also observed that the Appellant could not bring herself within the Immigration Rules, "it seems to me to be appropriate to consider the Rules that relate to spouses by analogy" (paragraph 11). Consideration was given to Section 117 of the 2002 Act, and on this basis the appeal was dismissed. Although the Appellant's husband had ILR this did not oblige him to remain in the UK and he could relocate with the Appellant to China.

Grounds of Application

4. The grounds of application state that the judge failed to give adequate reasons on material matters. This is because, given that the Secretary of State had concluded that the Appellant's husband merited settled status because of his exceptional and compelling circumstances, that this was a factor that should be weighed in the balance in deciding whether it was reasonable to expect the Appellant's husband to relocate to China with the Appellant. Second, the fact that the Appellant spoke Mandarin at home, but wished to use an interpreter at the hearing, did not mean that she did not have the ability to communicate in the English language. Finally, the judge failed to consider that the Appellant was not going to be a burden on the state, and that the existence of the two children did not mean that the income threshold would be raised still further because of the application.

5. On 22nd October 2014, permission to appeal was granted on entirely different grounds, leaving all grounds to be argued nonetheless.

6. On 12th November 2014 a Rule 24 response was entered by the Secretary of State.

Submissions

7. At the hearing before me on 27th August 2015, Mr Pipe, appearing on behalf of the Appellant relied upon the Grounds of Appeal and the skeleton argument drafted by Mr Vokes of Counsel, as the previous representative of the Appellant.

8. First, Mr Pipe submitted that the judge had misdirected himself by stating that, "although by virtue of the nature of her entry to the UK and continued presence the Appellant cannot bring herself within the Immigration Rules it seems to me to be

appropriate to consider the Rules that relate to spouses by analogy" (paragraph 11). This is because the Secretary of State herself considered the application under EX1, and the applicability of the ten year route to settled status, and this was made clear in the skeleton argument at paragraph 1 and paragraph 2. It was not the case that the Appellant could not bring herself within the Immigration Rules.

9. Second, the main challenge here was the way in which the judge dealt with the Article 8 application outside the Rules. This was a case where the husband had been granted ILR in 2010 on the basis of exceptional and compassionate circumstances. The judge states that, "I have not been told what these are or may be …" (paragraph 5). This was untrue. This is because even the refusal letter acknowledged what these exceptional and compassionate circumstances were. The refusal letter stated that, "due to his length of residence in the UK". Yet, the judge had appeared to indicate that these circumstances were unknown (see paragraph 5).

10. Third, the judge concludes that the Appellant could live with the husband in China observing that, "while the Appellant's husband has ILR on an unclear basis but clearly not connected with circumstances in China he is entitled to live in the UK if he wishes, but he is not obliged to do so" (paragraph 14). This conclusion could not be properly reached given the exceptional nature of the manner in which the ILR was granted to the husband. It could also not be reached given the jurisprudence in **Beoku-Betts** by the House of Lords which stated that it was important to look at the rights of people who are not subject to removal, such as the Appellant's husband in this case, who would want to live in this country, having acquired settled status here.

11. Finally, the judge had erred in his evaluation of Section 117 considerations of public interest when he observed that, "relevant to this and Section 117B is the fact that the Appellant does not have an English language test certificate and still prefers to communicate in her own language. That itself indicates a lack of integration within society …" (paragraph 11). This was to overstretch the provisions of Section 117. Those provisions do not suggest this at all.

12. For his part, Mr Richards submitted that, whilst he recognised the deficiencies in the determination, nevertheless, it was possible to rescue it because the judge had referred to Section 117 of the 2002 Act as required. The judge was entitled to say that, although the Appellant's husband had acquired ILR, this did not mean that he was obliged to remain in the UK. Finally, the judge did consider Article 8 in an appropriate fashion because at paragraph 15, when he states that, "I find there are no compelling or compassionate circumstances" or that, "I find that the Appellant's removal would not be unjustifiably harsh in the circumstances" (see paragraph 15) what the judge was doing was applying the "proportionality" considerations.

Error of Law

13. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, it is not true that the Appellant could not bring herself within the Immigration Rules because the refusal letter plainly recognises that the Immigration Rules were applicable to the Appellant,

given the reference to EX1. Second, it is incorrect to say that, whilst ILR was given to the Appellant's husband in 2010 on the basis of exceptional and compassionate circumstances, that the Tribunal was not aware what the basis of this was, given that the refusal letter recognised that this was "due to his length of residence in the UK". Third, the judge makes a finding (at paragraph 8) that the Appellant's husband earns £18,200 a year. Given this, it was wrong to transpose the spouse's Immigration Rules (see paragraph 11) in relation to Section 117B of the 2002 Act, and the need for financial independence. All that the family had to show was there would be no recourse to public funds.

14. Finally, and most importantly, the fact that the Appellant's husband had been granted ILR on the basis of exceptional and compelling circumstances, meant that this fact in itself had to be weighed in account in considering the reasonableness of relocation to China, especially in the light of **Beoku-Betts**' decision in the House of Lords, which does require specific regard to be given to the rights of family members, other than the Appellant subject to removal.

15. The effect of the error has been to deprive the Appellant of a fair hearing or an opportunity for the Appellant's case to be put and to be considered by the First-tier Tribunal, such that under Practice Statement 7.2(a) I conclude that the appropriate course of action is for this matter to be remitted back to the First-tier Tribunal in Birmingham Sheldon Court, to be determined by a judge other than Judge Parkes.

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back de novo to the First-tier Tribunal in Birmingham Sheldon Court, to be determined by a judge other than Judge Parkes under Practice Statement 7.2(a).

17. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st September 2015