Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14482/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 January 2015	**On 8 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Shurong Wang
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer Beijing

Respondent

Representation:

For the appellant: Ms N Mallick, instructed by RLegal Solicitors
For the respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Shurong Wang, date of birth 23.11.65, is a citizen of China.

2. This is her appeal against the determination of First-tier Tribunal Judge Carroll promulgated 22.9.14, dismissing her appeal against the decision of the respondent, dated 14.6.13, to refuse entry clearance to the United Kingdom for settlement as the

spouse of Michael Holmes, the respondent relying on paragraph 320(11) of the Immigration Rules. The Judge heard the appeal on 14.7.14.

3. First-tier Tribunal Judge Simpson granted permission to appeal on 22.9.14.

4. Thus the matter came before me on 7.1.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Carroll should be set aside.

6. The relevant background to the appeal can be briefly summarised as follows. The appellant came to the UK with leave as a domestic worker, limited until 15.11.07. She did not leave and thus became an overstayer illegally present in the UK. She met the British citizen sponsor Michael Holmes in 2009. They began a relationship in March 2010, and lived together for some 2 years. As her visa had expired they were unable to marry in the UK. Consequently she left for China in March 2012, with the intention to apply to return as a spouse. They were married in China on 2.6.12.

7. Judge Carroll considered the refusal on 320(11), referencing PS and the Statutory Guidance, reaching the conclusion at §21 that the refusal decision was entirely lawful. The judge then went on to consider the circumstances of the appellant and Mr Holmes in an article 8 ECHR private and family life assessment, reaching the conclusion at §22 that the decision of the Entry Clearance Officer was proportionate to those rights. In the circumstances, the appeal was dismissed.

8. In essence, the grounds contend:

   (a) The judge was mistaken in regarding the burden of proof to fall on the appellant in relation to 320(11), when it falls on the respondent to demonstrate that the appellant has contrived to frustrate the Rules;

   (b) Erred in finding the refusal under 320(11) justified, the appellant relying on PS (paragraph 320(11) discretion: care needed) India [2010] 4UKUT 440 (IAC);

   (c) Perversely found that the appellant's departure from the UK to sort out her immigration status was an aggravating factor;

   (d) Failed to take into account the appellant's family life with her husband;

   (e) Failed to make credibility findings in relation to the witness evidence;

   (f) Failed to take into account that the sponsor had family life with his elderly widowed father in the UK.

9. In granting permission to appeal, Judge Simpson pointed out that the burden on proof in establishing 320(11) rests on the respondent and considered it arguable that

the First-tier Tribunal Judge had not applied the correct burden and standard of proof. The judge was incorrect to suggest that the standard "is at the higher end of the balance of probabilities." The standard is simply the balance of probabilities.

10. Judge Simpson also considered the reference to the appellant having a 'premeditated intention to work' was arguably not an aggravating feature when a person enters the UK with leave as a domestic worker. "Finally, it is arguable that the appellant has not sought to frustrate the intention of the rules – indeed, by returning to China to make her application from abroad she has complied precisely with the rules. The decision reveals an arguable material error of law."

11. The Rule 24 response criticises the grant of permission, submitting that to characterise an intention to work outside the requirements of her visa as not an aggravating factor is arguably perverse. The appellant entered on a wholly false basis as a claimed domestic worker when she never was and never intended to be. It is noted that the grounds of application for permission to appeal do not challenge the appellant's immigration history. In the circumstances, the burden of proof issue is irrelevant as the facts speak for themselves. It is submitted that the findings were entirely open to the judge.

12. In what I find to be a careful and well-reasoned decision, Judge Carroll set out the factual background, relevant law, findings and conclusions.

13. At §19 Judge Carroll reached the conclusion that there was no credible evidence that the appellant had ever within the conditions of her limited leave. In interviews she said she came to the UK with an agent to work as a housemaid but she only ever had one job and did not change employment, working in a fish and chip restaurant in Malmesbury. In her first witness statement she said after entering the UK she looked for employment opportunities in order to support herself and found work in a local fish and chip shop, where she met the sponsor Mr. In a later witness statement produced for the appeal hearing, she claimed she came to the UK with her employer Mrs Birula, but as she was treated badly she left shortly after arriving in the UK. It is clear the judge did not accept that evidence. It is also clear that appellant never had any intention to leave and in this regard I note her reference to using an agent to come to the UK.

14. I do not accept that the judge placed the burden on the appellant, as it seems to me that all the judge was doing at §2 was to state the general burden of proof. However, even if she did misplace the burden, as the respondent has pointed out, on the facts of this case that is irrelevant as her immigration history has not been challenged. The standard of proof is on the balance of probabilities, B [2008] UKHL 35.

15. In relation to the 320(11) criteria, the judge carefully considered the provision, the case law and the Guidance and noted that a mere breach of immigration law would not be sufficient; there has to be aggravating circumstances. It is clear from the decision of the Entry Clearance Officer that reliance was placed on 320(11) for a number of factors, including: overstaying; failure to notify any change in

employment for which leave to enter had been given; working illegally; absence of evidence of payment of tax or National Insurance contributions.

16. It is relevant to point out that there was also a Entry Clearance Manager review following receipt of the grounds of appeal. In a very lengthy consideration the Entry Clearance Manager analysed the grounds of appeal and evidence. It is beyond doubt that careful consideration was given to the application of 320(11) and the article 8 assessment in the light of the circumstances of the appellant and Mr Holmes. It is pointed out that the appellant not only overstayed but worked illegally in employment she had not notified to the Home Office, thereby obtaining services and support, namely the employment, to which she was not entitled. The voluntary departure of the appellant is also taken into account and assessed.

17. The Guidance itself sets out as one of a number of examples of aggravating factors, previous working in breach of visitor conditions within a short time of arrival in the UK. There is no merit in the submission that the judge was perverse by finding a pre-mediated intention to work. What the judge was relying on at §20 was the findings at §19 and §20 that not only did the appellant never work within the terms of her domestic work visa, but she never intended to do so. In the circumstances, the judge was entitled to regard the appellant's behaviour as contrived in a significant way to frustrate the intention of the immigration rules. She took and remained in non-authorised employment for a significant period of time, overstaying whilst working illegally for a period of over 4 years. Even though it is said that the appellant returned to China voluntarily, it is clear that she only did so because she was apparently unable to marry in the UK. There is no doubt that the judge took the return into account, as it is referenced in §20 before the conclusion on 320(11) at §21.

18. In the circumstances, I find the decision of the First-tier Tribunal in relation to immigration grounds entirely justified as a decision the judge was entitled to reach and for which cogent reasons have been given. The circumstances were truly aggravating and comprised more than mere overstaying. The grounds of application for permission to appeal essentially seek to reargue the issues in the appeal and are no more than a disagreement with the judge's findings.

19. I also find no error of law in relation to the article 8 assessment. In addition to those factors taken into account by the Judge in the proportionality assessment, I pointed out to Ms Mallick that although section 117B had not come into force at the date of hearing, it was in force before the decision of the First-tier Tribunal was promulgated on 22.9.14. It follows that even though the judge did not apply section 117B when considering whether any error of law is sufficient to require the decision to be set aside and remade it is a matter I have to consider as applicable to an assessment of the public interest. In particular, 117B(4) provides that, "Little weight should be given to— (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully." Added to those factors taken into account by Judge Carroll, I fail to see how the decision of the Entry Clearance Officer could be regarded as disproportionate. The appellant and Mr Holmes entered into a relationship in 2010 at

a time when the appellant knew she was not entitled to remain in the UK. He even went to China to marry her after she had left the UK. Although she left the UK voluntarily, that does not excuse the flagrant breach of immigration law by her coming to the UK in the first place under what can only be considered as false pretences and proceeding to benefit from life in the UK over several years. Article 8 is not a shortcut to compliance with Immigration Rules. As with the appellant AB (Somalia) in VW (Uganda) [2009] EWCA Civ 5, this is not a case of enforced break-up. The pairing and parting of Mr Holmes and the appellant was voluntary, as was his decision to continue the relationship even though she was outside the UK. There was nothing unreasonable in those circumstances about expecting Mr Holmes to continue family life, if he so wishes, by joining the appellant in China. He decided to form the relationship at a time when he knew her status was precarious and decided to marry when it was far from clear that she would be able to meet the requirements to settle in the UK, given her poor immigration history. The judge took into account all relevant factors in reaching the conclusion that the decision was proportionate.

Conclusion & Decision:

20. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 7 January 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed:  Date: 7 January 2015

Deputy Upper Tribunal Judge Pickup