Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35784/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on**
On 22 June 2016	**On 05 July 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MRS CAXIA ZHOU
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Molyneux, Counsel, instructed by Global Immigration Solutions
For the Respondent: Miss A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against a decision to refuse to vary her leave to remain as a spouse and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The appellant is a citizen of China who came to the United Kingdom in July 2006 as a student dependent, which was extended until 11 April 2014, with a brief interruption between March and May 2010. In March 2014, she applied to vary her leave to remain as the Tier 4 spouse of a person present and settled in the United Kingdom.

3. The parties met in China and married there in 2006 in Yinxi Town, Fuqing City, China. Both are Chinese native speakers and the respondent was not satisfied that there was evidence that they could not return and pursue their private and family life in China. No evidence of children was produced to the respondent when she made her decision: the section headed 'dependent children applying with you' was crossed out. However, in her witness statement for the First-tier Tribunal hearing, the appellant asserted that she had two British citizen children, a son born on 20 February 2009 and a daughter born shortly before the hearing in September 2015. No birth certificates or other evidence to support the existence of those children, or their claimed nationality, was before the First-tier Tribunal.

4. The income evidence was examined under paragraph 284(b) of the Immigration Rules HC395 (as amended) but rejected because the parties could show combined earnings of only £5648.42 in the year preceding the appellant's application. On 28 August 2014, the respondent refused to vary the appellant's leave to remain on the basis that she had not shown income at the paragraph 276ADE level of £18600 (there are alternatives involving savings which do not apply here). It appears that the sponsor then obtained a new job with better pay, from September 2014.

First-tier Tribunal decision

5. In the decision under challenge the Judge took account of the limited evidence of the couple's income produced with the original application, which he calculated as considerably less than the required income under paragraph 276ADE of £18,600 per annum. The Judge considered Appendix FM-SE and noted that the specified documents had not been provided, which I do not understand to be in dispute.

6. The argument now relied on is set out at paragraphs 19 to 20 of the First-tier Tribunal decision: the appellant contends that by issuing a Section 120 notice the Secretary of State let in her financial evidence up to and including the date of hearing. It appears that her sponsor now has steady employment in the United Kingdom and is earning much more than he was at the date of decision.

7. The Judge did not accept that the date of hearing was the relevant date. He made his decision on the basis of the evidence before the respondent, which did not approach

the level of £18600. He was not satisfied under paragraph 284(b) that the parties could maintain themselves adequately without recourse to public funds as required by paragraph 284(b). At the date of application, their income barely covered the monthly rent paid by the appellant and her husband, leaving nothing for living expenses.

8. The undisclosed child (now 2 children) would increase the amount required, both under the Rules as they stand now, or under the old test of adequate maintenance without recourse to public funds. The appeal was dismissed.

Grounds of appeal

9. The challenge in the grounds of appeal is first, that the facts fall to be considered under paragraph 284 of the Immigration Rules rather paragraph 276ADE and that therefore the appellant was required only to meet the requirements of paragraph 284(b) of the Immigration Rules as they stood before the introduction of the present scheme. The respondent does not dispute that.

10. The appellant pursues her argument that the husband's post-decision income is admissible, by reason of the serving of a Section 120 notice and that the appeal should be allowed because now the parties' income did meet the income requirements. Ground 2 repeats that argument and relies on the decision of the Court of Appeal in *AS (Afghanistan)* in relation to paragraphs 85(2) and 85(5) of the 2002 Act before they were amended.

Permission to appeal

11. Permission to appeal was granted by Upper Tribunal Judge McWilliam on the basis that 'if indeed it is the case, which seems to have been accepted by the Judge, that relevant Rule is 284, it is arguable that the Judge should have taken into account the appellant's husband's income when assessing 284(viii)'. The income referred to was that at the date of hearing, as the husband now has a steady job and a better income than at the date of application or decision.

Rule 24 Reply

12. The Secretary of State replied pursuant to Rule 24, accepting that this appeal fell to be treated under paragraph 284 of the Rules, not paragraph 276ADE. She contended as follows:

> "2. … It is submitted that the grounds in relation to Appendix FM and Appendix FM-SE of the Immigration Rules have failed to have regard to the provisions of the Rules themselves. Whilst the Judge was entitled to consider evidence submitted after the date of the decision, given the wording of the Rules the evidence for meeting the financial requirements had to relate to a six-month period prior to the application, as stipulated by Appendix FM-SE(2)(a). Given the appellant's application was made on 20th March 2014 any evidence had to be in relation to the period September 2013 to March 2014. The evidence relied upon by the appellant post-dates this and Section 85A of the NIAA 2002 does not

amend the requirements under the Rules. It is submitted that *AS* (Afghanistan) [2013] UKUT 00044 is not relevant as the appellant's appeal is not a points based appeal. Even if *AS* [2013] applied to Appendix FM applications it is noted that the evidence postdates the decision of the appellant's application.

3. With regard to paragraph 284 of the Immigration Rules, if applied properly the appellant is unable to succeed as she is required to meet all elements of paragraph 284. The grounds do not contain any of the documentation asserted to establish the appellant meets all of the requirements and the author is without sight of the Home Office file. As such it is submitted that the Judge's approach and consideration was correct. Even if an error is found with the approach to paragraph 284 it is submitted that this is not material as the appellant in light of her immigration history, in any event, [the appeal] fails at paragraph 284(1)(c)."

Upper Tribunal hearing

13. In oral submissions, Mr Molyneux accepted that the evidence of income up to and including the date of application and indeed the date of decision was sparse, and that the specified documents in Appendix FM had not been provided.

14. Mr Molyneux reminded me that permission had been granted on the basis that the sponsor's post-decision income arguably should have been taken into account. The husband's income did not become steady until September 2014, and he relied upon a schedule of income evidence for him from September 2014 to the date of hearing. The appellant had included an English language certificate. He accepted that the Secretary of State did not have the post-decision evidence before her when making the decision and that it was produced for the first time before the First-tier Tribunal.

15. Mr Molyneux relied on the Court of Appeal's decision in *AS (Afghanistan) v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 1076 as authority for the introduction of post-decision evidence following a section 120 notice.

16. For the respondent, Miss Holmes observed that the evidence did not arise from the matters before the respondent for decision. The evidence did not avail the appellant in the context of the present appeal, she argued, and the appeal should be dismissed.

Discussion

17. I have considered the decision of the Court of Appeal in *AS (Afghanistan).* I do not find that it avails the appellant, for the reasons given in the judgment of Lady Justice Arden at [15] and [31]-[33], and supported by Lord Justice Moore-Bick at [72] and [81]-[83] and Lord Justice Sullivan at [113]. :

"15. Against the backdrop of Section 3C of the 1971 Act the 2002 Act deals with immigration, procedure and the procedure for appeal. …

(iv) The structure of Section 85 is important as it is the pivotal section that we have to examine. It this Section which deals with matters to be considered and thus sets the framework in which appeals must take place. The very first provision of Section 85 provides that all appealable decisions are

brought under the umbrella of the single appeal (Section 85(1)). Section 85(2) deals with statements made in response to a one-stop notice. It is a matter of some significance in relation to the arguments on this appeal that Section 85(2) states that the AIT's obligation is to consider any matter raised in response to a one stop notice which constitutes a ground of appeal 'against the decision appealed against '. An appeal in which grounds raised for the first time in response to a Section 120 notice fall to be decided is a 'one-stop appeal'.

(v) Section 85(4) is facultative. It enables the AIT to consider evidence about any matter that it thinks relevant 'to the substance of the decision, including evidence which concerns a matter arising after the date of the decision'. …

"31. ... Section 85(4) ... is limited to empowering the AIT to accept new evidence relevant 'to the substance of the decision'. In its decision in *EA*, the AIT held that these words meant that the new evidence had to be relevant to the decision actually made. It added that:

> 'A decision on a matter under the Immigration Rules is a decision on the detailed eligibility of an individual by reference to the particular requirements of the Rule in question in the context of an application that that person has made.'

32. In my judgement, this interpretation of Section 85(4) is plainly correct. ..."

The *ratio decidendi* of *AS (Afghanistan)* is clear: the evidence which may be admitted pursuant to Section 120 must relate to the substance of the decision which was made by the respondent.

18. In this case, the substance of the decision made by the respondent was that at the date of decision and certainly at the date of application the appellant and her husband did not have sufficient income to maintain themselves, whether the older, broader test or the test under the Rules is applied. They produced evidence of income which barely met the rental which they paid on their accommodation and did not demonstrate how else they were affording their standard of life. They also did not disclose the existence of the alleged children, one of whom was then 5 years old (if the child exists). The factual matrix on which they now seek to rely is entirely different from that which the respondent considered in her decision. On the basis of the facts before her, the respondent did not err in finding that the parties had not shown that they could maintain themselves without recourse to public funds, and the First-tier Tribunal did not err in dismissing the appeal on that basis.

19. It remains open to the appellants to make an application under the new rules, whether from their China after the appellant returns there or, if the Rules permit, from within the United Kingdom, but as far as this appeal is concerned the challenge to the First-tier decision disclosed no material error of law and I dismiss the appeal.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal shall stand.

Signed: *Judith A J C Gleeson* Date: 4 July 2016

Upper Tribunal Judge Gleeson