



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA110772014

THE IMMIGRATION ACTS

Heard at Field House
On 31 March 2017
Prepared 31 March 2017

Decision & Reasons Promulgated
On 22 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR YONG KANG HONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Professor W Rees, Counsel, instructed by Simman Solicitors
For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant a national of the People's Republic of China, date of birth 22 October 1957, appealed against the Respondent's decision dated 25 November 2014 to make

removal directions, a form IS151A having been served on 13 December 2002 on the basis that the Appellant was an illegal entrant.

2. Through various processes this matter has been considered by the First-tier and the Upper Tribunal but as a result of the decision of 17 August 2015 made by Upper Tribunal Judge Freeman the matter was sent back to be further determined in the First-tier with the intention it should go before the judge who previously dealt with the appeal, Judge S Lenier. As it transpired she was unwell and so the matter came to be listed before and was dealt with by First-tier Tribunal Judge N M Paul (the Judge) who in a decision [D] promulgated on 28 November 2016 dismissed the appeal on asylum and human rights grounds.
3. Whatever may have been the basis of his decision permission to appeal that decision was given by Upper Tribunal Judge McWilliam on 19 January 2017.
4. It is worth noting that originally before Judge Lenier, counsel who had appeared for the Appellant was a Mr S Karim, instructed by Simman Solicitors. When the matter came before the Upper Tribunal it was counsel, Miss V Easty, instructed by Simman Solicitors who appeared and when the matter returned and was dealt with by Judge Paul, counsel who appeared was Miss Malhotra, again instructed by Simman Solicitors.
5. Permission to appeal having been given on all grounds, the issues concentrated on really three points. First, whether or not the judge had failed to deal with paragraph 276ADE(1)(vi) of the Immigration Rules HC 395, as amended. Secondly, whether or not a concession made by Miss Malhotra in which she conceded Article 3 ECHR issues were not for consideration. Thirdly, an attack upon the exercise of the consideration of Article 3 insofar as it has been affected by the decision of the Grand Chamber of the European Court of Human Rights in the case of Paposhvili and Belgium, application number 41738/10.

6. The Respondent produced by letter dated 23 February 2017 a Rule 24 response essentially arguing that there was no material error of law.
7. Professor Rees argued the judge having identified [D15] that he was going to deal with the issue of paragraph 276ADE(1)(vi) and [D16] said he was paying regard to the same paragraph, nevertheless then went on to make no findings and did not address the paragraph 276ADE specifically. More particularly reliant upon paragraph 8 of the grounds (i) to (x) that the judge had failed to have regard to material considerations which were pertinent to the assessment of whether or not there were very significant obstacles to the Appellant integrating on a return to the PRC.
8. His second argument was that Miss Malhotra should not have conceded the Article 3 basis of claim and should have pursued the matter. The issue of Paposhvili and the significance of the Grand Chamber's decision either as a "game changer" or otherwise is contingent upon re-examining the question of Article 3 and the considerations that come into play.
9. The issue of whether or not this concession should have been made was originally raised in the grounds, dated 1 December 2016, settled by Mr Karim.
10. Notwithstanding the passage of time no evidence was ever filed to support the grounds of appeal and undermine the basis on which Counsel, instructed by solicitors appeared and made the concession. It does not appear that Miss Malhotra has been asked to explain the concession she made, nor to justify it on the basis that she had no authority, otherwise than Counsel's discretion, to make such concession. There is nothing from Simman Solicitors undermining Miss Malhotra's authority to make that concession. In the time available it seems to me, even before the renewed grounds of 24 December 2016 settled by Mr Karim, evidence should have been obtained if it was seriously to be argued as it was again that the concession should not have been made by counsel.

11. Professor Rees has been faced with a set of late instructions and has done what he could with the material but he inevitably is driven into speculating as to what might have been her reasons for making the concession, putting aside the question of whether she had authority to do so.
12. The further difficulty faced is that at the hearing before the Judge the Appellant felt unwell and it is said Miss Malhotra directed him to depart the hearing centre and go and see a GP or obtain medical assistance. Such events may have occurred. Again there is no direct evidence on it but there is nothing to suggest that the Appellant was unaware about the concession Ms Malhotra was making and there is nothing from him since that time indicating that he did not know of the concession being made.
13. By side wind Professor Rees also argues that this was a matter that clearly should have been adjourned and that the judge got it wrong in failing to do so.
It seems to me that the underlying problem with that argument is that an adjournment application was not a matter pursued by Miss Malhotra and she in the end indicated that she was content to deal with the matter by way of submissions, which it is perhaps hardly surprising given the relatively limited challenges there were to the factual matters relating to the Appellant's health.
14. So far as the issue of the concession is concerned: I am satisfied that the concession, on the evidence such as there is, was properly made and there is nothing to suggest it was done without authority. For that reason I therefore do not address directly the issue of Article 3 ECHR and Paposhvili and the issues as to whether or not it's binding on the UK courts and/or to what extent I am obliged to follow it as opposed to the settled House of Lords cases of D and N.
15. I therefore turn to the paragraph 276ADE(1)(vi). It seems to me that as a matter of impression, in the case which is not a deportation case, Article 8 as a fact invites a

wider consideration of all material factors that particularly bear on the question of proportionality.

- 16 It is clear, as Mr Wilding properly accepts, that there may be cases where an Appellant's health, mental or physical, may be an indicator of very significant obstacles to integration but in this case looking at the matters relied upon particularly in the grounds of appeal Paragraph 8 (i) to (ix) those factors are not sufficient to raise the question or show an inability to integrate: They are simply the disadvantages of being there, arising from his health.
17. In these circumstances it seems to me that the judge made an error of law in failing to deal with paragraph 276ADE of the Rules but it is not material: The Judge went on to consider, on the basis of the evidence that was being advanced, the impact on the Appellant's private life and the relationship between that and his health issues on a return to China.
18. So far as paragraph 8 of the grounds is concerned Mr Wilding with whom I agree on this point says that grounds (i) to (iii) are simply factual statements and do not particularly bear on the issue. The most relevant ground in (iv) concerning the impact of the available treatment and its cost and to this extent the position of the other health factor which could in due course of its nature irrespective of where the Appellant was be life threatening. As to the lack of social network or support network or the Appellant's wife those were matters, which the judge made reference to, as the Judge was aware about the ability of the Appellant to work.
19. In the circumstances it seems to me that the judge looking at the matter through the prism of the Rules nevertheless he was looking at a wider case and therefore the error of law which he made is not material to the outcome in the light of the findings he made in relation to Article 8 ECHR.

20. For these reasons I am satisfied that there was no material error of law made by First-tier Tribunal Judge Paul. The Original Tribunal's decision stands. The appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed on Humanitarian Protection and human rights grounds.

No anonymity direction is made.

Signed

Date 11 April 2017

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 11 April 2017

Deputy Upper Tribunal Judge Davey