Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/22585/2018**
HU/22587/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 September 2019	**On 13 September 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

H. W.
J. C.
(ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Haidar, Counsel, instructed by AA Immigration Lawyers
For the Respondent: Mr N Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants are mother and daughter, who are nationals of China. Their sponsor, who is respectively their husband and father, is also a national of China who entered the UK illegally in 2002 and was only granted leave on a discretionary basis outside the Immigration Rules on 12 May 2011, when he was granted ILR. Although he had claimed to be a refugee from

China, he has never been recognised as such, and indeed having acquired immigration status in the UK he took the opportunity to travel to that country in 2012 and 2015.

2. The Appellants entered the United Kingdom legally on 23 August 2015 with leave as spouse and daughter of the sponsor. That grant of leave expired on 10 May 2018, and on 17 April 2018 the Appellants made in-time applications for the variation of their leave. At this date the Second Appellant was still a child.
3. These applications were both refused on 15 October 2018 with reference to paragraphs 276ADE and R-LTRP.1.1.(c)(i) and (d)(i) of Appendix FM to the Immigration Rules. By this date the Second Appellant was no longer a child.
4. The Article 8 appeals of the Appellants were linked for hearing together since each relied upon the evidence that was relied upon by the other. Moreover, the prospects of success of the First Appellant's appeal were in large part dependent upon the outcome of the Second Appellant's appeal. The appeals were heard together on 21 May 2019 by a panel of Designated Judge Woodcraft and First Tier Tribunal Judge Raymond, and they were then dismissed in a joint decision upon both appeals that was promulgated on 26 June 2019.
5. The Appellants were both granted permission to appeal by decision of 30 July 2019 of Designated Judge Macdonald on the basis it was arguable the approach of the First-tier Tribunal ["FtT"] to the evidence of the Second Appellant had rendered the hearing of both appeals procedurally unfair.
6. No Rule 24 Notice has been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus, the matter came before us.

<u>Undisputed matters</u>

7. It was not in dispute before the FtT that the First Appellant did not hold the necessary language qualification for the application she had made for a variation of her leave as a spouse. She did not hold an English qualification at A2 level in the Common European Framework of Reference for Languages as required by Appendix O to the Immigration Rules.
8. It was also not in dispute before the FtT that the Second Appellant could not meet the requirements of the Immigration Rules if her mother's application failed; E-LTRC.1.16. Moreover, she had never been a "qualifying child" for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended, or paragraph 276ADE(1)(iv), and she had not lived half of her life in the UK by the date of the hearing , with reference to paragraph 276ADE(1)(v).

9. It was also not in dispute that although now an adult, the Second Appellant remained a member of the household of her parents. Whilst there had been an extended period of separation from her father from 2002 to 2015 as a result of his decision to travel to the UK, the three members of the family had lived together as a family unit in the UK since August 2015, so that "family life" was established between them at the date of the hearing.

The adverse findings of fact made by the FtT

10. Having heard evidence from the sponsor, and each of the Appellants, the FtT identified a number of inconsistencies in the evidence, and made a number of adverse findings.
11. The sponsor was found to have no genuine or objectively well-founded fear of a risk of harm at the hands of the Chinese authorities, either when he had left China in 2002, or, when he had returned in 2012 and 2015, or, at the date of the hearing. He was currently able to live in China without any risk of harm. There were no insurmountable obstacles that prevented him from living in China with the Appellants, and no good reason had been provided as to why he would be unable to secure employment there.
12. The sponsor and the First Appellant had a wide range of extended family members living in China with whom they were in contact, who included their respective parents and siblings. The Second Appellant therefore had a wide range of family members living in China. The sponsor and the Appellants also had a range of economic and other ties to China.
13. The Second Appellant had been educated in China to the age of 15. She would face no difficulties in re-integrating into life in China, and nor would either of her parents.
14. The First Appellant's claim to be illiterate was untrue.

The challenge to the decision in relation to the First Appellant based upon the language requirement

15. It is accepted before us that there is no merit in the third complaint; that the First Appellant had a "legitimate expectation" that she would always be able to vary her leave to remain without having to secure any language qualification beyond that which had been demanded of her in the course of her 2015 entry clearance application.
16. We note that at the time of her successful entry clearance application the First Appellant needed, and must be taken to have demonstrated, that she held an A1 language qualification. Any suggestion by the FtT to the contrary must be an error of fact, since she was plainly granted leave to enter, and produced the appropriate vignette entered into her passport in evidence

[Respondent's Bundle p79]. The core of the second complaint (that the FtT proceeded upon the basis of an error of fact) is therefore made out, although we are satisfied for the reasons set out below that nothing turns upon this error.

17. There was, however, a change in the Immigration Rules on 3 November 2016, with the result that since her period of leave expired after 1 May 2017 (hers expired on 10 May 2018), the First Appellant was required to demonstrate she held an A2 English language qualification. She did not, and indeed there is no evidence to suggest that she has ever attempted to gain this qualification.

18. The First Appellant's approach to the lack of the requisite language qualification was not to argue that she was exempt by reason of age, or disability (see E-LTRP.4.2(a) or (b) of Appendix FM), but rather to assert that since she was illiterate there were exceptional circumstances that prevented her from being able to do so (E-LTRP.4.2(c)). Literacy, or rather illiteracy, means different things to different people, as amply demonstrated in this appeal. The First Appellant did not for example claim that she was unable to read or write anything in any language, and so it would appear that a good part of the hearing before the FtT was taken up in an attempt to ascertain precisely what skills she admitted to, and what she actually held.

19. It is the approach of the FtT to the issue of whether or not the First Appellant had made out on the balance of probabilities her claim to be illiterate, that is the focus of the third complaint in the grounds. As drafted, it is asserted that the FtT made speculative and contradictory findings in reaching the conclusion that she was not illiterate.

20. We reject that complaint; the conclusion that the First Appellant was not telling the truth about her literacy levels was one that was well open to the FtT on the evidence, and was adequately reasoned, relying as it did upon discrepancies between the evidence given by the First Appellant, the sponsor, and the character witness. It is extremely difficult to see how the First Appellant could use social media or search the internet to find material she wished to view if she was completely unable to read and write, as she had sought to portray herself.

21. In any event, even if an error of fact were made out, it is quite clear to us for the reasons give below, that whatever level of "illiteracy" the First Appellant claimed, she failed to provide any evidence to demonstrate a causal nexus between the cognitive abilities and literacy levels she did admit to having, and her inability to train for and pass an A2 English language test.

22. It is accepted before us that the A2 qualification, like the A1 qualification, has neither a writing nor a reading test element; as

is the case with the A1 test, the A2 test is a speaking and listening test. Beyond the bald assertion that the First Appellant was illiterate there was no attempt to provide evidence to explain why she was able to acquire an A1 qualification, but should be excused from making any attempt to acquire an A2 qualification, as demanded by the Immigration Rules. There was, for example, no evidence from anyone who had assessed her cognitive abilities, or, from anyone who had sought to train her for the A2 test to explain why she was unable to engage with that training in the absence of a written component. When we sought to explore with Ms Haider why the First Appellant was said to be unable to engage with an A2 test she accepted that these were simply her instructions.

The challenge of procedural unfairness

23. The first complaint advanced in the grounds is that the FtT denied both Appellants a procedurally fair hearing, as a result of the decision to attach no weight to the evidence of the Second Appellant upon the issue of whether she was illiterate as claimed, since she had been present throughout her mother's oral evidence and could have tailored her own as a result of the exchanges she had heard.

24. Ms Haidar argued that the course taken by the FtT was sufficient to render the entirety of the hearing of the appeals procedurally unfair, so that the only course open to us was to remit both the appeals for fresh hearing.

25. For the reasons given above we are satisfied that this would not be the appropriate course. In short, the first complaint discloses no material error of law. Given the lack of evidence to show why she was unable to engage with training for an A2 language test, and was thus unable to meet such a test, the First Appellant was always bound to fail to meet the requirements of the Immigration Rules because she was unable to demonstrate that there existed any exceptional circumstances which allowed her to gain an A1 language qualification but prevented her from being able to gain an A2 language qualification. Given the nature of the A2 test, and the lack of a written component, the FtT was bound to reach that conclusion whatever its views of the First Appellant's claim to be illiterate.

26. What appears to have happened is that there was a misunderstanding between Counsel for the Appellants and the FtT. Counsel thought that she had explained that upon professional advice, the Second Appellant had decided to absent herself from the hearing whilst her mother gave evidence, in order that no argument could be advanced against her to the effect that her oral evidence had been tailored as a result of what she had heard. It would appear that the FtT may have mis-

understood her, and thought it was believed that the Second Appellant was unable to be present during her mother's evidence (see [5]). As an Appellant in a linked appeal, the FtT were quite correct to state that she was entitled to be present throughout the hearing to hear all of the evidence that was adduced in the course of the linked appeals. Equally, of course, Counsel was quite right to advise her client that an Appellant in a linked appeal might choose to absent themselves from part of the hearing to deny their opponent the opportunity to make a submission that their oral evidence had been tailored to what they had heard. It was unfortunate that this misunderstanding was compounded by the approach then taken to the weight that could be given to the Second Appellant's evidence on the issue of whether her mother was illiterate or not (see [22]), but as set out above, nothing turns on this.

The approach to the assessment of proportionality

27. The fifth, and final, complaint raised in the grounds is that the FtT erred in its approach to the assessment of proportionality, having found that Article 8 was engaged by virtue of the "family life" and "private life" established by the Appellants since their entry to the UK in August 2015.

28. As the hearing before us progressed it became clear that this was in reality the strongest ground of challenge. The focus of the assessment of proportionality should have been upon the nature and strength of the Second Appellant's "private life" which in reality meant focusing upon the educational course upon which she was actually enrolled, and when she had enrolled upon it, since no material evidence was offered of any other aspect to her "private life".

29. With a degree of hesitation, and as announced to the parties at the hearing, we conclude that the FtT did err in failing to adequately consider the Second Appellant's educational circumstances as a specific element of her private life in the UK. What is said in [29] does not address the fact that, as at the date of hearing, she was enrolled on a course of studies and that removal would disrupt this.

30. Whilst on reflection we consider that the error was not, in all the circumstances, material to the outcomes of the appeals, we nonetheless abide by our initial decision, as announced at the hearing, that it was.

31. Therefore, we set the FtT's decision on both appeals aside solely in relation to the error concerning the Second Appellant's education, as it went to her private life in the UK and, in turn, the potential impact of this on the First Appellant's case. For reasons set out previously, there is no basis on which to disturb any of the other findings reached by the FtT.

Remaking the decision

32. Whilst Ms Haider suggested that these appeals should be remitted to the FtT, we agreed with Mr Bramble's position that there was no justification for this course of action. In view of the limited basis upon which we have set the FtT's decision aside, these cases are eminently suited to a remaking decision in the Upper Tribunal.

33. In the absence of any Rule 15(2A) application at any stage, we remake the decision in these appeals on the evidence before us.

34. In summary, Ms Haider submitted that it would be very difficult for the Second Appellant to restart her education in China, that the disruption to her current course of studies by removal was highly relevant, that the fact of her being an adult is not fatal to her Article 8 claim, and that she continued to enjoy family life in the UK. These factors combined to render removal disproportionate. This in turn was of relevance to the First Appellants case.

35. Mr Bramble noted the absence of independent evidence relating to educational possibilities in China. The immigration status of both Appellants in this country had always been precarious. They could return to China together, with or without the sponsor, who could make a choice as to whether he would go, since he could plainly do so in safety.

36. For the reasons set out below, and having had full regard to the evidence, relevant findings of the FtT, and the applicable legal framework, we conclude that both of the appeals must be dismissed.

37. The FtT had already determined that neither Appellant met the requirements of the Immigration Rules, and, that the sponsor was perfectly capable of living in safety with his wife and daughter in China (there has of course been no challenge to the FtT's conclusion on the absence of insurmountable obstacles). The inability of the Appellants to meet any of the relevant provisions of the Rules is of itself a significant factor weighing against them (see, for example, Agyarko [2017] 1 WLR 823).

38. Beyond the length of time spent in the UK, and the evidence of his employment, there was no other evidence of the nature and strength of the "private life" established by the sponsor in the UK since his illegal entry in 2002. Moreover, the FtT found that both he and the First Appellant had a number of members of their extended family in China (including their own parents).

39. The First Appellant has not attempted to adduce evidence of a "private life" of sufficient strength to outweigh the public interest in removal, and so her Article 8 appeal is squarely based upon the "family life" she had pursued with her husband and daughter in the UK since August 2015. Thus the First

Appellant's Article 8 appeal essentially continues to depend upon the success or failure of the "private life" appeal of her daughter, since that would open up to her the argument that the decision to refuse to vary her leave would prevent her from enjoying "family life" with her daughter, if, her daughter were granted discretionary leave to remain in the UK.

40. Although the FtT referred to the Second Appellant from time to time as if she were a child at the date of the hearing, she was in fact already an adult by the date of the Respondent's decision.

41. She sat her GCSEs at the age of 17 in June 2017, but she had not achieved the grades she had hoped for (Appellants' Bundle p43). In consequence, in September 2017 she enrolled at the Bishop Laney Sixth Form College upon a "transition year" as a result of which she resat an English GCSE, and, also enrolled upon a Mandarin A-level course, which she completed within the year so that she sat the relevant examinations in June 2018.

42. At the age of 18, in September 2018 the Second Appellant enrolled upon a new course. This was a Level 3 Business course and an A-level Mathematics course. Her aim was to access enrolment in a University in the UK in September 2020. However, these were new courses upon which she had enrolled as an adult, and not simply a continuation of courses upon which she had already been enrolled prior to attaining 18. This fact is important. The weight to be given to the decision to enrol upon those courses, as an adult, when on any view her immigration status was "precarious" has to be considered in the light of the guidance to be found in Rhuppiah [2018] UKSC 58, Nasim and others (Article 8) Pakistan [2014] UKUT 25, and Patel [2013] UKSC 72. We conclude that the Second Appellant's private life is, in the absence of any compelling circumstances to the contrary, liable to be accorded little weight. On the evidence before us, there are no such circumstances. Whilst we conclude that it is appropriate to reduce the weight to be given to her private life we have taken into account the fact that she was still a child until June 2018, and have concluded that the appropriate reduction is not as significant as it might otherwise be. On the other hand we have reminded ourselves that the Second Appellant enjoys no right to education as such, and none at public expense. The combination of these two factors weighs heavily against the Second Appellant's Article 8 claim.

43. The FtT accepted that the Second Appellant had not attended three years of high school education in China, because she had been living in the UK since the age of 15, and, that neither of her parents were resident at the date of the hearing in China. It is the Second Appellant's case that she will be unable to enrol at a Chinese University as a result. Ms Haider accepts that this proposition is based entirely upon assertions of belief by the

Appellants, which have not been corroborated by way of independent evidence. We note that even taken at their highest, those beliefs appear to have been only that the Second Appellant's ability to gain entry to a Chinese University would be delayed in the event of the return of the Appellants to China, rather than being prevented absolutely. Moreover, the evidence before us does not engage with the Second Appellant's ability to continue any of the studies she had already embarked upon in the UK, once in China, through the international schools based in China, or the internet, so as to allow her to complete the courses upon which she is currently enrolled. This is not a case of a young adult being able to demonstrate that they are entirely unable to follow their chosen path in their own country of origin. This is a further weighty factor against the Second Appellant's claim.

44. We have taken into account the uncontroversial point that the Second Appellant's removal from the UK would cause a disruption to her educational progress. However, on the evidence before us, this has not been shown to be of a significant nature.

45. We have also taken into account the Second Appellant's age when she entered the UK in 2015. That is a factor that carries a degree of weight in respect of her private life, but when balanced against the relatively short length of residence, the precariousness of her status, the fact that she is now 19, and that her current course of study was only commenced once she was no longer a child, that weight does not advance her claim to any significant extent.

46. There is no suggestion that the Second Appellant would be separated from her mother as a result of the decisions under appeal. In the absence of any free-standing basis upon which the First Appellant can make out a successful Article 8 claim (and we can identify none) both would return to China together. Thus Ms Haider focused upon whether the Second Appellant would be separated from her father, the sponsor, in the event that she were removed from the UK. We are satisfied that in reality, this would be a matter of choice on his part. Although we accept that it may be a difficult choice, there is no challenge to the conclusion of the FtT that there are no insurmountable obstacles to him returning to China with his family. As noted previously, there is virtually no evidence detailing the sponsor's ties to the UK, other than his length of residence, his immigration status, and his employment in a takeaway restaurant. None of these, in isolation, or in combination, disclose any basis for concluding that his links to this country are sufficiently strong that it would be disproportionate for him to be required to make that choice (bearing in mind that the

focus of the insurmountable obstacles test is on the country of relocation).

47. The FtT addressed the issue of whether entry clearance applications could be made by the Appellants from China in future. It was right to do so, and we follow this approach. It is quite clear, as the evidential picture before us currently stands, that such applications would not be certain (or even close to being certain) of success. No proper attempt has been made to demonstrate evidentially that this would be the case. Therefore, the principle established by Chikwamba [2008] UKHL 40 is not engaged. Furthermore, we can see nothing remotely disproportionate in requiring the Appellants to make entry clearance applications if the sponsor does decide to remain in the UK, given that the original separation of the family was the result of his decision to migrate to the UK illegally in circumstances which did not give rise to a protection claim. As discussed above, there is nothing to indicate that the First Appellant cannot take steps to pass the A2 English language test in the future. Equally, there is no obvious reason why the Second Appellant will be unable in due course to apply to study at a British university.
48. We have of course borne in mind the significant public interest in maintaining effective immigration controls, as mandated by section 117B(1) of the 2002 Act.
49. The ability of the Appellant's to speak English is a neutral factor, as is the issue of financial independence; section 117B(2) and (3).
50. Bringing all of the relevant factors together, whilst the Respondent's decision constitutes an interference with the private life, and the family life enjoyed by the Second Appellant with her mother and father in the UK, it is not disproportionate, and it is therefore not unlawful under section 6 of the Human Rights Act 1998. Her appeal must therefore be dismissed.
51. It follows that the Article 8 appeal of the First Appellant must also be dismissed.

DECISION

The decision of the First Tier Tribunal, promulgated on 26 June 2019, is set aside on the basis that it contains a material error of law.

We remake the decisions in these appeals and dismiss them both.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellants are granted anonymity throughout these proceedings. No report of these

proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed
Deputy Upper Tribunal Judge JM Holmes
Dated 6 September 2019