Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/23268/2016**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On the 6 July 2022	**On the 15 August 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MRS FENGJIN XIAO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Brennan, Solicitor
For the Respondent: Mr A. Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State dated 24 September 2016 to refuse a human rights claim dated 25 November 2015.

Procedural background

2. The appeal was originally heard by First-tier Tribunal Judge Buchanan under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). By a decision promulgated on 24 June 2019, Judge Buchanan allowed the appeal. The Secretary of State appealed to the

Upper Tribunal. By a decision promulgated on 18 December 2020, Upper Tribunal Judge Plimmer allowed the Secretary of State's appeal, set aside the decision of the First-tier Tribunal, and directed that the appeal be re-heard in the Upper Tribunal, observing that there were few issues of factual dispute between the parties. It is in those circumstances that I remake the decision, acting under section 12 of the Tribunals, Courts and Enforcement Act 2007.

3. I should address the delay in this matter being heard. The initial appeal hearing before the First-tier Tribunal took around 18 months to list. It was then adjourned on a number of occasions to secure an interpreter. The appeal was eventually heard on 28 March 2019. The Secretary of State's appeal to this tribunal was delayed by the pandemic. The error of law hearing was, following an adjournment, conducted by Judge Plimmer on 15 December 2020, and her decision was promulgated on 18 December 2020. Judge Plimmer gave directions to the parties for the exchange of updated documents, a skeleton argument from the appellant, and a position statement from the Secretary of State. It took the parties a considerable period of time to comply with those directions, necessitating multiple attempts on the part of the Upper Tribunal's caseworkers to encourage them to do so. The final stage in the process envisaged by Judge Plimmer was for the Secretary of State to provide a position statement. The Secretary of State provided her position statement, to which I shall turn in due course, on 23 March 2022. Thereafter the matter was listed on the first available date in Belfast.

4. Judge Plimmer's decision may be found in the Annex to this decision.

Factual background

5. The appellant is a citizen of China born on 23 April 1969. She and her husband, YK, married in China in 1989. YK came here as an asylum seeker in 1997. His asylum claim was refused but he was granted indefinite leave to remain in 2011. He naturalised as a British citizen in 2013. The appellant arrived in the United Kingdom in February 2012 with entry clearance as the spouse of YK, in his capacity as a settled person, with leave until March 2014.

6. The appellant has two children with YK; Q, their daughter, who was born in 1991, and J, their son, who was born in 1993. J travelled to the UK with the appellant and has lived with her ever since. Q arrived a short period of time afterwards. On 23 August 2021, J was recognised as a refugee by the Secretary of State on account of his mental health conditions, learning difficulties and a speech impediment. J continues to live with the appellant and YK. Q is married to a British citizen, and they have an infant daughter together. Q was granted leave to remain on an exceptional basis on account of her daughter being British.

7. The appellant applied for indefinite leave to remain in February 2014. That application was refused on 12 November 2015 on the basis that she

had used a proxy in an English language test taken on 17 July 2013, and relied on the fraudulently obtained certificate in support of her application. The appellant enjoyed a right of appeal against the decision but did not exercise it.

The Secretary of State's refusal decision dated 24 September 2016

8. The Secretary of State refused the appellant's human rights claim because she did not meet the suitability requirements contained in paragraph S-LTR.1.6. of the Immigration Rules, on account of her use as a proxy test taker on 17 July 2013. Her presence was not conducive to the public good. She had "willingly participated in what was clearly an organised and serious attempt" to defraud the Secretary of State and others. The appellant did not meet the requirements of paragraph EX.1 to Appendix FM; there would be no "insurmountable obstacles" to her and her husband returning to China to continue their relationship there. She could not meet any of the private life provisions of the Immigration Rules and would not face "very significant obstacles" to her integration in China upon her return. The appellant should return to China to make an application for entry clearance in order to facilitate her continued residence in this country, the letter concluded. There were no exceptional circumstances such that it would be unduly harsh to remove the appellant from the UK.

Issues on appeal

9. The focus of the hearing before me was whether it would be proportionate for the appellant to be removed from the United Kingdom. The appellant accepts that she used a proxy test-taker on 17 July 2013. Nevertheless, Mr Brennan submitted that the appellant's past misconduct did not meet the threshold for not being conducive to the public good. She had not caused harm to anyone. She has expressed remorse. The gravity of what she was doing would not have been obvious to her at the time. Had she applied for further leave to remain, rather than indefinite leave to remain, she would not have had to take an English language test under the rules then in force. In any event, she would now be virtually certain to succeed in an application for entry clearance made overseas, thereby diminishing the public interest that would otherwise attach to her removal, and engaging the principle enunciated in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. The appellant has strong relationships with her two adult children. J is dependent upon her. His recent grant of asylum by the Secretary of State, and his learning difficulties and mental health conditions, add a further dimension to the case, tipping the proportionality balance in the appellant's favour.

10. The Secretary of State, in her position statement dated 23 March 2022, submitted that the appellant would not be virtually certain to succeed in an application for entry clearance, in light of the very suitability concerns that led to the present application being rejected. Before me, Mr Mullen accepted that the appellant's conduct was less serious than some other

immigration offences. She had not been convicted of any offences, for example. Her fraud was not multiple and sustained. However, the use of a proxy in an English language test was a clear attempt to undermine the rules and was a weighty public interest factor against the appellant being permitted to stay. She does not speak English and had made no attempts to learn the language in the time that has elapsed since she relied on the now invalid test result.

The law

11. This is an appeal brought under Article 8 of the European Convention on Human Rights ("ECHR"). The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be removed, in light of the private and, in particular, family life she claims to have established here. This issue is to be addressed primarily through the lens of the Immigration Rules, and also by reference to the requirements of Article 8 of the Convention directly (see *Razgar* [2004] UKHL 27 at [17]).

12. The following provisions of Appendix FM of the Immigration Rules are relevant to the disputed issues in this case. They concern applications for limited leave to remain made from within the UK in respect of claimed family life with a partner:

> **Section S-LTR: Suitability-leave to remain**
> S-LTR.1.1 The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply.
> […]
>
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.
>
> **Immigration status requirements**
>
> E-LTRP.2.1. The applicant must not be in the UK-
>
> (a) as a visitor; or
> (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings
>
> E-LTRP.2.2. The applicant must not be in the UK –
>
> (a) on immigration bail, unless:
> (i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and
> (ii) paragraph EX.1. applies; or

> (b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.
>
> **Paragraph EX.1**
>
> EX.1. This paragraph applies if:
>
> […]
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

13. Also relevant is paragraph 276ADE(1)(vi) (very significant obstacles to integration).

14. Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") contains a number of statutory public interest considerations to which I must have regard. I will address the relevant considerations in my analysis below.

15. The burden lies on the appellant to demonstrate that Article 8(1) of the ECHR is engaged, to the balance of probabilities standard. Having done so, it is for the respondent to justify any interference with the rights guaranteed by Article 8(1) of the ECHR pursuant to paragraph (2). In practice, it is for the appellant to demonstrate that she meets the requirements of the rules, or that the requirements of Article 8 ECHR outside the rules are such that her continued presence must be permitted.

The hearing

16. The resumed hearing took place at the Royal Courts of Justice, Belfast, on 6 July 2022. The appellant gave evidence and participated in the hearing through a Mandarin interpreter. YK, Q and J also gave evidence, through the interpreter. I established that all witnesses were able to understand and communicate through the interpreter at the outset of their evidence.

17. Each of the witnesses adopted their statements and were cross-examined. I do not propose to set out the entirety of their evidence here

but will do so below to the extent necessary to reach and give reasons for my findings.

Discussion

18. I reached the following findings having considered the entirety of the evidence in the case in the round, to the balance of probabilities standard.

Article 8 engaged

19. Since this is an appeal against the refusal of a human rights claim, the tribunal's jurisdiction is limited to considering whether the decision of the Secretary of State was unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the Human Rights Convention). I find that the removal of the appellant would be an interference with the private life she has established in the ten years she has lived here, and the family life she enjoys with her husband (and, as I set out below, J). Her removal would have consequences of such gravity so as potentially to engage the operation of Article 8. The interference would be in accordance with the law, since it would be pursuant to an established legal framework, coupled with a right of appeal to this tribunal. It would, in principle, be capable of being regarded as necessary in a democratic society for the purposes of one of the derogations contained in Article 8(2) of the ECHR. The remaining question is whether her removal would be proportionate.

20. To address the proportionality of the appellant's removal, I will first address the requirements of the Immigration Rules, since they reflect the Secretary of State's views and institutional competence concerning the balance between the public interest in the maintenance of effective immigration controls, on the one hand, and the rights of individual applicants, on the other. Where an appellant meets the requirements of the Immigration Rules, provided Article 8 is engaged, that is positively determinative of any Article 8 proportionality analysis: *TZ (Pakistan)* [2018] EWCA Civ 1109. I will then address Article 8 outside the rules, by reference to whether the proposed removal decision amounts to a "fair balance" for the purposes of Article 8(2) ECHR.

Appellant cannot meet the Immigration Rules

21. By way of a preliminary observation, there are few factual disputes in these proceedings. While there is minimal evidence to support the appellant's case that YK has both lost his Chinese nationality and the ability to reacquire it, there was no challenge by Mr Mullen to what the appellant or her husband wrote concerning those matters in their statements. Consequently, the accounts of YK losing his Chinese citizenship, and of being unable to relocate to China on a permanent basis without some form of leave (or its equivalent) from the Chinese authorities, are unchallenged evidence. I accept that the YK has lost his Chinese nationality, although I consider the evidence as to his entitlement

to return to China to be thin, notwithstanding that it was not challenged. I address below the implications of this finding.

22. I deal first with paragraph S-LTR.1.6. I reject Mr Brennan's submission that the use of a proxy test taker in a Test of English for International Communication ("TOEIC") is not a matter that engages paragraph S-LTR.1.6. of the Immigration Rules. It is well-established that such conduct *does* engage the suitability requirements of the rules. The use of a proxy test-taker entailed willing participation in a process designed to manipulate the administration of secure English language testing. It involved a fraudulent misrepresentation to the Secretary of State, and, in the case of this appellant, was an attempt to secure something to which she would not otherwise have been entitled.

23. Contrary to the submissions of Mr Brennan, it was nothing to the point that, had the appellant applied for limited leave to remain rather than indefinite leave to remain, she would not have needed to provide evidence of her claimed English language ability. I did not hear argument about the transitional provisions or guidance applicable to the introduction of the English language requirement, but assuming that Mr Brennan is correct (and I have no reason to doubt that he is, since the appellant was first granted leave before the significant changes made in July 2012 came into force), by attempting to obtain settlement by deception, the appellant sought to obtain for herself a far more advantageous category of leave to that which, on Mr Brennan's submission, she would have been entitled to without having to demonstrate any proficiency in the English language. It would mean that, in contrast to many who had deployed invalid TOEIC certificates, this appellant had another route open to her which did not require evidence of her proficiency in the English language, which she chose not to use simply in order to obtain a more advantageous form of leave. In my judgment, it is clear that the appellant's conduct fell foul of paragraph S-LTR.1.6.

24. I accept the general tenor of Mr Brennan's submissions, as did Mr Mullen, that the appellant's conduct is less serious than some other forms of immigration offending; regrettably, it is not hard to envisage far worse conduct in this field. The incident must be placed in context; it took place nearly ten years ago and was a one-off. The appellant has not benefitted from her deception, and it has marred her ever since, with two refused applications, and the uncertainty of these proceedings hanging over not only her, but the whole family, for a considerable period of time. The impact of the appellant's immigration uncertainty on the broader family was evident, if not unsurprising, from their evidence before me. To be clear, however, the appellant's conduct was reprehensible, and the fact it is less serious than other forms of immigration offending, or the fact that it has had an impact on the whole family, does not mitigate her conduct. I was unimpressed by the appellant's oral evidence that she did not understand what she was doing; I prefer the account in her statement, where she writes that she used the proxy precisely because it would pave the way for her to obtain indefinite leave to remain, rather than merely a

repeat grant of limited leave to remain. The use of the invalid TOEIC certificate attracts significant weight on the Secretary of State's side of the balance, albeit not as much weight as more serious forms of immigration-based deception.

25. Further, the appellant still cannot speak English. She has made only a single attempt to learn the language in the seven years since the Secretary of State refused her application for settlement, which she appears to have abandoned. She has lived here for ten years. Even if she met all other requirements of the rules, she would not meet the English language requirement contained in paragraph E-ECP.4.1. of Appendix FM.

26. In any event, even if the suitability concerns set out above did not apply, the appellant would need to demonstrate that there would be "insurmountable obstacles" to her relationship with her husband continuing in China, for the purposes of paragraph EX.1(b). While the evidence that YK has lost his Chinese citizenship was unchallenged, there is no evidence about whether he would be able to obtain a long term visa as the British spouse of a Chinese citizen, residing in China. The evidence is incomplete, and the appellant has not demonstrated to the balance of probabilities standard that the immigration and nationality regime applicable in China would present an "insurmountable obstacle" to her marriage with YK continuing in China. Nor has she demonstrated that she would face "very significant obstacles" to her own integration in China for the purposes of paragraph 276B(1)(vi) of the Immigration Rules; she lived in China until 2012 and speaks Mandarin. Realistically, Mr Brennan did not attempt to pursue these points.

27. I should observe at this stage that the only reason that paragraph EX.1(b) is relevant is because the appellant is unable to meet the immigration status requirements of the rules, contained in paragraph E-LTRP.2.1. The reason the appellant is an overstayer is because her application dated 21 February 2014 was refused on account of her use of a proxy. Her conduct has compounded and augmented itself over time.

28. It follows that the appellant cannot succeed under Article 8 "under the rules". The remaining question is whether it would be proportionate for her to be removed; this requires an assessment "outside the rules".

Article 8 outside the rules

29. I reject Mr Brennan's *Chikwamba*-based submissions. The appellant would not be almost certain to succeed in an application for entry clearance, for the reasons set out in the Secretary of State's position statement, namely her use of past-deception. Her English language skills are also very poor. It is difficult to see how she would presently meet any applicable English language requirement for entry clearance.

30. The most significant development in these proceedings is the grant of asylum to J. Mr Mullen confirmed at the hearing, having checked the

respondent's records, that J was granted asylum on account of his mental health conditions, learning difficulties and his speech impediment.

31. I have considered whether the grant of asylum to J is a "new matter" which is outside the jurisdiction of the tribunal, absent the express consent of the Secretary of State for the purposes of section 85 of the 2002 Act, thereby requiring the consent of the Secretary of State. I have concluded that it is not. The Secretary of State considered the strength of the ties between the appellant and her adult children in the refusal letter, specifically addressing the impact of the appellant's son living with her and her husband, his father. That being so, while the grant of asylum is a matter which post-dates the Secretary of State's refusal letter (and Judge Plimmer's directions), I consider that, properly understood, it is not a "new matter"; it is "further or better evidence of an existing matter" (see *Mahmud (S. 85 NIAA 2002 - 'new matters')* [2017] UKUT 488 (IAC), headnote at (3)).

32. The grant of asylum on the basis of J's mental health conditions is one manifestation of his underlying vulnerabilities and dependence upon his mother. J continues to experience anxiety and depression, which has manifested itself in hair loss. He has been prescribed mirtazapine and, in the past, sertraline. His unchallenged written evidence was that his mother's uncertain immigration status is a significant factor in his continued anxious state. J has lived with the appellant since birth, including for a significant period of time while she remained in China with the children while YK lived here. He still lives with his mother now, and his father, as a single household. J does not speak English and communicates with his parents in Mandarin. I find the family life that would exist between a mother and her minor son continues. In his closing submissions, Mr Mullen accepted that J's grant of asylum was, in his words, "a reasonably strong factor" in the appellant's favour.

33. I find that the description of the relationship between J and his mother, his anxiety, and his dependence upon her presence, demonstrates a situation of dependence sufficient to go beyond normal emotional ties which engages Article 8(1) ECHR on a family life basis.

34. Significantly, in light of J's refugee status, if this appeal is refused, he may well be likely to struggle to see his mother again, perhaps save for meetings in a third country. As a refugee in respect of his well-founded fear of being persecuted in China, he will not be able to travel to China to visit his mother there, were she to be returned. In light of the respondent's position in her position statement dated 23 March 2022, it is unlikely the appellant's mother would be granted entry clearance to return. The future of the appellant's relationship with her son will to a significant extent be dictated by these proceedings. In my judgment, this is a factor of significance.

35. In his closing submissions, Mr Mullen accepted that J's grant of asylum was, in his words, "a reasonably strong factor" in the appellant's favour.

He did not submit that it was a new matter, but rather accepted, realistically in my judgment, that the appellant's relationship with him is a factor of significance on her side of the balance.

36. I heard evidence from Q. She lives in a separate family unit to her parents. While I do not underestimate the emotional bonds between her and her mother, which were manifested in her evidence, I do not consider that their relationship goes beyond normal emotional ties. She does not enjoy Article 8 "family life" with her mother.

37. Against that background, I will conduct a balance sheet analysis to determine whether the appellant's removal would be disproportionate for the purposes of Article 8(2) ECHR. The essential question is whether the decision to refuse leave to remain to the appellant is a "fair balance".

38. Factors in favour of the appellant's removal include:

a. The public interest in the maintenance of effective immigration controls: see section 117B(1) of the 2002 Act. This is a weighty factor;

b. The appellant does not meet any of the requirements of the immigration rules. This is a facet of the public interest in the maintenance of effective immigration controls, but it is of such importance that it attracts its own emphasis;

c. The reasons the appellant does not meet the requirements of the immigration rules are conduct-based. She has deployed deception against the Secretary of State through having attempted to rely on a proxy test-taker in June 2013. That would have involved a course of conduct intended to deceive at every step of the process; from arranging (and presumably paying) a proxy to attend and take the test in her place, thereby deceiving the test administrator, to deploying the product of the deception against the Secretary of State, and thereby displaying a flagrant disregard of the immigration laws of the United Kingdom. Her conduct is all the more serious because she did not need to pursue settlement and could have secured limited leave to remain without providing evidence of her ability to speak English. In turn, the reason the appellant has remained her for a considerable period without leave is attributable to her use of a proxy. Collectively these are weighty factors;

d. The appellant does not speak English and is less likely to integrate as a result. It is in the interests of the economic well-being of the United Kingdom that those who seek to enter or remain in the United Kingdom are able to speak English: see section 118B(2) of the 2002 Act. It is nothing to the point, as submitted by Mr Brennan, that the appellant is financially self-sufficient. She may

well be working unlawfully at the moment, and her scope to work in other sectors will be limited on account of her poor language skills;

e. There would be no insurmountable obstacles to the relationship between the appellant and YK continuing in China, and the appellant does not meet paragraph EX.1(b) of Appendix FM;

f. The appellant's private life attracts little weight since it has primarily been established at a time when the appellant's immigration status was at best precarious (section 117B(5)) and for the main part unlawful (section 117B(4)(a));

g. The appellant would not face "very significant obstacles" to her own integration in China for the purposes of paragraph 276ADE(1)(vi).

39. Factors mitigating against the appellant's removal include:

a. She is now genuinely remorseful for her conduct. I accept her evidence, given forcefully before me, that she made a mistake without realising the consequences. She has caused a shadow of uncertainty to hang over her family's life for a considerable period. In my experience of TOEIC litigation, very few (if any) appellants ever accept the allegations made against them by the Secretary of State, notwithstanding the strength of the Secretary of State's evidence. It is to this appellant's credit that she does accept the allegations against her;

b. If the appellant were to be removed, there would be a considerable interruption to the family life she enjoys with YK;

c. J enjoys family life for the purposes of Article 8 ECHR with his mother. Her removal would have a significant impact upon him;

d. There would be a significant impact on J through the appellant's removal. Since he is now a refugee with a well-founded fear of being persecuted in China, he will not be able to visit his mother there. She will be unlikely to secure entry clearance to visit him here. The appellant's removal would effectively place a barrier between her and her son. I accept the evidence of J that his condition Even Mr Mullen recognised this as a "reasonably strong factor";

e. While the appellant's conduct was serious, it took place a considerable period of time ago. To put it in context, had she received a sentence of less than twelve months' imprisonment, she would not be categorised as a "foreign criminal" under section 117C of the 2002 Act;

f. It is the desire of the whole family for the appellant to remain here, and her removal would impact the remaining family members significantly;

g. YK is no longer a Chinese citizen and will experience considerable hurdles upon returning to China with the appellant, albeit not insurmountable obstacles.

40. Drawing this analysis together, I consider that the factor that distinguishes this case from many others involving English language-based deception is the relationship that the appellant enjoys with J, and the fact that he enjoys refugee status here. Were it not for that factor, I would have no hesitation in dismissing this appeal, and would have found that, notwithstanding the clear collective family commitment to the appellant's continued presence in the UK, her removal would be proportionate. However, J's refugee status throws the appellant's prospective removal into sharp relief. He is a vulnerable young man with mental health conditions which have led the respondent to recognise him as a refugee. As Mr Mullen realistically accepted, that was a factor in the appellant's favour; although Mr Mullen used the understandably muted language of it merely being "reasonably strong", in my judgment it is a factor of determinative strength. I reach this conclusion taking full account of the weight which attaches to the maintenance of effective immigration controls, and the steps this appellant took to undermine those very controls out of the desire to secure settlement, rather than merely being granted another period of limited leave to remain. A fair balance in this case is for the appellant to be permitted to remain. Her removal would be disproportionate.

41. This appeal is allowed on Article 8 grounds.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed Stephen H Smith Date 6 July 2022

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the following reason. The appeal was only allowed due to the appellant's provision of further and better evidence of the matters that were originally before the Secretary of State, and nothing in this decision, or the appeal, has impugned the Secretary of State's decision. A fee award would therefore be inappropriate.

Signed Stephen H Smith Date 6 July 2022

Upper Tribunal Judge Stephen Smith

Annex

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23268/2016 (V)

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype
On 15 December 2020

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FENGJIN XIAO

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Brennan, Martin Brennan Solicitors

DECISION AND DIRECTIONS (V)

1. The respondent is a citizen of China. In 2012 she entered the United Kingdom ('UK') as the spouse of a settled person. Her husband came to the UK in 1997 as an asylum seeker. Although his claim was refused he was eventually granted indefinite leave to remain ('ILR') in 2011 and became a British citizen in 2013.

2. The respondent made an application for ILR in 2014, wherein she employed deceit by using a proxy to take an English language test on her behalf. This was discovered and in a decision dated 24 September 2016 her application for ILR was refused on 'suitability' grounds.

3. In a decision sent on 24 June 2019 the First-tier Tribunal ('FTT') allowed the appeal on Article 8, ECHR grounds.

4. The SSHD appealed against this decision (with permission to appeal having been granted in a decision dated 12 September 2019), submitting inter alia that the FTT failed to provide adequate reasons and in particular failed to address the public interest considerations in s. 117B of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act').

Legal framework

5. The introduction of s. 117A into the 2002 Act imposes a statutory duty upon a court or tribunal to pay regard to the considerations listed in s.117B. The relevant parts state as follows:

> "117A Application of this Part
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -
> (a) breaches a person's right to respect for private and family life under article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard -
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals to the considerations listed in section 117C.
> (3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
> (1) The maintenance of effective immigration controls is in the public interest.
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.
> (3) It is in the public interest, and in particular in the interests of the economic well
> being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
> (a) are not a burden on taxpayers, and

(b) are better able to integrate into society…"

Submissions

6. Mr Diwnycz relied upon the grounds of appeal and a skeleton argument. Mr Brennan relied upon a letter dated 21 October 2020 responding to the skeleton argument. He acknowledged that there was a "slight failure in the reasoning" of the FTT and it should have made it clearer what weight it was prepared to attach to the various factors identified. Mr Brennan nevertheless submitted that when the decision was read as a whole, it was adequately reasoned. After hearing from both representatives, I reserved my decision, which I now give with reasons.

Error of law discussion

7. The FTT's decision is carefully drafted in many respects. The background facts and submissions are set out comprehensively. However, as Mr Brennan accepted, the part of the decision in which the FTT gives its reasons and conducts the requisite Article 8 balancing exercise i.e. [33] onwards, is succinct. That in itself does not give rise to an error of law. I must determine whether the reasons provided for resolving the balancing exercise in the respondent's favour are tolerably clear.

8. At [33] the FTT candidly confessed to finding the case difficult to determine on the basis that valid arguments had been advanced by each party. The FTT then went onto identify three matters that weighed against the respondent: the respondent's deception [34]; the husband's precarious immigration status prior to becoming a British citizen [35]; and the fact that little weight could be given to her relationships with her adult children [36]. The FTT considered that on balance the respondent's removal would be disproportionate in the light of the particular matters identified at [37].

9. The FTT has not been criticised in identifying the matters it did at [37]. The SSHD has focused her challenge upon the FTT's failure to specifically address the public interest considerations in s. 117B.

10. I turn first to s. 117B(1). Although the FTT took into account the adverse inferences to be drawn regarding the respondent's character that flowed from her deception at [34], it has not squarely addressed other important consequences of this deception. First, it meant that the respondent demonstrated flagrant disregard for immigration laws. She knowingly made an application for ILR in 2014 using an English language proxy when she knew she was unable to pass the English language test. She could have opted to apply for limited leave to remain without the English language test but instead sought to disrespect immigration laws. I was unimpressed by Mr Brennan's attempts to minimise the respondent's clear deception and her blatant

disregard for immigration control. Second, that deception had a 'knock on' effect – the respondent's subsequent application to remain was correctly dismissed under the Immigration Rules, on 'suitability' grounds in 2016. It follows that she was and remains unable to meet the requirements of the Immigration Rules. These two matters are directly relevant to s. 117B(1), which states that the maintenance of immigration controls is in the public interest. This is a matter the FTT was required to have regard to pursuant to s. 117A.

11. I turn next to s. 117B(2). The FTT has entirely omitted to address another matter, it was required to have regard to the respondent's English language ability. Mr Brennan accepted that the respondent remained unable to speak English.

12. I note that the SSHD's representative before the FTT laid emphasis upon these matters during the course of her submissions, with a view to inviting the FTT to find that the public interest considerations outweighed family life – see [12] and [24]. Regrettably, the FTT failed to include these matters in the balancing exercise or give any indicator as to the weight that should be attached to them. In a case as finely balanced as this one, it was incumbent upon the FTT to clearly identify and ascribe appropriate weight to the public interest considerations. In failing to do so, the FTT committed a material error of law.

Decision

13. I allow the SSHD's appeal and set aside the FTT decision.

Disposal and directions

14. There is little if any factual dispute between the parties. In the circumstances the decision can be remade by the Upper Tribunal ('UT') at an adjourned Skype remote hearing. The parties shall comply with the following directions.

    (1) Within 14 days of the date this decision is sent the respondent shall file and serve a consolidated bundle and a skeleton argument.

    (2) Within 28 days of the date this decision is sent the SSHD shall file and serve a position statement. That shall indicate whether any witness will be cross-examined.

    (3) The respondent is reminded that any arrangements for an interpreter will need to be made with the UT, if the SSHD wishes to cross-examine her.

Signed: Ms M Plimmer Dated: 15 December 2020
Upper Tribunal Judge Plimmer