



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/21092/2013  
OA/21095/2013

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 3 September 2015**

**Decision and Reasons  
Promulgated  
On 4 November 2015**

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**XIUMING LIN  
QUIPING GUAN**

Appellants

**and**

**ENTRY CLEARANCE OFFICER - BEIJING**

Respondent

**Representation:**

For the Appellant: Mr Walsh, Counsel instructed by Stephen & Richard  
Solicitors

For the Respondents: Mr Mills, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the determination promulgated on 27 October 2014 of First-tier Tribunal Judge Thomas which refused the appeals against refusal of entry clearance dated 28 October 2013.
2. The appellants are citizens of China. They are mother and daughter. They applied for entry clearance to join Mr Hogsden Guan, a British national. He

is the husband of Mrs Lin (the first appellant) and father to Ms Guan (the second appellant).

3. The applications for entry clearance were refused on a very narrow point. The respondent did not accept that Mr Guan was who he said he was. This was because the date of birth in his marriage certificate, household register and Chinese passport was 22 June 1970 and the date of birth in his UK immigration status document was 19 May 1970.
4. Mr Guan provided a statutory declaration indicating that the immigration status document had the wrong date of birth as this had been wrongly recorded when he had applied for asylum. The respondent did not find this sufficient to show that he was the person shown in the marriage certificate, household documents and Chinese passport as the husband of the first appellant.
5. This was the sole reason given for finding that it had not been shown that the first appellant was in a genuine and subsisting relationship with the sponsor. Her application was refused under paragraph EC-P.1.1(d) of Appendix FM with reference to E-ECP 2.6 and 2.10.
6. The application was also refused as it was not found that the English language requirement had been met as of the date of the decision.
7. The second appellant's application was refused solely because her mother's application had been refused with no independent reasoning relating to her application being provided.
8. Judge Thomas found that Mr Guan was who he said he was and that he was the person shown as the husband of the first appellant and father of the second appellant. This followed a concession to that effect from the respondent; see [3] and [11].
9. It might be thought where that concession as to Mr Guan's identity was made that nothing remained in dispute other than the English language test issue. However, Judge Thomas proceeded on the basis that the "subsistence of the relationship" was in issue beyond the fact of Mr Guan's identity as well as the English language certificate; see [3]. She went on to find that the first appellant and Mr Guan were not in a genuine and subsisting relationship where they had lived apart for many years and there was insufficient evidence of intervening contact.
10. It is my view that this was a procedural error where no case on the point had been put to the appellants prior to the hearing, the refusal prior to that being on an entirely different basis. Even though it was known to the respondent prior to the hearing that the point on identity would be conceded, no notice was given and no application or other formality followed to amend the reasons for refusal.
11. In addition, Judge Thomas found at [12] that she could not admit the two English Language certificates dated 24 October and 29 October 2013 as

“These documents must accompany the application.” She did not refer at all to the arguments put to her that there is nothing in the Immigration Rules or other legislation requiring the English language test certificate in a spouse entry clearance application to be provided with the application or stating it to be inadmissible on appeal, contrary to the provisions of section 85A(4) of the Nationality, Immigration and Asylum Act 2002.


12. Further, the English language requirement was not relevant to the second appellant’s application. After the identity issue was conceded, there were no extant reasons for refusing entry clearance to the second appellant. Even if her mother’s claim failed, she was accepted to be the daughter of a British national and was entitled to have her entry clearance appeal considered on that basis, paragraph 297 of the Immigration Rules potentially covering her circumstances, Article 8 certainly being relevant. The Article 8 assessment for the child at [13] is flawed, however, where it is built on the procedural unfairness identified above, and because Judge Thomas finds the second appellant to be the sponsor’s “adult” daughter which, as she applied when she was a minor was not a correct approach.
13. For all of these reasons, I found that the determination of First-tier Tribunal disclosed a material error on a point of law such that it had to be set aside to be re-made *de novo*.
14. The errors in determining the genuine and subsisting nature of the marriage and failing to determine the second appellant’s independent appeal amount to procedural irregularity such that the matter should be remitted to the First-tier Tribunal; see paragraph 7.2 of Part 3 of the Senior President’s Practice Statement dated 25 September 2012.

#### Decision

16. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made *de novo* in the First-tier Tribunal.

#### Directions

17. No later than 28 days prior to the hearing in the First-tier Tribunal, the respondent is directed to file with the Tribunal and serve on the appellants a skeleton argument setting out the legal position that will be pursued.
18. No later than 7 days prior to the hearing in the First-tier Tribunal, the appellants are directed to file with the Tribunal and serve on the respondent a consolidated, indexed and paginated bundle of all materials relied upon together with a skeleton argument.

Signed: 

Date: 2 November 2015

Upper Tribunal Judge Pitt