Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01246/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 March 2019	**On 21 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MRS SUHUA CHENG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Jones, Counsel
For the Respondent: Ms S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Judge Onoufriou which was promulgated on 2 January 2019.

2. The appellant is a citizen of China born on 1 August 1955 who appealed a decision of the respondent dated 22 November 2017 to refuse her application for entry clearance as the partner of her sponsor, Mr [CP], under the provisions of paragraph EC-P.1.1(d) and E-ECP.2.6, 2.10 and 3.4 of Appendix FM of HC 395.

3. It is plain that the central issue which the First-tier Tribunal had to determine was whether or not the appellant and the sponsor were in a genuine and subsisting relationship. They had married in 2005 but had lived apart for a substantial period.

4. The matter was before Immigration Judge Farrall, as long ago as 2008, who came to a view at that there was an absence of genuineness in the claimed relationship. What in effect this First-tier Tribunal was doing was reassessing the matter in the light of a passage of nearly a decade.

5. The judge came to the view, supported by an assessment of the evidence, not least the apparent durability of the claimed relationship in the intervening ten years, including visits made by the sponsor to the appellant of some duration during which he lived with the appellant in China. This was reinforced by what seemed to have been fully documented daily telephone conversations. The judge decided on the evidence provided that this was a genuine and subsisting relationship, as is recorded in paragraph 28 of the determination.

6. It is the content of paragraph 29 that has given rise to this appeal. The judge stated:

> "The remaining issue is the adequacy of the accommodation. In this respect, I am not satisfied that the sponsor has provided evidence that there is adequate accommodation available. He has provided a tenancy agreement which is over 12 years old. It does include the name of the appellant as a permitted occupant and it does state that it is a two bedroom flat, but there is no evidence as to the up to date condition of the property and its suitability for their joint occupation. However, there is clear up to date evidence that the sponsor resides there in the form of a utility bill. However, there is no evidence as to whether there are any other occupants currently, other than the sponsor, or whether the condition of the property contravenes public health regulations. Therefore, in this respect, the appellant does not satisfy the requirements of paragraph E-ECP.3.4 of Appendix FM of the Immigration Rules."

7. On any account this is a slightly odd finding, in two ways. First when one looks at the evidence advanced on behalf the appellant, the sponsor's statement includes at paragraph 11 the following, which was unchallenged:

> "My wife and I have been married for more than 13 years now. Our relationship is genuine and subsisting. We want to live together as husband and wife. I am nearly 90 years old. I have one adopted daughter who I do not live together [sic]. I am really lonely and I miss my wife. I constantly suffering stress and pressure. I cook for myself, I go to GP by myself when I need to. I look after myself but I am afraid that I might not be able to carry on like this anymore. I am

> afraid if one day I would fall over and not be able to get up in the house but nobody knows."

8. It is both implicit and arguably explicit in that paragraph that only one construction can be placed on it, namely that the sponsor lived alone. Were the judge to have had any concern, that ought to have been put to the sponsor during the course of the hearing, afforded him the opportunity of comment. It was not open to the judge to say that there was no evidence as to whether there are any other occupants currently residing there. To the contrary, there was relevant and unchallenged evidence pointing to the strong likelihood (at least) that he lived alone.

9. The absence of evidence on the public health regulations is again a surprising observation. I have been taken by Mr Jones for the appellant to the Immigration Directorate Instruction, Family Migration, *Adequate Maintenance and Accommodation* (August, 2015) and in particular paragraph 8.4.5 which concerns public health regulations and reads as follows:

> "It is likely to be rare that the property contravenes public health regulations. However, if the decision maker has satisfactory evidence that that is or will be the case, they may determine that the accommodation is not adequate."

I cannot see how this case could possibly have come within that rare category. I have been taken to the tenancy agreement, the landlord here being Clapham Park Homes, a charitable housing corporation. This is social housing and there are statutory obligations placed upon social housing landlords to ensure that minimum public health regulations are complied with. Mr Jones referred me to a document from Citizens Advice in this regard. It was not properly open to the judge to enter into speculation on this matter, still less to draw a conclusion adverse to the appellant.

10. Further I accept the point made by Mr Jones, and conceded by Ms Jones for the Secretary of State, that the matter which led to the Entry Clearance Officer's refusal in relation to the accommodation did not concern it being overcrowded or in some way unfit for human habitation. It was simply the fact that upon trying the telephone number there had been no response. In other words the issue was as to whether the property was genuinely occupied by the sponsor, not whether it was overcrowded or in breach of public health regulations.

11. As was rightly conceded by Ms Jones, this is an error of law and the decision of the First-tier Tribunal must be set aside.

12. Having set it aside, with the concurrence of counsel, it falls to me to remake the decision. Ms Jones properly accepted that having regard to the judge's finding as to the genuine and subsisting nature of the relationship of the appellant and the sponsor (in respect of which there

was no cross-appeal), the countervailing considerations in relation to the adequacy of the accommodation should be determined in the favour of the appellant. The evidence pointed to the appellant living alone in a two-bedroom property and there was no evidential basis for raising any public health concerns.

13. It therefore follows that this appeal must succeed under the Immigration Rules and I so direct.

Notice of Decision

(1) An error of law having been found, the decision of the First-tier Tribunal is set aside;
(2) The decision is remade, allowing the appeal under the Immigration Rules.
(3) No anonymity direction is made.

Signed *Mark Hill* Date 19 March 2019

Deputy Upper Tribunal Judge Hill QC