IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002760

First-tier Tribunal No: HU/01769/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

24th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

LING LOU
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hosen, Solicitor
For the Respondent: Mr Lawson, a Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 3 October 2023

Order Regarding Anonymity

The First Tier Tribunal made no order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

I make no such order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

DECISION AND REASONS

Procedural History

1. The Appellant, a Citizen of China, born on 4 October 1981, applied on 13 February 2021 for leave to remain in the UK on the basis of her private life and family life with her partner, Mr David Beaumont, who is a British Citizen and her Sponsor, pursuant to the provisions of Appendix FM to the Immigration Rules, as well as on the basis of her

private life. Her application was refused by the Respondent, and the reasons for refusal letter is dated 6 October 2021. Her appeal against the refusal was dismissed by First-tier Tribunal Judge Row (the Judge), in a decision promulgated on 18 May 2023, after a hearing on 3 May 2023. The Appellant applied for leave to appeal the Judge's decision on 1 June 2023, and permission was granted by First-tier Tribunal Judge Austin.

2. The Appellant entered the UK on 27 August 2020, with leave to enter as a marriage visitor, valid until 13 February 2021. She and the Sponsor were married on 23 September 2020. In the refusal letter it is stated that the application did not fall for refusal on suitability grounds under para R-LTRP.1.1.(d)(i), that under R-LTRP.(d)(ii), she met the eligibility relationship requirements of paragraphs E-LTRP.1.1. to 1.12., and the eligibility immigration status requirements of paragraphs E-LTRP.2.1 – 2.2. It is to be remembered that the Appellant could not make an in-country application because she was a marriage visitor.

3. In dismissing the Appellant's appeal, the Judge made the following findings: (a) he set out reasons for refusal of the application [2 – 5]; (b) he set out the grounds of appeal, identifying that the only ground of appeal capable of success is Article 8 although if the Appellant met the provisions of the Immigration Rules, "It would be a significant matter to be considered in the assessment of proportionality" [6 – 10]; (c) he was not able to identify why the decision-maker had not considered the application under the five-year route [14]; (d) the parties agreed that the financial evidence under Appendix FM-SE had not been provided and it was accepted that the Appellant had not passed the English language test; (e) the basic facts as to how and when the Appellant and Sponsor met, and where they lived was not in dispute [16 – 17 and 19 -20]; and (f) the Appellant and the Sponsor had still not provided the documentary evidence to establish that the requirements of Appendix FM could be met [22].

4. In relation to the provisions of EX.1, the Judge set out the reasons given by the Appellant as to why there were insurmountable obstacles to her continuing her family life outside the UK with the Sponsor, which were that the Sponsor had a job here, he had a home, he did not speak Chinese, the nature of his work would mean that he might be of interest to the Chinese authorities, and he had elderly parents, one of whom is receiving kidney dialysis [23]. The Judge found that these reasons could not be described as insurmountable obstacles; they were the type of obstacles any couple might face if they moved to another country, that the Sponsor's parents currently lived independently, and appropriate arrangements could be made for any assistance that they may require [25]. He also found that "The possibility that the sponsor might be of interest to the Chinese authorities is speculation" [26] and, "There is in any event no requirement that the appellant and the Sponsor should move to China. They have lived abroad because of the nature of their work for many years. The sponsor has skills which could be employed anywhere in the world. The appellant could go with him. She has done in the past" [28]. On these findings, the Judge found that insurmountable obstacles to family life continuing outside the UK had not been established [28].

5. In relation to para 276ADE(1)(vi), on the basis that the Appellant is a national of China, entitled to the benefits of citizenship, able to speak Mandarin, capable of employment, had lived most of her life there, and had extensive family connections, the Judge found that very significant obstacles to integration had not been established.

6. The Judge then considered the provisions of GEN.3.2(2) at [30 – 34], finding the consequences of the decision were that the Appellant may have to make an out of country application from China, that the stay there need not be long or unpleasant as she had family and friends there, that the Sponsor could meet her family at the same time, that all she needed to do was comply with the English language requirements and supply evidence of the Sponsor's income, and that "It is reasonable for the respondent to require the appellant to make the appropriate application, from the appropriate place, to provide the appropriate evidence, and to pay the appropriate fee, to enable a reasoned decision to be made upon her application. Subject to complying with its legal obligations the United Kingdom is under no obligation to allow the appellant to remain within its territories whilst such an application is made" [34]. He concludes that the consequences are not harsh and are justifiable.

7. As to the proportionality assessment under Article 8, the Judge accepts that the Appellant will have established a family and private life in the UK, and states that he will adopt the balance sheet approach in assessing proportionality as set out in Hesham Ali v SSHD [2016] UKSC 60 [36]. He weighs against the Appellant her failure to meet the Immigration Rules; and he states that family life can be continued outside the UK, and the Appellant can make the appropriate application which reduces the effect of interference [36 – 39]. In relation to the S 117B factors, the Judge finds that the Appellant established her private and family life in the UK when her immigration status was precarious, and so he can put little weight on it; that she speaks some English, so that does not weigh against her so the effect is neutral; that if the Sponsor's financial circumstances are as claimed, this would not weigh against her, and that the maintenance of immigration control weighs heavily against the Appellant because she did not meet the Immigration Rules and did not provide the relevant evidence with her application [39 – 44]. He concludes that the public interest in removing the Appellant far outweighs any interference with her private and family life in the UK [45].

8. Permission to appeal was granted by First-tier Tribunal Judge Austin, who merely stated that the application was in time and the grounds are arguable. Given the brevity of the grant of permission to appeal, it is worth setting out the grounds of application (the grounds) and the Rule 24 response (the Response) fairly fully.

Grounds on which permission to appeal was sought, and granted, and the Rule 24 Response

9. The grounds are lengthy, and are broken down into 3 grounds. Ground one is headed "The FTJ left material matters out of account in concluding that EX1(b) was not met or gave insufficient reasons for reaching that conclusion. Under this head it is argued that:

10. The Appellant's application was made under the 10 year route, that the main purpose of the application and the appeal was to consider the Appellant's case under para EX.1, because the Appellant was stuck in the UK, unable to go to China, and unable to make an application under the Immigration Rules due to her entry clearance as a marriage visitor. She was also unable to sit her English language test and did not have a valid passport, and could not renew it due to the Covid lockdown; her passport was with the Respondent when her application was made and was not returned to her. The Judge had proceeded on the mistaken basis that the Appellant could have made an application under the five year route, and this assumption infected all his findings of fact, as evidenced by the Judge's focus on irrelevant facts such as the failure to provide an

English language test [at 15, 20, 22, and 34], and the lack of financial evidence which complied with the provisions of Appendix FM-SE [15, 19, 21 – 22 and 34], when these issues were irrelevant to the assessment of the appeal under para EX.1(b).

11. The author of the Response, having reminded the Judge granting permission to appeal of the guidance in Joseph [2022] UJUT 00218 (IAC) at head note 4, that "All permission to appeal decisions should feature brief reasons. That includes a decision to grant permission to appeal. It is a useful exercise in judicial self-restraint to say why it is thought that the grounds are arguable, particularly where the grounds of appeal challenge findings of fact reached by the judge below", responds to ground 1 stating that there was no skeleton argument on behalf of the Appellant, which led to difficulties with the appeal, and that it would have been clear to the representatives that a marriage visit visa does not entitle an application to be made under the five year route, and that the Judge went on to consider the point raised at [7, 5 and 9]. The author of the Response submits that EX.1 was fully reasoned at [23 – 28] and GEN.3.2(2) was adequately considered.

12. Ground 2 is headed "The FTJ made an incorrect assessment of insurmountable obstacles in the A's case". Here it is submitted that the findings should be fact specific and based on the individual circumstances of the Appellant. There is reference to the Judge's findings at [24], that the difficulties that the Appellant and Sponsor would face were the "type of obstacles which would face any couple when they moved to another country" and which the Appellant faced when she moved to the UK and were not insurmountable obstacles. It is stated that the findings at [24] are "over generalised", that the Judge did not consider the evidence provided as to why the Appellant could not return to China, or why she could not provide an English language test certificate. It is submitted that relying on his assumption that a new application could be made with the right evidence, the Judge failed to take account of the Appellant's particular exceptional circumstances, that is why she had not been able to make an out of country application. It is also submitted that the Appellant's circumstances had changed because her husband had now obtained employment with a government sector in the UK and this had resulted in a fear of returning to China to make an application. It is submitted that the Appellant made clear that "it is not a case of her and her husband returning to China to make an application but rather she fears returning to China with her husband due to the risk posed by the state in addition to the difficulties her husband would face due to the language barrier". It is submitted that "R v Sivakumaran [1088] AC 958 states that harm can be considered a serious possibility and that KM (Somalia) v SSHD [2009] EWCA Civ 466 provided that mere speculation was an error of law,; the Judge had failed to consider the objective evidence provided, and that the Respondent's own guidance, at pp 67 – 76, states that regard must be had to cultural barriers that the Sponsor would face, pursuant to the Home Office Guidance at pp 67 – 76 of AB. It is further submitted in ground 2 that the Judge also erred in law in stating that there was no requirement on them to move to China; they could live abroad because of the nature of their work as they had done for many years because the law requires the assessment to be by reference to the Appellant's country of origin, and that the Judge was requried to assess the country's "law, attitudes and country situations", and he erred by failing to do so, making the findings unreliable. It is further submitted, at paras 18 – 19 of the grounds, that the Judge failed to reference case law in his assessment of insurmountable obstacles.

13. As to ground 2, it is submitted in the Response that the grounds of application take issue with the Judge's assessment of insurmountable findings because he failed to consider

political instability, healthcare concerns etc because he did not take onto account the articles provided by the Appellant regarding the Chinese authorities arresting a number of foreigners and so the Appellant may have been of interest to the authorities and this was not factored into in his findings at para [24]. It is submitted that the insurmountable obstacles assessment was fully reasoned, and a few "obscure articles within the Appellant's bundle was insufficient to show a material error of law" (para 23), and that it is trite law that the Judge does not have to mention every piece of evidence provided. There is reference within the Response to Joseph, at headnotes 1 – 2, which provides:

> "*1. The parties are under a duty to provide the First-tier Tribunal with relevant information as to the circumstances of the case, and this necessitates constructive engagement with the First-tier Tribunal to permit it to lawfully and properly exercise its role. The parties are therefore required to engage in the process of defining and narrowing the issues in dispute, being mindful of their obligations to the First-tier Tribunal.*
>
> *2. Upon the parties engaging in filing and serving a focused Appeal Skeleton Argument and review, a judge sitting in the First-tier Tribunal can properly expect clarity as to the remaining issues between the parties by the date of the substantive hearing."*

14. It is submitted in the Response that the grounds disclose nothing but an argument with the findings of the Judge and the threshold to dislodge those findings is a high one (that is that "no reasonable judge could have reached those conclusions" – Volpi v Volpi [2022] EWCA Civ 464) and that ground 2 has no merit.

15. Ground 3 is headed "The FTJ misdirected himself in law in considering proportionality under Article 8 ECHR, specifically with regard to s 117B NIAA and GEN3.2." It is submitted that Hesham Ali was not properly applied because the Judge did not consider the adverse effect on the Appellant's husband and his parents who are both British citizens, and that "incorrect or insufficient reasons" were given for this aspect of the appeal. It is argued in the alternative that the Judge failed to follow the Razgar approach, because he stated that it was open to the Appellant to make the appropriate application and this time do it correctly, thereby stating that she submitted the wrong application, and not considering the reasons why her application was made. It is submitted that this effects his assessment because it is stated in TZ & PG v SSHD [2018] EWCA Civ 1109, at para 22, that "*the structure of decision making in appeals of this kind will usually involve the application being considered under the relevant provisions of the Rules and, if the appellant does not qualify under the Rules, outside the Rules to determine where the removal would amount to a breach of article 8*." It is also submitted that the Judge failed to follow the guidance in Chikwamba v SSD [2008] UKHL 40 which provided that if an applicant satisfied the spouse entry clearance requirements, then there would be no public interest in removing her and she should be granted leave.

16. In the Response to ground 3, it is submitted that the Judge did not misdirect himself and that he conducted a proper proportionality assessment, including balancing the public interest against private and family life considerations. It is submitted that the appeal has been properly considered and leaves the reader in no doubt as to why it has been dismissed.

17. At the hearing, Mr Hosen relied on his grounds of application, adding the following: (a) the Judge' s findings at [24] were generalised, and that the evaluation should have been

fact sensitive, that the Judge gave insufficient weight to the different challenges faced by the Appellant, who had been away from China for 8 years, and he did not consider the effect that moving to China would have on the Sponsor. Evidence was provided that substantiated the Sponsor's concerns as to the risks he faced living there. The Judge would have been entitled to say that his fears were mere speculation if no evidence had been provided, but it was provided at pp 29 – 49 of the Appellant's bundle, with pp 29 and 39 confirming the Chinese authority's hostility to foreigners and the reluctance of foreigners to travel to China. He submitted that had the Judge considered this evidence, it would have changed the outcome of the appeal; (b) The finding at [27], that is that the Appellant and the Sponsor did not have to live in China, was harsh and would normally only be applied to those who were in the UK without any status, but the Sponsor is a British citizen who is working in a "sensitive sector"; (c) As to proportionality, the Judge stated that he would take a balance sheet approach but did not in fact do so, that his findings were over simplified because even if they could not succeed under the Rules, it did not mean that it was inevitable that they would not succeed under Article 8. He submitted that due to the number of issues with the decision of the Judge, it should be set aside and remitted to the First-tier Tribunal (FtT), with no facts preserved.

18. Mr Lawson, relying of the Rule 24 Response, submitted that: (a) the decision was well-written, well balanced and dealt with all the issues raised by the parties, and that the Judge was hampered by lack of documentation and this was the fault of the Appellant's representative because no skeleton argument was provided to the Judge; (b) the Judge carried out a proper evaluation of insurmountable obstacles and found that family life could continue in China. There was no evidence from the Foreign and Commonwealth Development Office to suggest that British citizens were warned not to travel to China. The parties had lived in a number of different countries worldwide, the Judge's consideration was well-balanced, and the grounds were simply a disagreement with the findings of the Judge.

19. In reply, Mr Hosen re-iterated that the Judge should not have required the additional evidence as to funds and the English language test, which was not required for the assessment under EX.1(b) and only did so because he was confused; that the Sponsor, working as he was with a government agency, may not be safe to continue working in China, and it was clear that the judge failed to consider it or omitted to refer to the evidence provided when making his findings of fact, and this could affect the entire Article 8 assessment, and so the error is material. He submitted that if the appeal was re-heard, a broad evaluative assessment would be needed.

20. Mr Lawson stated that if a material error of law resulted in the decision being set aside, I should decide if it should be retained in the Upper Tribunal or remitted to the FtT.

Discussion and reasons

21. I had before me a 300 page stitched PDF bundle (SB), which contains all the documents relied on by the parties. When I refer to a page number, it will be to the page number of the SB, not the internal pagination of the bundles it contains.

22. Although it is stated in the Response that the FtT was hampered by the lack of a skeleton argument, this is in fact incorrect. A skeleton argument is in the Appellant's bundle; it is lengthy and covers all the points on which submissions were made before me.

23. Mr Hosen relied heavily on the Judge's confusion as to which Immigration Rule the application had been made under infecting the entire decision. He correctly stated that TZ & PG provides, at para 22, that "*the structure of decision making in appeals of this kind will usually involve the application being considered under the relevant provisions of the Rules and, if the appellant does not qualify under the Rules, outside the Rules to determine where the removal would amount to a breach of article 8*." This is why it is important to identify the Immigration Rule under which the application is made and under which the application is to be assessed by the decision-maker, and then by the FtT, in any appeal against a negative decision.

24. Further, whilst it is submitted in the Response that it would have been clear to the parties that someone who holds a marriage visitor visa cannot make an in-country application, it does appear that it was not clear to the Judge; he states at [18] that "The Sponsor and the appellant came to the United Kingdom in August 2020. The appellant had a marriage visa which entitled her to enter, marry, and then make an application from inside the United Kingdom for further leave to remain." This is a clear error of law, which resulted in him then not taking into account the reasons given by the Appellant as to why she did not make an application under the 5 year marriage route. It is unclear, when the Judge states at [31] that "There are other options open to the appellant and the sponsor. The appellant could return to China to make an application for entry clearance there. This is what most people in her situation would do", whether this is because refusal of leave to remain would result in the Appellant having no status, and so she would have to leave the UK to make an out of country application, or if he recognises, albeit belatedly, that she cannot make an in-county application because her marriage visitor visa does not permit her to. Either way, is it is difficult to see which Immigration Rule he is relying on in his assessment as to whether or not the Appellant satisfied the provisions of the Immigration Rules.

25. Mr Hosen submitted that the reasons why the Appellant did not provide the financial documents and the English language test was because the provisions of Appendix FM, when applied to the facts of the Appellant's case, would only have travelled as far as the eligibility immigration status provisions because the Appellant was not permitted to make an in-country application and would have to rely on the provisions of para EX.1(b). He stated that the submissions as to why she could not have made an out of country application, or sit the English language test, would then have to be addressed. There is nothing within the Judge's decision to establish that he considered the evidence that was put before him in relation to these points. Mr Hosen is right in stating that when considering the insurmountable obstacles test, because of the reliance on the provisions of EX.1(b), if insurmountable obstacles had been established, there would have been no need for the Appellant to provide the financial information required by the provisions of Appendix FM-SE or provide an English language test certificate in order to succeed under the Immigration Rules.

26. As to ground 2, there is no merit in the reference to Sivakumaran; this is not a refugee appeal. The evidence before the Judge, as to risk to the Sponsor in China, would be assessed on the basis of the balance of probabilities on the evidence that was provided. In the skeleton argument, the Appellant did specifically raise the effects of Covid on her ability to find employment in China, providing background evidence in relation to Covid measures implemented there, and gender discrimination, in support of her appeal. The Appellant also provided background evidence in relation to the perceived risk to the Sponsor due to the sensitive nature of his work. However, there is nothing within the

decision to suggest that the Judge considered this evidence or made findings of fact on it. Whilst I accept that the Judge does not need to refer to every piece of evidence, there is a duty on a judge to engage with the submissions made and provide adequate reasons. Mr Hosen has demonstrated by reference to the materials placed before the Judge, and I accept that it is made out, that there was an insufficiency of reasons given for rejecting two of the main reasons given by the Appellant as to why she and the Sponsor could not re-locate to China for the purposes of insurmountable obstacles assessment under EX.1(b), and that this is a material error of law (VV (grounds of appeal) Lithuania [206] UKUT 00053 (IAC). It may be that the failure to provide FCDO travel advice information may affect the evidence provided, but without reasons given as to why the background evidence that was provided did not demonstrate a risk to the Sponsor for the reasons put forward by the Appellant, it would not be possible to make that assessment.

27. As to ground 3, whilst there is nothing within the decision which suggests that the Judge misdirected himself in relation to Article 8 (there is no need for him to make extensive reference to case law as submitted in the grounds, provided that he applies the principles set out in them), the errors of law established under grounds 1 and 2 infected the Article 8 assessment. I find that the Judge materially erred in law in not considering the evidence that was put before him, and I set aside his decision. Whilst considering the appeal under the wrong immigration rule will not always be material, on the facts of this case, the consideration of the appeal under the wrong Immigration Rule, coupled with the failure to consider the evidence put before him in making his findings of fact, resulted in unfairness to the Appellant, such that no findings of fact are preserved and the nature and extent of the necessary fact finding requires the appeal to be remitted pursuant to Begum [2023] UKUT 00046 (IAC).

Notice of Decision

28. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Row

M Robertson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 12 October 2023