IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-06334
UI-2023-001768

First-tier Tribunal Nos:
HU/56946/2021 & HU/56948/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 July 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

QINYING CHEN (1)
CHEUK KI HO (2)
(NO ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R McKee, of Counsel, instructed by David Tang & Co Solicitors
For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

Heard at Field House on 4 July 2023

DECISION AND REASONS

Introduction

1. The appellants are citizens of the Hong Kong Special Administrative Region of China. The first appellant was born on 9th June 1974 and the second appellant was born on 22nd June 2003. They are mother and daughter. The first appellant came to the UK as a visitor on 11th August 2020, the second appellant arrived as a Tier 4 general student on 10th November 2019. The appellants applied to remain in the UK on the basis of an application under Appendix FM and under paragraph 276ADE of the Immigration Rules, on the factual basis that the first appellant wished to remain permanently in the UK as the partner of Sunny Sang-Yau Lai, a British citizen and the second appellant wished to remain as her dependent. Their applications were made in time on 8th February 2021 and refused as human rights' claims on 2nd November 2021. Their appeal against the decision was allowed by First-tier Tribunal Judge Cameron after a hearing on the 8th August 2022.

2. Permission to appeal was granted to the Secretary of State, and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision appended as Annex A to this decision. The matter comes back before me now to remake the appeal. The hearing proceeded by way of legal submissions only.

3. The following matters are preserved from the decision of the First-tier Tribunal: that the first appellant's relationship with her British citizen partner is genuine and subsisting as recorded at paragraphs 14 and 26 of the decision; that the first appellant has passed the relevant English language test as set out at paragraph 27 of the decision; and that there is a family life relationship between the second appellant, first appellant and sponsor as found at paragraphs 32 and 36 of the decision.

4. At the hearing I provided the appellants' representatives with two days, until 4pm on Thursday 6th July 2023, to email the Upper Tribunal and the respondent with written submissions on The Coronavirus (Covid 19): advice for UK visa applicants and temporary UK residents in force at the date of decision / the point in time it was argued was relevant to my determining the appeal. Mr Basra then had a day to reply to the written submissions by the end of Friday 7th July 2023 after which, he explained, he was going on paternity leave. I received written submissions from both parties which I have taken into account in making my decision.

Evidence & Submissions – Remaking

5. The first appellant's evidence from her written statement is as follows. She had been living together with her partner and sponsor Mr Lai since 2007 as evidenced by the various utility bills, and her daughter also lived with them at their first two addresses in Hong Kong until she came to the UK to study in November 2019, although she spent some time with her grandmother who

continued to live at their first address after they moved to their second one. The first appellant believed that the Coronavirus guidance from the respondent permitted her to make an in-country application to stay with her partner even though she had entered the UK on a visit visa. Her partner has over £300,000 of savings so she also believes that she can meet the financial parts of the Immigration Rules. She lives together with her partner and daughter, the second appellant, at the same address. The second appellant's father has had no input in her upbringing, and the second appellant's grandmother, who helped bring her up, moved from Hong Kong to China after the second appellant came to the UK in November 2019.

6. The second appellant confirms the above chronology in her statement and oral evidence, and adds that she has been accepted on a degree course in the UK. She has lived with the appellant and the sponsor since she was four years old, as, although custody was officially awarded to her father, he did not have the money or ability to look after her. The first appellant has made all the key decisions in her life. She is part of a family with the first appellant, sponsor and gets on well with the sponsor's two grown up children. She does not wish to return to Hong Kong as she is not close to her brother and father who are her only family in Hong Kong as her maternal grandmother has retired to China.

7. Mr Basra for the respondent relied upon the refusal letter of 2nd November 2021. The relevant parts of the refusal decision find that the first appellant had failed to show that there would be unsurmountable obstacles to family life in China, a requirement she needed to fulfil under EX 1 of Appendix FM of the Immigration Rules because she did not have the correct immigration status to apply in-country. There were not considered to be any exceptional circumstances and the best interests of the second appellant were not relevant to a grant of leave to remain as she could live in Hong Kong with her mother.

8. Mr Basra added that the January 2021 version of the "The Coronavirus (Covid 19): advice for UK visa applicants and temporary UK residents" did not permit in-country switching as it states under "If you intend to stay in the UK" that "You'll need to meet the requirements of the route you're applying for and pay the UK application fee". Mr Basra could not explain what the policy meant, if this interpretation was correct, when it reads, in the sentence before the one he relied upon: "You'll be able to submit an application form from within the UK, whereas you would usually need to apply or a visa from your home country."

9. In answer to my question as to which version of the Coronavirus guidance I should consider in this appeal Mr Basra said it should be the current one, which in any case does not contain any guidance

about being able to submit an application in the UK. Mr Basra unfortunately did not receive Mr McKee's further written submissions due to Mr McKee having inadvertently incorrectly read Mr Basra's email address. Mr Basra did however make some further submissions on the issue of the guidance. He drew attention to the fact that on 22nd May 2020 there was a statement from the then Home Secretary that persons in the UK on temporary visas such as visit visa should return home as soon as it is safe and possible to do so. He also draws attention to page 4 of separate guidance entitled "Covid Visa Concession Scheme: where leave expires while the holder is overseas and unable to return to the UK due to COVID-19", version 2 25 January 2021, which states under the heading "Eligible immigration routes": "Those who were in the UK as Visitor are not eligible for this concession".

10. Mr Basra argued that the fact of the first appellant having access to sufficient funds to meet the requirements of the Rules was irrelevant as she could not succeed under the five year route under Appendix FM due to not having entry clearance as a partner and being present in the UK as a visitor. The first appellant's appeal failed when proportionality was considered because the Immigration Rules were not met, and although the first appellant was financially self-sufficient and spoke English these were neutral factors, and there were no exceptional factors weighing in her favour. He argued that the second appellant could not succeed as little was known about her beyond her being a 20 year old student who lived with her mother and her mother's partner.

11. Mr McKee clarified that there were no insurmountable obstacles to family life in Hong Kong/China and that he only argued that the appeal could succeed by reference to the five year route Immigration Rules at Appendix FM on the basis that the first appellant could properly apply in country because she applied at the time when the Coronavirus (Covid 19) advice for visa applicants and temporary UK residents clearly meant that she could apply when being present with leave to enter as visitor due to the guidance stating: "You'll be able to submit an application form from within the UK, whereas you would usually need to apply or a visa from your home country."

12. When I pressed Mr McKee as to explain which version of this guidance was relevant to my determining this human rights appeal (which must be determined on the facts at the date of hearing): the one at the date of application (8th February 2021); that from the date of decision (2nd November 2021) or the current one he responded that it would, in his view, be the guidance at the date of decision which was relevant. That version had not been put before the Upper Tribunal as it should have been if the appellant wished to reply upon it. Before me Mr McKee appeared to accept that if the relevant guidance which he argued permitted switching had

been deleted at the point of decision then the appeal could not succeed.

13. Subject to the above Mr McKee argued that the first appellant could succeed under the five year route because she had shown the sponsor had more than £62,500 of savings for a period of more than 6 months prior to the date of application with appropriate evidence including full translations where the bank statements were in Chinese, and indeed had also provided bank statements showing more than this amount existed in the sponsor's account for six months prior to the date of decision and for six months prior to the date of hearing with the necessary translations where the bank statements were not in English.

14. Mr McKee argued that the second appellant could succeed in the appeal as she had applied as a child dependent on her mother's application and thus was in the application system as a child, and the fact that she was now over the age of 18 years made no difference in circumstances where she had not formed an independent unit.

15. In his written submissions of 5th July 2023 Mr McKee argues in summary as follows. He once again argued that the Coronavirus guidance valid as at the date of application in February 2021 permitted the first appellant to switch from visitor to partner. He argued that the respondent had not taken the point about the guidance changing in the refusal decision in November 2021 but rather had said there was insufficient evidence that the first appellant had lived with her partner for two years and that she had no valid form of leave to remain (which was inaccurate) and so could not meet the eligibility immigration status requirement. He goes on to argue that the respondent did not take this point before the First-tier Tribunal either, and instead argued that the financial requirements of the five year route could not be met due to the failure to fulfil the requirements of Appendix FM-SE. Mr McKee accepts that by the time of decision in November 2021 the guidance no longer permitted an application to be made where the route is one for which the Rules make no provision for an in-country application but argues that as the change in guidance did not go to the requirements of the application, which would have to be met at the time of decision, but to the ability to make the application at all that there could be no retrospective invalidation of the application.

16. In summary Mr McKee argues that the first appellant can clearly meet all the suitability, eligibility, financial and language requirements of Appendix FM of the Immigration Rules at the time of application and decision, and has at no time been unlawfully present in the UK. He therefore argues that there is no public interest in her removal and so it would be a disproportionate

interference with her right to respect for family and private life to remove her from the UK. He also argues that the second appellant should be allowed to remain as she only was refused due to her mother's inability to meet the Immigration Rules, and the requirement at E-LTRC.1.2 was only to be under 18 years at the date of application and to have not married or formed an independent unit. This was clearly the case, and so for her too removal would be a disproportionate interference with her right to respect for family life.

Conclusions – Remaking

17. The appellants' case is that they meet the requirements of the five year route under the Immigration Rules at Appendix FM, and so their removal would be a disproportionate interference with their Article 8 ECHR rights as there is no public interest in their removal. They do not argue that they can succeed in their appeal by showing that there would be insurmountable obstacles to family life and thus by showing they can meet the requirements of the 10 year route at EX1 of Appendix FM of the Immigration Rules, or indeed in relation to the private life Immigration Rules.

18. As per the preserved findings from the First-tier Tribunal the first appellant and sponsor have a genuine and subsisting relationship and the first appellant has passed the relevant English language test. Mr McKee argues that there was no prohibition against switching from visitor status due to the suspension of this requirement via the Coronavirus guidance, and that the financial provisions of Appendix FM and Appendix FM-SE are met. Mr Basra did not submit that the first appellant had not met these financial requirements, and I find that they are indeed met at all three points in time: the date of application, the date of decision and at the date of hearing on the basis of the bank statements and translation produced before the Upper Tribunal.

19. The key question for this Tribunal is whether the first appellant is entitled to succeed in her appeal on the basis that she met the totality of the respondent's policies (Immigration Rules combined with Covid 19 guidance) at the date of decision, when ordinarily she clearly would not be entitled to succeed as she would fail to meet the Eligibility for limited leave to remain as a partner requirements as she would fail to meet the Immigration Status Requirements at E-LTRP2.1 not to be in the UK as a visitor.

20. The respondent's guidance at the date of application is as follows. "The Coronavirus (Covid 19): advice for UK visa applicants and temporary UK residents" [first published on 24th March 2020 and updated to 27th January 2021] provided under the heading: "If you

intend to the stay in the UK" the following: "If you decide to stay in the UK, you should apply for the necessary permission to stay to regularise your stay. You'll be able to submit an application form from within the UK, whereas you would usually need to apply for a visa from your home country. You'll need to meet the requirements of the route you're applying for and pay the UK application fee." I find that this clearly meant that the first appellant could apply in country, and indicated that the respondent would use discretion to waive the normal requirement for her to return home and obtain entry clearance/ not be present as a visitor. I find that the appellants therefore acted in good faith when their application was made as they were able to meet all of the requirements. I do not find that the guidance relating to when leave expires while the holder is overseas and unable to return relied upon by Mr Basra is of any relevance, and neither is the statement of the former Home Secretary, Ms Priti Patel, made in May 2020. I find that the appellants would have examined the Immigration Rules and relevant guidance relating to the in country application they wished to make at the point of time they applied, and I find that this was properly understood as permitting the application they made.

21. With his written submissions of 6th July 2023 Mr McKee submitted a copy of the relevant section of the guidance "The Coronavirus (Covid 19): advice for UK visa applicants and temporary UK residents" updated to the date of decision, i.e. to 1st November 2021. This guidance clearly states under the heading "If you intend to stay in the UK" that it would be possible to apply to stay in the UK if you hold permission in a route that would normally allow you to do so, can meet the requirements of the route and pay the application fee, and explicitly states that it is not possible to stay in a route where there is no provision in the Immigration Rules for making an in-country application. I find that at the date of decision in November 2021 this guidance clearly means that the appellants had to meet the whole of the relevant Immigration Rules and therefore that they could not meet the requirements of the five year route at Appendix FM to apply at that time because of the first appellant's inability to meet the Immigration Status requirement not to be in the UK as a visitor.

22. I do not find it relevant that the issues of the Coronavirus guidance was not fully addressed in the reasons for refusal letter or in the submissions of the respondent before the First-tier Tribunal. It is for me to determine whether the application of Odelola v SSHD [2009] UKHL 25 means that the first appellant fails because the requirements of the Immigration Rules have changed by the date of decision; or whether, as argued by Mr McKee, that as the change of policy in the guidance goes to the ability to make the application, rather than the actual requirements, the appellants

succeed because they can fulfil the relevant requirements of the substantive Rules at the time of decision.

23. I do not find that Mr McKee's argument succeeds. The Coronavirus (Covid 19): advice for UK visa applicants and temporary UK residents" updated to the date of decision did not permit a visitor to switch where the Immigration Rules prohibited this and it did not contain a provision that outstanding applications would be dealt with under the previous Covid guidance which allowed variation applications to be made by visitors. The requirement not to be a visitor at E-LTRP2.1 of Appendix FM of the Immigration Rules is a requirement of the Rules as much as the other requirements, such as the amount of savings the sponsor of the first appellant was required to show. I find that the first appellant was properly refused in November 2022 for being present as a visitor just as she would have been if the amount of funds had increased due to a variation of the Immigration Rules between application and decision and she could not show this new amount of funds. There is also no doubt that the version of The Coronavirus (Covid 19): advice for UK visa applicants and temporary UK residents at the time of hearing also did not remove the eligibility requirement of the Immigration Rules at Appendix FM for those applying under the five year route as a partner not to be present as a visitor.

24. As such I find that that the first appellant cannot show compliance with the Appendix FM Immigration Rules, and neither can the second appellant as she applies to remain as her dependent. The appeal therefore does not succeed by reference to the relevant Article 8 ECHR Immigration Rules. If looked at more broadly under Article 8 ECHR the appellants' family and private life ties can only be given little weight as they have been established whilst they have been precariously present. The fact that they speak English and are financially self-sufficient is a neutral matter. I find I can give some weight to the fact that the application to vary was made initially in good faith and in accordance with the Rules and policy of the respondent at the time made, but ultimately I find that the appellants have not shown that it would be disproportionate for them to be removed given the weight that must be given to the public interest in maintaining immigration control by removing those who do not comply with the Immigration Rules.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of errors on points of law.

2. I set aside the decision of the First-tier Tribunal.

3. I remake the appeal by dismissing it under Article 8 ECHR.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11th July 2023

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The claimants are citizens of the Hong Kong Special Administrative Region of China. The first claimant was born on 9th June 1974 and the second claimant was born on 22nd June 2003. They are mother and daughter. The first claimant came to the UK as a visitor on 11th August 2020 as a visitor, the second claimant arrived as a Tier 4 general student on 10th November 2019. The claimants applied to remain in the UK on the basis of an application under Appendix FM and under paragraph 276ADE of the Immigration Rules, on the factual basis that the first appellant wished to remain permanently in the UK as the partner of Sunny Sang-Yau Lai, a British citizen. Their application was made in time on 8th February 2021 and refused as a human rights claim on 2nd November 2021. Their appeal against the decision was allowed by First-tier Tribunal Judge Cameron after a hearing on the 8th August 2022.

2. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal ID Boyes on 1st February 2023 on the basis that it was arguable that the First-tier judge had erred in law in the interpretation of the Immigration Rules. All grounds were found to be arguable.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and the decision should be set aside.

Submissions – Error of Law

4. In the grounds of appeal it is argued for the Secretary of State, in summary, as follows. It is contended that the First-tier Tribunal erred in law in allowing the appeal of the first appellant by reference to the partner Immigration Rules at Appendix FM on the basis that she could meet the “five year” route because her immigration status (as a visitor) was not, as it normally would be, an obstacle to this given Covid-19 guidance. It is argued that the Covid-19 guidance did not contain any such concession and that the decision of the First-tier Tribunal is insufficiently reasoned as it does not identify any relevant guidance. Further it is accepted by the First-tier Tribunal Judge that the first appellant had failed to produce the specified evidence of savings required by Appendix FM-SE and so the appeal could not be allowed by reference to these Immigration Rules for this reason too. The appeal of the second appellant is allowed by reference to the

first appellant qualifying and so the allowing of her appeal also errs in law for the same reasons.

5. In a Rule 24 notice and in oral submissions for the claimants Mr McKee argued, in summary, as follows. It was argued by Mr McKee that the Covid-19 guidance, which is specifically identified in the claimants' skeleton argument that was before the First-tier Tribunal (Coronavirus (COVID-19): advice for UK visa applicants and temporary UK residents, first published on 24th March 2020 and updated on 27th January 2021) did indeed make it possible for the claimants to lawfully change their status as it is stated that "You'll be able to submit an application form from within the UK, whereas you would usually need to apply for a visa from your home country." It is further argued that the First-tier Tribunal did not allow the appeal because the claimants met the requirements of the Immigration Rules because from paragraph 29 of the decision it is clear that it was found that the requirements of Appendix FM-SE were not met (which was due to a lack of a full translation of the sponsor's bank statements which were in Chinese). It is argued that this was in itself procedurally unfair because this issue had not been raised in the reasons for refusal letter as a basis for refusal, as this decision focused on deciding the application with reference to EX1 of Appendix FM and thus the ten year route which has no financial requirements.

6. It is argued however that the appeal was properly allowed outside of the Immigration Rules on Article 8 ECHR grounds. It is argued that this decision is properly made because it is said at paragraph 33 of the decision that there are compelling circumstances to allow the appeal outside of the Immigration Rules and at paragraph 37 of the decision that there are exceptional circumstances outweighing the public interest.

7. At the end of the hearing I informed the parties that I found that the First-tier Tribunal had erred in law but did not give an oral judgment. I set out my reasons below in writing. I informed the parties that the facts at paragraph 8 below would be preserved as they were not challenged in the grounds of appeal. I found that it was appropriate to remake the appeal in the Upper Tribunal as the extent of remaking was not great, and Mr McKee agreed it would take less than two hours and there would not need to be any or much oral evidence.

Conclusions – Error of Law

8. It was accepted in the refusal decision by the Secretary of State that the first claimant's relationship with her British citizen partner is genuine and subsisting, and the First-tier Tribunal also found as such, as is recorded at paragraphs 14 and 26 of the decision. It was also found by the First-tier Tribunal that the first claimant has

passed the relevant English language test as set out at paragraph 27 of the decision; and that there is a family life relationship between the second claimant, first claimant and sponsor at paragraphs 32 and 36 of the decision.

9. As set out at paragraph 12 of the decision it was accepted for the claimants that the first claimant could not succeed under the "ten year" route under Appendix FM for the reasons set out in the refusal letter, but it was argued that the Secretary of State had been wrong to exclude the "five year" route under Appendix FM, and it was argued that the first claimant could succeed in this way. It was clearly not procedurally unfair for the First-tier Tribunal to have reasoned the decision in this way, as argued by Mr McKee, given this was an argument put forward for the claimants, and in any case it cannot logically assist the claimants to put forward an argument attacking the decision of the First-tier Tribunal if they argue that the decision of the First-tier Tribunal allowing the appeal was lawfully made and should stand.

10. It was found, at paragraphs 13 and 24 of the decision, that Covid-19 guidance permitted the first claimant to make an application in country, rather than return abroad to make it, as this was extended to applications made before 31st May 2021 and the application was made in February 2021. However no particulars are given of why this is the case citing the wording of the guidance or other reasons and so, I find, this finding is insufficiently reasoned.

11. It was found at paragraph 29 and 30 of the decision that the first claimant had not submitted the precise documents required to show that she held the required amount of savings in accordance with Appendix FM-SE. I therefore find that it was irrational to have found at paragraphs 30 and 32 of the decision that the first claimant does "to all intents and purposes meet the requirements of the Immigration Rules". Either a claimant meets the requirements of the Immigration Rules or they do not, and as the documentary requirements were accepted by the claimants, before the First-tier Tribunal and before me, as not having been met in full (due to lack of a complete translation of the bank statements) the family life Immigration Rules were not met by the first claimant, and that was the starting point for determining the appeal.

12. It was a further error on the part of the First-tier Tribunal to have found at paragraph 32 of the decision that the claimant satisfying the Immigration Rules carried "considerable weight" in the Article 8 balancing exercise. I find that the decision of the First-tier Tribunal was therefore vitiated by error in the decision-making when deciding the appeal by reference to the Immigration Rules, because it ought to have been found that those Immigration Rules were not met, and outside of the those Rules by way of a more general balancing exercise because a factor was placed in the

balance in the claimants' favour that should not have been found, namely compliance with the Immigration Rules.

13. The decision does refer to compelling circumstances at paragraph 33 and exceptional circumstances at paragraph 37 but no particulars are given and simply the use of these words cannot make the above errors immaterial.

14. The decision in relation to the second claimant is clearly reliant on the success of the first claimant at paragraphs 34 to 36 of the decision, so this decision is also vitiated by the above errors.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of errors on points of law.

2. I set aside the decision of the First-tier Tribunal.

3. I preserve the findings set out at paragraph 8 above, but set aside all other findings.

4. I adjourn the re-making of the appeal.

Directions:

1. Any party wishing to rely upon an updating bundle of evidence for the remaking hearing must file and serve it ten days prior to the hearing date.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11th April 2023