**Upper Tribunal**
**(Immigration and Asylum Chamber**) Case No: UI-2023-000674

FIRST-TIER TRIBUNAL NO: HU/53252/2022

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 20 July 2023**

**Decision Promulgated on**
7th March 2024

**Before**

**THE HON. MR JUSTICE DOVE, PRESIDENT**
**MR C M G OCKELTON, VICE PRESIDENT**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**WING HUEN LO**

Respondent

**Representation:**
For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer.
For the Respondent: Mr R Blennerhasset, instructed by UK Migration Lawyers.

**DECISION AND REASONS**

1. The appellant is the Secretary of State. The respondent, whom we shall call 'the claimant', is a national of the People's Republic of China and holds a Hong Kong SAR passport. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Sweet) allowing the claimant's appeal against a decision of 17 May 2022 refusing her indefinite leave to remain.

2. The claimant came to the United Kingdom aged 14. Her school, university and vocational education and her employment have been in the United Kingdom. She has been granted leave to remain on several occasions, the most recent being due to expire on 21 December 2021. She applied for indefinite leave on 17 December 2021, thus causing the continuation of her leave by virtue of section 3C of the Immigration Act 1971. Because of her appeal that remains the position and she still has leave.

3. Under paragraph 276B of the Statement of Changes in Immigration Rules, HC 395 (as amended) a person who has been in the United Kingdom

lawfully for over ten years is, unless other considerations apply, entitled to indefinite leave to remain. But there is no such entitlement if the residence in the United Kingdom is broken by absences of more than a certain length: eighteen months days in the ten years. The claimant has been outside the United Kingdom for 671 days (over twenty-two months) between 17 May 2012 and 17 May 2022, the ten years immediately preceding the date of the decision. She does not therefore meet the requirements of paragraph 276B, and it is accepted on her behalf that she has no entitlement under the Rules to the leave she seeks.

4. The claimant's absences were in connexion with the illness and subsequent death of her maternal grandfather, from his diagnosis with cancer until the conclusion of the funeral ceremonies in September 2016, and then in connexion with her own mental illness following his death. She was particularly close to him as her only elder male relative: she never knew her paternal grandfather, and her father left the family to go to mainland China in 2010 and has not subsequently been heard of. There does not seem to be any dispute about any of this, and in any event there is ample documentary evidence fully justifying the judge's findings of fact.

5. The difficulty arises from the judge's assessment of proportionality. Any assessment of proportionality under article 8 of the ECHR has to balance the rights of the individual against other matters and in a case like this the most important of those other matters is the public interest in maintaining immigration control. The Rules themselves are the authoritative statement of the demands of the public interest and it is implicit that in a case where the individual does not meet the requirements of the Rules, the public interest would appear to outweigh the demands of the individual claimant. It is always possible that in a particular case the reverse applies, but such a case will not be an ordinary case. In any event, Part 5A of the Nationality, Immigration and Asylum Act 2002 requires a judge to bring certain considerations to an assessment of this sort. One of those requirements is that 'little weight should be given to a private life established by a person at a time when the person's immigration status is precarious' (s 117B(5)) As the decision of this Tribunal in Dube [2015] UKUT 90 (IAC) makes clear, a judge is not required to set out the relevant provisions of Part 5A, nor to refer to them specifically, but the obligations imposed by that group of sections apply as a matter of the judge's duty.

6. In the present case the judge set out the facts and findings based on them. Submissions were made at the hearing on the claimant's behalf but the Secretary of State chose not to be represented and so made no contrary oral arguments. After reviewing the evidence, the documents and the submissions, the judge wrote this:

> "14. However, in this case I consider that there are exceptional circumstances which would render refusal of this appeal a breach of her Article 8 ECHR rights. This is because there are exceptional and compelling circumstances. The appellant explained in her evidence - both written and oral - that she had returned to China in order to see her ailing and subsequently dying maternal grandfather, who was diagnosed with cancer in May 2015 and died in June 2016. She had a particularly

close relationship with him, not least because she did not know (or had known only briefly) her paternal grandfather. She also explained in oral evidence, which was not set out in the written evidence, that there was a particular event which led to her depression in 2014, in that her father left for China in 2010 and lost contact with the family. She suffered from this loss over the period 2010 to 2014, when her depression was diagnosed. It is clear from the papers that she is still receiving treatment for that medical condition.

15. Another aspect in this case is that the appellant has formed a relationship with Yuefan Li (also known as Billy), whom she met on a work project in the UK in October 2020, and they have been in a relationship since December 2020. While at the date of the decision (17 May 2022) their relationship had not lasted for the necessary two years for the purposes of 'partner' under the Immigration Rules, it is clear from their continuing relationship today (and he attended the hearing today with her - though did not give oral evidence) that that relationship continues and they intended to move into a property recently purchased by her partner's family for their use. It is also clear from the papers produced, in the original bundle and the supplementary bundle that the appellant is enjoying a successful career, at YSC Consulting, where she is excelling in her performance.

16. For all these reasons, I conclude that it would be a breach of the appellant's Article 8 ECHR rights if this appeal were not allowed because of the exceptional circumstances and the unjustifiably harsh consequences."

7. On application, the Secretary of State was granted permission to appeal solely on the issue of "Whether the judge materially erred by not setting out consideration of the appellant's case under the Nationality, Immigration and Asylum Act 2002, section 117B(1) and (5)". But the procedural requirements of a partial grant were not complied with, and we therefore indicated that we would hear argument on all the grounds advanced by the Secretary of State, reserving until later, if necessary, the question whether they were all open.

8. Mr Lindsay summarised his submissions as coming under two heads: first, the judge had not considered the public interest in the maintenance of immigration control; secondly, the judge had erred in dealing with the claimant's private life and the weight to be given to it. He accepted that the question is one of substance rather than form but submitted that the judge's decision did not show that the judge had either appreciated that the public interest expressed in the Rules had a weight counterposing the claimant's own circumstances, or that the claimant's private life had little weight against it, because of the application of s 117B(5). In addition, as pointed out in the Secretary of State's written submissions, the judge appeared to have conflated the claimant's private life with observations about her family life, both in the past and at the date of the hearing. Mr Blennerhasset submitted that the decision was in substance clear and lawful and was open to the judge for the reasons given.

9. The judge's decision is a short decision, and it moves swiftly from the facts to the relevant assessment. It is not necessarily the worse for that, but we

have to decide whether its brevity reveals incomplete (and therefore unlawful) reasoning by the judge. Probably it would have been desirable for the judge to make specific reference to the balancing act being undertaken, and to his obligations under the statute, but their absence need not be fatal if the reasoning is clear enough.

10. Although not referring specifically to the public interest as embodied in the Rules having weight against the claimant, it appears to us that the judge clearly had that principle in mind, otherwise there would have been no reference to the implicit need for 'exceptional circumstances', as seen in paragraph [14]. The judge was clearly aware that the Rules imposed a norm that would rarely be displaced. The judge took into account the claimant's family connections and duties in the period before the appeal, in particular the effect they had had on her inability to remain in the United Kingdom when her grandfather's health demanded otherwise. We see no objection to that, and s 117B has nothing to say about it, save insofar as those circumstances feed into the claimant's private life claim. So far as concerns the claimant's present relationship, it appears to us that paragraph [15] is written as a makeweight if necessary. Despite the opening words of paragraph [16], the judge gave the reason for the decision that the refusal of leave would be a breach of the claimant's article 8 rights as that 'there are exceptional and compelling circumstances' [15]. We do not think that the reference to what we may describe with respect as a wholly unexceptional relationship with a partner can be intended to fall within that description. The exceptional circumstances here were the relationship with the grandfather, his needs from the other side of the world, and the claimant's own needs arising out of her relationship with him and her own health. These were the causes of her absence and are properly described as both exceptional (that is, presumably, rare) and compelling (that is, requiring a decision in the claimant's favour despite the requirements of the Rules).

11. The language is not the language of weight, and it would certainly have been better to have been; but as we read the decision it is clear that the judge, faced with the Rules on one side of the scale and the wholly exceptional reasons for the claimant's periods of absence, regarded her case as compelling. We are not persuaded that the judge failed to give little weight to the claimant's private life as required by s 117B. The assessment was that the weight was nevertheless sufficient to make the claimant's case. The Secretary of State has failed to demonstrate an error of law.

12. In these circumstances we do not need to decide whether we were right to hear the Secretary of State's arguments in full, without the restriction the grant of permission sought to impose: even in full, they fail. There was an application by the claimant's representatives for a wasted costs order. There is no basis for saying that the Secretary of State has acted unreasonably in pursuing this appeal: the grounds were considered arguable and the Secretary of State has presented them with proper efficiency. We refuse that application.

13. The Secretary of State's appeal is dismissed.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 22 February 2024