IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006137
UI-2022-006138
UI-2022-006139
First-tier Tribunal No: HU/00258/2021
HU/00259/2021
HU/00257/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 September 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

MEIHUA YOU
ZHIWEN LIN
ZHILONG LIN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mavrantonis of Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Ms Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 7 June 2023

DECISION AND REASONS

Introduction

1. The Appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Davey ("the Judge"), promulgated on 18 October 2022.

2. No anonymity order was made previously and there is no need for one now.

Factual background

3. The Appellants are nationals of the People's Republic of China ("China"). The Second and Third Appellants, born on 23 December 2001, are the twin children of the First Appellant. On 7 September 2019, the Appellants applied for leave to remain on the basis of their private lives and their family life with Mr Dajing Lin. Mr Lin is a Chinese national and a British citizen. He is the partner of the First Appellant and father of the Second and Third Appellants.

4. On 26 May 2020, their applications were refused on the grounds that they did not meet the requirements of the Immigration Rules and the were no exceptional circumstances warranting a grant of leave to remain outside of the Rules. In relation to the Immigration Rules, the Respondent concluded that:

(1) the First Appellant had submitted a false bank statement in her application for entry clearance as a visitor, made on 4 August 2016 (suitability requirement, S-LTR.4.2);
(2) the First Appellant had not demonstrated that there are insurmountable obstacles to family life continuing in China (EX1); and
(3) in respect of all three Appellants, they had not demonstrated that there are very significant obstacles to integration into China (276ADE(1)(vi)).

Decision of the Judge

5. The Judge dismissed the appeals "under the Immigration Rules and on Article 8 ECHR grounds" having concluded that "I can find nothing that suggested that there would either be insurmountable or significant obstacles, that is very significant difficulties that will be faced on return … "[15].

Grounds of appeal and grant of permission

6. The grounds of appeal, which we have reformulated, pleaded that the Judge erred in that he failed to:

(1) take into account relevant evidence, such error possibly arising as a result of the delay in promulgating the decision [ground 1];
(2) make a material finding of fact, namely whether the First Appellant meets the requirements of paragraph EX.1(b) of the Immigration Rules and/or erred in his application of that paragraph of the Rules [ground 2a];
(3) make material findings of fact in accordance with section 117B of the 2002 Act [ground 2b];
(4) make a material finding of fact, namely whether the Second and Third Appellant enjoy family life with the First Appellant and sponsor [ground 2c];
(5) "make a clear and/or detailed … proportionality assessment" such that his conclusion is inadequately reasoned [ground 2d]; and
(6) make a material finding of fact, namely whether the First Appellant meets the suitability requirement of the Immigration Rules and/or erred in his application of the standard of proof in respect of this requirement of the Rules [ground 3].

7. In the rule 24 response (drafted by Mr Tufan), dated 4 January 2023, the Respondent pleaded that (i) "there is no nexus between the delay and the safety of the decision" [8] and (ii) in light of the evidence adduced by the Appellants, the conclusion reached by the judge was one that was open to him [9].

8. Permission was granted by First-tier Tribunal Judge Elliot on 7 December 2022. The grounds upon which permission was granted were not restricted.

Upper Tribunal hearing

9. Mr Mavrantonis and Ms Gilmour made oral submissions. During the course of this decision, we address the points they made.

10. At the conclusion of the hearing, we reserved our decision.

Discussion and conclusions

11. The appeal was heard on 11 November 2021 and the decision promulgated on 18 October 2022. The Judge stated that the decision was "prepared" on 12 November 2021 however, in the absence of any explanation for the delay in promulgation or clarification of what was meant by "prepared", we proceed on the basis that almost a year passed between the hearing of the appeal and the promulgation of the decision.

12. In R (SS) v Secretary of State for the Home Department [2018] EWCA Civ 1391 at [29], the Court of Appeal stated that a nexus must be shown between the delay and the safety of the decision though, where the delay in promulgation exceeded three months, the findings of the First-tier Judge should be "scrutinised with particular care to ensure that the delay has not infected the determination".

13. The grounds of appeal identified at [13] aspects of the evidence, for example, the oral evidence of the Appellants, to which the Judge made no specific reference. In respect of the oral evidence, Mr Mavrantonis confirmed that there had been no oral examination-in-chief and, as the Respondent had not been represented, there had been no cross-examination. Mr Mavrantonis sought to rely upon the failure to take into account oral evidence given in reply to questions asked by the Judge but he was unable to identify the questions asked or the answers given.

14. We invited Mr Mavrantonis to identify with particularity any other evidence, said to have not been taken into account, capable of having a material effect on the outcome of the appeal. He identified only one matter, namely that part of the country evidence which demonstrated that, because the Chinese authorities do not recognise dual citizenship, the sponsor would be unable to access UK consular support in China.

15. At [16], the Judge noted the issue in relation to dual nationality and stated, "The evidence was simply speculative as to what the consequences might be and/or its impact on the integration of the Appellants back into the PRC". The sum total of the evidence relied upon by the Appellants is reflected in the Foreign Office travel advice, up to date as of 30 April 2021: "if you have both British and Chinese nationality you may be treated as a Chinese citizen by local authorities, even if you enter China on your British passport. If this is the case, the British Embassy may not be able to offer you consular assistance". Given this was the only evidence of any consequence for any of the Appellants it is reasonable to infer that the Judge was referring to this evidence at [16] and, further, that his conclusion about the effect of dual nationality on the ability of the Appellants to reintegrate and continue their family life in China is one that was properly open to him.

16. Mr Mavrantonis submitted that his argument was supported by an error made by the Judge. He submitted that the Judge found that the sponsor ran a "successful" business, whereas in fact no such case was advanced and, indeed, it had been submitted on behalf the Appellants that they could not meet the financial requirements for entry clearance under the Immigration Rules.

17. The relevant finding of the Judge is that, "The First Appellant's husband is a successful operator of a Chinese takeaway restaurant business and evidence was provided as to his means and ability to support his wife and their two children" [3]. In our view, it is clear that the Judge was saying no more than that the sponsor was able financially to maintain his family, which was the case put forward by the Appellants (see for example the written submissions of the Appellant's solicitors, dated 16 September 2019, Respondent's bundle PDF page 36).

18. We therefore conclude that the Judge did not fail to take into account any relevant evidence capable of having material effect on the outcome of the appeal and that the delay in promulgation, whilst unfortunate, does not give rise to any error of law.

19. In relation to ground 2a, it is correct to state that the Judge did not specifically cite paragraphs EX.1(b)/EX.2, or any relevant case law, but he did he need to do so. An experienced judge can be taken to know, and to have applied, the correct law unless it is clear from the words used in the decision that they failed to do so (see AA (Nigeria) v SSHD [2020] EWCA Civ 1296 at [34]). It is clear on the face of the decision that the judge did apply both paragraphs of the Immigration Rules and made relevant findings. At [15], after considering the circumstances of all members of the family, both in relation to their life in the UK and on return to China, he concluded, "I can find nothing that suggested that there would either be insurmountable or significant obstacles, that is very significant difficulties that would be faced on return [to China]". The Judge specifically referred to the case law relied upon by the Appellants [15] and the wording used by the Judge is consistent with the test of 'insurmountable obstacles' in paragraph EX.1 and broadly consistent with the 'very significant obstacles" test in paragraph 276ADE. In our judgment, the Judge's conclusion is consistent with the findings of fact he made, such that it cannot be stated that he misunderstood or incorrectly applied the relevant legal test to the facts as he found them to be.

20. In relation to ground 2b, the Judge did not make findings, or any findings that were sufficiently clear, in relation to section 117B of the Nationality, Immigration and Asylum Act 2002 and we conclude that this is an error of law. However, it is not a material error because (i) at best, matters relating to the ability of the Appellants to speak English and support themselves would have been neutral factors in the proportionality assessment and (ii) given that all Appellants had been in the UK unlawfully, the application of the relevant provision would have been adverse to their case.

21. In relation to ground 2c, the Judge did not make a finding as to whether the Second and Third Appellants enjoy family life with their parents. We conclude that this is not an error of law because it was neither a matter in dispute nor a relevant matter. At the time of their applications, these two Appellants were 17 years old and the Respondent did not dispute that the sponsor and the First Appellant had a genuine and suggesting parental relationship with their children. In his skeleton argument drafted for the First-tier Tribunal appeal, Mr Mavrantonis

clearly set out the issues and did not describe this question as being one that required resolution; and we would agree with him. It would only have been necessary to reach a conclusion on the question of family life if the Judge had made findings the consequence of which would have meant that the adult children would have been separated from their parents.

22. In relation to ground 2d, whilst the decision of the Judge might have been more clearly structured, we are satisfied that it is not tainted by any inadequacy of reasoning in relation to the proportionality assessment under Article 8. The Judge took into account all matters raised by the Appellants in relation to their family and private life and explained that the limitations of the evidence led him to conclude that their removal was not disproportionate.

23. In relation to ground 3, the Judge's finding in relation to the suitability requirement of the Immigration Rules was as follows:

> "I found that the reasonable inference from the documentation was that in all likelihood there had been a false document provided on behalf of the Appellant or particularly the First Appellant but even so it was certainly potentially without the knowledge of the First Appellant. That may not matter in terms of its consequences that I could reach no firm conclusion on whether or not the Respondent had discharged the burden of proof beyond the fact that the document was false and beyond the fact that it had been submitted as part of the First Appellant's application. Whether she knew of its falsehood and/or the false documentation is difficult to say that she is in principle fixed with the responsibility for documents submitted for and on her behalf as part of a visa application" [8].

24. The relevant requirement of Immigration Rules was paragraph S-LTR.4.2, which provides that the application may be refused on grounds of suitability if "the applicant has made false representations or failed to disclose any material fact in a previous application …". In describing the standard of proof as being "in all likelihood", we cannot be satisfied that the Judge has applied the appropriate standard of proof and/or made a clear finding as to the suitability requirement. We therefore conclude that this is an error of law. However, given that the Judge concluded, irrespective of any findings in relation to suitability, that the circumstances of the private and family lives of the Appellants were not such that the decision of the Respondent was disproportionate, the error cannot be said to be material.

Notice of Decision

25. The decision of the First-tier Tribunal did not involve the making of a material error of law and so the decision stands.

C E Welsh

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 September 2023