IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-000099
First-tier Tribunal Nos:
HU/55482/2023
LH/05172/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

XT (CHINA)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Vokes, Counsel instructed by Corbin & Hassan Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 27 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge French promulgated on 26 November 2023. By the Decision, Judge French dismissed the appellant's appeal against the decision of the respondent made on 11 April 2023 to refuse to grant her leave to remain on human rights grounds outside the Rules.

Relevant Background

2. The appellant is a national of China, whose date of birth is 1 January 1975. She claims to have entered the United Kingdom as a visitor in November 2008. She was issued with RED.0001 papers as an overstayer on 12 November 2014. On 16 December 2015 she attempted to submit an application for leave to remain on the basis of family and private life established in the UK. This application was rejected as invalid on 17 February 2016.

3. On 19 March 2016 the appellant applied for leave to remain on the basis of her family and private life in the UK, and this application was refused with an in-country right of appeal on 4 November 2016. The appellant did not exercise her right of appeal, but instead submitted an application on the same basis on 12 December 2016. This application was refused and rejected under paragraph 353 of the Immigration Rules on 11 August 2017. On 6 July 2018 the appellant again submitted an application for leave to remain on the same basis, and this application was again refused under paragraph 353 of the Immigration Rules on 17 November 2018.

4. On 9 September 2019 the appellant submitted a claim for asylum, but she subsequently informed the Home Office that she wished to withdraw this application.

5. On 2 March 2023 the appellant applied for permission to stay in the UK on the basis of family life with her partner, YL.

6. The application was refused by the respondent on 11 April 2023. It was accepted that she met the eligibility relationship requirement, but she did not meet the eligibility Immigration status requirement. As to whether she was exempt from meeting this requirement because paragraph EX.1 applied, it was accepted that she had a genuine and subsisting relationship with her British partner. However, the Secretary of State had not seen any evidence that there were insurmountable obstacles in accordance with paragraph EX.2 of Appendix FM, which meant that there would be very significant difficulties to be faced by her or her partner in continuing their family life together outside the UK in China, or which could not be overcome or would entail very serious hardship for her or her partner. It was noted that her partner was originally a Chinese national. This would suggest that YL was familiar with the culture and way of life in her home country. She also stated in her application form that she and her partner communicated in Mandarin. This meant that there would not be a

significant language barrier to her partner adjusting to life in her home country.

7. As to private life, she stated in her application form that she had family ties in China in the form of her parents and a sibling. In the absence of any evidence to the contrary, it was considered that her family would be able to assist her to readjust to life in her home country.

8. Consideration had been given as to whether there were exceptional circumstances which would mean that requiring her to leave the UK would be an unlawful interference with her right to respect to family life and/or private life under Article 8 ECHR. It was stated that she and YL had begun a relationship in January 2010 at a time when she did not have valid leave to remain in the UK. As such, she and her partner should have considered relocation in order for her to continue their family life. She should not have held any expectation that she would be permitted to enjoy her family life in the UK indefinitely. It was accepted that her partner was self-employed in the UK at the date of application. However, it was considered that it would be possible for her to seek and gain employment in her home country, and therefore be in a position to maintain herself, and also her partner, should he choose to relocate with her. It would also be open to her partner to explore the possibility of seeking and gaining employment in her home country, should he wish to do so.

9. It was stated in her application that she had received treatment for cancer in the UK in 2013 and that since then she had undergone a number of other medical treatments. Her application had therefore been reviewed to determine whether Article 3 of the ECHR was engaged as a result of the medical conditions she had. The application had been considered in line with the case-law of *AM (Zimbabwe)* [2020] UKSC. Although it was accepted that the healthcare systems in the UK and China were unlikely to be equivalent, this would not entitle her to remain here. The fact that her circumstances would be less favourable in China then they were in the UK was not decisive from the viewpoint of Article 3. Consequentially, it was not accepted that her removal from the UK reached the high threshold of severity to breach Article 3 ECHR on the basis of her medical conditions.

The Hearing Before, and the Decision of, the First-Tier Tribunal

10. The appellant's appeal came before Judge French sitting at Birmingham on 15 November 2023. Both parties were legally represented, with Mr Vokes of Counsel appearing on behalf of the appellant.

11. In the Decision, the Judge proceeded chronologically through the various stages of the appeal process, beginning with a review of the contents of the refusal letter at para [4]. At para [6], the Judge reviewed the ASA, and provided a detailed commentary on it.

12. At para [7], the Judge reviewed the documents in the Tribunal bundle, and again made various comments and findings in the course of the review.

13. At para [8], the Judge addressed the contents of the respondent's review.

14. At para [9], the Judge gave a very detailed account of the evidence which the witnesses at the hearing had given in cross-examination.

15. At paras [10] and [11], the Judge gave a detailed summary of the closing submissions of the Presenting Officer and Mr Vokes, although the Judge incorrectly referred to Mr Vokes as the Sponsor.

16. At para [12], the Judge held that he was required to adopt a balance sheet approach as suggested in *Hesham Ali* [2016] UKSC 60. He had to balance the rights of the individuals against the requirements of UK Immigration Policy. If the appellant did not satisfy the Rules, should leave be granted because the refusal of the application resulted in unjustifiably harsh consequences such that refusal would not be proportionate? In that regard, he said that he had in particular looked at the appellant's medical situation.

17. The Judge's findings of fact were set out in sub-paras (1) to (6) of para [13]. On the topic of exceptional circumstances, the Judge said that the appellant had had treatment for cancer in 2013, but that the current medical evidence indicated that the treatment had been successful. Her lymphoedema was treated by support stockings and cream. The treatment she required was not sophisticated or expensive and there was no reason to suppose that such treatment was not available in China.

18. At para [14], the Judge said that it would be apparent from everything he had said in the above paragraph that he agreed with the reasoning in the refusal letter that the appellant failed in her application for leave to enter the UK on grounds of "*suitability*" and eligibility. Moreover, there were no serious family or other considerations that would make exclusion of the appellant from the UK to be undesirable, and he did not believe that a refusal of this appeal would constitute a breach of the Article 8 rights of the appellant.

19. At para [15], the Judge concluded that there was no justification to frustrate the decision of the Home Office to "*deport*" the appellant. She had arrived in the UK in 2008 but did not make any application to regularise her immigration status in the UK until 2015, which was 7 years after she came to the UK and more than year after she had been served with a RED.0001 order. He held that there were significant inconsistencies in her evidence such as to undermine the credibility of her application. He had balanced the rights of the appellant against the need to maintain immigration control, and he had concluded that refusal of the appellant's application to remain in the UK was proportionate.

The Grounds of Appeal to the Upper Tribunal

20. The grounds of appeal to the Upper Tribunal were settled by Mr Vokes. Ground 1 was that the Judge had failed to give reasons, or any adequate reasons, for findings on material matters, specifically for his finding that the appellant's lymphoedema did not entail that her removal would be unjustifiably harsh.

21. Ground 2 was that the Judge had made a material misdirection of law on material matters. Firstly, the Judge had wrongly purported to consider *Devaseelan* at para [13](vi). Secondly, the Judge had wrongly appeared to consider he was dealing with an appeal against a deportation order, at para [15]. Thirdly, the Judge was mistaken in para [14] when he found that the Home Office was correct to refuse the application made on grounds of suitability.

22. Mr Vokes submitted that the decision as a whole appeared to lack a proper structured approach, consisting of very long paragraphs and also of commentary within the narrative rather than proper findings, which were clear and accessible.

The Rule 24 Response

23. On 24 January 2024 Alain Tan of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. He submitted that the Judge had directed himself appropriately.

24. Ground 1 identified the medical condition of the appellant (lymphoedema) as the "*strongest part*" of her case. There was no indication that the Judge's attention was drawn to the letter of Gemma Jones, Lymphoedema Nurse, dated 9 November 2023, that was uploaded onto the CCD platform only a few days before the hearing. In reality, the only difference between that letter and the one in May 2023 (identified in the Tribunal bundle and referred to by the Judge) was that the letter refers to visits by nursing staff to apply bandaging twice a weak. The rest of the information remained the same, including a recommendation not to fly.

25. When considering the issue at para [13](5), the Judge viewed the matter in the context of findings made that in brief established that the appellant could return to China, where she had an established family network, and there were no apparent barriers to the spouse of the appellant returning with her. The Judge also found that there was likely to be appropriate treatment in China. In the circumstances, any argument based on the need for personal care fell away. The Judge was not required to detail every item of evidence. It was clear that the limited information held in the latest letter of Gemma Jones had been ventilated at the hearing. Whilst the Judge was cognisant of a recommendation not to fly, there was no indication that the appellant would suffer harm as a result - a point

made by the Judge. Nor was there evidence to suggest that there were not mitigating actions available which could be undertaken, or any indication as to how long the condition would take to stabilise. Quite rightly, the Judge's focus was on whether family life could be continued in China.

26. As to Ground 2, while the Judge referred to the principles of *Devaseelan* and previous determinations, the Judge made no findings on this point. The mistaken reference to suitability and deportation had no material effect, since no matter was considered by the Judge under either of these headings, or under an applicable Rule/statute.

The Reasons for the Grant of Permission to Appeal

27. On 15 January 2024, First-tier Tribunal Judge Curtis gave detailed reasons as to why Ground 1 was at least arguable, and as to why the concluding paragraphs of the Decision arguably demonstrated that the Judge had in mind an incorrect factual matrix and therefore misdirected himself as to the legal principles he was required to apply, and that Ground 2 was therefore also arguable.

The Hearing in the Upper Tribunal

28. At the hearing before me to determine whether an error of law was made out, both representatives attended remotely via Teams. Mr Vokes developed the grounds of appeal, and in response Ms Simbi developed the Rule 24 response opposing the appeal. After hearing from Mr Vokes in reply, I reserved my decision.

Discussion and Conclusions

29. Having regard to the nature of the error of law challenge mounted by the appellant, I I consider that it is helpful to bear in mind the observations of Lord Brown in *South Bucks County Council -v- Porter* [2004] UKHL 33; 2004 1 WLR 1953. The guidance is cited with approval by the Presidential Panel in *TC (PS compliance - "Issues-based reasoning") Zimbabwe* [2023] UKUT 00164 (IAC). Lord Brown's observations were as follows:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration...Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party

aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Ground 1

30. Ground 1 relates to a further update letter from Gemma Jones on the appellant's current treatment needs for lymphoedema, which now included two home visits from the Lymphoedema Nursing Team each week to change her multi-layer Lymphoedema dressings. Again, it was recommended that she should not fly until her condition had stabilised.

31. It is common ground that the letter was loaded separately from the stitched bundle onto the CCD platform 2 days before the hearing.

32. As observed by Judge Curtis when granting permission, since the letter had been provided late, the Judge was required to deal with its admissibility as a preliminary matter, pursuant to paragraph A.14 of the Presidential Practice Statement No.1 of 2022.

33. Mr Vokes's recollection is that he put the letter before the Judge. However, the position taken by Ms Simbi is that it was not open to Mr Vokes to give evidence on this issue when he was appearing in the Upper Tribunal as the appellant's advocate.

34. I accept that Mr Vokes understood that the letter was before the Judge, and hence that he referred in his closing submissions to the appellant needing the attention of the Lymphoedema Service at home during an acute flare-up.

35. However, it is clear from an analysis of the evidence in the stitched bundle, and from the Judge's detailed account of (among other things) the closing submissions made by the Presenting Officer, that the update provided in the latest letter from Gemma Jones was not raised or explored in the oral evidence, and it was not referred to by the Presenting Officer in her closing submissions.

36. In her appeal statement dated 6 September 2023, the appellant said that she could only manage her lymphoedema condition by wearing compression socks which were very painful. If her legs were not up, she had a lot of pain, and this heavily restricted her movement. As a result of this condition, she heavily relied upon her husband who had been devotedly looking after her without any complaint. She made no reference to receiving home visits.

37. In his witness statement, YL said that the lymphoedema had recently got quite worse and his wife had been referred for further treatment. But YL did not elaborate on the outcome of this referral, and made no reference to the appellant receiving home visits.

38. In cross-examination, it was put to the appellant that in the bundle there was a letter from her GP to confirm that she had been cancer-free for 10 years. She did not dispute that, and said that she still had check-ups every 2 years. Most recently, she had had a check-up in May 2023. Mr Vokes intervened to say that his client had been considered to be high risk, but agreed that there was no indication that her cancer had returned for the moment. He argued that he understood that she would continue to be monitored. The Presenting Officer asked if the appellant had made any research about whether the other medical treatment she received (i.e. stockings and cream) was available in China, and she answered that she had not made such enquiries. The Judge commented that included within the bundle was a letter from her GP to say that she was unable to fly. (In fact, the letter was from Gemma Jones – see below). The appellant said that even after a car journey of an hour today she had *"pins and needles*".

39. The Judge asked YL what practical help his wife needed from him. He answered that he had to assist her because she had memory loss. He also said that he had to help his wife when she was walking up stairs. In addition, he said that he had to help her undress and into the bath. In re-examination, Mr Vokes put questions as to what help the appellant needed during the day. YL said that she could put on her upper garments, but he would pull her trousers up. He said that he also did all the housework and the cooking.

40. In summary, there was apparently no reference to home visits by nursing staff in the oral evidence, which indicates that the latest letter from Gemma Jones was not the subject of any questions or the focus of any scrutiny.

41. In her closing submissions, the Presenting Officer submitted that the appellant had now been cancer-free for 10 years. As for her other condition (i.e. lymphoedema) this would be treated by compression stockings and cream. There was no evidence of such treatment not being available in China. The appellant's husband had said today that he assisted with most aspects of her personal care, but there was no independent medical evidence of that. In fact, there was medical evidence that the appellant had been advised to exercise.

42. In his closing submissions, Mr Vokes submitted that she was currently experiencing acute flair-ups of lymphoedema. It was obvious that, given her medical problems, she needed help with her personal care, and it was not necessary to provide medical evidence of her care needs. During a flair-up, the appellant would need attention from the Lymphoedema Service at home. Given her continued ill-health, he submitted that it would be unjustifiably harsh to expect her to leave the UK whilst her lymphoedema was "*unstable*". He submitted that the medical evidence suggested that it was not stable. At present, the appellant needed the active support of the NHS, and there was no evidence that support for her

treatment would be available in China. Moreover, she should be required to leave the country against medical evidence not to fly.

43. The GP letter referred to by the Judge in his commentary on the oral evidence was in fact the letter from Gemma Jones, Lymphoedema Nurse Specialist, dated 4 May 2023. She said that XT had been assessed by the Lymphoedema Service in September 2020 and diagnosed with a unilateral secondary lymphoedema of the left leg. This was a life-long condition which required daily skin care and regular exercise, and the application of lymphoedema compression hosiery. On assessment 'today', they had noticed that XT had experienced an acute flair-up of her lymphoedema with an unknown cause. This was causing her pain and affecting her sleep. At present, they would not recommend flying until further investigations had been completed by her GP.

44. The Judge noted the contents of this letter in his review of the documents in the stitched bundle. The Judge observed that it did not amount to an indication that flying would do the appellant harm.

45. In her letter of 9 November 2023, Gemma Jones repeated what she had said previously, but added that XT currently remained under the care of the Lymphoedema Service who visited her at home twice a week to apply multi-layer lymphoedema bandaging for decongestion therapy. At present, they would not recommend her flying until her lymphoedema became stable.

46. I do not consider that the Judge's failure to address the recommendation in his findings at para [13] discloses an error of law.

47. Firstly, it was not suggested (still less established) that the appellant's lymphoedema condition met the high threshold for a medical claim under Article 3 EHCR. Secondly, the recommendation was contained in a letter that was written to support the appellant's appeal (and hence each letter was addressed "To whom it may concern"), rather than in an expert medical report in which the expert acknowledged that their primary duty was to the Tribunal. Thirdly, it was not asserted that a long-haul flight would cause the appellant harm or unbearable short-term discomfort, and there was no discussion within either letter of any steps - such as the appellant being allocated a row of seats so she could sit sideways with her leg up and/or her getting up at regular intervals and walking around - that could be taken to mitigate the discomfort which the appellant might be expected to experience. Fourthly, the ASA relied upon the fact that the appellant's Specialist Nurse had advised the appellant against flying until further investigations had been completed. But the Judge had not been provided with any GP records or medical reports relating to any further investigations into the flair-up reported in May 2023, and the Judge had been given no information as to the time-line for when further investigations were going to be completed. It was thus open to the Judge to treat the recommendation as a peripheral consideration which did not

materially advance the appellant's case, since – as he had observed earlier at para [7] – there was no indication that the appellant would suffer harm from undertaking a long-haul flight during a flare-up.

48. The Judge did not directly address at any point in the Decision the fact that the appellant was currently receiving decongestion therapy twice a week at home provided by nursing staff at the Lymphoedema Service. But this was an even more peripheral issue in the appeal, as it had not been brought into the foreground by the witness statement evidence or the oral evidence. The burden was on the appellant to show that the medical treatment she was accessing in the UK was not available in China, and there was no objective evidence before the Judge to the effect that decongestion therapy would not be available to the appellant in China. So, it is not shown that the Judge was clearly wrong to find that the treatment which the appellant would require in China would not be sophisticated or expensive, especially as this was the thrust of the NHS information leaflet on lymphoedema in the stitched bundle, which the Presenting Officer referenced in her closing submissions.

49. The principal controversial issue in the appeal was whether there are insurmountable obstacles to family life being carried on in China on account of, among other things, the appellant's medical condition, and the Judge gave adequate reasons for finding that EX.1 did not apply, and that the impact of requiring the appellant to return to China would not be unjustifiably harsh.

Ground 2

50. It is undoubtedly the case that the Judge made a series of careless errors in the closing paragraphs of the Decision.

51. However, while there are inaccuracies in the closing paragraphs, I do not consider that there is a substantial doubt as to whether the Judge reached his conclusions on EX.1, Rule 276ADE, and on the appellant's Article 8 claim outside the Rules, as a consequence of applying the wrong factual matrix or the wrong legal principles. It is tolerably clear from the Decision as a whole - and in particular from the Judge's extensive rehearsal of the competing cases put forward in the decision letter, the ASA and the respondent's review, and from the Judge's findings at paras [13](1) to (5) - that the Judge directed himself according to the correct factual matrix and the correct legal principles.

52. Although the Judge wrongly introduced the *Devaseelan* principle into the discussion at para [13](6), this did not prejudice the appellant, as it did not lead anywhere. The Judge was correct on the evidence to find that all the applications were made on the basis of the appellant's relationship with YL, and that the only change since the previous applications were refused was the effluxion of time. If there had been previous determinations against the appellant, they would only have been a starting point, and in

effect the Judge adopted a starting point which was no different from the actual position, which was that the appellant had not appealed against the refusal of any previous application in respect of which she was given an in-country right of appeal.

53. Although the respondent had not raised a suitability ground in the refusal decision, it was open to the Judge to take into account in the proportionality assessment the fact that the appellant had not made any application to regularise her immigration status in the UK until 2015, which was 7 years after she came to the UK and more than a year after being served with a RED.0001 order.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

I consider that it is appropriate that the anonymity direction made by the First-tier Tribunal should be maintained for these proceedings in the Upper Tribunal in order to preserve medical confidentiality.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
16 April 2024