



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number OA/13370/2013

THE IMMIGRATION ACTS

Heard at Field House
On 31 October 2014

Decision and Reasons promulgated
On 29 April 2015

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Lujun Zhang

(No anonymity order made)

Appellant

and

**Entry Clearance Officer,
Beijing**

Respondent

Representation

For the Appellant: Ms. S. Panagiotopoulou of Counsel instructed by Edwin Coe LLP.

For the Respondent: Ms. J. Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

1. This appeal was previously before me on 23 September 2014 when I determined that First-tier Tribunal Judge Hussain had erred in law in his determination allowing the Appellant's appeal against a decision of the Respondent dated 3 June 2013 to refuse to grant entry clearance as an adult dependent relative. In consequence, I set aside the decision of the First-tier Tribunal Judge, and issued Directions for the future conduct of the appeal, including that the decision in the appeal would be remade before the Upper Tribunal. (For ease of reference the text of my 'Error of Law' decision and the Consequent Directions is reproduced at Annex A below.)

Background

2. The procedural background to the appeal is summarised at paragraphs 3-5 of the Error of Law decision.
3. The Appellant's medical history forms a significant aspect of the factual background of this case. The history is helpfully summarised at paragraphs 7-12 of the Skeleton Argument settled by Ms Panagiotopoulou for today's hearing.
4. Further to this I note the following by way of chronology.

28 DEC 2012:	Appellant admitted to Shenzhen hospital; diagnosed with bipolar disorder. In-patient for 14 days.
11 JAN 2013:	Appellant discharged from Shenzhen hospital.
3 FEB 2013:	Appellant readmitted to Shenzhen hospital having experienced manic disorder episodes with psychotic symptoms. In-patient for 18 days.
21 FEB 2013:	Appellant discharged from Shenzhen hospital. Appellant admitted to Sun Yat University Cancer Centre; diagnosed with malignant tumours in her uterus.
28 FEB 2013:	Appellant underwent a total hysterectomy.
8 MAR 2013:	Appellant discharged from Sun Yat University Cancer Centre.
3 APR 2013:	Appellant readmitted to Sun Yat for chemotherapy.
7 APR 2013:	Appellant discharged.
1 MAY 2013:	Online visa application form submitted.
3 JUN 2013:	Notice of Immigration Decision refusing the Appellant's application for entry clearance with reference in particular to paragraphs E–ECCR2.4 and 2.5 of Appendix FM of the Immigration Rules.
5. The relevant requirements of the Rules - including the evidential requirements of Appendix FM-SE - and the essential reasons for the Respondent's decision are summarised at paragraphs 6-8 of the error of law decision.
6. As identified in the discussion set out in the Error of Law decision the issues under the Rules in this case focus upon:
 - (i) the extent to which the Appellant has identified and shown by way of specified medical evidence long term personal care needs in respect of the performance of everyday tasks; and further
 - (ii) the extent to which the Appellant has identified and shown by way of specified evidence that the required level of care is not available to her in China because there is no person in that country who can reasonably provide it, or it is not affordable.
7. In considering such issues because this is an appeal against refusal of entry clearance, I remind myself of the applicability of sections 85(5) and 85A(2) of the 2002 Act, and

that I should consider only the circumstances appertaining at the date of the decision to refuse. However, I note that this does not prevent me from considering evidence that post-dates the decision, providing that evidence assists in any assessment of the circumstances as they existed at the date of the Respondent's decision.

8. Similarly, as was acknowledged by Ms Panagiotopoulou, the relevant date for an assessment of the Appellant's alternative Article 8 submission (Skeleton Argument paragraphs 22-23) is also the date of the Respondent's decision - **AS (Somalia) [2008] EWCA Civ 149**.
9. Further to the identification of the issues summarised above, although at the 'error of law' hearing it was the sponsor's instructions that the sort of evidence identified at paragraph 34 of Appendix FM-SD was not available in China, and a direction was issued to file supporting evidence of such a circumstance (Directions at paragraph 15(i)(b) of the 'Error of Law' decision), it is to be noted that nothing has been filed in this regard, and consequently Ms Panagiotopoulou's Skeleton Argument does not provide a written submission of the nature contemplated in the Direction at paragraph 15(iii).

Consideration

10. The Rules under Appendix FM introduced a less generous regime for elderly dependent relatives such as parents and grandparents than had existed previously. In the premises it is necessary to demonstrate through the production of specified evidence significant level of care needs. However, even then, if the care needs are being met, or can be met where the applicant is living, then an applicant is expected to remain where they are.
11. It has not been argued before me that the requirements of the Rules are themselves incompatible with human rights. In any event, notwithstanding their stringency, individual decisions are required to respect Article 8 – and so there may be cases that are exceptional on their own particular facts that warrant the grant of entry clearance on human rights grounds even though the requirements of the Rules are not met.
12. The starting point is to consider the Appellant's care needs as of the date of the Respondent's decision in the context of the wording of the Rules - "*as a result of age, illness or disability [she] require[s] long-term personal care to perform everyday tasks*" (E-ECDR.2.4). The Rules require that any such care needs be evidenced by the production of medical evidence from a doctor or other healthcare professional - "*Medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks*" (paragraph 34 of Appendix FM-SE).
13. It may be, and I say no more than that, that in some cases medical evidence as to the fact of the underlying medical condition will inevitably establish that there is a concomitant care need. As such, I do not rule out as a matter of principle the possibility that a medical report that is silent on care needs is nonetheless sufficient to establish that a care need is more likely than not because of the extreme nature of the underlying condition eg paraplegia. I envisage such a case is likely rare. I am clear that the instant case is not such a case.

14. Although there is medical evidence in respect of the Appellant's medical histories and treatments, in my judgement there was no clear relevant supporting evidence of a sort identified in Appendix FM-SE relating the Appellant's care needs. The matter became one essentially of inference from the available medical evidence and largely subjective assertions of the sponsor. It seems to me that the scheme of the Rules exactly seeks to avoid the difficulties and issues that arise from inference and evaluation of subjective opinion by requiring the production of an objective assessment from an independent qualified medical source.
15. Be that as it may, I make the following observations and findings in respect of the available evidence.
 - (i) The Appellant has identified two medical conditions in the course of her application and appeal: a mental health diagnosis of bipolar disorder (including episodes of manic disorder with psychotic symptoms); a diagnosis of malignant uterine tumours requiring hysterectomy and chemotherapy.
 - (ii) In her application form, which focused on the ongoing chemotherapy to the seeming exclusion of any mental health diagnosis (Appendix 1 (VAF) section 1.7), the Appellant declared in respect of her ability to care for herself on a daily basis *"I have difficulties in washing myself, walking out to do food shopping, and travelling to hospital for treatment"* (section 1.8).
 - (iii) The supporting medical evidence submitted with the Appellant's application – a 'CT Image Inspection Report', two 'Disease Diagnosis Certificates', two 'Gynaecological Records for Leaving the Hospital', and Cardiograph details – is entirely silent on the Appellant's care needs, whether by reference to her current needs pending chemotherapy, or more particularly in respect of long-term care needs as envisaged under the Rules (See Respondent's bundle at annexes F-G.)
 - (iv) On appeal the Appellant's sponsoring daughter, Ms Wanling Huang, referred in her witness statement to the Appellant having become wheelchair-bound following the hysterectomy operation, and being *"no longer able to complete simple everyday tasks such as going to the toilet by herself or put on her clothes"*, and being unable to go to the supermarket. It was also said that the Appellant had lost confidence, was *"occasionally suicidal"*, and reference was made to her bipolar disease and that she suffered from hallucinations and was *"not able to tolerate people around her"*. (The Appellant did not provide any additional detail by way of her witness statement, essentially endorsing the contents of the sponsor's statement.)
 - (v) The supporting medical evidence in the Appellant's bundle before the First-tier Tribunal comprises predominantly documents in relation to the Appellant's cancer diagnosis (comprising both Chinese language documents and translations). These documents set out in some considerable detail the history of the Appellant's diagnosis, and include records of physical examinations, test reports, surgical records, pathology reports, echocardiogram reports, lung function reports, imaging reports, and the discharge records included in the

application. There are also documents in respect of the Appellant's bipolar disorder.

(vi) In the main part the documents do not refer to any ongoing care needs; however there are some limited references, particularly in the context of guidance on discharge. Matters of particular relevance either drawn to my attention or otherwise identifiable are:

(a) *"Sometimes, the patient is afraid to stay home alone and feels safe when staying with others. Sometimes, the patient dare not go to open wild place or are afraid to be together with strangers. However, the patient can restrain or disguise, so not obviously affecting the work"; and "The patient often thinks that others are against or persecute him or her, and often feels being followed or monitored by others"; and "Occasionally, the patient has hallucinations. In most cases, the patient feels been criticised, blamed or persecuted by others. Sometimes, the patient feels that others know what he or she is thinking about. The patient often is hostile, and may be self-blamed or feel lonely"* (page 147).

(b) *"She still lacked of insight."; and "Discharge Instructions – Custody of drugs was by the family member who should supervise the patient in medication according to the doctor's advice. Pay attention to side effects of drugs, and in case of discomfort, please see the doctor"* (page 153).

(c) I pause to note that in my judgement the fact that a family member was mentioned as having custody of the Appellant's medication is not to be read as a requirement that only a family member could undertake such a responsibility, but is rather a reflection of the reality that it was a specific family member to whom the Appellant's medication was passed at the time of discharge. There is nothing intrinsic in this report, and it is not a matter of reasonable inference, to suggest that any other suitably responsible individual – for example a paid carer – would be unable to ensure compliance with the Appellant's medication regime by providing her with the appropriate tablet at the appropriate time. The suggestion to the contrary is without any foundation.

(vii) Since the Error of Law hearing the Appellant has filed a supplementary bundle which includes four further items of medical evidence: further extracts from the Appellant's hospital records, a further diagnosis report, a correction of the translation in respect of an earlier document, and a report prepared by a UK-based Consultant Psychiatrist on the basis of the available translations of the Chinese medical documents and a conversation with the sponsor. An accompanying witness statement from the sponsor, amongst other things, seeks to identify various passages in the supporting medical evidence wherein reference is made to family members' roles during the Appellant's various treatments - including in particular acts of the sponsor.

(viii) I have not found this latter approach to the evidence to be of any particular assistance in identifying the Appellant actual long-term care requirements at the date of the Respondent's decision. In my judgement it is of no particular consequence, for example, that when the Appellant was admitted

to hospital on 3 February 2013 it was consequent upon her daughter having sent her there which had required the assistance of an ambulance. Whilst I understand that the sponsor would like me to infer that the Appellant would not have been able to access any treatment without her intervention, I do not find the circumstance to support such a conclusion; nor, in any event, does it go to the question of long-term care requirements with everyday tasks. It seems to me in any event entirely reasonable to infer if there are any long-term care requirements that were to be met with the assistance of a paid carer, such a person would be able to identify any incidents of crisis in the Appellant's mental or physical health and facilitate an appropriate admission to hospital if necessary.

(ix) In my judgement none of the references to the actions of either the sponsor or other family members that are to be found incidentally in the various medical documents is of any great assistance in identifying the long-term care needs at the date of the Respondent's decision. Far less do such incidental references support the contention that any such care needs could *only* be met through the assistance of the sponsor, and could not otherwise be met through some form of paid carer.

(x) The report of Dr A Okolie, a UK-based Consultant Psychiatrist, constitutes for the main part a short summary of the diagnoses to be gleaned from the medical evidence from China. The report contains a generalised observation to the effect that a person's bipolar affective disorder may severely impact on others including in particular family members and caregivers - an observation that I find of no particular value in the abstract. Otherwise I note the following in respect of the passages that may have any relevance to the issue of ongoing care requirements:

(a) Dr Okolie identifies the consequences for the Appellant of her bipolar affective disorder as being "*frequent disengagement from treatment, lack of insight, difficulty getting on with neighbours in China, hallucinations and suspiciousness*".

(b) Although Dr Okolie also observes "*There also seems to be an issue of personal neglect and inability to look after her personal hygiene*", he does not identify the particular source for this comment and I have not been able to identify any such passage in the supporting documents, and nor has Ms Panagiotopoulou directed my attention to any relevant extracts.

(c) "*Management of this illness requires a partnership between the mental health professionals and the caregivers*". This on the face of it is uncontroversial. It does not, however, particularly assist in identifying what the long-term care needs actually are, or how they might be met, or by whom.

(d) Although Dr Okolie opines "*in this instance the only identifiable caregiver at this time is her daughter*", it is not apparent on what basis he has reached such a conclusion except perhaps on the mere say-so of the sponsor. In any event it is not a matter directly within his expertise, it being a matter of practical support rather than medical opinion. For the avoidance of any

doubt in this context I do not read Dr Okolie's opinion as being one to the effect that the particular features of the Appellant's underlying medical conditions make it imperative that her daughter be her carer, as opposed to it being his opinion that it is only the daughter who has put herself forward as a person in a position to offer care. If it were indeed Dr Okolie's opinion that for medical reasons the Appellant could only satisfactorily be cared for by her daughter, I would have expected him to state so in terms and also to offer a clear reason for such a conclusion. He has not done so, and accordingly I find that it is more likely than not that he does not hold such an opinion on medical grounds.

(e) In this latter regard and generally I do not consider that the general observation taken from a 'science direct' website to the effect that generally clinicians can rely on family members as caregivers, to be of any particular assistance in determining the key issues in this appeal. More particularly I am not prepared to infer from such a passage that it is the opinion of Dr Okolie that no other caregiver might be able to provide the Appellant with the care that she requires.

(xi) I have noted the sponsor's evidence to the effect that the Appellant is currently refusing to comply with her cancer treatment. However, it appears that this is a matter that post-dates the Respondent's decision, is not matter in respect of which there is any particular supporting medical evidence as to the underlying reasons, and in any event does not relate to everyday tasks of living.

16. The very real difficulty I have had in this case is identifying any supporting medical evidence as to the Appellant's long-term care needs in respect of everyday tasks. The Appellant's cancer, which was at the forefront of the initial application seems over the course of the appeal to have become marginalised in favour of arguments based on the Appellant's mental health. Be that as it may, no specific long-term care need has been identified by reference to the Appellant's physical condition. As regards the Appellant's mental health, I accept that she has a chronic underlying condition which is variable, and indeed episodic, in nature. I also accept that at or about the time of the application the Appellant had experienced a period of recent crisis. I accept that during periods of crisis her care needs might alter, and in particular she may require the intervention of a third party to ensure she accesses professional treatment. I am not satisfied that any particular long-term care need has been clearly and adequately identified, or clearly and adequately proved on a balance of probabilities – by reference to the supporting medical evidence. In any event, were it otherwise I am not persuaded that there is anything in the supporting evidence that demonstrates any specific long-term care needs with everyday tasks – such as washing, toileting, dressing, shopping, cooking, feeding, getting in and out of bed, or taking medication – could not be adequately met through the assistance of a relatively lowly skilled paid carer. Far less is there any evidence from a relevant health authority, a local authority, a doctor or other healthcare professional to demonstrate such care could not be obtained in China.
17. In this context I am not persuaded that the Appellant's underlying conditions are such that she would not accept the assistance of a non-family member. I approach

her circumstance as it was at the date of the Respondent's decision, and subsequent to her discharge from hospital at a time when she was in the process of recovery and had, as it were, calmed down from the manic episode that had led to her hospitalisation. Whilst there are references to an element of paranoia and suspicion, I am not persuaded that there is anything in the evidence to demonstrate that when the Appellant's condition is under control - as it is for the vast majority of the time - that this would prevent her engagement with a paid carer. Certainly there is nothing by way of medical evidence that demonstrates that the Appellant could not adequately engage with a non-family member carer.

18. I am reinforced in this conclusion by the circumstance that at the time of application the sponsor proposed that the Appellant be looked after by a paid carer during the daytime in the UK: *"My daughter is planning to find an outside care for me during week days' day time. She will look after me in the evenings and weekends"* (Appendix 1 (VAF) section 1.17). The sponsor denied that this would now be the arrangement. I accept in the abstract that plans may indeed change with the surrounding circumstances and needs. However the sponsor told me that it had been the plan all along that the Appellant would be looked after by her in the UK rather than a paid carer. Necessarily, this is inconsistent with what was said in the application - which in any event on its face was not based on issues relating to mental health. In the circumstances I do not accept the sponsor's evidence in this regard.
19. In my judgement the inconsistency is of significance. This is because on the one hand it is said that care in China is unsuitable because the required care to be provided to the Appellant needs to be provided by a family member - and in particular the sponsor - and that her care needs cannot be met by the employment of a carer because the Appellant's mental health condition makes her suspicious and/or fearful; yet on the other hand it was exactly proposed in the application from that care in the UK would be provided in significant part (during the working week when the sponsor has left home for work until she returned) by an employed carer. I find the arrangement was advanced in support of the visa application because at that time there was no perception that the Appellant would not cooperate with a non-family carer. I consider the subsequent assertions to the contrary essentially to be driven by a combination of untested and thereby unfounded pessimism and the expediency of the desired appeal outcome.
20. In this context it is appropriate to pause to note that Ms Panagiotopoulou raised an objection during the course of the hearing to one line of Ms Isherwood's cross-examination on the basis that there had been no challenge to the credibility findings of the First-tier Tribunal. That may be so, but as I observed to Ms Panagiotopoulou the decision of Judge Hussain had been set aside. In as much as some of his findings might be preserved and taken forward to the considerations in remaking the decision in the appeal they could not be considered as binding. Where - as here - there was a clear discrepancy in the evidence it could not be disregarded merely because there had been no express challenge to the findings of fact: it would be in neglect of the duty of independent judicial scrutiny to simply ignore such matters: they required to be addressed.

21. That said, on the whole I found the sponsor – perhaps not surprisingly – to be well versed in the details of her mother’s conditions, and a reliable witness as to historical fact. However, in terms of matters that amounted essentially to opinion, and matters of intention and future planning, in my judgment she demonstrated a propensity to give expedient answers – most likely arising from her understandable anxiety over her mother’s condition. In particular, for example, her assertion at the ‘error of law’ hearing that certain types of evidence were quite simply not obtainable in China, was not supported in any way by the production of independent evidence. For the avoidance of any doubt I find the sponsor’s assertion that it was not possible to obtain a report from a medical source in China identifying a person’s particular care needs to have been no more than an assertion of opinion representing a pessimism in respect of the matter, and not to have been based on any actual experience or knowledge. However, the sponsor’s readiness to express such an opinion without proper or due enquiry is, in my judgement, indicative of an unreliability in respect of matters of secondary fact where she has no direct knowledge or experience. In particular in this regard I am not prepared to accept her mere assertion as to the unavailability of suitable paid care for the Appellant. In my judgement the sponsor preferred to deny such a possibility as any alternative position would necessarily undermine the prospect of seeking to achieve the goal of securing entry clearance for her mother.
22. Even so, I understand and recognise what is said about emotional support - adequately summarised in the following passage taken from the determination of the First-tier Tribunal, “[A]side from the physical help her mother needs she can also provide her with emotional support that she desperately needs. One cannot provide the same support by hiring others. The appellant’s quality of life would improve by being in this country with the daughter” (paragraph 11). The sponsor again alludes to such matters in her supplementary witness statement signed 24 October 2014: “I do not accept that my mother’s physical care needs will be met in China even though paid care might be available as I do not believe that such care in itself would be suitable” (paragraph 3). This, in the sponsor’s opinion, is because the Appellant needs “emotional, psychological and moral support”. However, notwithstanding my acknowledgement of the possible significance of emotional support and the different nature of being cared for by a family member and by a paid carer, this does not go so far as to demonstrate that this particular Appellant has satisfied the requirements of the Rules.
23. For completeness I note that Ms Isherwood provided me with a copy of extracts from the Respondent’s COIR on China dated 20 December 2013, specifically section 11 ‘Medical issues’, paragraphs 11.01-11.20. (Ms Panagiotopoulou after taking instructions raised no objection to me admitting this material into evidence notwithstanding that it had not been served in accordance with the Directions previously issued.) In my judgement the evidence in the COIR is of limited value in considering the availability of personal care for everyday tasks, focussing primarily on the availability of medical treatment rather than provision of personal care for everyday tasks.
24. In this context it is not suggested as part of the Appellant’s case that relevant medical care is not available: indeed the Appellant has accessed treatment in respect of both

her underlying mental health and physical health conditions. Whilst I note the extent to which the Appellant is prepared to access further such treatments as may be available in China has been raised as a concern by the sponsor, this is distinct from personal care with everyday tasks.

25. I do note that the COIR at paragraph 11.01, quoting from a 2012 World Health Organisation report, 'The Health Service Delivery Profile, China', makes a non-specific reference to outpatient care: *"For outpatient care, the private sector has increased its market share in recent years, with concomitant increases in out-of-pocket payments"*. Whilst in isolation this tells me little about the sort of care that might be available, it does indicate the existence of a private sector, and it is to be borne in mind on the facts of this particular case that the specific care needs appear likely to be limited, but in any event have been identified with no particularity or by reference to admissible supporting evidence.
26. For the avoidance of any doubt I have disregarded the untranslated documents submitted by the Entry Clearance Officer which were said to demonstrate the availability of private sector care. In any event in this context and generally I remind myself that the burden of proof is on the Appellant.
27. In conclusion:
 - (i) It seems to me that the only matter of any real substance in respect of long-term care needs that emerges from any of the medical evidence is that the Appellant will need help from another person to ensure that she takes her medication in order to control her bipolar disorder.
 - (ii) I am unable to identify anything else by way of evidence from a doctor or other health care professional that demonstrates on a balance of probabilities that the Appellant has any other long-term care needs in respect of everyday tasks.
 - (iii) The Appellant has not provided any evidence that adequately supports the assertion made by the sponsor that it is only a family member – and more particularly ideally only the sponsor – who would be able to provide the relevant care to ensure compliance in taking her medication.
 - (iv) The Appellant has not provided any evidence from a central or local health authority, or from a local authority, or from a doctor or other healthcare professional, to the effect that the sort of care required to ensure compliance with her medication regime could not be obtained in China even with the practical and financial help of the sponsor.
28. The Appellant has failed to demonstrate that she met the requirements of the Immigration Rules at the date of the Respondent's decision. The Respondent's decision was in accordance with the Immigration Rules. The appeal under the Rules is dismissed.
29. I turn to a consideration of the case in the alternative by reference to Article 8.
30. I note that Ms Panagiotopoulou acknowledged that in circumstances where Article 8 was only reached on the premise that it had not been shown that the Appellant's care

needs could not adequately be met in China, the case in respect of Article 8 was 'difficult'. She argued that there was a potential impact on the sponsor's own health in worrying about her mother, and that she could not be expected to relocate to China. She also emphasised the 'cultural aspect' of there being an expectation that children will look after their elderly parents. Otherwise she relied upon the matter as set out at paragraph 22 of her Skeleton Argument, pleading that compelling circumstances existed and that irrespective of the requirements of the Rules the nature of the Appellant's illness was such that she was best looked after with the personal care that only a daughter could provide.

31. I note and take in to account that the sponsor is a national of China. She first came to the UK in 1999, when she was 16, to study for 'A'-levels. She remained in the UK, with leave, to pursue higher education obtaining a degree from Warwick University, and thereafter in due course, qualified as an accountant. She is employed and earns £65,000 per year. In her witness statement before the First-tier Tribunal signed 16 May 2014, the Appellant's daughter relates that her accountancy qualification gained in the UK is not recognised in China – *"and I cannot use my skills there"*, explaining that there is a *"very different accounting system"*. The sponsor refers to having spent almost 10 years building up a career in the UK, and having lived in UK continuously since she was 16 years old. I accept that it would not be reasonable to expect the sponsor to relocate to China.
32. In my judgement in considering the question of family life, and the quality of family life, it is of very particular significance that a family decision, or 'election', was made to live continents apart. Necessarily, in the first instance, the decision that the sponsor should study in the UK cannot be taken to be an entirely voluntary decision of her own: she was a child. However, it seems to me that at the point that it was decided that the sponsor would pursue qualifications in the UK not recognised in China, in the absence of evidence to the contrary – and there was none – it must be assumed to have been in contemplation that it was thereafter likely that the Appellant and her daughter would spend most of the rest of their lives apart – including into the Appellant's old age.
33. The effect of the Respondent's decision does no more than reflect the circumstances and consequences of the decision that the sponsor should pursue a career through qualifications not recognised in China. Accordingly, notwithstanding that the sponsor is the Appellant's only child, and notwithstanding the sponsor's financial support for her mother, I am not persuaded that the nature of the family life that exists between the Appellant and the sponsor is such that the second of the **Razgar** questions is to be answered in the Appellant's favour. I find that the impact of the Respondent's decision does not have consequences of such gravity as potentially to engage the operation of Article 8. The Appellant and the sponsor are left in no different situation from that they reasonably envisaged would be their family life in consequence of the family decision to live as they do.
34. There is no issue between the parties in respect of the third and fourth **Razgar** questions. However, in light of my conclusion in respect of the second **Razgar** question the fifth **Razgar** question – proportionality – is not reached. In such circumstances it is unnecessary for me to consider where the balance between the

Appellant and the sponsor's respective and/or mutual Article 8 rights and the public interest concern represented by the imperative of maintaining effective immigration control, is to be struck. In the circumstances it is not necessary for me to undertake an evaluation of the public interest considerations pursuant to part 5A of the Nationality, Immigration and Asylum Act 2002. In any event, were it necessary for me to consider proportionality I would reach the conclusion that given the stringent nature of the requirements of the Rules both in terms of the test and the specified evidence – that the Appellant's case was essentially completely answered by the Rules and the Appellant had not shown there to be present any particular or compelling circumstances that would justify departure from the Rules: in all of the circumstances the respondent's decision was both in accordance with the Rules and proportionate by reference to Article 8.

35. I conclude that the Respondent's decision did not breach the Appellant's, the sponsor's, or anybody else's human rights. The appeal is also dismissed on human rights grounds.

Notice of Decision

36. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 21 April 2015

To the Respondent

Fee Award (*This is not part of the determination*)

I have dismissed the appeal and in the circumstances make no fee award.

Deputy Judge of the Upper Tribunal I. A. Lewis 21 April 2015

Annex A: Text of Error of Law Decision of 23 September 2014

1. This is an appeal against the decision of First-tier Tribunal Judge Hussain promulgated on 25 June 2014 allowing Ms Zhang's appeal against the decision of the Entry Clearance Officer ('ECO') dated 3 June 2013 to refuse to grant entry clearance as an adult dependent relative.
2. Although before me the ECO is the appellant and Ms Zhang the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Zhang as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of China born on 1 February 1951. By way of an on-line application form completed on 1 May 2013 she applied for entry clearance as the dependent relative of her daughter, Ms Wanling Huang ('the sponsor'). The application was refused for reasons set out in a Notice of Immigration Decision dated 3 June 2013 with particular reference to paragraphs E-ECDR.2.4 and 2.5 of Appendix FM of the Immigration Rules. A subsequent Review by an Entry Clearance Manager ('ECM') dated 13 January 2014 additionally made reference to the evidential requirements specified in Appendix FM-SE at paragraphs 34-37.
4. The Appellant appealed to the IAC. The First-tier Tribunal Judge allowed the Appellant's appeal under the Immigration Rules for reasons set out in his determination. No human rights grounds were raised in the Notice of Appeal to the First-tier Tribunal, and the Judge in any event did not consider such grounds in the alternative.
5. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Page on 11 August 2014.

Consideration: Error of Law

6. An applicant for entry clearance as an adult dependent relative such as the Appellant must, pursuant to paragraphs E-ECDR.2.4 and 2.5 of Appendix FM demonstrate that *"as a result of age, illness or disability [she] require[s] long-term personal care to perform everyday tasks"* (E-ECDR.2.4), and is *"unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where [she lives] because (a) it is not available and there is no person in that country who can reasonably provide it; or (b) it is not affordable"* (E-ECDR.2.5).
7. Appendix FM-SD *"sets out the specified evidence applicants need to provide to meet the requirements of rules contained in Appendix FM"* (paragraph A of Appendix FM-SD). Paragraph 34 of Appendix FM-SD relates to the requirements of paragraph E-ECDR.2.4, and paragraph 35 relates to E-ECDR.2.5. Both paragraphs stipulate evidence from independent sources: in respect of the applicant's care needs this should take the form of medical evidence from a doctor or other health professional that the applicant requires long-term personal care; in respect of the inability to obtain the required level of care, this should be from a health authority, a local authority, or a doctor or other health professional.

8. The Respondent has not disputed the Appellant's medical history or her underlying medical conditions. It was not accepted, however, that the Appellant had demonstrated any particular care needs arising in consequence. Moreover, in the Notice of Immigration Decision it was noted that the Appellant had not provided evidence to suggest that she could not receive any care required in China – in particular it was noted that she had family members living close by; further, in the ECM review it was asserted that provision of care, including nursing support, was available in the Appellant's area.
9. Regrettably, for the following reasons, I have little hesitation in concluding that the First-tier Tribunal Judge did not engage properly with the issues in this appeal, and thereby erred in law.

(i) At paragraphs 31–33 the Judge accepts the Appellant's underlying diagnoses. However, beyond the brief reference at paragraph 34, and the stated general conclusion at paragraph 35, he makes no findings as to care needs.

(ii) The Judge states at paragraph 34, that he is satisfied "*the appellant finds it difficult to move about without physical support of others*", adding that "*that is why she has taken to using a wheelchair*". The Judge acknowledges that this is "*not objectively evidenced*" and is based on "*the sponsor's testimony*". Necessarily the sponsor's testimony does not satisfy the 'specified evidence' requirements of the Rules as set out in Appendix FM-SE. In fairness Ms Panagiotopoulou acknowledged that 'difficulties' were presented by the Judge's failure to have regard to Appendix FM-SE, and indeed that the requirements of Appendix FM-SE presented difficulties to the application and appeal more generally.

(iii) Moreover, it is not clear from the sponsor's testimony, as summarised at paragraph 8 of the determination, the extent to which any mobility issues arose by reason of being in a period of post-operative recovery, there being nothing else in the underlying medical conditions that would suggest a mobility issue. As such the Judge does not consider or analyse, and makes no findings in respect of, long-term care needs in this – or indeed any other – regard.

(iv) Further, it is to be noted that the testimony was to the effect that the Appellant remedied any mobility needs by use of her wheelchair; there was no suggestion that the Appellant required the assistance of another person to make use of her wheelchair. As such it is not clear what, if any, care needs existed relating to mobility: far less is there an adequate analysis undertaken by the Judge, and far less are there any clear findings.

(v) There is no finding as to any other care needs. I invited Ms Panagiotopoulou to identify amongst the various medical reports that were filed before the First-tier Tribunal any passages that indicated specific care needs. Although my attention was directed to a list of symptoms (Appellant's First-tier Tribunal bundle page 147) I was not satisfied that the symptoms listed under the heading 'Guidance' were anything other than a list of general symptoms that might be exhibited by a person with a diagnosis of bipolar disorder, and I was wholly unable to interpret the figures or 'scores' that appeared to relate to the

Appellant: far less was it possible, in my judgement, to infer anything about care needs from such figures in the absence of expert evidence.

(vi) Consideration of the ability to meet care needs within China is, in light of the error of approach and the absence of clear findings as to what those care needs might be, inevitably premised on an inadequate foundation. The ability to meet care needs cannot properly be evaluated if those care needs themselves have not properly be evaluated.

(vii) Whilst the Judge reasonably concludes that the Appellant's relatives cannot be expected to provide care, there is no consideration given to the requirements of Appendix FM-SE, and otherwise no consideration of healthcare provision in China, save the 'blind alley' reference to institutional care which it is acknowledged is not required.

(viii) Permission to appeal to the Upper Tribunal was granted in part because it was considered arguable that the Judge had misdirected himself at paragraph 35 of the determination in stating "*The question is whether that care could be provided in China or be better provided in the United Kingdom*". This appears to introduce a comparative test inconsistent with the test stated in the Rules. Ms Panagiotopoulou directed my attention to paragraphs 29 and 40 where the Judge had, consistent with the Rules, identified the issue as being "*whether that care can be provided in China*" (paragraph 29), and concluded that he was "*satisfied that this care cannot be suitably provided in China*" (paragraph 40). I am not prepared to accept that the question the Judge poses at paragraph 35 represents an aberrant anomaly in circumstances where he otherwise appropriately directed himself to and in accordance with the Rules. Rather, in my judgement, it renders the determination unclear as to what test the Judge actually was applying. In any event, even if it were otherwise, I am not satisfied that the Judge's approach to the issue of the ability to meet the Appellant's care needs in China was adequate for the reasons already given.

10. In all such circumstances I find that the First-tier Tribunal Judge materially erred in his approach to the appeal under the Rules. I conclude that the decision of the First-tier Tribunal must be set aside.

Remaking the Decision / Future Conduct of the Appeal

11. Both representatives acknowledged that the appeal was suitable for consideration by the Upper Tribunal.
12. Ms Panagiotopoulou requested more time essentially for two reasons. It was suggested that some further evidence might be available to enable a better understanding of aspects of the medical evidence (such as the scores recorded at page 147) and suitable expert opinion as to the likely consequent care needs. Further, it was the sponsor's instructions that the sort of evidence identified at paragraph 34 of Appendix FM-SD quite simply was not available in China: doctors and hospitals did not routinely issue reports as to care needs, it was not possible to commission such a report privately, and/or in any event a doctor would not be prepared to visit a mental health patient at home because of risk of harm to the doctor. If that were the

case – and in effect no dependent adult relative living in China would be able to comply with the requirements of the Rules – then it might be necessary for the Tribunal to consider the extent to which the Rules might be relaxed, or whether any alternative resolution might be available by reference to Article 8.

13. With some hesitation – conscious of the limitations of the scope of the appeal under the Rules by reference both to the date of the decision and the requirements of Appendix FM-SE – I was prepared to grant an adjournment to provide the Appellant with an opportunity to obtain any further evidence upon which she might wish to rely. I issue directions accordingly: see below.

Decision

14. The decision of the First-tier Tribunal Judge contained material errors of law and is set aside.
15. The decision in the appeal is to be re-made before the Upper Tribunal.

Consequent Directions

(i) The Appellant is to file and serve by 24 October 2014 all such further evidence upon which she wishes to rely. So far as it is available such evidence should address:

(a) The extent to which it is possible to identify and/or infer long-term care needs from the available medical evidence.

(b) The availability or otherwise of reports from doctors or other health professionals in China concerning an individual's care needs.

(ii) The Respondent is at liberty to file and serve any similar evidence – perhaps in particular in respect of (i)(b) above – within the same time limit.

(iii) In the event that the Appellant obtains evidence to the effect that it is not possible in China to obtain evidence that would meet the requirements of paragraph 34 of Appendix FM-SE, the Appellant is to file and serve by 24 October 2014 a written submission as to how this impacts upon the appeal herein.

(iv) The appeal will be re-listed for hearing at Field House – reserved to me – on 31 October 2014.