



**Upper Tribunal**

**(Immigration and Asylum Chamber)  
HU/06006/2019 (P)**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Decided under rule 34 (P)**

**Decision & Reasons  
Promulgated**

**On 28 October 2020**

**On 5 November 2020**

**Before**

**UPPER TRIBUNAL JUDGE KEKIĆ**

**Between**

**QING XIONG**

**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation (by way of written submissions)**

**For the appellant: No submissions received.**

**For the respondent: No submissions received**

**DECISION AND REASONS**

**Background**

1. This appeal comes before me following the grant of permission to appeal to the appellant by First-tier Tribunal Judge O'Brien on 30 March 2020 against the determination of First-tier Tribunal Judge Chana promulgated on 27 September 2019 following a hearing at Harmondsworth on 4 September 2019.
2. The appellant is a national of China born on 1 January 1985. She appeals against the decision of the respondent on 20 March 2019 to refuse her application for leave to remain on long residence and private life grounds.
3. The appeal was heard and dismissed by First-tier Tribunal Judge Chana who found that the appellant did not meet the requirements of paragraph 276B(a) of the Immigration Rules because she had been absent for more than the required period during the ten years she had been here and that there were no exceptional circumstances which warranted a grant of discretionary leave on article 8 grounds.
4. The appellant sought permission to appeal. She argued that : (i) the judge erred in her consideration of article 8 outside the rules in that she considered that the appellant's failure to meet the requirements of the Immigration Rules was determinative of her ability to come within article 8; (ii) the judge failed to conduct a proper and comprehensive balancing exercise when considering article 8; and (iii) the judge failed to consider material evidence over why the appellant had returned to China and failed to give reasons why she rejected the appellant's explanations.

**Covid-19 crisis: preliminary matters**

5. The matter would ordinarily have then been listed for a hearing but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen and instead directions were included in the grant of permission sent to the parties on 4 August 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.
6. The Tribunal has not received any submissions from either party in compliance with the directions. I am satisfied that the directions were properly served both on the appellant's representatives and the respondent by email and I now consider whether it is appropriate to determine the matter on the papers.
7. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance

Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being *"to enable the Upper Tribunal to deal with cases fairly and justly"*. To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

8. I have had careful regard to all the evidence before me before deciding how to proceed. I take the view that a full account of the facts are set out in those papers, that the arguments for and against the appellant have been clearly set out and that the issues to be decided are uncomplicated. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in her best interests. I am satisfied that both parties have had the opportunity to respond to the directions issued but have not done so. I consider that I am able to fairly and justly deal with this matter on the papers and now proceed to do so.

### **Findings and reasons**

9. I have considered the evidence, the determination, the grounds for permission and the grant of permission.
10. As argued in ground 1, the judge appears to have concluded against the appellant on article 8 outside the rules because she could not meet the requirements of paragraph 276B. Indeed, she approached the appeal as one brought under the Immigration Rules and under article 8 (at 1, 11 and 28 and in the decision where she dismisses the appeal under the Immigration Rules). Ironically, although focusing on the Immigration Rules as a primary consideration, the judge fails entirely to give any consideration to paragraph 276ADE as she was required to do.
11. Whilst an inability to meet the provisions of the rules is a relevant factor when considering article 8, it is not necessarily determinative and the only balancing exercise undertaken by the judge is contained in a single brief paragraph (at 42) refers to nothing else. There is no assessment of the lengthy period the

appellant has resided in the UK, the private life she has established during periods of lawful leave, her studies, her employment, her reasons for having to travel to China and for her prolonged stays there or the ties she has built up here including a purchase of property. Whilst s.117 is referred to in paragraph 41, there is no consideration of any of the factors set out in s.117B such as the appellant's ability to speak English or to maintain herself without recourse to public funds. As observed by First-tier Tribunal Judge O'Brien when granting permission, the consideration of article 8 is so brief as to be arguably insufficient.

12. Conversely, the judge focused unduly on matters which were not directly relevant to the claim, such as the source of the appellant's funds to purchase a property (at 31-33). She also incorrectly found no evidence to support certain matters when the evidence had been available (at 21 and pp.60-65 of the appellant's bundle). In rejecting the appellant's reasons for visiting China, she gave no reasons for disbelieving the evidence (at 30).
13. It follows that the judge's determination is wholly inadequate in its reasoning and is rendered unsustainable by the errors of law identified above.

### **Decision**

14. The decision of the First-tier Tribunal contains material errors of law and it is set aside in its entirety. No findings are preserved. The appeal shall be remitted for a fresh hearing to another judge of the First-tier Tribunal and directions shall be issued by that Tribunal in due course.

### **Anonymity**

15. No request for an anonymity order has been made at any stage and I see no reason to make one.

Signed:

R. Kekić  
Upper Tribunal Judge

Date: 28 October 2020