



**Upper Tribunal
(Immigration and Asylum Chamber)**

Case No: UI-2023-000870

First tier Tribunal Number: HU/53718/2022

THE IMMIGRATION ACTS

**Heard at Field House
On 4 September 2023**

Decision & Reasons Promulgated

13th October 2023

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

Between

**QING GAO ZHENG
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances:

For the Appellant: Mr R McKee, Counsel instructed by Christine Lee & Co
For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Chinese national who was born on 20 June 1973. On 20 June 2023, Upper Tribunal Judge Kamara found that the First-tier Tribunal (Judge Gandhi) had erred in law in dismissing the appellant's appeal on Article 8 ECHR grounds. She set aside Judge Gandhi's decision and she ordered that the decision on the appeal would be remade after a further hearing in the Upper Tribunal.
2. Judge Kamara ordered that the Secretary of State should review the appellant's case and should explain why he had been granted permission to work. In the event, there was no explanation before us of the basis on

which that decision was taken, although Mr Clarke provided some contemporaneous screenshots.

Background

3. The appellant entered the UK lawfully on 15 December 2008. He was granted periods of further leave and eventually Indefinite Leave to Remain. When he applied for Indefinite Leave to Remain in 2013, he submitted a TOEIC English test result from Queensway College. It was subsequently alleged that the appellant had obtained that test result by using a proxy. The cancellation of his ILR on that basis was the subject of an appeal to the First-tier Tribunal.
4. The appellant's appeal was allowed by Judge Boardman in 2015 but that decision was set aside by Upper Tribunal Judge McGeachy, who considered the FtT's decision to be perverse in its conclusion that he had not used a proxy in his TOEIC test. He ordered that the appeal should be reheard in the FtT. Permission to appeal to the Court of Appeal having been refused by Sir Stephen Silber, the appeal was reheard and dismissed by Judge Monson, who found the appellant to have cheated in his TOEIC test and found that his removal to China would be proportionate. The appellant's appeal rights against that decision were exhausted in October 2019.
5. The appellant made further representations to the Secretary of State on 8 September 2021, relying on his relationship with his wife and children in the UK and submitting that his removal would be in breach of Article 8 ECHR. As we have said, that application was refused and his appeal against the refusal was dismissed but the matter comes before us to remake the decision on the appeal.

Submissions

6. It was confirmed at the outset of the hearing before us that there was to be no oral evidence. The appeal therefore proceeded on the basis of submissions only.
7. Mr McKee provided us with an update on the appellant's wife's health. He stated that she had developed a slow heart rate. Her gall bladder had been removed recently. She remained under medical observation and was due to have an MRI scan on 19 September 2023.
8. Mr McKee turned to address us on the balance sheet of proportionality considerations. He submitted that a decade had passed since the appellant had cheated in his TOEIC test and he had lived a blameless life since then. It was clear that his wife remained unwell. She was understandably reluctant to leave the United Kingdom, given those conditions, the fact that she enjoys ILR and is working. Their two sons lived at home when not at university and they continued to enjoy a family life together.
9. Mr McKee's 'best point', however, was that which had concerned Judge Kamara. The appellant had been given permission to work by the respondent, despite his leave being cancelled in 2014. Permission had apparently been given at the request of his previous solicitors. This was not a step which the respondent usually took and it diminished the public

interest in immigration control. It was notable that the respondent had refused the application under paragraph S-LTR 4.2, rather than a mandatory ground of refusal.

10. For the respondent, Mr Clarke noted that there was an unchallenged finding that the appellant had used deception in his ILR application. But that was not merely a point in the past; the appellant had maintained that deception up to and including the hearing before Judge Gandhi. There was a cogent public interest in his removal. The appellant's deception was compounded by the fact that he had frustrated his removal by stating that he would go voluntarily but then changing his mind. The matters on the appellant's side of the balance sheet did not suffice to outweigh that conduct. There was scant evidence of the appellant's wife's current health. There would be no difficulty in the appellant relocating to China, given his experience of working as a chef, and his family remained there also. There was evidently a support network there.
11. Mr Clarke submitted that nothing flowed from the respondent's use of a discretionary refusal provision. This was refusal in a previous application and S-LTR 4.2 was apt. Nor could any significance properly attach to the decision to grant permission to work. That was open to the respondent in the exercise of her discretion. It was apparent from the screenshots that there had been a complaint and the appellant's permission to work had been reinstated. That decision did not meaningfully reduce the public interest in the removal of a person who had obtained ILR by deception. Given the litigation, it was perverse to suggest that the respondent had lost interest in removing the appellant.
12. Mr Clarke submitted that the appellant's sons were of university age and were able to support their mother. The appellant and his wife could relocate to China. There was nothing to suggest that she would be unable to work in China. Section 117B of the 2002 Act militated against the appellant.
13. In response, Mr McKee submitted that the appellant's wife had held ILR since 2013. The point about the appellant changing his mind about voluntary return should not be held against him. He might have thought that he was at the end of the road, merely to receive new advice. The appellant could not be blamed for that, or for pursuing his appeal rights. The reality was that the appellant's denial of the TOEIC allegation had placed him in a worse position than if he had accepted his guilt. An application for entry clearance would most likely be refused now. So much time had passed that it would be disproportionate to remove the appellant.

Analysis

14. In reaching our decision in this appeal, we have taken account of all of the evidence which has been placed before the FtT and the Upper Tribunal, up to and including the screenshots adduced by Mr Clarke and the further evidence submitted by the appellant's solicitors under cover of a letter dated 28 July 2023.
15. As will be apparent from our summary of the submissions, this is not a case in which the appellant seeks to submit that he meets the requirements of

the Private Life Immigration Rules. He does not submit before us, therefore, that there would be very significant obstacles to his reintegration to China. For the reasons given by Mr Clarke, we think that would be a difficult submission for him to make. He has worked as a chef in this country and seemingly has transferable skills. He has family in China and there is no reason to think that he does not have a support network there. That was the finding of the First-tier Tribunal and there is no reason to depart from it.

16. Nor, for the reasons given by Judge Gandhi, do we consider there to be any insurmountable obstacles to the appellant and his wife continuing their family life in China. As the judge noted, it is a country which is familiar to them, and they speak the language. There is scant medical evidence before us to show that the appellant's wife's medical condition is such that she cannot relocate to China. We understand her reluctance to do so when she remains under observation following an operation but there is no evidence before us to show that she would be unable to receive similar or better care in China. We note in that connection that we were told by Mr McKee that the latest round of treatment was paid for privately.
17. The appellant's sons are both now at university in the UK. They had a family life with their parents at the time of the FtT hearing and, given what was said by Stanley Burnton LJ at [24] of *Singh v SSHD* [2015] EWCA Civ 630; [2016] Imm AR 1, there is no reason to depart from that finding. Having said that, they are both healthy young students and would be able to live and study in the UK without their parents, just as many international students do. They may remain in the UK or they could relocate to China with the appellant. We have not been told of any obstacles to the family's relocation which would be insurmountable, as that term is defined at EX2 of Appendix FM and at [42]-[48] of *R (Agyarko & Ikuga) v SSHD* [2017] UKSC 11; [2017] 1 WLR 823.
18. It is therefore for the appellant to show that his removal would give rise to unjustifiably harsh consequences such as to be disproportionate. In considering that question, we have been much assisted by the submissions made by Mr McKee and Mr Clarke, both of whom were conscious of the 'balance sheet' approach to proportionality which has been urged on the Tribunal by a number of decisions since *Hesham Ali v SSHD* [2016] UKSC 60; [2016] 1 WLR 4799.
19. In our judgment, the most significant factor in the appellant's favour is the disruption which will be caused to his family by his removal. Whilst the evidence of his wife's ill health is sparse, it is clear that she has been unwell and we accept that she remains under investigation, with an MRI scan scheduled for 29 September 2023. We have no evidence of the nature of that investigation or of her prognosis, but we accept that she and her family are concerned about her health. The stress of these proceedings will have added to their concern. The stress of the appellant being removed, and the choices that will obviously present to the family, will contribute to that significantly, both from an emotional and a financial point of view. They have been a stable family unit in the UK for many years. They have raised intelligent children who have gained admission to university. The interruption to that stability at what is already a time of heightened stress is a matter to which we attach significance.

20. Mr McKee submitted that the effluxion of time was a also matter of significance. We are conscious of the fact that this was advanced as a positive matter for the appellant, rather than a point which reduced the public interest in immigration control. The side of the scales on which it appears is immaterial from that perspective; it is capable of either impact and what matters is that it is borne in mind but not 'double-counted'. We agree with Mr Clarke, however, that the point does not bear the weight which Mr McKee sought to attribute to it. We agree with Mr Clarke that it is wrong in principle to see the appellant as a man who has lived a 'blameless life' since he obtained his TOEIC certificate by deception. By the time of the appeal hearing before us, the finding that he had used deception was a preserved one but we note that he had contested that allegation for many years. The initial appeal went through the hands of two first instance judges, one of the Upper Tribunal and one of the Court of Appeal (see above). Even when the appellant returned to the Tribunal in the course of this appeal, he continued to deny the allegation before Judge Gandhi. Mr McKee is correct to submit that he has placed himself in a worse position by denying the allegation. It means that the weight we can properly place on the passage of time since the deception is much reduced.
21. We do not consider the respondent's decision to refuse the application by reference to a discretionary provision is a matter of any significance in the assessment of proportionality. The appellant had used deception in a previous application and S-LTR 4.2 of Appendix FM was a proper ground of refusal. It might have been open to the respondent to rely on S-LTR 1.6 but there is nothing before us to show that her decision not to do so somehow indicates that she took a less than serious view of the appellant's conduct.
22. Nor do we consider the respondent's decision to give the appellant permission to work to be a matter of any significance beyond the fact that his removal will deprive the family of his income. Although we heard submissions from Mr McKee on the point, and although we have read what was previously said to the Upper Tribunal about it, we do not agree that that decision serves to assist the appellant in the assessment of proportionality. The screenshots which were belatedly produced by the Home Office show that permission was given in response to communication from the appellant's former solicitors. We do not know why the decision was made or whether it was in compliance with some form of policy. What we do know, however, is that the appellant can have been under no illusions about the intentions of the Home Office. Although he had permission to work, his first appeal was hotly and successfully contested by the respondent and his second application was refused. It could not properly be suggested that he had somehow come to believe that the respondent had decided not to remove him. The fact that she had chosen not to expose him to the full force of the 'hostile environment' made his life and that of his family more comfortable during the removal proceedings but we do not consider it to be of any significance in the assessment of proportionality.
23. We recognise that the appellant has a private life in the United Kingdom in addition to the family life he enjoys with his wife and children. He has been in the UK for many years and has seemingly worked throughout. He will have forged important connections since he entered in 2008 and those will be lost in the event of his removal.

24. Against those matters, we balance the public interest in immigration control, as recognised by statute, in s117B(1) of the Nationality, Immigration and Asylum Act 2002. That aspect of the public interest is not a fixity and we find it to weigh particularly heavily against this appellant. He used deception to gain settled status and he continued to deny that deception over the course of many years, causing additional strain on the public purse through litigation. He has rightly been stripped of his ILR but there remains a cogent and powerful public interest in his removal notwithstanding the passage of time.
25. Mr Clarke attempted to persuade us that the public interest was strengthened still further by the appellant having rescinded his agreement to return voluntarily to China. We do not accept that submission, for the reasons given by Mr McKee. We know that the appellant did change his mind but we cannot know the reasons for that decision. His family circumstances may have changed at the time; it does not follow from the decision that it was motivated by a wish to 'game' the system, which was the premise underlying Mr Clarke's submission.
26. Weighing the two sides of the scales, we find that the proper outcome is clear. Whilst we have taken full account of the matters which weigh in favour of the appellant, particularly the disruption it will cause his family at this time, we find that his removal is a proportionate course. He used deception to secure settlement and his presence in the United Kingdom since that date has been premised on a lie which he has until recently maintained. That course of conduct outweighs the private and family life the appellant has in the UK. Whether the decision results in the separation of the appellant from his family, or a decision by some or all of them to accompany him to China, we find that the respondent has shown her decision to be a proportionate one.

Notice of Decision

The decision of the First-tier Tribunal having been set aside, we remake the decision on the appeal by dismissing it.

M.J.Blundell

Upper Tribunal Judge
Immigration and Asylum Chamber

3 October 2023