



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002170

First-tier Tribunal Nos: HU/58234/2021
IA/17992/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 14 September 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**P Z
(ANONYMITY ORDER MADE)**

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Mavrantonis (Counsel)
For the Respondent: Mr Terrell (Senior Home Office Presenting Officer)

Heard at Field House on 1 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Burnett, promulgated on 10th May 2023, following a hearing at Taylor House on 2nd May 2023. In the determination, the judge dismissed the appeal of the Appellant, following which, the Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of China, and was born on 17th October 1974. She appealed against the refusal of leave to remain in the UK on the basis of her private and family life by the Respondent in a decision dated 17th November 2021.

The Appellant's Claim

3. The Appellant's claim is that she entered the UK as a visitor on 25th March 2015, and on 30th November 2020 made an application for leave to remain in the UK on the basis of her family life with her British husband, Mr Ying Ping Wang, who however has dual nationality. The Appellant's husband, also Chinese, is age 62, and entered the UK in 1990, before becoming naturalised as a British citizen in 2002. He has been in the UK for 33 years, and has visited China approximately five years ago, although he is currently signed off as being unfit to work. Their relationship has been accepted as being genuine and subsisting by the Respondent. Indeed, they entered into a lawful marriage in the UK on 24th March 2021. They share a family life together. They would face "very significant difficulty" in being able to continue their family life together in China, if the Appellant were required to return, and her husband was to accompany her or visit her there, in order to be with her in China. The very serious hardship to their being able to do so arises from the Appellant's husband dual nationality.
4. The Appellant argues that the effect of her husband's dual nationality can have one of two consequences. First, that China will not recognise her husband's British nationality, even if he were to go to China on a British passport with a Chinese visa registered in it, and as such he would lose British consular support and crown protection when residing there. As the FCDO, nationality in China (published 2016) document makes clear he would potentially be unable to leave China, especially with the ongoing Hong Kong political crisis in which the UK has adopted a particularly robust stance against China. Second, there was the option that China may treat him as a Chinese citizen because China forbids dual citizenship. If he is taken to have *de facto* renounced his Chinese nationality by virtue of having taken British citizenship, then China would treat him as a foreign non-Chinese national, unless it is the case that he opts to renounce his British nationality. The Appellant's husband, however, has been living in the UK for over two decades. If he were to relocate to China to be with his wife, the Appellant, he would have to *de facto* renounce his British citizenship and cut off any UK ties and any private life that he had built up in this country. The couple have a child in the UK, although he is over 18 and does not reside with them. Whichever way the Appellant's predicament was looked at, it is argued on her behalf, there is a "very significant difficulty" in the Appellant and her husband continuing with their family life in China were she to be required to move there. This is to say nothing

of the fact that there would be very significant obstacles to the Appellant's re-integration into life in China under paragraph 276ADE(1)(vi).

The Judge's Findings

5. The judge observed that the focus of the submissions before him "was that the health of the Appellant's husband and his age would mean there would be insurmountable obstacles to integration" and that "the health condition and age would make it less likely that he would be able to secure employment" and that moreover, "He is also now British and would be treated as a foreign national" (paragraph 26). The judge went on to note that the Appellant still had a mother living in China and the Appellant had spent the majority of her life there (paragraph 27). Although it was further recognised that "the appellant's partner is now a British citizen" nevertheless, "he is of Chinese decent and has family members who remain there", and that as the judge went on to explain, "he has visited China fairly frequently and his mother still resides there". The judge was careful to note that the appellant's Counsel "submits that the appellant's husband would not be able to leave China once there", but the judge did not accept that submission because the Appellant's husband "has visited China in the past and has been able to return to the UK", such that "the evidence does not support this bold submission" (paragraph 28). Accordingly, there were no insurmountable obstacles to family life (paragraph 31). The appeal was dismissed.
6. The grounds of application state that the judge misdirected himself. First, he referred to "insurmountable obstacles to integration" (at paragraph 26) when he should have been considering insurmountable obstacles to "family life continuing" as required by EX.2. Second, he had gone on to say that, "there was no evidence to demonstrate that, in time, [the appellant's husband] would not be able to obtain work" when this was inconsistent with the undisputed evidence that the Appellant's husband had been signed off as being unfit to work (see paragraphs 25 to 26). Third, and most critically, the judge, it was said, had failed to appreciate the serious effect of the nationality laws in China of a person who had dual nationality. The judge had the Appellant's skeleton argument of 8th May 2023 which made it quite clear that there were two scenarios that awaited the Appellant's husband.
7. First, that China would not recognise his British nationality so that he would then stand deprived of consular support and Crown protection.
8. Second, that he would be treated as a Chinese national and be unable to leave China. The FCDO Guidance was appended to the Appellant's Counsel's skeleton argument as "Annex 1". That guidance made it quite clear, that *"If you enter China on a Chinese passport we may not be able to help you if you have a problem. Our advice is that you should only travel to China on your British passport, with a Chinese visa on it"*. This is how the Appellant's husband had always gone to China, namely, on a British passport with a Chinese visa registered in it. The FCD advice also went on to say that,

"if you travel to China or Hong Kong on your Chinese passport, the authorities may also require evidence in the passport that you can enter the UK (via a UK visa or Certificate of Entitlement to Right of Abode). Holding a British passport may not fulfil their requirements".

The Appellant's husband would not be able to acquire a UK visa on his Chinese passport in order to re-enter the UK. The judge had made no reference whatsoever to the FCDO Guidance. Instead the judge had referred to this as a "bold" submission. As such, the seriousness of the issue in relation to dual nationality in China was overlooked. The grounds ended with the assertion that, "The crux of A's case surrounds the problematic nature of [her husband's] dual citizenship and the obstacles this may cause" (paragraph 18).

9. On 19th June 2023, the First-tier Tribunal granted permission to appeal.

Submissions

10. At the hearing before me on 1st August 2023, Mr Navrantonis of Counsel began by referring to his original skeleton argument of May 2022, where he had been at pains to emphasise the importance of the Appellant's husband's dual citizenship, and the difficulties that this would entail for the continuance of the party's family life in China. The FCDO Guidance made it clear that if the Appellant's husband entered China on his Chinese passport he would lose British Consular support which was arguably an insurmountable obstacle to be considered by the judge as such. If on the other hand, the Appellant's husband did enter China on his Chinese passport, the Chinese authorities may require evidence in the passport itself that her husband could then re-enter the UK, so that holding a British passport in itself would not fulfil these requirements. The Appellant's husband however, could not be issued with a UK visa in his Chinese passport because pursuant to the Immigration Act 1971, as a British citizen he was not subject to immigration control. It is true that the Appellant's husband had returned to China about five years ago but this was before the Hong Kong crisis had erupted. The judge had also gone on to say that, "I am required by Section 117 of the Nationality, Immigration and Asylum Act 2002 (NIAA 02) to give little weight to a relationship formed with a partner whilst in the UK unlawfully", before going on to say that "the public interest in this case is strong given that the Appellant has remained unlawfully in the UK" (paragraph 39). Mr Navrantonis submitted that the reference to Section 117 does not require the public interest to be "strong", so that this too was a misdirection by the judge.
11. For his part, Mr Terrell submitted that the judge had referred to the Supreme Court judgment in **MM (Lebanon) v SSHD [2017] UKSC 10** at considerable length (at paragraph 18). Drawing attention to how "insurmountable obstacles" are to be understood, before concluding that the test to be applied "is thus a stringent one" (paragraph 20), which had not been met here. The judge was also entitled to form the view that the Appellant's husband is not permanently incapable of working, but is only temporarily disabled from doing so, such that he could work in the future in China. As far as the core point in the Appellant's submissions was concerned, namely, that relating to the Appellant's husband's "dual nationality" the judge did not have to rehearse everything, but it was plain that he had the situation described by the Appellant's side fully in contemplation, noting that the Appellant's husband had been able to return back to China in the last five years.
12. As for the FCDO Guidance itself, this was dated 2016. It was plain that it did not prevent the Appellant's husband from returning to China notwithstanding the guidance having been issued, because the Appellant's husband had done so in the last five years. The judge was clear that, "I have also taken into account that the appellant's partner is now a British citizen but he is of Chinese decent", before noting that "He has visited China fairly frequently and his mother still

resides there”, taking on board the argument submitted that “the appellant’s husband would not be able to leave China once there”, before rejecting that submission (at paragraph 28).

13. The fact was, submitted Mr Terrell, that one had no idea how the Chinese authorities would treat the Appellant and her husband because the application of nationality law is complicated. The FCDO Guidance is not expert guidance and the Appellant had to prove her case and there was no evidence as such that the Appellant’s husband would be refused consular support. Moreover, the likelihood of the Appellant’s husband requiring consular support had not been flagged up and nor has the likelihood that he would be prevented from leaving China.
14. In reply, Mr Navrantonis submitted that the fact was that the FCDO Guidance was before the judge, had never been challenged by the Respondent, and yet had not in terms been considered by the judge.

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. This is because, although it is the case that the judge does consider the position of the Appellant’s husband in a broad sense, (at paragraph 28) when noting that he had “visited China fairly frequently” and rejecting the submission that “the appellant’s husband would not be able to leave China once there”, the fact is that the skeleton argument submitted on behalf of the Appellant extensively drew attention to FCDO Guidance (at paragraphs 18 to 21), as did oral submissions before the judge, and the FCDO Guidance was then also appended to the skeleton argument on the day of the hearing. It ought to have been considered as relevant evidence by the judge.

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. The appeal is to be reheard by a judge other than Judge Burnett, with no findings preserved, in accordance with Practice Statement 7.2.(b). This is because the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade, is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal. I note that the bundles in this appeal were put together in 2020 during the COVID-19 lockdown period, the skeleton argument was drafted in 2021, and the hearing took place in 2022. It is important that the *de novo* hearing of the appeal proceeds on the basis of up-to-date materials and an updated bundle, especially in relation to the core point that the Appellant’s representatives seek to make regarding the dual nationality of the Appellant’s partner.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12th September 2023