Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: IA/01308/2021
UI-2021-001384
[HU/50338/2021]

THE IMMIGRATION ACTS

Heard at Field House
On 20 May 2022

Decision & Reasons Promulgated
On 14 July 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

JINGSHUN HUANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Biggs, instructed by JKR Solicitors
For the Respondent: Mr Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission granted by Designated Judge Shaerf, against the decision of First-tier Tribunal Judge Andrew Davies, who dismissed his appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant is a Chinese national who was born on 24 March 1994. He entered the UK as a student in 2008 and was granted successive leave periods leave to enter or remain in that capacity until 19 January 2018. He was then granted leave to remain under Tier 2 of the Points Based System until January 2021. On 7 September 2018, however, the

appellant applied for Indefinite Leave to Remain ("ILR") on grounds of long residence under paragraph 276B of the Immigration Rules.

3. The ILR application was refused on 12 March 2019 and the appellant's existing leave to remain under Tier 2 was subsequently curtailed. The respondent concluded that the appellant had submitted a Certificate of Sponsorship ("COS") to which he was not entitled in support of his Tier 2 application. It was alleged that he had submitted a COS from a firm called AIQ Consulting, whereas that company had confirmed to the Secretary of State that the appellant had never worked for them. The application was refused under paragraphs 322(5) and 276B(ii) and (iii) of the Immigration Rules accordingly. The respondent did not consider the appellant to have a claim under Appendix FM or paragraph 276ADE of those Rules, nor did she accept that his removal would be in breach of Article 8 ECHR.

4. The appellant appealed against the refusal of ILR and his appeal was heard by First-tier Tribunal Judge Moore. In a decision which was issued on 2 September 2019, Judge Moore dismissed the appellant's appeal. The judge found that the appellant knew that he had submitted a COS which was not genuine and that he was 'a party to the fraud'. He therefore dismissed the appeal insofar as it was submitted that the appellant met the Immigration Rules. As it was not submitted that the appellant had a separate Article 8 ECHR claim outside the Rules, the appeal was dismissed.

5. Permission to appeal against Judge Moore' decision was refused by the First-tier Tribunal (Judge Manuell) and the Upper Tribunal (Judge Macleman). The appellant's appeal rights were exhausted on 2 January 2020.

6. Shortly thereafter, on 16 January 2020, the appellant made further submissions to the respondent, based on his relationship with his British partner. The respondent decided not to treat the further submissions as a fresh claim on 20 October 2020 but she agreed to reconsider that decision in response to a letter before claim.

7. The respondent's reconsidered decision was issued on 2 February 2021. She considered that the appellant fell for refusal on suitability grounds, under paragraph S-LTR 4.2 of Appendix FM, as a result of his previous deception. She did not accept that the appellant met the Relationship Requirement or the Immigration Status Requirement. The application was refused under the Five-Year Route accordingly. As for the Ten-Year Route, the respondent did not accept that the relationship was genuine and subsisting and she did not consider whether there were insurmountable obstacles to the continuation of family life in China. The respondent did not consider the appellant to have a private life claim or to have any residual Article 8 ECHR claim. The application was accordingly refused but the appellant was permitted a right of appeal.

The Appeal to the First-tier Tribunal

8. The appellant's second appeal came before Judge Andrew Davies ("the judge"), sitting at Manchester Piccadilly on 13 October 2021. The

appellant was represented by Mr Biggs of counsel, as he was before me. The respondent was unrepresented. The judge heard evidence from the appellant, his partner and a character witness, Ms Yang. The judge heard submissions from Mr Biggs before reserving his decision. Those submissions were made in development of a detailed skeleton argument and in response to a review of the case prepared by the respondent in compliance with rule 24A(3) of the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014.

9. The judge's reserved decision was issued on 30 October 2021. At [5]-[16], the judge considered the issues in the case, which he summarised at [15]-[16]. The first was whether he was entitled to revisit Judge Moore's finding that the appellant had been party to the fraud involving AIQ Consulting. The second was whether the appellant was dishonestly involved by relying on a false COS. The third issue was whether the appellant had been the victim of a historical injustice (perpetrated by the other participants in the fraud) such as to diminish the weight attached to immigration control. There were then the questions raised by paragraphs 276ADE(1)(vi) and EX1(b), of whether there were very significant obstacles to the appellant's own integration to China and whether there were insurmountable obstacles to his relationship continuing in China. There was finally the question of 'exceptional circumstances', by which the judge referred to the resolution of the residual Article 8 ECHR claim outside the Immigration Rules.

10. At [23]-[30], the judge reminded himself of the Devaseelan [2003] Imm AR 1 principles and of the findings reached by Judge Moore in 2019. At [31]-[57], the judge took careful account of the evidence adduced by the appellant in response to Judge Moore's conclusion that the appellant had been a knowing participant in the fraud which procured the false COS. He noted the 'comprehensive and skilful submissions' made by Mr Biggs but he was unable to accept his description of the appellant 'as an innocent dupe or that the appellant suffers from a personality disorder resulting in excessive naivety': [57]. In reaching that conclusion, the judge attached particular significance to the fact that the appellant had taken no action when the job with AIQ Consulting had failed to materialise, which suggested that 'he had achieved the result he wanted after obtaining the fraudulent COS': [34] and [41]. The judge rejected the appellant's claim to have little knowledge of the immigration system: [37]. He found the appellant's claim of believing a man who hid behind the pseudonym 'Dark Chocolate' implausible: [28]. The additional evidence relied upon by the appellant (oral evidence from his partner and Ms Yang, an Action Fraud report, statements from former teachers and a report from a consultant psychiatrist) were all considered in detail by the judge. Having done so, he refused to depart from Judge Moore's decision.

11. In accordance with his summary of the issues, the judge then proceeded to consider whether there were very significant obstacles to the appellant's reintegration to China. He concluded that there would be 'significant adjustment difficulties but that these would not meet the elevated threshold required by the Immigration Rules: [58]-[71].

12. At [72]-[76], the judge considered the range of difficulties which were advanced in support of the submission that there would be insurmountable obstacles to the continuation of family life in China. He was satisfied that the obstacles were of such a magnitude that they could fairly be described as insurmountable, and he directed himself to take that conclusion into account in his conclusion of proportionality under Article 8(2) ECHR.

13. At [77], therefore, the judge turned to his assessment of Article 8(2). He noted his finding that the 'requirements of the Immigration Rules cannot be met because of suitability grounds arising from the Appellant's dishonesty' and that what was required for such a case to succeed was 'unjustifiably harsh consequences'. He recalled what had been said in R (Razgar) v SSHD [2004] UKHL 27; [2004] 2 AC 368 about the need for a staged approach to Article 8. The judge was satisfied that Article 8 was engaged and that the interference proposed by the respondent was in accordance with the law.

14. In considering the proportionality of the respondent's decision, the judge recalled the statutory manifestation of the public interest in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). He noted, at [82], that he was required to give considerable weight to the appellant's failure to meet the Rules but, at [83], he recalled that he had accepted there to be insurmountable obstacles to the continuation of family life in China. At [84]-[90], the judge undertook a 'balance sheet' assessment of the matters militating for and against the appellant's removal. He took account of the statutory public interest factors, the appellant's dishonesty, and 'the impact on the family life of the appellant and [his partner]'. Having done so, he concluded that the public interest outweighed the appellant's family life and he dismissed the appeal accordingly.

The Appeal to the Upper Tribunal

15. There are two grounds appeal. The first is that the judge erred in failing to consider the discretionary element of S-LTR 4.2 of Appendix FM. The second is that the judge failed to appreciate the significance of his finding that there were insurmountable obstacles to the continuation of family life in China and had misdirected himself accordingly.

16. In her response to the notice of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Secretary of State confirmed that the appeal was opposed. In the event that the judge had erred in failing to consider the discretionary element of S-LTR 4.2, any such failing was immaterial to the outcome in light of the findings reached. The Article 8 analysis was cogent and contained no legal error.

Submissions

17. Mr Biggs confirmed that there had been no reference to the discretionary element of S-LTR 4.2 in his skeleton argument before the FtT, although his instructing solicitor thought that it had been raised orally. It was, in any event, for the judge to consider this issue even if

it had not been raised expressly, particularly in circumstances in which it was submitted in the skeleton argument that the Immigration Rules were met. This was a strong Article 8 case in which the discretionary element of that paragraph might properly have been resolved in the appellant's favour. The discretion was relevant to an entitlement under the Rules and it was for the judge to resolve that question one way or the other. The respondent had not adequately assessed that question in the notice of decision and it fell to the FtT to do so on appeal. The appellant's Article 8 ECHR rights were relevant to that question as it was a broad, all-encompassing discretion, possibly even including consideration of the factors in s117B of the 2002 Act.

18. In relation to the second ground, Mr Biggs submitted that the finding of insurmountable obstacles was deserving of significant weight according to the domestic and Strasbourg authorities. The judge had failed to attribute proper weight to that finding and had erred accordingly. The point was akin to one about the length of exclusion, whereas the judge had concluded here that separation would be permanent. The judge's conclusion that the appellant's removal would be proportionate was perverse in the circumstances.

19. Mr Kotas submitted that it was difficult to criticise the judge when the case had been put below on an 'all or nothing' basis. It was either difficult or very difficult to see how the discretion in S-LTR 4.2 could properly have been exercised in the appellant's favour. Mr Biggs greatly overstated the appellant's Article 8 ECHR case and this was plainly an appeal in which the appellant had the maximum culpability for the false COS. The appellant's second ground represented nothing more than a disagreement with a careful proportionality assessment in which the judge had taken proper account of the severity of the consequences to the appellant and his wife.

20. In reply, Mr Biggs reiterated his submission that the skeleton before the FtT submitted in terms that the Immigration Rules were met, as a result of which it fell to the judge to consider the exercise of discretion. S-LTR 4.2 should be construed sufficiently widely so as to include Article 8 ECHR considerations. The judge had clearly erred in failing to consider the fact that the appellant and his wife would be separated permanently by his removal. In the event that I set aside the FtT's decision in part, the proper relief was to remake the decision in the Upper Tribunal, rather than remitting the appeal to the FtT.

21. I reserved my decision at the conclusion of the submissions.

Analysis

22. The appellant sought to persuade the FtT that the respondent's decision was unlawful under section 6 of the Human Rights Act 1998 and that his appeal fell to be allowed on the ground set out in s84(2) of the 2002 Act. He sought to make that submission on two bases. Firstly, that he met the Immigration Rules and that such a conclusion was determinative of the human rights claim: TZ (Pakistan) & Anor v SSHD [2018] EWCA Civ 1109; [2018] Imm AR 1301, at [34]. Secondly, that his removal would result in unjustifiably harsh consequences and would therefore be in breach of Article 8 ECHR even if he could not

meet the Immigration Rules. Mr Biggs contends that the judge erred in his resolution of each of those submissions.

Ground One – failure to consider the discretionary element in S-LTR 4.2

23. By the first ground, it is submitted by Mr Biggs that there is a gap in the judge's process of reasoning. I have endeavoured to do justice to the structure of the judge's careful decision above, and the gap in question is said to fall between my [10] and [11]. Mr Biggs accepts that the judge reached a lawful conclusion on the question of whether the appellant had made false representations in his application for leave to remain as a Tier 2 Migrant. He submits that the judge then failed to consider whether the discretion in paragraph S-LTR 4.2 should nevertheless be exercised in the appellant's favour.

24. It is not in dispute between the parties (nor could it be) that paragraph S-LTR 4.2 of Appendix FM of the Immigration Rules is a discretionary ground of refusal. By paragraphs S-LTR 4.1 and 4.2, an applicant '**may** be refused on grounds of suitability … [when] … he has made false representations … in a previous application … for leave to remain'. The discretionary nature of the ground of refusal is made clear by the use of the word 'may' in S-LTR 4.1 and was underlined by the Upper Tribunal in Mahmood [2020] UKUT 376 (IAC); [2021] Imm AR 475, at [77]-[84] in particular.

25. The respondent failed in her decision of 2 February 2021 to turn her mind to the discretionary element of paragraph S-LTR 4.2. She rehearsed the conclusions of Judge Moore before concluding that the appellant's application 'fails to meet S-LTR 4.2 of Appendix FM'.

26. As Mr Kotas noted in his excellent submissions, however, nothing was said about that failure in the appellant's Appeal Skeleton Argument, settled by Mr Biggs and dated 21 May 2021. At [3] of that skeleton, Mr Biggs set out a schedule of issues which did not make any reference to the discretionary element of S-LTR 4.2. In her pre-hearing review of the case, in response to that skeleton argument, the respondent expressly agreed with the schedule of issues and provided a response in relation to each of the submissions made by Mr Biggs in writing. The list of issues which appears at [15]-[16] of the judge's decision mirrors that agreed schedule of issues. I have reproduced a summary of it at [9] above. The wording closely resembles that used by Mr Biggs in his skeleton argument.

27. It might well be thought that this is not particularly fertile ground for a submission that the judge failed to consider an issue. Mr Kotas is entitled to respond that the judge was not asked to do so. This was a case in which there had been an exchange of written argument in order to refine the issues which the FtT was asked to consider and it is rather difficult to see how it erred in law in failing to consider something which fell outside the agreed list of issues. Mr Biggs confronted this difficulty with two submissions.

28. Mr Biggs' first submission was that the judge *had* actually been asked to consider the discretionary element of S-LTR 4.2. He was as frank as I would have expected when it came to his own recollection, stating

quite clearly that he could not personally recall whether he had raised the point. He had no contemporaneous note of his own to which he was able to draw my attention. His instructing solicitor was in attendance before me, however, and Mr Biggs relayed to me the solicitor's recollection that the point had been raised before the FtT.

29. The hearing before me took place in May 2022. The hearing before the judge took place six months earlier, in October 2021. The judge's Record of Proceedings, which I was able to access during the hearing, is legible and comprehensive. It makes no reference whatsoever to Mr Biggs raising the discretionary element in S-LTR 4.2. Nor is there any reference to that issue in the judge's carefully reasoned decision. All of this suggests very strongly that no such submission was made. I am bound to observe that the absence of reference to the point in Mr Biggs' skeleton also militates strongly in favour of that conclusion. This document was clearly (and characteristically) the product of a great deal of thought, care and research on the part of expert immigration counsel.

30. There is nothing to support the recollection of the appellant's solicitor. I was not asked to consider any contemporaneous note which he had kept, or any summary of the hearing which had been prepared thereafter. In all the circumstances, I come to the clear conclusion that the discretionary element in S-LTR 4.2 was simply not raised at the hearing. I should make it clear that I do not suggest for a moment that the appellant's solicitor was dishonest in what he said to Mr Biggs. My conclusion is, instead, to prefer the contemporaneous record kept by the judge, supported as it is by the preceding events which I have set out. I conclude that the appellant's solicitor's recollection of the hearing is inaccurate.

31. I should also add that I find the way in which the schedule of issues was framed by Mr Biggs, omitting any reference to the discretionary element in S-LTR 4.2, entirely unsurprising. Had I been hearing the appeal in the FtT, I would have concluded that no submission was made in reliance on that discretion. The submission made was, as Mr Kotas submitted before me, an 'all or nothing submission'. Mr Biggs submitted before the FtT, in other words, that the appellant had not sought to deceive the respondent in his application for leave to remain under Tier 2 of the Points Based System. He made no alternative submission that even if the appellant had sought to deceive the respondent, the discretion fell to be exercised in his favour. For Mr Bigs to put the case in that way was, as I have said, unsurprising, given the seriousness of the deception which was alleged, and the appellant's maintenance of his innocence ever since.

32. Mr Biggs submits, secondly, that the judge was required to consider this point of his own volition, not least because there was a submission in the skeleton argument that the Immigration Rules were 'met'. But the judge was not asked to consider whether the Immigration Rules were met because the discretionary element of S-LTR 4.2 fell to be exercised in favour of a fraudster; he was asked to find that the Immigration Rules were met because the appellant was not a fraudster. He was entitled to proceed as he did, and to conclude that the

satisfaction of the condition precedent (by the proof of prior deception) was determinative of this point against the appellant *in the circumstances of this case.*

33. Mr Biggs cited Balajigari & Ors v SSHD [2019] EWCA Civ 673; [2019] Imm AR 1152 and Ashfaq [2020] UKUT 226 (IAC) in support of his submission that the judge was required to consider the discretionary element of S-LTR 4.2 even if it had not been raised in written or oral argument. The first of those cases (in which Mr Biggs appeared for the first appellant) does not assist on this particular point. All of the cases before the Court of Appeal were applications for judicial review and what was said about the process to be followed in such cases was said about the process which the respondent was required to follow. Where, as here, the appellant had focused his fire only on the existence of the condition precedent, and had not raised the discretionary element of S-LTR 4.2 as an issue for the Tribunal to resolve, it was entitled to proceed on the basis that it was not an issue which it was required to consider.

34. Ashfaq was a statutory appeal before the Vice President of the Upper Tribunal, however, which resulted in a judicial headnote which stated, inter alia, that "*the availability of the appeal process corrects the defects of justice identified in* Balajigari". The defect of justice about which the Vice President spoke in that decision was the failure of the respondent to give notice of an allegation of deception. Such a failure would be likely to be amenable to judicial review where no right of appeal existed but, where there was a right of appeal, an individual accused of such conduct had an opportunity to respond to it within the appellate process. What the Vice President did not say was that it was always incumbent upon a Tribunal judge to consider, firstly, whether deception had been established and, if so, whether discretion should be exercised in favour of the person concerned. There will be cases in which nothing is said about the second limb in S-LTR 4.2 and the judge is entitled to conclude that the applicant accepts that the resolution of the first limb is determinative of the issue. A case brought by a self-representing litigant would not be likely to fall for resolution in that way. In a case in which the appellant is represented by expert counsel who has honed and agreed the issues in writing, however, a judge is entitled to proceed on the basis that an issue not raised is an issue not pursued.

35. My primary conclusion on the first ground is therefore that it was not incumbent on the judge to consider for himself whether the discretion in S-LTR 4.2 was to be exercised in the appellant's favour. Having resolved the issue of deception against the appellant, he was entitled to conclude that the appellant had nothing to say about the discretionary element and was content for it to be resolved against him.

36. My primary conclusion suffices to resolve this ground of appeal against the appellant. In case I am wrong in that conclusion, however, I turn to consider Mr Kotas' alternative submission, which was that the only rational way in which the judge could have resolved the discretionary element in S-LTR 4.2 was against the appellant, and that

any omission on the FtT's part was consequently immaterial to the outcome. Whilst my conclusion on that submission is rather more tentative than my primary conclusion, I consider Mr Kotas to be correct, for the following reasons.

37. The starting point for resolving that submission is necessarily the scope of the assessment required by the discretionary element of S-LTR 4.2. In this respect, I received little assistance from the advocates, neither of whom were able to direct me to any policy documents issued by the respondent. For his part, Mr Kotas submitted that the judge was required to put Article 8 ECHR considerations out of his mind and to ignore, in particular, the finding that there would be insurmountable obstacles to the couple relocating to China. For the appellant, however, Mr Biggs submitted that the judge was required to consider whether to exercise the discretion holistically, taking full account of the Article 8 ECHR rights at stake.

38. Balajigari is of some assistance in this regard, albeit that it concerned the process to be followed by the Secretary of State and not the FtT on appeal. At [39] of Balajigari, the Court of Appeal accepted Mr Biggs' submission that the discretionary element of paragraph 322(5) required consideration of "such factors as the welfare of any minor children who may be affected adversely by the decision and any human rights issues which arise." That, to my mind, clearly suggests that the FtT, when considering the discretionary element in the (similarly framed) paragraph S-LTR 4.2, should incorporate consideration of any relevant matters, including human rights issues.

39. Had the judge adopted that approach, Mr Kotas is correct in his submission that there could only have been one rational conclusion reached. The judge had considered the appellant's account and rejected it. Like Judge Moore, he found that he was a knowing participant in the fraud and had lied about his knowledge in an attempt to escape from the consequences of his actions. He had persisted in that lie during two appeal hearings. He was not an 'innocent dupe' who could attribute the fraud to others, as he had claimed. The judge considered the appellant's human rights and those of his partner and concluded, in light of his conduct, that it would be proportionate to remove him from the UK. Had all of that analysis been subsumed into a detailed and holistic consideration of the discretionary element in paragraph S-LTR 4.2, therefore, the judge would necessarily have found that the discretion should not be exercised in the appellant's favour.

40. Ground one cannot succeed, therefore. Mr Biggs has not established that there was an omission on the part of the judge. Any such omission would have been immaterial to the outcome in any event.

Ground two – insurmountable obstacles and the significance thereof

41. By ground two, Mr Biggs submits that the judge's finding that there were insurmountable obstacles to the couple's relocation to China was marginalised or given irrational weight in the assessment of proportionality. I can state my conclusion on this ground more shortly.

42. The submission made at [16] of the grounds of appeal is that where an insurmountable obstacle to the continuation of family life abroad is found 'the respondent must establish a particularly compelling public interest justifying removal'. That submission is attributed to the authorities cited at [15] of the grounds of appeal – Agyarko & Anor v SSHD [2017] UKSC 11; [2017] Imm AR 764 and Jeunesse v. The Netherlands (2015) 60 EHRR 17 – and the authorities cited by the Supreme Court and the ECtHR in the passages identified. Try as I might, however, I have not been able to locate any precise support for that submission in any of those cases.

43. It is obviously well established that one of the mandatory considerations in expulsion cases is 'whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned'. That formulation appears in many authorities from the Strasbourg court but I have taken those words from [107] of Jeunesse v The Netherlands.

44. However, while the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. That observation is not my own; it was made by Lord Reed (with whom the other Justices agreed) at [46] of Agyarko.

45. The statement of principle from the ECtHR which comes closest to that relied upon at [16] of the grounds of appeal is perhaps this sentence, from [49] of Sezen v The Netherlands (2006) 43 EHRR 30:

> The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see *Mehemi v. France (no. 2)*, no. 53470/99, § 45, ECHR 2003-IV).

46. What is required, therefore, is that a decision maker recognises the obvious consequence of a finding that there are insurmountable obstacles to the continuation of family life abroad. What is not required, according to the authorities to which I have been directed, is that an expelling state must establish an especially compelling case in order to justify such a course. The existence of an insurmountable obstacle is a factor to be considered, and it must be understood that what is contemplated is an interference of a very serious order. Where it is an ingredient in a proportionality exercise, however, the respondent is not required to establish even more cogent grounds for the expulsion decision.

47. In my judgment, the judge was plainly aware that the consequence of his decision would be to prevent the appellant and the sponsor from living together, and he was aware that this was an interference of a very serious order. In conducting the balancing exercise under Article 8(2), the judge made reference to his earlier finding of insurmountable obstacles at [83] and [88]. At [90], in concluding his analysis, he

stated that the public interest weighed 'heavily in the balance sheet'. He then expressly acknowledged 'the impact on the family life of the Appellant and [his partner]' but concluded that the public interest prevailed.

48. Nothing more was required on the part of the judge. I do not accept that this consideration was marginalised. It is impossible to reach that conclusion when it was mentioned repeatedly and given such prominence in the final balancing exercise at [90]. Nor do I accept that the conclusion reached was irrational. It was open to the judge to conclude that the appellant's protracted dishonesty was such as to justify the separation of the appellant from his partner. Some judges might not have reached that conclusion but that is immaterial: MM (Lebanon) v SSHD [2017] UKSC 10; [2017] Imm AR 729, at [107]. The judge demonstrably took all relevant factors into account and reached a conclusion which was open to him on the evidence. The Upper Tribunal should exercise proper restraint before interfering with such a conclusion and there is no proper reason in this case to do so.

49. Mr Biggs did not develop orally a submission which he made at [23] of the grounds of appeal but it is necessary for me to say something about it. The submission in that paragraph was that it was hard to see how a reasonable judge could have dismissed the appellant's appeal if he had been the subject of a deportation order for his conduct.

50. I do not agree with that submission. In the event that the appellant was prosecuted for the offence of procuring leave to remain by deception, contrary to s24A of the Immigration Act 1971, he would likely have received a sentence of between one and two years' imprisonment[1], making him a 'medium offender'[2]. He would have available to him, therefore, the two statutory exceptions to deportation which appear in s117C(4) and (5) of the 2002 Act. He would be unable to satisfy the private life exception on the facts of this case. He would have been able to establish that he had a genuine and subsisting relationship with a qualifying partner, however, so as to engage the first requirement in s117C(5). He would not have been able to establish that his deportation would give rise to unduly harsh consequences for his partner, however. Although it would have been accepted by the hypothetical judge that it would be unduly harsh for her to live in China with the appellant, I cannot see how a judge could reasonably have concluded on the evidence before the FtT in this case that it would be unduly harsh on the appellant's partner to remain in the UK without him. It is clear from the authorities that something more than separation is required and that the test is an elevated one, and there is nothing here which begins to establish such a case. Nor is there anything which begins to show that there are very compelling circumstances which would outweigh the public interest in the appellant's deportation.

[1] Applying the range considered in R v Heng Pit Ding [2010] EWCA Crim 1979; [2011] 1 Cr App R (S) 91

[2] Those with sentences of between one and four years' imprisonment: NA (Pakistan) v SSHD [2016] EWCA Civ 662; [2017] Imm AR 1, at [14].

51. In the circumstances, I find it difficult to see how a reasonable judge considering a hypothetical appeal against the appellant's deportation could properly conclude that such a course would be disproportionate.

52. I find that neither ground demonstrates a legal error on the part of the FtT and the appeal will be dismissed accordingly.

Notice of Decision

The appeal is dismissed. The decision of the FtT shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 July 2022