Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04167/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 25 October 2013	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Y Q X
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr K Hibbs, Home Office Presenting Officer
For the Respondent: Mr C Howells instructed by Gloucester Law Centre

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Page) which allowed the claimant's appeal against the Secretary of State's decision taken on 19 April 2013 to remove her by way

of directions to China following the refusal on 9 April 2013 to grant her asylum or humanitarian protection under paras 336 and 339C of the Immigration Rules (HC 395 as amended).

3. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

The Background

4. The appellant is a citizen of China who was born on 3 June 1992. She comes from the province of Sichuan. She arrived in the United Kingdom on 3 December 2007 travelling on a false passport. On 23 October 2008, she was arrested whilst illegally working. On 1 December 2008 she absconded.

5. On 14 November 2012 the appellant claimed asylum. The basis of her claim was twofold. First, she claimed to be at risk because of a dispute between her grandmother and the Chinese authorities over her grandmother's fish farm which had been requisitioned for development. Her grandmother had refused to hand over the farm and sign a document transferring the property to the government. Secondly, she claimed to be at risk as a returning single mother who had given birth to a child before marriage. Her son was born in the United Kingdom in October 2012.

6. Following the refusal of the appellant's claim, she appealed to the First-tier Tribunal. Judge Page rejected the appellant's claim on the basis that she was at risk on return because of the dispute between her grandmother and the government. That finding is not challenged. However, Judge Page found that the appellant would be at risk of forced sterilisation on return and, as a result, was a refugee and her return would breach Art 3 of the ECHR.

7. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the judge had failed to make adequate findings as to whether the appellant could internally relocate safely in China. On 24 June 2013, the First-tier Tribunal (Judge Blandy) granted the appellant permission to appeal on that ground in the following terms:

> "2. The grounds of the application argue that the Judge did not properly consider the possibility of internal relocation. I do find this to be arguable. Paragraph 14 of the headnote of the country guidance case of AX (Family planning scheme) China CG [2012] UKUT 00097 (IAC) does envisage the possibility of internal relocation where, as in the case of this appellant, forcible sterilisation was found to be a risk, and it is arguable that the Judge failed to properly consider the potential for internal relocation and failed to give adequate reasons as to why internal relocation was not a viable remedy. The application must be granted."

8. Thus, the appeal came before me.

The Grounds of Challenge

9. On behalf of the Secretary of State, Mr Hibbs relied upon the grounds upon which permission was sought and granted by the First-tier Tribunal, namely the issue of internal relocation. However, in addition he sought to raise an further ground, namely that Judge Page had failed to consider and properly apply the country guidance case of AX in finding that the appellant was at risk of forced sterilisation in her home area. He raised that ground for the first time in his skeleton argument served both on the Upper Tribunal and the appellant's representative, Mr Howells, on the morning of the hearing before me.

10. Mr Howells forcefully objected to the Secretary of State now relying on a ground which had not previously been raised. He submitted that the appellant had, in effect, been ambushed. The Secretary of State's grounds were exclusively concerned with the issue of internal relocation. It was now too late, he submitted, to rely on a ground challenging the judge's finding that the appellant was at risk of forced sterilisation in her home area.

11. In essence, I agree with Mr Howells' submissions. Mr Hibbs seeks to amend the grounds upon which the Secretary of State mounts a challenge to Judge Page's decision. Whilst there is no specific power to amend the grounds of appeal set out in an application for permission to appeal to the Upper Tribunal, there is a general power in the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) at rule 5(3)(c) to permit the amendment of a document. That is subject to the Tribunal's case management powers which must be exercised to promote the overriding objective of dealing with the appeal justly and fairly including the prevention of delay (rule 2). Here, there has been considerable delay. The First-tier Tribunal determination is dated 4 June 2013 and was sent to the Secretary of State shortly thereafter and was sent to the appellant on 11 June 2013 by the Secretary of State. The application by the Secretary of State seeking permission to appeal is dated 12 June 2013. Permission was granted on 24 June 2013 and the hearing before me was listed on 25 October 2013. The ground which Mr Hibbs now seeks to rely upon was not, therefore, raised by the drafter of the application seeking permission nor subsequently raised until the day of the hearing before me over four months after the Judge's determination was promulgated. The procedural structure applicable to appeals against decisions of the First-tier Tribunal was set out by the Upper Tribunal in Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) at [16]. There, in refusing permission to amend the grounds at the UT hearing, Blake J (Chamber President) said this:

> "16. ....
>
> i) The Tribunal Procedure (Upper Tribunal) Rules 2007 (the Procedure Rules) rule 22(2)(b) and 23(1A), the Senior President's Practice Statements and the standard directions issued by the Tribunal contemplate that the notice of appeal will form the basis of the appeal in the absence of any further document such as a skeleton argument amplifying the contentions in the notice.

ii) The Tribunal must send a copy of the written notice granting permission and of the reasons for any limitations or conditions on permission to each party (rule 22(2)(a) and 23(6)).

iii) The respondent may provide a response to a notice of appeal within one month (rule 24) and an appellant may reply to the response within one month (rule 25(2A)) or five days before the hearing whichever is the earlier.

iv) There is a general power in the Procedure Rules rule 5(3)(c) to permit amendment of a document but the Tribunal's case management powers must be exercised to promote the over-riding objective including the prevention of delay (rule 2(2)).

v) It would be incompatible with the overriding objective and the scheme of the Procedure Rules outlined above, to permit a rule 25 reply to open up fundamentally different grounds of appeal for which permission has not been granted and indeed to challenge a different decision on appeal than that contained in the notice of appeal.

vi) What should have happened in this case, is that if the appellant wanted to fundamentally depart from the grounds of appeal on which permission was obtained he should have lodged an application to amend the notice of appeal in good time and secured that a copy of such a notice was served on the respondent.

vii) Bearing in mind that an application for permission to appeal is normally required to be made within the relevant period set out in rule 21(3), any application to fundamentally change the grounds should be made as soon as practicable with some explanation of why a legally assisted person did not include the amended grounds in the original notice."

12. In my judgment, the ground upon which Mr Hibbs now seeks to rely does raise a "fundamentally" different ground from that upon which permission was sought and granted. It challenges the risk to the appellant in her home area rather than, as do the grounds as drafted, accepting that risk argues that internal relocation has not been properly dealt with. Mr Hibbs offered no explanation why the ground has not been previously raised other than to state that he only had sight of the file shortly before the hearing date. That, of course, I accept. The cause of the delay is not due to Mr Hibbs. He has raised the matter shortly after he had sight of the file. But that does not explain why the Secretary of State did not seek to rely upon this ground in her application in June. The appeal has progressed, and the appellant has expected it to do so, solely on the basis that the Judge erred in law in failing to consider internal relocation. There has been a singular failure to follow the procedural route leading to an appeal hearing in the Upper Tribunal, clearly and unequivocally set out in the 2008 Procedure Rules. As Blake J pointed out in [16(vii)], a fundamental change in the grounds required an application to amend the grounds set out in the original notice to be made "as soon as practicable" and with an explanation as to why they were not previously relied upon. As I have indicated, there is no explanation for the delay and the fact that neither the Tribunal nor the appellant were given any notice of an application to amend the ground prior to the date of the hearing. In

agreement with Blake J, and adapting his words, in my judgment it would be incompatible with the overriding objective and the scheme of the Procedure Rules to permit, in those circumstances, an amendment to the ground upon which permission to appeal was both sought and granted so as to permit a challenge on a fundamentally different basis to be made on the day of the Upper Tribunal's hearing.

13. For these reasons, I refuse the Secretary of State's application to amend the grounds of appeal. The sole ground of appeal before me relates to the issue of internal relocation.

14. I would only add this. While Mr Howells (entirely characteristically) sought to deal with the substantive content of the new ground, he was necessarily seeking to meet submissions (which I invited Mr Hibbs to make *de bene esse*). As I have refused the application to amend the grounds, it would not be proper to consider those submissions in detail. In my judgment, however, the Secretary of State's position that Judge Page wrongly departed from the country guidance in AX by finding that the appellant would be at risk of forced sterilisation in her home province, suffers from a number of weaknesses.

15. First, the judge correctly directed himself (as I will set out shortly) at para 19 in terms of the risk, if any, of forced sterilisation set out in the Upper Tribunal's determination at [185]. He clearly recognised that a risk could arise at the time of a crackdown in an individual's own area. Secondly, he considered the background evidence which referred to the appellant's own area and the potential risk in circumstances where crackdowns had occurred (see para 17 of the determination). Thirdly, nothing in AX excluded the possibility of a real risk of forced sterilisation existing in an individual's home area, each case necessarily turning upon an assessment of the evidence relied upon. Fourthly, and linked to the previous point, the Upper Tribunal did not specifically consider the factual situation in this appellant's home area. The appellant in that case came from Hunan Province. The fact that she was unable to succeed said nothing about the risk, if any, to this appellant, particularly given the differences in their situation, namely that this appellant is a single woman returning with one child whilst in AX that appellant was married and was a "double-single couple" both of whom were only children. Given that the judge was alive to the country guidance in AX and he considered the situation in the appellant's own province, there would be considerable difficulties to surmount in establishing that the judge's finding was not properly open to him on that evidence. But, as I say, until the date of the hearing the possibility that he erred in reaching that finding was not relied upon by the Secretary of State and cannot now be raised.

Discussion

16. Turning then to the ground upon which permission to appeal was sought by the Secretary of State and granted by the First-tier Tribunal, Mr Hibbs submitted that Judge Page had found in the appellant's favour (on the

basis of the risk of forced sterilisation in her home area) without considering whether internal relocation within China was open to her. He pointed out that in AX, the Upper Tribunal recognised that internal relocation was possible at [191(14)]. That paragraph is in the following terms:

> "(14) Where a real risk exists in the *'hukou'* area, it may be possible to avoid the risk by moving to a city. Millions of Chinese internal migrants, male and female, live and work in cities where they do not hold an 'urban *hukou*'. Internal migrant women are required to stay in touch with their *'hukou'* area and either return for tri-monthly pregnancy tests or else send back test results. The country evidence does not indicate a real risk of effective pursuit of internal migrant women leading to forcible family planning actions, sterilisation or termination, taking place in their city of migration. Therefore, internal relocation will, in almost all cases, avert the risk in the *'hukou'* area. However, internal relocation may not be safe where there is credible evidence of individual pursuit of the returnee or her family, outside the *'hukou'* area. Whether it is unduly harsh to expect an individual returnee and her family to relocate in this way will be a question of fact in each case."

17. On behalf of the appellant, Mr Howells submitted that the judge had, in effect, considered all the circumstances relevant to internal relocation and there was only one possible answer, namely that she could not internally relocate. Mr Howells submitted that even if the judge was in error in not expressly dealing with internal relocation, that error was not material. Mr Howells pointed out that at para 16 of his determination the judge had considered the difficulties faced by a single mother with a child born out of wedlock and the "social support fee" which would be payable. He also relied upon para 19 where the judge stated that:

> "The fines that she would be unable to pay do of course add to the overall consequences of return as a single mother who faced forced sterilisation. They are to be viewed cumulatively and not in the alternative."

18. The judge continued in para 19:

> "Also, the financial consequences were identified as being worse for a single mother with a child born out of wedlock. And they may suffer further disadvantages in terms of access to education for their children, medical treatment, loss of employment, detriment to future employment, that would not in general reach the severity threshold to amount to persecution or serious harm or ill-treatment in breach of Article 3 ECHR, but it is plain that these consequences should be viewed cumulatively with the risk of enforced sterilisation."

19. Whist I accept that the judge does make reference to the level of fines that the appellant as a single mother would face, he does so in the context of his assessment of risk. Indeed, para 16 is concerned not with the judge's view of the implications for the appellant as a single mother, but rather the respondent's position set out in the refusal letter. The issue of internal relocation requires a consideration of both the risk (if any) to, and reasonableness (or undue harshness) of, the appellant relocating elsewhere in China. I am unable to accept Mr Howells' submission that the

judge has, in effect, considered all relevant matters to those two issues. Even if the appellant had little prospect of establishing that she was at risk elsewhere, the reasonableness of her relocation involved a deeper and richer consideration of her circumstances than was given by the judge not directly in the context of a consideration of the internal relocation option. That latter issue is not directly addressed by the Judge.

20. For these reasons, the judge did materially err in law in failing to consider whether, given the risk to the appellant in her home area, she could safely and reasonably relocate within China.

Decision

21. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal involved the making of an error of law.

22. In my judgment, it is appropriate that the appeal be remitted to the First-tier Tribunal to be heard by Judge Page to make relevant findings and a decision in respect of internal relocation. The Judge's finding that the appellant would be at risk in her home area shall stand.

Signed

A Grubb
Judge of the Upper Tribunal