Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/31280/2014
IA/31285/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 April 2015	**On 7 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MRS WENTING YANG (FIRST APPELLANT)
MASTER ZIHAN LIN (SECOND APPELLANT)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr. S. Karim, Counsel.
For the Respondent: Mr. D. Clarke, Home Office Presenting Officer.

DECISION AND REASONS

1. Both appellants are citizens of China and the first appellant is the mother of the second appellant. The first appellant applied to the respondent for leave to remain in the United Kingdom on the basis of her, and the second

appellant's family and private life. The application was refused on 17 July 2014 because the respondent was not satisfied that the appellants met the requirements of Appendix FM and paragraph 276ADE of the Immigration Rules HC 395 (as amended). In the alternative there were no exceptional circumstances that justified consideration outside the Immigration Rules and the refusal of leave would not result in unjustifiably harsh consequences.

2. No application for anonymity has been previously made in these proceedings and no such application was made before me today. There is no reason for such an order being made.

3. The first appellant was born and brought up in China. On 6 October 2007 she arrived in the United Kingdom with leave to enter as a student which expired on 31 October 2008. An extension was granted until 28 February 2011. The appellant was subsequently granted leave to remain as a Tier 4 (General) Student until 20 April 2014.

4. In February 2010, in the United Kingdom, the first appellant met Mr. Tian Fu Lin. Mr. Lin had arrived in the United Kingdom on 18 April 2004 and subsequently claimed asylum. It was recorded that having done so he then absconded and was not encountered until September 2008 when he was discovered working illegally in a restaurant. At the time he was encountered he was in possession of forged identity documents. His asylum claim was refused on 28 August 2014 and I was told in submissions today that his appeal had been initially dismissed but was now remitted pending the outcome of the appeal before me. Mr. Lin is the father of the second appellant and the first appellant's second child, Eric Fu Lin, born on 23 June 2014. They all live together in accommodation provided by Mr. Lin's employer in Peterborough.

5. Following the refusal of their application the appellants appealed and in a decision promulgated on 4 December 2014 Judge of the First-tier Tribunal E. M. M. Smith dismissed their appeals. The judge did so having been told at the outset of the hearing that it was conceded that neither appellant can meet the requirements of the Immigration Rules. The judge then carried out a balancing exercise before coming to the conclusions that he did and which are summarised at paragraph 32 of his decision. That states:-

> "32. Taking into account the facts surrounding the appellants, the position of Mr Lin, the case law, and not least the best interests of the children I am satisfied and so find there are simply no exceptional circumstances that justify consideration outside The Rules. There is nothing exceptional in the appellant's (sic) case."

6. The appellants sought permission to appeal Judge Smith's decision which was granted on 28 January 2015 by Judge of the First-tier Tribunal Page. His reasons for so granting were:-

> "1. The appellants seek permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Smith) who, in a decision promulgated on 4 December 2014, dismissed the appellants' appeals against the respondent's decision to refuse leave to remain on the basis of their private and family life in the United Kingdom.
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> 2. Complaint is made in the grounds of appeal that the judge's decision is 'too brief and inadequate', particularly in relation to the position of the appellant's (sic) children. Secondly, the grounds for permission to appeal argue that the judge failed to provide reasons as to why the first appellant would not be punished and eventually sterilised upon her return to China due to the country's one child policy. This ground of appeal is arguable. At paragraph 27 an (sic) 28 of the decision the judge has recorded that this point was raised and that it was argued that Mrs Yang would be punished and potentially sterilised. The judge said that this was not part of the grounds of appeal but this gained traction in her witness statement. There is record of the response of the respondent's representative to this at paragraph 27 of the decision. However, at paragraph 28, where the judge recorded that there was no evidence that Mrs Yang would be subjected to any form of discrimination, there is no indication that the judge has adjudicated between the appellant and the respondent on the contested issue as to whether Mrs Yang would be punished and potentially sterilised upon return. This was a one-stop appeal and it was behoven on the judge to make clear findings about this. As no clear findings have been made, it follows that the appellants have identified an arguable error of law in the judge's decision. I find there is merit in this ground of appeal so permission to appeal is granted."

7. Thus the appeal came before me today.

8. In making his submissions Mr. Karim submitted that the judge had erred in three ways.

9. Firstly, that the judge erred in his consideration of the welfare and best interests of the children which was not set into the context of China's "one child policy". That there had been failure by the judge to take account of the country guidance case of **AX (family planning scheme) China CG [2012] UKUT 00097 (IAC)**. In particular the judge had been deprived of the benefit of paragraph 6 of the head note to that authority which states:-

> *"It is unhelpful (and a mistranslation of the Chinese term) to describe the Chinese family planning scheme as a 'one-child policy', given the current vast range of exceptions to the 'one couple, one child' principle. Special provision is made for 'double-single' couples, where both are only children supporting their parents and their grandparents. The number of children authorised for a married*

couple, ('authorised children') depends on the provincial regulations and the individual circumstances of the couple. Additional children are referred as 'unauthorised children'."

10. Secondly, the judge erred in not considering Article 8 outside of the Immigration Rules and in particular failed to take account of the authority of **Nagre, R (on application of) v SSHD [2013] EWHC 720 (Admin)**.

11. Mr. Clarke argued that the risk of sterilisation had been advanced in the First-tier Tribunal and was raised by the first appellant at paragraph 15 of her witness statement. However, no evidence had been put before the judge which showed this appellant to be at specific risk, for example by reason of there being a crackdown in her "Hukou" area, or any other evidence in relation to individual risk. He submitted that the burden was on the first appellant to prove her case and there was no evidence either then or now that she would be at any individual risk. He acknowledged that the judge's decision was silent on this issue. However, he cannot be said to have materially erred bearing in mind, in the absence of individual evidence, paragraph 11 of the head note to **AX** which suggests that in general for female returnees there is no real risk of forcible sterilisation. Beyond that, Section 55 issues have been properly dealt with by the judge and whilst Article 8 may not have been considered outside the Rules the judge has, nonetheless, in coming to the conclusions that he did, dealt with all issues that fell to be balanced within any Article 8 consideration. There was no evidence before the judge to enable him to find that there was anything outside of the Immigration Rules that fell to be considered.

12. It is important to be alert to the fact that the burden of proof rested upon the appellants. Both representatives today highlight the head note to the country guidance case of **AX**. I appreciate that it may not have been considered by the judge within the First-tier. Mr. Karim submitted that it was "**Robinson** obvious" that the judge should have given consideration to it. Whilst in a specialist Tribunal that may be right it was nonetheless incumbent upon the appellants' advocate to put the case and provide and indicate which relevant authorities were relied on. I also appreciate that the judge may have erred in not making a formal finding in relation to whether or not the first appellant would be forcibly sterilised upon return. However, none of these shortcomings or errors can be said to be material upon proper consideration of **AX** and the absence of evidence brought by the first appellant to the First-tier Tribunal in relation to any individual risk that she might face.

13. Mr. Karim, thirdly, urged me to accept the judge had further erred in not considering paragraph 6 of the head note in **AX**. It states:-

"Any second child, even if authorised, entails the loss of the family's SCP certificate. Loss of a family's SCP results in loss of privileged access to schools, housing, pensions and free medical and contraceptive treatment. Education and medical treatment remain available but are no longer free."

However, such an error is also not material in that if as a consequence of a second child there is a loss of the family's SCP certificate and privileged access to schools, housing, pensions and free medical and contraceptive treatment, there is the alternative available in terms of education and medical treatment by making payment.

14. The judge, contrary to Mr. Karim's submission had given careful consideration to Section 55 considerations and the relevant authority of **EV (Philippines) and Others [2014] EWCA Civ 874** the judge emphasises that a consideration of all the factors set out therein leads him to a conclusion from the evidence that the best interests of the children lie with being with their parents. Neither has been in the United Kingdom long enough to establish strong ties to the United Kingdom, either educationally, medically or to establish that there will be any linguistic difficulties were they to return to China.

15. I appreciate again that it could be argued the judge erred by not giving consideration to Article 8 outside the Immigration Rules. However, this again is not material in light of the fact that all the issues that fell to be considered within the Article 8 balancing exercise have been taken into account by the judge when coming to the conclusions that he did. In particular the position of the children and Section 55 considerations have been subsumed within that analysis.

16. It is difficult to see how these appellants could possibly have succeeded in their appeals. The first appellant came to the United Kingdom for temporary purposes and was always aware that at the end of her visa she would have to return to her country of origin. On the basis of the limited evidence presented to the judge he was entitled to come to the conclusions that he did that there would be no risk to either the first appellant or her family upon return to China. Coming to those conclusions the judge took account of the first appellant's husband's own circumstances as a failed asylum seeker and the position of their two children.

17. There are no material errors within this decision.

Notice of Decision

18. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

19. I do not set aside the decision.

20. No anonymity order is made.

Signed Date 6 May 2015

Deputy Upper Tribunal Judge Appleyard