



IAC-TH-CP-V1

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

Appeal Number: AA/00155/2015

THE IMMIGRATION ACTS

**Heard at Glasgow
On 2nd November 2015**

**Decision & Reasons Promulgated
On 23rd February 2016**

Before

UPPER TRIBUNAL JUDGES DEANS AND MACLEMAN

Between

YL

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by Katani & Co

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Mozolowski dismissing an appeal on asylum and human rights grounds.
2. The Appellant was born in February 1987 and is a national of China. She entered the UK unlawfully on 19th July 2010. She came to the attention of the immigration authorities on 19th June 2014 and claimed asylum. At that time the Appellant was pregnant and she gave birth to a daughter in September 2014. The father of the child was a Chinese national without

any status in the UK and the couple are no longer in contact with each other.

3. The basis of the Appellant's asylum claim was her involvement in a house church in China and fear of sanctions under the family planning regulations were she to return there. She claimed to have been detained in China as a consequence of her religious activities and to have escaped. In her evidence before the First-tier Tribunal the Appellant said she no longer goes to church and would not practise Christianity if she returned to China. The Judge of the First-tier Tribunal did not accept as credible the Appellant's claim to have participated in Christian worship in China. The judge did not believe the Appellant had been detained in China as a consequence of her religious activities.
4. In relation to the Chinese family planning regulations the Judge of the First-tier Tribunal noted at paragraph 40 that in terms of the country guideline case of AX (family planning scheme) China CG [2012] UKUT 00097 the attitude taken by provincial birth control authorities to parents returning with foreign-born children was unclear but the consequences of any unauthorised birth were social and financial. A parent returning with a foreign-born child would be expected to produce a birth certificate for the child and pay a social compensation payment or "social upbringing charge".
5. At paragraph 44 the judge noted that under Chinese law household registration should not be refused. At paragraph 47 the judge stated that although the Appellant and her family might not qualify for free birth control, medical treatment and education, medical treatment and education would be available albeit at a price. There were many Chinese parents who did not qualify for free medical treatment or education. The child would not be denied education or medical treatment.
6. At paragraph 59 the judge referred to the balancing exercise under Article 8 and observed that the child had been born only recently. The child's young life was centred around the Appellant. There was no dispute that the Appellant and her child would not be separated. The child was a Chinese national and had no claim to remain in the UK. An argument had been advanced that the child would be deprived of access to healthcare and education because a high social compensation fee would be imposed upon the Appellant. The judge was not satisfied that a social compensation fee would necessarily be imposed on the Appellant because of a foreign-born child, or whether, if such a fee was imposed, it would be imposed in full. The Appellant could return to China with assistance from the Respondent which would include financial assistance. It was indicated in **AX** that once a social compensation fee was paid, the child would have access to health and education.
7. At paragraph 60 the judge then noted that the child's extended family of grandparents and uncle were living in China. The child would be able to learn about her Chinese heritage and culture. The best interests of the

child would be for her to be with her mother and conditions in China for the child were not so bad to outweigh the family and cultural influences which the child would not experience if she was in the United Kingdom.

8. Permission to appeal was granted by the Upper Tribunal on a number of grounds. These included that the judge had taken into account irrelevant considerations; had failed to resolve contradictory findings; had erred in assessing the amount of any social compensation penalty; and as a result had not properly assessed the best interests of the child.

Submissions

9. At the hearing before us Mr Winter, on behalf of the Appellant, referred to the grounds of the application for permission to appeal. The first point arose from paragraph 35 of the decision, where the judge noted that giving birth outside wedlock breached the family planning regulations in Fujian, which was the Appellant's home province. This would lead to a very substantial compensation charge being imposed. At paragraph 36 the judge had regard to a COI Report about laxity in the Chinese family planning regulations for returning Chinese nationals. This, however, was not relevant to the Fujian family planning regulations, which were referred to in **AX** at paragraphs 61-66. These prohibited giving birth out of wedlock and did not allow any exception if the child was born abroad.
10. Mr Winter continued that at paragraph 37 the judge referred to it being rare for a single woman to give birth in China due to family planning restrictions. The judge had earlier stated at paragraph 27 that in such a populous country as China there would be a large number of unmarried mothers. This was irrelevant to the circumstances of the Appellant, whose appeal should be considered on an individual basis. At paragraph 39 the judge referred to there being an appeal right against any administrative calculation of a social compensation charge but there were no such appeal rights and this was a further irrelevant consideration.
11. Turning to the alleged failure to resolve contradictory findings, Mr Winter referred to paragraphs 43, 44 and 49 of the decision. The judge found at paragraph 43 that there was no direct legal barrier to a single mother registering a child. At paragraph 44 the judge found that a child born out of wedlock had the same rights as those born to married couples. At paragraph 49, however, the judge accepted that children from pregnancies outwith the scope of family planning regulations might not be registered or treated equally until their parents had paid the financial sanctions imposed. It seemed that at paragraphs 43 and 44 the judge had failed to bear in mind that the child could not be registered until the social compensation penalty was paid.
12. Mr Winter then turned to the alleged error by the judge in assessing the amount of any social compensation payment. He submitted that the Appellant's former partner was unemployed. Her father was in a low paid job and the Appellant herself had been in low paid work. The judge found

at paragraph 46 of the decision that even if a social compensation payment was imposed it would not be excessive as the Appellant claimed. However, the family were not in a position to pay. The judge's finding that the payment would not be excessive was contrary to **AX** at paragraph 66. The judge had speculated about possible financial assistance being given to the Appellant on return. There was either no or insufficient evidence to show that the Appellant would be able to make arrangements to pay the social compensation charge.

13. Turning to the fourth ground, Mr Winter submitted that the judge's errors in relation to whether the Appellant would be able to pay a social compensation charge affected her assessment of the best interests of the child. The decision in **AX** was based on the return of a couple. The judge had disregarded the Fujian family planning regulations, which gave no exemption for foreign-born children from payment of the charge. It could not be in the best interests of the child to be returned where the Appellant would not be able to meet the social compensation payment. At paragraph 49 of the decision the judge acknowledged that the child would be discriminated against if she remained unregistered. Internal relocation would not resolve the situation of the child. There would be loss of privileged access to schools, housing, pensions and free medical and contraceptive treatment. Although this discrimination might not amount to a breach of Article 3, it would be relevant in assessment of the best interests of the child in terms of Article 8.
14. For the Respondent, Mrs O'Brien submitted that the judge had properly considered the credibility of the Appellant's claim and taken into account aspects of the family planning policy. At paragraph 53 the judge found that the Appellant could relocate to other parts of China and this would not be unduly harsh for her to do so, taking her claim at its highest.
15. Mrs O'Brien continued that when considering Article 8 the judge took into account the best interests of the child. Arguably the child would have better access to educational and medical facilities in the UK but this was only part of the consideration.
16. In response Mr Winter said the adverse credibility findings that were made by the judge related to the Appellant's alleged Christianity, not to a breach of the family planning regulations owing to the birth of a child outwith marriage. The family's low income was not fully explored by the judge. As far as internal relocation was concerned, the child was still young but would be disadvantaged. Reference was made to Zoumbas [2013] UKSC 74 at paragraph 10, and the need to set out clearly the circumstances of the child and whether the best interests of the child were outweighed by other considerations.

Discussion

17. The first part of the challenge to the judge's decision was on the basis that she had erred in law by taking into account irrelevant considerations. We

do not accept this contention. What the judge did was to look at the evidence relating to the application of family planning policies in China and assess that evidence and decide what weight to give to different parts of it, having particular regard to where the evidence was unclear or seemingly inconsistent. Making an assessment of the evidence or country information in this manner is by no means the same as taking into account irrelevant considerations. The judge was not only entitled but indeed required to assess the evidence and make findings of fact based upon it in respect of the conditions which the Appellant and her child would be likely to face on return to China.

18. Looking at the decision with this in mind, we note that at paragraph 36 of her decision the judge referred to the family planning regulations in Fujian, as set out at paragraphs 61 to 66 of **AX**. She compared this information with information in the COI Report, as she was entitled to do. She was not taking into account irrelevant considerations.
19. At paragraph 37 the judge referred to a passage in the COI Report which states that it is rare for a single woman to give birth in China. She then comments that in such a populous country there would nevertheless be a large number of unmarried mothers but it would be rare that this would lead to persecution. This is not a failure to consider the individual circumstances of the Appellant but simply an observation on the size of China and what risk there might be for unmarried mothers. These matters were not beyond the range of considerations to which the judge was entitled to have regard.
20. At paragraph 39 of the decision the judge referred to paragraph 37 of **AX**, in which it was said that there is a right of appeal against the calculation of the social compensation fee. The grounds of the application for permission to appeal dispute this and state that there are no such appeal rights. The judge, however, was simply relying on the country guideline case of **AX**. No evidence has been referred to in the application for permission to appeal to indicate that the decision in **AX** was wrong on this point. Accordingly the judge was entitled to have regard to what was said in **AX** about a right of appeal.
21. The second main ground of challenge to the decision of the Judge of the First-tier Tribunal was on the basis that she had failed to resolve contradictory findings about whether the Appellant's child could be registered in China. Registration would be important, according to paragraph 41 of the judge's decision, in order to obtain access to education and medical treatment. At paragraph 41 the judge referred to paragraph 167 of **AX**. According to **AX** hundreds of thousands of unauthorised children are born every year and family planning officials are required to register them once a penalty has been paid (paragraph 173). The judge then referred, at paragraphs 43 and 44, to evidence contained in the COI Report, at paragraph 25.17, to the effect that in China there was no direct legal barrier to even a single mother registering a child and, at paragraph 25.23, that children born out of wedlock had the same rights as

those born to married couples and a child could be registered by any of its relatives.

22. According to the Appellant the information in the COI Report contradicted what was said in **AX** about the social compensation charge having to be paid before registration could take place.
23. To a certain extent what the judge has done at paragraphs 41-44 is to summarise the evidence on this issue. In doing so some of the nuances may not be entirely apparent. Paragraph 25.17 of the COI Report states that there is no direct legal barrier to a single mother registering her child but that in most provinces there are heavy fines for having a child out of wedlock. This is not inconsistent with what was said in **AX**. The implication is that registration can take place provided the fine is paid. It is worth pointing out that the decision in **AX** avoids the use of the word "fine" because it is clear that under Chinese law the social compensation fee is a civil rather than a criminal penalty.
24. What is stated at paragraph 25.23 of the COI Report, sourced to an expert in Chinese law, is that children have the same rights whether born to a married couple or born out of wedlock. Any child should be able to obtain a household registration. This appears to be a statement that there is no legal disability applied to children born out of wedlock. It does not specifically state that no social compensation payment has to be made.
25. On close examination there does not appear necessarily to be any conflict in the evidence on these points. The judge accepted the likelihood that a social compensation charge would have to be paid and if this was done the child could then be registered. This is the import of the succeeding paragraphs of the decision, namely paragraphs 46-47. Indeed, having considered the evidence in paragraphs 41 to 45, the judge then makes her findings on that evidence at paragraphs 46-47. She finds that there would be a social upbringing charge to be paid by the Appellant but this would not be as excessive as the Appellant claimed. The judge considers that the Appellant would be able to make arrangements to pay the social compensation charge and the child would not be denied access to education or medical treatment, albeit that this would not be free.
26. The application for permission to appeal then takes issue with the judge's findings that the social upbringing charge would not be excessive and would not be beyond the means of the Appellant. Reference is made to the Fujian regulations in relation to an income multiplier of four to six times for calculating the charge when the child was born as a consequence of an extramarital affair. It is further submitted that the judge erred by taking into account that the Appellant had been in the UK since 2010 and speculated that financial assistance from the UK government would be provided to her which she could use to pay the charge.

27. In our view the judge's findings about whether the social upbringing charge would be excessive must be read having regard to the judge's observations on how the charge is calculated, set out at paragraph 39 of the decision. The judge noted that according to paragraph 37 of **AX** the social compensation or social upbringing charge is calculated taking into account the actual income of the persons concerned and the detailed circumstances of any breach. The circumstances affect the income multiplier which is used. As pointed out in the application for permission to appeal, according to **AX**, at paragraph 66, an income multiplier of four to six times may be used in Fujian in respect of a child born as a result of an extramarital affair.
28. In finding that the payment required would not be excessive the judge was clearly aware of this evidence. The judge noted at paragraph 39 of the decision that according to the Appellant because the child had been born in the UK and the Appellant was a single mother there would be a particularly harsh social compensation charge which would breach the threshold of Article 3. Based on the evidence before her the judge did not accept this submission. It seems that when the judge used the term "excessive" at paragraph 46 she was doing so by reference to whether the amount of the charge would be a breach of Article 3. She found there would not be a breach of Article 3 and this was a finding, based on the evidence, which the judge was entitled to make.
29. It is not clear where in the context of this particular case the judge obtained information to which she refers at paragraph 46 about the possibility of financial assistance to the Appellant for returning to China, but it is well known in this jurisdiction that assistance may be available. Even if this was incorrect, however, it was not material to her decision. The judge was entitled to find that the requirement to pay a social upbringing or social compensation charge would not be a breach of Article 3. As the judge concluded at paragraph 46: "The social upbringing charge can be paid over three years and is tailored to the financial circumstances of the Appellant." This finding is supported by the evidence and reinforces the judge's conclusion.
30. It was argued for the Appellant that the errors supposedly made by the judge in assessing the evidence led to her Article 8 assessment being flawed in respect of the best interests of the child. For the reasons given above, we are not satisfied the judge did err in any material way in her consideration and assessment of the evidence. When considering the case under Article 8, at paragraphs 55-65 of her decision, the judge made a proper assessment of the best interests of the child. The judge did not accept that the child would be deprived of access to healthcare or education as a result of a high social compensation charge which would have to be paid. The judge found that there was clear guidance about the social compensation charge and that the child would have access to health and education once this was paid. These were findings the judge was entitled to make upon the proper assessment of the evidence which she carried out.

31. Finally it is argued in the application for permission to appeal that internal relocation would not avail the Appellant because the child would be discriminated against if she remained unregistered. At paragraph 53 of her decision the judge said that even taking the Appellant's account at its highest in respect of the impact of the family planning regulations, her claim centred on a very localised area in Fujian. The Appellant could relocate to other parts of China and it would not be unduly harsh for her to do so.
32. In the application for permission to appeal it was argued that this would not resolve the situation of the child, who would lose access to education, housing, medical treatment and other facilities. This would be discrimination against the child.
33. In making a finding about internal relocation the Appellant had relied upon paragraph 182 of **AX**, referred to at paragraph 42 of the decision. This passage in **AX** refers primarily to the risk of forcible termination of pregnancy. The decision further states, however, that there are over 200,000 unauthorised births in China, many of them in cities. The country information did not indicate effective pursuit of internal migrant women by birth control officials from their *hukou* area.
34. As already mentioned, this finding in **AX** in respect of internal relocation was made in relation to forcible terminations. It is not being argued here that the Appellant is facing anything more than a requirement to pay a social upbringing charge in Fujian based on a multiplier of four to six times the notional income attributed to the Appellant. The finding of the Judge of the First-tier Tribunal was that such a charge would not be excessive under Article 3 and could be paid by the Appellant, if necessary over an extended period of three years. Based on this finding the judge's assessment of the best interests of the child was properly carried out and sustainable reasons were given for the conclusions reached. We find no error of law in the Article 8 assessment.

Conclusions

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

We do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order for anonymity. We have not been asked to make such an order and we see no reason of substance for so doing.

Signed

Date

Upper Tribunal Judge Deans

