Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06981/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 1 February and 7 March 2016	**on 31 March 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

YAN ZHENG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Latta & Co., Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of China, born on 16 October 1988. She has not asked for an anonymity order.

2. The appellant sought asylum on 29 April 2014 based on (a) her membership of the China New Democratic Party and (b) breach of family planning policy, having had two children out of wedlock.

3. The respondent refused the claim for reasons explained in a letter dated 9 April 2015. The matter of political opinion is dealt with at paragraphs 12 - 15. The family planning policy issue is dealt with at paragraphs 16 - 25, and resolved by reference to background evidence and by applying *AX* (Family Planning Scheme) China CG [2012] UKUT 97 (IAC).

4. The appellant appealed to the First-tier Tribunal, on grounds which are merely generic and identify no specific issue on which the appeal might turn.

5. First-tier Tribunal Judge Kempton dismissed the appellant's appeal by determination promulgated on 20 November 2015.

6. In her grounds of appeal to the Upper Tribunal, the appellant does not pursue the political opinion issue. The judge is said to have erred on the family planning policy issue by holding that the appellant could be required to alter an important aspect of her life in order to avoid persecution, that is, by consenting to invasive medical treatment, notwithstanding that she has made it clear that she does not wish to undergo sterilisation.

7. Permission to appeal was granted on 9 December 2015.

8. The respondent filed a response to the grant of permission, dated 18 December 2015. This accepts under reference to headnote (12) of *AX* that if an appellant were to be forced to undergo sterilisation against her will, that would amount to persecution, and that the judge should have addressed whether or not the appellant would have been forced to do so.

9. The respondent says, however, that there was no evidence of a "crackdown" in the appellant's home *hukou* area, that she was pregnant at the time of the hearing, or that her family had been threatened with ill-treatment as a result of her breach of the family planning scheme. Thus, in terms of *AX*, in particular headnote (11), the appeal would have failed in any case, and so the error is immaterial.

10. Mr Caskie conceded at the hearing on 1 February that if the decision fell to be remade simply by applying *AX*, the appeal would again be dismissed. However, he referred to a report which was before the First-tier Tribunal. This is by Ms S Gordon, currently a PhD student at the University of Leicester, with relevant experience and qualifications set out in her accompanying *curriculum vitae*. Mr Caskie said that her information postdates *AX*, and some of it was acquired at first hand, she having quite recently spent 6 months in China. At paragraph 33 the report explains that risk of sterilisation linked to birth registration and hence to acquiring *hukou* applies in all places and all times, and is not dependent upon local crackdowns. The appellant would have to undergo sterilisation in order to gain access to housing and education for her children. This went beyond *AX*. The determination at paragraph 35 contains the finding, "I would accept that … she will have to undergo sterilisation before she can register the children." Thus, Mr Caskie argued, on the evidence which was before the judge, including the expert report, and on findings of fact which ought to be preserved, the appeal should be allowed.

11. Mr Matthews acknowledged that there were submissions to the judge from both sides on whether she ought to go beyond the country guidance in *AX*, and that the rule 24 response oversimplified the consequences of the error in the determination. The submission based on the expert report had to be resolved. That had to be done by a proper analysis of the relevant evidence, both from the appellant and in the report, and an explanation of why it did or did not justify departure from *AX*. That would most conveniently be accomplished by full submissions at a later date. It should not be arrived at simply by accepting what the judge said at paragraph 35, which was not the outcome of a correct approach, nor by simply accepting that the expert report overrides *AX*.

12. Mr Caskie argued that the rule 24 response does not seek to revisit the factual findings [i.e. the imposition of sterilisation in order to register the children], and there has been no suggestion that they are perverse. The Upper Tribunal should regard those findings as untouchable. Notwithstanding *AX*, it had been open to the judge to make such findings in the appellant's favour, based on the expert report, and all that was needed was to correct their logical outcome.

13. I reserved the first stage of my decision at that point, following which it was issued along the lines of paragraphs 14 – 20 which follow.

14. It is common ground that the determination of the First-tier Tribunal must be **set aside**.

15. The judge did not explain why she decided to dismiss the appeal in respect of family planning for the particular reasons she gave, which were unprompted by any submission to her, and which are contrary to principle and precedent. She failed (a) to consider the respondent's quite extensive reasoning, based both on background evidence and on *AX* and (b) to consider and resolve the submissions which she recorded from both sides on the weight to be given to the expert report, and on the extent to which *AX* might no longer hold good.

16. It is good general doctrine that findings of fact should not too readily be revisited. However, all depends on the facts and circumstances of the particular case. The doctrine applies more readily to preserving a decision which has its imperfections but remains comprehensible than to preserving findings in a decision which cannot stand because its outcome is based on a fundamental misconception. Of course country guidance must be departed from where that is justified by the evidence, but it would be odd to reverse the outcome in a case where the submission to that effect is recorded but not resolved (or not adequately resolved; paragraph 35 is not a good enough explanation for preferring the expert evidence over the guidance).

17. There was no application to lead any further evidence. The appellant was not found credible on the matter of politician opinion. That is no longer live. The primary facts related to the family planning policy issue have not been the subject of any credibility dispute. The question is what conclusions to draw from that evidence in

light of country guidance, the further background evidence cited, and the expert report.

18. That required further submissions, not restricted by any of the conclusions drawn by the First-tier Tribunal from the primary evidence.

19. I directed that parties were to file and to copy to each other an outline of their submissions on the remaking of the decision, referenced to the supporting evidence, by 29 February 2016.

20. The case was then to be listed for further hearing, which took place on 7 March 2016.

Written submission for the appellant.

21. The issue was whether to go beyond the guidance provided in *AX*, considered in December 2011. In *SA (Sri Lanka)* [2014] EWCA Civ 683 at paragraph 12 the Court of Appeal said that it was important to emphasise that country guidance cases were no more than factual summaries updated from time-to-time to record material changes in the position on the ground. In this case there was significant new evidence in the form of the expert report by Ms Gordon, which should be accepted.

22. *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6 is cited at length (thirteen pages) on the correct approach to expert evidence.

23. Paragraph 8 of the submission states that there is clear evidence from Ms Gordon of the changed situation based on "her knowledge and experience built both through lengthy and recent periods in China and from the findings of published research and pooled knowledge".

24. The report of Ms Gordon evidence satisfies the criteria required of expert evidence, and should be accepted by the Upper Tribunal.

Written submission for the SSHD.

25. Paragraphs 1 - 5 of the submission set out the legal background on departure from country guidance.

26. The report by Ms Gordon falls short of providing the cogent evidence or strong grounds needed to depart from *AX*.

27. In *AX*, the UT had expert evidence from three sources.

28. Evidence from Professor M Aguilar was given limited weight.

29. The expertise of Dr J Sheehan was accepted. At paragraph 79 she was recorded as saying that the authorities no longer refused to register a child on the family *hukou* even where the child was unauthorised. Parents sometimes did not seek registration because SUC would have to be paid. It was the absence of *hukou* which caused educational and other difficulties. Those could be avoided if the parents were

prepared or able to discharge the SUC. At paragraph 92 the evidence of Dr Sheehan was that it was overwhelmingly likely that the appellant in that case, as the mother of four children, would be forced to undergo sterilisation.

30. There was thirdly the evidence of Professor Fu. At paragraph 105 he was recorded as saying that incidents were isolated and the authorities were now extremely cautious about using force to enforce termination or sterilisation, and at paragraph 109 that foreign born children identified by overseas birth certificates would be registered. Whether they would be regarded as unauthorised was controversial. In Guangdong they might be so regarded, but not in Hainan.

31. The UT noted some concerns about the limitations of the evidence from Dr Sheehan and from Professor Fu, and did not say in terms what weight was given to the evidence from Dr Sheehan, but broadly accepted the evidence of Professor Fu.

32. Attention is then drawn to the country guidance given in particular at paragraphs 172, 173 and 176; paragraph 185, real risk of forcible sterilisation would be persecutory, but the UT was not satisfied that in general there was "a real risk of forcible sterilisation of either partner", although there had been scandals and crackdowns". "We recognise... that some of the international reports state that forcible sterilisation carries 'fairly frequently'; however, the overwhelming evidence, and the evidence of Professor Fu (which we accept and prefer on this point) is that the occurrence is limited and therefore, in our judgment, it does not amount to a real risk".

33. On foreign born children the UT said at paragraphs 188 and 189 that parents were expected to produce birth certificates and to pay SUC, which even if imposed was not likely to be beyond the means of a couple who had lived abroad for some years. There was very little evidence of parents being disproportionately penalised when they returned to China with foreign born children. In general, no real risk arose.

34. The submission then turns to the report by Ms Gordon. The evidence she cites falls short of showing that it was reasonably likely that a child would not be registered because it was unauthorised. Ms Gordon said at paragraph 19 that it was highly likely that the appellant might be "punished" because her children were unauthorised. That was not inconsistent with the UT's conclusions in *AX* at paragraphs 188 and 189. The report by Ms Gordon provided no basis for saying that those conclusions were wrong.

35. Ms Gordon referred to a social compensation fee, the equivalent of the SUC, but was unable to say what it might amount to. She used a comparison based on UK income levels "presumably for shock value, and perhaps indicative of a lack of objectivity and of advocacy". There was no reason to suppose that the appellant would not be in a position to pay any SUC for having unauthorised children. She had been here as a student from 2007 to 2009, with the means to pay fees at the higher international student rate, and had shown access to an amount equivalent to £59,000. She had survived with her children living unlawfully in the UK for five years. On return she

could benefit from the Assisted Voluntary Return programme, a point to which the UT gave weight in *AX* at paragraph 204. Even if SUC were charged for foreign born children, the appellant was not likely to be unable to pay it.

36. In any event, the consequences of non-payment of SUC would not generally reach the severity threshold to amount to persecution or serious harm – paragraph 191(9) of *AX*.

37. The report by Ms Gordon next turned to the likelihood of forced sterilisation, and cited three examples. The first was based on a somewhat ambiguous quotation from the Family Planning Department (page 9 of the report) but even if to be interpreted as Ms Gordon put forward, it was one example and not sufficient to establish general risk of forced sterilisation in order to obtain *hukou*. The report then gave an example of a lady from Fujian province who said that pressure was applied so as to leave no option, and a third such example was provided at the foot of paragraph 36 of the report. The report at paragraph 38 made unsupportable assertions. The author said that she had never heard of a woman refusing to accept an IUD after the birth of the first child, but given the number of women in China with more than one child that could not be correct. The author said that she did not know of any example of a woman with two children who was not required by local regulations to accept an IUD insertion or sterilisation, but that was again an assertion unsupported by research. The author's reliance on a decision of the US Court of Appeals for the 7th Circuit was no support for such a conclusion, for which reference was made to *DL* [2014] CSOH 147. The position of Ms Gordon that parents who breached family planning policy were often prevented from registering their child until they had paid SUC with cases of prevention from obtaining *hukou* unless the parents submitted to sterilisation was general and unspecific. Her report did not show a likelihood that this might happen.

38. The risk of forced sterilisation through pressure was clearly a live matter in *AX*, evidence about which was recorded for example at paragraph 92. The UT, based on extensive evidence, found no general such risk, apart from "crackdowns". Ms Gordon's report was no cogent basis for going further.

39. Ms Gordon's final point on the matter was that unless a parent submitted to sterilisation *hukou* would be refused, but again there was no cogent basis for departing from *AX*. Even if Ms Gordon was correct that unless the appellant submitted to insertion of an IUD or sterilisation her children would be denied *hukou* and thus an education (which the respondent did not accept) the report left out of account that there is a private educational system in China, and that *AX* found that having to pay for education did not, without more, amount to persecution.

40. The evidence in *AX* had been that hundreds of thousands of unauthorised children are born every year in China, that family planning officials are required to register them once an SUC has been paid, and there was no incentive to refuse to register them as fines formed as a significant source of income. Whether registered or not there would be no disproportionate breach of Article 8. The best interests of the

children were to be with their mother whether in China or in the UK. The high point of any argument was that they might not be registered, in which case they would be barred from state but not from private education. Their status would not preclude access to healthcare and there was no reliable evidence that not being registered would have a lasting impact on their wellbeing. If there were any impact on the best interests of the children, it was outweighed by the public interest.

Oral submissions for appellant.

41. Mr Caskie referred to the report at paragraphs 33, 38 and 40. He submitted that although the examples given by the author were to an extent anecdotal, the evidence to which she referred was sufficient to show that the risk of sterilisation was not confined to local cutdowns, but was general. Figures at paragraph 44 showed that sterilisation or the use of an IUD must apply to some 83% of the population. The author showed that internal relocation might help the appellant to avoid sterilisation or IUD insertion, but not to obtain *hukou*. A risk of enforced sterilisation was not restricted to those cases where physical coercion was used. Having to submit to an invasive medical procedure against one's will amounted to persecution or ill-treatment, and was a risk which would qualify the appellant as a refugee, within the particular social group of women from China who do not wish to undergo sterilisation or the insertion of an IUD. The appellant might submit to these procedures in order to obtain *hukou* for her children, but that would amount to an alteration of behaviour which under the principles of *HJ (Iran)* should be left out of account in recognition of her refugee status. This was a step which was missing from the logic of *AX*.

42. Mr Caskie said finally that on reflection the logic of his submission was more to the effect that this point was overlooked in *AX*, rather than that the underlying evidence was significantly different from that which was before the Tribunal in *AX*. The alternative of hiding away to avoid the pressure to have an IUD inserted or to undergo sterilisation, or choosing to submit, amounted to a need for protection. There was also the point that an appellant could not be required to give up her Article 12 right to found a family.

Oral submission for SSHD.

43. Further to his written submission, Mr Matthews said that the report of Ms Gordon was in some parts inconsistent and unclear. For example, in the first sentence of paragraph 43 the author said that parents in breach of family planning policy were often prevented from registering their children with *hukou* until they had paid the social compensation fee. In the next sentence, the author said there were cases where parents were also prevented from registering their child with *hukou* if they refused to submit to sterilisation. This was further contradicted at paragraph 72 where the author said that there was a very high risk that the appellant would be required to undergo sterilisation, enforced through administrative pressure such as withholding of *hukou*. The report was inconsistent in its use of language and as to the level of risk, and its conclusions were not justified by the evidence cited. The evidence was no

stronger than in *AX*. At most the consequence of having no *hukou* was a loss of access to state education, which had limited impact. It was not the infraction of a core right, private schools being widely available and commonly used. Medical treatment had to be paid for whether or not children had *hukou*. That outcome had been found in *AX* not to justify a protection claim. In any event, the appellant clearly came from a family of substantial means. The need to pay for schooling for her children was the height of her case, and would not make her a refugee.

Final reply for appellant.

44. Although the respondent pointed to the appellant at one time having access to £59,000, that was years ago. She is currently on NASS support. The Secretary of State supplies that support, and could not have matters both ways. There was evidence that parents in breach of family planning policies might often be prevented from obtaining *hukou* for their children, and the likely consequences were enough to establish a need for protection.

Conclusions.

45. Partes were in agreement that the decision of the First-tier Tribunal could not stand. I have given my reasons for declining simply to reverse that decision. Although the parties' respective submissions on remaking the decision are set out above at some length, I can state my conclusions fairly briefly.

46. The submission for the appellant is long on the correct legal approach to expert evidence, but on that the parties are not significantly at issue. It is shorter on what the evidence actually says. The respondent's submission focused more accurately on the evidence, and on a comparison with the consideration in *AX* - which are of the essence, if guidance is to be superseded.

47. The report by Ms Gordon is based on few examples and on rather sweeping assertions. A good example was taken by Mr Matthews from paragraph 38 of the report, pointing out that although the author had never heard of a woman refusing an IUD after her first child, there are millions of second and subsequent children in China. The report does not bear out its contentions by reference to the specific evidence which might justify departing from the conclusions in *AX*.

48. In particular, there is no substantial evidence in the report by Ms Gordon or from any other source to show that sterilisation is carried out by force other than during local crackdowns, as found in *AX*.

49. Mr Caskie emphasised that *AX* was decided some time ago, but there was no evidence produced to show force being used to any significant extent at any date later than that of the evidence before the UT in *AX*.

50. The general tenor of the background evidence is in the direction of relaxation of family planning policy, and of its enforcement, in recent years.

51. The evidence that the appellant is likely to be forced to undergo insertion of an IUD or sterilisation in order to obtain *hukou* for her children is lacking. The evidence is rather that on production of their UK birth certificates and (perhaps) on payment of SUC or social compensation fees, the children will be registered.

52. If payment is required, there is no good reason to think that the appellant would be unable to comply. She is from a relatively well off background. She has the opportunity to return with financial benefits provided by the respondent.

53. Denial of *hukou* is a situation faced on official figures by at least 13 million children in China in 2010, and on further evidence mentioned by Ms Gordon at paragraphs 48 – 51 of her report the true number may be 30 million or even more.

54. I do not find that the children in this case are at risk of *hukou* denial, but even if they were, the findings in *AX* were that millions live in that situation without suffering consequences which give rise to entitlement to international protection. No evidence has been shown to justify going beyond *AX* in this branch of the case.

55. The appellant's argument towards the end veered towards new territory, which was barely opened up for exploration. It is not immediately obvious that it has been overlooked to date that the principles explained in *HJ and HT* [2010] UKSC 31 open up an alternative route to protection for women from China. I see in this only another way of raising the same point about being protected from bodily invasion, a risk which I have not found to be established.

56. The decision of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as brought by the appellant to the First-tier Tribunal, is **dismissed** on all available grounds.

14 March 2016
Upper Tribunal Judge Macleman