



Upper Tribunal
(Immigration and Asylum Chamber)

PA/09930/2017

THE IMMIGRATION ACTS

Heard at Glasgow
on 18 January and 25 April 2019

Decision & Reason Promulgated
on 1 May 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KAI BING WANG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

For the Respondent, on 18 January Mrs M O'Brien, and on 25 April Mr A Govan, Senior Home Office Presenting Officers

DETERMINATION AND REASONS

1. The appellant appeals against a decision by FtT Judge David C Clapham SSC, promulgated on 2 February 2018, on grounds headed "error of law in relation to family planning policy", set out as (i) – (iv).
2. On 18 January, Mrs O'Brien conceded that the FtT erred in law, by failing to deal with the report of Professor Christoph Bluth dated 29 December 2017.
3. It was agreed that the decision should be remade in the UT at a continued hearing.
4. The appellant provided an updated report by Professor Bluth dated 23 April 2019, although it was not suggested that there was any material difference between the two. Further references herein are to the later report.

5. The appellant is a citizen of China, born on 11 March 1983. He says he is from Fu Qing City in Fujian Province. His wife, born on 6 October 1988, is also a Chinese citizen. They had one child at the time these proceedings began, born on 15 January 2014. They married after the birth of that child, and now have a second child. Both children are also Chinese citizens. His wife and children have no entitlement to live in the UK. Removal to China would be as a family group. His case is now advanced only in relation to family planning policy and on human rights grounds, based on the best interests of the children.
6. Mr Govan put the respondent's position, in outline, thus. The decision dated 22 September 2017 at 89 – 105 correctly applied AX (family planning scheme) China CG [2012] UKUT 00097. The report of Professor Bluth took "a very broad-brush approach" and did not identify sources which were more recent, or to different effect, than those considered in AX. Nothing in the report justified a different outcome.
7. Mr Winter put the appellant's position, in outline, thus. The case turned on interpreting the report of Professor Bluth. It did not depend on "overturning" AX, but on issues not dealt with in that case, emerging from the report. The report did not make sweeping or unsupported statements, but provided sources. Findings about the likely consequences of return to China in line with the report would establish protection grounds. Additionally, or alternatively, the report disclosed consequences for the children which were adverse to their best interests, establishing human rights grounds. This was a case such as envisaged in YC [2019] CSIH 5 at [20] – production of an expert report to show that AX should not be followed.
8. The headnote of AX states:

Chinese family planning scheme:

(1) In China, all state obligations and benefits depend on the area where a person holds their 'hukou', the name given to the Chinese household registration system. There are different provisions for those holding an 'urban hukou' or a 'rural hukou': partly because of the difficulties experienced historically by peasants in China, the family planning scheme is more relaxed for those with a 'rural hukou'.

(2) 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'.

(3) The Chinese family planning scheme expects childbirth to occur within marriage. It encourages 'late' marriage and 'late' first births. 'Late' marriages are defined as age 25 (male) and 23 (female) and 'late' first births from age 24. A birth permit is not usually required for the first birth, but must be obtained before trying to become pregnant with any further children. The Chinese family planning scheme also originally included a requirement for four-year 'birth spacing'. With the passage of time, province after province has abandoned that requirement. Incorrect birth spacing, where this is still a requirement, results in a financial penalty.

- (4) Breach of the Chinese family planning scheme is a civil matter, not a criminal matter.

Single-child families

(5) Parents who restrict themselves to one child qualify for a “Certificate of Honour for Single-Child Parents” (SCP certificate), which entitles them to a range of enhanced benefits throughout their lives, from priority schooling, free medical treatment, longer maternity, paternity and honeymoon leave, priority access to housing and to retirement homes, and enhanced pension provision.

Multiple-child families

(6) 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.

(7) Where an unauthorised child is born, the family will encounter additional penalties. Workplace discipline for parents in employment is likely to include demotion or even loss of employment. In addition, a ‘social upbringing charge’ is payable (SUC), which is based on income, with a down payment of 50% and three years to pay the balance.

(8) There are hundreds of thousands of unauthorised children born every year. Family planning officials are not entitled to refuse to register unauthorised children and there is no real risk of a refusal to register a child. Payment for birth permits, for the registration of children, and the imposition of SUC charges for unauthorised births are a significant source of revenue for local family planning authorities. There is a tension between that profitability, and enforcement of the nationally imposed quota of births for the town, county and province, exceeding which can harm officials' careers.

(9) The financial consequences for a family of losing its SCP (for having more than one child) and/or of having SUC imposed (for having unauthorised children) and/or suffering disadvantages in terms of access to education, medical treatment, loss of employment, detriment to future employment etc will not, in general, reach the severity threshold to amount to persecution or serious harm or treatment in breach of Article 3.

(10) There are regular national campaigns to bring down the birth rates in provinces and local areas which have exceeded the permitted quota. Over-quota birth rates threaten the employment and future careers of birth control officials in those regions, and where there is a national campaign, can result in large scale unlawful crackdowns by local officials in a small number of provinces and areas. In such areas, during such large scale crackdowns, human rights abuses can and do occur, resulting in women, and sometimes men, being forcibly sterilised and pregnant women having their pregnancies forcibly terminated. The last such crackdown took place in spring 2010.

Risk factors

(11) In general, for female returnees, there is no real risk of forcible sterilisation or forcible termination in China. However, if a female returnee who has already had her permitted quota of children is being returned at a time when there is a crackdown in her ‘hukou’ area, accompanied by unlawful practices such as forced abortion or sterilisation, such a returnee would be at real risk of forcible sterilisation or, if she is pregnant at the time, of forcible termination of an unauthorised pregnancy. Outside of these times, such a female returnee may also be able to show an individual risk, notwithstanding the absence of a general risk, where there is credible evidence that she, or members of her family remaining in China, have been threatened with, or have suffered, serious adverse ill-treatment by reason of her breach of the family planning scheme.

(12) Where a female returnee is at real risk of forcible sterilisation or termination of pregnancy in her 'hukou' area, such risk is of persecution, serious harm and Article 3 ill-treatment. The respondent accepted that such risk would be by reason of a Refugee Convention reason, membership of a particular social group, 'women who gave birth in breach of China's family planning scheme'.

(13) Male returnees do not, in general, face a real risk of forcible sterilisation, whether in their 'hukou' area or elsewhere, given the very low rate of sterilisation of males overall, and the even lower rate of forcible sterilisation.

Internal relocation

(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.

9. The respondent's decision finds also upon the following paragraphs:

Foreign-born children

186. In general, the evidence before us indicates that the consequences of an unauthorised birth once it has occurred (whether within or outside China) are social and financial. We remind ourselves that breach of the family planning policy is not a criminal offence but a civil matter, and that after a down payment of 50%, the balance of any SUC imposed may be paid over at least three years. We accept Professor Fu's evidence regarding the existence of statutory protection against destitution for those who cannot pay. We note that many couples regard giving birth abroad as evidence of wealth and status, and that significant numbers of parents travel to Hong Kong and Macao, in particular, for that purpose.

187. The attitude taken by provincial birth control authorities to parents returning with foreign-born children remains unclear; some provincial officials indicated that the additional child would be treated as unauthorised and registered only on payment of SUC; others, that foreign-born children do not breach the family planning scheme because their birth did not breach the PFP Regulations in any particular province.

188. Parents returning with foreign-born children are expected to produce birth certificates for that birth and to pay the SUC. In general, the rate of SUC, even if it is imposed, is not likely to be beyond the means of a couple who have lived abroad for some years. There is very little evidence of parents being disproportionately penalised when they return to China with foreign-born children.

189. We find that in general, couples with foreign-born children, over and above the permitted number for that couple (which is variable, depending whether they are a double-single couple, children of heroes or miners, members of ethnic minorities and so forth) will on return to China not be at real risk of persecution, serious harm or human rights breaches engaging international protection.

190. It was not suggested by either representative that the international protection Conventions would be engaged either by an appellant's intention to become pregnant unlawfully after return to

China, or her intention to abstain from such pregnancy. That was not the evidence in this appeal and we do not purport to give guidance on the point.

10. Country guidance is not superseded simply by producing a report of later date. It is necessary to show that such a report is based on evidence which is not the same as, or similar to, the evidence before the tribunal in the country guidance case. Not to follow country guidance requires very strong grounds supported by cogent evidence: *SG* [2013] 1 WLR 41, approved in *YC* at [18].
11. Professor Bluth at 5.3.9 - 11 refers to *YZ* [2017] CSIH 41 as a case which “could be interpreted to challenge some of the key findings” of *AX* on forced sterilisation and coercive measures, and cites the report of Dr S Gordon as showing an absence of consideration in *AX* of the use of pressure to obtain registration of children. Professor Bluth finds the methodology of Dr Gordon “very impressive and convincing” and “much more solid and reliable” than the respondent’s sources.
12. That approach by Professor Bluth is based on misconceptions about *YZ* which are put firmly to rest in *YC*:

[19]. The reference in a purely procedural decision to a few paragraphs of an expert report used simply to show that there was some evidence of a particular nature available to the fact finder in that case does not constitute cogent evidence for treating a CG case as superseded. Nor does the fact that in some other individual case a FtT has been persuaded not to follow that guidance.
13. It is plain that Professor Bluth’s knowledge of the report of Dr Gordon is limited to reading the excerpts quoted in *YC*. That is an extremely weak reason for placing her methodology above anything relied upon by the respondent, which includes country guidance, in turn based on evidence from multiple sources.
14. Professor Bluth refers at 5.3.13 to “very extensive use of coercion to ensure reliable birth control” as supporting the argument by Dr Gordon. This is an example of sweeping generalisation which runs through his report.
15. The report concludes at 6.1:

... the appellant violated the family planning policy by having a child out of wedlock. There is a risk of imposition of fines, discrimination including the possibility of forceful sterilisation if the appellant is returned to China ... the important decision in *YZ* ... accepted the evidence that forceful birth control measures, which commonly include female sterilisation, will be imposed after the second child. Moreover, the appellant will be denied the choice of having another child which is also a violation of his human rights.
16. *YZ* is not authority that return to China having had two children carries a risk of forceful birth control measures.
17. The appellant has referred to no instance, in any source, of the Chinese authorities being concerned about children born abroad prior to the marriage of their parents, or of imposing sterilisation on parents returning to China with foreign born children.

18. Professor Bluth inextricably mixes up references to difficulties over registering births and difficulties over registering for *hukou*. The children in this case have birth certificates. It has never been suggested that the Chinese authorities do not recognise UK birth certificates, or require any further registration of the birth of Chinese citizens abroad.
19. There is no analysis in the report by Professor Bluth, or elsewhere in the appellant's case, of which sources are different from those which were before the tribunal deciding AX.
20. The gist of later evidence is that the imposition of family planning policies in China has in recent years become more relaxed, not sterner.
21. Professor Bluth in his conclusion and throughout his report clearly believes that anyone returned to China is subject to violation of human rights, because that person may be denied the choice of how many children to have. That may be a respectable opinion on a matter of very wide principle, but it lies far outside the scope of expert evidence on country circumstances.
22. The appellant has not referred to sources in the report of Professor Bluth or elsewhere which take his case beyond AX at 188 – 189: very little evidence of disproportionate penalties on return with foreign-born children, and no real risk of persecution, serious harm or human rights breaches engaging international protection.
23. The decision of the FtT is set aside, but the appeal, as brought to the FtT, is again **dismissed**.
24. No anonymity direction has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

25 April 2019
UT Judge Macleman