



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

Appeal Number: PA/07744/2018

**THE IMMIGRATION ACTS**

**Heard in The Royal Courts of Justice,  
Belfast  
On 10 December 2021**

**Decision & Reasons  
Promulgated  
On 28 January 2022**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**C Z  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr T Jebb, instructed by Bigger & Strahan

For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Rea promulgated on 29 January 2021 dismissing her appeal against the decision of the Secretary of State made on 13 June 2018 to refuse her asylum and human rights claim.
2. The appellant's case is that she has a well-founded fear of persecution in China as she is the victim of domestic violence perpetrated by her "husband", the man to whom she had been sold. Her partner began to abuse her from 2008 onwards. They separated, the appellant leaving her

partner for good in 2013 (leaving their two children) and moving to Beijing. Fearing her partner and fearing the state would not be able to protect her she left China using a false passport on 30 January 2016 and travelled to the United Kingdom. She arrived in London, then moved later to Belfast where she had a relationship with a man, as a result of which she became pregnant. The child was born in October 2017. The child has since been diagnosed with autism and attends nursery.

3. The Secretary of State did not accept her account, did not accept she had a well-founded fear of persecution in China and did not accept her removal would be in breach of Articles 2, 3 or 8 of the Human Rights Convention.
4. The Secretary of State was not represented at the appeal which took place remotely by CVP. The judge found that the appellant had given a credible account of being the victim of domestic abuse at the hands of her partner [23] and was genuinely in fear of him and fears the consequence of coming into contact with him. The judge found that:
  - (i) the appellant had separated from her partner in 2013, had lived for three years in Beijing and had not had face to face contact with him during this time [24(i)];
  - (ii) the appellant was not in contact with her parents, her older children and there were no means by which the former partner could get in touch with her through family [24(ii)];
  - (iii) there was no evidence of the former partner's current domestic circumstances or even if he was alive; and, aside from the evidence of a single phone call, found little to demonstrate that he maintains any interest in her and thus she had not shown that her fear of persecution was well-founded [25];
  - (iv) the appellant had not shown, following the test set out in Horvath v SSHD [2000] UKHL 37 that although domestic violence remains widespread, the evidence had not shown that there was not adequate state protection for the appellant in China were she to have a well-founded fear of persecution [28];
5. The judge then considered proportionality in the context of Article 8 concluding as follows:-
  - (i) There is a need to maintain effective immigration controls
  - (ii) The fact the appellant was born and lived in China to the age of 30, speaks Mandarin and is familiar with the culture and had provided no evidence of private life in the United Kingdom, which was in any event precarious;
  - (iii) the child's best interests were in favour of her remaining, the appellant being the sole carer and that if she returned to Beijing she and her child would face considerable hardship [39(ii)];

- (iv) having had regard to Section 55 of the UK Borders, Citizenship and Immigration Act 2009, this was the starting point in weighing the public interest;
  - (v) the factors in favour of removing the appellant outweigh those mitigating against removal [44].
6. The appellant sought permission to appeal on three grounds:
- (i) the judge had erred in finding the appellant would not be at risk from her husband;
  - (ii) the judge had erred in his assessment of sufficiency of protection;
  - (iii) had erred in his approach to Section 55 of the UK Borders Act.
7. In granting permission to appeal, First-tier Tribunal Judge Page observed that the judge had failed properly to engage with paragraph 276ADE given the finding that the appellant was likely to face considerable hardship on return to China with an autistic child.

### **The Hearing**

8. It was common ground between the representatives that the judge's approach to Section 55 of the UK Borders Act 2009 was, in the light of Arturas (child's best interests: NI appeals) [2021] UKUT 237 (IAC), wrong in law and that that aspect of the appeal needed to be remitted to the First-tier Tribunal.
9. Mr Jebb submitted the judge's approach to the risk from her former partner was irrational and that if they met she would be at risk. I do not consider that this point is well-made. The judge was entitled, having found for sustainable reasons that there had been no contact since 2013 and that was only a phone call, that there was little or no basis for any concern that the appellant would be at risk from her former partner even were they to meet. It was open to the judge also to conclude that it was unlikely he would be able to find her. Whilst it is of course impossible to answer whether they could come into contact or not the issue is one of the risk, and that is the probability, of that happening. That is predicated on a number of matters including whether the former partner would be interested in taking steps to find her, whether he would be motivated to do so and also the chance of this happening. Further, it cannot be said that there is no doubt that if they did meet the appellant would be at risk of persecution and there was little evidence of any contact other than one phone call in a period of three years. Accordingly, it cannot be said that this aspect involved the making of an error of law.
10. It is not arguable, despite Mr Jebb's submissions, that the judge's approach to sufficiency of protection was flawed. Whilst Mr Jebb drew attention to the entirety of the phrase used by Lord Clyde in Horvath at [28] that "It

will require cogent evidence that the state which is able to afford protection is unwilling to do so, *especially in the case of a democracy* [emphasis added]”, it is not arguable that the judge erred in finding, on the evidence before him, that even taking into account the fact that China is not a democracy, that there was a sufficiency of protection for the appellant. The reference by Mr Jebb to the disappearance of the tennis player Peng Shuai, is not relevant; the issue there is the fact that she embarrassed a senior member of the Communist Party.

11. Accordingly, I am not satisfied that the judge erred as was averred in grounds (i) and (ii). The finding that the appellant was not at risk of persecution or serious harm on return to China did not involve the making of an error of law and the findings on those issues are preserved.
12. Paragraph 276ADE. I am, however, satisfied that the judge appears not properly to have engaged with this provision given the findings of the difficulties that the appellant and her child would face on reintegration to China. The fact that the child was diagnosed as autistic as early as 3 years old is in itself an indicator that severity of his condition and in reality it is difficult to separate this issue out from that concerning Section 55 of the UK Borders Act 2009.
13. Accordingly, I consider that the decision of the First-tier Tribunal did involve the making of an error of law on that issue.
14. The headnote in Arturas (child's best interests: NI appeals) [2021] UKUT 237 (IAC) provides:

*(1) Under the laws of England and Wales and the law of Scotland, a failure by the Secretary of State to comply with her duties under section 55(1) or (3) of the Borders, Citizenship and Immigration Act 2009 is highly unlikely to prevent the Tribunal from reaching a lawful decision in a human rights appeal involving a child: AJ (India) v Secretary of State for the Home Department [2011] EWCA Civ 1191; ZG v Secretary of State for the Home Department [2021] CSIH 16.*

*(2) Under the law of Northern Ireland, the position is different: JG v Upper Tribunal Immigration and Asylum Chamber [2019] NICA 27.*
15. As this appeal was heard in the FtT in Northern Ireland which is where the appellant and her child live, the First-tier Tribunal should have adopted the approach set out in JG.
16. It was common ground between both representatives that the First-tier Tribunal had not done so and had not properly approached the apparent failure to engage with section 55 of the 2009 Act.
17. For these reasons I am satisfied the decision of the First-tier Tribunal involved the making of an error of law with respect to paragraph 276ADE (6) and in respect of Section 55. The Tribunal did not make an error with

respect to the asylum and protection claim and the decision on that aspect of the claim is maintained.

18. Given the nature of the error and the fact people require a full Article 8 analysis as well as reference to Section 55 of the UK Borders Act, as both parties agreed it would be appropriate to remit this, the remaking of this part of the appeal to the First-tier Tribunal for a fresh decision.

### **Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The appeal is remitted to the First-tier Tribunal for a fresh decision on the non-asylum parts of the appeal. The findings in respect of the asylum appeal are preserved; fresh findings will need to be made in respect of paragraph 276 ADE of the Immigration Rules, section 55 of the UK Borders Act and article 8 of the Human Rights Convention.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 24 January 2022

Jeremy K H Rintoul  
Upper Tribunal Judge Rintoul