**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/04718/2010

**THE IMMIGRATION ACTS**

| **Heard at Belfast Laganside** | **Determination Sent** |
|---|---|
| **On 3 July 2013** | **On 9 August 2013** |
| | …… |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**XIA XIA WENG**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: No appearance and not represented
For the Respondent: Ms M. O'Brien, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of China, born on 16 November 1983. She is said to have arrived illegally in the UK on 2 August 2003 when she applied for asylum. She was refused leave to enter but given temporary admission. She failed to report

and was classed as an absconder. A decision was made on 22 March 2010 to refuse her leave to enter after the refusal of her asylum claim.

2. Her appeal against that decision was dismissed by Immigration Judge Farrelly, the appeal having taken place on 5 May 2010. Permission to appeal having been granted, the appeal came before Upper Tribunal Judge Deans on 19 January 2011. He set aside the decision of the Immigration Judge because he identified errors of law in the determination. The relevant part of Judge Deans' 'Decision and Directions' states as follows:

> "1. The previous determination of the Tribunal has been set aside on the following grounds:- (i) the Immigration Judge did not make proper findings of fact on the issues in dispute and did not give adequate reasons for his decision; and, more specifically, (ii) the Immigration Judge did not adequately consider the effect on the family and private life of the appellant and her child of the child being treated as an unregistered child in China. There is to be a further hearing for the purpose of re-making the decision, subject to these directions."

3. The appeal then came before me for the re-making of the decision. However, at that hearing the appellant did not appear. On 2 July 2013 the appellant's former solicitors wrote to the Tribunal by fax, stating that they had not had contact with the appellant since about October 2012. The letter goes on to state that the appeal is therefore "academic and should not come before the court". However, given that the solicitors do not appear to have the appellant's instructions, I do not consider that the letter can be taken as the appellant's authority for the appeal to be withdrawn.

4. The appellant was written to by the Tribunal by letter dated 7 May 2013 at the address given to the Tribunal. This is the address given on the original notice of appeal and on the application for reconsideration of the appeal. It is also the address at which the appellant was notified of the hearing before Upper Tribunal Judge Deans in January 2011. There is no indication from the Tribunal file that the appellant has notified a change of address to the Tribunal, or to her solicitors for that matter.

5. Ms O'Brien informed me that the Home Office has treated the appellant as an absconder since March 2013, she having failed to report on three occasions.

6. I decided to proceed with the hearing, having considered rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I am satisfied that reasonable steps had been taken notify the appellant of the date, time and place of the hearing and that it was in the interests of justice to proceed with the hearing. The appellant had been written to by the Tribunal at the address given by her or on her behalf, notifying her of the hearing. Her solicitors had tried to contact her. It was encumbent on the appellant to keep in touch with her solicitors and/or the Tribunal, particularly bearing in mind that she would have been aware that she had an appeal outstanding.

*The appellant's claim*

7. In summary, the appellant claims that she is from Fujian province. Because of her poor circumstances in China, arrangements were made with a 'Snakehead' for her to leave the country. She was given the choice of either working as a prostitute, which would mean she would be free in six months, or as a housekeeper for the prostitutes, which would mean that it would take her two years before she was free. She chose the latter. She was first taken to Africa, moving between various countries before finally, after several attempts, being successful in leaving for England.

8. She did not report to the immigration authorities after being given temporary admission because she was taken away by the Snakehead, for whom she worked for a little over two years. She was freed at Christmas in 2005 or 2006.

9. She has a partner who, it seems, is also from China. They have a daughter born on 15 January 2008. In China her daughter would be discriminated against. They would be fined because her and her partner were not married and had had a child.

10. The appellant suffers from haemophilia which requires medication and hospital check-ups. She also suffers from Hepatitis B.

11. Her adoptive parents are dead and her brother would not allow her to live in the family home. She would be homeless on return and she would not be able to get a job.

*My assessment*

12. Credibility issues are raised in the refusal letter concerning the appellant's claim to have been the victim of trafficking and of having been taken to 'Africa' before coming to the UK. The appellant has not given evidence before me to answer those concerns. The effect of that is that, aside from her witness statement and the oral evidence she gave before the First-tier Tribunal, there is no other evidence from her to contradict or explain the matters raised in the refusal letter.

13. Having said that, I do not consider that there is much merit in the suggestion in the refusal letter that the appellant could have claimed asylum in Africa. It is not clear from the appellant's account what countries she claims to have been in. Similarly, although it is said that she would not have continually been given her passport back or that she would only have been subject to detention without further action for repeated attempts to leave, without more evidence of the countries in which she claims to have been, I do not consider that those are matters that adversely affect her credibility either.

14. However, she was granted temporary admission when she arrived in August 2003 but she failed to report as required. The explanation she gave in her asylum interview is that she was taken away by the Snakehead. Whilst that may on the

face of it provide an explanation for her having failed to report, the refusal letter points out that she claims that she was finally released in 2005 or 2006 yet she still did not come forward to the authorities here. It seems that it was not until after being arrested in 2008, at the earliest, that she made, or pursued, her claim for asylum.

15. Her case was referred to the Competent Authority to consider whether there were reasonable grounds to believe that she was a victim of trafficking. The result was that it was concluded that there were no such reasonable grounds. There was a judicial review of that decision but, as revealed by the judgment from the High Court in Northern Ireland sent to me after the hearing, the judicial review challenge failed.

16. In the screening and asylum interviews the appellant referred to what she says were her difficult economic circumstances in China and her poor prospects. The refusal letter suggests that this is evidence that her motivation for coming to the UK was economic. Whilst that could be consistent with her claim to have been the victim of trafficking, it does not reveal a reason within the Refugee Convention to be granted international protection. The claim that she was the victim of trafficking is open to question for the reasons already referred to.

17. In the circumstances, I am not satisfied that the appellant is the victim of trafficking or that she has established any risk on return in terms of her relationship to those who may have made arrangements for her to come to the UK.

18. Upper Tribunal Judge Deans' error of law decision did not rule out the possibility that such credibility findings as are not affected by the error of law in the determination of the First-tier Tribunal could be preserved. In this context I note that at [62] the Immigration Judge accepted that the appellant had established a private life in the UK, albeit that that private life was established in circumstances where she had no lawful immigration status. At [63] he noted the appellant's claim that she has a blood disorder, albeit that there was no medical evidence. Judge Farrelly appears to have accepted that aspect of her claim however, referring to her then regular hospital visits.

19. From [55] onwards he also appears to have accepted that she has a daughter in the UK. The judge heard evidence from the person said to be her partner.

20. On the basis of those positive findings I accept that the appellant has a blood disorder which is said to be haemophilia. In her witness statement dated 28 April 2010 she gave details of her consultant at the time and the hospital that she attended. However, there is no medical evidence before me and no up-to-date evidence from the appellant on this issue such as would support any Article 3 claim.

21. Her daughter is said to have been born on 15 January 2008. I am satisfied that she does have a daughter. It seems, again from evidence provided after the hearing by

the respondent, that the appellant's partner left the UK voluntarily. The CID printout is not very clear but it is possible to discern that the details on it match those given by the appellant in the screening interview as to her partner.

22. The question arises as to whether the appellant is at risk of persecution on account of having had a daughter when not married, albeit that her daughter was born in the UK. The risk of persecution can, in appropriate circumstances, arise by extension in the sense that the treatment of a person's child could amount to persecution of the parent.

23. In her witness statement at [12] the appellant stated that she and her partner got married in the UK in a Chinese ceremony but that they are not married in law. That evidence in my view is not a sufficient basis from which to conclude that she would be viewed by the Chinese authorities as unmarried, and that consequently her daughter would be considered to have been illegitimate. It is for her to put forward evidence of the ceremony and evidence as to how it would be viewed in China.

24. Nevertheless, I have considered what the position would be for the appellant and her daughter if it was decided that the child was "unauthorised", to use the term in AX (family planning scheme) China CG [2012] UKUT 97 (IAC). Ms O'Brien referred me to that decision which was promulgated on 16 April 2012. With reference to various paragraphs it was submitted that it deals with the question of the appellant's and her child's circumstances on return and that on the basis of that decision the appeal should be dismissed.

25. It is apparent from the guidance in AX that the Chinese family planning scheme expects childbirth to occur within marriage. Paragraph 66 refers to particular Regulations in Fujian province relating to unauthorised births. At [99] there is reference to the evidence of Dr Sheehan relating to the position of single mothers who are returned to China having left illegally or having lived or worked illegally abroad. The individual would not be entitled to a passport for between six months to three years and would be the subject of rumours and gossip and would find life extremely difficult on her own.

26. In relation to that last issue, the appellant has not established in evidence what her circumstances would be on return. I note what she *claims* about her poor circumstances there when she left, but she has not given evidence before me that could have been tested. She has not given evidence, for example, in relation to whether she is still in a relationship with her partner, the father of her child, and whether they would be living together in China.

27. At [185] the Upper Tribunal concluded that in general there was not a risk of forcible sterilisation.

28. Between [186]-[190] the position of "Foreign-born children" was considered. The consequence of having an "unauthorised birth", within or outside China, are social and financial. Breach of the family planning policy is not a criminal offence

but a civil matter. After payment of 50% of the Social Upbringing Charge ("SUC") the balance of any SUC may be paid over three years. There is statutory protection against destitution for those who cannot pay. The rate of the SUC is not likely to be beyond the means of a couple who have lived abroad for many years. "There is very little evidence of parents being disproportionately penalised when they return to China with foreign-born children." It was concluded that couples with foreign-born children above the permitted number for that couple would not be at risk of persecution.

29. Of course, this appellant, on her account, is an unmarried mother rather than a married woman with more than the permitted number of children. Nevertheless. It appears from AX that her child would be regarded as an unauthorised birth. Putting aside the fact that the appellant has not established what her circumstances on return would be in terms of whether she would be with her partner or what her wider family circumstances would be, the current country guidance does not establish that the appellant or her daughter would be subject to treatment amounting to persecution (or Article 3 ill-treatment) on return.

30. So far as Article 8 is concerned, I accept that in the time the appellant has been here she will have established a private life, although there is little evidence of the extent of it. The current evidence does not indicate that she has family life with her partner, although it is reasonable to conclude that she still has her daughter with her.

31. The decision to remove her would amount to an interference with her private life. On the reasonable assumption that her daughter would be returning with her, there would be no interference with her family life with her daughter.

32. The interference with her private life will have consequences of such gravity as potentially to engage the operation of Article 8, applying the second principle in Razgar [2004] UKHL 27. It is a decision that is nevertheless in accordance with the law and pursues a legitimate aim: the economic well being of the country expressed through the maintenance of an effective immigration control.

33. As to proportionality, I consider first the best interests of the appellant's daughter, that being a primary consideration. She is now aged five. There is no evidence as to her circumstances, in terms of education or relationships outside that with her mother. There is no evidence as to her relationship with her father. A child's best interests would usually be to live with both parents in a stable family environment. On the limited evidence before me, I am satisfied that the appellant's daughter's best interests are to remain with her mother, and that those best interests would not be compromised by the appellant and her being removed together. It has not been demonstrated that the child's best interests would be adversely affected in any way were she to return to China, whether because of her potentially being an "unauthorised" child or otherwise.

34. There is no other evidence before me which would indicate that the appellant's removal would amount to a disproportionate interference with her private life. There is no medical evidence in relation to her haemophilia and no evidence from the appellant as to how it affects her. She has not established that she would not have appropriate treatment for that condition on return.

35. She entered the UK illegally and has remained illegally. Although she has been here since August 2003, there is nothing in the evidence to indicate that her removal would be disproportionate.

36. In summary, I am not satisfied that the appellant has established that she has a well founded fear of persecution on return to China, or that there would be a breach of her or her daughter's human rights in any respect. I am equally not satisfied that the appellant is entitled to humanitarian protection.

***Decision***

37. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. I re-make the decision, dismissing the appeal on asylum, human rights and humanitarian protection grounds.

Upper Tribunal Judge Kopieczek

6/08/13