Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00438/2012

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 12 March 2013	**On 31 July 2013**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MING CHEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M H Rasoul instructed by Blavo & Co Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the People's Republic of China, from Fujian province, born on 5 May 1982 and now 29 years old. The First-tier Tribunal did not make an anonymity order and nothing in the materials before me indicates that I should make one.

2. The appellant appeals with permission against the determination of the First-tier Tribunal (First-tier Tribunal Judge Mathews and Ms J A Endersby, a non-legal member) dismissing his appeal against the decision of the Secretary of State to remove him as a foreign criminal pursuant to Section 32(5) of the UK Borders Act 2007. The respondent was not satisfied that the appellant fell within any of the exceptions to automatic deportation set out in Section 33 of that Act, and in particular she was not satisfied that he came within Exception 1 in s.33(2) on the basis of having relevant convention or Refugee Convention rights which would be breached by his removal.

Background

3. The appellant came to the United Kingdom on 8 September 2001, using a Japanese passport to which he was not entitled and the name of Li Hua. He was on his way to Canada on a flight from Malaga, allegedly to join an aunt who lived in Canada. He was given temporary admission when he asked to claim asylum. Although he was told to report to an Immigration Officer the next day, the appellant absconded.

4. On 3 April 2002, whilst still a minor, he was convicted of offences of dishonesty including the possession of a false instrument, and was sentenced to four months' imprisonment in a young offenders' institute.

5. In February 2011, following an arrest in November 2010, the appellant pleaded guilty to being involved in the production of a class B controlled drug, cannabis, and was sentenced to two years in prison. He did not appeal against either the conviction or the sentence. He had been taking part in the cultivation of cannabis on a large scale in a house modified for a sophisticated cannabis operation, with potential yields of between £12,000 and £23,000 from the drugs being cultivated.

6. During his sentence on 28 June 2012, he was notified of his liability to automatic deportation, and claimed asylum, having by this time been in the United Kingdom for almost eleven years.

First-tier Tribunal determination

7. The Refugee Convention basis relied upon for Exception 1 was the appellant's account of his flight from China after the forced purchase by local officials of a business owned by the his father. The appellant's father had, he said, been detained for four weeks without charge or due process, and the same had happened to his brother. An appeal to the governor of his home province was ineffectual. There was a further detention and intimidation until finally a friend of the appellant's father who worked for the police told him that false charges of murder and corruption were to be brought against him.

8. The appellant said that his father and the rest of his family fled to North America. The appellant was living away from home and left China separately for Canada, with the help of an agent arranged by his father.

9. The human rights element relied upon was the appellant's a relationship with Ms Xue Hua Lin and they have a daughter together, born while he was in custody. Ms Lin visited him with the child during his prison sentence. The appellant has been on bail since September 2012, which has afforded him an opportunity to get to know his daughter better. She is now about 18 months old.

The First-tier Tribunal determination

10. The First-tier Tribunal heard evidence from Ms Lin and from the appellant. Ms Lin said she had been the sole carer for their daughter since her birth. The appellant had been in prison and his claimed family in the United States had not offered any financial support. She wished that he could remain with them in the United Kingdom so that they could be a family. A statement purporting to be from the appellant's father in the United States was considered; it was brief and gave no details of his experiences in China. There was no evidence from the appellant's Canadian aunt, or of her existence, except in that letter.

11. The First-tier Tribunal considered that there was a general lack of consistency in the appellant's account, such that they found him to be 'a man lacking entirely in credibility…who frequently uses dishonesty and criminal actions to further his own ends'. The appellant's claim that he could bring himself within s.33(2)(b) by raising an asylum claim was rejected, along with the whole of his core account.

12. The Tribunal then considered under s.33(2)(a) whether the appellant could show the statutory exception for Convention rights under the ECHR, in particular Article 8 thereof. DNA evidence had been provided establishing that the appellant was indeed the father of Ms Lin's baby daughter. Ms Lin had not referred to the relationship during her own application for asylum or other leave to remain in the United Kingdom. Ms Lin had not disclosed the basis on which she had obtained indefinite leave to remain and she also had been convicted of dishonesty offences. They accepted that Ms Lin had taken the child to visit the appellant in prison, and that the appellant, Ms Lin and the child had private and family life together.

13. Article 8 was engaged, and the first four of the *Razgar* questions posed no difficulty. The appellant had submitted that Article 8 within the Rules was not applicable to him and that he could succeed, if at all, only under Article 8 outwith the Rules. That does not appear to have been contentious before the First-tier Tribunal. The appellant had seen his daughter only occasionally in prison; her mother had been her sole carer; and the appellant and Ms Lin had never lived together at the date of the First-tier Tribunal hearing. The Tribunal balanced the private and family life against the public interest, having regard to the seriousness of the appellant's offence and concluded that despite the possibility of the appellant's relationship with Ms Lin being enhanced on his release, the limited relationship existing between them and the child in September 2012 was not sufficient to make out the exception in s.33(2)(b).

14. The First-tier Tribunal concluded that deportation of the appellant was proportionate and dismissed the appeal.

Permission to Appeal

15. First-tier Judge McWilliam granted permission to appeal on the basis that the First-tier Tribunal had failed to give sufficient weight to family life and private life existing between the appellant, and his partner and daughter, both of whom are now British citizens. The appellant's case was that insufficient weight had been given to the best interests of the child, there was no assessment of the appellant's asylum claim, and she considered it arguable that the First-tier Tribunal had failed properly to apply *Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)* and *ZH Tanzania v SSHD [2011] UKSC 4*.

16. The judge considered that whilst it was open to the First-tier Tribunal to dismiss the deportation appeal despite the separation of the family it was incumbent upon them to give reasons why this was proportionate and necessary, which she considered an arguable error of law.

Respondent's r.24 Reply

17. The respondent replied under Rule 24 opposing the appeal and submitting that the First-tier Tribunal had directed itself appropriately. The notice continues:

> "3. The judge had regard to the very specific facts of the case in respect of the appellant and his daughter. In the light of those facts the conclusion that the welfare of the child was not such as to indicate a disproportionate interference did not result from the respondent's decision.
>
> 4. The judge was entitled to note that there was no apparent risk to the appellant's partner in China."

18. The respondent requested an oral hearing. That was the basis on which the appeal came before me.

Upper Tribunal hearing

19. At the beginning of the hearing, I was asked to renew bail on the same terms which I did. I was asked to, and did, receive additional oral evidence from the appellant. On this occasion, there was no oral evidence from Ms Lin. I heard oral submissions, and gave leave for further written submissions on country guidance relating to internal relocation within China.

Oral Evidence

20. The appellant adopted the evidence set out in a witness statement dated 1 August 2012; he confirmed that he had checked it with the assistance of a translator in Mandarin which is the language which he speaks. He now said that his real name was Li Hua, and that Ming Chen was an alias, a false name which he gave.

21. The appellant is not a married man. In his evidence, he accepted that he had told the Immigration Officer that he had a wife and child in China. He had done so because

he was very worried about being deported and the agent had advised him that this was the best way to avoid deportation.

22. The appellant's account was that his father was a successful businessman who had five seafood restaurants in three different cities: three in Fu Zhou City, the central city of Fujian Province and two others, one in Lianjiang and one in San Ming. The appellant managed one of the shops in Fu Zhou, while his father remained in the oldest of the shops in Lianjiang.

23. The attempted takeover of the family's restaurants occurred at the behest of officials in Lianjiang and criminal charges were laid against the family members. The appellant stated that the false charges had also been reported to the police station in Fu Zhou, the capital city. The appellant was not detained at that time: he was living in the shop in Fu Zhou and not at home, but his father and younger brother were detained.

24. In cross-examination, the appellant confirmed that the rest of his family had left China at the end of 2000. He said at first that he had not met them before they left to go to Korea and that he had not found out until an aunt told him, after the appellant arrived in Canada.

25. The appellant had been working in the restaurant in Fu Zhou employing almost twenty staff. The officials had taken it over when he went into hiding. He did not know who they were. He was only concerned with his own safety and he was very mobile and of no fixed abode so he had travelled to Shan Zi Province, Shanbei Province, Kungming in Yunnan Province and Guanzhou in Guangdong Province. No one had come to the restaurant to tell him to leave.

26. He said his father had managed to call him and tell him that they were going to flee and he had simply left the restaurant for the government people without telling the staff anything. He simply ran away. To travel to the four other areas that he had named he took buses and trains using money which was in the shop which he was managing and which he had taken. The appellant was neither charged nor arrested in any of the three or four provinces to which he travelled but his understanding was that the whole family, including the appellant himself, had been charged with criminal offences.

27. It was put to the appellant that previously his account had been that the charges were against his father alone: the appellant said that the charges had been laid first against his brother and father and later against the whole family. He thought that that was what he had said in his witness statement. When pressed, the appellant gave a variety of answers and eventually said that he had found out about the charges when he was already overseas from his maternal aunt in approximately February 2002, after the appellant arrived in the United Kingdom. She had told him that there were warrants around issued in 2000 for all the family. His aunt had told him that the warrant was everywhere where she lived and that she had seen it.

28. The appellant had three aunts, two still in China. He habitually phoned them on Chinese New Year each year, including in 2013, but apart from that, he seldom contacted them. His evidence was that his Chinese aunts were still telling him not to come back since the warrants were everywhere in the region, for everyone in the family, with all of their photographs.

29. The appellant was asked about copy documents which he had submitted , purporting to show that his parents had permanent residence in the United States. He could not say on what basis the family had obtained permanent residence because he said that when they got it in 2000 his father had thrown away all the documents only, retaining the green card. The names on the residence permits were not those which the appellant had given as his parents' names.

30. A letter was produced, purporting to be from the appellant's father, using the new name, and stating that the writer had left China in 2001. When asked why the letter mentioned 2001, rather than 2000, the appellant said that the later date was 'impossible', since his father's flight took place in the year 2000.

31. In answer to questions from me, the appellant explained that he had an aunt in, in Lianjiang Province, and another in Zhejiang Province in Wenzhlu City. It was the auntie in Wenzhlu who had told him about the warrants in Lianjiang; the Lianjiang aunt had telephoned the Wenzhlu aunt to give her the information.

32. The official who had caused his family all this trouble was now of a higher rank and therefore a longer reach within China. He did not know who was running the restaurants now; it was impossible for him to get the information. His aunts dared not ask in case it caused their families trouble.

33. There was no re-examination.

Submissions

34. In submissions, Ms Rasoul relied on her skeleton argument prepared for the First-tier Tribunal, and on the respondent's Country of Origin Information, although she accepted that there she had made no reference to any of the Tribunal's country guidance in relation to China. The appellant had made an illegal exit from China.

35. Ms Rasoul argued that the Tribunal had given insufficient weight to the British citizenship of the appellant's partner, by naturalisation in March 2011, and their child who was born after the grant of indefinite leave to remain and was therefore herself a British citizen at birth. The reason why indefinite leave was granted to the appellant's partner was not given in the letter of grant but she had made an asylum claim. The parties were not currently married but they had been co-habiting since the appellant had been released on bail in September 2012. There were no further children.

36. The future of both mother and child had been recognised by the respondent as being in the United Kingdom and the appellant's removal would result in a lengthy

severance of essential family ties. Ms Rasoul submitted that the best interests of the child were to stay with her mother in the United Kingdom; the child had been introduced to her father on prison visits while he was still detained and had now been living with him in a family unit for several months. Particular weight should be given to the fact that he would be barred from re-entering the United Kingdom for a further ten years at an essential stage of his daughter's life, leaving him with no family life or personal contact with her.

37. The panel had not assessed the substance of the appellant's asylum account. The appellant should not be criticised for having said on entry that his parents were still in China because the agent had told him to make that false statement. The appellant had produced copies of his father's green card in America which was strong evidence that the father had been granted refugee status in America although there was no formal confirmation that this had occurred. The appellant should not be criticised for any delay in claiming asylum since he was a minor when he came to the United Kingdom. He had made two asylum applications both of which had been rejected by the Secretary of State.

38. Given that there were false criminal charges against the family in their home area, the persecutory risk should be regarded as existing throughout China and therefore the question of internal flight was not relevant. The appellant had given a credible account of difficulties faced by his family and the veracity of his evidence should be regarded as confirmed by the asylum grant to his family in the United States. He had explained the discrepancies between his initial account and his new account in his witness statement. Internal flight was not an option because there would be checks on return, particularly as he had made an illegal exit. She would make written submissions on country guidance after the hearing.

39. Ms Rasoul accepted that the charge against the appellant was a serious one but submitted that the appellant had brought himself within the s.33 exception; there was extensive case law indicating that the denial of access to one parent was always disproportionate and in this context she relied on *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, and *Harrison (Jamaica) and AB (Morocco) v Secretary of State for the Home Department* [2012] EWCA Civ 1736.

40. Ms Lin had applied for refugee status in 2005 and the couple had met in 2006 so it was not surprising that he had not been mentioned in her application. The appellant's claim for leave to remain outside the Rules had been made in 2011. Ms Rasoul asked me to allow the appeal.

41. In her written submission on country guidance, Ms Rasoul stated that *AX (family planning scheme) China CG* [2012] UKUT 97 (IAC) was of limited relevance since it dealt with internal relocation in the context of a breach of the family planning policy not a criminal offence which had received the significant internal publicity claimed for this appellant's family situation. She relied on the summary of *AX (China)* in the respondent's OGN, in particular paragraph 14 of the italic words in that case:

"***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."

42. If there really were criminal charges against the appellant and his family members, the risk would exist throughout China, for which she relied upon paragraphs 6.01-6.03, 8.05, 11.01-11.07, 17.01-17.03, and 34.03-34.12 of the respondent's current Country of Origin Report for China. If the appellant's account were to be accepted there would be no feasible internal relocation for him.

43. For the Secretary of State, Mrs Pettersen indicated that bail was not opposed and the appellant had been complying with his bail conditions. The credibility probabilities had been exacerbated rather than resolved by the appellant's oral evidence, which was embellished above and beyond the evidence in his witness statement and produced yet further contradictions in his account.

44. Taken at its highest, the asylum claim was that the appellant had problems with local officials in China in the late 1990s and there was unlikely to be a real risk even in the home area, given the lapse of time. There was no credible evidence that the authorities in the home area had any desire to pursue any charges against the appellant or his family or indeed that such charges actually existed. He could return to any other large city in China without difficulty and even in his home area it was unlikely that there was any continuing interest since the officials have now obtained the businesses that they sought if his account were to be believed and would not want to bring their corruption to anyone's attention.

45. The appellant, as a person with a serious criminal conviction in the United Kingdom, would not now be permitted to rejoin his parents in the United States and would be excluded from the United Kingdom for ten years. The child was now 1½ years old and would be unable to spend time with her father until she was almost 12 years old.

46. The best interests of the child were to remain with its mother; given that the child was very young and the mother was the primary carer, the deportation of the appellant would not adversely affect the child's best interests. It was open to the family to decide whether to live in China, although she accepted that the appellant's partner and child could not be expected to do so, given that the Secretary of State had accepted that their future lay in the United Kingdom.

47. The point of the *Harrison* case was that this appellant's partner and child could not be expelled from the United Kingdom because the child was entitled to exercise her EU citizenship as indeed was her mother. However the removal of the appellant was proportionate. He had a poor immigration history and had committed a serious offence. When the appellant's partner made her application for indefinite leave she had failed to mention the relationship. The balance should be regarded as tilting towards removal rather than allowing him to develop the relationship further and she invited me to dismiss the appeal. The respondent did not make any additional submissions on country guidance and internal relocation.

48. I reserved my decision which I now give.

Discussion

49. The grounds of appeal, and the permission given, raise three points:

    (a) Whether the First-tier Tribunal assessed properly the asylum claim made by the appellant;

    (b) Whether the First-tier Tribunal gave sufficient weight to family life and private life existing between the appellant, and his partner and daughter, both of whom are now British citizens; and if so,

    (c) Whether they gave sufficient reasons why deportation was nevertheless proportionate and necessary.

50. I remind myself that the appellant had committed a serious criminal offence; he was involved in cannabis farming on a very large scale and received a two-year prison sentence. He had not pursued an opportunity to claim asylum in 2001. He had an earlier offence for which he received four months in a young offenders' institute. There is no doubt that he comes within the automatic deportation provisions in section 32 of the UK Borders Act 2007. Section 32(4) says that, save as set out in the exemptions in s.33, for the purposes of s.3(5)(a) of the Immigration Act 1971, deportation of a foreign criminal is conducive to the public good.

51. The question is whether he can bring himself within the s.33 exceptions to such automatic deportation. The relevant exception is Exception 1, set out at s.33(2):

> **"33(2) Exception 1** is where removal of the foreign criminal in pursuance of the deportation order would breach—
> (a) a person's Convention rights, or
> (b) the United Kingdom's obligations under the Refugee Convention."

52. Dealing first with the Refugee Convention, I note that the First-tier Tribunal found the appellant's evidence to be wholly lacking in credibility. His evidence before me did nothing to improve his credibility. I do not accept that the Tribunal failed to deal adequately with his asylum argument, since they stated that they did not believe any of his account. Paragraphs 28-32 are a sufficient analysis of the asylum element of his Exception 1 argument, given his low credibility.

53. Even allowing for the lower standard of proof required for the international protection Conventions, and even (which is not the case) had I found the core claim to be credible, I would have considered that the appellant had an internal flight alternative. On his own account, he lived in at least four provinces before coming to the United Kingdom, and China is an enormous country with very many people living away from home. There is no credible evidence of continuing interest in the appellant or in his family; the documents from America are poor photocopies of documents for which the underlying reason for grant is not available, the persons in question do not have the same names as the appellant, and the date of their leaving China is a year later than he claims that his family left. I am unable to place any weight at all on those documents. I reject the appellant's claim to the s.33(2)(b) exception on Refugee Convention grounds.

54. I turn therefore to s.33(2)(a) and the ECHR element of the appellant's Exception 1 argument. I must consider the weight to be given to the appellant's relationship with his partner and her child and to the best interests of that child. I note that before his prison sentence in 2011, the appellant was not in a co-habiting relationship with his partner, although it is established that he is the parent of her 18-month old daughter. His partner and her daughter are British citizens and are entitled to remain in the United Kingdom. The child is an EU citizen and has the right to be brought up within the EU. Following *ZH (Tanzania),* she also has the right to be the full benefit of her United Kingdom citizenship, by growing up in the United Kingdom. She is very young and her links with the appellant are confined in practice to a few prison visits and about six months' co-habitation under the age of two.

55. The appellant did not cohabit with Ms Lin until he came out of prison. I am not satisfied that the links which exist between the appellant and his daughter are so strong that they ought to outweigh the public interest in deporting to his country of origin a person who was involved with a cannabis farm involving large scale production of cannabis and who received a two year prison sentence in connection with that involvement. It is unfortunate that in consequence he will be unable to visit his daughter in the United Kingdom for the next ten years but that is the consequence of his actions, but it remains open to Ms Lin to arrange visits to him in China, or perhaps elsewhere, and the relationship can be maintained by modern means of communication.

56. I had reached the above conclusions before the publication of the judgment of the Court of Appeal in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550. The observations of Lord Justice Laws at paragraphs 53-55 and of Mr Justice Mann at paragraph 62 of that decision fortify me in my approach to the proportionality question in this appeal.

57. There is no material error of law in the determination of the First-tier Tribunal and I decline to set it aside.

Conclusions

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

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed Date

Upper Tribunal Judge Gleeson