



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

Appeal Number: AA/10775/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 23 April 2014**

**Determination
promulgated
on 25 April 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KONG QING WU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms L Kerr, of Katani & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

- 1) The appellant is a citizen of China, born on 26 February 1987. He appeals against the determination by First-tier Tribunal Judge Hutchinson, promulgated on 23 January 2014, dismissing his appeal on all available grounds.
- 2) The appellant's first ground of appeal to the Upper Tribunal relates to paragraph 44 of the determination, where the judge says there was no adequate evidence to suggest that the appellant's wife and child could not voluntarily return to China with him. This is said to be in direct contradiction of the witness statement by the appellant's wife which was before the judge, saying that she could not return to China because of her own

problems and fears in respect of which a hearing had been fixed for 3 days after the hearing in his case, but had been adjourned for health reasons.

- 3) The second ground of appeal complains of the finding at paragraph 42 that the child's best interests would be served by remaining with her mother and returning to China. The ground says that the judge failed to consider the evidence that the child and mother had a separate case from the appellant and that to return the appellant as a father without the rest of the family unit would breach Article 8 of the ECHR. While it was accepted that it was in the child's interests to remain with the mother, there had been a failure to consider that they had an ongoing separate appeal.
- 4) On 12 February 2014 a Judge of the First-tier Tribunal granted permission to appeal to the Upper Tribunal, on the view that the judge had not sufficiently engaged with Article 8 of the ECHR, outside the Rules.
- 5) In a Rule 24 response dated 25 February 2014 the SSHD submits:

... the grounds do no more than to disagree with the findings of the judge and do not disclose any errors ... the judge did give anxious scrutiny to the Article 8 evidence. At paragraph 40 notwithstanding the fact that family and private life was not substantively argued, the judge gave a detailed consideration including the miscarriage suffered by the appellant's wife, her discharge date and her pending appeal hearing. After careful consideration ... the judge arrived at a conclusion open to [her].
- 6) Ms Kerr said that an Article 8 case was put to the First-tier Tribunal, and that it was inadequately resolved at paragraphs 41 and 42 of the determination. The judge was wrong in saying that there was no evidence why the appellant's wife might not return to China, because it was in her statement. The judge had erred materially in failing to deal with Article 8. A further decision should be reached, based on the evidence before the First-tier Tribunal, or, preferably, the case should be remitted to the First-tier Tribunal for fresh hearing before another judge. The appellant's wife has recovered, and could give evidence.
- 7) In response to my enquiries, Ms Kerr said that her firm also represented the appellant's wife, and that her appeal was dismissed by the First-tier Tribunal. The First-tier Tribunal refused her application for permission to appeal, but she has made a further application for permission to the Upper Tribunal, which is pending. No request had been made to the First-tier Tribunal for the appeals of husband and wife to be heard together, because their asylum claims were based on different circumstances.
- 8) Mr Mullen said that the judge had considered Article 8, going outside the Rules. At paragraphs 41 - 43 she took account of all factors made known to her, which was all she could be expected to do. A pending appeal by another family member was a fairly precarious basis on which to seek to remain under Article 8, and the situation was now even more precarious, her appeal having failed. She had presumably also relied upon Article 8. The outcome in this case could hardly have been otherwise, and if the matter

were to be revisited on the further circumstances now known, the case was significantly weaker, not stronger.

- 9) I reserved my determination.
- 10) If the appellant and his wife thought they had a good collective case as a family, they should have sought to advance it together, not separately. What the judge said in this case was that there was “no adequate evidence to suggest that the entire family cannot return to China as a family unit”. The scanty evidence in the appellant’s wife statement that she feared return could not properly lead to any other conclusion, and it is now confirmed by the outcome in her appeal.
- 11) The determination of the First-tier Tribunal, dismissing the appellant’s appeal, shall stand.

A handwritten signature in black ink, appearing to read "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial 'H'.

24 April 2014
Judge of the Upper Tribunal