



IAC-AH-CJ-V1

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

Appeal Numbers: AA/02292/2015
AA/02296/2015
AA/02300/2015
AA/02303/2015

THE IMMIGRATION ACTS

Heard at Field House
On 21 December 2015

Decision & Reasons Promulgated
On 11 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

**X P (FIRST APPELLANT)
C K (SECOND APPELLANT)
C K (THIRD APPELLANT)
H K (FOURTH APPELLANT)
(ANONYMITY ORDER MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Eaton (Counsel instructed by BHT Immigration Legal Services)

For the Respondent: Ms S Sreeraman (Home Office Presenting Officer)

DECISION AND REASONS

1. This matter comes before me as an error of law hearing to consider whether or not there is a material error of law in the decision made by the First-tier Tribunal (Judge Malins) ("FtT") who in a decision and reasons promulgated on 7 August 2015 dismissed the appellants' appeals against the Secretary of State's decision to refuse international protection.
2. The appellants are all citizens of China. The first appellant and second appellant are husband and wife and the third and fourth appellants are their children. The basis of the appellants' claim was that in having three children the one-child policy was contravened with the result that a fine of 200,000 RMB was imposed on the first appellant and that she was liable to forcible sterilisation as a resident of the Jiangxi Province, and furthermore that she was subjected to a serious sexual assault by a man in authority between August 2013 and April 2014.

Summary of relevant findings made by the FtT

3. The FtT heard evidence from five witnesses including the first and second appellants, the first appellant's mother-in-law and sister and the second appellant's aunt. The FtT referred to the COIR dated 12 October 2012 section on family planning (one-child policy) and to the country guidance case of **AX (Family planning scheme) China CG [2012] UKUT 00097**.
4. The FtT found that there had never been any attempts on the part of the authorities in China to forcibly sterilise the appellant [11E].
5. That before the appellant left China to come to the UK she could have paid the outstanding amount of the fine owed in the sum of 176,808 RMB [11J]. The FtT rejected as untrue the appellant's numerous assertions that she had to leave China because she was unable to pay the fine imposed by the family planning authorities [11K].
6. The FtT found that the appellants' firstborn child had been legally adopted by her sister-in-law and as from December 2012 was a citizen of Sweden.
7. The FtT found that the firstborn child was no longer a citizen of China and that the appellant's two Chinese children were both registered on the family rural hukou.
8. The FtT found that the appellant was able to move to the city away from the rural area where she lived for one year and relied on **AX** which confirmed that pregnancy tests could be conducted from a long distance.
9. The FtT found at [11Q]:

“Crucially the second appellant told me that as a couple he and his wife do not wish to have more children. That being the case, I find the appellant's refusal to undertake sterilisation in company with not only millions of fellow Chinese, but millions of women in the UK, to be not credible: it is day surgery with benefits. I reject the

appellant's evidence on this predicated on her mother's claimed experience as to which, there is in any event, no evidence."

10. The FtT found that there was no real risk of forced sterilisation to the appellant based on the objective evidence and that breaches of family planning regulations were a matter of civil law not criminal law.
11. As to the allegation of rape, the FtT found that the sexual relationship was consensual; the result of mental pressure. The FtT rejected the appellant's claim to have been raped by an official in authority in its entirety.
12. At [12] the FtT specifically considered the issue of the first appellant's credibility and found that she had given dishonest evidence. The FtT went on to conclude that the appellant had taken a conscious decision to have a third pregnancy motivated by the desire to have a son and then she had made cynical arrangements to divest herself of the first daughter by sending her to Sweden and thereafter engaged in a plan to manipulate the Immigration Regulations. At [12.2] the FtT found that the evidence of the remaining four witnesses' was less crucial and that they were in collusion with the appellant's plan and evidence.
13. Having considered and made findings as to credibility the FtT at [14] referred to the expert evidence of Stephanie Gordon. It found that the expert evidence was not reliable because it contradicted the background evidence in the COIR. It rejected the expert evidence because the expert had never met with the appellant. The FtT placed no weight on a psychologist's report because it took the view that the report was predicated on dishonest evidence.

Grounds for Permission to Appeal

14. **Ground 1** - the FtT failed to consider material evidence produced by the appellants in support of their appeals including:
 - (1) a letter from the village committee setting out the fine to be paid and that the appellant must subject herself to forced sterilisation by 2014;
 - (2) testimonials from three women from the first appellant's province who had to undergo forced sterilisation;
 - (3) a testimonial from a former member of the family planning office in the appellants' province confirming women were forcibly arrested and sterilised;
 - (4) the family's hukou document.

In addition there was no reference made to the written or oral evidence provided by the second appellant's mother, the aunt and the sister.
15. **Ground 2** - the FtT reached a perverse conclusion as to why the first appellant was unwilling to go forced sterilisation in finding that there was no objective risk of forced sterilisation. This is in contradiction to the conclusions reached in **AX** and

established in the background material. In **AX** it was concluded that forced sterilisation amounted to persecutory treatment and that forced sterilisation could occur in areas where there had been a crackdown on unauthorised pregnancies. The Reasons for Refusal Letter (paragraph 40) referred to forced sterilisation reported in the Jiangxi Province. The FtT erred in finding that there was no specific reference to forced sterilisation in Jiangxi Province, the appellants' home province, which in fact was specifically referred to in the COIR September 2013 Annex H. The FtT erred in failing to consider the background material including the country expert report of Stephanie Gordon and further objective evidence in the appellants' bundle as regards the risk of forced sterilisation.

16. **Ground 3** – the FtT's finding that the appellant's forced sexual relationship with the head of the family planning committee, was perverse. The FtT reasoned that the appellant did not become pregnant and secondly that the relationship followed from mental pressure. The appellant's account was corroborated in a report by Dr Lissa Morrish who made a diagnosis of post-traumatic stress disorder. The FtT erred in reaching findings of fact made in isolation of the medical evidence and further in giving no weight to the medical evidence itself because it found that the report was premised on dishonest evidence.
17. **Ground 4** – the FtT failed to consider the expert evidence from Stephanie Gordon as to material aspects of the appellant's claim, made findings on credibility without reference to the report and in particular the expert's corroboration of the documentary evidence relied on.
18. **Ground 5** – the FtT made clear errors of fact by failing to consider relevant oral evidence regarding the appellant's credibility in particular as regards her ability to pay off the fine. The FtT wrongly found that the appellants had funds of £21,014 available. The FtT miscalculated the amounts held in the applicant's bank accounts and wrongly took into account a deposit of £15,000 when in fact it was money belonging to the appellant's husband's aunt.
19. Further factual errors were made with reference to an interview with the appellant in which she was asked whether it was possible to remove the child from the hukou, in response to which her answer was "I don't know – I have never made enquiries about this".
20. The FtT made no reference to the appellants' evidence that they had lived on the run between 2008 and 2012 and that it was only after it became untenable to continue without registering their son on the hukou that they returned to their home village.

Permission to Appeal

21. First-tier Tribunal Judge Shimmin granted permission to appeal. It was arguable that the FtT erred in finding that it was not credible that the appellant was not prepared to undergo sterilisation and in failing to follow the country guidance case of **AX**. It

was also arguable that the FtT erred in making perverse findings in connection to the appellant's rape and the supportive psychological evidence. Thirdly, it was considered an arguable error of law that the FtT failed to consider or adequately consider the expert evidence.

Rule 24 Response

22. In a response dated 8 September 2015 the respondent opposed the appeal and submitted that the FtT had appropriately directed itself, had sufficient regard to the country guidance in **AX** and arrived at adverse findings in light of the same [13]. It further submitted that the FtT at [11] made detailed and lengthy adverse credibility findings which were sustainable. The expert evidence was considered at [14] and the FtT was entitled to find the report to be of little assistance for the reasons given.
23. It was submitted that the grounds had no merit and amounted to a disagreement with the outcome.

Error of Law Hearing

24. At the start of the hearing Mr Eaton raised a preliminary issue. He had been handed a fax of a letter dated 22 June 2015 from the respondent stating:

“Please find attached additional objective evidence documents requested by the Immigration Judge post-hearing.

A-C - COI response dated 25 November 13 - registration and documentation

D-E - COI response dated 20 February 14 - PTSD.”

Copies of those documents were attached to the letter. Mr Eaton applied to amend his grounds of appeal by adding a further ground that the FtT erred by soliciting additional evidence post-hearing and further by providing no opportunity for the appellant to respond to additional evidence. The action of the FtT indicated a suggestion of bias. This was a **Robinson** obvious error of law point.

25. Ms Sreeraman drew attention to a file note dated 15 June 2005 stating “IJ asked for further objective evidence relating to free movement around China. (HOPO to send China COIS within the next few days)”. She confirmed that there was no information as to whether the FtT's request had been made in the presence of Mr Eaton or after the hearing. Mr Eaton confirmed that he was the appellants representative at the First -tier hearing and that he had no recollection or note of further objective evidence being requested by the FtT and in any event he had not been afforded the opportunity to respond to the same which was clearly unfair.

Decision Re Preliminary Issue

26. I granted leave for the grounds of appeal to be amended to include an additional ground that the FtT erred by seeking to obtain further objective evidence post

hearing and without an opportunity for either party to respond. It was not clear whether the FtT had in fact taken into account such evidence in reaching its decision.

Main Submissions

27. Mr Eaton amplified the arguments set out in the five grounds of appeal. As to ground 1 he submitted that the FtT failed to take into account the four particular pieces of written evidence that were relevant to the credibility of the appellants' claim and there had been no reference or consideration of that evidence at all. Furthermore no reference was made to any of the written or oral evidence given on behalf of the appellants.
28. The second ground contended that the FtT failed to engage properly with the whole issue of forced sterilisation which was a persecutory act and there was ample background evidence to support the same. That evidence established that the FtT was entirely wrong in concluding that there was no objective evidence to contradict the statements made [92].
29. Ground 3 argued that the Tribunal had reached a perverse conclusion regarding the allegation of rape without any reference to the psychologist's report. It was clear that the Tribunal fundamentally erred by deciding credibility in advance of looking at the expert's report.
30. Ground 4 contended that the FtT failed to take into account the country expert report at all and the reasons given were not sustainable.
31. Ground 5 related to findings of fact that were incorrect. Mr Eaton outlined the same.
32. Ms Sreeraman relied on the Rule 24 response. She argued that any errors were not material in light of the fact that internal flight was a viable alternative. Even if the appellant had been found credible she would still have been able to pursue internal relocation. Ms Sreeraman acknowledged that the FtT had not in fact made any finding as regards internal flight alternative but argued that the outcome would have been the same.
33. Mr Eaton responded by relying on the appellants' evidence that they had been on the run for a period of time, had been forced back to their home area because the family were only registered on the Jiangxi hukou and they had been forced to return because the children in particular did not have access to any services including education.
34. At the end of the hearing I raised with both representatives the possible future disposal of the appeal in the event of my finding an error of law. Both representatives agreed that the matter would need to be reheard in its entirety.

Discussion and Decision

35. I have considered the submissions made by Mr Eaton and the response by the Secretary of State set out in the Rule 24 response. I am satisfied that the appellant has made out all of the grounds of appeal. In essence I am satisfied that the FtT erred materially in assessing the credibility of the appellant's account in isolation of the additional evidence that was before the FtT which included documentary evidence, oral evidence from witnesses and background and expert evidence produced in the appellants' bundle in particular that in relation to the risk of forced sterilisation in the Jiangxi Province. I take the view that the FtT's finding that it was not credible that the appellant was not prepared to undergo the required forced sterilisation was in my view indeed perverse and in light of the fact that in AX the Upper Tribunal held forced sterilisation amounted to persecutory treatment. The fact that the first and second appellants did not wish to have anymore children was not in my view determinative of the issue of forced sterilisation. I accepted the submission made by Mr Eaton that the FtT's reference to forced sterilisation as being "day surgery with benefits" showed a fundamental failure by the FtT to engage objectively with the issue of forced sterilisation. So too was the FtT's request to the respondent for further background material post hearing capable of amounting an indicator of possible bias and thus unfairness to the appellant.
36. Furthermore it is clear from the contents and indeed the layout of the decision and reasons that the FtT approached the issue of credibility in isolation of the two expert reports and other evidence of relevance. The role of the FtT is to consider the appellants' claim in the round in light of objective and subjective evidence including any expert report and thereafter to reach an informed decision as to credibility having regard to whether the claim is both internally and externally consistent. The FtT found the appellant to have been dishonest and as a consequence placed no weight on the expert reports of Dr Morrish and Stephanie Gordon. This approach amounts to a clear and material error of law. Finally I am satisfied that ground 5 is made out and that there clear errors of fact (as detailed above) made by the FtT that have impacted on the credibility findings.
37. As regards the issue of internal flight I am of the view that it would be unfair to the appellant for this issue to be raised and considered in isolation at this stage, particularly given that the FtT failed to specifically make findings and or determine this issue. The appellant's evidence was that the family went on the run for a period of years is material to relocation and is a matter that ought to be properly and fully ventilated before the Tribunal.
38. At the end of the hearing I found that there were material errors of law in the decision and accordingly I set it aside. The nature of the errors, which focused on the FtT's credibility findings, were such that none of the findings of fact could be preserved.

Notice of Decision

39. The decision and reasons discloses material errors of law and is set aside.
40. The appeal is remitted to Hatton Cross for a hearing de novo (not before First-tier Tribunal Judge Malins). A date is to be fixed with a time estimate of three hours and four witnesses are to be called and an interpreter in the Mandarin language.

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

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

Signed

Date 7.1.2016

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

No fee award made.

Signed

Date 7.1.2016

Deputy Upper Tribunal Judge G A Black