Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02908/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 2 November 2015	**On 23 February 2016**

Before

UPPER TRIBUNAL JUDGES DEANS AND MACLEMAN

Between

MISS PING LIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Forrest, Advocate instructed by Katani & Co
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1) This is an appeal against a decision by Judge of the First-tier Tribunal Mozolowski dismissing an appeal on asylum and human rights grounds.

2) The appellant was born in June 1992 and is a national of China. She came to the UK in 2009 as a student. Her leave was extended until October 2011 but she has been without leave since then. She entered into a relationship early in 2013 which lasted for about a year. As a result of this relationship the appellant gave birth to a child in November 2014.

3) In August 2014 the appellant claimed asylum and this claim was refused by the respondent. The appellant appealed against the refusal on asylum and human rights grounds.

4) The basis of the appellant's asylum claim was that she was at risk in China for attending a "house church" considered by the authorities to be part of a sect referred to as Hu Han Pai. She also claimed to be at risk as a result of having had a child outwith marriage.

5) The Judge of the First-tier Tribunal did not find credible the appellant's claim to have belonged to an unregistered house church. This finding is not challenged.

6) The judge considered the appellant's circumstances as a single mother, having regard to the family planning regime in China and the country guideline case of AX (family planning scheme) China CG [2012] UKUT 00097. At paragraph 36 of the decision the judge noted that in terms of paragraph 186 of AX the consequences of any unauthorised birth were social and financial but the attitude taken by provincial birth control authorities to parents returning with foreign born children remained unclear. Parents returning with a foreign born child were expected to produce a birth certificate and to pay a social compensation payment, or "social upbringing charge" but in general the rate of the payment, even where it was imposed, was not likely to be beyond the means of an appellant who had been living abroad for some years. In general Chinese nationals with foreign born children would not be at real risk of persecution on return to China.

7) The judge then found, at paragraph 43, that even if the appellant encountered difficulties in her local area in Fujian, she could relocate to another part of China and this would not be unduly harsh. At paragraph 44 the judge found that on return the appellant would be able to pay the social compensation fee. The appellant might not qualify for free birth control, medical treatment and education for the child but medical treatment and education for the child would be available on payment. There were many Chinese parents who did not qualify for free medical treatment or education.

8) At paragraph 46 the judge accepted that the appellant and her child might be discriminated against because initially the child would be unregistered if they were to move to a different province. This could be resolved on payment of a financial sanction. The level of discrimination would not be such as to preach Article 3, neither would the financial sanction. The law in China prohibited discrimination against children born outside marriage.

9) Permission to appeal was sought on the principal ground that the judge had not properly considered the best interests of the child as an integral part of the Article 8 balancing exercise. The Supreme Court in Zoumbas [2013] UKSC74 had said that when considering the best interests of the child it was important to ask the right questions in an orderly manner. It was

stated in JO (section 55 duty) Nigeria [2014] UKUT 00517 that decision makers should be properly and adequately informed about the interests of the child. There was no indication of this in the decision of the Judge of the First-tier Tribunal.

10) Permission to appeal was refused by First-tier Tribunal but was granted by the Upper Tribunal.

Submissions

11) At the hearing before us Mr Forrest submitted that the Judge of the First-tier Tribunal had given insufficient consideration to the best interests of the child when making a decision under Article 8. He relied upon the decision in JO, in which it was said that a decision maker must be properly informed. There might not be a duty to look for facts but the exercise was a fact sensitive one.

12) Mr Forrest drew our attention to evidence in the Home Office bundle. He pointed out that at her screening interview (C9, at paragraph 4.2) the appellant was not recorded as having referred to difficulties arising as a result of having had a child. Following the interview, however, on 25 August 2014, the appellant's solicitors wrote to the Home Office seeking to amend this answer to include fears expressed by the appellant on behalf of her Christian beliefs, and as a result of breaking family regulations.

13) At her asylum interview (E7, Q16) the appellant confirmed that she was not married. At Q28 she stated that according to Chinese law she had to be married before having children. She did not dare go back because she already had a child and she was worried that they would do "something really bad" to the child in China. Reference was also made to the appellant's response to Q141 where she said that she wanted to protect her child and give him a better future.

14) Mr Forrest submitted that in the respondent's reasons for refusal letter of 2 February 2015 no specific consideration was given to the concerns expressed by the appellant in respect of her child. This was notwithstanding that a decision maker should be properly informed. Information supplied by the appellant was ignored. In terms of JO there was a duty to have regard to guidance issued by the Secretary of State. There was evidence before the judge at pages 54-57 of the appellant's bundle relating to the treatment of unregistered children born outside the Chinese family planning policy. Such children were treated poorly. This evidence should have been considered by the judge. The judge should have carried out a careful examination of all the relevant facts. This judge had carried out no examination at all. The appeal should be allowed and remitted to the First-tier Tribunal.

15) For the respondent, Mrs O'Brien submitted that it was difficult to know how the best interests of the child were put forward before the First-tier Tribunal. It appeared from paragraph 5 of the decision that no argument

under Article 8 was advanced on behalf of the appellant. The only issue before the judge was whether the appellant's fears under the family planning policy were made out. Mrs O'Brien continued that it was not clear whether the criticisms made by Mr Forrest were of the Secretary of State or of the Judge of the First-tier Tribunal. The expression of fear on behalf of the child was different from providing information about that child. There was suitable consideration under section 55 of the Borders, Citizenship and Immigration Act 2009 in the respondent's decision letter.

16) Mrs O'Brien continued by saying that in her decision the Judge of the First-tier Tribunal accepted that there might be discrimination against the appellant and her child and a social compensation fee would have to be paid. The relevant facts were set out by the judge at paragraph 44. These facts were within the focus of the best interests of the child. The judge compared free education and health care in the UK with the arrangements in China for which the appellant would have to pay. The judge clearly took account of the best interests of the child. If the judge's consideration was lacking, however, it was not clear on what basis the appeal might be allowed. There was no consideration affecting this child such as disability, or having integrated into the education system. The child was very young and it was difficult to see how consideration of the best interests of the child would lead to a different outcome.

17) In response, Mr Forrest referred to paragraph 44 of the decision in which the circumstances of the child were mentioned but not in terms of the child's best interests, only in terms of the effect on the child of the family planning policy and other matters. The judge had observed at paragraph 6 of the decision that section 55 of the 2009 Act had to be taken into account but the way in which this was done was not apparent.

Discussion

18) In making our decision we note that at the date of the hearing before the First-tier Tribunal, 31 March 2015, the appellant's child was just over 4 months old. There appeared to be no significant medical circumstances relating to the child. It was the intention of the Secretary of State to remove the mother and child together. The appellant appeared to have lost contact with the child's father, who was himself a Chinese asylum seeker.

19) Taking these matters into account, we have to ask ourselves what considerations there might have been in relation to the best interests of the child which the Judge of the First-tier Tribunal left out of account. As was pointed out before us, at paragraph 5 of her decision the judge stated that the appellant was not expressly arguing a case under Article 8. Nevertheless at paragraph 6 the judge recorded that it was argued that consideration must be given under section 55 of the 2009 Act to the need to have regard to safeguard and promote the welfare of children who are in the UK. This was borne in mind throughout the decision.

20) The only significant factor brought to the attention of the judge with regard to the welfare of the child was how the child might be affected on return to China as a consequence of his birth in a foreign country without authorisation under the Chinese family planning scheme. The judge, at paragraph 36 of the decision, referred to the guidance at paragraph 186 of AX in relation to this. The terms in which she did so have already been summarised above, at paragraph 6. In the following paragraph of the First-tier decision, paragraph 37, the judge observed, in terms of AX, that hundreds of thousands of unauthorised children are born every year and family planning officials are required to register them once the relevant penalty has been paid. Education and medical treatment were available but were no longer free.

21) As already pointed out, at paragraph 44 of the decision the judge found that on return the appellant would be able to make arrangements to pay the social compensation fee. The judge then went on to say:

> "Although the appellant and family may or may not qualify for free birth control, medical treatment and education for the appellant's child, medical treatment and education for the child is available, albeit at a price and there are many Chinese parents who do not qualify for such free medical treatment or education. The child would not therefore be denied education or medical treatment. The child would have the opportunity to learn about the appellant's family and deepen his knowledge of his heritage. I do not find that a claim under the Refugee Convention or for humanitarian protection can be made out on consideration of the above."

22) The judge then stated, at paragraph 46:

> "I note that it may well be that the appellant and her child may be discriminated against because initially they would be unregistered if they moved to a different province. However, this can be resolved on payment of financial sanctions. I do not consider that the level of discrimination showed would be such to breach the appellant's Article 3 rights and the case of AX does not consider that the financial sanctions would be such as to breach their Article 3 rights either. The Chinese family planning regulations do not include the concept of an illegal child or unauthorised child and the law prohibits discrimination against children born outside marriage. However, I accept that children from pregnancies outwith the family planning regulations may not be registered or treated equally until their parents have paid the financial sanctions imposed."

23) We acknowledge entirely the submissions made by Mr Forrest in respect of JO. In particular, it is clear that a duty is imposed by section 55 of the 2009 Act requiring the decision maker to be properly informed of the position of a child affected by the discharge of an immigration function. The decision maker must conduct a careful examination of all relevant information and factors. What we have difficulty in ascertaining is what information about the child the Judge of the First-tier Tribunal should have had which she did not have and what relevant information or factors she left out of account. On the basis of the evidence before the First-tier Tribunal there does not appear to be any information about the child's position which the judge required to know and which she did not know and

there do not appear to be any relevant factors which the judge did not take into account.

24) Part of Mr Forrest's argument was that the judge did not adequately direct herself as to the proper approach in terms of Section 55. Nevertheless, the judge did refer to this provision at paragraph 6 of the decision and stated that it would be borne in mind throughout the rest of the decision. Looking at paragraphs 44 and 46 of the decision it does indeed seem that the judge did bear in mind the duty under section 55 in reaching her conclusions.

25) The grounds for permission to appeal refer to the case of Zoumbas but the best interests of the child are a primary, rather than a paramount consideration. Nowhere in Zoumbas is there authority for the proposition that a child who is not either a British or a European citizen would be entitled to remain in the UK for the purpose of obtaining the benefits of free medical treatment and free education. Indeed, observations to the contrary are made in EV (Philippines) [2014] EWCA Civ 874 in respect of education, and in GS (India) [2015] EWCA Civ 40 in respect of medical treatment.

26) The conclusion we reach is that the Judge of the First-tier Tribunal adequately and properly considered all the relevant factors in relation to the child as well as to the appellant. The judge had regard to relevant country guideline cases, particularly the case of AX, and reached a valid and sustainable decision without making any error of law.

Conclusions

27) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

28) We do not set aside the decision.

Anonymity

29) The First-tier Tribunal did not make an order for anonymity. We have not been asked to make such an order and we see no reason of substance for doing so.

Signed Date

Upper Tribunal Judge Deans