**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/05024/2015

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Decision Promulgated** |
|---|---|
| **on 20 May 2016** | **8 July 2016** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**JL (China)**
**(Anonymity order in force)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Mair instructed by Chung and Co Solicitors
For the Respondent: Mr McVeety Senior Home Office Presenting

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge McGarr promulgated on 16 January 2015 in which the Judge dismissed the appellant's appeal against the respondents refusal of her application for leave to remain, dated 10 March 2015. The appellant had sought leave to remain as a refugee and on human rights grounds.

2. Permission to appeal to the Upper Tribunal was initially refused but granted on a renewed application, in limited terms, that it was arguable that the Judge erred in failing to consider paragraph 267ADE(1)(vi).
3. The Judge sets out his findings and reasons from paragraph 40 of the decision under challenge. It is noted in paragraph 41 that the Judge found the appellant and her witness to be dishonest in aspects of their evidence. It was found the appellant and her witness are not father and daughter or that the appellant is at risk of harm if returned to China, due to her connection with her witness. [41(a)].
4. The Judge sets out the reasons for dismissing the protection claim at [41(a)-(j)]. In relation to the situation on return, this is considered at [42] but it found the appellant had not proved an entitlement to protection in light of the country situation and the findings of the Tribunal in AX [2012] UKUT 97 [43] or that the appellant had made out her claim to be at risk of sterilisation [44-45]. The Judge noted that the appellant's son has cerebral palsy that gives rise to significant health issues but finds "Whilst it was not pursued in any meaningful way by the Appellants representative, I am guided by the case law in GS (India) and Others v Secretary of State for the Home Department [2015] EWCA Civ 40 and I am satisfied that the Appellant's son would have access to the required medical care in China. [46]".
5. The Judge notes in paragraph 47 that it was only after prompting from the Bench that the appellants representative suggested Article 8 was an issue "although did not pursue Article 8, as part of his submissions, in any meaningful way". The finding on this aspect of the case is set out at [49] in the following terms "Looking at the totality of the evidence I am unable to say that the facts of this case show that the decision to remove the Appellant and her family would amount to a disproportionate breach of fundamental human rights."

**Error of law**

6. Miss Mair sought to amend the grounds of challenge at the commencement of the hearing which was not opposed by Mr McVeety. The new, additional, grounds are (1) a failure to apply Devaseelan and (2) no best interests consideration.
7. In relation to the Devaseelan point, it was submitted on the appellant's behalf that at pages 158-167 of the bundle is a full copy of a previous determination of which the First-tier Tribunal is said to be on notice of. That decision was promulgated on the 18 March 2013 and relates to an appeal against a decision of an Entry Clearance Officer by a person said to be the appellant's mother. It is said the determination contains findings relevant to the issue of the relationship and paternity of the appellant and her witness, as father and daughter, contrary to the findings of the Judge.
8. When asked how the appellant had come by this decision the Upper Tribunal were advised that it was because her current representatives, who were not her original representatives before Judge McGarr, had

acted for the appellant in the earlier case and had a copy of the decision on their file.

9. It is said that at page 30 of the bundle before the First-tier Tribunal in this matter is a witness statement by the appellant's witness in which Judge McGarr is altered to the existence of a previous decision.

10. In so far as it is alleged the Judge erred in law in not taking the earlier decision into account, no arguable legal error is made out.

11. It was accepted by Miss Mair that proceedings in this jurisdiction are adversarial and not inquisitorial. The general rule is that a judge is entitled to assume the parties will furnish the evidence they are seeking to rely upon. No legal obligation upon the Judge to embark upon a 'fishing expedition' to ascertain what other evidence may be available has been made out on the facts.

12. Although before the Upper Tribunal Miss Mair seeks to rely upon a complete copy of the earlier determination that was not a document that was before the First-tier Tribunal. Sandbrook Solicitors filed the trial bundle under cover of a letter dated 26 May 2015. The bundle has an index, item number 13 of which is described as "Determination on 18 March 2013 granting mother's appeal to join father" 62. At page 62 is the first page of the determination followed by two further pages [pages 62-64] and no more. The copy relied upon in the new bundle runs from pages 158 to 167, this is clearly a complete copy and that provided to Judge McGarr incomplete. Of importance to the ground and related submissions is the fact the pages provided to Judge McGarr contain no reference to material relevant to the issue of paternity.

13. The appellant has not made out that the Judge failed to correctly apply the Devaseelan principles in relation to a previous decision of which he was made aware, which contained a previous judicial finding material to an issue in the current appeal.

14. In relation to Miss Mair's submission that the decision in Devaseelan imposed a duty upon the Judge to find out what the original determination says, notwithstanding an incomplete copy having been provided, I do not find the case law relating to the application of Devaseelan says any such thing. It is not a mechanism whereby responsibility for obtaining best evidence can be transferred from the parties to the judge. There may be cases in which a judge requires a full copy to be provided and causes one to be located. Such documents are not readily available to the First-tier which is not a court of record with a data base of decisions that can be searched. Obtaining a copy will ordinarily require the file to be sent from storage or other delay in checking if an electronic copy exists elsewhere.

15. I find no merit in the submission Devaseelan creates a fairness point in this regard. This is, arguably, stretching the principles in Devaseelan way beyond their intended purpose. The common law duty of fairness has been found to apply to the procedure by which a decision is made. In a litigious system it is fair to provide the parties with the opportunity to provide the evidence they are seeking to rely upon and then consider that evidence and make a finding based upon

the same. Fairness, in cases such as this, does not place a legal obligation upon a judge to do more. It was submitted by Miss Mair that the Judge could have asked the parties for a complete copy but as the copy in the new bundle was taken from a client's file held by Chung & Co it is not certain such a document would have been made available by the previous representatives. The appellant claims the incomplete determination related to her mother's case. If so, why was a complete copy not provided through the family?

16. It may be the case that had the evidence been provided in proper form the decision may have been different but that is not the issue at this stage. There has been no criticism of the conduct of the appellant's barrister at the hearing suggesting the case was properly handled and all the evidence the appellant was seeking to rely upon provided. There is no suggestion an adjournment should have been sought to obtain the missing material.

17. In relation to the second additional ground, it is submitted the Judge failed to consider the best interests of the child. It is said there was a lot of material before the Judge in relation to the needs of the child. At pages 79-114 is an assessment of the child's needs undertaken by medical staff. It is submitted that the Judge should not have come to the conclusion he did in relation to return without considering the needs of the chid. It is also submitted that the Judge needed to consider the impact upon the child of the loss of benefits outlined in AX. The child has a need for a stable multi-disciplinary approach to his care needs. It is said the Judge does not mention the child's needs and how they impact upon the balancing exercise.

18. It was also submitted that the ground on which permission was granted overlaps with this ground. There is a materiality issue. It is said the Judge dismissed the appeal under the Rules without considering this issue.

19. Mr McVeety referred to material in the evidence showing parents of children with cerebral palsy sending their children to China for treatment as a result of the expertise available in that country. Whilst this may be so, the problem the appellant faces is a more fundamental one which is that although some evidence was made available there is no indication in the determination that section 55 was raised by the appellant as an issue in the appeal. The Judge was aware of the needs of the child and refers to them in paragraph 46 of the determination but also that the needs of the child were not pursued in any meaningful way. The Judge considered the evidence in the round and found he was unable to say on the facts that the decision to remove was not proportionate. Section 55 is not determinative but is an element of the balancing exercise.

20. This is arguably a further example of new representatives, assisted by Miss Mair, suggesting how the case should have been advanced before the Judge and what decision should have been made had it been presented as they would have done. This may be the case, although in part based upon speculation as to the outcome, but that was not how the case was prepared or presented on the day.

21. On the basis of the evidence made available, the case as presented, and the matters the Judge was asked to consider, I find no arguable legal error material to the decision to dismiss the appeal has been made out.
22. As stated at the hearing, the way forward may not be to challenge the determination but, if fresh evidence is available, to make fresh application that the respondent is able to consider on its merits in light of all the available evidence and detailed submissions in relation to the needs of the child.

## Decision

23. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

24. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 5 July 2016