



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07079/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13th October 2017

Decision and Reasons Promulgated
On 10th November 2017

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Ms D D W
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of China born on [] 1987 and she has a one year old son. She arrived in the UK in 2007 on a false passport. She claimed asylum after her arrest in 2015 and that claim was refused by the Secretary of State on 20th June 2016. Her appeal against that refusal came before First-tier Tribunal Judge Morgan on 4th January 2017 and on 16th January 2017 he allowed the appeal on asylum and human rights grounds.

2. The Secretary of State then applied for and was granted permission to appeal on the basis that the judge had misdirected himself in law and his reasoning was inadequate. The judge failed to engage with paragraph 14 of the head note of **AX (family planning scheme) China CG** [2012] UKUT 00097 which states

(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.

3. The second ground of challenge related to the analysis under Paragraph 276ADE (vi) which it was argued, was also deficient in that it allowed the appeal 'for the same reasons' as the asylum claim. As the analysis under the asylum claim was deficient so was this approach.
4. As Mr Wilding indicated the risk to the appellant, as decided by the judge, focussed on the risk from the local authorities and equated the risk from the local government with the national authorities. She was found to be at risk in her own hukou area but there was no analysis of the position 'outside the hukou area' merely a statement that she would not relocate. There was no full analysis of why the appellant could not relocate or whether the local authorities would look for her outside her hukou area. The local government and the national government could not be simply equated. It was also submitted that the judge failed to address the situation regarding foreign born children which is addressed at paragraph 186 of **AX** and paragraphs 6 - 10 of the head note with regard second children. Anxious scrutiny and analysis of the family, the support and the conditions she would experience would be required.
5. The Judge erred materially for the reasons identified and whilst preserving the credibility findings and the findings in respect of risk in her home area of First-tier Tribunal Judge Morgan but I set aside the conclusion for want of further analysis. The appellant did not have representation before me and thus I directed that the matter be adjourned to give the appellant a further opportunity to obtain assistance and to submit further information.
6. I directed that evidence should be submitted by the appellant on the following

- (i) why she is unable to relocate outside of her hukou area,
 - (ii) her statement on and any evidence that the local government of her hukou area, where relevant, is seeking her outside her area and
 - (iii) details of the family support, accommodation and financial support she might receive and/or employment she would gain on return to China should she relocate outside her hukou area.
7. The appellant returned to the resumed hearing without further representation because she stated solicitors asked for money which she did not have but she did submit a further statement.
 8. Under cross examination the appellant confirmed that her parents lived in the same area. She had fallen pregnant in 2007 but the child was miscarried. Her first child born in 2005 was given away by her parents and she had no contact with her daughter who was given away. She stated that because of her difficulties her child born in 2016 would not be able to obtain a hukou. She knew the family planning or village committee had visited her father because she had been in contact with her father and mother in the last two years. She added that if she relocated she would have to return to her own hukou, where she was at risk from the snakeheads and the local committee would have her name and she would be unable to transfer her hukou. She had not only fallen foul of the family planning policy but also had been fined. There would be contacts made between the current hukou and any outside hukou. She did not pay her debt in full. She had tried to pay the interest to the snakeheads but would be at risk from them in her local area. The debt was not her father's debt but her own.
 9. Her father was angry with her because she did not marry thereby obtaining status but had had a child out of wedlock. She would have difficulty working on return. She had been absent from China for 10 years and now had a small child. In order to obtain education for the child he would have to have a hukou. Her fear was that her father would send away her child as he done her daughter. She was afraid that the village committee would indeed be able to track her down. She would not be able to transfer her hukou in the current circumstances. She would first have to return to the area where she was at risk in order to arrange a transfer of documents.

Conclusions

10. As Judge Morgan found at [23] of his decision the appellant gave oral evidence which was subjected to lengthy and robust cross examination. She was credible and consistent. She did not waiver from her account. As pointed out it is the lower standard of proof which is relevant. Judge Morgan pointed out in his decision at [28] the reason she was not being hassled was that she had paid interest on the loan but was expected to work to pay off the loan itself. I accept that would be difficult for her. Judge Morgan found that the appellant had indeed been

threatened with forced sterilisation (she had one child and had left whilst pregnant with another) and her first child was given away by her parents to pay off the debt. Some of this debt to the Chinese authorities remained and there were still enquiries of her home asking for her whereabouts. She still owed an exorbitant debt to the snakeheads, continued to risk forced sterilisation and neither she nor her family would be in a position to pay on the salaries earned in China.

11. Mr Walker in his submissions had relied on the Reasons for Refusal letter. This considered that the appellant may be part of a particular social group further to **AX** as she had breached China's family planning system but found she would be able to return to her home area. It is clear that the appellant (as found by Judge Morgan and I have no reason to depart from those findings) she had been persecuted in the past because of her breach of the family planning laws, had been fined and had to flee with the money loaned from the snakeheads to avoid sterilisation.
12. The appellant explained the authorities in China are linked and it is clear that the appellant cannot approach the local authorities for assistance. She is at risk not only of sterilisation, is being pursued by the snakeheads and also pursued for the fine. It is this authority to which she would have to return to arrange her transfer of her hukou failing which she will not be able to register elsewhere. For this reason it is understandable that she would not approach the authorities in the area to protect her against the snakeheads whom I accept would seek her out should she return without further payment. I accept on the salary that she would earn in China (if any) that she would soon fall further into debt. The Secretary of State considered the appellant should seek protection from the snakeheads further to **Horvath** [2000] UKHL 37 but did not address the fact that she could not return to her home area and would need to return to secure her hukou transfer.
13. **AX** conceded it may be possible to avoid the risk of forced sterilisation by moving to a city and that millions of Chinese internal migrants do so without an urban hukou.
14. As set out in **AX**

(11) In general, for female returnees, there is no real risk of forcible sterilisation or forcible termination in China. However, if a female returnee who has already had her permitted quota of children is being returned at a time when there is a crackdown in her 'hukou' area, accompanied by unlawful practices such as forced abortion or sterilisation, such a returnee would be at real risk of forcible sterilisation or, if she is pregnant at the time, of forcible termination of an unauthorised pregnancy. Outside of these times, such a female returnee may also be able to show an individual risk, notwithstanding the absence of a general risk, where there is credible evidence that she, or members of her family remaining in China, have been threatened with, or have suffered, serious adverse ill-treatment by reason of her breach of the family planning scheme.

(12) *Where a female returnee is at real risk of forcible sterilisation or termination of pregnancy in her 'hukou' area, such risk is of persecution, serious harm and Article 3 ill-treatment. The respondent accepted that such risk would be by reason of a Refugee Convention reason, membership of a particular social group, 'women who gave birth in breach of China's family planning scheme'.*

(13) *Male returnees do not, in general, face a real risk of forcible sterilisation, whether in their 'hukou' area or elsewhere, given the very low rate of sterilisation of males overall, and the even lower rate of forcible sterilisation.*

15. This is someone who has clearly had her permitted quota of children and I accept, because of the evidence that she was previously fined and threatened with sterilisation such that she fled the area, that the authority is active in its pursuit of transgressors in that area. There can be crackdowns which can entail human rights abuses. I accept therefore that she would be at risk for a convention reason in her own area. The question is whether she can relocate and would be unduly harsh for her to relocate? The appellant in her own statement, and I repeat that she was found to be credible, confirmed that before any transfer formalities the migrants needed to account to their local police station. She believed that the police had access to her files and as such migration to another city was impossible. In effect she would be tracked and I accept that.

16. Further as set out in AX,

(6) Any second child, even if authorised, entails the loss of the family's SCP certificate. Loss of a family's SCP results in loss of privileged access to schools, housing, pensions and free medical and contraceptive treatment. Education and medical treatment remain available but are no longer free.

17. and

(9) The financial consequences for a family of losing its SCP (for having more than one child) and/or of having SUC imposed (for having unauthorised children) and/or suffering disadvantages in terms of access to education, medical treatment, loss of employment, detriment to future employment etc will not, in general, reach the severity threshold to amount to persecution or serious harm or treatment in breach of Article 3.

18. In the particular circumstances I find that it would be unduly harsh for her to relocate. The September 2015 Guidance on China Background Information at Section 8 confirms that the law provides for freedom of internal movement but the government generally did not respect these rights. Further the hukou registration system retains the dichotomy between access to land for rural hukou holders and social entitlements restricted to urban hukou holders. Although migration to cities expanded, the Guidance at 8.2.2 cited from the US Department of State report which identified that many could not change their official residence or workplace within the country and although there were

changes to the system, for example, 'Guangzhou issued a new policy to allow persons who were legally employed within the city to marry and have a child without returning to the hometown listed on their 'hukou'. This rather underlines the enforcement of the hukou system based on residence with its attendant benefits. Section 8.2. also underlines the difficulties faced by 'illegal residents' and that in some localities authorities would not issue hukous to children born to single parents and as such children 'are left behind by their parents in the rural areas'. As can be seen this is not an option for this appellant.

19. The appellant has a young child who is her second child. She was extremely distressed when recounting evidence that her previous child had been removed from her and that she was at risk that her second child would be removed her father. She was also at risk from sterilisation. I accept her (indeed all else was found credible) that her father was angry that she had brought shame on the family and that her child would be removed if she contacted her parents.
20. The China: Country Policy and Guidance Notes: Contravention of national population and family-planning laws, China at 2.5.2 [2017] (the guidance referred to in **AX** has now been updated)

Decision makers must give careful consideration to the relevance and reasonableness of internal relocation on a case-by-case basis taking full account of the individual circumstances of the particular person. Decision makers must consider factors such as the age, gender, health, ethnicity, religion, financial circumstances and support network of the person, as well as the security, human rights and socio-economic conditions in the proposed area of relocation, including their ability to sustain themselves.

21. She cannot therefore derive any form of support from her parents. She will be a single mother returning with a very young child, without support and I further accept that the local government authorities will be in contact with each other – at the very least she will need to contact or return to her own hukou to obtain a registration in order to re-register. Failing this she will be unable to access medical treatment, will experience detriment to future employment and education for her child. This is someone who has been absent from China for 10 years, would be without any form of family support (or be at risk of losing her second child). Even if the snakeheads would not pursue her because she had moved area, I am not persuaded that being someone from a rural background with minimal education and the responsibilities of a small child to care for (or pay for child care) and without family support that she would be able to maintain employment and herself and her child. As **AX** states at [14] internal migrant women are required to stay in touch with their hukou area. Each case was said in **AX** to be fact sensitive and in these particular circumstances I find that the appellant could not be expected to relocate as it would lead to unduly harsh consequences.

22. Despite possible relaxation on birth policies the current country guidance sets out the evidence at paragraph [172] suggested that even employment might be jeopardised where women have more than one child

172. ...Any second child, even authorised (including first pregnancies ending in a multiple birth, whether natural or IVF-induced), will entail the loss of the family's SCP Certificate, and affects the whole family, including children. The family loses its privileged access to schools, housing, pensions, and free medical and contraceptive treatment. SUC will be payable, albeit at a reasonable rate, where the additional child is authorised or results from a multiple birth. If the child is unauthorised, there are additional penalties. Those working for emanations of the state will be dismissed; in private businesses, they may be demoted or dismissed and their line managers penalised'.

23. The Country Guidance at 2.3.6 outlines that the 'relaxation' of China's child policies has not been realised

Although the Chinese Communist Party announced a new exception to its population planning policy in November 2013 to allow couples in which one parent was an only child to have a second child, this does not appear to have been uniformly implemented and Chinese officials reportedly have not relaxed their enforcement of the population planning policy, and have continued to use coercive measures such as forced abortion and sterilization. Since the announcement of the policy adjustment in November 2013, the Chinese Communist Party Central Committee and State Council jointly instructed local authorities to 'strictly control noncompliant births, particularly extra births, [and] seriously investigate and deal with illegal births.' Chinese and international media reports have documented abuses, including: the authority's refusal to register a child whose mother did not want an intrauterine device (IUD); coercive IUD

24. The appellant has been fined and owes debts to the local government which are still outstanding. **AX** identifies that the evidence confirmed women are sent back for regular tri-monthly pregnancy tests even when working away from their hukou area and further to [182] 'a number of provinces have returned to requiring physical testing because they are concerned that many of the tests they receive are falsified' Thus even if there may not be effective pursuit of this appellant outside her area by her own hukou I find that there is a significant risk that she may have to return to her area where she is at risk even if she has relocated which in turn I find unduly harsh. Indeed the appellant maintained that she could and would be tracked outside her home area because of her debts to the authorities.

25. When applying the Immigration Rules (paragraph 276ADE (vi)), I do find that she would face significant obstacles to her return. She has lived in the UK for 10 years, albeit illegally and she now has a small child dependent on her as a single mother. As I have described she would be at real risk of being without accommodation and financial support for herself and her child.
26. When considering the compelling circumstances outside the Rules, the appellant must after 10 years have some semblance of private life. There is a low threshold for the engagement of such a protected right. I accept that immigration control is a legitimate aim for the protection of rights and freedoms of others but I find that the Secretary of State has taken a decision which is not consistent with her obligations under the Refugee Convention or under the Human Rights Act. Even if I were wrong about that I turn to a consideration of proportionality with reference to **Huang v SSHD** [2007] UKHL 11.
27. I take into account Section 117 of the Nationality Immigration and Asylum Act 2002 and note I am enjoined to place little weight on her private life in the UK because of the nature of its institution and development. No one came to assist or support her in court despite and she was unrepresented. Her command of English was limited and I do not accept that she would be financially independent. I balance those factors into the equation.
28. Nevertheless under Section 55 of the Borders Citizenship and Immigration Act 2009, I must consider the best interests of the child as a primary consideration and I note the factors in relation to **Azimi-Moayed** (decisions affecting children onward appeals) [2013] UKUT 197 (IAC). The appellant's history demonstrates and I accept that should this child be returned to the mother's home area that he would be at risk of being removed as was his older sibling. If she relocates to a city she may be forced to leave him behind in the rural areas. His best interests are to remain with his mother. Should his mother be forced to relocate away from the home area his welfare would be severely compromised. Because of her length of absence from China, I do accept that her sources of support should she be removed to China would be negligible. For all the reasons I have given above, I therefore allow the appeal of Ms DDW on all grounds (as I have allowed the matter on asylum grounds I dismiss the matter on humanitarian protection grounds).

Notice of Decision

I allow the appeal on asylum grounds.

I dismiss the appeal on humanitarian protection grounds.

I allow the appeal on human rights grounds.

I allow the appeal under the Immigration Rules.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. I impose this order because the appeal involves a minor.

Signed

Helen Rimington

Date 14th October 2017

Upper Tribunal Judge Rimington