Upper Tribunal
(Immigration and Asylum Chamber) PA/13462/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
On 12th October 2018	**On 19th October 2018**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

FENG [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Katani & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This decision is to be read with:

   (i) The respondent's decision dated 28 October 2016, refusing the appellant's claim.

   (ii) The appellant's grounds of appeal to the First-tier Tribunal.

(iii) The decision of FtT Judge Mozolowski, promulgated on 21 February 2018.

(iv) The appellant's grounds of appeal to the UT, stated in the application for permission to appeal filed on 6 March 2018.

(v) The grant of permission by FtT Judge Brunnen, dated 27 March 2018.

2. Permission was not granted on ground 1, and the appellant did not seek to renew it.

3. Ground 2 is "errors of law in relation to family planning policy", (i) – (iii).

4. Sub-paragraph (i) complains that there was no finding, or no clear finding, on whether the appellant or his wife would have to undergo sterilisation. Sub-paragraph (ii) contends that even if the appellant's wife does not fall within the assessment, the error applies in relation to article 8. Sub-paragraph (iii) complains of lack of a finding that the appellant could pay a social compensation fee, and the consequences for the children.

5. It does not appear that much was made in the FtT of risk of enforced sterilisation. The matter is not to be found in the grounds of appeal to the FtT or in the appellant's statement of evidence. There is at paragraph 15 a record that the family planning case was advanced in part on a risk "that the appellant's partner would be forced to be sterilised if she were to fall pregnant again". However, she has previously failed in an appeal; has no outstanding proceedings or legal basis for remaining in the UK; and did not give evidence, written or oral. The appellant provided no information about the extent to which these matters have already been litigated in her name.

6. The ground founds upon *YZ v SSHD* [2017] CSIH 41 at paragraph 39. That case was not cited to the FtT.

7. *YZ* considered the extent to which the UT was entitled to interfere with findings of fact by the FtT. I do not understand it to be an authority on the extent to which country guidance normally governing consideration of Chinese family planning policy issues is to be departed from.

8. Although in a different context, *YC* [2018] CSOH 40 and *XL* [2018] 58 tend to confirm that view.

9. Ground 2 does not show that any error in respect of the judge's application to the case before her of country guidance on Chinese family planning policy. It is only a vague suggestion that she ought of her own initiative to have considered some other approach, based on little evidence, no clear submission, and no clear authority.

10. Ground 3, on which Mr Winter concentrated his submissions, is "errors of law in relation to the best interests of the children", (i) – (viii).

11. It was accepted that (i), which aims at the judge's formulation of the article 8 test, was not by itself of much significance. The question is not how perfectly the judge formulated her self-direction on the law, but how it was applied.

12. Sub-paragraph (ii) says there was insufficient support for the judge's view that there was no problem in the return of the whole family to China because he would continue to be a protective factor for the children, given the acknowledgment at paragraph 54 of a professional structure of support (in the UK) from social workers, specialised nurseries and play groups, and the protection of the Sheriff Court. This overlaps with (iv), where a similar point is made, although I find it rather obscure.

13. The underlying contention, as I understood it after submissions, is that the appeal should have succeeded on the best interests of the children, because concerns over their treatment by the appellant's partner are met by social work department and court mechanisms in the UK, but would not be met in the same way in China.

14. Sub-paragraph (iii) complains of lack of findings about whether the appellant's partner has family or accommodation in China. It is not said that there was evidence by which findings more favourable to the appellant's case could or should have been made. It was for the appellant to explain and establish his case, not for the judge to find it for him.

15. Sub-paragraphs (v), (vi) and (vii) say that the FtT erred in law because of insufficient evidence to show the family's situation on return, social work approval of arrangements for their departure, or whether foster care might come into play.

16. Sub-paragraph (viii) says there was no evidence that the appellant's wife would consent to his removal of the children from the UK. This again blames the tribunal for deficiencies in the case, in this instance on a point on which the appellant (who lives with his wife) should have had no difficulty in supplying the evidence. It also appears far-fetched that a case might be bolstered by the mother withholding consent to the children's departure from the UK jurisdiction, when neither she nor the children have any legal right to be here.

17. I find ground 3, as a whole, rather confused. It is, as Mr Winter submitted, for the SSHD to show that interference with family and private life is proportionate. However, it is for an appellant to say what the interference may be, and to advance the evidence by which it might be found.

18. As to the complaint of lack of evidence of social work approval of removal, not only was that another matter for the appellant, but it is well known that the SSHD has elaborate mechanisms in place governing removal of families with children. The appellant did not point to any evidence that those mechanisms would not safely govern any removal in this case.

19. The appellant did not begin to show that protective mechanisms in China are less effective than in the UK. The judge considered at paragraph 60 that "there is a high possibility of there being social workers in China as well". The appellant does not say that she speculated wrongly; and again, the onus was on him.

20. The judge took careful note of the evidence before her on these issues and the serious concerns to which it gave rise - see paragraphs 16, 17, 53, 54 and 61 – 62. She found nothing to show that the welfare of the children would be compromised by the family's return to China, giving the appellant a right, derived from their best interests, to remain in the UK. It has not been shown that the reaching of that conclusion, which was rooted in the evidence before the judge, involved the making of any error on a point of law.

21. The decision of the First-tier Tribunal shall stand.

22. No anonymity direction has been requested or made.

15 October 2018
Upper Tribunal Judge Macleman