Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06639/2018
HU/06645/2018
HU/06650/2018
HU/06656/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 11 February 2019	**On 27 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

CC
QW
DDC
KZC
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Timson, instructed by AGI Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 3 December 2018, I found that the First-tier Tribunal had erred in law and I set aside its decision. My reasons were as follows:

> "1. I shall refer to the appellant as the respondent, and to the respondents as the appellants (as they appeared respectively before the First-tier Tribunal). The appellants are citizens of China. The first and second appellants are the parents of the third and fourth appellants who were born respectively in 2010 and 2012. In March 2013, the appellants were served with deportation orders. The first appellant had been convicted of an offence relating to the possession and/or use of a false instrument on 25 June 2007 and had received a fifteen month custodial sentence on 2 July 2007. He appealed on human rights (Article 8 ECHR) grounds to the First-tier Tribunal (Judge A J Parker) which, in a decision promulgated on 29 June 2018 allowed the appeals. The Secretary of State now appeals, with permission, to the Upper Tribunal.
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> 2. Both parties acknowledge that Judge Parker has referred to Section 117B(6) of the 2002 Act in his decision, notwithstanding the fact that the Section does not apply to a person who is liable to deportation:
>
> > '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
> >
> > (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
> >
> > (b) it would not be reasonable to expect the child to leave the United Kingdom. [my emphasis] '
>
> 3. The parties acknowledge that the judge should have confined his analysis to Section 117C (5) of the 2002 Act:
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> > (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
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> 4. It also appears to be common ground between the parties that the judge has variously throughout his analysis applied both Section 117B(6) (and the test of "reasonableness") and Section 117C(5) (the test of "undue harshness"). The question is whether the judge's analysis is vitiated by this apparent confusion between the two provisions.
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> 5. Mr Timson, who appeared for the appellants, submitted that it was not. He submitted that the judge's reference to Section 117B(6) in the earlier part of his decision was little more than a "overview" of the various legal provisions. Mr Timson did acknowledge that there were particular findings to which the judge had applied the test of reasonableness (see, in particular, the finding regarding a restrictive right to employment in China at [65] and whether it would be "unreasonable" for the children to be returned to China after "such a long time in this country"). However, Mr Timson submitted that the

judge had also set out and applied the test of undue harshness. These comprehensive findings effectively saved the decision from legal error.

6. Mr Timson mounted a skilful defence of Judge Parker's decision but I do not agree with his submissions. A careful reading of the decision shows that the judge has (i) conflated the two tests, and (ii) made findings in respect of particular facts to which he has only applied the test of unreasonableness. At [48], the judge wrote, "the concept of reasonableness brings back into play all the more potentially relevant public interest considerations. This is the same range of considerations that fall to be applied when determining an application [under] Section 117B(6) as in any other Article 8 determination" and the judge states at [57] that, "however we are dealing with a deportation case and the public interest is stronger". It is not entirely clear what this means. The statutory framework should have been adopted by the judge; the only test which he needed to apply given that the first appellant is a foreign criminal is that which appears in Section 117C. I acknowledge that [61] arguably puts the judge's analysis back on the right track but subsequently he lapses back into the language of reasonableness. At [65], he writes that "there is evidence from the appellants that there was a restrictive right to employment which would restrict their ability to register the children's identity. I find that it would not be reasonable for the appellant and their children to return".

7. At [66], the judge notes that the children "do speak a little Mandarin" but that there would be a "significant culture shock to return to China". Here, the judge does not refer to the language of either test so it is unclear whether the "significant culture shock" would amount to undue harshness or would only be an unreasonable difficulty with which the children would have to deal. At [68], the judge introduces what appears to be a new test, or at least a new form of expressing one of the tests which the judge conflates. He finds that, "the appellants had their ID cards and household register documents discontinued whilst in the United Kingdom and therefore if returned to China they would be unable to access employment, housing, education of the children for at least twelve months. This would cause the family severe destitution as they would be homeless with no finances and the children would have no education". I assume from the context that the judge would consider such problems to have unduly harsh consequences for the children but he does not say so in terms. I acknowledge that in his final paragraph [70] the judge refers only to Section 117C but I find that by that stage of the analysis it is unclear which consequences a return to China the judge considers unduly harsh and those which he finds would be no more than unreasonable. In the light of the confusion of the analysis, I find that the only safe course of action is to set aside this decision. The facts concerning this family do not appear to be particularly controversial. The judge only heard evidence from the first and second appellants [6]. I find that the appeal may be disposed of in the Upper Tribunal which will re-make the decision. As the judge's findings of fact and his application of the law have been conflated throughout, I set aside all findings of fact so as to avoid any doubt.

Notice of Decision

8. The decision of the First-tier Tribunal which was promulgated on 29 June 2018 is set aside. None of the findings of fact shall stand. The appeal will be retained in the Upper Tribunal which will re-make the decision following a resumed hearing at Manchester Civil Justice Centre on a date to be fixed before Upper Tribunal Judge Lane.

9. An anonymity direction is made."

2. In the Article 8 appeal the standard of proof is the balance of probabilities. I heard evidence from the first and second appellants who spoke in Mandarin with the assistance of an interpreter.

3. The first appellant told me that he had his mother and younger brother still living in China. He does not contact his mother very often indeed only about once a year. He has no contact with his younger brother. When asked why he did not contact his mother in China, the appellant said that she had a "new family" and did not want to be "disturbed by me." When asked about his ability in English, the appellant said that he is able to understand English when spoken but is unable to speak it himself. A mixture of English and Mandarin is spoken at home with the children.

4. The second appellant also gave her evidence in Mandarin with the assistance of an interpreter. Her English appeared to be rather better than that of her husband. She said that she was using an interpreter at court because it was "important." She confirmed that she and the first appellant had not married and they continued to have a family which was born out of wedlock.

5. I reserved my decision.

6. As I pointed out in my error of law decision [3] the test is one of undue harshness. I was assisted by Mr Timson who e-mailed to me the most recent Country Policy and Information Note (CPIN) which is relevant namely that of December 2018 which was entitled China: contravention of national population and family planning laws. This note deals with children born abroad and out of wedlock at 5.9.1:

> 'An Australian Refugee Review Tribunal response, dated 29 April 2011, quoting the DFAT stated:
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> '"In order to apply for the child's household registration, the parents would be required to provide the following documentation: a Chinese translation of the child's birth certificate; the parents" household registration; ID cards; passports; certificate of marriage; and a receipt issued by the local Family Planning Committee to demonstrate that a family planning fee (also known as a social compensation fee) has been paid. This list of requirements is not comprehensive; the local authority may request more information or identification on a case-by-case basis.
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> '"Most provincial and municipal governments have stated that a family planning fee would be imposed for children born out of wedlock. The State

> Family Planning Commission authorises local governments to establish their own criteria when imposing family planning fees in each jurisdiction."'

7. Mr Timson submitted that it is unlikely that those who have children born out of wedlock abroad would fair any better than those whose children are born in China. The requirements in the first paragraph of 5.9.1 refers only to a certificate of marriage; if they were to be returned, it is likely, in my opinion, that the first and second appellants will marry in order to mitigate any penalty which they may receive on return to China. I consider that Mr Timson is probably right in the light of what is said in the second paragraph of 5.9.1. That paragraph makes clear that the Chinese State delegates to local authorities policy and implementation of family planning fees. I find that if the family were to return to China, and it is likely that the first and second appellant would marry for the reasons I have given above before leaving and that they would be subject to family planning fees the level of which would depend upon what would be levied in their home area or any other part of China to which they chose to return. Because there is no national policy controlling the level of fees, it is not possible to say how much those local fees may be. However, I also accept Mr McVeety's submission that elsewhere in the CPIN and other background material it is made plain that the level of fines and fees for contravention of the family planning policy is likely to be proportionate to the level of income of the person upon whom the fine is imposed. In the circumstances, I do not consider that an excessive or punitive fine would therefore be imposed upon this couple. Whilst it is unlikely that, by marrying before leaving the UK, they will wholly escape the imposition of a fine or fee that fine or fee is very unlikely to be so heavy as to put them into financial difficulties let alone render them destitute.

8. The registration of the children with or without the payment of a fine or fee will enable the family and the children in particular to access state benefits. That is an important consideration in the appeal.

9. The children of the first and second appellants are now 12 and 7 years old respectively. Those children have been living in the United Kingdom for more than seven years and are in consequence "qualifying children" for the purposes of Section 117 of the 2002 Act. I accept Mr McVeety's submission that the "real world" consideration in this case is that neither of the children's parents have had legitimate immigration status in the United Kingdom and, notwithstanding the length of residence of the family, the parents and the children should be expected to return to their country of nationality. Further defining the issue, the Tribunal needs to consider whether it would be unduly harsh for the children to leave with their children to live in China. On the appellants' side of that equation, is the fact that the family have lived here for a number of years and the children each longer than seven years. The children have a good knowledge of English and so does their mother although I accept that the first appellant's English is not good. On the opposing side of the scales,

there is the first appellant's offending although I acknowledge that that is not particularly serious. However, I accept Mr McVeety's submission that, following *KO (Nigeria),* what may be characterised as relatively mild offending does not add positively to an appellant's case any more than a poor criminal record should be held against the children when assessing questions of best interests or undue hardship. Moreover, very little was made of any private life connections which either the first or second appellants have within the United Kingdom. I am prepared to accept the evidence given by the first and second appellants regarding their lack of contact with their families in China but given that no member of this family has any health issues or other special needs, I do not consider the lack of any family connections in China proving to be an obstacle to their return provided the family's relationship with the Chinese State and local government is such that the family can access local services. On that issue, I refer to what I have noted above from the CPIN. I find that no penalty or fee will be excessive rather it will be within the appellants' financial means and, once paid, the family will be able to access local services.

10. I find that this is a close family which loving parents care for their children adequately. On the evidence before me, I am unable to identify any particular features of the private lives of any of the appellants which would indicate that they should be allowed to remain in this country. If they leave, they will do so together as a family and will, for the reasons I have given above, be able to resettle in China and access necessary services. Accordingly, the absence of any close family contacts in China is not of particular relevance. Mr McVeety submitted, the question of "undue harshness" sets a high threshold. Some "harshness" is bound to result from the removal of this family from the United Kingdom to China but I am unable to identify any aspect of this case and of the circumstances of each individual appellant which would render that harshness "undue." I find, therefore, that the appeal should be dismissed.

Notice of Decision

The appellants' appeals against the decision of the Secretary of State are dismissed on human rights grounds (Article 8 ECHR).

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.

Signed Date 21 February 2019

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 21 February 2019

Upper Tribunal Judge Lane