Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/09139/2017
PA/08999/2017, PA/09097/2017
PA/09095/2017, PA/09092/2017

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 12 April 2019	**On 23 April 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

QW (1)
YT (2)
EY (3)
EW (4)
ZW (5)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr M Mathews, Senior Presenting Officer
For the Respondents: Mr K McGuire, instructed by Latta & Co Solicitors (for QW)

Mr Byrne, instructed by Latta & Co (for YT)
Miss L Irvine, instructed by Latta & Co (for EY, EW and ZW)

DECISION AND REASONS

Anonymity

I make an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of any matter or material that might lead to the identification of these appellants. Any breach of this order may result in contempt proceedings.

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and QW, YT, EY, EW and ZW as "the appellants". I also make an order under Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 for these appeals to be heard together.

2. The appellants who comprise a family unit (husband, wife and their children) are citizens of China. Their appeals against the Secretary of State's refusal of their protection claims were allowed by First-tier Tribunal Judge Kempton following a hearing on 17 July 2018. Her reasons are set out in two decisions promulgated 21 August 2018; the judge made a separate determination in respect of the second appellant in the light of the particular issues relating to her case.

3. The first appellant who was born in 1972 came to the United Kingdom in 2006 and claimed asylum on 9 August 2007 following his conviction of possession and control of false identity documents (he had used a Japanese passport on 2 August that year).

4. The judge's decision in relation to the first, third and fourth appellants (the first decision) refers to the conviction (and the asylum claim) having taken place in 2017 which is clearly a typographical error.

5. The Criminal Court had recommended the first appellant's deportation and he was served with a notice to make a deportation order on 13 September 2007. He unsuccessfully appealed that decision to the AIT. Immigration Judge Suchak gave reasons for his decision to dismiss the appeal under the Immigration Rules and on asylum and human rights grounds in a decision dated 18 January 2008. A deportation order was made against the first appellant on 3 March 2008.

6. The first appellant lodged further representations with the Secretary of State on two occasions in 2011. The first was rejected for reasons in a letter dated 4 February 2011. The Secretary of State considered that no evidence had been produced to demonstrate that the first appellant was Christian as claimed in those representations nor was it accepted that the first appellant had family life in the United Kingdom or that he was in a subsisting relationship. Removal would be proportionate to his established

private life. The second set of representations led to a further refusal dated 7 September 2011. The claim had been that the first appellant had been regularly attending St Aloysius Church in Glasgow and had wanted to become more involved in proselytising. He claimed to have been involved in the Hu Han Pai religion in China. The appellant had produced a copy of his certificate of marriage to the second appellant on 26 July 2011. He had also produced a birth certificate of the third appellant dated 13 May 2011. The respondent did not accept the evidence of the risk claimed by the first appellant that he would face because of his religion and it would not be disproportionate for him together with the second and third appellants to return to China.

7. Time passed. On 5 August 2014 and 22 November 2015 further representations were made on behalf of the first appellant seeking revocation of the deportation order on the basis of his family and private life, the difficulties the children would face on return and the risk the first appellant would face as a Mormon and his imputed political opinion. His fear also included a risk of forced sterilisation. By then the third and fourth appellants had been born. For reasons given in a detailed decision dated 31 August 2017 the Secretary of State refused the protection and human rights claim which he nevertheless considered had amounted to a fresh claim within paragraph 353 and thus giving rise to the right of appeal to Judge Kempton.

8. The second appellant came to the United Kingdom on 18 April 2005 when she entered with a false passport. She too has a lengthy history of dealings with the Secretary of State which included the claim to asylum made on 27 May 2005 against which she had appealed unsuccessfully. Her most recent representations following two sets made in April and December 2015 were on 27 April 2017. Her fear of return was based on her Mongolian ethnicity, breach of the Chinese Family Planning Policy, membership of the Church of Jesus Christ of Latter Day Saints and medical problems encountered by the fourth appellant. In addition, the second appellant claimed a fear of persecution based on her father's political opinion and the protest she had organised in relation to his arrest which had been considered in the appeal in 2005.

9. First-tier Tribunal Judge Davidge granted permission to the Secretary of State to appeal Judge Kempton's decisions for reasons given in her grant dated 2 October 2018 as follows:

> " ...
>
> 2. First-tier Tribunal Judge Kempton (Ft TJ) allowed the husband's appeal, brought to prevent his deportation, on asylum grounds, finding that because he would be returned without a passport he is at a risk of being detained and questioned until officials have determined how he should be treated in the context of being a failed asylum seeker with a UK criminal conviction [29,31,32], and additionally he might be subject to forced sterilisation. The

human rights appeal was allowed on the basis that it would be disproportionate to deport in light of the length of residence and integration of the children, the eldest of whom is seven, who might resent their parents for failing to prevent their removal, as well as the difficulties the mother would face in looking after the children if her husband were to be detained [36]. The wife's asylum grounds on ethnicity and religion were also found established, and her and the children's family life rights similarly infringed.

3. There is merit in the grounds concerning international protection when they point out the paucity of reasoning in the context of the decision running counter to the country guidance cases, which are not referred to, and the previous judicial decisions. The grounds also have merit when they argue the Article 8 assessment is incomplete and flawed for failing to consider all relevant permutations and being without reference to the relevant tests, including that of 117 of the 2002 Act.

4. The grounds reveal arguable errors of law."

10. The application for permission to appeal in relation to the first, third, fourth and fifth appellants was in the following terms:

"The Judge of the First-tier Tribunal (FTT) has made a material error of law in the Determination.

1. The Appellant is subject to deportation action and seeks to avoid deportation on protection and human rights grounds, the Appellants three children are also included in this determination whilst the FTTJ has made a separate determination (PA/08999/2017) in relation to his wife see paragraph 20 of the determination. Although separate determinations it may be prudent that the grounds in both appeals are considered by the same FTTJ.

2. It would appear from the determination that the FTTJ finds that the Appellant is in need of International protection on the basis of double jeopardy and a risk of forced sterilisation if deported to China.

3. If the FTTJ is correct regarding the risk of double jeopardy it would in effect mean that any foreign national offender from China could not be deported and as such this finding is irrational.

4. It is also of note that the FTTJ has failed to take into account paragraphs 40-42 of the decision letter dated 31/08/2017 that specifically deals with this issue with reference to the Country Guidance case of **JC China CG 2008 UKIAT 00036**. Failure to address the rational of the aforesaid country guidance case is a material error of law.

5. In a similar way it is asserted that the FTTJ has failed to address the findings in the Country guidance case of **AX China CG 2008 00097 (IAC)** as relied on by the respond in the decision letter at paragraphs 26-38, again this failure represents a material error of law.

6. With regards to the children and family life there is no indication in the determination that the FTTJ has considered the mandatory

requirements of section 117, and has only found that it would be disproportionate for the children to be removed (paragraph 37 of the determination), failure to apply the higher threshold of unduly harsh consequences as this is an appeal against deportation is a further material error in law.

7. It is of note that the FTTJ has not considered the possibility of the children remaining with the Appellants wife if her separate determination is upheld by the tribunal. The FTTJ has made no findings of would there be any unduly harsh consequences if the Appellant was deported and the children were to remain in the United Kingdom.

Permission to appeal is respectfully sought.

An oral hearing is requested."

11. In respect of the second appellant, the grounds of challenge, from which I quote the relevant extracts:

"**Ethnicity/past persecution**

2. It is respectfully submitted that in coming to the conclusion the Appellant has been persecuted due to her ethnicity, the FTTJ has failed to address paragraphs 46-48 of the refusal letter dated 31/08/2017. The Appellant may indeed face discrimination upon return to China but there is no objective evidence to suggest that she would be persecuted on account of her bring an ethnic Mongolian.

3. The FTTJ has relied on the medical report of Dr Moultrie to depart from the previous credibility findings made by IJ Grimes in 2005. Dr Moultrie has relied on the Appellants account that she was sexually assaulted and is as a result is experiencing mental health issues. Although Dr Moultrie's expertise is not in doubt there is no indication in the determination that other causes were considered in particular the stress and anxiety connected with the appeals process culminating in a hearing. With reliance placed on the starred authority of **AE & Anor Sri Lanka [2002] UKIAT 05237**, with particular reference to paragraph 8.

4. It is therefore respectfully submitted that the FTTJ has failed to give clear reasons as to why the finding of IJ Grimes should not be followed or the starting point for this determination. It is note that the report of Dr Moultrie is dated 2011, there is no suggestion that IJ Grimes failed to conduct a balanced impartial assessment of the Appellants claim in 2005 even if the Appellant was suffering from a mental health condition at that time would have been able to make detailed findings on the Appellants credibility that would not be a matter for Dr Moultrie to consider.

5. Even if the FTTJ has found that the Appellant was subject to past persecution in paragraph 51 of the determination, past persecution is not an indicator of future persecution with reliance placed on **I v Sweden – 61204/09 – Chamber Judgment [2013] ECHR 813 (05 September 2013)**. The FTTJ is required to give clear reasons as to why at the date of hearing the Appellant would be at risk.

Religion

6. It is of note that in the husbands determination at paragraph 30 this FTTJ finds that appellants conversion more likely to be convince rather than genuine but in the alternative finds, *it appears to be the position that the Mormon Church advises its adherents to obey the laws of the country where they may be practising the faith and so would include not proselytising anything to arouse the anger of the Chines authorities if he is a genuine Mormon and if wishes to practise the faith in China.* It follows that the same finding should apply to this Appellant any other approach would be irrational.

Family planning

7. It is also of note that the FTTJ has failed to take into account paragraphs 49-61 of the decision letter dated 31/08/2017 that specifically deals with this issue with reference to the Country Guidance case of **AX China CG 2012 UKUT 00097 (IAC)** this failure represents a material error of law.

Children

8. At paragraph 52 of the determination the FTTJ observes that it would be unreasonable for the children to go to China with their father and without their mother. The current situation is that all the family are to be removed to China, if only this Appellant was successful in their appeal the SSHD would revisit the situation regarding the position of the children and consider the question of splitting the family and would there be any unduly harsh consequences as a result."

12. Judge Kempton's first decision refers to the first appellant's acceptance that he had used a false identity in the United Kingdom for a number of years. He is in fact XG. The judge was not satisfied that the first appellant was ever a Christian in China and in respect of his fear based on a crime of assault that was of prosecution not persecution. The judge did also not accept that the first appellant was a "genuine adherent of the Mormon faith". In respect of the incident of assault which had happened prior to the first appellant leaving China (using a fish knife in the living room where a religious gathering was taking place which was used on a police officer) the judge considered that as "an admitted felon in China, the appellant cannot claim he should not be returned to his country of origin". Based however on a report by Dr Dhillon on the risk of re-prosecution for the offence for which the first appellant had been convicted in 2007, the judge accepted the expert's view and found a real risk of detention of the first appellant and questioning of him on return and "a real risk of detention without trial without trial for years".

13. The judge also referred to a report by Dr Sheehan. A Country Guidance Note on China dated March 2018 was also considered by the judge who explained at [32] and [33]:

"32. … The guidance note also makes reference to persons who have committed crimes which would bring them within the ambit of Article 1F of the Refugee Convention thus excluding them from

protection. That was not a matter argued before me. However, if it is the case that the appellant did assault a police officer, then he would be excluded from the Refugee convention. Dr Sheehan does not seem to have been asked about that matter.

33. On the basis that Dr Sheehan's report is dated 10 April 2018 and so is dated after the country guidance note, I assume that he has taken that note into account in his report and his expert opinion is based upon his assessment of all the evidence given to him."

14. In respect of the risk of sterilization, the judge explained at [34]:

"34. In relation to the three children of the marriage, it would appear that there is a real risk of sterilisation of the appellant's wife on account of her background and lack of hukou for herself. The appellant too, may face a real risk of sterilisation on return, given that he will be regarded as a felon who has assaulted a police officer. They are a family likely to come to the attention of the authorities on account of their background and also on account of having three children, which will certainly make them stand out in China."

15. In respect of the children the judge noted the evidence of their development in the United Kingdom and concluded at [36] and [37]:

"36. It is clear that the children will be very much at sea if uprooted from where they have grown up in familiar surroundings and taken to an alien country and culture with very different ways of looking after the population. There is also the risk that they would be separated from their parents on arrival as their father could be detained and questioned and their mother would then have to find accommodation and work to maintain the children on her own while trying to obtain a hukou for them all. Clearly, there would be significant practical difficulties for the family on return and for the children this could lead to a real risk of impacting negatively upon their psychological health.

37. Clearly in all the circumstances, removal of the children would be a breach of their rights to family and private life as they need to be together as a family with their parents. The siblings also need to be together as a family unit. It is not just the eldest child of 7 who can be looked at in isolation. It would be completely disproportionate to society for the children to be removed and in particular the eldest child. The family must remain as a family group. Section 55 makes it clear that the respondent has a clear duty to have due regard to the welfare of the children. The only means of doing so on the particular facts of this case is to allow the appeal."

16. In relation to the second appellant, the judge observed in her second decision that YT had unsuccessfully appealed in 2005 which was dismissed by Immigration Judge Grimes which she regarded as her starting point. She also considered evidence from Dr Patricia Moultrie from the Medical Foundation who had seen the second appellant in 2011, a psychological

report from Dr Asghar dated 17 December 2017 and an expert report from Dr Elena Consiglio who had addressed issues relating to family planning, freedom of religion and the second appellant's ethnicity.

17. Having reviewed all the evidence the judge concluded that it was clear the second appellant had been ill-treated on account of her political opinion and ethnicity in China. She considered there was added complication by virtue of the second appellant's religion as a Mormon and continued in respect of the risk the second appellant would face by three children having been born in "out of plan" at [50]:

> "50. Added to the above factors is the issue of three children born out of plan. The appellant herself did not have a Hukou apparently, although she did attend school. The lack of Hukou on return is, however, likely to be the least of her problems as her mental health is likely to deteriorate if she is to be returned. Given her profile and ethnic and political background, I would have thought that having three children will not assist her safety and so if anyone is going to be targeted for forced sterilisation, there is a very real risk that the appellant would be such a person."

18. Returning to the issue of persecution the judge explained at [51]:

> "51. The appellant runs a real risk of persecution on account of her political opinion mixed with her ethnicity as a person of Mongolian ethnicity. Past persecution is an indicator of future persecution. She has suffered serious persecution in the past and this is likely to be repeated on return given her illegal escape from detention and departure from the country."

19. Finally, in respect of the children the judge reasoned at [52]:

> "52. In relation to Article 8, the appellant has her husband and three children in the UK. The eldest child is now aged seven years. The three children were born in the UK and have never left the country. It would be unreasonable to expect them to go to China with their father and without their mother. The children are entitled to have family life with both parents in the UK. In addition, the eldest child has built up a private life in the UK and it would be disproportionate for the eldest child to be expected to leave behind the friends made and life in the UK. The welfare of the children in terms of section 55 would not be served by removing them from the UK with only their father."

20. In respect of appellants QW and the children, EY, EW and ZW, Mr Matthews indicated at the outset of his submissions that he maintained the Secretary of State's challenge to the judge's decision on protection grounds but acknowledged difficulties in respect of the challenge to the Article 8 grounds. The decision letter in error had considered QW's case based on the regime in Part 13 of the Immigration Rules in particular paragraphs A39 *et seq*. The first appellant had been sentenced to three months' imprisonment and the only possible application in Part 13 would

be paragraph 398(c). It was not the Secretary of State's case that his offending had caused serious harm or that he was a persistent offender who showed a particular disregard for the law. The judge had therefore correctly applied a traditional Article 8 approach by not treating the appellant as a foreign criminal. This has left Mr Mathews with "nowhere to go" as to the judge's Article 8 conclusion. Similarly, in respect of the children, the acknowledged difficulty for the Secretary of State was that the challenge had been brought on a misconceived basis and Mr Mathews considered that he was unable to challenge the judge's Article 8 decision in relation to the children based on the opinions from the experts.

21. As a result, Mr Mathews sought permission to withdraw the Secretary of State's case insofar as it related to the challenge on Article 8 grounds. If granted this would resolve the appeals for the children in their entirety and for QW as to his human rights claim. Miss Irvine had nothing to add and accordingly pursuant to Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I consented to the withdrawal of the part of the Secretary of State's case in respect of the Human Rights Convention identified by Mr Matthews.

22. In respect of the challenge to the decision on protection grounds, Mr McGuire obtained instructions in the course of the morning which were in terms not to resist the appeal by the Secretary of State on protection grounds. He sought to withdraw QW's case in that regard and I gave permission for him to do so. Accordingly, the appeal by the Secretary of State on the protection grounds decision by the First-tier Tribunal is allowed. The decision of the First-tier Tribunal on protection grounds in relation to QW is set aside. I remake the decision on protection grounds and dismiss the appeal on those grounds. The decision by the First-tier Tribunal on human rights grounds in relation to the appellants QW, EY, EW and ZW allowing the appeals on human grounds stands.

23. In respect of YT, Mr Matthews took a near similar approach in respect of YT's appeal. He sought permission to withdraw the Secretary of State not only on Article 8 grounds but in respect of the protection claim. That claim had initially been based on YT's ethnicity and imputed political opinion. Although the evidence of the letter had been rejected by First-tier Tribunal Judge Grimes, new evidence was provided before Judge Kempton. Mr Mathews accepted that the judge had considered the case properly and gave acceptable reasons for finding the account reliable. She had accepted that it was highly likely that YT would come to the attention of the authorities. Although Mr Mathews had reservations in relation to the limb of the asylum claim relating to YT's religion, he considered that this was no longer material in the light of his acceptance of the other limbs to the protection claim. Accordingly, he sought permission to withdraw the Secretary of State's case in its entirety and as a consequence the appeal against the decision of First-tier Tribunal Judge Kempton allowing YT's appeal on protection and human rights grounds. Understandably this was

not resisted by Mr Byrne. Accordingly, the appeal by the Secretary of State in the Upper Tribunal is withdrawn and the decision of First-tier Tribunal Judge Kempton in respect of YT's appeal stands.

Signed Date 19 April 2019.

UTJ Dawson

Upper Tribunal Judge Dawson