



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA 085652019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34  
On 7 July 2020

Decision & Reasons Promulgated  
On 23 July 2020

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JS

(ANONYMITY DIRECTION MADE)

Respondent

DECISION AND REASONS

1. I shall refer to the appellant as the appellant and the respondent as the respondent, as they respectively appeared before the First-tier Tribunal. The appellant was born in 1986 and is a male citizen of China. He entered the United Kingdom in 2008 and claimed asylum. Further submissions made by the appellant in July 2016 were reconsidered by the Secretary of State but the appellant's asylum/human rights claim was refused by her. The appellant appealed against that decision on asylum/human rights grounds to the First-tier Tribunal which, in a decision promulgated on 15 November 2019, allowed the appeal on human rights grounds only (Article 8 ECHR); the asylum appeal was dismissed, a decision which is not subject to challenge in the Upper Tribunal.

2. The Secretary of State now appeals against the decision of the First-tier Tribunal. Permission was granted by Designated Judge Woodcraft on 30 December 2019 and an initial hearing listed in Edinburgh on 16 April 2020. The coronavirus emergency led to that hearing being vacated and, on 16 April 2020, Upper Tribunal Judge Sheridan gave further directions, indicating that the Upper Tribunal was of the provisional view that that it may be appropriate for the determination of the initial stage of the appeal to take place without a hearing. Both parties have responded to Judge's Sheridan's directions by making written submissions. I have very carefully considered those submissions and all the papers before deciding whether to proceed without a hearing under rule 34. For reasons which I will explain further below, I have decided that it is appropriate to proceed under rule 34 and I have determined the appeal accordingly.
3. The appeal was allowed in the First-tier Tribunal by Judge Kempton. The judge found that the effect of the removal of the appellant to China would, having proper regard to the public interest concerned with his removal, lead to a disproportionate interference with the rights to family life of the appellant, his wife and their two children. I am satisfied for the reasons detailed in the appellant's advocate's [11-17] written submissions that the judge did apply the appropriate test when determining the appeal under Article 8. I accept that the judge accurately recorded that the respondent had adopted the test of unjustifiably harsh consequences and that she carried out her own analysis and reached her own conclusions by reference to the same test. In places in the decision, the reasoning of the judge could be clearer but I am satisfied that, reading the decision as a whole, the judge has directed herself appropriately and that the Upper Tribunal should hesitate before finding otherwise.
4. I agree also with the appellant's advocate that the grounds of appeal at [4] misrepresent the reasoning of the judge. It is not the case that at [25] the judge recorded that there was '**no evidence**...[from] the appellant as to what exactly does with the children...' [my emphasis]. As the appellant's advocate records, the judge wrote that she had '**no independent** evidence of exactly what the appellant does for the children or the effect on the children of removal of the appellant back to China.' [my emphasis]. I take this to mean that the judge was recording the absence of any independent expert evidence (for example, from an independent social worker) which might supplement that of the appellant himself and his wife. The grounds suggest that the judge reached a finding based on no evidence at all when, in fact, she reached her finding having accepted the truth and accuracy of the evidence of the appellant and his wife, which he was not only entitled to do but for which she has given cogent reasons for so accepting.
5. I find that I also agree with the remainder of the advocate's submission and prefer those submissions to the submissions set out in the skeleton argument of the Secretary of State. I do not propose to provide detailed reasons for reaching that decision for the following reason. I am determining this appeal on 7 July 2020, the date upon which the appellant's eldest child reaches her seventh birthday. I am well aware, as was the judge [27], that this child had not achieved this milestone at the date of the hearing before the First-tier Tribunal. It is, however, so far as the Upper Tribunal is now concerned, a pertinent factor. Even if I were to find that the First-tier

Tribunal had erred in law such that its decision fell to be set aside, it would then fall to me to remake the decision having regard to the circumstances of the appellant and his family as at the present date. As at today's date, the circumstances of the eldest child should to be considered under s117 B(6) of the 2002 Act:

(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.

Given that I have rejected the respondent's challenge to the judge's analysis of the evidence there remains little in the Secretary of State's submissions of April 2020 which would suggest that, given the appellant's wife's own immigration position and employment status, it would be reasonable for either the whole family to move to China or, more particularly, for the eldest daughter, now a 'qualifying child', to leave the jurisdiction of the United Kingdom. I am satisfied that the judge reached findings of fact which were available to her on the evidence and that she applied the correct legal test to those findings. On the basis of those findings I would inevitably find that, by application of section 117B(6), it would not be in the public interest for the appellant to be removed from the United Kingdom. Therefore, whilst my primary finding is that, for the reasons articulated by the appellant's advocate, the First-tier Tribunal judge did not fall into legal error, even if I were to find that she had done so, I would exercise my discretion not to set aside the decision for the reasons I have articulated above. Given those circumstances, the Secretary of State's appeal is, therefore, dismissed.

### **Notice of Decision**

The Secretary of State's appeal is dismissed.

Signed

Date 7 July 2020

*C.N.Lane*

Upper Tribunal Judge Lane

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.