



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: AA/08346/2013  
AA/08344/2013  
AA/08348/2013  
AA/08350/2013

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 20<sup>th</sup> January, 2014**

**Determination Promulgated**

**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**X C  
W L  
A H X L  
D L**

**Appellants**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellants: Miss Warren of Counsel  
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

## DETERMINATION AND REASONS

1. This is the Appellants' appeal against the decision of Judge Thornton made following a hearing at Bradford on 18<sup>th</sup> October 2013.

### Background

2. The Appellants are Chinese nationals. The first Appellant arrived in the UK as a minor on 10<sup>th</sup> August 2007 and claimed asylum, and was refused and her subsequent appeals were dismissed. She made further submissions and was ultimately granted a period of discretionary leave, which expired on 19 October 2012. The refusal of her application for further leave was the subject of the appeal before Judge Thornton. The second Appellant arrived, also as a minor in May 2008 and also claimed asylum. His appeal rights are exhausted and he is dependent on this claim. The third and fourth Appellants are their children.
3. The Appellant appealed on a number of grounds, including under the Refugee Convention and Articles 2 and 3 of the ECHR and Judge Thornton dismissed her appeal on all counts.
4. The Appellant sought permission to appeal against each aspect of Judge Thornton's decision. On 26<sup>th</sup> November 2013 Judge Kinnell granted permission to appeal against the decision on Article 8 grounds only.
5. With respect to Article 8, the judge recorded that the Appellants would be returned to China as a single family unit and their family life would not suffer interference on return. She rejected the contention that the second Appellant enjoyed family life with his former foster carers.
6. She accepted that the adults had been in the UK since 2007 and 2008 respectively but each had entered illegally. They were 16 when they came and therefore had spent the majority of their lives in China. There was no reliable evidence in relation to the claim that the first Appellant had no family in China nor that the second Appellant had no contact with his grandparents, his parents having died. She said that even if it were the case that neither had any family in China they were adults who had gained advantages of education and work experience in the UK which could be used to enhance employment prospects in China. Friendships could be maintained via modern means of communication.
7. With respect to the children she wrote as follows:

"In balancing the Appellants' rights against the wider interests of the community, I shall first consider in accordance with the judgment of the Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC 4 and *EA (Article 8 – best interests of child) Nigeria* [2011] UKUT 00315 what is in the best interests of the children. It is in the best interests of the children to live with and be brought up by their parents. Although the children were born in the UK they are not

British citizens. They are very small children of only 2½ and 20 months and will therefore be primarily focused on themselves and their parents. It is in their best interests to return to China, the country of their nationality, to live in a family unit with their parents.”

8. Miss Warren submitted that the consideration of the children’s best interests was flawed. The judge had referred to the health condition of the fourth Appellant in relation to her consideration of Article 3 but had not taken into account his complex health needs in her assessment of what would be in his best interests. There was evidence before the judge that he had significant health problems which had required hospital admission in the past and it was clear that he would need treatment for those conditions in the future. Moreover she had not taken into account the decision in AX (family planning scheme) China CG [2012] UKUT 00097 in relation to Article 8. In failing to have regard to relevant factors the judge had erred in law.
9. Mr Diwnycz submitted that on the evidence before the judge she was entitled to reach the conclusion that she had.

#### **Consideration of whether there is an error of law**

10. I agree that the consideration of the best interests of the children is incomplete because although the judge referred to the fourth Appellant’s medical issues in relation to Article 3 she did not turn her mind to their relevance in assessing his best interests. Neither, when she said that the children’s best interests lay in remaining with their family and returning to their country of nationality did she consider what in practice that would mean for these children.
11. The country guidance case, AX, held that, for multiple child families:
  - “(vi) Any second child even if authorised entails for 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.
  - (vii) Where an unauthorised child is born, the family will encounter additional penalties. Workplace discipline for parents in employment is likely to include demotion and even loss of employment. In addition a social upbringing charge is payable (SUC) which is based on income with a down payment of 50% and three years to pay the balance.
  - (viii) There are hundreds of thousands of unauthorised children born every year. Family planning officials are not entitled to refuse to register unauthorised children and there is no real risk of a refusal to register a child. Payment for birth permits for the registration of children and the imposition of SUC charges for unauthorised births are a significant source of revenue for local family planning authorities. There is a tension between that profitability and enforcement of the nationally

imposed quota of births for the town, country and province exceeding which can harm officials' careers.

- (ix) (ix) The financial consequences for a family of losing its SCP (for having more than one child) and/or of having a 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."

12. The decision in relation to Article 8 is set aside.

### **Remaking the decision**

13. Judge Thornton's findings of fact have not been successfully challenged. The basis for this determination is therefore her finding that neither the first nor the second Appellant would be at risk on Refugee Convention grounds on return to China, that neither had shown that they were unregistered persons in China and none of the family would be at risk of Article 3 ill-treatment.
14. Miss Warren adduced further evidence namely a letter from the consultant paediatrician dated 13<sup>th</sup> January 2014. She also asked for a short adjournment so that the mental health needs of the first Appellant could be assessed. I did not consider this to be necessary. This appeal has been going on for a very long period of time. If there was a serious mental health issue I would have expected it to have come to light at a much earlier stage than the day of the hearing.
15. It says that the fourth Appellant was born at 30 weeks' gestation and remained in hospital until he was 4 months old. He was briefly admitted to the paediatric ward on 14<sup>th</sup> August 2012, some four months later with bronchiolitis and there have been two further admissions in January 2013 and April 2013. He was last seen in clinic in December 2013 when he appeared well on his current treatment of daily oral medication. If he remained well he may be able to try for a period off the medication during the summer but was likely to need further support in the winter. The history of prematurity and early bronchiolitis are the most likely underlying cause for his tendency to wheeze with viral illnesses.
16. The consultant says that DL also has hearing loss and has had a general anaesthetic to investigate when he was found to have very narrow ear canals contributing to wax build-up and subsequent hearing loss. He ought to have further hearing assessments in the community to evaluate his hearing. Prematurity in itself carries some risk of developmental problems and such children require close attention to all aspects of their health to ensure development is not further compromised. Whilst to date he has made good progress, it is too early to assess any potential needs he may have.
17. Miss Warren also produced a letter from Humber NHS Trust referring the first Appellant to an individual in relation to mental health problems.

18. She submitted that it was clear that the children's best interests lay in remaining in the UK. If they were returned to China they would face significant hardship.
19. They would not be returning with any financial resources. Miss Warren relied on AX for the proposition that children in multiple families would not be entitled to free education and medical treatment. They would also face difficulties on account of their both having left illegally. At paragraph 108 of AX the Tribunal said that the penalty for illegal exit would be administrative detention for not more than five days and a fine of up to 500 RMB. Both parents had been out of China for a very lengthy period of time. There was evidence that the first Appellant had vulnerabilities of her own which in turn would impact on her ability to care for the children. For this family the consequences of return would be harsh.
20. Whilst there were countervailing factors, namely the fact that they had made claims for asylum on grounds not found to have been made out, the best interests of the children should be followed and the appeal ought to be allowed.
21. Mr Diwnycz relied on the reasons for refusal letter. He accepted that there would be some hardship but there were no insurmountable obstacles to the family's return and where the Article 8 Rules were not met it would be rare for the Tribunal to depart from them.

### **Findings and Conclusions**

22. It is not argued that the Appellants meet the requirements set out in the Immigration Rules for a grant of leave to remain on the grounds of private life, paragraph 276ADE. Miss Warren did not suggest that the Appellants have no social, cultural or family ties with China. They would be returned as a unit. Neither can they meet the requirements of EX1 of Appendix FM of the Immigration Rules because the children have not lived in the UK continuously for seven years immediately preceding the date of application.
23. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 the Upper Tribunal held that:

“After applying the requirements of the Rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre.”
24. The Tribunal also wrote as follows:

“On a thorough review of the Strasbourg guidance, Sales J concluded that in a precarious family life case only in exceptional circumstances would removal of the non-national family member constitute a violation of Article 8. To show that, despite the absence of insurmountable obstacles to removal, it would nonetheless be disproportionate, it would be necessary to show other non-

standard and particular features of the case of a compelling nature demonstrating that removal would be unjustifiably harsh.”

25. In this case there are arguably good grounds for considering whether there should be a grant of leave outside the Rules, namely the health of the fourth Appellant and the particular circumstances to which the Appellants would return in China.
26. The leading case on considering the best interests of the children remains ZH (Tanzania) v SSHD [2011] UKSC 4. The Supreme Court held that the best interests of the children must be a primary albeit not paramount consideration. It will involve asking whether it is reasonable to expect the child to live in another country. The court accepted that the children’s best interests could be outweighed by the cumulative effect of other considerations.
27. Both children retain the nationality of their parents and as Chinese nationals would be returning with them to their country of nationality. They are very young and there is no evidence of their having put down any roots in the UK or formed links outside the family unit save with the doctors who are treating the fourth Appellant. Their parents speak limited English, if any, in that they needed an interpreter to explain the proceedings to them and the children would therefore be returning to a country where their primary language is spoken.
28. Most important in the consideration of the children’s best interests are D L’s health needs. In fact it is uncertain what they are. He was born very prematurely, spent the first four months of his life in hospital and has had a couple of brief admissions since, the last nine months ago. Neither of the conditions from which he suffers are in any sense life threatening and indeed at the moment he appears to be doing well. He is taking oral medication in the winter months and may be able to manage without in the summer. The evidence in relation to his mother’s mental health is scant, there having only been a very recent referral, but if there were serious concerns I would have expected them to have been documented over the last months or years.
29. There is some evidence that the family would suffer some degree of hardship in returning to China, with two children, having left as illegal entrants. The penalties outlined in AX relating to the workplace would not apply in this case since W L is not presently in employment in China. On the other hand there is evidence that they would have to pay for medical treatment.
30. The Appellants have not been believed in their claims. They state that they would be returning without any meaningful support and it is true that they both came to the UK some seven years ago at the age of 16. It is likely therefore that the family and social networks which they had when they left will have to be rebuilt.
31. It is difficult to say what the best interests of the children are. On the one hand they will return to an uncertain situation in China where there is evidence that the family will have to pay to access the health care which is required. On the other they will be returning with their parents to the country of their nationality and whilst there is no

positive evidence of relatives in China, the witnesses having been found not to be credible, it is not possible to conclude that there will be no members of either the immediate or wider family able to assist in their resettlement.

32. In ZH the children were British and the Supreme Court placed strong emphasis on the detriment caused by the loss of access to the advantages of British citizenship which removal would entail. Moreover the children were older and had formed their own social networks. None of those considerations apply here.
33. On balance I conclude that whilst it is in the children's best interests to remain in the UK in the shorter term, because of the problems in resettlement, in the longer term returning to their country of nationality and the opportunity of making relationships with wider family members may well be in their best interests. D L's problems appear to be mainly behind him and there is excellent health care in China should that be needed.
34. The Secretary of State has a significant interest in this family's removal. The two adults came here on a false prospectus, and there is likely to be a cost to the public purse if they stay. No evidence was adduced to show that the family is self sufficient. The second Appellant says in his witness statement that he is now working, and if so that experience will stand him in good stead on return.
35. Accordingly I conclude that removal is proportionate and the Appellants' appeals fail on article 8 grounds.

### **Decision**

36. The original judge erred in law. Her decision is set aside. The following decision is substituted. The Appellants' appeal is dismissed on all grounds.

Signed

Date

Upper Tribunal Judge Taylor