IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42055/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Decision & Reasons Promulgated**
On 22 December 2014	**On 15 January 2015**
Given 22 December 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS DINGQIN ZHENG

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Presenting Officer
For the Respondent: Mr S Vokes, Lin & Co Solicitors

DECISION AND REASONS

1. In this determination the Appellant is referred to as the Secretary of State and the Respondent is referred as the claimant.

2. The claimant, a national of the People's Republic of China, date of birth 23 January 1992, appealed against the Respondent's decision dated 30 September 2013 to refuse to vary leave to remain, based on an application on 28 September 2012, and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. That

appeal came before First-tier Tribunal Judge D Birrell who, on 10 June 2014, promulgated a decision, having heard the matter at Stoke, on 29 May 2014. Permission was given to the Secretary of State to appeal by First-tier Tribunal Judge Keane on 24 July 2014.

3. Without doing disservice to either side's arguments, it seemed to me the thrust of the Secretary of State's challenge was that there was no proper basis for the judge's conclusions that Article 8 in respect of the Claimant were engaged. The *gravamen* of the submission was that, the Claimant having entered the United Kingdom as a student and being married to Mr Chen, from 2007 Mr Chen had started to develop serious health problems with his lungs leading to major surgery and that the consequences of that left him so debilitated he could not be expected to return to the PRC with the Claimant.

4. Those matters were summed up by reference to three points. First, Mr Chen now had only either part or none of his left lung working. Secondly, he had sustained through the operation process some brain damage, potentially associated with hypoxia, and that it had left him with physical difficulties including tremors, on the left side of his body.

5. Thirdly, it was said that taking him away from the United Kingdom and in particular him returning to China, where urban areas air pollution was a significant problem, presented a real risk to his continued survival and the possibility of having a life in an urban area in the PRC. It was, it seems, considered that life in a rural area would be undesirable for different reasons, not least the income he could earn and the availability of the appropriate quality of hospital care. The judge, it is fair to say, was persuaded on these latter two issues and concluded that it was not proportionate for him to be required to return with the Claimant and their young child aged about 2 years at the material time.

6. The difficulty Mr Volkes faces is that before the judge there was some evidence of the past issue of Mr Chen's ill health, identification of much of the consequences back in 2009 arising from the operation and his recovery, but there the evidence stopped. It was therefore just short of five years from that information when the matter came before the judge in May 2014.

7. In the circumstances there was no updating medical evidence although it seems it was contemplated some would be provided at the hearing and the position was that there was no prognosis on Mr Chen's health, there was no information about current treatment, medication or review. In the circumstances the impact of return upon the Mr Chen health appeared to be a completely speculative exercise by the judge doing the best she could in the circumstances that arose.

8. As at today, again that position remains that there is nothing to confirm the 2009 circumstances were continuing in 2014 or to date or that such

was the residual value of Mr Chen's right lung as to give rise to a real concern that air pollution and life in China would give rise to the serious risk to his health.

9. Of itself, the fact that there is significant environmental pollution in the PRC takes the matter of Mr Chen's health little further. But it is the association with the Mr Chen's lung condition that is the crucial issue determining the judge's finding. I appreciate the judge took into account many other factors which were entirely matters of weight for the judge and upon which it would be wholly inappropriate to interfere. Nevertheless, I find unfortunately that the evidence was not sufficiently up-to-date to entitle the judge to rationally reach the decision she did.

10. The case law on this matter has been entirely clear since R (Iran) [2005] EWCA Civ 982 and in the normal course of events despite a judge feeling that a different decision should have been reached, that is not a proper basis to overturn a decision. However in this case it seems to me that there was no evidential basis for the reasoning that the judge gave as to present risk in relation to the adverse effects upon Mr Chen's medical condition. In those circumstances that being the key issue in connection with their return as a family, it seems to me that that was a material error of law.

11. It may be it is unnecessary for these purposes to resolve the matter if there is an outstanding legacy case that will be a matter for the parties to resolve. It is unfortunate that a further and resumed hearing is going to be needed but plainly it is critical that the medical evidence is brought up-to-date and also evidence is provided as to the likely impact upon Mr Chen's health associated with air pollution and the extent to which it gives rise to risks to him in particular.

12. The original Tribunal's decision can not stand. The decision will have to be remade on Article 8 ECHR issues in the Upper Tribunal.

Directions.

List before Deputy Upper Tribunal Judge Davey.
Hearing – 2 hours
Mandarin interpreter required unless the Claimant notifies the Upper Tribunal to the contrary.
Documents – any additional bundles of documents relating to Article 8 as an issue to be submitted by not later than 14 days before the further hearing.
Case to be relisted with reference to Mr Stephen Vokes' availability.

Signed Date 8 January 2015

Deputy Upper Tribunal Judge Davey