



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/08808/2012
AA/05329/2011

THE IMMIGRATION ACTS

Heard at Bradford
On 17 July 2013

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XIUJIAN LIU (FIRST RESPONDENT)
KEVIN LIU (SECOND RESPONDENT)

Respondents

Representation:

For the Appellant: Mrs R Pettersen, a Senior Home Office Presenting Officer
For the Respondents: Mr A Hussain, Burton & Burton Solicitors

DETERMINATION AND REASONS

1. The respondents are citizens of China. The first respondent is the father of the second respondent. He was born on 13 March 1984. The second respondent was

born in the United Kingdom on 23 February 2010. I shall refer to the first respondent as “the respondent” throughout this determination. On 12 April 2011, the decision was made to refuse asylum and to issue directions for the removal of the respondent as an illegal entrant from the United Kingdom. The respondent appealed against that decision to the First-tier Tribunal (Judge N P Dickson) which, in a determination dated 19 December 2012, dismissed the appeal on asylum and Article 3 ECHR grounds but allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal. The dismissal of the asylum/Article 3 ECHR/humanitarian protection appeals have not been challenged by the respondent. The respondent claims to have been abandoned as a child in China and he was brought up in a temple. The judge [42] did not accept the credibility of that account. The mother of the second respondent no longer has a relationship with the first respondent or the child and the first respondent has been the sole parent of the second respondent who has a number of medical problems, including a cleft lip and palate and ongoing speech and language difficulties. He also has a problem with an index finger which may require surgery.

2. At [59] the judge wrote:

I have carefully read the decision of ZC (Risk – illegal exit – loan sharks) China CG [2009] UKAIT 00028. While the head note does refer to unsuccessful asylum seekers being unlikely to be imprisoned having left China unlawfully, paragraph 24 of the determination refers to the New York Times’ report as to the doubt of what happened to those who are repatriated to China in part because there have been so few. Paragraph 41 would suggest that at worst an appellant would have a short term of imprisonment and it was most likely that a fine would be imposed. In ZC the children in that case were fast approaching their 18th birthdays and there were relatives who could look after the children if either of the appellants were imprisoned. I have previously found that the appellant has not given a credible account of his history in China. There may or may not be relatives who would be able to care for the second appellant if the first appellant suffered a short period of imprisonment. In view of the child’s age it would be quite wrong if he were abandoned in China in those circumstances. Accordingly I am not satisfied that it would be in the best interests of the second appellant to be returned to China in view of the current situation.

3. I consider that that paragraph reveals some difficulties in the judge’s approach to the facts of this appeal and his application of country guidance. The headnote of ZC, to which the judge refers, actually reads as follows:

(1) Individuals returning to China after having made unsuccessful claims for asylum are not reasonably likely to be imprisoned or subjected to administrative detention for having left China unlawfully; LJ (China – Prison Conditions) China [2005] UKIAT 00099 upheld. Those able to provide the authorities with information on loan sharks or snake heads are even less likely to be at risk of prosecution.

(2) The evidence does not establish that failed asylum seekers indebted to loan sharks will come to harm on return to China; the information on loan sharks in HL (Risk – Return – Snakeheads) China CG [2002] UKIAT 03683 is still applicable.

4. This headnote contains the country guidance of the Senior Immigration Judge. Rather than follow that guidance, the judge has instead found a passage in the determination where the Tribunal discusses the evidence, including that from the New York Times:

On 11 June 2006 the New York Times reported:

"There is some dispute about what happens to those who are repatriated to China, in part because there have been so few... A Department of Homeland Security spokesman told me, 'We have no reports of people who have been sent back to China being persecuted.' Others, though, are not so sanguine. Two years ago, Richard Posner, a judge on the U.S. Court of Appeals for the Seventh Circuit, vacated a deportation order for a Chinese youth because the immigration judge did not consider the evidence – numerous human rights reports from both U.S. and British organizations – that the asylum seeker might well be sent to jail or a labor camp if returned to China. Posner was concerned that the Chinese youth might be tortured upon his return, though he also conceded that 'the treatment of repatriated Chinese by their government is to a considerable extent a mystery.' Indeed, one Chinese legal scholar I spoke with, Daniel Yu, said that while there is a law on the books in China that calls for a short jail sentence if a person leaves the country illegally, more than likely whatever punishment there might be is at the discretion of local officials." (35.05, cited in COIR)

5. Curiously, the judge then reminds himself that he has found the respondent not to have given a credible account of his history in China. I say this is curious because he then immediately goes on to give at least some credence to the respondent's assertion that he has no relatives in China who would assist him, in particular in caring for the second respondent if he and the child were to be separated. I agree with the Secretary of State that this portrays an inconsistency of approach on the part of the judge. The burden of proof was upon the respondents to prove material facts which would indicate that they faced a real risk of persecution or ill-treatment upon return to China. The respondents had not proved that they did not have relatives or others in China who would assist them. Further, I find the judge has assessed the risk of the respondent being imprisoned upon return to China at a much higher level than the country guidance would indicate was likely. Moreover, the judge has then, in the space of a few sentences, moved from acknowledging the country guidance to allowing the appeal on the basis that the respondent would be imprisoned and the second respondent would, as a consequence, be abandoned on the streets. I find that there was simply no basis for reaching that conclusion. There was nothing in the evidence before the judge which would indicate that the Chinese authorities would allow the very young child of a prisoner to be completely abandoned. In any event, as I have noted, the respondents had failed to show that third parties would not be available to care for the child. In the circumstances, I find that the judge's reasoning is flawed to the extent that the determination should be set aside and the decision remade.
6. Even if I am wrong in that finding, I find that the judge also erred in his assessment at [60]:

I have also taken into account the medical evidence. It is likely the second appellant's index finger will be repaired within the immediate future. His cleft lip and palate have been repaired and the wounds following the operation have healed. It is not clear who was present at the interview with Mr Neil-Dwyer or whether an interpreter was used [Mr Neil-Dwyer is a consultant plastic surgeon at Nottingham Children's Hospital]. I have no detailed information concerning the previous hearing tests and the abnormalities. However it is intended that over the next year the speech and language therapy team of the Nottingham Children's Hospital will see the appellant regularly in order to assess his further language and speech production. Again it would not be in the second appellant's best interests to be removed from the first appellant while these tests are ongoing and before any conclusion can be reached. It also follows in my view that the second appellant should not be separated from his father, the first appellant.

7. The judge has not considered at all the availability in China of treatment for the second respondent's health problems. He appears to assume that the treatment can only be carried out in the United Kingdom. I find that there is no basis for the judge allowing the appeal on that basis.
8. I did not find that it is necessary to receive further evidence in order to remake the decision in this appeal. I adopt the finding of Judge Dickson in relation to the respondent's credibility which I find has not been vitiated by any error of law. I find that the respondent has failed to discharge the burden of proving that he does not have family or friends in China who would help him and the second respondent on their return to that country. Following the clear country guidance of *ZC*, I find that it is not reasonably likely that the respondent would be imprisoned upon his return. He would not, therefore, be separated from his son. Even if the first respondent were to be imprisoned, I find the respondents have failed to prove the second respondent would be, in effect, abandoned during the period of any imprisonment. I also find that the respondents have failed to prove that the second respondent's medical problems could not be treated in China. Such background evidence as there is in the Tribunal's file indicates that China has a fully functioning medical system and I have no reason to suppose that language development problems cannot be treated within it.
9. As regards Article 8 ECHR, I find that the family life of these respondents will not suffer interference because they will be removed together to China. As far as the second respondent is concerned, I acknowledge that he will suffer some disruption in his medical treatment. I have little, if any, other evidence of the strength of the private life ties which the first respondent may have in the United Kingdom; the second respondent's private life is, in the light of his youth, consists to a very great of being with his father. Set against the possible interference caused to the respondents by their removal to China, there is the public interest concerned with their removal. The first respondent is a failed asylum seeker. I find that the public interest concerned with his removal to his country of origin was a strong one. I find that the removal of both respondents to China would be proportionate in all the circumstances. As a consequence, the Article 8 ECHR appeals are dismissed.

DECISION

10. The determination of the First-tier Tribunal dated 19 December 2012 is set aside. I have remade the decision. These appeals are dismissed on asylum grounds. These appeals are dismissed on human rights grounds. Neither respondent is entitled to a grant of humanitarian protection.

Signed

Date 10 October 2013

Upper Tribunal Judge Clive Lane