



Upper Tribunal
(Immigration and Asylum Chambers)

Appeal Number: PA/07541/2018

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 1st February 2019

Decision Promulgated
On: 14th February 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

WJH

(anonymity direction made)

Respondent

For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondent: Mr Katani, Katani & Co Solicitors

DECISION AND REASONS

1. The Respondent (WJH) is a national of the People's Republic of China born in 1988. On the 22nd August 2018 the First-tier Tribunal (Judge Raikes) allowed his appeal, on human rights grounds, against the Secretary of State's decision to deport him. The Secretary of State now has permission to appeal against that decision.
2. In broad summary the First-tier Tribunal allowed the appeal with reference to Article 8, having accepted that it would be 'unduly harsh' to expect WJH's

seven year old son to go to live with his parents in China: it had already been accepted by the Secretary of State that it would be unduly harsh to expect him to remain here without his father. That finding was made on the basis that the child is on the autistic spectrum and there is not in China adequate provision for his needs.

3. The Secretary of State appeals against that decision on two grounds. The second of these need not concern me since it was withdrawn at hearing by Mr Bates, the grounds having been overtaken by the decision of the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 (IAC): the Secretary of State's complaint that the First-tier Tribunal had failed to weigh in the balance the nature of WJH's offending was no longer relevant.
4. The remaining submissions are set out at paragraphs 3-7 of the written grounds, and concern the First-tier Tribunal's finding that it would be unduly harsh to expect an autistic qualifying child to relocate to China. These grounds are, with respect, somewhat difficult to follow. Paragraphs 3 & 4 simply summarise parts of the First-tier Tribunal decision. Paragraph 6 suggests that the First-tier Tribunal should have asked itself whether the child's future development would be "irreparably harmed" by removal to China, a rather startling inflation of the actual test in the rule. Paragraph 7 appears to amount to a disagreement with the First-tier Tribunal's findings. I am left, then, with paragraph 5:

"It is also of note that there is no reference in the determination to any medical evidence beyond acceptance that the child is on the autism pathway and certainly no indication that the eldest child is disabled and in no way satisfies the demanding threshold of being unduly harsh if returned to China".

Before me Mr Bates adopted this ground and submitted that the Secretary of State's real complaint about this determination was the lack of reasoning or explanation for the findings made. I have read the written ground set out above to omit the double negative in the final part of the sentence.

5. What then were the First-tier Tribunal's findings on the autistic child?
6. He was born in the United Kingdom to Chinese parents who were without leave, and has remained here ever since [§10]. He is therefore a 'qualifying child' who has only ever known the United Kingdom as his home [§30 & 32]. Mr WJH enjoys a subsisting parental relationship with his son [§25]. The child is happy and settled at school and is making progress [§30]. The Secretary of State accepts that separation from his father would have a significant impact upon him and his ability to manage on a daily basis [§30]. The child has significant health and development needs that are currently being investigated, and he has been placed on the 'autism pathway' [§32]. Although the Secretary

of State has asserted that there are facilities for children with autism in China it is unclear whether this is conclusively the case [§32]. Whilst there is some evidence of research and treatment taking place in China it “appears that it is at best piecemeal” [§32]. WJH produced evidence stating that such support that there is available in China is only for children up to the age of six and there is no support for adults [§33]. He would therefore face serious difficulties [§33]. The family may be subject to penalty for breaching the family planning scheme and the financial and social consequences of this could be significant [§34]. There is a risk that the ability of the family to access services such as education would be extremely limited [§34].

7. The Tribunal reaches its global conclusion at §37:

“I find therefore that whilst it may not be considered inherently unduly harsh to expect a child who is a qualifying child to leave the United Kingdom, the impact of removing the eldest child and indeed his siblings in these particular circumstances could be viewed as such. I am satisfied that the evidence indicates that he is fully socially and culturally integrated into the United Kingdom and whilst experiencing difficulties at present and awaiting further assessment has progressed well in his education at school. If he were to be removed with the Appellant, it would in my view not only cause significant disruption to his development now and at this stage in his life, but in the future”.

8. I turn then to the Secretary of State’s surviving ground. I disregard the point made about the lack of medical evidence to demonstrate that the child is ‘disabled’. There is no requirement that a child be ‘disabled’ before the test could be satisfied. The question for the Tribunal was whether there was before it evidence to demonstrate that it would be ‘unduly harsh’ to expect this child to relocate to China with his family.

9. Mr Bates submits that if this was the case, the Tribunal fails to articulate what it might have been. There is no explanation in the determination as where on the autism spectrum this child fell. Without that it was impossible to say how the lack of educational opportunities in China, or the lack of provision for autism, might affect him. In short, it was not possible to simply draw a line between the word ‘autism’ and a conclusion that removal would be ‘unduly harsh’. Whether that was the outcome depended not just on the circumstances in China, but upon how severely the child was affected by his condition.

10. Mr Katani points out that the Secretary of State has taken no issue with the child’s diagnosis, and that none of the findings about his life here have been challenged. The evidence cited in the determination, and included in the bundle, was that beyond the age of 6 – which this child is – there is no care for

autism in China. In those circumstances it was plainly open to the Tribunal to find that his removal would be unduly harsh.

11. I am satisfied that the Secretary of State has made out his ground of appeal.
12. Many of the individual findings made by the First-tier Tribunal were perfectly reasonable. I cannot think, for instance, that there is anything wrong in fact or law with its conclusion that an autistic child who is happy and settled in a certain school will be adversely affected by an enforced move. I am however satisfied that the Secretary of State is entitled to complain that he cannot understand the basis of this decision overall. The Tribunal has found that the child will face “serious disruption” if moved to China [at §37], and that the difficulties he is likely to encounter would be “significant” [at §33], but the determination contains no analysis of whether such disruption or difficulties could be described as “bleak” or “excessively” harsh. As KO (Nigeria) underlines, this is a high threshold test: ‘significant difficulties’ is not the same as ‘undue harshness’. The determination finds that there is a “risk” that the child would have “extremely limited” access to education without setting out an actual finding on the extent of that risk, or what the consequences of that might be [at §34]. For those reasons I find that the decision of the First-tier Tribunal must be set aside for a lack of reasoned findings.

Anonymity

13. WJH is a foreign criminal and as such would not ordinarily benefit from an order protecting his identity. The appeal however turns on the presence in the United Kingdom of his child. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I am concerned that identification of the WJH may lead to identification of his child and I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions

14. The decision of the First-tier Tribunal contains material errors of law and it is set aside.
15. Due to the extent of fact-finding required I am satisfied that the most appropriate forum for disposal of this appeal is the First-tier Tribunal. I remit

the matter *de novo* for remaking before any judge other than First-tier Tribunal Judge Raikes.

16. There is an order for anonymity.

Upper Tribunal Judge Bruce
8th February 2019