



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

Appeal Number: AA/01150/2015

THE IMMIGRATION ACTS

**Heard at Glasgow
on 2 November 2015**

**Decision and Reasons
Promulgated
On 9 November 2015**

Before

UPPER TRIBUNAL JUDGES DEANS & MACLEMAN

Between

LING LI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Devlin, Advocate, instructed by Latta & Co., Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of China, born on 6 January 2015, who sought asylum in the UK.
2. In her decision dated 6 January 2015, the respondent declined to accept that the appellant had been a practising Christian in China, or that she fled after the authorities interrupted an illegal religious gathering; accepted that she had become a Jehovah's Witness in the UK; and held that she would not be at risk of persecution on account of her religion if she

returned to China. (The application was also refused on other grounds, which are no longer live.)

3. By letter dated 2 April 2015 the respondent withdrew her concession that the appellant is a Jehovah's Witness.
4. First-tier Tribunal Judge D'Ambrosio dismissed the appellant's appeal by a determination, with 2 appendices, promulgated on 11 June 2015.
5. The appellant sought permission to appeal to the Upper Tribunal. The grounds dispute the adverse credibility findings, beginning with an alleged error based on a "structural failing" of reaching an adverse credibility finding without reference to corroborating evidence. The grounds further assert that the judge lapsed into speculation, failed to deal with the appellant's submissions, and failed to engage with proposition (2) at section (8) of written submissions.
6. Permission to appeal was given on 28 August 2015. The judge granting permission was concerned that the FtT judge had not summarised the evidence heard. He thought that the judge might have erred by failing to demonstrate that he considered the background evidence before making findings of fact, and by seeking corroboration.
7. The point taken at 8(2) of the written submissions is an alleged risk on return as a failed asylum seeker. This argument is not dealt with in the determination, but it is far-fetched and unsubstantiated, and Mr Devlin did not pursue it. He acknowledged at the outset that the judge did set out the appellant's evidence quite fully, in appendix 1 to the determination. He accepted that it would be difficult to say the judge fell into the error of seeking corroboration, given the clear self-direction on that point at paragraph 65.
8. Mr Devlin presented the argument by reference to the authorities on "structural error" (*Mibanga* [2005] INLR 377, *S* [2007] Imm AR 1, *HH* [2007] EWCA Civ 306, and *ND (Togo)* [2007] EWCA Civ 1431) and took us carefully through the order and format in which the judge set out his conclusions. He aimed to persuade us that the judge conclusively rejected the appellant's account by way of artificial separation of particular findings, and not on the evidence as a whole.
9. In view of the decision which we have reached, we do not need to dissect the determination in detail. It is written in the judge's usual inimitable and idiosyncratic style, but we do not think it contains an overall structural error.
10. We were concerned, as submissions developed, by three particular passages in the determination.
11. At paragraphs 106 - 108 the judge deals with an expert report by Dr Barker, Professor Emeritus of Sociology at the London School of Economics. He says that when writing her report Dr Barker:

"[107] ... then believed that the respondent had conceded that the appellant was a Jehovah's Witness [and so] had no reason to critically assess the appellant's related claims and broadly accepted them *per* report section C (pages 23-28). Dr Barker was not asked to provide a revised report after the respondent had withdrawn that concession. In any event, it is the duty of this Tribunal to decide whether or not the appellant's various claims are credible.

[108] I have previously found that the appellant has failed to provide reliable evidence that she was a Christian in China or in the UK ... "

12. Some of the report does trespass into the Tribunal's field of credibility, arguing points which are for a judge and not an expert. However, it is wrong to suggest that the report contained no critical assessment of the claims. That is the purpose of section C. Not everything said there is outside the expert area. There is pertinent comment on why the division of Christianity between Catholics and Protestants might not be prominent in China, and why the distinction between Trinitarians and non-Trinitarians might be more obvious to the appellant.
13. We are also concerned that the statement, "I have previously found that the appellant has failed to provide reliable evidence", at least suggests an error of reaching a negative conclusion, then looking to see if other evidence might displace it.
14. At paragraph 78 the judge comments on the absence of evidence from the appellant's husband. That is a matter which a judge might reasonably treat as adverse to credibility, but he goes on:

"... those circumstances indicate (*prima facie*) that he declined to provide such corroboration because it would be dishonest for him to do so and such dishonesty would be discovered if he attempted to do so."
15. At paragraphs 115-116 the judge takes that approach further. He finds it ***particularly significant*** (emphasised thus, by bold type, italics and underlining) that the appellant failed to provide evidence from pastors or members of the Kingdom Hall to support her claims of weekly attendance. He explains why he does not accept the appellant's explanation of the absence of such evidence. No criticism has been made of his reasoning to that point, but he continues:

"The absence of such evidence raises the presumption that (if the appellant had asked them) Kingdom Hall pastors or members would have declined to provide evidence to support the appellant's claims ... because it would have been dishonest to provide such evidence. That is a rebuttable presumption. But that presumption remains sound because the appellant has failed to provide reliable evidence which rebuts it."
16. Mr Devlin said that there is no authority for a presumption of that nature. We indicated that we were not aware of any such authority. Nor was Mrs O'Brien.

17. A Rule 24 response for the respondent submits as follows: this is a very lengthy and comprehensive determination, giving cogent reasons, and clearly holistic; a particular observation by the judge which is criticised in the grounds, paragraph 83, based on the appellant's incentives to make a false claim, played no material part in the overall assessment and was in any event a finding open to the judge; the findings based on absence of evidence were also sustainable; the judge provided "a plethora of reasons for rejecting the appellant's claim"; the grounds are only re-argument.
18. Mrs O'Brien submitted that the Rule 24 response hit the nail on the head, and that there were numerous well-made adverse credibility points in the determination. Properly read, it did not separate out its conclusions and approached the case as a whole. The expert report was not focussed on the credibility of the appellant but on risk on return, predicated on accepting the appellant was telling the truth. While the passages from the determination which we have quoted above might be overstated, they did not taint the determination as a whole. They could safely be read out, and the same outcome would inevitably have been reached.
19. We reserved our determination.
20. We find that the determination falls down at the three places mentioned. Paragraph 108 reads as if conclusions were reached in isolation from the report. The determination does contain many well made adverse credibility points, and that particular failure might not have been enough for it to be set aside, but paragraphs 78 and especially 116 go more seriously wrong. Failure to produce obvious evidence is often a good reason for finding that an appellant has failed to establish her case to the necessary standard, but it is not proof positive that she is lying. There is no legal presumption as stated by the judge. He is so emphatic in making and in founding upon this error that we do not think the determination can safely stand.
21. The determination of the First-tier Tribunal is **set aside**. None of its findings are to stand. Under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to **remit the case to the First-tier Tribunal**. The member(s) of the Tribunal chosen to reconsider the case are not to include Judge D'Ambrosio.
22. No anonymity direction has been requested or made.



Upper Tribunal Judge Macleman

4 November 2015