



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08902/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 15th March 2016

Decision & Reasons Promulgated
On 11th April 2016

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

and

WH
[Anonymity direction made]

Appellant

Claimant

Representation:

For the claimant: Ms K Smith, instructed by TRP Solicitors

For the respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Hollingworth promulgated 2.10.15, allowing the claimant's appeal against the decision of the Secretary of State to refuse his asylum, humanitarian protection and human rights claims and to remove him from the UK. The Judge heard the appeal on 21.8.15.
2. First-tier Tribunal Judge Reid granted permission to appeal on 23.10.15.
3. Thus the matter came before me on 15.3.16 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Hollingworth should be set aside.
5. The issues in claimant's asylum claim can be summarised briefly as follows. He helped plan, organising propaganda, and then participated in the 1989 student protests. He was beaten in June 1989, with the result of losing sight in both eyes. He has also practiced Falun Gong in secret since 1995. He has been fined for having a second and third child and is not willing to comply with China's family planning policy, intending to have as many children as nature will permit with his current wife, but does not yet have any children with her. A close friend of his father who worked for the police advised him that people who knew he was involved in the 1989 demonstration were arrested in March 2014 as they were planning to commemorate the 25th anniversary of the event. He fears that they will inform the government of his involvement, as he was also planning with them to commemorate the anniversary by holding a secret candlelight memorial.
6. The Secretary of State did not accept that he had participated in the 1989 protests and did not give him the benefit of the doubt under paragraph 339L as to whether his friends were arrested in March 2014 for their intention to commemorate the anniversary. Based on his apparent lack of knowledge of Falun Gong at interview, his claim to practice it was rejected. His second wife has had no children of her own and is entitled to have at least one child before being fined. Even if he was a practiser of Falun Gong, it is not accepted that he would be at risk on return.
7. The reasons for refusal letter raises a series of credibility issues based on his answers or unwillingness/inability to answer questions. In particular, the Secretary of State relied on inconsistencies in the claimant's asylum interview account, including as to his claim to practice Falun Gong. He was unable to name any of the five Falun Gong exercises and was only able to demonstrate one on the second day of interviews, after having the opportunity to research the matter in the public domain overnight. Although he did not challenge the screening interview, the claimant did not accept the accuracy of the asylum interview and sent detailed corrections and clarifications to the interviewing officer some time after the interviews.
8. Noting that the claimant is not only blind but has hearing difficulties (in one ear), Judge Hollingworth considered that the procedures adopted at the interview were insufficient for the claimant's physical difficulties and no additional safeguards were provided. The judge found that it would have been necessary for at least the first tranche of the interview to have been read back to the appellant "to ensure that the (Claimant) had expressed himself in the way in which he sought to do. I find, therefore, that the foundation for the edifice constructed by the respondent in analysing and criticising the answers given by the appellant is insufficient to support that edifice."

9. At §39 the judge accepted the claimant's factual account and found that imputed political opinion had been made out and a real risk or serious possibility of harm exists, and thus allowed the appeal on asylum grounds. The judge also allowed the appeal on human rights grounds for the same reasons. At §41 the judge did not reach a conclusion on the Falun Gong claim, stating that in light of the asylum and human rights findings "It is otiose in these circumstances to consider whether the (claimant) would be at risk on the basis of his practising Falun Gong." The judge then added, "With regard to internal relocation I do not find that this is either reasonable or practicable given the source of persecution and the scope of operations of agents of the State. It is otiose to consider the other limbs of the appeal."
10. In summary, the grounds argue that the First-tier Tribunal Judge failed to give reasons for his conclusion on a material matter, namely that the claimant was at risk by virtue of his imputed political opinion; that at §35 the judge was unclear on what basis the Secretary of State's interview procedures could have been improved for this claimant; that the judge failed to engage fully with the evidence or to give reasons why the claimant would now be of interest to the authorities, 25 years after the events described; the judge misdirected himself and failed to make clear findings about the claimant's practice of Falun Gong.
11. In granting permission to appeal, Judge Reid found it arguable that the judge did not make adequate findings in respect of the risk on return some 25 years after the event and failed to adequately analyse the Falun Gong issue. In addition, "It is arguable that the judge's conclusions on the weight to be given to the interview answers are lacking in reasoning."
12. Ms Smith relied on the claimant's Rule 24 response, under cover of letter dated 10.11.15, and amplified in her oral submissions to me, which I have carefully considered.
13. For the reasons summarised below, I find that the judge's approach to and assessment of the asylum interview, and the consequent dismissal of the Secretary of State's reliance on inconsistencies and criticisms of the claimant's account, to be flawed and in error of law for want of adequate and rational reason.
14. I accept that Judge Hollingworth suggested at §35 how the procedures could, in his view, have been improved or better. However, the judge failed to explain in what way those or any other proposals would have addressed the credibility issues raised by the Secretary of State arising from that interview. The Rule 24 response of the claimant also fails to engage with this point.
15. As Mr Parkinson pointed out, the claimant's rebuttal statement disputing the inconsistencies in his asylum interview related entirely to alleged interpreter issues and not to any difficulties arising from any visual or auditory impairment, or other disability. He makes no assertion he was unable to understand the interview questions because of any disability. Neither did he suggest in the first day of interview that he could not understand or misunderstood what was being asked of

him. In fact, reading the interview it appears that he gave clear and detailed answers to the questions asked of him. Nothing from the interview transcript suggests that he might have been having difficulties understanding. At §17 of the refusal decision it is noted that the claimant twice confirmed he understood the interpreter. At no stage on the first day did he raise any issue about understanding questions or the interpreter. It was only on the second day that he cryptically claimed he could not guarantee that he understood all the questions. Asked AT Q240 to identify which questions he did not understand, he said he was unable to say now. Asked why he could not say whether he understood particular questions, he was unable to do anything other than repeat his initial statement, stating, "I cannot determine which questions now. There are many misunderstandings from yesterday."

16. Given that he failed to mention any such problems with the interpreter when specifically asked, and only raised these after the interviews, the Secretary of State does not accept that there were any communication problems and in effect his post-interview representations was an attempt to revise or rationalise the evidence he had given in his interview answers.
17. It was only in post-interview representations that he claimed that there were many interpreter translation errors. He is described in the refusal decision as highly educated and assertive and his detailed witness statement comprising 22 pages is articulate and comprehensive in his attempts to clarify, add, or comment on the refusal decision, all of which suggests that he was perfectly capable of understanding the questions asked. I note that much of his rebuttal witness statement seeks to add or clarify what was said in interview.
18. On the facts set out above, I accede to the submission that the First-tier Tribunal Judge has failed to provide any adequate cogent reasons why reading back to the claimant of the first part of the interview by the same interpreter would have addressed the concerns the claimant subsequently raised.
19. As the approach to the interview was also integral and crucial to the overall assessment of the claimant's credibility, this error vitiates the finding as to the credibility of the appellant's factual account to have been involved in the 1989 protests and that he was planning the 2014 anniversary commemoration, rendering the decision in the unsustainable.
20. Further, the judge declined to address the Falun Gong issue, stating that it was otiose to do so, and thus there has been no adequate assessment of that issue.
21. In summary, the decision of the First-tier Tribunal cannot stand and must be set aside in its entirety.
22. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier

Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

23. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

24. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside set aside the decision.

I remit the decision to be remade afresh in the First-tier Tribunal.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

10 March 2017

Deputy Upper Tribunal Judge Pickup

Consequential Directions

25. The appeal is remitted to the First-tier Tribunal at Stoke on Trent;
26. The appeal is to be reheard afresh with no findings of fact preserved;
27. The appeal may be heard by any First-tier Tribunal Judge with the exception of Judge Hollingworth;
28. The estimated length of hearing is 3-4 hours;

29. An interpreter in Mandarin Chinese will be required;
30. Not later than 15 working day before the relisting of the appeal in the First-tier Tribunal the claimant shall serve on the Secretary of State and lodge with the Tribunal two copies of a single, consolidated, paginated and indexed bundle, comprising all subjective and objective materials to be relied on, together with copies of any case law or guidance to be relied on, and any skeleton argument. The Tribunal will not accept materials submitted on the day of the hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order pursuant.

Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

10 March 2017