



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19280/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2018

Decision & Reasons Promulgated
On 12 September 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

H K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms J. Fisher, instructed by Gillman-Smith Lee Solicitors
For the respondent: Mr D. Mills, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case potentially involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent.

DECISION AND REASONS

1. The appellant's nationality is disputed. She claims to be a national of North Korea, the respondent asserts that she is likely to be a Chinese national of Korean ethnicity. The appellant claims that she entered the UK illegally on 05 October 2007 with the assistance of an agent. She claimed asylum on 08 October 2007. The respondent refused

the asylum claim on 14 November 2007. In short, the respondent did not find the appellant's account of her claimed nationality or the course of events leading to her arriving in the UK credible. Immigration Judge Verity dismissed an appeal in a decision promulgated on 07 February 2008. Judge Verity did not find the appellant's account credible. There is no evidence to suggest that the appellant appealed the decision. Her appeal rights became exhausted on 18 March 2008.

2. On 13 July 2016 the appellant made a human rights claim on the basis of her family life with a British citizen. The appellant's husband was originally a Chinese national of Korean origin. The respondent refused the application on 14 July 2016.
3. First-tier Tribunal Judge Manyarara ("the judge") dismissed the appeal. She found that there were no insurmountable obstacles to the couple continuing their family life outside the UK. She found that there were no barriers to the appellant and her husband continuing their family life in China. She rejected the appellant's claim to be North Korean with reference to Judge Verity's earlier decision. The appellant and the sponsor had both lived in China previously. Her findings relating to the additional evidence regarding the appellant's nationality were as follows:

"30. Ms Hulse submits that the earlier decision can be departed from on the basis of the evidence relied on in the appeal before me. The only additional evidence in the appeal before me is that of Mr [C], whom the appellant says she knew in China. I have had the benefit of hearing Mr [C] giving oral evidence. I find that his evidence has not displaced the findings of the previous immigration judge on the issue of nationality. This is because he did not state in oral evidence that he was a North Korean national despite being repeatedly asked what his nationality is by Ms Hulse (including a leading question that I disallowed). He claims to have known the appellant in China when he and the appellant both worked on a farm there. The appellant's account of having worked on a farm in China was rejected by the previous immigration judge. I find that even if Mr [C] may have worked on a farm in China with the appellant, this is not determinative of the appellant's nationality in light of the conclusions reached by the previous immigration judge.

31. The fact that Mr [C] speaks Korean is also not determinative of the issue of nationality. Judge Verity concluded that the appellant was a Chinese national of North Korean ethnicity and this therefore explains her ability to speak Korean. Similarly, this may explain Mr [C]'s ability to speak Korean. The sponsor was also able to give his evidence in Korean and he does not claim to be of North Korean ethnicity.

.....

33. I find that there is no cogent evidence before me which is sufficient to displace the unappealed decision of Judge Verity. I find that the appellant has not established that she is a North Korean national. ..."

4. The appellant appeals the First-tier Tribunal decision on the single ground that the judge erred in her assessment of the evidence given by the appellant's witness, Mr C, who confirmed in his statement that he was a North Korean citizen who was recognised as a refugee in October 2007. The decision wrongly recorded Mr C's evidence to say that he was refused asylum [17], when he was in fact recognised as a refugee. Mr C attached his Residence Permit to his witness statement. The appellant's evidence that she worked on a farm had been consistent, and although previously

rejected, was supported by the new evidence provided by Mr C, which should have been given weight. The appellant's nationality is a material issue, because if she is North Korean she would not be removed there and could not be removed to China.

Decision and reasons

5. Judge Verity rejected the appellant's claim to be a North Korean national. She concluded that the appellant was likely to be a Chinese national of Korean origin. In light of that decision Mr Mills said that it was likely that the respondent would remove the appellant to China. The appellant did not appeal the First-tier Tribunal decision relating to the earlier protection claim.
6. This appeal is not an appeal against a decision to refuse a protection claim. It concerns the respondent's decision to refuse a human rights claim. The basis of the claim is her marriage to a British citizen. In his witness statement her husband said that he was born in China to South Korean parents. He said that he came to the UK in 1999 (when he was around 35 years old). It is reasonable to infer that he spent most of his life in China. He was a Chinese national but has since been naturalised as a British citizen. Some of this information conflicts with what was claimed in the original application, where the further submissions dated 08 July 2016 assert that the appellant's husband was a North Korean refugee.
7. The only ground of appeal relates to evidence that might go to support the appellant's claim that she is a North Korean citizen. In his statement Mr C said that he was North Korean. He left North Korea in 1981 and went to China. In 1998 he met the appellant when they were both working on a farm in Heilongjiang (China). They met again at a supermarket in New Malden in the UK in 2009. He said that, based on their conversations, he believed that the appellant was North Korean. He could not see why she would lie to him. In support of his evidence, Mr C produced a copy of his UK Residence Permit granting Indefinite Leave to Remain. The permit did not confirm his nationality. At the start of the hearing in the Upper Tribunal Mr Mills confirmed that the Secretary of State's records showed that Mr C was recognised as a refugee and was recorded to be a citizen of North Korea.
8. The judge heard evidence from Mr C. She was clearly not impressed with the evidence. At [16] she refers to Mr C repeatedly saying that he was from China. Given that he had lived in China for many years, I accept that this was not necessarily a statement of his nationality or citizenship. There was little more than Mr C's bare statement of his nationality before the judge. In light of the information confirmed by Mr Mills at the hearing, it is at least arguable that the judge made a mistake of fact if Mr C is recorded to be North Korean.
9. The Upper Tribunal will only set aside a decision if the error would have made a material difference to the outcome of the First-tier Tribunal appeal. In this case, Mr C's evidence could only go to the appellant's claim that she was also a North Korean citizen. Even if the judge had accepted that Mr C was a North Korean citizen it did not necessarily follow that the appellant is North Korean. His witness statement contains

little information to explain why the conversations that he had with the appellant led him to believe that she was likely to be North Korean. Nothing is recorded in the judge's summary of his evidence to suggest that he was asked to expand on his reasons for believing that the appellant was North Korean.


10. Even if the evidence was taken at its highest and it were to be accepted that the appellant is North Korean as claimed, it would have made no material difference to the outcome of the human rights appeal. The relevant legal issue was whether the appellant met the requirements of paragraph EX.1 of Appendix FM. The burden of proof was on the appellant to show that there would be 'insurmountable obstacles' to the couple continuing their family life outside the UK. The test is a stringent one: see *Agyarko v SSHD* [2017] UKSC 11. The test contained in paragraph EX.1 does not specify in what country the family life could continue, merely that there are 'insurmountable obstacles' to it continuing "outside the United Kingdom".
11. In this case, little evidence was produced in support of the appeal. The appellant and her husband produced statements. There was a brief statement from Mr C as well as various documents relating to the marriage. The appellant's husband stated that his parents were from South Korea and migrated to China. He says that he was born in China. His British passport states that he was born in Sim Yang, but there is no evidence to show whether this is in South Korea or in China. Either way, it seems clear that the appellant's husband may have residence rights in China and/or citizenship rights in South Korea. No evidence was produced to show that there was a bar on dual nationality in either country. Whether the appellant is North Korean or not, she was a long-term resident in China. Even if she is North Korean it is at least arguable that she might have residence rights in South Korea: see *GP and others (South Korean citizenship) North Korea* CG [2014] UKUT 391.
12. The only reason given in the witness statements for the couple not returning to China was the fact that her husband has been resident in the UK for a long time and had few connections there now. The judge noted at [47] that the appellant's husband confirmed that "they would be able to continue their family life in China where both have lived independent adult lives." Ms Fisher argued for the first time at the hearing that this was not an accurate summary of the sponsor's evidence. However, the matter was not pleaded in the grounds nor was any evidence produced from the sponsor or from counsel who appeared at the hearing to outline what evidence the sponsor did in fact give if it was alleged that the decision was inaccurate in this respect.
13. The burden of proof was on the appellant to show that there were 'insurmountable obstacles' to the couple continuing their family life outside the UK. It is trite law that a state is not obliged to respect a couple's choice about their country of residence. The appellant produced no evidence to show that her husband would not be readmitted to China or could not reside in South Korea if necessary (given his ancestry). Even if she is North Korean, there was no evidence to show that she would not be admitted to China as the sponsor's spouse or to South Korea in her own right. The appellant failed to produce sufficient evidence to show on the balance of probabilities that she met the requirements of paragraph EX.1 of Appendix FM of the immigration rules.

14. Ms Fisher made general submissions on the facts and argued that the evidence relating to the appellant's nationality was relevant to the question of whether it would be proportionate to expect the appellant to leave the UK to apply for entry clearance: see *Chikwamba v SSHD* [2008] UKHL 40. If the appellant is North Korean she could not be expected to return to China to make an application for entry clearance. First, this point was not argued in the grounds of appeal. Second, it is questionable whether *Chikwamba* is properly engaged if the appellant failed to produce sufficient evidence to show that there would be 'insurmountable obstacles' to the couple continuing their family life outside the UK. Mrs Chikwamba was a Zimbabwean national whose husband, also a Zimbabwean national, had been recognised as a refugee in the UK. As such, his status precluded him from continuing their family life together in Zimbabwe. The circumstances were quite different from this case, where there was insufficient evidence before the First-tier Tribunal to show that there were 'insurmountable obstacles' to the couple continuing their family life in China or South Korea. Of course, it is open to the appellant to make a further application for leave to remain with better evidence.
15. I conclude that the First-tier decision did not involve the making of a material error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of a material error of law

The decision shall stand

Signed 
Upper Tribunal Judge Canavan

Date 10 September 2018