Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12437/2019**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On 18th November 2021	**On 24th November 2021**

Before

UT JUDGE MACLEMAN

Between

QI GUO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge Rea dismissed the appellant's appeal by a decision promulgated on 18 May 2021.

2. By an application dated 28 May 2021, the appellant sought permission to appeal to the UT.

3. The grounds, in summary, are as follows:

1. Religion

The FtT erred at [29-30] for the following reasons:

(i) reliance on whether the appellant is committed to her religion … is not an adequate reason – *RT (Zimbabwe) v SSHD* [2013] AC 152 at [41 – 51] …

(ii) in any event the findings that she is not committed are inadequately reasoned or not adequately supported by the evidence …

2. National id card / hukou

The FtT erred at [31]:

(i) unclear finding on whether the appellant has a passport or other documentation, or absence of reasons for finding that she does not;

(ii) error in finding that the appellant's mother could assist in obtaining a national ID card / hukou … Even if in contact with her mother, the evidence was that her mother returned her hukou to the authorities … The expert report indicates that production of hukou is a pre-requisite to obtain a national ID card … contact with her mother is not going to be sufficient without the mother being able to produce her hukou … In turn the appellant would face … obstacles such that there would be a breach of humanitarian protection.

4. FtT Judge O'Brien granted permission on all grounds on 29 June 2021.

5. The relevant passage from RT (Zimbabwe) is as follows:

40. Freedom to hold and express political beliefs is a core or fundamental right. As Mr Husain *[for the appellant]* says, it would be anomalous, given that the purpose of the Convention *inter alia* is to ensure to refugees the widest possible exercise of their fundamental rights and freedoms, for the right of the "unconcerned" to be protected under human rights law, but not as a religious or political opinion under the Convention.

41. Mr Swift *[for the SSHD]* accepts that political neutrality is an important human right protected by the Convention, but, he submits, only if the individual is a "committed" political neutral and not one to whom his neutrality is a matter of indifference. This is because there is no entitlement to protection under the Convention where the interference involves matters which are only at the margins of an individual's right to hold or not hold political opinions, and not at the core of that right. There is no entitlement to protection where what is required of the applicant does not oblige him to forfeit a fundamental human right. Mr Swift, therefore, draws a distinction between a person who is a conscientious or committed political neutral (A) and a person who has given no thought to political matters because the subject simply is of no interest to him (B). He accepts that the Convention protects A from persecution, because his political neutrality is a core or fundamental human right. The *HJ (Iran)* principle is capable of applying to A. Refugee status may not be denied to him simply because he would pretend to support a regime in order to avoid persecution. But Mr Swift says that the *HJ (Iran)* principle cannot apply to B because, in his case, false support for the regime would cause interference at the margin, rather than the core, of the protected right and would not cause him to forfeit a fundamental human right. Mr Swift seeks support for the distinction, in particular, from paras 72 and 115 of *HJ (Iran)* to which I have referred at paras 20 and 21 above.

42. I would reject this distinction for a number of reasons. First, the right *not* to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and, for the reasons that I have given, the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. A focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle. The argument advanced by Mr Swift bears a striking resemblance to the Secretary of State's contention in *HJ (Iran)* that the individuals in that case would only have a well-founded fear of persecution if the concealment of their sexual orientation would not be "reasonably tolerable" to them. This contention was rejected on the grounds that (i) it was unprincipled and unfair to determine refugee status by reference to the individual's strength of feeling about his protected characteristic (paras 29 and 121) and (ii) there was no yardstick by which the tolerability of the experience could be measured (paras 80 and 122).

43. As regards the point of principle, it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. One of the hallmarks of totalitarian regimes is their insistence on controlling people's thoughts as well as their behaviour. George Orwell captured the point brilliantly by his creation of the sinister "Thought Police" in his novel *1984*.

44. The idea "if you are not with us, you are against us" pervades the thinking of dictators. From their perspective, there is no real difference between neutrality and opposition. In *Gomez v Secretary of State for the Home Department* [2000] INLR 549, a "starred" decision of the Immigration Appeal Tribunal, Dr Storey put the point well at para 46:

> "It will always be necessary to examine whether or not the normal lines of political and administrative responsibility have become distorted by history and events in that particular country. This perception also explains why refugee law has come to recognise that in certain circumstances 'neutrality' can constitute a political opinion. In certain circumstances, for example where both sides operate simplistic ideas of political loyalty and political treachery, fence-sitting can be considered a highly political act."

45. There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer. All are equally entitled to human rights protection and to protection against persecution under the Convention. None of them forfeits these rights because he will feel compelled to lie in order to avoid persecution.

46. Secondly, the distinction suggested by Mr Swift is unworkable in practice. On his approach, the question arises: how important to the individual does the right not to hold political beliefs have to be in order to qualify for protection? On a spectrum of political non-belief, at one end is the person who has carefully considered matters engaging "the machinery of State, government, and policy" (*Goodwin Gill and McAdam, The Refugee in International Law*, 3rd ed (2007) p 87) and conscientiously decided that he is not interested. He may, for example, have concluded that effective political governance is beyond the ability of man and that he cannot therefore support any political party or cause. At the other end is the person who has never given any thought to such matters and has no interest in the subject. There will also be those who lie somewhere between these two extremes. Where is the core/marginal line to be drawn? At what point on the spectrum of non-belief does the non-belief become a core or fundamental human right? The test suggested by Mr Swift would, to say the least, be difficult to apply. Unless compelled to do so, we should guard against introducing fine and difficult distinctions of this kind. In my view, there is no justification for calling on immigration judges to apply the distinction suggested by Mr Swift. It would be likely to be productive of much uncertainty and potentially inconsistent results.

47. Thirdly, Mr Swift's suggested distinction between core and marginal rights is based on a misunderstanding of what we said in *HJ (Iran).* In order to understand what Lord Rodger and I said on the issue, it is necessary first to see what was said by the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03.* At para 82, the Authority said that if the right sought to be exercised by the applicant is not a core human right, the "being persecuted" standard of the Convention is not engaged. But if the right is a fundamental human right, the next stage is to determine "the metes and bounds of that right". The Authority continued:

> "If the proposed action in the country of origin falls squarely within the ambit of that right the failure of the state of origin to protect the exercise of that right coupled with the infliction of serious harm should lead to the conclusion that the refugee claimant has established a risk of 'being persecuted.'"

48. The same point was made at para 90. For the purpose of refugee determination, the focus must be on "the minimum core entitlement conferred by the relevant right". Thus, where the risk of harmful action is only that "activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of 'being persecuted'". The point was repeated at para 120.

49. At paras 99, 101 and 102, the Authority gave examples of the kind of activity which were at the margin of a protected right. Prohibition on a homosexual from adopting a child on the grounds of his sexual orientation would not be persecution, because adoption of a child was "well on the margin" of the right enjoyed by homosexuals to live their lives as homosexuals openly and free from persecution. The same point was made in relation to (i) the denial to post-operative transsexuals of the right to marry, (ii) the denial to homosexuals of the right to marry and (iii) the prosecution of homosexuals for sado-masochistic acts. It was suggested that, whether or not any of these involved breaches of human rights, they could not be said to amount to persecution since the prohibited activities in each case were at the margin of the protected right.

50. In *HJ (Iran),* Lord Rodger gave as another possible example the applicant who claimed asylum on the ground that he feared persecution if he took part in a gay rights march. If a person would be able to live freely and openly as a gay man provided that he did not take part in gay rights marches, his claim for asylum might well fail. At paras 114 and 115 of my judgment too, I was saying no more than that a determination of whether the applicant's proposed or intended action lay at the core of the right or at its margins was useful in deciding whether or not the prohibition of it amounted to persecution. I remain of that view. The distinction is valuable because it focuses attention on the important point that persecution is more than a breach of human rights.

51. What matters for present purposes is that nothing that was said in the Authority's decision or by us in *HJ (Iran)* supports the idea that it is relevant to determine how important the right is to the individual. There is no scope for the application of the core/marginal distinction (as explained above) in any of the appeals which are before this court. The situation in Zimbabwe as disclosed by *RN* is not that the right to hold political beliefs is generally accepted *subject only to some arguably peripheral or minor restrictions.* It is that anyone who is not thought to be a supporter of the regime is treated harshly. That is persecution.

52. For the reasons that I have given, I would reject the restrictive approach suggested by Mr Swift to the application of the *HJ (Iran)* principle to these cases and hold that it applies to applicants who claim asylum on the grounds of a fear of persecution on the grounds of lack of political belief regardless of how important their lack of belief is to them.

6. In this case, the respondent's decision was based on the view that the appellant's claimed involvement with Yi Guan Dao was a fraudulent invention. The respondent says nothing about whether such involvement, if genuine, presents a risk of persecution (although that may be implicitly accepted). The FtT found, based on expert evidence, that it does. The respondent takes no issue with that in the UT.

7. The FtT found at [27] that it was "plausible that the appellant should have been arrested and detained on account of the practice of Yi Guan Dao and that this might have provided her with the motivation to leave China". At [29] he found that she had given a credible account of arrest and detention for her "suspected involvement in hosting meetings of followers of Yi Guan Dao", but continued, "I am not satisfied however … that she is a committed follower and has a well founded fear on this account should she return", for reasons given at (a) – (d).

8. That moves immediately from a crucial finding into the erroneous distinction between the zealous and the marginally committed believer.

9. At [30] the Judge finds the appellant to have "demonstrated only the most tenuous attachment to Yi Guan Dao as a religion … the main attraction for her is the social contact and support that attending meetings offers, and I do not accept that she has a religious commitment … I am not satisfied that if returned … she would choose to pursue Yi Guan Dao … in the knowledge that it is illegal and she would be a risk of … the adverse attention of the authorities. I therefore find that the appellant is not entitled to protection as a refugee …"

10. It is contrary to principle to hold that because an appellant would abandon her religious practice to avoid persecution, she is not a refugee.

11. The error identified in ground 1 (i) is material.

12. There is also force in the challenge in ground 1 (ii) to the finding of "no commitment" as an unjustified watering down of the accepted evidence of participation, arrest and detention in China and of activities in the UK. Social contact and support from attending meetings is a major component of many practitioners' attachment to their religion. No doubt many practitioners share the appellant's admitted struggle to remember the teachings of their faith. The evidence portrayed the appellant as a beginner in the faith but I see no reason for reducing reduce this to "no commitment" at all.

13. The case of someone who participates in a religion in bad faith as a ruse to gain protection is quite different; but there was not even a faint suspicion of bad faith in the findings here.

14. Mr Diwyncz was unable to find any counter to ground 1 and the submissions thereon, challenging the FtT's decision on the principles enunciated in *RT*.

15. Parties agreed that if there was error of law in terms of ground 1, it followed on the findings made by the FtT, accepting the appellant's evidence of participation, arrest and detention in China, and of her participation in the UK, that the outcome should have been to the contrary.

16. The outcome on ground 1 having been indicated, Mr Winter did not insist on developing ground 2. I am doubtful whether it discloses any error, or whether there

was any viable case based on difficulties over documentation; but in absence of full submissions, I do not resolve the point any further than that.

17. I am obliged to Mr Winter and to Mr Diwyncz for their accurate and helpful submissions.

18. The decision of the FtT is set aside. The appeal, as originally brought to the FtT, is allowed on Refugee Convention grounds.

19. No anonymity direction has been requested or made.

18 November 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.