



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15502/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 16th November 2018

Decision & Reasons Promulgated
On 18 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR. QI YING XIE
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R O’Ryan, Counsel, instructed by Ashraf Law

For the respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of the People’s Republic of China born on 23 December 1952. He has been given permission to appeal the decision of First-tier Tribunal Judge Warren who, in a decision promulgated on 4th September 2018, dismissed his appeal against the respondent’s decision to refuse to grant him leave to remain based on long residence.

2. He applied on 23 April 2017 for leave to remain. His application was refused on 7 November 2017. His immigration history was set out in the refusal. He entered the United Kingdom on 9 October 1994 and was granted temporary admission. He made a claim for asylum which was unsuccessful.
3. On 24 June 2010 he made a long residency application which was refused with no right of appeal. Then, on 23 October 2014 he applied for leave to remain on the basis of his family and private life which was refused. He then made a series of applications on the same basis which were refused. He was arrested on 21 January 2017 and subsequently made the present application.
4. His application had been considered under paragraph 276 ADE of the immigration rules, with the respondent concluding he had failed to demonstrate 20 years continuous residence. He had presented evidence spanning the 20 years but had not demonstrated continuous residence throughout that time.
5. The respondent did not find very significant obstacles to his reintegration into life in the People's Republic of China. Appendix FM was considered but the appellant did not have a partner or any dependent children. He did have an adult daughter and a granddaughter here. No other circumstances were found to justify the grant of leave outside the rules.

The First tier Tribunal

6. First-tier Tribunal Judge Warren found the appellant's evidence to be inconsistent and did not find him credible. He had said that his wife and two sons remained in China, as did his parents. He suggested his wife had remarried whereas his daughter said she had not been married but was living with her parents in China. He claimed to know little about his family in China. His daughter's evidence was that she was in regular contact with her mother and brothers. The judge did not find it credible with this level of contact that the appellant would know as little as he claimed.
7. The judge accepted that since 2012 the appellant had been living with his daughter, Ms. Weimin Xie and her daughter in Manchester. His daughter's evidence was that the appellant had not been back to China because he did not have a passport, his original passport having been retained by the respondent.
8. The judge heard evidence from a Mrs Wing Fou Yong who stated that the appellant moved into her home in 1999 where he remained until he moved in with his daughter in 2012. Mrs Wing Fou Yong said that she owned the property where the appellant and his daughter

and granddaughter now lived. The judge did not accept her evidence about the appellant pre-2012.

9. The judge then heard from a Ms Yingying Yang who said she met the appellant in London in 1995 and they would meet periodically between then and 1999. In cross-examination her evidence of contact was different and the judge found the evidence to be unreliable.
10. The judge then heard from a Ms Sui Mei Wu who had lived in the United Kingdom 45 years. She stated that she had known the appellant since 2009 and as far she was aware, he had been living here with his family. The judge said this contradicted the appellant's evidence that he moved in with his family in 2012 and before that had been living with Mrs Yong.
11. The judge then refers to the documentary evidence provided about residence. The judge question how the appellant had been able to live from 1999 to 2018 without apparently working, paying tax or claiming benefits. He had accepted that between 1994 and 1999 he had been working illegally.
12. The judge concluded the appellant had not demonstrated he had resided continuously in the United Kingdom since 1994. The judge accepted he had provided evidence of his presence on certain dates namely in 1994; 2002; 2006 and from 2008 onwards. However, the judge was not satisfied the residence had been continuous.

The Upper Tribunal

13. Permission to appeal was granted on the basis it was arguable that the judge should have adjourned the hearing if there were problems with interpretation.
14. The grounds contended that the judge failed to explain why the evidence of the appellant's daughter and granddaughter about his absence from China since 1994 was not accepted if the judge found them to be credible witnesses. At the permission little merit was seen on this ground because their evidence only related to his presence from 2008.
15. It was also contended that the judge failed to attach appropriate weight to the documentary evidence, including the letters of support provided. However the permission granted stated it amounted to little more than a disagreement with the judge's findings.
16. It was also argued the judge failed to consider paragraph 322 of the immigration rules which is concerned with grounds on which

leave to remain is to be refused. It includes consideration of the person's conduct. This was also found to lack merit on the basis it had not been argued at the hearing.

17. At hearing, Mr O'Ryan pursued the argument that the judge did not adequately consider the documents submitted to show his presence. To this end he had prepared a supplementary ground, albeit he suggested this with covered in the grounds already pleaded.
18. He said the judge had accepted from the evidence the appellant was here in 1994, 2002, 2006, and 2008 onwards. However, the judge questioned the continuity, particularly in the earlier period.
19. Mr O'Ryan referred me to a letter from the respondent dated 21 March 2017 at B7 of the appellant's bundle confirming that the appellant's passport had been held at Heathrow airport since 2002. I was referred to other documents said to show the appellant was present in the United Kingdom.
20. There was a notice of hearing dated 27 November 1995 about the appellant's asylum claim. In order to appeal Mr O' Ryan submitted he would need to have had to been present to instruct his representatives. I was then referred to a letter from his solicitors dated 21 May 1996 advising the Home Office of his change of address. Following this, the Home Office wrote to the appellant granting him temporary admission. There was another letter from the Home Office dated 24 October 2016 again relating to temporary admission. He submitted that all of these suggested the appellant was present in 1994 through to 1996. I was then referred to a legacy questionnaire dated 7 February 2008 at D8 and D9 of the appellant's bundle.
21. I was also referred to statutory declarations from the appellant's friends as to his presence here. Whilst the judge commented on the oral evidence from friends he did not deal with this written evidence.
22. The appellant's daughter arrived as the spouse of a British citizen in 2012. Mr O' Ryan referred me to paragraph's 14 and 24 of the decision where the judge accepts their evidence that the appellant live with them since 2012. He refers at paragraph 24 to the credible evidence of his granddaughter and daughter of him residing in the United Kingdom. Mr O'Ryan argue that having found them credible witnesses the judge should also have accepted their evidence that they were unaware of the appellant having return to China when they lived there.

23. Mr O 'Ryan then turned to the interpreting issue. The judge recorded the interpreter had expressed difficulties following the appellant. Cantonese was used and the interpreter expressed problems as he spoke in a thick accent; mumbled and spoke quickly. Mr O 'Ryan submitted the problem manifested itself at paragraph 8 of the decision in relation to the appellant's evidence about whether or not his wife had remarried. He submitted that the judge should have adjourned the proceedings of his own volition given the difficulties being experienced.
24. The final point made was that someone in the appellant's situation would have limited documentation, particularly in their early years. It was contended that the judge placed too high a standard of proof upon the appellant in the circumstance.
25. Mr Bates, in response, dealt with the interpretation issue firstly. He acknowledged that this ground went to fairness issues. However, he made the point that the appellant was represented by Counsel and if there were some major problem this should have been raised at the hearing. The decision refers to problems of accent, with the appellant mumbling and speaking quickly. There was no suggestion there were any dialect issues and had this been the case then Counsel who appeared could have prepared a statement of what occurred for use in the Upper Tribunal. The appellant had been asked on a number of occasions to slow his evidence down and Mr Bates submitted that is difficult to see how any other interpreter could have fared any better.
26. Regarding the other grounds raised, Mr C Bates made the point that ultimately the burden of proof is upon the appellant to show 20 years continuous residence. It was not for the Secretary of State to speculate where he was, if not here. The fact the Secretary of State had possession of the appellant's passport would not have prevented him approaching the Chinese Embassy for a replacement. Furthermore, his claim for protection had failed and there was a suggestion therefore he was an economic migrant. It was within the realms of possibility that with the ebbs and flows of the economy he might enter another European country illegally for a time in search of work. He referred to the porous Borders and suggested, for instance, the appellant might have travelled to France or caught a ferry to Northern Ireland and then crossed the unmanned land frontier with the Republic.
27. I was referred to the evidence of Ms Wing Fou Young, as recorded at paragraph 18 of the decision. She said the appellant lived with her since 1999 until he moved out to live with his daughter in 2012. However, the judge noted she was unable to explain where the gas bill was in the name of Mrs Xie alone at one stage and confirmed he did not pay rent. She could not explain how

he maintained himself. The judge did not find her account to be credible. Mr Bates referred to the significant unaccounted for periods.

28. He acknowledged that in recent times it has been more and more difficult for someone here illegally to obtain documentation but this was not the case when the appellant 1st arrived. He had been able to produce, for instance, documentation from the NHS. Like the respondent, the judge does not need to speculate where else the appellant may have been. Rather, the issue for the judge is whether the appellant has demonstrated continuous presence here for 20 years.
29. I was referred to paragraph 17 where the judge referred to the non-family witnesses who gave evidence in support. The judge did not distinguish between those it gave oral evidence and those whose evidence was in the form of statutory declarations. He questioned why the judge would have afforded greater weight to the untested documentary evidence in the statements compared with that of the witnesses who attended.
30. Regarding the evidence of his daughter that he had not returned to China since 1994, Mr Bates pointed out the size of China and the possibility she may not have known where he was. He submitted the height of her evidence was that he was saying he had never visited her in China. In any event he submitted if the appellant left China for economic betterment it was improbable he would return there but might see what his fortune would bring elsewhere in Europe.
31. He also made the point that the fact the respondent or the tribunal wrote to the appellant did not establish that he was actually in the country.
32. No argument had been advanced that the judge should have looked at matters beyond the immigration rules. There was no argument for instance that he was dependent upon his daughter and it was pointed out they had been apart for many years. There was passing reference at paragraph 26 and 27 to this. Section 117 B was not raised but in any event the factors there would have been of no assisted the appellant. The private life he had established he was whilst he had a precarious immigration situation. There was no evidence a wider integration or of command of the English language or economic independence.

Consideration

33. I start by considering the interpretation issue which has been raised. The 1st observation I would make is that the appellant gave evidence in Cantonese and the decision records that the interpreter

was also a Cantonese speaker. Consequently, it was not the case that interpreter was using a 2nd language. There was nothing to suggest that the interpreter engaged was not able or skilled for the task in hand. The issue appears to be more that the appellant had a strong accent, spoke quickly and also mumbled. There is nothing to suggest there were any linguistic issues.

34. There clearly was some difficulty as the interpreter had indicated it was hard for her to interpret what he was saying. The decision records he was told repeatedly to slow down. It has to be remembered that the appellant already had a pre-prepared statement which sets out his evidence.

35. At paragraph 8 the judge referred to serious inconsistencies in the evidence. The appellant's evidence was that his wife had run away with another man and had remarried. It was later suggested that the interpreter had misinterpreted this and he meant to say 'maybe'. However, this appears a relatively minor point. There were inconsistencies arising in cross-examination over a girlfriend. The appellant then sought to explain this again by issues of interpretation. It has to be borne in mind that a person whose evidence is contradictory in cross-examination may unjustifiably seek to explain this by linguistic issues.

36. Paragraph 8 of the decision indicates it was possible to obtain a substantial amount of evidence from the appellant at the hearing. Cross-examination was carried out and the appellant was able to give evidence about his parents and children in China and gave an account of an absence of contact. This contrasted with the evidence of his daughter whose evidence was that she was in regular contact with her mother and brothers. The judge did not accept his account of having no information about his family in China given his daughter's evidence. Although the decision does not record the fact the normal practice would be for his daughter to have remained outside whilst he gave evidence.

37. I do not find any evidence of unfairness occurring because of linguistic issues which would justify setting aside the decision.

38. I then turned to the suggestion that the judge was inconsistent in finding the appellant's daughter credible and yet not applying her evidence that until she came to the United Kingdom in 2008 her father had not been back to China. However, the judge was not making a blanket finding of credibility about all of his daughter's evidence. The judge heard from her and also from her daughter who at that stage was 19 years of age. The appellant's evidence was that he lived with his daughter and granddaughter in Manchester since 2012. It was this aspect of the evidence that the judge was accepting.

39. There are two other aspects of her evidence that I will comment upon. His daughter's evidence was that the appellant had not been back to China. In support of their she states that he does not have his passport any more. There is evidence that his original passport is with the Home Office. However, as Mr Bates points out, he could well have obtained a replacement passport. Another point made by the presenting officer was that just because his daughter's evidence was that she had not seen the appellant in China did not mean he had not been to China. Against this, the appellant's representative made the point that if he returned to China where else would he call but to his family.
40. A stronger point made by the presenting officer is on the basis the appellant left China as an economic migrant he was hardly likely to return to China in search of work. Rather, he was more likely to go to another European country.
41. My conclusion is that there is no material error of law arising in the way the judge dealt with his daughter's evidence. The judge accepted her account that he had lived with her in Manchester since 2012. This however still did not resolve the gaps in the evidence about his presence before that.
42. The appellant's representative seeks to fault the judge for not setting out in detail conclusions on the various statutory declarations provided and correspondence. Those declarations and documents are contained in the appeal bundle. The probative weight of the declarations is limited particularly as the makers did not give evidence. The statements are very general and simply refer to occasional encounters and the description of his personality.
43. The judge did analyse in detail the evidence of the witnesses that were called. No specific challenge has been made in the judge's conclusions which essentially, apart from the evidence of his daughter and granddaughter, rejected their evidence. The presenting officer made the valid point in that it was difficult to see how untested testimonials could have influenced the outcome when the tested evidence of support was rejected. Paragraph 17 of the decision refers to the nonfamily witnesses and can be read as alluding to these testimonials. I do not find the correspondence referred to is adequate to fill in the gaps.
44. When I consider the decision in the round is apparent there were some difficulties in relation to the appellant's oral evidence. The judge concluded he was inconsistent. It is difficult to know if the problems with the appellant's delivery were on purpose but whatever the reason the areas in contention were not central to the appeal. It is clear that the judge was able to obtain adequate

evidence from the appellant about his claim. Thereafter the judge carefully analysed that evidence and the evidence of the other witnesses that were called.

45. The judge gave good reasons for finding the evidence of Mrs Wing Fou Yong, Ms Yingying and Ms Sui Mei Wu unreliable. No challenge to this has been made and there were no linguistic issues here. A clear example is given in relation to Ms Sui Mei Wu. She said she has known the appellant since 2009 when she met his daughter at her doctor's surgery and that he had always lived in the United Kingdom with his family. This contradicted the appellant's evidence that he had been living with Mrs Young until 2012.
46. The judge then had regard to the documentary evidence but this still did not fill in the gaps in the evidence. Ultimately, it was for the appellant to prove his case.
47. Overall, this is a clear carefully prepared decision and having regard to the points made on behalf of the appellant I find no material error of law established.

Decision

No material error of law has been established in the decision of First-tier Tribunal Judge Warren. Consequently, that decision dismissing the appellant's appeal shall stand.

Francis J Farrelly

Deputy Upper Tribunal Judge