



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004548
First-tier Tribunal No:
PA/54692/2021
IA/14161/2021

THE IMMIGRATION ACTS

**Heard at George House,
Edinburgh
On the 14 December 2022**

**Decision & Reasons Promulgated
On the 21 February 2023**

Before

UT JUDGE MACLEMAN

Between

G C

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge Farrelly dismissed the appellant's appeal by a decision dated 10 July 2022.
2. The appellant sought permission to appeal to the UT, on these grounds:

Introduction.

The appellant is Chinese. He was born in July 1980. He came to the UK in January 2004. He claimed he was at real risk for having distributed Falun Gong leaflets over a 4 month period. There was no Home Office Presenting Officer. The FTT refused the appeal.

Ground 1- Dr Dillon's report/ real risk

1. The appellant's position is that the FTT has proceeded on the basis that the appellant was involved in distributing Falun Gong leaflets over a 4 month period, albeit the FTT states that the Home Office did not accept that (paragraph 21 of the FTT's decision). The FTT erred in law for the following reasons. The informed reader is left in real and substantial doubt as to why the FTT states, at paragraph 22, that it finds the report of Dr Dillon to be of limited assistance:

(i) the FTT, at paragraph 22, refers to the fact that the report refers to double jeopardy and reported cases which are not applicable to the appeal. However Dr Dillon recognises that although those factors are not strictly involved in the appeal, his view is that some of the considerations in those issues have wider implications for the appeal (see pages 36-37 of the stitch bundle). Dr Dillon goes on to consider the risks of potential prosecution to the appellant and other implications to the appellant in light of that information (see pages 38-39, 44 and 47 of the stitch bundle). The informed reader is left in real and substantial doubt as to why the FTT places reliance on Dr Dillon referring to those factors when Dr Dillon recognised that those were not strictly applicable but took the view that they assisted in informing on other relevant considerations;

(ii) the FTT states at paragraph 22 that it is likely the leaders will be targeted rather than someone like the appellant. The informed reader is left in real and substantial doubt as to why that is said. The Home Office Country Policy Information Note which was cited in the refusal letter (page 73 of the stitch bundle) did not limit risk to leaders (neither does the country guidance case law *LL* (Falun Gong Convention reason-risk) China CG [2005] UKAIT 00122 which the Country Policy Note refers to) and neither does Dr Dillon;

(iii) at paragraph 23 the FTT states that there is nothing which would have brought the appellant in the past to the Chinese authorities' attention. However the informed reader is left in real and substantial doubt as to why the FTT says that when the appellant's position was that he had been arrested previously by the authorities, or if the FTT has rejected that why that is, (page 25 of the stitch bundle, paragraph 16). In any event the informed reader is left in real and substantial doubt as to the relevance of the appellant being of previous adverse interest when the FTT accepts at paragraph 24 that the appellant will be questioned by the authorities. He is not expected to lie and on the FTT's approach it is accepted that he distributed Falun Gong leaflets;

(iv) the informed reader is left in real and substantial doubt as to why the FTT says there are no reasons as to why the appellant would be of

ongoing interest to the authorities in light of Dr Dillon's report. Even if the appellant has not engaged in anything further in the UK, the FTT's approach is based on the fact that the Chinese authorities are able to operate a rational, careful assessment when it comes to those it suspects of being involved with Falun Gong. However the informed reader is left in real and substantial doubt as to why that is when the information is that the Chinese authorities do not operate a rational, careful assessment when it comes to those it suspects are involved with Falun Gong. The evidence is of a repressive, arbitrary regime (*KS (Burma) v Secretary of State for the Home Department* [2013] Imm AR 525 at paragraph 31 per Maurice Kay LJ);

(v) the informed reader is left in real and substantial doubt as to why the FTT states at paragraph 24 that Dr Dillon has not co-related the risk to the length of time the appellant has been absent. However Dr Dillon has co-related the length of time as a factor to be considered when assessing risk (page 47 of the stitch bundle). In light of the errors identified the remaining findings of the FTT are vitiated and in any event are not sufficient for the FTT's decision to stand.

Ground 2- *esto* case based on contradictory findings

2. If the appellant is wrong to suggest that the FTT approached matters on the basis that the appellant distributed Falun Gong leaflets over a 4 month period, the FTT erred in law:

(i) by coming to contradictory findings and failing to resolve those. The appellant's position was that the Home Office had accepted that the appellant had distributed Falun Gong leaflets over a 4 month period. At paragraph 18 the FTT states that as it reads the refusal letter the Home Office is not accepting that the appellant distributed the leaflets. At paragraph 21 the FTT states that what is known is that the appellant's representatives are indicating his involvement was very limited and the FTT has proceeded on that basis. At paragraph 22 the FTT finds that the appellant has established that his activity would place him at real risk. At paragraph 25 the FTT states that it does not find that the respondent accepts the appellant's claimed activity. In light of the foregoing the FTT has made contradictory findings as to whether it is approaching matters on the basis that it accepts the appellant was involved in distributing leaflets or not (and standing the respondent's own internal advice at page 235 of the stitch bundle). That is material to the outcome where the expert is of the view that the risk to the appellant is linked also to his involvement with distributing leaflets for Falun Gong;

(ii) if it is read that the FTT was proceeding on the basis that the appellant was not involved in distributing leaflets for Falun Gong, the FTT has erred as the informed reader is left in real and substantial doubt as to whether the FTT accepts the appellant's evidence (including what is said by Dr Dillon at pages 47-49 of the stitch bundle)/ explanations and if not, why not. The FTT is not bound by the respondent's refusal letter. The appellant is prejudiced as his appeal has been refused.

3. On 10 August 2022 FtT Judge Oxlade granted permission: ...

Ground 1 (ii) says that the Judge's finding [22] that the Appellant would not be at risk on return, in light of his historic and claimed low profile, is neither explained and not borne out by the CPIN. It is an arguable error of law to not explain the basis on which an historic involvement with a proscribed organisation – even with a low profile, in the sense of not being a leader - would not give rise to a real risk on return.

Ground 1(iii) says that the Judge's finding [23] that he is not known to the authorities, fails to take into account/address his claim that he had been detained by the authorities; the Appellant's statement at page 26 (para 16) does refer to this, and is not mentioned by the Judge. It is not clear if this was relied on as part of his case at the hearing, but if not retracted, then it was arguably incumbent on the Judge to address it ...

4. Mr Winter submitted along the lines of grounds 1 (i), referring to the report of Dr Dillon on double jeopardy. On ground 1 (ii), he said that case law and the respondent's CIPIN did not state that only leaders of Falun Gong were at risk. On ground 1 (iii), the FtT did not explain at [23] why there was nothing in the appellant's past to bring him to attention, when he said he had been detained, and at [25] the FtT accepted that he would be questioned. Further, he seemed to have left illegally. Dr Dillon referred to new legislation in China on exit and entry, which could lead to interrogation.
5. On ground 2, Mr Winter said that the FtT made contradictory findings, and left those unresolved. On either or both of the grounds, he sought a remit to the FtT. Alternatively, he suggested that if the FtT had accepted the appellant's activities as claimed, and there was no credibility issue, the decision could be remade in the UT.
6. Mr Mullen suggested that the case was simpler than suggested by the grounds. The value of the expert report was diminished by its tendency to stray into advocacy. It came close to usurping the tribunal's function on credibility. The reader of the FtT's decision was left in no doubt that even on the assumption that the appellant engaged in minor Falun Gong activity and came to some attention from the authorities, that was so long ago and so peripheral to Falun Gong, notwithstanding the authoritarian nature of the regime, as to constitute no risk now.
7. In reply, Mr Winter said that criticism of the expert report was irrelevant at this stage, not having been advanced to the FtT, and that the FtT's decision was not based on giving the report any diminished value. He referred to an extract of the SSHD's reasons for not resisting a judicial review in 2021, as showing that the SSHD did not then take the line that the expert went beyond his proper function, and that the facts of the appellant's case was accepted as advanced.
8. I reserved my decision.

9. The appellant provided the FtT with a statement dated 8 February 2022. The respondent was not represented in the FtT, and he gave no further oral evidence. At [11] of his statement he says he came to the UK because he had "... problems in China. I was involved in distributing leaflets for Falun Gong ... I was not a member ... it has been many years ... I no longer have anything to do with Falun Gong ...". He goes on to give reasons why he would be at risk – firstly, long absence and lack of identification; secondly, imprisonment for having claimed asylum abroad; and thirdly, having fled "... because I was wanted in connection with Falun Gong. It doesn't matter to the authorities that I have not been involved for a number of years".
10. Under the heading, "responses to decision letter dated 20 September 2021", the appellant says at [16], "I was detained by the police in China because of my involvement in Falun Gong". Under the heading "responses to decision letter dated 14 January 2004", he says, " ... it has been such a long time ... that I cannot remember what process I followed ... for my exit. It has been over 18 years ...".
11. That was the height of the appellant's evidence before the judge.
12. Under the heading "consideration" the decision of Judge Farrelly begins at [18] by reading the refusal letter as not accepting that the appellant distributed leaflets, and saying that "even if the basic claim is accepted" that does not change the outcome. At [20] his case is recorded that involvement which was "very limited and for a short period many years ago" is enough to place him at risk. The decision goes on to find that the expert report does not demonstrate risk. At [25] the decision adds, "Furthermore, his repeated absconding and the delay in now claiming detracts from his overall credibility".
13. I find it sufficiently clear from the decision that the claim failed, even taken at the highest as stated by the appellant, and that in any event he failed to establish that his claim was credible.
14. The SSHD's decision of 20 September 2021 at [27], and elsewhere, notes that Dr Dillon had not been provided with previous refusal letters, which did not accept that the appellant came to adverse attention of the Chinese authorities, and that his report is based on the assumption that the appellant's account is accurate. At [28], [32], and elsewhere, the decision again does not accept that the appellant distributed leaflets or came to adverse attention.
15. Dr Dillon's report, under the heading "reasons for refusal", begins:

The Home Office does not deny that Mr C was detained, questioned and assaulted by the police after having been discovered distributing leaflets on behalf of Falun Gong which were highly critical of the government.

16. The appellant's case in the FtT and in the UT has glossed over the SSHD's observations on the expert report. Those observations, going by everything referred to before me, are accurate.
17. The SSHD did not accept the appellant's claim, although it was dealt with also in the alternative. I have been shown no record of the appellant saying that he was assaulted by the police or that the leaflets he distributed were highly critical of the government. The appellant's statements are generally to the effect that he had no real idea what Falun Gong is about.
18. The SSHD's reasons for deciding not to resist a judicial review are far removed from any concession of credibility at the stage of the hearing in the FtT. The SSHD's position there was plainly otherwise.
19. Ground 1 (i) does not show any error in finding that the expert report on double jeopardy had no significant bearing on the case.
20. Ground 1 (ii) amounts to saying that any involvement with Falun Gong, however remote, carries risk; but there must always be some question of fact and degree. For example, would distribution of leaflets on one day, decades ago, or the acceptance of a leaflet, be enough? It is obvious that prominent leadership is likely to increase risk. This sub-ground is only disagreement with where the FtT drew the line in a tenuous case.
21. Ground 1 (iii) shows no ambiguity.
22. Grounds 1 (iv) and (v) show no error in the weighing of the expert report.
23. Ground 2 shows no contradiction. The appellant's case fell short, taken at highest as he put it, and in any event his claim fell short of probation.
24. Realistically, once the unjustified gloss of the expert report is removed, the claim was faint to vanishing point.
25. The decision of the FtT shall stand.
26. The FtT made an anonymity direction. The matter was not mentioned in the UT. It is doubtful whether there is any ongoing justification, but anonymity is maintained at this stage.

H Macleman

19 December 2022
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.