



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/02955/2014
AA/02964/2014

THE IMMIGRATION ACTS

Heard at Glasgow
on 26th November 2014

Determination issued on
On 1st December 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

YING LIN
JIN HE

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the First Appellant: Mr O Mullan, Advocate, instructed by Miss Rutherford of Latta & Co., Solicitors

For the Second Appellant: Mr J Bryce, Advocate, instructed by Mr Singh of Latta & Co., Solicitors

For the Respondent: Mrs M O'Brien, Senior Presenting Officer

DECISION AND REASONS

1. The appellants appeal against two determinations by First-tier Tribunal Judge Agnew, both dated 16th June 2014.
2. The judge appears to have been led into issuing two determinations as partial recognition of the application by the appellants, which was refused, for their cases to be heard separately. That application has been only a source of confusion. There

was no good reason why the cases should have been subject to separate hearings or determinations.

3. The first appellant sought permission to appeal to the Upper Tribunal. The first ground is the plainly absurd one that it was prejudicial to her case that it was not separated from that of her husband. Ground 2 is that the judge overlooked submissions about the appellants returning to different provinces in China [Szechuan and Fujian], they being a married couple with a young child. Ground 3 complains that the finding on the risk of forcible sterilisation lacks reasoning. Ground 4 is lack of consideration of the best interests of the child.
4. On 10th July 2014 First-tier Tribunal Judge Andrew granted permission to appeal, observing that while in all other respects the determination was well-structured and sound, there might be an arguable error in failure to deal with a submission on return of the appellant and her husband to different provinces, which might have an effect on the best interests of the child.
5. The first appellant did not apply to the Upper Tribunal for permission to appeal on the grounds which had been refused. Mr Mullan recognised that his case was confined to the ground on which permission was granted.
6. The second appellant also sought permission to appeal to the Upper Tribunal. Ground 1 is inadequacy of reasoning for the finding that it was extremely unlikely that photographs of the appellant practising Falun Gong would come to the attention of the authorities. Ground 2 is failing to take account of background evidence that the authorities reportedly instructed some neighbourhood communities to report Falun Gong members, who were then liable to detention and abuse. Ground 3 is failing to take account of evidence - photographs of the appellant practising Falun Gong, a letter of support, and evidence from his wife. Ground 4, which is unclearly expressed, complains about failure to make findings in line with *HJ (Iran) v SSHD* [2010] UKSC 31.
7. On 10th July 2014 First-tier Tribunal Judge Andrew refused the second appellant permission to appeal to the Upper Tribunal, on the view that the judge explained the finding that photographs of the appellant practising Falun Gong would not come to attention of the authorities, the relevant evidence had been taken into account, and as the appellant was found incredible it was not necessary to consider *HJ (Iran)*.
8. The second appellant renewed his application for permission to the Upper Tribunal on essentially the same grounds. On 29th September 2014 Upper Tribunal Judge Goldstein granted permission, for the sake of uniformity with the appeal by the appellant's wife, and without restricting the grant on other grounds.
9. Mr Mullan said that he understood from his instructing solicitor that submissions on the "separate provinces" point were made in the First-tier Tribunal. The matter was raised in the statements of the appellants at paragraphs 8 and 7 respectively. At paragraph 35 of the determination, the judge found that the child was very young, it was in his best interests to be with his parents and there were no reasons why the

family could not live in China or that it would be unreasonable for him to accompany his parents to China. The wording made it plain that the point of possible separation of the family had not been appreciated. If they were sent to separate provinces the child would inevitably be separated from one parent or the other. On whether the parents would in reality have to live in separate provinces, they had both mentioned in their statements the requirements of the *hukou* system about which there was background evidence. Mr Mullan accepted that there was also evidence of large scale internal migration in China irrespective of *hukou*, but said there were details of very different practices in the various provinces. He submitted that there had been evidence showing a real possibility of wife and husband being separated, which raised an issue about the best interests of the child which was not answered in the determination. The point was material. The remedy would be to fix a further hearing at which further evidence would be provided. There was no sufficient record of the submissions to enable a decision to be substituted immediately. The case should not be sent back to the same First-tier Tribunal Judge and was probably suitable for further decision in the Upper Tribunal rather than in the First-tier Tribunal.

10. Mr Bryce indicated that he had three lines of argument to pursue. He accepted that although the grant of permission in respect of the second appellant was not restricted, and some of the grounds in the application were wide, the objection might be raised that his points could not all be clearly derived from those grounds. I indicated that I would hear from him on the substance of his points, reserving any question of the scope of the grounds.
11. The first and main argument for the second appellant was based on *YB (Eritrea) v SSHD* [2008] EWCA Civ 360 and *KS and NL (Burma) v SSHD* [2013] EWCA Civ 67. These cases vouch the general proposition that *sur place* activity, even if cynical and opportunistic, may be a sound basis for a claim. The second appellant's position continues to be that his involvement in Falun Gong was sincere, notwithstanding the judge's conclusions to the contrary. Mr Bryce did not say that these conclusions were open to criticism, but he said that was insignificant. The judge overlooked that such activities might nevertheless give rise to a risk and to a protection need. Mr Bryce emphasised the finding at paragraph 46 that the appellant "may now be making the attempt, and will continue to do so, to connect himself with Falun Gong practitioners for the sole purpose of remaining in the UK". At paragraph 59 the judge accepted that he had involvement with Falun Gong, even if "calculated only to enhance his prospects of a successful application to obtain legitimate status in this country".
12. Mr Bryce turned to background evidence at page 116 of the bundle for the second appellant in the First-tier Tribunal, the US State Department Report for 2013, under the heading *Internet Freedom*:

The CCP continued to increase efforts to monitor internet use ... and punish those who ran afoul of political sensitivities. According to news sources, more than fourteen government ministries participated ... resulting in the censorship of thousands of domestic and foreign websites, blogs, cell phone text messages, social networking services, online chat rooms, online games, and e-mail. These measures were not universally effective. In addition to its own

extensive system of internet censorship, the government imposed more responsibilities on internet companies to implement online censorship and surveillance regimes, and it sought to prohibit anonymous expression online ...

...

Under guidance from the CCP the government employed thousands of persons at national, provincial, and local levels to monitor electronic communications. Official monitoring focused on such tools as social networking, microblogging, and video-sharing sites. Internet companies also employed thousands of censors to implement CCP directives.

13. Mr Bryce submitted that such scrutiny was sufficient to establish a real risk. He accepted that no example had been cited of a person who practised Falun Gong abroad being identified by the authorities and persecuted on return.
14. Mr Bryce's second point related to paragraph 43 of the determination. The judge notes that Falun Gong held a media festival the day prior to the hearing in the area where the appellant claimed to practice (the West End of Glasgow) but he failed to mention it, had not been present, and when asked gave a poor explanation of why he was not there. Mr Bryce said that the only source of information that a major festival of Falun Gong had taken place seem to have been the judge's own knowledge, and the point had not been put to the appellants' representative for comment.
15. Mr Bryce's third point was that at paragraph 32 the judge lapsed into speculation.
16. Mr Bryce said that the errors cumulatively were such that the determination should be set aside and the case remitted to the First-tier Tribunal for entirely fresh hearing before another judge.
17. Mrs O'Brien accepted that the matter of the appellants being from separate provinces was before the judge, and was not dealt with. However, she submitted that any error was immaterial, because based on her other findings, in which no legal error was shown, the judge would plainly have found that the appellants could relocate within China. The availability of that option is well-established by general background evidence and by the findings in *AX (family planning scheme) China CG* [2012] UKUT 00097 (IAC). Separation of the three family members would not happen. The judge would have given the same answer on the best interests of the child for the same reasons. Alternatively, Mrs O'Brien said that if the determination did require to be set aside on this point there was no need for a further hearing. The appellants have had the opportunity to produce all their evidence. *AX* should be applied on internal relocation and it should be found that removal would have no disproportionate effect, taking account of the best interests of the child.
18. As to the second appellant, Mrs O'Brien said that Mr Bryce's arguments did not arise from the grounds on which permission had been granted. Those grounds were vague and did not amount more than disagreement with the credibility findings. The main line of argument for the second appellant, based on *YB (Eritrea)*, was not put to the First-tier Tribunal, was not in the Grounds of Appeal to the Upper Tribunal and was not obvious. Even if it were to be entertained, there was no

evidence to support a real risk on return. Evidence of monitoring the internet did not establish that the Chinese authorities would take an adverse interest in the appellant on return because of photographs of him engaging in Falun Gong practices abroad.

19. As to the point of wrongfully relying on judicial knowledge, Mrs O'Brien said that the matter had been put to the appellant for his comment. Objection might have been taken then, but was not. In any event, this was a minor issue in the determination.
20. On the third point, Mrs O'Brien submitted that it was a reasonable inference from all the other findings and could not be categorised as speculative.
21. Finally, Mrs O'Brien said that even if error were to be found such as to require a fresh decision there had been no application for any further evidence to be introduced and the case was suitable for decision in the Upper Tribunal based on submissions only.
22. Mr Mullan had nothing to add by way of reply.
23. Mr Bryce submitted that his argument based on *YB (Eritrea)* amounted to an obvious point of Refugee Convention jurisprudence which should be considered even if it had not been raised earlier. He withdrew his third point, being persuaded that Mrs O'Brien's submission was sound.
24. I reserved my determination.
25. Counsel made as much as could reasonably be made of the points available to the two appellants at this stage, but in my opinion those points were all succinctly met in the reply by Mrs O'Brien.
26. The judge unfortunately lost sight of the "two provinces" point. However, the background evidence is that although the *hukou* system is restrictive and non-compliance with it carries disadvantages, tens if not hundreds of millions of Chinese citizens nevertheless relocate without such difficulty as to amount to undue harshness.
27. AX held at paragraph 191(14):

Where a real risk exists in the *hukou* area, it may be possible to avoid the risk by moving to a city. Millions of Chinese internal migrants, male and female, live and work in cities where they do not hold an urban *hukou* ... The country evidence does not indicate a real risk of effective pursuit of internal migrant women ... internal relocation will, in almost all cases, avert risk in the *hukou* area. However, internal relocation may not be safe where there is credible evidence of individual pursuit ... Whether it is unduly harsh to expect an individual returnee and her family to relocate in this way will be a question of fact in each case.
28. There is no good reason to think that these appellants may be split up on return to China. There is no reason why the question of the best interests of the child should be resolved differently than in the First-tier Tribunal determination.

29. Mr Bryce's arguments do not derive from the second appellant's Grounds of Appeal. In any event, it is not clear that the judge thought that her finding that the appellant's activities were cynical and contrived was the end of his asylum case. She found that his activities had been "extremely limited", and that he had "failed to establish the Chinese authorities will take any interest in him for the reasons he claims".
30. Further, Mr Bryce has not shown that after putting the element of cynicism and calculation entirely to one side entitlement to protection claim should follow. The background evidence cited does not yield a reasonable inference that the authorities would be likely (a) to identify from photographs on the internet someone like the appellant who has engaged in low level Falun Gong practice abroad or (b) to punish such activity if they did know about it.
31. The judge did apparently base her questions about a major Falun Gong event in Glasgow on her own knowledge. She says the point is a minor one. The decision as a whole does not suggest otherwise. In any event, the appellant cannot say he was treated unfairly, because he accepted in evidence that there was such an event and he knew about it. That is quite different from a judge relying on a specialist insight which might be open to debate, where fairness would demand an opportunity to refute the matter.
32. No error has been identified such as to require the determinations of the First-tier Tribunal to be set aside in terms of section 12(2)(a) of the 2007 Act. Both determinations **shall stand**. Alternatively, if the decision had been set aside, I would have substituted one determination, dismissing both appeals.
33. No anonymity direction has been requested or made.



28 November 2014
Upper Tribunal Judge Macleman