



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04427/2015**

THE IMMIGRATION ACTS

**Heard at Field House
On 29 January 2016**

**Decision & Reasons Promulgated
On 11 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**P Y
(~~ANONYMITY DIRECTION NOT MADE~~)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Appiah (Counsel) instructed by Vine Court Chambers
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 29 October 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 18 August 1952 and is a national of China. On 2 March 2015 the Secretary of State refused the Appellant's application for Asylum.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Bart-Stewart ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 18 November 2015 Judge Cox gave permission to appeal stating *inter alia*

"... The Judge clearly formed a jaundiced view of A, finding at [72] that the only consistency in his case was that "he takes every opportunity to try to bring himself to the attention of the authorities" as a practitioner of Falun Gong. She may or may not have been correct in that assessment but in this essentially *sur place* claim it is the perceived profile of A rather than his intention that counts. I therefore conclude that grounds 4 and 5 are arguable, to which may be added 3 as it is somewhat linked. Grounds 1 & 2 have essentially to do with lack of adequate reasons for findings. They may be weaker but I do not exclude them at this stage"

The Hearing

6. (a) Miss Appiah, for the appellant, moved the grounds of appeal and told me that at [74] the Judge was wrong to find that a significant amount of the materials produced by the appellant to support his claim postdate his asylum interview. She drew my attention to witness statements and photographs contained in the respondent's bundle which predate the interview, and argued that the conflict created by what is said by the Judge at [74] indicates that the Judge did not take account of evidence which goes directly to the core of the appellant's claim.

(b) Ms Appiah challenged the Judge's credibility findings at [71] and argued that the Judge's finding that the appellant's history of the practice of Falun Gong in China is irrelevant, because this is a *sur place* claim. She was critical of the Judge's treatment of the background information relied on by the appellant at [80] of the decision, and argued that the Judge has failed to consider the guidance given in YB (Eritrea) v SSHD [2008] ECA Civ 360. She argued that [there] was a wealth of evidence placed before the Judge from which the Judge should have drawn the conclusion that the Chinese authorities have an adverse interest in Falun Gong practitioners in the UK.

(c) Miss Appiah argued that the Judge failed to take account of the risk on return created by the appellant's dedication to the Falun Gong movement in the UK. She told me that although the Judge found (at [74]) that the appellant's account at asylum interview was "*vague and lacked detail*", the evidence presented to the Judge indicated the contrary; and that although the Judge refers to major inconsistencies in the appellant's evidence, the Judge does not give adequate reasons for finding that there are major inconsistencies; that the

finding of the Judge at [82] that the appellant is not a genuine follower of Falun Gong is without support from the evidence placed before the Judge.

7. (a) For the respondent, Ms Fijiwala opposed the appeal. She told me that at [74] of the decision the Judge is clearly stating that the appellant's performance at asylum interview with vague and lacked detail, and that the Judge went on to consider other evidence elsewhere in the decision. She referred me to [73] to [76] and told me that that was careful exegesis of the evidence placed before the Judge, which led the Judge to the conclusion that the appellant was not a credible witness.

(b) Ms Fijiwala told me that, when read as a whole, the decision sets out reasons for the Judge's finding that there are major inconsistencies in the totality of evidence placed before the Judge - and referred me to [28] to [36] where there is a discussion of the oral evidence heard by the Judge.

(c) Ms Fijiwala conceded that the Judge has not cited YB Eritrea, but argued that the Judge has considered the correct case law, taken guidance therefrom and then applied the principles set out in both Danian and YB Eritrea. She told me that the Judge acknowledged that the appellant's claim was a *sur place* claim, and told me that the Judge had considered the appellant's activities in the UK in the correct context. She told me that at [18] the Judge correctly considers the background materials; and told me that the decision does not contain errors material or otherwise. She urged me to dismiss the appeal and to allow the decision to stand.

Analysis

8. At [82], after taking guidance in the case of Danian [2000] IAR 96, the Judge says "*I find that the appellant is not a genuine adherent to Falun Gong. There is no objective evidence to support his claim that his sur place activities in the United Kingdom places him at risk on return in China.*"

9. Between [20] and [66] the Judge sets out the evidence that she heard from the appellant his wife and six witnesses. Between [67] and [82] the Judge sets out findings after identifying the risk categories set out in LL (China) CG [2005] UKIAT 00122. At [71] the Judge rejects the appellant's claim to have practised Falun Gong in China but appears to accept that, for his own disingenuous reasons, the appellant has created a profile of a Falun Gong practitioner in the UK. The last two sentences of 71 say "*in that regard the appellant has I find sought to create a considerable public profile and for the reasons that follow, I find the appellant not to be credible. I find that his activities have been self-serving with the sole motivation being to bolster his claim.*"

10. For the reasons given by the Judge, the Judge finds that the appellant is a bogus Falun Gong practitioner in the UK, but finds that he participates in a vigil outside the Chinese embassy, that he (along with others) handed in a petition to Downing Street, that several times each week he distributes leaflets in Chinatown, and at least twice a week he participates in a public "truth telling" demonstration.

11. In Danian v SSHD [2002] IMM AR 96 the Court of Appeal said that there is no express limitation in the Convention in relation to persons acting in bad faith, despite Counsel's attempt in Danian to have one implied. In the court's opinion the answer to the 'riddle' lay in the judgement of Millet J in Mbanza (1996) Imm AR 136. Millet J said "*The solution does not lie in propounding some broad principle of abuse of the system....but in bearing in mind the cardinal principle that it is for the applicant to satisfy the SSHD that he has a well founded fear of persecution for a Convention reason. Whether he can do so will largely turn on credibility and an applicant who has put forward a fraudulent and baseless claim for asylum is unlikely to have much credibility left.*" The court referred to a letter from the UNHCR which stated that regard should be had to whether the person's actions had actually come to the notice of the authorities in his home country and how they would view such actions. It does not matter whether an appellant has cynically sought to enhance his asylum prospects by creating the very risk he then seeks to rely on, although bad faith is relevant when evaluating the merits/credibility of the claim, as explained in Danian. However, as Bingham J also said in Danian - the actual fear has to be shown to be genuine and not one that was manufactured by conduct designed to give plausibility.

12. In YB (Eritrea) v SSHD [2008] EWCA Civ 360 the Court of Appeal sounded a note of caution in relation to the argument that, if an appellant was found to have been opportunistic in his *sur place* activities, his credibility was in consequence low. Credibility about what, said the Court of Appeal. If he had already been believed *ex hypothesi* about his *sur place* activity, his motives might be disbelieved, but the consequent risk on return from his activity *sur place* was essentially an objective question.

13. In this case, the Judge did not find the appellant to be a credible witness, and found the appellant to be a man who is cynically exploiting a profile which he has disingenuously created, but that is not the test. The test is whether or not the appellant's activities are known to the Chinese authorities, and whether that knowledge creates a well-founded fear of persecution.

14. At [70] the Judge quotes from the conclusion of the respondent's own operational guidance note on China. "*Credible Falun Gong practitioners who have come to the attention of the authorities are likely to face ill-treatment amounting to persecution in China.*"

15. At [80] the Judge finds "*there is no objective evidence of Chinese authorities monitoring Chinese citizens who practice Falun Gong outside of China*", but the Judge appears to accept the evidence that the appellant participates in a vigil demonstration outside the Chinese Embassy in London three days a week. The Judge does not explain why the conclusion is reached that the Chinese authorities are not aware of the appellant when he stands outside the embassy in London three days a week, publicly declaring that he is an active Falun Gong practitioner seeking to recruit others to that movement.

16. The fact that the Judge found the appellant to be opportunistic in his *sur place* activities is not determinative of this appeal, although the judge found it to be so. The decision therefore contains a material error of law and must be

set aside. There is sufficient material before me to enable me to substitute my own decision.

17. The Judge's unchallenged findings of fact indicate that the appellant associates with Falun Gong practitioners in London. That he publicly practices Falun Gong practically every day and that he has deliberately brought himself to the attention of the Chinese authorities by participating in a visible and obvious Falun Gong ritual outside the Chinese Embassy in London three days a week.

18. The appellant is not therefore a person who practices following Gong in private and with discretion. In LL (China) CG [2005] UKIAT 00122 the Tribunal found that if there was a real risk of persecutory ill treatment by reason of Falun Gong activities on the facts of a case, then it would properly be held to be a reason of imputed political opinion and thus engage a 1951 Convention reason as well as Article 3 ECHR. That was because there was considerable evidence that the Chinese government imputed political opinion to practitioners of Falun Gong and of the extent of its hostility towards them. The Tribunal said that absent special factors there would not normally be any risk sufficient to amount to a real risk from the Chinese authorities for a person who practiced Falun Gong in private and with discretion. Nonetheless the risk of material ill treatment escalated significantly when a practitioner engaged in activities that were reasonably likely to bring him to the notice of the authorities, such as the public practice of Falun Gong exercises, recruitment of new members and dissemination of Falun Gong information. In LW(China) [2012] EWCA Civ 519 the Court of Appeal held that it was open to the Tribunal on the information available to follow LL (China) CG [2005] UKIAT 00122.

19. The appellant quite clearly falls within the risk category identified in LL and so is at risk of escalating ill-treatment. The respondent's own operational guidance note indicates that a Falun Gong practitioner who has come to the attention of the authorities is likely to face ill-treatment amounting to persecution in China.

20. What is determinative of this case is the profile which the Chinese authorities are likely to attribute to the appellant. The weight of evidence indicates that the appellant will be seen as an ardent proselytising Falun Gong member. The risk categories identified in LL (and the respondent's own operational guidance note) indicate that rightly or wrongly the appellant has created a profile which places him at risk on return to China. The appellant therefore discharges the burden of proving that he has a well-founded fear of persecution.

21. The decision does not contain a consideration of ECHR, and no submissions made to me under the 1950 convention.

22. The appeal is allowed in asylum grounds only.

Decision

23. There is a material error of law in the decision of the First-tier Tribunal. I therefore set that decision aside

24. I substitute the following decision.

25. The appellant's appeal is allowed on asylum grounds.

Signed

Date 8 February 2016

Deputy Upper Tribunal Judge Doyle