IAC-AH-KRL-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03813/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 30th March 2016	**On 11th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS XIAOYAN HE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Jagadesham, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of China born on 15th October 1989. The Appellant left China on 13th March 2009 with the use of a student visa arriving in the UK on the same day. That visa expired on 13th December 2013. The Appellant claimed asylum on 26th March 2014 and was served

with IS151A as an overstayer. On 17th February 2015 the Secretary of State served Notice of Refusal on the Appellant. Within that Notice of Refusal the Secretary of State acknowledged the Appellant's claim for asylum was based on a fear that if returned to China she would face mistreatment due to her religious beliefs as a Christian believed by the authorities to follow "the Almighty God" sect.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Robson sitting at Bradford on 27th May 2015. In a decision promulgated on 30th June 2015 the Appellant's appeals based on asylum and human rights grounds were dismissed and the Appellant was found not to be in need of humanitarian protection.

3. The Appellant lodged Grounds of Appeal to the Upper Tribunal. Permission to appeal was refused by Designated Judge McClure on 24th July 2015. Renewed Grounds of Appeal were lodged on 11th August 2015.

4. On 21st September 2015 Upper Tribunal Judge McWilliam granted permission to appeal. Judge McWilliam considered that it was arguable that the judge did not take into account the statement from the Appellant's father. Further Judge McWilliam noted that so far as Ground 1 was concerned the issue was whether or not the Appellant had had communication with Hehua Lin and whether this individual had communicated information to the authorities that the Appellant had joined an illegal sect. Whether the Appellant was aware of the potential criminality in relation to her practice of Christianity was not material to the decision. Judge McWilliam held that there was no freestanding arguable error of law in relation to Ground 1 if the Upper Tribunal concluded that there was a material error of law in relation to Ground 2 that this would impact on the judge's findings at paragraph 55.

5. On 8th October 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. That response submitted inter alia that the Judge of the First-tier Tribunal directed himself appropriately and that he refers to the arrest and release of the Appellant's father within the determination.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears via her instructed Counsel Mr Jagadesham. Mr Jagadesham is familiar with this matter. He appeared before the First-tier Tribunal and he is the author of the Grounds of Appeal and renewed Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Submission/Discussion

7. Mr Jagadesham points out that it was before the Immigration Judge that the Appellant feared the Chinese authorities due to her involvement with the Church of Almighty God which in China was considered a proscribed religious cult. He acknowledges that she had never been a member of the

church but she was suspected by the authorities of being one. He submits that the judge accepts the Appellant "had some knowledge of her claim to faith but such knowledge was lacking in depth and was itself subject to contradictions, a fact referred to by the Respondent in the claim." He poses questions as to how the Appellant's knowledge could be shown to be lacking in depth and where and what were the contradictions and even more importantly why were they material. He submits that this creates a material error and that the judge has failed to apply the test of anxious scrutiny.

8. Further he submits that the Respondent never suggested the Appellant's knowledge of her faith contained contradictions and as a result contends that the adverse finding of credibility was perverse. He submits that the judge has failed to take into account, or address, relevant evidence and asks me to give due and proper consideration to paragraphs 42 onwards, namely those relating to the judge's findings. He points out that the judge has concluded at paragraph 51 that there was no evidence of there being an arrest and at paragraph 54 there was no evidence that Heua was imprisoned and that at paragraph 56 that there was no evidence that the Appellant was wanted by the authorities. He submits it was a material error of law to reach such conclusions because there was such evidence. He submits that that consisted of the Appellant's testimony and the letter from her father. He submits that this was the point taken up by Judge McWilliam when granting permission. He contends the judge has not addressed the letter and it was incumbent upon him to do so. He further contends that there are factual errors set out in the judge's assessment of the Appellant's case. He takes me to paragraph 11 of the decision where the judge says

> *"She explained that she was a member of a secret family church having converted to Christianity in 2006 and had been arrested for church involvement in December 2012."*.

Mr Jagadesham points out that that is inaccurate and that such a statement had never been part of the Appellant's case nor had there been any detention. He submits the judge wrongly imposed a wrong standard by relying on the absence of such corroboration or proof of such events. Looking at the issues as a whole he submits that generally there has been a failure which is material to take into account aspects which ultimately infect the findings at paragraph 55 as a whole and he asks me to set aside the decision and to remit it to the First-tier Tribunal for rehearing.

9. In response Mr Harrison takes me to the Rule 24 response, pointing out that the Secretary of State notes that the judge has actually referred to the arrest and release of the Appellant's father in the determination. He says this must have a material impact because it is relied upon by the Appellant and therefore any comment made by the judge must address the relationship of the father's letter to the claim and that the weight that the judge gave to it is a matter for the judge. Generally he asks me to

endorse the view set out in the Notice of Refusal and to find that there is no material error of law.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

12. Analysis of this case shows that the approach adopted by Upper Tribunal Judge McWilliam is correct. The starting point is whether or not the judge took into account the statement from the Appellant's father. I acknowledge the point made by Mr Harrison that there is reference to the father's arrest in the First-tier Tribunal Judge's decision but there is no reference therein to the letter of the Appellant's father and that is a material omission. It may be that the judge would have come to the same conclusion but it is impossible to comment on that and the failure to address it is material. It goes to the findings that there was "no" evidence on certain matters made in the findings of the First-tier Tribunal Judge when in fact there clearly were. The Appellant had provided in evidence that he had actually been mistreated and I agree with the submissions of Mr Jagadesham the case has revealed the judge has consequently erroneously relied on an absence of actual or corroborative evidence and that that is contrary to the lower standard and the notion of the benefit of the doubt as set out in *KS (benefit of the doubt) [2014] UKUT 552 (IAC)*.

13. As a result I am satisfied that the error is material and that it could well have impacted on the judge's findings set out at paragraph 55. The

correct approach consequently is to find there is a material error of law; to set aside the decision of the First-tier Tribunal Judge and to remit the matter back to the First-tier Tribunal for rehearing with none of the findings of fact to stand.

Additional Issue

14. There is one further issue that may or may not be relevant when the matter comes back before the First-tier Tribunal. It is both clear to me and I am advised by Mr Jagadesham that the Appellant is pregnant. I understand that the birth is due to take place either at the end of April or the beginning of May. The Appellant already has one child who is 21 months old. I am advised that the father of the expected child is not a British citizen and has no status in the UK. This appeal has not in any way addressed the issues that might arise as a result of this child's birth. It is agreed by both legal representatives that it is not a matter I need to concern myself with, be it they both acknowledge that it may be an issue that needs to be addressed in the future and if that were to be the case it would have to be addressed with a fresh claim. In such circumstances that issue is not one that is extant before me.

Notice of Decision and Directions

15. (1) The decision of the First-tier Tribunal discloses a material error of law and is set aside. None of the findings of fact are to stand.

(2) The matter is remitted to the First-tier Tribunal for rehearing before any Immigration Judge other than Immigration Judge Robson.

(3) That it is recorded that the Appellant lives in Oldham and consequently it is appropriate that the rehearing of this matter be listed either in Bradford or in Manchester.

(4) That due to the imminence of the birth of the Appellant's second child the listing of the remitted hearing take place on the first available date after 1st July 2016 with an estimated length of hearing of three hours.

(5) That there be leave to either party to file and serve any additional witness statements and evidence upon which they seek to rely on a date at least fourteen days prior to the restored hearing.

(6) Mandarin interpreter required.

16. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris