



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/08387/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 18 January 2016**

**Decision &
Promulgated
On 7 March 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

**J L L
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel instructed by Parker Rhodes Hickmotts

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Simpson who in a decision promulgated on 5 October 2015 refused the appellant's appeal against a removal decision of the Secretary of State dated 30

September 2014, following a refusal to grant him asylum, humanitarian protection and protection under the European Convention.

2. The history is as follows. The appellant claimed asylum on 5 November 1998 and that application was refused on 22 August 2000. From August 2000 he did not make any face-to-face contact with the Home Office until he began to report in August 2011 and he waited until December 2013 to lodge further submissions. His further submissions of 3 December 2013 were in fact treated as a fresh claim. He claimed that he left China illegally and he had problems with the authorities before he left China, and his imputed political opinion would lead to persecution. Essentially the appellant claimed that he was in a property dispute whereby the government authorities wished to demolish his property and he disagreed. An ensuing struggle resulted in him being accused of hitting an officer which led to his arrest. He states that the officers arrested him and put him in a car but he escaped from the car while the vehicle was in motion. He believed he would be arrested and detained by the authorities and chose to escape and fled to the UK.
3. The appellant claimed that owing to the above incident he was of adverse interest to the authorities in China. The respondent maintained that he had failed to provide any evidence to support this and although he stated that the authorities would have arrested and detained him had he not escaped from the hospital, he had not provided any evidence of arrest warrant, wanted notices, court orders or any documents to support this claim. It was noted he still had family in China therefore and his family were able to send any supporting documentary evidence to him regarding the claim.
4. At the First-tier Tribunal hearing it was submitted that there were no matters giving rise to a discrepancy or implausibility in the appellant's claim and the basis of the refusal was that he had not furnished supporting documentation. It was submitted that the appellant's difficulty was that when his application in 1998 had been refused, he had not been aware of this refusal and in 2012 and 2015 he was not able to produce evidence going back to 1998. He has been unable to provide the evidence. It was submitted at the First-tier Tribunal that it would have been open to the respondent to have informed the appellant's representative that the appellant could be interviewed. It was also submitted that the appellant had brought himself back to the attention of the authorities. There was an explanation for this. It was an unreasonable expectation on the part of the respondent that those escaping persecution should be required to produce documentation in support. It was submitted that the question was whether the appellant had told the truth in 1998 [31] and it was said on his behalf that his account was consistent with the country information and with regard to the issues raised concerning his contact with his family, and the account the appellant had given was sustainable. In addition, because of the circumstances of him departing China and the length of time since his departure and having had no contact with his family he would not be able to avoid imprisonment through payment of a fine.

Those facts were different from those submitted in relation to **XH (illegal departure - risk - return) China CG [2202] UKIAT 01478** and the appellant should be considered for Article 3 protection.

5. At the hearing in essence Mr Nicholson relied on the written grounds for permission to appeal which encapsulated that there was a delay in the promulgation of the determination, there was no indication as to whether the appellant's account was accepted as true. There had been speculation on the part of the judge and a reversal of the standard of proof in determination of the human rights claim.
6. Mr Avery submitted that the delay in promulgation of the determination was not considerably over the three months within which it was appropriate to decide a decision. The key issue was one of credibility and that the point was that the appellant had not produced documentation and should have done. He had merely made an asylum claim and then absconded. The judge had not rejected the appeal on the basis of the inconsistencies in the oral evidence.
7. Despite Mr Avery's attempts to defend the determination it is clear that there was an issue of credibility raised within this appeal and that submission is clearly recorded in the determination at paragraph 31 as part of the submissions of the appellant. The question was whether the appellant had told the truth in 1998. Although the judge indicates that there was now evidence that the authorities in China issued persons such as the appellant official documents in the circumstances that he described there was no evidence that those documents were issued when the appellant departed from China and although the appellant clearly gave oral evidence at the appeal hearing there was no evidence on the face of the decision that the judge did in fact engage with the oral evidence or the explanations of the appellant in relation to his failure to produce the documentation.
8. The consideration of this appeal engages issues of credibility, which in turn involves consideration of the explanations of the appellant regarding the documentation, or rather lack of it, presented to the Tribunal, but it is axiomatic in asylum appeals that corroboration of an account through documentary evidence is not necessarily required. It is whether it is reasonably expected to be available and clearly the appellant's oral evidence in relation to his explanations for this were pertinent. As stated in **RK (Algeria) [2007] EWCA Civ 868** at paragraph 18:

"Another factor which usually figures prominently in a court's consideration of the effect of delay upon the safety of the lower court's or Tribunal's decision is that there were issues of credibility for the court or Tribunal to consider; and that, in the long passage of time until preparation of the decision, the court's or the Tribunal's memory of the often subtle features relevant to an assessment of credibility may well have dimmed. But, as the Secretary of State has, in effect, always conceded, such is the factor entirely absent from this

case. The adjudicator had described the respondent as ‘in general, a credible witness’; and, before the Tribunal, his credibility was not in issue. Indeed he did not even give oral evidence.”

9. That is not the case in this matter and it is clear that credibility was a factor to be taken into account and the appellant did give extensive evidence.
10. Although it was submitted that the Secretary of State argued it was a carefully written determination that there is no record of what the appellant said in oral evidence and no record of the cross-examination and moreover no attempt to engage with that record of oral evidence within the findings themselves albeit that the Secretary of State’s decision and subsequently the judge’s decision following determined that the appellant had failed to substantiate his claim. The appellant had, as recorded, offered to be interviewed by the Secretary of State and clearly gave evidence at the appeal hearing.
11. That said, nowhere did the judge indicate that he did not believe the appellant and there appeared to be no findings in relation to the appellant’s credibility itself. There was no engagement with the claim by the appellant that he had lost contact with his family and therefore was unable to be in a position to request documentary evidence from them even if it were available.
12. That leads on to the third ground of challenge which was that the judge engaged in speculation. I have already referred to this above on the basis that the judge appeared to apply the consideration of the evidence and the objective evidence as it is now rather than in 1998. The judge did consider paragraph 43 that the authorities would have issued arrest warrants against him but the judge found that the appellant had made “no efforts over the course of sixteen years to obtain from China any evidence to support his claim”. This did not engage with the appellant’s submission that the appellant had not been aware of his refusal up until 2012 and he was not able to produce documents going back to 1998.
13. There is further support for the contention that the judge had erred in speculating in relation to the appellant’s case and **HK v Secretary of State for the Home Department [2006] EWCA Civ 1037**, paragraph 39 was cited whereby Lord Justice Neuberger stated,

*“inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding Tribunal have any (even second hand) experience. Indeed, it is likely that the country which an asylum seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents in this country will be wholly unfamiliar. The point is well-made in **Hathaway (on law of refugee***

status) [1991] at page 81: “in assessing the general human rights information, decision makers must constantly be on guard to avoid implicitly re-characterising the nature of the risk based on their own perceptions of reasonability.”

14. As I have pointed out the judge did engage in speculation at paragraph 43 although there was a reference at paragraph 28 that there was now evidence that the authorities issued persons such as the appellant official documents I am not persuaded that there was evidence that this was the case in 1998.

15. Again at paragraph 47 the judge states:

*“Having regard to **XH** above, I consider that there is a sufficiency of basis upon which to conclude that if returned to China there remain persons in the Appellant’s family circle to whom he may reasonably be able to turn to assist with discharging any fine that may be raised against him for having like many others departed China illegally.”*

16. The judge did not appear to engage with the facts in this case that the appellant’s claim was that he was not in contact with his family and indeed, at paragraph 48, the judge noted that the friend with whom he was living did not appear to support him at the hearing.

17. As such I find that there was an inadequate reasoning in relation to the findings of **XH** and this is an error of law.

Notice of Decision

I find that The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 29th February 2016

Deputy Upper Tribunal Judge Rimington