IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00283/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th November 2015	**On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RENTON

Between

X H
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel, instructed by K&G Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a female citizen of the People's Republic of China born on 1st October 1986. It is not in dispute that she entered the UK illegally sometime in 2006 and applied for asylum on 21st May 2015 having been arrested as an illegal immigrant. That application was refused on 8th June 2015 for the reasons given by the Respondent in a letter of that date. At the same time the Respondent decided to remove the Appellant under the provisions of Section 10 Immigration and Asylum Act 1999. The Appellant

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appealed, and her appeal was heard by Judge of the First-tier Tribunal Keane (the Judge) sitting at Yarl's Wood on 24th June 2015. He allowed the appeal on asylum grounds and under Article 3 ECHR for the reasons given in his Decision dated 26th June 2015. The Respondent sought leave to appeal that Decision, and on 18th September 2015 such permission was granted.

Error of Law

2. I must first decide if the Decision of the Judge contained an error on a point of law so that it should be set aside.

3. The Judge found that the Appellant was at risk on return to China and therefore allowed the appeal because he was satisfied that the Appellant was a credible witness who had given a credible account of events in China. The Judge found the Appellant's credibility to be damaged in accordance with the provisions of Section 8(6) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, but nevertheless the Judge decided that the Appellant's account of events should not be rejected. She had given an account which was absent of any discrepancies and inconsistencies, and could be described as clear and cogent. The Judge decided to attach no weight to the factors concerning credibility raised by the Respondent in the Refusal Letter. The Judge found that the Appellant had made honest attempts to answer difficult questions concerning the start of the Falun Gong movement and the purpose of its exercises.

4. As a consequence of his finding as to credibility, the Judge found that the Appellant had become an orphan at the age of 8 years and from that age she had survived by begging in the streets of her village. When she had been about 18 years of age, she had noticed a group of people practising Falun Gong exercises. She had then joined a group of adherents, but sometime in 2006 she had heard her name shouted out. As she had believed that her name was included on a wanted list, she had believed that she would be caught, arrested and detained. She had then been helped to leave China and had come to the UK.

5. It is recorded in the Decision that at the outset of the hearing before the Judge, Mr Morris, the Home Office Presenting Officer, applied to be excused as a result of a personal emergency. Mr Morris did not apply for an adjournment of the hearing, and indicated that he would be content to rely upon written submissions which he had prepared and which he submitted. The Judge decided to proceed on that basis, taking into account the overriding objective set out in what the Judge described as Rule 2 of the Tribunal Procedure Rules 2004. During the hearing, which took place in the absence of Mr Morris or any other representative for the Respondent, the Judge asked questions of the Appellant after she had given her evidence-in-chief which amounted to the Appellant identifying herself and stating that the contents of her statement were true. At the hearing before me Mr Whitwell said no more than he relied upon the

grounds of application. Those grounds were that there was an error of law in the Decision of the Judge because there had been a procedural irregularity in the conduct of the hearing before him. That hearing had been conducted in a way unfair to the Respondent. The Home Office Presenting Officer had not agreed to the hearing taking place on the basis that the Judge would hear oral evidence from the Appellant. The Judge had made no attempt to ascertain the availability of a replacement Home Office Presenting Officer. The Judge had conducted the hearing not in accordance with the **Surendran** guidelines, and the Judge's questioning of the Appellant amounted to independent post-hearing research of the sort deplored in such decisions as **EG Nigeria [2008] UKAIT 00015**. The Judge had erred in criticising the Respondent for not cross-examining the Appellant. The Judge had not asked the Appellant's representative to deal with the issues concerning credibility raised in the Refusal Letter.

6. The grounds continue to argue that the Judge further erred in law by making perverse or irrational findings of fact and failing to give any or adequate reasons for them. It was perverse for the Judge to find that the Appellant had been a Falun Gong practitioner when her knowledge of that movement had been so sparse. The Judge had paid scant attention to what the Appellant had said during her interview. Finally, the Judge had not specifically assessed the risk on return to China for this Appellant.

7. In response, Ms Revill submitted that there had been no such errors of law. She referred to her Skeleton Argument and argued that there had been no breach of the **Surendran** guidelines in the way the Judge had conducted the hearing. No application had been made to adjourn the hearing by the Respondent, nor for the case to be put back in the list so that a replacement Home Office Presenting Officer could be arranged. The conduct of the hearing was exclusively a matter for the Judge, and there had been no procedural irregularity in the course of action he had chosen. The Judge had not conducted any sort of post-hearing research, and had not made any unfair criticism of the Respondent's absence. The **Surendran** guidelines did not prevent a Judge from asking questions of a witness for the sake of clarification, and the Judge had done no more than that. In any event, it was decided in **WN (Surendran; credibility; new evidence) (Democratic Republic of Congo) [2004] UKIAT 00213** that a breach of the **Surendran** guidelines was not in itself an error of law. The real test to be applied was "whether the hearing was fair or unfair and whether a fair-minded and informed observer would conclude that there was a real possibility that the Adjudicator was biased". In this case, there was no evidence of bias, and bias was not relied upon by the Respondent. In particular, it was decided in **SW (Somalia) [2005] UKIAT 00037** that there was no obligation upon a Judge to ask a representative to ask questions and deal with issues raised in the Refusal Letter.

8. In any event, the questions asked by the Judge had been very limited. The Judge had asked no more than four questions of the Appellant relating to the credibility issue.

9. As regards the second ground, Ms Revill argued that the Judge had made findings of fact open to him on the evidence before him and which he had fully explained. As established in **<u>Nixon</u> (Permission to appeal; grounds) [2014] UKUT 00368 (IAC)** a very high threshold had to be met for perversity to be established. The Respondent had failed to do so in this case.

10. I find no error of law in the Decision of the Judge requiring it to be set aside. I find no procedural irregularity in the way the Judge conducted the hearing of the appeal. The Judge was faced with a situation whereby the Respondent's representative, apparently for a very good reason, needed to absent himself from the hearing. That representative did not seek an adjournment, nor the opportunity to find a replacement, and there was no error of law in the Judge deciding to proceed with the hearing on the basis that the Respondent would rely upon written submissions. It is not for the Respondent's representative to dictate the terms upon which a hearing will take place, and it is trite law that there is no bar to a Judge asking questions of a witness for the purpose of clarification either in the **<u>Surendran</u>** guidelines or elsewhere. Indeed, those guidelines specifically state that the Judge "should be at liberty to ask questions for the purposes of seeking clarification". It is apparent from reading the Decision that the Judge did no more. Ms Revill helpfully produced a copy of her note of the proceedings which revealed that only four questions were asked by the Judge, each one in order to clarify evidence given by the Appellant in her interview which had been criticised in the Refusal Letter. At paragraphs 6 and 8 of the Decision the Judge explained that he had asked questions in order to provide the Appellant with an opportunity of dealing with credibility issues raised by the Respondent in the Refusal Letter, and in the last line of paragraph 14 the Judge referred to clarification being provided by the Appellant's answers to his questions. In any event, as Ms Revill pointed out, non-compliance with the **<u>Surendran</u>** guidelines per se does not amount to an error of law. For there to be an error of law, there must also be bias or unfairness. I find no evidence of such in the Judge's conduct of the hearing. The Judge did not unfairly criticise the Respondent for not cross-examining the Appellant nor did he use that factor in the Appellant's favour. Quite the opposite appears to be the case from what the Judge wrote at paragraph 14 of the Decision. There was certainly no unfairness in the Judge choosing to ask the clarificatory questions himself as opposed to requiring the Appellant's representative to carry out this task.

11. I also find no error of law in the Judge's fact-finding. As argued by Ms Revill, I am satisfied that the Judge made findings of fact open to him upon the evidence and which he satisfactorily explained. The Judge dealt with each point in the Refusal Letter challenging the credibility of the Appellant in a way which in my view cannot be described as perverse. The Judge clearly did take account of what the Appellant had said during her interview. The Judge considered the Appellant's evidence against the background information at paragraph 14 of the Decision.

Notice of Decision

The making of the Decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the Decision.

~~Anonymity~~

~~The First-tier Tribunal did not make an order for anonymity and I find no reason to do so.~~

Signed Date

Upper Tribunal Judge Renton