IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03898/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral determination given following hearing	**On 25 April 2016**
On 7 April 2016	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

GZ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Mold, Counsel instructed by Wimbledon Solicitors (Merton Road)
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

In order to protect the anonymity of the appellant's children the anonymity direction previously made is retained.

1. The appellant in this case is a national of Mongolia who was born in April 1965. In January 2004 he was issued with a multi-entry visa valid until July 2004; he arrived in this country just before the expiry of this visa using a false passport and applied for further leave to remain as a student nurse. That application was granted and he had valid leave to remain until August 2005 which leave was subsequently extended until January 2009.

2. In 2007 his wife and children arrived in this country. His older child was then aged about 7 and his younger child about 3. The appellant's wife then applied in September 2007 for leave to remain as the spouse of a refugee which application was refused and the appellant and his elder child returned to Mongolia. Subsequently, in March 2008 the appellant with his wife entered the UK on a flight from Mongolia and the current position is that the appellant, his wife and his two children are in this country. In January 2009 he made an application for leave to remain as a student nurse with his family members as his dependants which application was refused and his appeal was dismissed on 6 December 2010. The appellant did not return to Mongolia as he should but remained in this country eventually claiming asylum on 29 May 2013. His wife and two children are dependants on this claim.

3. The respondent refused to grant the appellant asylum on 19 December 2014 and the appellant with his family as dependants appealed against this decision which appeal was heard before First-tier Tribunal Judge Devittie sitting at Taylor House on 11 December 2015. In a determination promulgated on 12 January 2016 Judge Devittie dismissed the appeal both on asylum and human rights grounds (Article 3) and also under Article 8. The appellant sought permission to appeal against this decision both on asylum/Article 3 grounds and also on Article 8 grounds. His appeal on Article 3 grounds was founded on one ground which was that the judge had conducted his own enquiry which was said to be the wrong approach in reliance on the Presidential Tribunal decision in *AM (fair hearing) Sudan* [2015] UKUT 00656 in which the Tribunal had set out certain general Rules and principles which should be applied with regard to a judge conducting his/her own enquiries. In particular guidance was given that "independent judicial research is inappropriate". It is said in the grounds at paragraph 12 that, "in the present case the judge has conducted independent judicial research. The judge did not decide the case based on the evidence before him. This was not a fair procedure and was an error of law".

4. The grounds also make submissions that Judge Devittie failed adequately to consider the position of the appellant's children and their private life under the Immigration Rules (that is those Rules which set out how Article 8 claims should be considered). In particular it was noted that the judge had referred to the children as two daughters whereas in fact the appellant had a son and a daughter which is said to be "indicative of the absence of care which the judge displayed in considering the children's position". Subsequently the appellant was granted permission to appeal with regard to the decision refusing to allow the appeal on asylum/Article 3 grounds by First-tier Tribunal Judge Grimmett on 4 March 2016. However,

Judge Grimmett refused permission to appeal on Article 8 grounds. When giving her reasons for this decision at paragraph 2 Judge Grimmett considered as follows:

> "2. The grounds say that the judge erred in undertaking his own research. This point is arguable in light of *AM* [2015] UKUT 00656."

5. With regard to the Article 8 argument, however, at paragraph 3 of her reasons, Judge Grimmett stated as follows:

> "3. It is not arguable that the judge erred in his consideration of the children's private lives as that issue is fully addressed in paragraphs 20 and 24."

6. It would have been open to the appellant had he chosen to do so to renew the application for permission to appeal on Article 8 grounds to the Upper Tribunal but he chose not to do so. Although I raised article 8 at the outset, no substantive submissions had been put in writing before this hearing with regard to Article 8 and indeed on further consideration even the one concern I had which was that at paragraph 20 of his decision the judge had stated that it was "in my view highly improbable that [the children's] parents (and in particular their father, an accomplished linguist in the Mongolian language) would not have nurtured in their children some degree of fluency in their mother tongue" might have been partly speculative, was not in fact arguable. I say this because on any view the older child would have been 7 when arriving in this country and the younger child 3 and it would have been open to the judge properly to find that the older child in particular but also the younger must have had some understanding of the Mongolian language. However, in any event, this aspect of the case is not before me as the application for permission to appeal on Article 8 grounds had not been renewed.

7. With regard to the appeal on asylum/Article 3 grounds the issues were fully canvassed before the First-tier Tribunal and the Decision is fully reasoned. It is noted that the only objection that is taken to the Decision is that at paragraph 12(ii) the judge found as follows:

> "(ii) To the extent that [the appellant] claims persecution because of his academic work, I have noted that no evidence has been presented of a general trend showing persecution of other dissenting academics by the authorities in Mongolia. **My own inquiry on this point from information within the public domain, has not yielded any results showing that academics who express independent views are generally at risk of persecution in Mongolia** [my emphasis]."

8. There are a number of other reasons given why the judge does not accept that the appellant and his family would be at risk such as the delay in claiming asylum and the fact that he had visited Mongolia briefly in 2008

and did not attract any adverse attention. The judge also noted that what he describes as "the main pillars on which his claim of past persecutory treatment rests" amounted to no more than that the appellant had briefly been arrested in 1994 but was released on the same day and no further action was taken, together with an attack on him in 1998 by unknown drunk persons whom he claims made statements during the attack indicating they were state agents (which was not believed by the judge) and (this is the aspect of the case giving rise to this appeal) what he claims to have been the conduct of the university authorities "in frustrating his academic career".

9. In his submissions before me on behalf of the appellant (further to the skeleton argument which had usefully been prepared prior to the hearing) Mr Mold submitted that the real objection was that the judge had reinforced a view that he had had by making his own enquiries that there was no evidence without giving the appellant an opportunity of addressing that point in argument. It was also submitted further, based on the guidance given in *AM*, that had the judge had the doubts that he expressed in the first sentence of paragraph 12(ii) these should have been raised at the hearing in order to give the appellant the opportunity of making such arguments as might be available to him. The real failure (it was submitted) was that the judge had not given the appellant the opportunity to address such concerns as he, the judge, had.

10. On behalf of the respondent Mr Wilding submitted that what in effect the appellant was seeking to argue in this case was that the judge erred materially by <u>not</u> finding something which in Mr Wilding's words was "ludicrous". Mr Wilding accepted that had the judge found some evidence, either through having made independent enquiries or because he had been made aware of that evidence subsequently, at that stage he should have raised it with the parties either by reconvening the hearing or asking for written observations. However, in this case, the appellant's submissions within the grounds that the appellant's representatives do not know what he actually did find does not assist.

11. Mr Wilding paraphrased what the judge was saying at paragraph 12(ii) as follows:

> "If the appellant is claiming risk due to his academic work per se, there was no evidence in the bundles or materials before him to show persecution of dissenting academics – because there was no evidence I did a search myself but I could not find anything either."

12. This had not been the central plank of the appellant's case. The judge was just noting that to the extent that there was a claim that the appellant would be persecuted because of his academic work, there was no evidence to support this aspect of the appellant's case and the judge could not find any evidence either.

13. In my judgment, while in light of the guidance given in *AM* it is not best practice for a judge to conduct research on the internet or anywhere else but he should rely rather on the evidence put before him by or on behalf of the parties, in this case the fact that the judge looked on the Internet to see whether he could himself find the evidence which had so far been lacking cannot on any sensible view be regarded as a material error; the judge's action in searching (without success) for further evidence which might have assisted the appellant cannot have made any material difference to the outcome. What is notable about the grounds and indeed the submissions which were put before this Tribunal is that at no time has it been asserted that had an opportunity been given to the appellant to deal with any concerns the judge might have had, there would have been or was any evidence capable of supporting a proposition that any academic in Mongolia had been persecuted in the past because of his or her political opinions. It is all very well claiming that a judge erred by not giving a party an opportunity to make his or her case; for that to be arguably a material error however there needs to be at least some evidence (or even argument) that had that opportunity been given this would or might have had a material impact on the decision. In this case no suggestion has been made to this effect and even when this point was raised in argument, Mr Mold did not put before the Tribunal any submission that such evidence existed. The highest he was able to put the appellant's case was that because he did not know what enquires the judge had made or what he had actually found he was not in a position to address those concerns. Accordingly, there is no basis upon which this Tribunal could realistically find that the judge's enquiries made any material difference to the outcome of the appeal and while it would have been preferable had he restricted himself to considering the evidence which was put before him, the fact that he looked to see if the appellant's case could be improved by his own enquiries but was unable to find that it could did not make the respondent's case any stronger. The judge had started from the position that there was no evidence and that is where he ended so in these circumstances there was nothing that the parties could usefully have addressed had they been invited to comment.

14. In these circumstances it must follow that because such error as there was in the judge making his own independent enquiries was not material this appeal must be dismissed and the decision affirmed.

Decision

There being no material error of law in the Decision of the First-tier Tribunal, this appeal is dismissed and the decision of the First-tier Tribunal, dismissing the appellant's appeal, is affirmed.

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 his 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:

Upper Tribunal Judge Craig Date: 18 April 2016_