



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07116/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14th August 2018

Decision & Reasons Promulgated
On 31st August 2018

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

J L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss M Cohen (instructed by Luqmani Thompson & Partners
Solicitors)

For the Respondent: Mr T Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Appellant, who is a young man from China born on 15th February 1998. His asylum claim was refused by the Secretary of State and his appeal against that Decision came before Judge Cassel at Taylor House on 11th January 2018. In a Decision promulgated on 26th January 2018 the appeal was dismissed.
2. The basis of the Appellant's claim was that he and his parents were ethnic Han. His parents had a factory in which they made Tibetan flags for local Lamas. He was arrested while delivering a flag and violently mistreated in custody. After being released, upon payment by a family friend he was smuggled out of the country by a snakehead and delivered to members of the Chinese diaspora in the UK for whom he

worked for long hours without payment. He was eventually apprehended by police and claimed asylum.

3. The Appellant was referred to the National Referral Mechanism to ascertain whether he was the victim of modern slavery. The NRM made a negative conclusive grounds decision on the basis of his adverse credibility and found that he had not been trafficked.
4. The Appellant also claimed to be at risk on return on the basis that he was gay.
5. The Judge did not find the Appellant to be credible in his claims regarding the production of Tibetan flags or his arrest. He did not find that the Appellant was a victim of trafficking and concluded that even if the Appellant was gay that would not place him at risk of persecution on return to China.
6. Permission to appeal was granted on all grounds argued.
7. The first ground argued and elaborated before me was that the Judge erred in failing to consider, as a preliminary issue, whether the conclusive grounds decision was irrational. Miss Cohen relied on the recent case law of MS (Pakistan) [2018] EWCA Civ. 594 and the subsequent guidance from the upper Tribunal in AUJ (trafficking-no conclusive grounds decision) Bangladesh [2018] UKUT 00200 (IAC).
8. Miss Cohen argued that, albeit that the two authorities relied upon post-dated the hearing and determination in the current appeal, they nevertheless pointed to the fact that the Judge had made an error of law. She relied on the head note of AUJ which reads as follows:-

“in cases in which there is no “conclusive grounds” decision:

- (1) If a person (“P”) claims that the fact of being trafficked in the past or a victim of modern slavery gives rise to a real risk of persecution in their home country and/or being re-trafficked or subjected to modern slavery in the home country and/or that it has had such an impact upon P that removal would be in breach of protected human rights, it will be for P to establish the relevant facts to the appropriate (lower) standard of proof and the Judge should make findings of fact on such evidence.”

9. Upper Tribunal Judge Gill, in that decision, attempted to give further guidance following the Court of Appeal’s decision in MS (Pakistan) and she did so at paragraph 62 where she said:-

“In cases in which the Competent Authority has reached a negative “conclusive grounds decision” but the Appellant continues to rely (in his statutory appeal) upon evidence that he has been a victim of trafficking or modern slavery, the Judge should decide, at the start of the hearing and before oral evidence is given, whether the decision of the Competent Authority was perverse or irrational or not reasonably open to it. At this stage, evidence subsequent to the decision of the Competent Authority must not be taken into account. If (and only if) the Judge concludes that the Competent Authority’s decision was perverse or

irrational or one that was not reasonably open to it, that the Judge can then re-determine the relevant facts take account of subsequent evidence.”

10. That guidance followed the Court of Appeal’s decision in MS (Pakistan). In that case the Court of Appeal found that the decision of the Competent Authority was not a decision which could be appealed to the Tribunal. Any challenge to such a decision was by Judicial Review only. The Court of Appeal concluded that in re-deciding the trafficking decision, previously made by the Competent Authority, the Upper Tribunal had erred because it had no jurisdiction to do so.
11. Miss Cohen, relying on AUJ, argued that in failing to consider, as a preliminary issue and before oral evidence, whether the decision of the Competent Authority was irrational, perverse or not a decision reasonably open to it the Judge had erred.
12. I do not find that the Judge erred as suggested. In this case the Appellant continued to argue that he had in fact been trafficked and the Judge dealt with this from paragraph 36 to 39 of his Decision and Reasons.
13. The Judge looked carefully at the evidence in support of the assertion that the Appellant had been the victim of trafficking and reminded himself that the standard of proof in the Tribunal proceedings is at a lower level than for the Competent Authority. He looked at what the Appellant had claimed regarding the trafficking claim and found that he was not a victim of trafficking or of modern slavery.
14. In so doing the Judge had gone further in fact than we now know he was entitled to. It was not open to the Judge to consider all of the evidence before him when looking at the trafficking decision. Had the Judge concluded on that basis that the Appellant was a victim of trafficking then he would have made a material error of law on the basis of MS (Pakistan). The error however was not damaging to the Appellant, rather it was in the Appellant’s favour. In going beyond that which he ought to have done in looking at the trafficking decision it cannot be said that he erred in not looking at the matter as a preliminary issue. The fact is the Judge did look at the trafficking decision and agreed with it. It follows that the Judge did not consider the decision to be irrational, perverse or not a decision open to the Competent Authority.
15. The second ground refers to the expert report of Dr Gordon and asserts the Judge erred in failing to attach appropriate weight to that report and that the Judge erred in finding against the Appellant on the basis that his claim was implausible. Miss Cohen referred to case law indicating that a finding based solely on implausibility is wrong.
16. The Judge dealt with Dr Gordon’s report starting at paragraph 41 of the Decision and Reasons. He stated that the picture painted by the country information and by Dr Gordon was of very great sensitivity by the Chinese authorities of any moves towards Tibetan separatism with extensive monitoring of the population. He notes at paragraph 42 that Dr Gordon had opined that generally the Chinese Communist Party tacitly approved of the rise in Buddhist practice and that Buddhist practice itself did not equate necessarily to supporting Tibetan independence. He noted that she had gone on to say that it was entirely possible for the Appellant to have been arrested in

the circumstances he described given the severity of treatment meted out to persons who supported Tibetan independence.

17. However, the Judge then went on at paragraph 43 to note that Dr Gordon had not had the benefit of hearing the Appellant's oral evidence. He referred to the fact that the Appellant had described a factory producing only Tibetan flags and documents which is materially different to an earlier account which suggested there was only one flag produced.
18. The Judge also referred to the complete absence of any security measures taken by the Appellant's parents to conceal the fact that they were producing Tibetan flags and documentation, which provided the only source of income for his parents.
19. The Judge at paragraph 44 simply did not believe that the Appellant's parents would not either take security measures or caution the Appellant against talking about what took place in a factory that produced Tibetan flags. This work was of such a risky nature and would have put the family at such risk that the Judge simply did not believe that the Appellant would not have been warned about this.
20. Whilst it is of course the case that something being implausible does not necessarily mean it did not happen, when something is as implausible as this Judge finds it to be it is not an error of law to make an adverse finding based upon it.
21. With regard to the Judge's assessment of the evidence generally and the question of inconsistencies in the evidence, it is said that the Judge erred in failing to give proper account of the fact that the Appellant was a minor at the time of his screening interview and his asylum interview.
22. That argument is also without merit. The Judge was very well aware that he was dealing with a minor.
23. At paragraph 25 the Judge said that in deciding the appeal he was required to make an assessment of the Appellant's credibility and that in doing so he had to take into account his age, level of education, health and the evidence he had given before and after the refusal of his application in his statements, his asylum interview and his evidence. The Judge was clearly aware of his duty towards this minor Appellant and clearly aware of the relevant Presidential Guidance Note of 2010. The main finding and the one which weighed most heavily, it seems with the First-tier Tribunal Judge was the total implausibility of the claim. That was a finding that the Judge was entitled to make. It is also of note that whilst the Appellant was a minor he was not an infant. He was 16 years of age when he arrived in the UK. He was old enough to understand that what his parents were doing would have been risky and old enough to understand any instructions, had they been given, not to broadcast what they were doing.
24. Another alleged error relied upon by Miss Cohen is, it was argued, that the Judge gave inadequate consideration to the Appellant's other claim, namely that he would be at risk on return to China because he is gay. The Judge did not give inadequate consideration to that claim. Rather, he started his consideration by making a finding as to the risks to a gay man in China and found that he would not be at risk of

persecution for that reason. He may face discrimination but not persecution. Having so found there was no need for the Judge to go further and make any other findings in that regard.

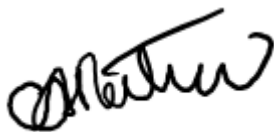
25. In short, the Appellant in this case, a teenager of 16 years, had made a claim that was wholly implausible which was found to be not credible for that reason. He was found not to have been a victim of modern slavery or trafficked to the UK based on answers that he had given. He was found not to be at risk on account of being a gay man in China and for those reasons the appeal was dismissed. The remaining grounds amount no more than arguments and disagreements with the Judge's findings.
26. The Judge in this case gave a detailed assessment of the Appellant's claim with due allowance for the fact that he was a minor and gave sound reasons for dismissing the appeal.
27. The decision and reasons of the First-tier Tribunal does not contain a material error of law and accordingly the appeal to the upper Tribunal is dismissed.

Notice of Decision

The appeal is dismissed

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

Date 22nd August 2018

Upper Tribunal Judge Martin