Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06131/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 2 July 2020 remotely	**On 21 July 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

CG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, instructed by Rutherford Sheridan Ltd, Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

The appellant is a citizen of China who was born on 22 April 1989. She first arrived in the United Kingdom on 3 September 2009 at Heathrow Airport with a student visa valid until 31 October 2012. When that visa expired, the appellant overstayed.

On 13 June 2019, the appellant claimed asylum. The basis of her claim was that she feared the Chinese authorities if she returned to China. She claimed that in August 2008 2she had been involved in, and had helped organise, a demonstration which had arisen out of a land dispute over the use of land in her village. She claimed that, at the demonstration, a number of demonstrators were arrested by the police. She was not arrested. She left the demonstration and subsequently discovered, from her mother, that the police had visited their home with an arrest warrant seeking to arrest her. She discovered later that a number of the other organisers of the demonstration had been imprisoned for five years. After she learnt of their arrest, she left her village and travelled to her father's home (which was elsewhere) where she remained for one year. After that, she came to the UK as a student.

On 13 June 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds. The Secretary of State did not accept her account. She did not accept that the appellant had been involved in a demonstration in August 2008 and that she was wanted by the Chinese authorities.

The Appeal to the First-tier Tribunal

The appellant appealed to the First-tier Tribunal. In a determination sent on 6 June 2019, Judge S P J Buchanan dismissed the appellant's appeal on all grounds. In relation to the appellant's asylum claim, the judge made an adverse credibility finding, rejected her account which she claimed would put her at risk on return.

The Appeal to the Upper Tribunal

The appellant sought permission to appeal to the Upper Tribunal challenging the judge's adverse credibility finding.

On 18 October 2019, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal.

Initially, the Upper Tribunal in the light of the COVID-19 crisis, issued directions dated 23 March 2020 indicating a provisional view that the error of law issue could be determined by the Upper Tribunal without a hearing. The parties were invited to make submissions both as regards that issue and also the substantive error of law issues.

Written submissions were received from both the appellant and respondent in response to the Directions. Having considered the submissions and the issues raised in the appeal, I concluded in directions dated 12 May 2020 that, despite

the UT's provisional view, it would not be appropriate for the error of law issue to be determined without a hearing. Consequently, as a face-to-face hearing was not currently practical and given that the hearing was limited to legal submissions, I directed that the error of law hearing should be listed as a remote hearing by Skype for Business.

That hearing took place on 2 July 2020 without objection from either party. For the hearing, I sat in the Cardiff Civil Justice Centre and the appellant's representative Mr Caskie and the respondent's representative Mr Howells took part in the hearing remotely via Skype for Business.

The Appellant's Submissions

On behalf of the appellant, Mr Caskie adopted the grounds of appeal and the two sets of written submissions made on behalf of the appellant which he developed in his oral argument.

First, Mr Caskie submitted that the judge had unfairly counted against the appellant, in assessing her credibility, that the appellant had failed to provide evidence or documents from, for example, friends, classmates or had related discussions with her teachers whilst she was studying or healthcare professionals whilst she was undergoing treatment in the UK about her experiences in China which led her to leave China and gave rise to her fear on return. Mr Caskie drew my attention to paras 9.1 – 9.7 of the judge's decision in which he took the absence of that evidence into account adversely to the appellant's credibility.

Mr Caskie submitted that the respondent's decision letter formed the "agenda" for the live issues in an appeal. He accepted that a judge could go beyond that "agenda" but could only do so on giving the parties notice and giving them a fair opportunity to deal with the additional issues. Mr Caskie submitted that in this appeal, the appellant did not know that the judge considered that the absence of evidence, of the sort he referred to in paras 9.1 – 9.7, was an issue which the appellant had to address until the determination was read.

Mr Caskie accepted that the Secretary of State had, in the decision letter, taken into account the appellant's delay in claiming asylum under s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. She had done so, however, only in relation to the appellant's failure to claim asylum on arrival at Heathrow Airport and, Mr Caskie again accepted, the judge had properly directed himself when he stated that that behaviour was "potentially damaging" of the appellant's credibility. However, the appellant was not on notice, because the matter was not raised by the respondent or the judge, that the absence of documentation supporting her claim that she did not know how to claim asylum was relevant to her credibility and a matter which the judge considered significant.

In support of his submissions on this issue, Mr Caskie relied upon two decisions of the Outer House of the Court of Session. First, Oke, Petitioner [2012] SCOH 50 at [59] where Lord Glennie said this:

> "When he appeals to the FTT, the appellant has had a decision and knows what points have been taken against him. He therefore ought to be in a position to present his appeal in confidence that it is those points that he has to meet. If further points are to be taken, he should have notice of them. That is only fair."

Secondly, Mr Caskie relied upon the decision of Lord Jones in YHY (China), Petitioner [2014] SCOH 11 at [21] where, adopting the earlier view of Lord Glennie in Oke, Lord Jones said:

> "I am of the opinion, … that there was such procedural irregularity that [the petitioner] did not have a fair hearing before that Tribunal. The question of L's paternity was not a live issue. In the SSHD's Decision Notice, … the decision maker proceeded on the basis that the petitioner had a relationship with his wife 'and two sons, L … and A …' …. I do not understand the respondent to dispute the petitioner's assertion that the matter of L's paternity was not raised at any time during the hearing before the FTT. Nonetheless, the FTT reconsidered the decision maker's determination on that issue, without giving the petitioner an opportunity to make representations on the matter. It impugned the credibility of both the petitioner and his wife on the basis that it was not explained why the petitioner had never been registered as L's father, when, so far as the petitioner was concerned, the matter of his paternity was not contentious, and without asking him for an explanation."

Mr Caskie essentially adopted the same reasoning in relation to other matters relied upon by the judge which, he submitted, had not been in issue before the judge. In summary, Mr Caskie submitted that the judge had been wrong at para 9.16 to take into account that the appellant had not provided any details as to how she had left China. Mr Caskie submitted that this was not a matter relied upon by the respondent in the decision letter or raised at the hearing.

Thirdly, Mr Caskie relied upon what the judge had said at para 9.30, where the judge had taken into account that the appellant had not undertaken any research in the UK into the process of claiming asylum by talking to people who could assist her. This again was not a matter raised by the respondent either in the decision letter or at the hearing.

Fourthly, in relation to para 9.31, Mr Caskie submitted that the judge had taken into account in reaching an adverse conclusion on the appellant's evidence, that she had not been able to research asylum policy, that she had nevertheless been able to "navigate through the healthcare facilities" as a pregnant woman in the UK. Again, Mr Caskie submitted these matters were not raised at the hearing by the respondent or, indeed by the judge.

Finally, in response to the respondent's reliance upon the case of TK (Burundi) v SSHD [2009] EWCA Civ 40, Mr Caskie submitted that it was only proper for a judge to take into account the absence of evidence if it were reasonable to expect the appellant to produce such evidence. That was not the case here, Mr Caskie submitted, as the appellant was unaware that the matters relied upon

by the judge (in the form of an absence of evidence) were live issues which the appellant needed to deal with.

In all the circumstances, Mr Caskie submitted that the judge's adverse credibility finding was necessarily flawed by the unfairness in taking the points without the appellant having notice and that the decision should be set aside and remitted to the First-tier Tribunal for a rehearing.

The Respondent's Submissions

On behalf of the respondent, Mr Howells adopted the written submissions filed with the UT which he developed in his oral submissions.

First, he submitted that the judge was entitled to take into account the absence of the documents following TK (Burundi). He agreed that the respondent's decision letter did set the agenda for the hearing. However, he submitted that that "agenda" included the nine-year delay in the appellant claiming asylum. He submitted that the judge had not gone beyond the Reasons for Refusal Letter. He submitted that the appellant's "delay" was indeed a live issue.

Secondly, as regards the two decisions of the Outer House, Mr Howells submitted they were distinguishable on their facts. In Oke, the appellant had no notice that the accountancy evidence might be considered not to be authentic. That had not been raised by the respondent and was only taken for the first time by the judge in his decision. Likewise, in relation to YHY, the judge had gone behind the refusal letter by questioning the "father's" paternity when that had not previously been an issue.

Here, Mr Howells submitted that the absence of documents and other matters relied upon by the judge in paras 9.1–9.7 and the points made about the absence of explanation in paras 9.12, 9.3 or 9.31 were related to the appellant's case that her claim was genuine and that any delay in claiming asylum after arriving in the UK was explicable. The delay was, Mr Howells reiterated, a live issue raised in the refusal letter.

Discussion

I accept Mr Caskie's submission, with which Mr Howells agreed, that a decision letter sets the "agenda" for the issues which the parties (in particular the appellant) must address at an appeal hearing before the First-tier Tribunal. I also accept that a judge is entitled to raise other issues but, he must do so fairly, which means that the parties must be put on notice that a particular issue concerns the judge and the parties must then be given a fair opportunity to deal with it, whether by evidence (which may potentially require an adjournment) or by submissions.

I respectfully agree with the judicial statements of Lord Glennie and Lord Jones in Oke and YHY (China).

In Oke it was unfair for the judge to question, and reach an adverse decision upon, the authenticity of the accountant's document relied upon by the

petitioner in Oke. That had not been an issue in the case until the judge made it an issue in his decision. Of course, the judge could have raised the matter at the hearing and, subject to giving the parties a fair opportunity to deal with it, could have reached a finding – potentially adverse to the appellant if the evidence led in that direction – having given the appellant an opportunity to deal with the judge's concerns about the authenticity of the document.

Likewise, in YHY (China) the petitioner's paternity was not an issue in the case until the judge made it so in her determination. As a consequence, the petitioner was denied a fair opportunity to deal with a relevant and significant issue for the judge in reaching her decision. Again, there would have been no objection, in principle, in the judge addressing the question of the petitioner's paternity but only if she had raised the matter at the hearing and had given the parties (particularly the appellant) an opportunity to deal with that issue by way of evidence and/or submissions.

The central issue in this appeal is whether the judge did, in fact, depart unfairly from the "agenda" set by the respondent's decision letter without giving the parties, in particular the appellant, an opportunity to deal with those matters.

The point is not as clear-cut as it was in Oke or YHY (China). In one sense, the judge's points relate directly to an issue which was live in the appeal, namely the appellant's credibility. However, simply because that underlying general issue was a live one does not mean that the appellant had a fair opportunity to deal with specific issues relevant to her credibility.

The judge dealt with the absence of evidence, whether documentary or otherwise, at a number of points in his determination. At paras 9.1–9.4, 9.6-9.7 and 9.16 the judge said this:

> "9.1 It is notable the appellant arranged for her son to be taken to China by a 'friend'; but she does not produce any witness statement from that source.
>
> 9.2 It is notable that at WS8, the appellant states that she knew someone who lived in Manchester 'through my school. She helped me to arrange my studies and accommodation … I live with one of my classmates'. There is no evidence from the person whom the appellant knew or with whom the appellant lived (if different).
>
> 9.3 The appellant states at WS8 that she studied English in [] College at [], and despite saying that she 'fled to the UK' to escape from persecution at the hands of the Chinese authorities, she makes no mention of any discussion that she might have had with course tutors, or lecturers or student bodies about events in China which had brought her to the UK. She states at WS9 that she moved to [] College, but again she makes no mention of any discussion about her circumstances with course tutors, or lecturers or student bodies about her life in China.
>
> 9.4 At WS10, the appellant explains that her child was born in the UK. The appellant has had contact with health professionals in the UK but she makes no mention of any discussions with them about her

> plight in having to flee China; or any fear arising from the child being born out of wed-lock.
>
> ….
>
> 9.6 I note that at WS13, the appellant explains that a friend asked her to 'come and stay with her in Glasgow'; but there is no evidence from the friend about those events."

Then, at para 9.7 the judge said this:

> "9.7 At WS2, the appellant states that she did not work after leaving school. She states: 'I was preparing to the United Kingdom to study'. Although stating that she was preparing to come to the UK to study, the appellant does not give any substance to her evidence about steps taken in preparation. For example, the appellant does not say what research she undertook at the time to see what courses might be available to her; nor does she explain how she anticipated meeting the financial demands of travelling to the UK to study at the time."

At para 9.16, the judge dealt with the absence of supporting document concerning how the appellant left China:

> "9.16 Although the appellant states at WS7 that she 'then made arrangements to leave China as soon as I could and left on 2 September 2019', the appellant does not give any substance to what those arrangements amounted to. The appellant does not say whether she herself booked a flight to leave the country or how she managed to pay for any travel arrangements. If the appellant was truly of interest to the authorities in China, then such activities might have been monitored by them for the purpose of tracing the appellant; but there is no detail given about the practicalities in making arrangements to leave the country."

The judge's conclusion in relation to the evidence is set out at paras 9.29–9.31 as follows:

> "9.29 Although there is no requirement to provide corroboration of an appellant's account in making her claim for international protection or in bringing this appeal before the Tribunal; where there is a failure to produce evidence, which might reasonably be expected, then that might affect the weight which can be attributed to the claim. I note that there are a number of sources of evidence which might reasonably be introduced to support the appellant's account but which have not been produced nor absence of evidence reasonably explained. In my judgment, the appellant's account is rendered of less weight in those chapters of evidence where other sources of evidence which might reasonably have been expected have not been produced.
>
> 9.30 In my judgment, I am not persuaded that after arriving in the UK in September 2009 the appellant 'didn't apply for asylum straight away after my visa expired because I didn't know the proper procedure'. Having regard to the series of people with whom the appellant has had contact since her arrival in the United Kingdom

> I am far from persuaded that someone genuinely in fear of persecution from China would not have made anxious enquiry from lecturers or tutors or student bodies or healthcare professionals about how to go about claiming asylum. The appellant was aware that her visa was only for a limited time and she had the where withal to secure a change of course during her time in the UK; so, I infer that the appellant had the means and the inclination to undertake research for the purposes of securing a course of studies which she might undertake in the UK. In my judgment, the failure of the appellant to undertake any research into the process for claiming asylum even by talking to the series of people who could have assisted her if she had raised the matter with them, gives rise to my conclusion that the appellant did not perceive herself to be at risk of persecution on return to China during the time she was studying there.
>
> 9.31 The appellant has been able to navigate through the healthcare facilities which would have been made available to her in the UK as a pregnant mother on both pregnancies. There is nothing in evidence to explain how she managed to undertake that course of navigation, but was unable to navigate around the asylum process in the UK before making her claim some nine years or so after first arriving in the UK. In my judgment, the fact that the appellant was able to understand and take advantage of the healthcare facilities when she was pregnant and after the birth of her children in the UK, is evidence from which I infer that had the appellant had the inclination, she would have had the wherewithal to research the UK's policy and procedure about claiming asylum. I do not consider it reasonable for the appellant to maintain an ignorance of matters relating to asylum; in circumstances in which she had had the chance to research the policy and procedure for making her claim; but did not elect to do so. I conclude that the appellant did not perceive herself to be at real risk of persecution on return to China; otherwise she would have researched and investigated and discovered the position about claiming asylum much sooner than ultimately claimed."

The Secretary of State's contention is that para 9.29 contains a proper direction in accordance with TK (Burundi) and that the absence of documents or evidence did relate to an issue raised in the appeal namely whether the period of nine years' delay in claiming asylum after coming to the UK was behaviour that fell within s.8(2) of the 2004 Act.

Reading the refusal letter, it is clear that it does raise the issue of delay in claiming asylum. At para 43 the respondent relied on this:

> "You have delayed your claim for asylum for [a] period. You have stated in your Witness Statement and Asylum Interview that you did not claim asylum sooner because you could not afford a lawyer nor were you aware of how the asylum process worked. It is therefore concluded that your behaviour is one to which s.8(2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 applies."

I agree with Mr Caskie's submissions that para 42, when dealing with the appellant's failure to claim asylum at Heathrow Airport, is concerned with the *other* behaviour "potentially damaging of the appellant's credibility". That is also true of paras 44 and 45 dealing respectively with the appellant's failure to produce a passport and her stated intention was to come to the UK, contrary to her now claim, to study. They are not related to any inference that might be drawn from the nine-year delay in her claiming asylum whilst in the UK. But that, in my judgment, cannot be said about para 43. Clearly, the issue of delay in claiming asylum was raised in the refusal letter and the Secretary of State rejected her explanation that it was because she could not afford a lawyer or was unaware of the asylum process.

To that extent, I do not accept Mr Caskie's submission that the issue of delay in claiming asylum whilst in the UK as an aspect of the appellant's credibility was not, at least, a part of the "agenda" set out in the refusal letter.

It is plain from the passages of Judge Buchanan's determination that he took into account the absence of supporting evidence *not only* to doubt her explanation for the delay in claiming asylum, namely that she did not know how to claim asylum, *but also* more generally in doubting aspects of her claim such as how she came to leave China. Nevertheless, delay (and the absence of supporting evidence to explain it) was a significant feature of the judge's reasoning.

Although the issue of delay in claiming asylum for 9 years was raised in the refusal letter, it does not appear that it was a focus of the hearing. I accept Mr Caskie's submissions that the judge relied upon a number of very specific instances of lack of supporting evidence which, in my judgment, it could not be expected to produce as being "readily available" to the appellant. As Mr Caskie pointed out in his submissions, the evidence, for example, from her school would have dated back some years. Mr Caskie contended, and Mr Howells did not dispute this, that the specific parts of the evidence which the judge found significantly lacking were never part of the case before the judge. The appellant was neither asked questions about the evidential gaps by the representatives nor by the judge.

The judge, in my view, alighted upon a number of pieces of evidence which, in his view, should have been produced but were not. The difficulty is that it is hard to understand why the appellant or her legal representatives would, without notice, have considered this range of evidence, which (in some instances) dated back some years, would have been important to her case and which she should either have produced or, at least, have offered some explanation for their absence.

To that extent, I have concluded that the judge fell into error by taking into account the absence of this evidence even though, at least in general terms, para 43 of the refusal letter raised the issue of the appellant's delay in claiming asylum whilst in the UK. This is not, in my judgment, a situation where the appellant could reasonably, absent notice, be expected to produce this range of historical material relating to an issue which was not a focus of the hearing.

In my judgment, this was not a case where the rationale in TK (Burundi) (set out at [20] and [21] of Thomas LJ's judgment) applied. Put another way, I am satisfied that the appellant was, in effect, 'taken by surprise' on the evidential issues relied upon by the judge in paras 9.1 – 9.7, 9.16 and 9.30. The proceedings were, in my judgment, unfair as a result.

As regards para 9.31 where the judge took into account that the appellant had been able to navigate healthcare facilities in the UK while she was pregnant such that he did not accept that she would be unable to navigate the asylum process in the UK, this reasoning is, of course, not based upon the absence of evidence but rather an inference drawn from her ability to navigate the healthcare system in the UK. It generates a somewhat different objection. In my judgment, that was pure speculation and was not a reasonable inference that could properly be drawn from the evidence. The judge's reasoning was not properly open to him.

For these reasons, I am satisfied that the judge erred in law in reaching his adverse credibility finding.

In the respondent's written submissions, though the point was not pressed by Mr Howells in his oral submissions, it is contended that any errors by the judge identified in the grounds of appeal are not material to his decision as he gave a number of other reasons why he did not accept the appellant's account, in particular that the Chinese authorities had shown no interest in pursuing the appellant before she left China (see paras 9.13 and 9.36).

In my judgment, however, the judge's approach to the evidence that led to his conclusions in paras 9.29–9.31 was material to his decision. His reasoning is expressed in a way which demonstrates that it led the judge to disbelieve the appellant's claim. I am, therefore, persuaded that the errors which I have identified above were material to the judge's decision.

For those reasons, I am satisfied that the judge materially erred in law in dismissing the appellant's appeal.

Decision

For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

As the judge's central finding on credibility cannot stand, the remaking of the decision requires a rehearing *de novo*.

Given the nature and extent of the fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the appropriate disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Buchanan.

Signed

Andrew Grubb

Judge of the Upper Tribunal
7 July 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email