Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09733/2019

THE IMMIGRATION ACTS

Heard at Field House
On 31 August 2021

Decision & Reasons Promulgated
On 19 October 2021

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

XX
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Mr F Farhat, In-house Counsel from Gulbenkian Andonian Solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

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Introduction

1. This is the re-making decision in the appellant's appeal against the respondent's refusal of her human rights claim. This follows the decision of Upper Tribunal Judge Kekic, promulgated on 17 July 2020, by which she found that the First-tier Tribunal had materially erred in law when allowing the appellant's appeal. Her decision was made without a hearing, pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Following the judgment of Fordham J in JCWI v The President of the Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin), neither party raised any objections to the method of disposal adopted by Judge Kekic.

2. As we have now reached the re-making stage in proceedings, we shall once again refer to XX as "the appellant" and to the Secretary of State as "the respondent", notwithstanding that it was the latter which brought the challenge in the Upper Tribunal.

3. The appellant is a citizen of China, born in 1985. She arrived in the United Kingdom in 2007 as a student and has resided in this country ever since. That period of residence was lawful until 23 February 2016, when a previous appeal was finally determined against her. Further applications for leave were made, the latest of these being in May 2018. It raised human rights grounds only, specifically relating to Article 8 ECHR ("Article 8") and her relatively lengthy time here. The respondent refused that human rights claim on 17 May 2019. It is the appeal against that refusal with which we are presently concerned.

The decision of the First-tier Tribunal

4. The appeal to the First-tier Tribunal was dismissed by First-tier Tribunal Judge Gibbs ("the judge"). In a brief decision, the judge summarised the appellant's case as being based on the latter's undisputed conversion from Buddhism to Christianity, specifically within the Emmanuel Chinese Church.

5. The judge's core findings are set out at [10]:

> "… The appellant's evidence is that she attends her church every Sunday and also attends a Bible study group. She would want to continue these activities in China, although she would not know where to go as she has never lived in China as a Christian. Further, the appellant finds it important to be able to talk to people about her faith. She described, very credibly I find, that if she was living in China she would want to share her newly found faith with her friends, and she could imagine being at a party and talking to people about Christianity. She also gave evidence that she has, in the UK, proselytised in the streets on two occasions and that she would want to be able to do this in China. The appellant currently posts religions (*sic*) messages on her Instagram page and would want this freedom in China."

6. The judge went on to consider an expert report and country information contained in a CPIN from March 2016. Having regard to these materials, the judge concluded that

the appellant had satisfied paragraph 276ADE(1)(vi) of the Immigration Rules ("paragraph 276ADE(1)(vi)"). Accordingly, she allowed the appeal on Article 8 grounds alone. Nothing was said about Article 3 ECHR ("Article 3").

The error of law decision

7. The respondent sought and was granted permission to appeal on the basis that the judge had arguably failed to consider a relevant country guidance decision, namely QH (Christians - risk) China CG [2014] UKUT 00086 (IAC) ("QH").

8. Judge Kekic concluded that the judge below had failed to apply the relevant country guidance. This amounted to an error of law. She found that the guidance was relevant to the consideration of whether the appellant would face "very significant obstacles to integration" were she to return to China. Thus, the error of law was material and the judge's decision had to be set aside. In so doing, Judge Kekic specifically preserved the findings made at [10] of the judge's decision, quoted above.

9. Case management directions were issued over the course of time in preparation for a resumed hearing.

The hearing

10. At the hearing before us, Mr Farhat appeared remotely, whilst Ms Cunha attended in person. This arrangement did not give rise to any objections by the parties. We were satisfied that this was a fair method of proceeding.

11. Mr Farhat confirmed that the appellant would not be called to give oral evidence. The hearing proceeded by way of submissions only.

12. We were assisted by concise oral submissions from both representatives, which supplemented their respective written arguments.

13. Rather than recite the submissions here, we intend to deal with relevant aspects thereof when setting out our conclusions, below. We note here, however, that the appellant's case has been put forward in reliance on Articles 3 and 8 (with particular emphasis on paragraph 276ADE(1)(vi)), but not Article 9 ECHR. In addition, Mr Farhat urged us to depart from the guidance set out in QH, a position opposed by Ms Cunha.

The evidence

14. In re-making the decision in this appeal, we have had regard to all of the materials placed before us, including the respondent's original appeal bundle and the appellant's bundle, indexed and paginated 1-259. In addition, and having confirmed our intention with the representatives, we have taken account of the respondent's current CPIN on Christians in China, version 3.0, dated November 2019.

The relevant legal framework

15. As mentioned earlier in our decision, the appellant's appeal lies against the refusal of her human rights claim: section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). No protection claim was ever made or, therefore, refused. This has the effect of restricting the appellant's ground of appeal to the sole contention that the respondent's decision is unlawful under section 6 of the Human Rights Act 1998: section 84(2) of the 2002 Act.

16. The appellant's case is, and has always been, protection-related, albeit in the context of a human rights claim and the refusal thereof. Historically, in scenarios such as this, the respondent had often invited individuals to make a protection claim. Indeed, it was not uncommon for the respondent to decline to consider protection-related issues where no protection claim had been made.

17. The recent decision of the Upper Tribunal in JA (human rights claim: serious harm) Nigeria [2021] UKUT 97 (IAC) makes it clear that it is permissible to raise protection issues in the context of human rights claim and, if this is done, a tribunal is bound to consider these on appeal. The headnote of JA reads as follows:

> "(1) Where a human rights claim is made, in circumstances where the Secretary of State considers the nature of what is being alleged is such that the claim could also constitute a protection claim, it is appropriate for her to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required, in the light of the Secretary of State's international obligations regarding refugees and those in need of humanitarian protection.
>
> (2) There is no obligation on such a person to make a protection claim. The person concerned may decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the immigration rules. If so, the "serious harm" element of the claim falls to be considered in that context.
>
> (3) This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is drawn to their attention by the Secretary of State, will never be relevant to the assessment by her and, on appeal, by the First-tier Tribunal of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person's refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002.
>
> (4) On appeal against the refusal of a human rights claim, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1) of the 2002 Act, but only on the ground specified in section 84(2)."

18. The specific provision within the Immigration Rules relied on by the appellant is, as in JA, paragraph 276ADE(1)(vi):

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

19. The country guidance set out in QH is as follows:

> "Risk to Christians in China
>
> (1) In general, the risk of persecution for Christians expressing and living their faith in China is very low, indeed statistically virtually negligible. The Chinese constitution specifically protects religious freedom and the Religious Affairs Regulations 2005 (RRA) set out the conditions under which Christian churches and leaders may operate within China.
>
> (2) There has been a rapid growth in numbers of Christians in China, both in the three state-registered churches and the unregistered or 'house' churches. Individuals move freely between State-registered churches and the unregistered churches, according to their preferences as to worship.
>
> (3) Christians in State-registered churches
>
> > (i) Worship in State-registered churches is supervised by the Chinese government's State Administration for Religious Affairs (SARA) under the RRA.
> >
> > (ii) The measures of control set out in the RRA, and their implementation, whether by the Chinese state or by non-state actors, are not, in general, sufficiently severe as to amount to persecution, serious harm, or ill-treatment engaging international protection.
> >
> > (iii) Exceptionally, certain dissident bishops or prominent individuals who challenge, or are perceived to challenge, public order and the operation of the RRA may be at risk of persecution, serious harm, or ill-treatment engaging international protection, on a fact-specific basis.
>
> (4) Christians in unregistered or 'house' churches
>
> > (i) In general, the evidence is that the many millions of Christians worshipping within unregistered churches are able to meet and express their faith as they wish to do.
> >
> > (ii) The evidence does not support a finding that there is a consistent pattern of persecution, serious harm, or other breach of fundamental human rights for unregistered churches or their worshippers.
> >
> > (iii) The evidence is that, in general, any adverse treatment of Christian communities by the Chinese authorities is confined to closing down church buildings where planning permission has not been obtained for use as a church, and/or preventing or interrupting unauthorised public worship or demonstrations.

(iv) There may be a risk of persecution, serious harm, or ill-treatment engaging international protection for certain individual Christians who choose to worship in unregistered churches and who conduct themselves in such a way as to attract the local authorities' attention to them or their political, social or cultural views.

(v) However, unless such individual is the subject of an arrest warrant, his name is on a black list, or he has a pending sentence, such risk will be limited to the local area in which the individual lives and has their hukou.

(vi) The hukou system of individual registration in rural and city areas, historically a rigid family-based structure from which derives entitlement to most social and other benefits, has been significantly relaxed and many Chinese internal migrants live and work in cities where they do not have an urban hukou, either without registration or on a temporary residence permit (see AX (family planning scheme) China CG [2012] UKUT 97 (IAC) and HC & RC (Trafficked women) China CG [2009] UKAIT 00027).

(vii) In the light of the wide variation in local officials' response to unregistered churches, individual Christians at risk in their local areas will normally be able to relocate safely elsewhere in China. Given the scale of internal migration, and the vast geographical and population size of China, the lack of an appropriate hukou alone will not render internal relocation unreasonable or unduly harsh."

20. That the well-known principle established by HJ (Iran) [2010] UKSC 31; [2010] Imm AR 729 applies to religious beliefs was confirmed by the Court of Appeal in WA (Pakistan) [2019] EWCA Civ 302, a case relating to restrictions on the ability of Ahmadis to practice their faith in that country. Paragraph 47 of Irwin LJ's judgment reads:

> "Mr Husain QC for the Appellant relies on the decision in RT as applying directly to Ahmadis in Pakistan. Ms McArdle for the Secretary of State did not dissent from that in principle. Some of her submissions sought to maintain the distinction between "core" beliefs and rights, and "important" incursions and those which are not important. It may be that Ms McArdle was inhibited in developing such submissions in this particular case, given that the Respondent's case here is that none of this arises on the facts. For myself, I would accept that there can be restrictions on the expression of political or religious opinion which fall well short of persecution. An example would be public-order-based prohibitions, or expressions of opinion which may lead to public violence. However, that does not appear to be in question in this appeal. Broadly speaking, I accept the submissions of Mr Husain as to the implications of RT (Zimbabwe) for Ahmadis in Pakistan. If enforced false expressions of political enthusiasm for Zanu (PF), engendered by potential violence, represent persecution even in relation to the politically indifferent, then repression of religious practice by the practice or threat of persecution must logically give rise to a valid claim for asylum, where the individual would otherwise engage in the public practice of his Ahmadi faith. That must be so, even where he or she is a moderate adherent to the faith, rather than a zealot or would-be martyr. Of course, if the individual is indifferent to the public expression of faith, then it is hard to see how the threat of persecution could be shown to have a material effect on his religious practice. These considerations reinforce the need for enquiry when the question arises at all: the need to explore the "why" question."

Discussion and conclusions

21. The relevant factual matrix in this appeal is, given the way in which the appellant has put her case, fairly narrow and is no longer disputed. The preserved findings contained within [10] of the judge's decision can be restated as follows:

    (a) the appellant is a genuine Christian convert;

    (b) she has been baptised and regularly attends the Emmanuel Chinese Church;

    (c) she wants to speak to others about her faith;

    (d) she has proselytised of the United Kingdom;

    (e) she has posted religious messages on her social media account;

    (f) she would want to do all of the above if returned to China.

22. The appellant has stated in previous evidence that a reason for not making a protection claim was so as to keep open the option of visiting her family in China, specifically if any medical emergency or suchlike were to arise. This, she has said, was consistent with a fear of the consequences of practising her faith openly if she had to live in that country, as opposed to simply visiting. Whilst Ms Cunha has made the legitimate point in her submissions that the appellant's stance may have the appearance of wanting to 'have the best of all worlds', we note that the judge below accepted this explanation as credible. Further, although we will consider the effect of the appellant's position when assessing the protection-related issues, below, we too find that her explanation has been honestly put forward.

23. The central question in this case is what consequences flow from this set of facts.

24. Mr Farhat submitted that we could and should depart from the guidance set out in QH. That decision was now relatively old and more recent evidence, in the form of expert reports and country information, disclosed strong grounds to look again at the position of Christians in China.

25. As we indicated at the hearing, this appeal is not the appropriate vehicle with which to effectively rewrite QH and set out new country guidance by stealth, as it were. No protection claim has been made and the usual procedure by which cases are selected for potential country guidance and appropriately case managed has not been followed.

26. We appreciate the volume of expert evidence and country information which has been provided by the appellant (seven reports from three experts, two of whom provided evidence in QH itself), but in our judgment, the resolution of this case can properly be derived from an application of the existing country guidance.

27. In undertaking our assessment, we have applied the balance of probabilities when reaching any additional findings of past or present fact over and above those preserved from the judge's decision. This is a pragmatic approach: the factual matrix

relied on by the appellant for her Article 3 claim are essentially the same as for her Article 8 claim, and, whilst these two provisions attract different standards of proof, applying the higher of these to our assessment covers all. As regards the appellant's position on return to China, it is for her to demonstrate the existence of substantial grounds for believing that she would face's a real risk of torture, inhuman or degrading treatment. In respect of Article 8, we apply facts found on the balance of probability standard to an evaluative assessment and the paragraph 276ADE(1)(vi) and a wider proportionality exercise beyond the confines of the Rules.

Article 3

28. Paragraph 137(4)(iv) of QH concludes that:

> "(iv) There may be a risk of persecution, serious harm, or ill-treatment engaging international protection for certain individual Christians who choose to worship in unregistered churches and who conduct themselves in such a way as to attract the local authorities' attention to them or their political, social or cultural views."

29. The Tribunal's recognition of a category potentially at risk is circumscribed. No generalised risk existed and a "fact-specific assessment" was required in any given case: paragraph 117. It found that many millions of Christians in China were able to practice their faith without encountering significant problems, albeit that they had to do so within restrictive parameters. What is said at paragraphs 123 and 124 is also relevant:

> "123. We accept Dr Hancock's evidence that any renewed interest by the authorities in a particular house church will be more closely related to the political struggles within the Chinese government and its need to establish social controls. His evidence was that an unregistered church may well come under close scrutiny because of a public articulation of opposition to government policy, local directive, or police treatment. If the behaviour of a Christian or the Christian community is deemed sufficiently provocative, disruptive, illegal or dangerous then there may be a risk that persecution, discriminatory, legal, administrative, police and judicial acts or more serious human rights violations will occur. The extent to which in an individual case this will entail a risk of persecution, serious harm, or ill-treatment engaging international protection will depend on how strongly such individual considers that public protest or proselytisation is central to his or her faith.
>
> 124. Considering the evidence as a whole and the reports from the experts in particular, we find that the focus of concern of the Chinese authorities towards the unregistered churches arises not so much because of the theology, denomination or theological content of any particular Christian group, but instead is based on whether a particular church's activities are seen as mounting criticism or opposition to a particular state policy or purpose."

30. On the preserved findings of fact, this particular appellant has been openly practising her Christian faith in the United Kingdom. This has included proselytising in the streets and, in effect, online. There is no suggestion that her church is registered with the authorities in China. We find that the appellant is a Christian convert who would

choose to worship in an unregistered church in China. We also find that she would wish to conduct herself in a manner more likely than not to attract the attention of the local authorities. This finding is based not on what she would be likely to do within the four walls of, for example, a house church (although such conduct might, in combination with other activities, result in the attraction of attention), but on what is described at paragraph 130 of QH as "Overt Public Behaviour". The appellant has expressly stated that she would wish to pronounce her faith in public and through social media, these practices being "very important" to her. The former is expressly referred to by the Tribunal in QH as constituting conduct likely to attract attention. In addition, we note the evidence cited in the CPIN to the effect that proselytising in public is "not permitted" and that offenders are subject to "administrative and criminal penalties": paragraph 6.3.1. In respect of social media activity, QH does not specifically address the issue. It is, however, uncontroversial that the Chinese authorities maintain a firm grip of the Internet and communications conducted on it: see, for example, paragraph 8.1.1 of the respondent's CPIN on "Opposition to the state", version 3.0, dated November 2018. Articles in the appellant's bundle specifically refer to Christian applications and social media accounts being taken down by the authorities: 230 and 233. We find that attention brought about by proselytising in public is likely to lead to checks been made on social media activity, the end result being that the authorities will have a full picture of the appellant's conduct as a Christian convert.

31. We have carefully considered whether the appellant's wish to visit family in China materially undermines her assertion that the open expression of her Christian faith is "very important" to her. We find that it does not. In so doing, we do hold a concern that she would be willing to "suspend", as it were, the open practising of faith during a visit. Having said that, a visit would by its nature be temporary in duration and, in all the circumstances, we see no inherent and insuperable contradiction between the central plank of her claim and her disinclination to make a protection claim.

32. What then would be the consequence of adverse attention from the authorities? As discussed above, QH contemplates that certain individuals will be at risk of persecution and serious harm, albeit that the category will be relatively few in number.

33. This limitation is to be seen in the context of the respondent's recognition in the assessment section of her CPIN that the restrictions on Christians imposed by the Chinese authorities have "intensified" since QH was decided, that "public worship or expressions of a person's faith are more vulnerable to adverse treatment than private worship", and that "[r]eligious practice that the government perceives as being in conflict with its broader ethnic, political or security policies is at high risk of adverse official attention.": paragraphs 2.4.12 and 2.4.13.

34. The CPIN also cites country information which, taken cumulatively, demonstrates an increasingly repressive approach to Christians, particularly those from Protestant the nominations seeking to practice their faith outside of the state registration scheme:

(a) "Since early 2014, local authorities have increased efforts to stem the spread of Christianity amid official rhetoric on the threat of "Western" values and the need to "Sinicize" religions";

(b) "According to religious freedom advocates, more than 5,000 Christians and 1,000 church leaders were arrested in 2018 because of their faith or religious practices (most of these arrests were short-term detentions that did not lead to criminal charges)";

(c) "Party and government officials maintained restrictions on the religious activities of Chinese Protestants, estimated to number around 60 to 80 million, with some believers facing harassment, surveillance, detention, imprisonment, and other abuse because of their religious activities";

(d) "Under the ''sinicization'' campaign promoted by Chinese Communist Party General Secretary Xi Jinping, officials have sought to bring Protestant communities into alignment with Party interests and ideology by tightening control over registered, state-sanctioned Protestant groups and using harsh measures to pressure unregistered groups into submitting to government scrutiny and regulation. Measures implemented that have increased official control over officially sanctioned Protestant churches in some local areas included the installation of surveillance cameras, ordering cross removals from church buildings, and the establishment of official village-level groups to monitor religious activities. Under Xi's leadership, officials planned to extend further influence over religious affairs and activities of registered Protestant communities";

(e) "Religious leaders and congregants who refuse to register for theological or practical reasons risk having their place of worship shuttered and face detention, beatings, dismissal from employment, or imprisonment";

(f) "Unregistered church communities (commonly referred to as ''house churches'') faced additional persecution as officials sought to pressure them into registering under the auspices of a patriotic religious association. As in previous years, Protestant house churches continued to face raids during church gatherings and eviction from meeting spaces";

(g) "Police arrested and otherwise detained leaders and members of religious groups, often those connected with groups not registered, as part of the state-sanctioned "patriotic religious associations." There were reports police used violence and beatings during arrest and detention. Reportedly, authorities used vague or insubstantial charges, sometimes in connection with religious activity, to convict and sentence leaders and members of religious groups to years in prison. Some previously detained persons were released."

Paragraphs 5.1.1, 5.1.3, 5.3.2, 6.1.1, 6.1.2, and 6.1.8

35. The combined opinions of the three experts (none of which has been specifically challenged by the respondent) represents a collective body of evidence to which we attach significant weight, acknowledging at the same time that Professor Aguilar's evidence was treated with some caution by the Tribunal in QH.

36. Professor Aguilar is of the opinion that there was a "very high probability" of the appellant being branded an "anti-Communist agent of subversion… likely to be

arrested, detained and tortured by the PRC security forces." He deemed the fact that the appellant had converted to Christianity outside of China to be an aggravating factor. On the issue of "Sinicisation" and its implications for the appellant, he opines that there is a pattern of increasing repression in the country which further underpins the risk to the appellant. Professor Aguilar expresses his agreement with the opinion of Professor Bluth, to whom we now turn.

37. Professor Bluth provides numerous examples of an increasing tendency of the Chinese Communist Party to interfere with and disrupt religious groups and their followers do not conform to the regulatory framework. This, he states, flows from the policy of "Sinicisation" brought in by the current President in 2015 to ensure compliance by religious groups with the Party's ideology. Professor Bluth is the only expert who specifically addresses the church attended by the appellant in the United Kingdom. This is described as an "apostolic cell church" and they have a "strong focus" on proselytising, thereby constituting one of the "religious movements targeted by the Chinese state and considered a threat to the state." In conclusion, he states that:

> "The appellant will be at serious risk of arrest, incarceration and possibly torture if she is required to return to the People's Republic of China, due to her membership of a religious movement that is perceived as a security threat by the Chinese authorities and that requires her to perform activities (assembly for worship proselytising that are considered illegal and subject to prosecution by the Chinese authorities."

38. This conclusion is maintained in his two subsequent addendum reports. Indeed, he cites the increasing surveillance of Christian groups and individuals as risk factor for the appellant, given her social media activity.

39. Professor Hancock's evidence in QH was received with general approval, particularly in light of his close connections with churches in China. His evidence in the present case asserts that the position of Christians in that country has deteriorated over time. He too cites "Sinicisation" as a policy which has had an adverse impact, and provides what we consider to be a measured explanation of the thread of anti-Christian sentiment which existed at the time of QH, but has become more formalised (our term, not his) in the last six years or so. In conclusion, Professor Hancock refers to the:

> "… targeting of religious and ethnic 'minorities' for particularly harsh treatment (viz. 'criticism', public censure, socio-economic, professional and educational 'discrimination', summary condemnation, detention without trial, enforced organ harvesting, incarceration and execution)."

40. Like Professor Aguilar, Professor Hancock agrees with the conclusions reached by Professor Bluth.

41. The current US State Department human rights report on China (a previous version being a source of evidence in <u>QH</u>) paints a bleak picture in respect of the treatment of detainees:

> "The law prohibits the physical abuse and mistreatment of detainees and forbids prison guards from coercing confessions, insulting prisoners' dignity, and beating or encouraging others to beat prisoners. The law excludes evidence obtained through illegal means, including coerced confessions, in certain categories of criminal cases. There were credible reports that authorities routinely ignored prohibitions against torture, especially in politically sensitive cases.
>
> Numerous former prisoners and detainees reported they were beaten, raped, subjected to electric shock, forced to sit on stools for hours on end, hung by the wrists, deprived of sleep, force fed, forced to take medication against their will, and otherwise subjected to physical and psychological abuse. Although prison authorities abused ordinary prisoners, they reportedly singled out political and religious dissidents for particularly harsh treatment.
>
> Authorities used administrative detention to intimidate political and religious advocates and to prevent public demonstrations. Forms of administrative detention included compulsory drug rehabilitation treatment (for drug users), "custody and training" (for minor criminal offenders), and "legal education" centers for political activists and religious adherents, particularly Falun Gong practitioners. The maximum stay in compulsory drug rehabilitation centers is two years, including commonly a six-month stay in a detoxification center. The government maintained similar rehabilitation centers for those charged with prostitution and with soliciting prostitution."

42. The Department's latest report on International Religious Freedom (also a source in QH) states that:

> "There continued to be reports of deaths in custody and that the government tortured, physically abused, arrested, detained, sentenced to prison, subjected to forced indoctrination in CCP ideology, or harassed adherents of both registered and unregistered religious groups for activities related to their religious beliefs and practices."

43. The evidence referred to above does not represent a departure from the country guidance in QH. It does not, for example, show that all Christians are now at risk in China. Rather, it illustrates in cogent evidential terms and increasingly repressive continuum of the attitudes of the authorities towards Christians over the course of time based on the perception of Christian groups and certain adherents as being "in opposition to a particular state policy or purpose": paragraph 124

44. An individual at risk of ill-treatment from the Chinese authorities is unlikely to be able to avail themselves of any protection from the state, a reality recognised by the respondent in her CPIN at paragraph 2.5.1.

45. Bringing all of the above together, we conclude that the conduct which the appellant would wish to undertake in China as an integral aspect of the profession of her Christian faith would more likely than not result in her coming to the adverse attention of the authorities in her home area. In turn, we conclude that this adverse attention would result in her being detained. In our judgment, once in detention there is a real risk that the appellant would be subjected to ill-treatment.

46. Therefore, we conclude that the appellant has demonstrated a real risk of ill-treatment contrary to Article 3 in her home area.

47. The next step of the enquiry is whether the appellant could internally relocate in order to avoid the adverse attention described above. Paragraph 126 of QH states that in general terms relocation is a viable option where the difficulties encountered by the individual in their home area relates to "local officials":

> "126. The evidence before us indicates that local authorities in different areas of China have different approaches to Christians and Christianity. China is a country with a very large internal migrant population and in general, the evidence before us does not indicate that internal relocation will be unreasonable or unduly harsh for the great majority of Christians. We remind ourselves, for example, that in Wenzhou city in Zhejiang province in south-eastern China, 40% of the population are said to be Christian and that celebration of Christian festivals takes place publicly. We accept that there may be exceptional personal factors indicating that internal relocation for a particular individual or family would be unreasonable or unduly harsh, but we consider that such cases will be relatively rare. In general, we consider that internal relocation within China will be a safe solution to a local risk affecting individual Christians."

48. It is, with respect, not entirely clear to us how it is possible to determine whether the problems arising from the open expression of Christian beliefs would attract the attention only of "local officials", or whether other aspects of the state apparatus would become aware., The answer provided in QH seemingly relates to the existence or otherwise of a warrant or other matter against the individual concerned: paragraph 137(4)(v). Be that as it may, in the present case we are concerned with a Christian who wishes to openly express their faith on return to China. At no stage has she said, nor has it been suggested by the respondent, that the desire to undertake "overt public behaviour" relates solely to the home area.

49. On this basis, the appellant could attempt relocation and once again be in the position whereby she seeks to openly express her faith through the conduct described previously, only to be met with the adverse attention of the authorities in that new area. This, we find, is the likely scenario wherever she would attempt to resettle. QH suggests that different attitudes to Christians in different parts of China and we take into account the possibility that one particular location might be somewhat more tolerant than another. The evidence before us does not identify which areas might in fact turn a blind eye to proselytising in public and/or through social media. In light of the country information and the respondent's assessment set out in the CPIN, we deem it to be very unlikely that her desired conduct would simply be ignored. After all, the evidence presented to us does not draw any material distinctions between different regions in China as regards the attitude of the state to the types of Christian groups and adherents with which we are concerned.

50. In short, whilst internal relocation might exist as *a* possibility, it is not, on the facts of this case, a feasible option. The overall views of the experts is that the hukou system is more effectively policed now than it was at the time of QH. Professor Hancock's evidence is that it is being increasingly used to monitor and target internal migration

of ethnic and religious minorities. In our judgment, the lack of an appropriate hukou would only make the appellant situation more precarious in a place of relocation. However, even if she did obtain a hukou in the new area, it would not negate the scenario described in the previous paragraph and it may even exacerbate adverse attention in light of Professor Hancock's evidence. Taking the evidence as a whole, we conclude that problems experienced in the home area would be replicated in a place of relocation.

51. Would the appellant desist from the open expression of her Christian faith in order to avoid the consequences discussed above? Ms Cunha has relied on the Court of Appeal's judgment in YD (Algeria) [2020] EWCA Civ 1683 in support of the contention that the appellant would modify the practice of her faith, not out of a fear of the authorities, but rather because of societal norms and/or her mother's disapproval. In addition, she cites the judgment in support of a distinction between protection cases and those based on Article 8.

52. For the following reasons, we conclude that YD (Algeria) does not undermine the appellant's case. First, that case concerned a factual matrix whereby the concealment of sexuality was due to social, cultural, and religious pressures a fear of the actions of the authorities. That context begs the question of why the appellant would modify her conduct: it does not provide any evidential support for Ms Cunha's position. Second, it is undoubtedly the case that the Refugee Convention is not intended to protect individuals from all pressures arising from the societies from which they come. Yet the present case concerns attitudes and actions of the state itself. Whilst societal pressures may well exist, YD (Algeria) is not authority for a proposition that the adverse attention of the authorities (as we have described above) cannot be relevant to Article 8, in addition to any consideration of a protection claim.

53. For his part, Mr Farhat asked us to draw an inference from the appellant's evidence to the effect that she was aware of the risks of her conduct on return and would only modify such conduct in order to avoid the risk of adverse attention from the authorities. We have considered the passages in the appellant's witness statement which was before the judge and the consideration of that evidence at [11]. It is, we find, tolerably clear that the appellant was expressing a fear of the authorities if she attempted to practice her faith in China as she had been doing so in the United Kingdom. The judge found this evidence to be credible. We have come to the same conclusion. It follows that a material reason for any material modification of her conduct on return to China is the fear of what the authorities would do to her if she practised her faith in the manner she would wish.

54. Thus far, we have conducted an analysis through the prism of the HJ (Iran) principle, as extended to religious beliefs by WA (Pakistan), which is rooted in the Refugee Convention. Neither party submitted that the HJ (Iran) principle does not apply in Article 3 cases, although Ms Cunha's reliance on YD (Algeria) suggested that it should do. For the purposes of this appeal we proceed on the basis that there is no material difference when considering the appellant's claim under Article 3 from the approach to be adopted when assessing a claim under the Refugee Convention. Her

claim is underpinned by religious beliefs, the ill-treatment to which she would be at risk of exposure in detention would otherwise be persecutory in its severity, and it would be objectionable to expect her to modify and/or conceal the expression of her faith in order to avoid Article 3 ill-treatment in the same way that such actions would not defeat claim under the Refugee Convention.

55. Having regard to the foregoing, we conclude that the appellant would be at risk of treatment contrary to Article 3 if removed to China and that as a consequence, the respondent's refusal of her human rights claim is unlawful by virtue of section 6 of the Human Rights Act 1998.

56. On this basis, the appellant succeeds in her appeal.

Article 8: paragraph 276ADE(1)(vi)

57. What follows is in the alternative to our conclusion on Article 3.

58. We acknowledge that there may be questions as to whether it was ever intended that paragraph 276ADE(1)(vi) was an appropriate mechanism with which to deal with the type of issues relied on by the appellant. However, JA (Nigeria) provides that protection-related claims can be considered in the context of this Rule and we proceed to do so.

59. Paragraph 276ADE(1)(vi) represents the respondent's view as to where the appropriate balance lies between the protected rights of the individual on the one hand and the public interest on the other. It is therefore appropriate to begin an analysis of Article 8 with this provision. It comprises two central elements: the need to show obstacles to "integration" into the society of the country in question; and for those obstacles to be "very significant" in nature.

60. The authoritative interpretation of the term "integration" is found in the judgment of Sales LJ, as he then was, in Kamara [2016] EWCA Civ 813, at paragraph 14:

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

61. Absent the appellant's faith and her desire to practice it openly, there would be no material obstacles to her (re)integration into Chinese society, and Mr Farhat

realistically accepted this to be the case during the course of his submissions. Success for the appellant in her appeal is entirely dependent on problems consequent on the practice of her faith. In our judgment, this is an integral aspect of the appellant's private life and we did not understand Ms Cunha to be suggesting otherwise.

62. Her basic position was that an inability to practice Christianity on return in the precise manner permitted in the United Kingdom might be inconvenient and involve adaptation, but would not prevent integration, or at least would not present very significant obstacles.

63. There are three main difficulties with Ms Cunha's argument. The first is that it overlooks aspects of integration, as that term must be understood. The "broad evaluative judgment" includes taking into account the capacity to participate in the society, having the reasonable opportunity to be accepted, and the ability to operate on a daily basis such as to establish (or re-establish) substance to one's private life. If faith and a particular manifestation thereof is, as we have found, integral to the private life, the acceptance by society and reasonable participation within it must be viewed through that prism. This aspect of the private life cannot be excised from the equation, a fact recognised by the respondent in the current version of her guidance: "Family Policy: Family life (as a partner or parent), private life and exceptional circumstances", version 14.0, dated 24 June 2021, at page 62 of 96 (a previous version of this guidance was considered by the judge). We do not consider it appropriate to expect the appellant to fundamentally alter the practice of the faith in order that she might better re-integrate into society. To do so would effectively impose a self-denying ordinance which significantly undermines the "substance" of the private life.

64. The second difficulty is the failure to acknowledge that the adversity to the appellant's faith and her practice thereof will emanate not (or not solely) from sections of society, but from the authorities. It is artificial to assess an individual's ability to participate in society without taking full account of interactions with the state apparatus, particularly in relation to a country such as China where regulation of its citizens is pervasive.

65. The third difficulty flows from the other two and relates to the second element of paragraph 276ADE(1)(vi). In light of our conclusions on the consequences likely to face the appellant were she to openly practice her faith on return, a submission that detention(s) and ill-treatment, or at least concerted and significant harassment, would not amount to "very significant" obstacles faces an uphill struggle. Such consequences would in our view clearly extend beyond the "inconvenient" or endurance of "mere hardship": they would constitute "very significant" obstacles.

66. If we were to approach the issue on the basis that the appellant had to desist from openly practising her faith, that requirement would itself constitute a "very significant" obstacle to her re-integration. In that scenario, she would be denying the expression of her faith, and thereby extracting a core aspect of her identity from the

substance of her private life, in order to avoid serious harm. The necessity to avoid would be sufficient to meet the elevated threshold.

67. On either view, and whether at the date the human rights claim was made in January 2019 or as at the date of our assessment, the appellant satisfies the requirements of paragraph 276ADE(1)(vi). In the circumstances of this case, there is nothing to displace the usual consequence of a satisfaction of the relevant Immigration Rule in an Article 8 claim and on this basis the appellant succeeds in her appeal: TZ (Pakistan) [2018] EWCA Civ 1109.

Article 8: a wider proportionality exercise

68. We consider it appropriate to go on in the further alternative and conduct a wider proportionality exercise, outside the parameters of the Rules.

69. We have found that the appellant's Christian faith and the manner she seeks to practice it constitutes an integral part of her private life. She has come to her new faith whilst in the United Kingdom and has now resided in this country since 2007. In the circumstances, it is clear that the respondent's decision constitutes an interference with the private life.

70. Moving directly onto the question of proportionality, the way in which the appellant has put forward her case is firmly linked to difficulties likely to arise in the country of origin, although not exclusively so, given what is said in the preceding paragraph concerning the nature of the private life established whilst in this country.

71. In all the circumstances, we apply an elevated threshold to the proportionality exercise, akin to the "flagrant denial" test set out by Lord Bingham of Cornhill in Ullah [2004] UKHL 26; [2004] 2 AC 323, at paragraph 24:

> "24. Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: Soering, paragraph 113 (see paragraph 10 above); Drodz, paragraph 110; Einhorn, paragraph 32; Razaghi v Sweden; Tomic v United Kingdom. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion

that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in Devaseelan v Secretary of State for the Home Department [2002] IAT 702, [2003] Imm AR 1, paragraph 111:

> "The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state".

72. We take account of the fact that Article 9 has not been relied on by the appellant.

73. We are also fully cognisant of the mandatory considerations under section 117B of the 2002 Act. The appellant has not had lawful status in the United Kingdom since February 2016 and the public interest in maintaining effective immigration control clearly applies with force. But for the issue of the appellant's faith, she would not able to demonstrate a disproportionate interference with her private life.

74. There is no evidence of reliance on public funds and the appellant gave evidence to the First-tier Tribunal in English. These two factors are of neutral effect.

75. In the appellant's favour is our assessment of her faith and its practice, both currently and were she to return to China, together with the consequences of pursuing that practice. Absent the importance of openly practising her Christian faith, as that represents an integral part of her private life, the appellant would fall well short of demonstrating a flagrant denial of her protected rights if removed. However, we assess the nature of the interference with the appellant's private life likely to occur in China on the basis of that life as we have found it to be. The consequences for the appellant on return would be a nullification of her ability to practice her faith in the manner she regards as integral to her Christian identity. To openly express her faith would, on our findings, lead to significant adverse attention and the risk of ill-treatment. That would in our judgment represent a flagrant denial of the appellant's rights. So too would the requirement for the appellant to avoid risks by fundamentally changing the way in which she acts.

76. In conclusion, the nature of the breach of the appellant's private life if returned to China would be of sufficient seriousness to outweigh the public interest in maintaining effective immigration control. The appellant therefore succeeds on wider Article 8 grounds.

<u>Anonymity</u>

77. The First-tier Tribunal did not make an anonymity direction, but one was put in place by Judge Kekic at the error of law stage on the basis that the case concerned protection-related issues. Whilst fully acknowledging the importance of the public interest in open justice, we maintain the anonymity direction on the grounds that the appellant's case is, in essence, based entirely on protection needs.

Notice of Decision

78. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

79. We re-make the decision by allowing the appeal on the ground that the respondent's refusal of the appellant's human rights claim is unlawful under section 6 of the Human Rights Act 1998, with specific reference to Articles 3 and 8 ECHR.

Signed: *H Norton-Taylor* Date: 8 October 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a full fee award of £140.00. The appellant has succeeded in her appeal and there is no sound reason to reduce the award.

Signed: *H Norton-Taylor* Date: 8 October 2021

Upper Tribunal Judge Norton-Taylor