Case No: C5 / 2009 / 1931

Neutral Citation Number: [2010] EWCA Civ 575
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/09687/2008]

\Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 7th May 2010

Before:

LORD JUSTICE WARD
LORD JUSTICE RICHARDS
and
LORD JUSTICE JACKSON

- -

Between:

XL (CHINA)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Mr Christopher Jacobs (instructed by Messrs Howe and Co) appeared on behalf of the **Appellant**.

Mr Alan Payne (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Jackson:

1. This judgment is in five parts, namely part 1 introduction, part 2 the facts, part 3 the present appeal, part 4 the first ground of appeal, part 5 conclusion.

Part 1: Introduction

2. This is an appeal by an asylum seeker against a decision of the Asylum and Immigration Tribunal rejecting her claim to asylum and her alternative claim to remain in the United Kingdom on human rights grounds. At an earlier stage of the proceedings the appellant had persuaded an immigration judge that her asylum claim was well-founded. She contends that that earlier decision was correct and it should not have been set aside for error of law. In this judgment I shall refer to the Asylum and Immigration Tribunal as "AIT".

3. After that brief introduction I must now turn to the facts.

Part 2 : The facts

4. The appellant is a citizen of the People's Republic of China who was born on 7 May 1982. Today, therefore, is her 28th birthday. The appellant arrived in the United Kingdom illegally and with the assistance of an agent on 1 February 2006. Over two years later on 8 May 2008 the appellant made an application for asylum. On the same day the appellant underwent a screening interview. The basis of the appellant's claim for asylum was that she was a practising Christian and that she had a well-founded fear of persecution by reason of her religion in the event of return to the People's Republic of China. The factual basis of the appellant's asylum claim was set out in her first witness statement dated 19 May 2008.

5. Essentially this was that the appellant belonged to the Hu Han Sect ("the Shouters") on 10 August 2004. The appellant was arrested while at a religious meeting. The police questioned her. They searched her home. They also arrested her mother. The appellant was ill-treated while at the police station. She was in due course sentenced to two years' detention at a re-education camp. A year later she was released on bail because her father bribed an official. She continued to attend church meetings after her release on bail. The police raided one such meeting on 24 December 2005. The appellant escaped but she left her ID card behind. After that the appellant was wanted by the police. She fled the country and escaped to England with the help of the Snakehead Agency. The Agency would not let her claim asylum until she had paid off her debt to them. That was the reason why she did not claim asylum until May 2008.

6. On 23 May 2008 the appellant was interviewed by a Home Office representative for a second time. This was a longer interview than the initial screening interview. It included a number of questions designed to test the appellant's knowledge of Christianity. The appellant answered some questions correctly and a smaller number of questions incorrectly.

7. On 31 October 2008 the Secretary of State sent his letter responding to the appellant's claim for asylum. The Secretary of State refused that claim. The Secretary of State stated in the letter that he disbelieved the appellant's account of her Christianity and her experience of persecution in China. The Secretary of State took the view that the appellant was an economic migrant who had fabricated an asylum claim. The reasons why the Secretary of State disbelieved the appellant's account of events may be summarised as follows.

8. First, there were numerous inconsistencies and improbable features in the appellant's account of events. I shall refer to these by the abbreviation "discrepancies". Secondly, the appellant was unable to answer some basic questions concerning Christianity. Thirdly, the appellant had delayed for over two years before making her asylum claim.

9. The appellant appealed to the AIT against the Secretary of State's decision in support of that appeal. The appellant submitted a second witness statement dated 11 December 2008 which responded to most but not quite all of the points in the Secretary of State's refusal letter.

10. The appellant's appeal was heard by Immigration Judge Callow on 18 December 2008. The appellant gave oral evidence at that hearing. The appellant also submitted a written statement signed by four members of her "house-church". This statement confirmed the appellant's regular attendance at church meetings. Immigration Judge Callow considered the evidence which he had heard and he promulgated his decision on 7 January 2009. He stated in that decision that he had considered the written material. He had considered the oral evidence of the appellant. He concluded that evidence was truthful. He was satisfied that she was a practising Christian. He accepted her account of events in China. He concluded that she was outside China because she had a well-founded fear of persecution in the event of return. Accordingly he allowed her appeal and held that she was entitled to refugee status and also she had a right to remain in this country under Articles 2 and 3 of the European Convention on Human Rights.

11. The Secretary of State applied for reconsideration of that decision. The grounds of application were that Immigration Judge Callow had failed to address adequately or at all the Secretary of State's reasons for rejecting the appellant's credibility.

12. The reconsideration hearing took place on 6 April 2009 before Senior Immigration Judge McGeachy. Senior Immigration Judge McGeachy promulgated his decision on 16 April 2009. He held that there was a material error of law in Immigration Judge Callow's determination in that the Immigration Judge did not properly engage with the issues raised by the letter of refusal. Accordingly he ordered that the matter should proceed to a second stage reconsideration hearing.

13. That second stage reconsideration duly took place on 11 June 2009 before Immigration Judge Cohen. The judge on that occasion reviewed the written material, heard oral evidence from the appellant and, taking matters shortly, he took a different

view from the original Immigration Judge and he dismissed the appellant's appeal. Immigration Judge Cohen disbelieved the appellant's evidence about her religious belief and her experience of persecution. Accordingly he held that the appellant was not entitled to asylum nor was she entitled to remain in the United Kingdom on human rights grounds.

14. The appellant was aggrieved by the effective reversal of Immigration Judge Callow's decision. She takes the view that that original decision was correct and that it should have been upheld at the first stage of reconsideration. Accordingly, the appellant appeals to the Court of Appeal against the decision of the AIT to reject her appeal.

Part 3. The present appeal to the Court of Appeal

15. By a notice of appeal dated 2 September 2009 the appellant appeals to this court on two grounds. The first ground is that the AIT erred in law in ordering reconsideration of the determination of Immigration Judge Callow, who allowed the appellant's appeal against refusal of asylum. The second ground of appeal is that the AIT erred in failing to remit the hearing back to Immigration Judge Callow for clarification and reasons to be given in respect of some of the points raised in the Secretary of State's refusal letter.

16. There was originally a third ground of appeal but that was abandoned last week and so I pass over it in silence.

17. At the hearing of the appellant's appeal today argument has been focussed upon the first ground of appeal. There are obvious difficulties in relation to the second ground of appeal, not the least of which is the fact that no one ever asked the Senior Immigration Judge to remit the matter back to Immigration Judge Callow. In any event if the Immigration Judge's decision was flawed in the manner that the Secretary of State alleges, this would not have been an appropriate case for remission to the Immigration Judge to give reasons for his finding on credibility. At the hearing today the appellant's counsel very wisely has not advanced any oral submissions in relation to the second ground of appeal. I shall therefore address that ground with equal brevity. If the appellant fails on ground 1 she cannot possibly succeed on ground 2. If the appellant succeeds on ground 1 then she does not need ground 2 and that ground does not arise. In the circumstances, therefore, I shall concentrate attention exclusively upon the first ground of appeal.

Part 4: The first ground of appeal

18. Mr Christopher Jacobs on behalf of the appellant, in his oral submissions today, has mounted a sustained attack on the reasoning of Senior Immigration Judge McGeachy and a sustained defence of Immigration Judge Callow's decision. Mr Alan Payne on behalf of the Secretary of State has mounted a sustained attack on the reasoning or lack of it in the decision of Immigration Judge Callow. Mr Payne supports the decision of Senior Immigration Judge McGeachy.

19. It is helpful to consider the two decisions which are under scrutiny in chronological order. I start therefore with the decision of the Immigration Judge. The Immigration Judge first addresses the question whether or not the appellant is a genuine practising Christian. He concludes that she is. It is clear from paragraphs 14 and 15 of his decision that Immigration Judge Callow has taken note of the questioning of the appellant in respect of the Christian religion. That questioning which took place in the second interview involved 13 questions about religious issues. The appellant got ten answers right and three answers wrong. The Secretary of State in his refusal letter attached significance to the three wrong answers, in particular to the appellant's ignorance that it was Moses who saw the burning bush. The Immigration Judge on the other hand attached significance to the appellant's ten correct answers. In paragraph 15 the Immigration Judge said this:

> "At her asylum interview the appellant was questioned about her knowledge of the Bible and the existence of various denominations in China. Whilst she was unable to say it was Moses who saw the burning bush when God spoke to him and appointed him to lead the Israelites out of Egypt, a reading of the interview shows knowledge of the Bible and different denominations. The fact that she was unable to identify the Archbishop of Canterbury does not undermine her credibility"

20. In my view the Immigration Judge was quite entitled to come to this conclusion. The reasons for his conclusion were sufficiently clear. It was a decision which was well open to the Immigration Judge on the evidence. It is clear to me that the Immigration Judge had regard to the view taken by the Secretary of State in his refusal letter in relation to the questioning of the appellant on religious matters, but the Immigration Judge came perfectly properly to the opposite conclusion on that matter. Of course, the Immigration Judge had the additional advantage of seeing the appellant give evidence and hearing her cross-examined.
21. The Immigration Judge next had to consider whether or not he accepted the appellant's account of events in the People's Republic of China, in particular her account of persecution on and after 10 August 2004. In relation to this issue the Immigration Judge had before him the two witness statements of the appellant (previously mentioned), the record of her answers in two interviews, a bundle of objective evidence concerning conditions of the People's Republic of China and the Secretary of State's refusal letter. The Immigration Judge also had the considerable advantage of hearing the appellant's oral evidence including her cross-examination.

22. The Secretary of State's refusal letter identified numerous discrepancies in the appellant's account of events which caused the Secretary of State to disbelieve her story in its entirety. The appellant's responses to those alleged discrepancies (with one exception) were set out in her witness statements, principally the second statement. The Immigration Judge dealt with the alleged discrepancies in the appellant's account (as identified in the refusal letter) in a summary manner. In paragraphs 3 and 4 of his decision the Immigration Judge said this:

> "3. The reasons for refusal of protection in the UK appear from a refusal letter dated 31 October 2008. They are, in summary, upon a recital of the facts the respondent did not consider the appellant's account to be credible for various reasons. For the reasons recorded it is considered that she would not be persecuted should she be returned to China. For the reasons given in the refusal letter, the respondent is of the opinion that the appellant's removal would not contravene Articles 2 and 3 of the ECHR and that she does not qualify for humanitarian protection ...
>
> 4. The respondent has placed in issue the appellant's credibility that she fled China due to a genuine fear of persecution occasioned by her religious beliefs and practice. It is the opinion of the respondent that the appellant is an economic migrant and not a refugee, as she was unable to answer all the questions about the Bible and the practice of Christianity. Furthermore, that the knowledge possessed by the appellant has been obtained whilst living and working illegally in the UK and whose overall credibility is undermined by a delay of two years in making her asylum claim."

23. At paragraphs 18 and 19 of his decision the Immigration Judge said:

> "18. Whilst it might be said that the appellant's omission to claim asylum for a period in excess of two years does compromise her credibility, I accept her explanation, upon a consideration of the evidence as a whole, that she and her family had been threatened by the agent to delay her claim until such time as she had discharged the liability due to the agent.
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> 19. Having carefully considered the appellant's evidence and the submissions made by the representatives I conclude that the incidents described by her concerning her treatment by the police in China and detention in a labour camp are true. Accordingly there is a real risk of persecutory treatment should she be returned to China."

24. Mr Payne submits that the Immigration Judge simply has not addressed the discrepancies identified in the Secretary of State's letter. In his oral submissions today he focussed attention upon eight separate discrepancies which broadly but not precisely coincide with those identified in his skeleton argument.

25. Those eight discrepancies identified in the refusal letter and focussed upon by Mr Payne may be briefly summarised as follows.

    1) There are inconsistencies in the accounts given by the appellant as to when she first became a Christian. At one point she asserts that she was born into Christianity. At another point she asserts that she became a Christian at the age of 6 or 7.

    2) The appellant is unable to explain why her mother was converted to Christianity. Since the appellant followed her mother into the Christian faith one would expect her to have discussed the matter with her mother and to have obtained an explanation.

    3) It is in the Secretary of State's view incredible that two members of the appellant's family, namely the appellant and her mother should be practising Christians, but the other two members, namely her brother and her father should not be.

    4) The answers given by the appellant to the questions concerning religious matters betray ignorance of the facts which she would be expected to know if a genuine Christian.

    5) The appellant asserted that her arrest when troubles began was on Sunday 10 August 2004. In fact 10 August 2004 was a Tuesday. Therefore the nearest Sunday would be either 8th or conceivably 15 August.

    6) There are inconsistencies in the appellant's account of when she was sent from the police station to the re-education camp. Was it three days after she arrived following her arrest or was it three weeks after she was taken to the police station?

    7) It is not credible that the appellant, if she was really of interest to the authorities, should secure her release by means of a bribe paid by her father.

    8) It is incredible that the appellant would have carried her ID card with her when she went to the religious service on Christmas Eve 2005. Alternatively, if she was carrying it, it was incredible that she should leave it behind.

26. First, it should be noted that in this list of items taken by Mr Payne item 4), namely the appellant's answers to the religious examination, was addressed satisfactorily by Immigration Judge Callow in his determination. Therefore I am really focussing upon the seven other discrepancies which are not expressly dealt with. It must be said that some of those seven discrepancies are not matters of huge moment. It is far from unknown for some members of a family to subscribe to a religious faith and attend

church regularly and for others not to do so. All of the matters identified by Mr Payne are addressed in the appellant's witness statements, principally her second witness statement, and the Immigration Judge expressly states that he has given full consideration not only to the refusal letter but also to the witness statements provided by the appellant. Also, as previously mentioned, the Immigration Judge heard the appellant cross-examined on her witness statements. He was satisfied that she was truthful and he spells this out in his decision.

27. The question then arises whether the Immigration Judge's failure expressly to refer to seven discrepancies identified by Mr Payne in his submissions today has the consequence that there was a material error of law in the Immigration Judge's decision. This is a question which arises from time to time in broadly similar contexts. It must be said that usually the boot is on the other foot. Usually it is the asylum seeker saying that the Immigration Judge failed to give sufficient reasons for disbelieving the asylum seeker's evidence and therefore the Immigration Judge's decision was wrong in law and it must be accepted that over the years this is an argument which has not infrequently received short shrift.

28. There is guidance as to the correct approach to such an argument in a number of recent decisions of this court. In R (Iran) v SSHD [2005] EWCA Civ 982 Brooke LJ delivering the judgment of the court said this:

> "Adjudicators were under an obligation to give reasons for their decisions (see reg 53 of the Immigration and Asylum Appeals (Procedure) Regulations 2003), so that a breach of that obligation may amount to an error of law. However, unjustified complaints by practitioners that are based on an alleged failure to give reasons, or adequate reasons, are seen far too often. The leading decisions of this court on this topic are now *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 and *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409."

29. Brooke LJ then went on to quote from those well known decisions and I will not set out in this judgment the quoted passages. He then continued as follows:

> "15. It will be noticed that the Master of the Rolls used the words 'vital' and 'critical' as synonyms of the word 'material' which we have used above. The whole of his judgment warrants attention, because it reveals the anxiety of an appellate court not to overturn a judgment at first instance unless it really cannot understand the original judge's thought processes when he/she was making material findings.
>
> 16. What we have said does not absolve an adjudicator of his/her duty of devoting the intense scrutiny to the

> appellant's case that is required of a decision of such importance. What we wish to make clear, however, is that the practice of bringing appeals because the adjudicator or immigration judge has not made reasoned findings on matters of peripheral importance must now come to an end."

30. The Court of Appeal addressed a similar issue in AT (Guinea) v SSHD [2006] EWCA Civ 1889. Laws LJ (with whom Sir Igor Judge P and Leveson LJ agreed) said this at paragraph 18:

> "Now I do not suggest that there may not be a credibility case in which the immigration judge is indeed obliged to provide a substantial explanation of his or her approach to discrepancies which are found to exist. That was the position in Malaba [2006] EWCA Civ 820 (see the judgment of Dyson LJ at paragraphs 19 and 20) and also AK [2006] EWCA Civ 1182. But every case is of course different. Discrepancies may sometimes be more important where they are internal to a witness's evidence. The duty to give reasons is not a matter of ticking a checklist. Its essence is to ensure that the parties to a decision - and indeed any relevant appeal court - should understand why one has won and the other has lost. Here the immigration judge Mr Camp gave objective overarching reasons for accepting the appellant's testimony: its internal consistency in the face of thorough crossexamination (paragraph 17); its detailed nature; the support given on some points by documents found to be genuine; and a point about the date when he left the country. The three individual points on which the AIT founded on 21st November 2005 could (and I am bound to say should) have been dealt with more fully than they were, and it may be that a different immigration judge might have found them more damaging to the appellant's credibility. But in the end that is neither here nor there. Looking at the matter in the round, the parties reading the decision made by Mr Camp know why he accepted the appellant's evidence."

31. Fortified by that brief review of authority, I return to the issue in the present case. In this case the Immigration Judge directed himself correctly as to the burden and standard of proof. He then went on to review the objective evidence concerning the People's Republic of China. He recounted the description given in the COIR reports of the persecution of some Christians in China. He recounted the situation of the Hu Han Sect which is banned. He reviewed the information in the Home Office operational guidance note. No criticism is made of the Immigration Judge's summary of that objective evidence. The Immigration Judge noted that the appellant's account

of events in the Peoples Republic of China was consistent with that objective evidence. The Immigration Judge also accepted, on a perfectly proper basis, the appellant's evidence that she was a practising Christian. The Immigration Judge also makes clear that he has considered all the evidence before him, including the discrepancies identified in the refusal letter.

32. I am bound to say that Immigration Judge Callow's determination falls some distance short of excellence. On the other hand, in my view the Immigration Judge has reached a decision that was open to him on the evidence. Also, although this is not an easy case, the Immigration Judge has gone just far enough to explain why he has reached the decision which he did. In the result, therefore, I conclude that there is no error of law in that decision which warrants it being set aside and the whole matter being reconsidered at a reconsideration hearing.

33. It follows from this conclusion that, although I have some sympathy for the criticisms expressed by Senior Immigration Judge McGeachy, I reject his conclusion that Immigration Judge Callow's decision was flawed by an error of law. In my view Immigration Judge Callow's decision, both in respect of past persecution and also in respect of the risk of future persecution, ought to have been upheld upon reconsideration.

Part 5. Conclusion

34. Let me now draw the threads together. For the reasons given in parts 3 and 4 of his judgment, in my view the appellant succeeds on her first ground of appeal. Her second ground of appeal does not arise for consideration. Therefore in my view this appeal should be allowed.

Lord Justice Richards:

35. I agree.

Lord Justice Ward :

36. Despite the characteristically eloquent submissions from Mr Alan Payne for the Secretary of State I agree with Jackson LJ and I too would allow the appeal.

Order: Appeal allowed