Neutral Citation Number: [2008] EWHC 3050 (Admin)

Case No: CO/9416/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2008

Before:

MISS BELINDA BUCKNALL Q.C.
Sitting as a Deputy Judge of the High Court

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Between:

THE QUEEN	**Claimant**
On the Application of	
JIA FU ZHANG	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Tasaddat Hussain (instructed by **Howells Solicitors**) for the **Claimant**
Gerald Facenna (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 11 November 2008

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Judgment

Miss Belinda Bucknall Q.C. :

1. The Claimant is Jia Fu Zhang. He is a national of the People's Republic of China.

2. This is a judicial review of the decision of the Defendant made in a letter dated 18th August 2006 in response to the Claimant's submissions in his statement dated 6th June 2003 and a letter dated 11th August 2004 from the Claimant's solicitors presented as a fresh claim for asylum and/or human rights application. As to the latter, counsel for the Claimant stated expressly at the hearing on 11th November 2008 that the Claimant was not in fact relying upon Art.3 or 8 of the Convention. It was also clear that Art.6 had no application to the facts of the case and any claim that the Claimant may have previously asserted under Article 5 was not pursued.

3. The conclusion of the Defendant in the letter of 18th August 2006 was that the Claimant's submissions did not amount to a fresh claim. The details of the Defendant's considerations that led to that conclusion and the criticisms made of them on behalf of the Claimant are considered below.

4. The Claimant entered the United Kingdom on 12th June 2002 and claimed asylum on arrival. He had no passport or identity card. He was granted temporary admission to stay at an address in Islington, the home address of a friend. He was also issued with a Statement of Evidence Form ("SEF") returnable by 22nd June 2002. The SEF was not returned by the due date and on 4th July 2002 the Defendant wrote to the Claimant at the Islington address but the letter was returned. It appears that he left the Islington address after only three days and failed to notify the Defendant of that fact. The Defendant claims that all the Claimant's rights of appeal were exhausted as at 22nd July 2002.

5. On 17th December 2002 the Claimant's first solicitors submitted the SEF duly completed and signed by the Claimant. He, however, says that when he signed it he did not know what it said, and when he came to understand its contents he discovered that it was almost entirely fabricated. On 6th June 2003, by which time he had appointed new solicitors, he withdrew that SEF in its entirety and replaced it with his witness statement of that date. By a letter dated 11th August 2004 his new solicitors made further representations to the Defendant.

6. The account in his witness statement as to why he was claiming asylum was as follows. In late 2001 his wife became pregnant in breach of the one-child policy in his country, there being already a child in the family. This pregnancy was discovered when the Claimant's wife was tested at the local family planning office and found to be about five months pregnant. This was a surprise because a pregnancy test some 2-3 months earlier by the local hospital had been found to be negative. She was forcibly taken to hospital and injected to effect an abortion. She was very upset about this. The Claimant was told that he would have to pay 1,200 RMB as the cost of the abortion and duly did so although he had to borrow 1,000 RMB from his mother and a friend.

7. On 27th January 2002 the Claimant and his wife went to church and after the service various other members of the church came back to his house. While there, two family planning officers arrived and asked the Claimant to pay a fine of 1,000 RMB, being the cost of the two pregnancy tests. The Claimant thought this was unfair because he

and his wife had been following the family planning policy, it was not their fault that the first pregnancy test had failed to discover the pregnancy at a time when abortion would have been easier and he had already paid for the abortion. So he didn't go to pay the fine on the following day.

8. On 29th January 2002, the family planning office sent a message asking him to attend at the office to solve the problem. The Claimant went and maintained his resistance to paying the fine. He was told that if he continued to refuse he would have to accept all the consequences. He was then detained in a small room so that he could think about it. His wife learned that he was being detained and went to the family planning office in company with her parents, her great uncle and some friends from her church to see what they could do, implicitly to see what they could do to obtain his release. They argued with the family planning officers to the extent that there was almost a fight but in the end the Claimant was released. However, the argument between the Claimant's wife and the senior family planning officer continued, with his wife protesting about the abortion, the unfairness of the additional fine and the fact that the senior planning officer and various members of her family had more than one child. The Claimant was also involved in the argument. More people arrived to support the Claimant's wife until in the end there was a group of some 50-60 people, some of whom were calling the family planning officers corrupt. The senior family planning officer asked everyone to go home, saying that the matter could be discussed on another day and it seems that everyone left peaceably.

9. On 1st February 2002 the Claimant was told by a friend, Yi Gui, that when he had been at the family planning office that day he had overheard the family planning officer talking to four policemen about the Claimant and saying that he was going to be arrested and punished harshly. On the advice of his mother and his wife, the Claimant decided to run away. He hid for two days in a fishing boat owned by his wife's cousin during which time he was told that the police had attended his house looking for him on two occasions. On what must have been 2nd or 3rd February 2002 the Claimant then left the fishing boat and went to stay with his own cousin in a city for two weeks which would take his stay there to 16th or 17th February 2002. He says that while there his cousin rang the Claimant's wife and told him that his wife had told her that the police were still looking for him and saying that he and his wife had acted against the government, that they had gone against the family planning policy and had stirred up people against the government. The police had told his wife to get him to come back so that he could be punished because they blamed him for turning the people against the government. The Claimant was afraid that the police would arrest him and punish him.

10. The Claimant spoke to his mother on 28th February 2002. It is not clear where he was at this stage. She told him that his wife had had to go into hiding because the police were now blaming her as well as the Claimant and that the police had put up "wanted" notices in the village. The Claimant says that the decision was taken, in conjunction with his wife and mother, to go further away. Using money borrowed by them he went to another city and stayed there for about 20 days until the money ran low. He then took up night residence at the train station. This must have been on 8th/9th March 2002. On 18th/19th March 2002 he met a woman at the train station who said she was going abroad and suggested that he should go with her. She said she had a neighbour who knew someone who could help. The Claimant knew this man only by the name

of "Boss". He gave Boss his passport and Boss did the rest. On about 20th or 21st March 2002 he and Boss flew to Hong Kong, then took a 12 hour flight to another county. Thereafter they travelled for 2-3 months through various countries using many different modes of transport including a helicopter. How this journey was funded is not explained. The Claimant claims he did not know where he was during this period. On arrival at a London airport Boss disappeared and the Claimant claimed asylum.

11. The statement further says that the Claimant is claiming asylum because of the consequences of his wife's second pregnancy.

Immigration Rule 353

12. Immigration Rule 353 provides as follows.

> *"When a human rights or fresh claim as been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim.*
>
> *The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered.*
>
> *The submissions will only be significantly different if the content had not already been considered and taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection".*

13. Taking it from the helpful analysis of Buxton LJ in WM(DCR) and SSHD [2006] EWCA Civ. 1495, the task of the Defendant under Rule 353 is as follows. He/she has to consider the new material together with the old and make two judgments.

    a) Whether the new material is significantly different from that already submitted. If it is not the Defendant has to go no further.

    b) If the material is significantly different the Defendant has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim.

    That second judgment will involve not only judging the reliability of the new material but also judging the outcome of tribunal proceedings based on that material and in assessing the reliability of the new material the court can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable and also have in mind where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator.

14. The rule only imposes a somewhat modest test that the applicant has to meet before it becomes a fresh claim. First the question is whether there is a realistic prospect of success in an application before an adjudicator but no more than that. Secondly, the adjudicator himself does not have to achieve certainty but only to think that there is a

real risk of the applicant being persecuted on return. Thirdly and importantly since asylum is in issue, the consideration of all the decision makers (the SS, the adjudicator and the court) must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution.

15. The determination of the Defendant can only be impugned in judicial review proceedings on *Wednesbury* grounds.

16. I now turn to consider the grounds relied upon by the Claimant in light of the relevant principles, bearing always in mind my obligation to apply anxious scrutiny in so doing and that the scope of my task is to determine whether the Defendant's decision was unreasonable in the *Wednesbury* sense.

17. Before doing so I must refer to a late, faint suggestion on behalf of the Claimant, the effect of which was, as I understood it, that the case did not fall within the ambit of s.353 because there had been no previous adjudication. If that was the point being advanced I reject it as clearly wrong. The Claimant had exhausted his rights of appeal as long ago as 22nd July 2002 and the Defendant had no alternative but to consider the submissions of June 2003 and August 2004 in accordance with Rule 353.

18. The Claimant relied upon 3 grounds as follows.

19. The First Ground. It is claimed that the rationale for the Defendant's decision of 18th August 2006 was non-compliance with the requirement that the SEF provided to him at the time of his application should be completed and returned within 10 working days. Accordingly, in reliance upon the decision of the European Court of Human Rights in the case of Jabara v. Turkey (Case no.40035-98) which in summary states that refugee status should not be rejected solely on the ground of non-compliance with a procedural requirement (in that case a particularly onerous one) it was claimed that the Defendant's decision was wrong in law.

20. The ground is, however, misconceived because it is apparent that the SS did not base his decision of 18th August 2006 solely upon non-compliance grounds. On the contrary the author of the letter says in paragraph 9, having already referred to the matters described in the Claimant's witness statement, and the failure to comply with the asylum procedure "*Notwithstanding the above, consideration has been given to the claimed facts of your client's case …*". The author then goes on to address specifically and in considerable detail the various factual claims in the Claimant's witness statement, the contents of the Claimant's Asylum Screening Form and the Country of Origin Information Report dated April 2006; in paragraph 15 he says "*The asylum claim has been reconsidered on all the evidence available including the further representation*".

21. Accordingly, this ground fails.

22. The second ground. This is a rather technical point arising out of the reliance by the Defendant in para 9 of the letter of 18th August 2006 upon the decision of the AIT in the case of Jin Huan Lin (01/TH/00099). It is contended on behalf of the Claimant that the Defendant erred in law in referring to this decision because the IAT's practice

direction no.10, CA3 of 2003 (taking it directly from para 6.2 the Claimant's amended skeleton)

> *"states that a case cannot be relied upon as authoritative in any subsequent appeal unless the determination is directly linked to the Claimant through, for example, his family and permission is granted to rely upon it, or the Defendant is in a position to certify that the matter or proposition for which the determination is cited has not been the subject of a more recent reported Tribunal determination, neither of which was done in this case."*

23. It was submitted on behalf of the Defendant that the SS did not act unlawfully in referring to the case because

    a) the PD only applied to determinations as from 19th May 2003 when the practice of dividing IAT determinations into "reported" and "unreported" categories was introduced for the purpose of preserving anonymity in those cases where there was no requirement for publication and the Jin Huan Lin case (in which the decision was notified on 11th April 2001) predated the PD by more than two years and thus was outside its scope, and

    b) the PD in any event only applies to restrict citations in proceedings before any adjudicator or the Tribunal and does not bind the Defendant.

24. Having reviewed the text of the PD I am satisfied that it does not apply to the Jin Huan Lin case which was decided in 2001, long before the PD relied upon by the Claimant came into force. Accordingly the Defendant did not act unlawfully in referring to it and this ground fails. This conclusion makes it unnecessary to consider the second point made on behalf of the Defendant.

25. The third ground. This is that the Defendant erred in law in his approach to the Claimant's claim to be a refugee both in relation to his claim to have a well founded fear of persecution for political opinion and his claim to have a well founded fear of persecution for his membership of a particular social group. I will consider each in turn.

26. In relation to political opinion the Claimant contends that,

    a) the Defendant was wrong to take into account the case of Jin Huan Lin because that case does not lay down any general principle that the actions of a person responding to China's one-child policy would not constitute political opinion for the purposes of the Refugee Convention; whether it does or not is a question of fact.

    b) the Claimant's actions readily fit within the definition of political opinion under the Refugee Convention; see Farshad Kiani De Kiani v. SSHD [2002] UKIAT 01328.

    c) Jin Huan Lin's case was decided before the introduction of the ECHR into UK law by the Human Rights Act 1998 and the Defendant was wrong to take it

into account in denying the Claimant an appealable decision under the ECHR. Since the Convention claims were not pursued, this ground has no content and is not considered further.

27. The Defendant referred to the case of Jin Huan Lin in paragraph 9 of the letter in the following terms, leaving out the final words which relate to membership of a particular social group,

> *"In addition, case law has shown that fear of officials in relation to the one child policy was based neither on actual, nor perceived, political opinions … Jin Huan Lin (01/TH/00099)"*

That, however, has to be read in the context of the summary in paragraph 6 of the Claimant's account of what he claimed happened in China and the view expressed earlier on in paragraph 9 that even if the Claimant's account were accepted at face value there was no evidence that he would be persecuted for a Convention reason. The case itself bears similarity to the facts asserted by the Claimant in this case in that neither asylum seeker had ever sought to resist or oppose the family planning policy and had only come into conflict with the family planning authorities because of a refusal to pay a fine which was considered to be unfair.

28. Unlike the present case, the claimant in the Jin Huan Lin case had resisted the officials seeking to enforce payment of the fine by killing one of them. The Immigration Appeal Tribunal presided over by Collins J, held that the actions of the claimant were not political. It therefore held that the claim to be entitled to refugee status failed, in the process rejecting as wrong the decision of the adjudicator in the case of Chen v. SSHD (a 1997 decision) that the response of a woman who had assaulted and injured a family planning officer who was seeking forcibly to sterilise her was a political act. Reading what the SS said about the Jin Huan Lin case, and bearing in mind both its facts and the facts asserted by the Claimant (which the SS had well in mind), it does not seem to me that the Defendant is doing anything more than saying that the case of Jin Huan Lin lent weight to his view, arrived at independently of that case, on the hypothesis that the facts were as stated by the Claimant, that the refusal to pay the fine and the actions that followed, including the accusations made by the Claimant's wife and others that the person in charge of family planning in the village corruptly disapplied the policy in the case of her own family members, did not amount to political opinion which would be visited with persecution.

29. The case of Farshad Kiani De Kiani v. SSHD [2002] UKIAT 01328 involved an Iranian writer who wrote an article that was critical of the state owned company for which he was working and critical of the state, had been involved in a hunger strike at the company, produced leaflets that were critical of the management of the company and was the subject of surveillance of him at his home address. The Immigration Appeal Tribunal (Collins J presiding) pointed out that it was not necessary to be a member of a political party or indeed to be a supporter of any political group to show that persecution is the basis of political opinion. The passage relied upon on behalf of the Claimant states,

> *"Any member of the public may have views about the government of a particular country and if those views are expressed and if those views are contrary to the state and if the state is a form of dictatorship which ill treats and persecutes those whom it regards as being opposed to it, then there is a classic case of persecution for political opinion"* (emphasis added).

That passage, however, has no application to the facts claimed by the Claimant and does not demonstrate that the Defendant was in error.

30. In relation to membership of a particular social group, the Claimant contends that the Defendant was wrong to take account of the Jin Huan Lin case and also wrong in failing to take account of the decision of Chun Lan Liu v. SS [2005] EWCA Civ. 249 in which the CA held that a fear of persecution due to a transgression of China's one child policy was capable in law of founding a claim under the Refugee Convention by reason of membership of a particular social group.

31. Taking the words in paragraph 9 of the Defendant's letter as they relate to this basis of claim for refugee status what is said by the Defendant is as follows,

> *"In addition, case law has shown that fear of officials in relation to the one child policy was [not] … nor was it part of a particular social group."*

32. Making the adjustment required by grammar the passage becomes "*fear of officials was not part of a particular social group*". Even with that adjustment, however, the sentence makes no sense; the mangled language of the passage is such that it affords no confidence that the SS has properly applied his mind to this basis of claim with the anxious scrutiny required. This alone is sufficient in my judgment to entitle the Claimant to a further consideration of his case.

33. The Claimant's further point that the SS referred only to the Jin Huan Lin case and did not refer to the case of Chun Lan Liu v. SS [2005] EWCA Civ. 249 leads to the same conclusion. The Jin Huan Lin case expressly did not consider whether the appellant in that case was a member of a particular social group for the purposes of the Convention and thus provided no authority upon which the Defendant could reasonably have relied as support for his rejection of the Claimant's case on this ground. Furthermore, the only reference made in the determination and reasons to the "*membership of a particular social group*" was a comment that the appellant's counsel was right not to rely upon that ground because "*the only conceivable social group here is itself defined as a result of the alleged persecution"*. In the case of Chun Lan Liu the central issue before the CA was whether the IAT was correct in confining its consideration of this ground to the general principle that the group must exist independently of the persecution. Maurice Kay LJ, with whom the other members of the court agreed, held that the IAT was wrong to do so, without also considering the qualification referred to by Lord Steyn in Shah and Islam [1999] 2AC 629 that while that general principle has an important part to play, the persecutory conduct may serve to identify or even create a particular social group.

The failure to refer to this case, or to the qualification of the general principle in Shah and Islam, and the sole reliance upon the earlier case of Jin Huan Lin Lin which referred only to the general principle satisfies me that the Defendant erred in his approach to consideration of the Claimant's claim for asylum based upon his membership of a particular social group.

34. Because I was asked to do so I read the case of AK (Afghanistan) [2007] EWCA Civ. 535 after the hearing was over, reliance having been placed on it on behalf of the Claimant at a very late stage in the proceedings without a copy of the authority being then available to me. It adds nothing to the matters referred to above.

35. Accordingly the decision of the Defendant in his letter dated 18th August 2006 is quashed and the matter must go back to the SS for further consideration of the Claimant's application for refugee status based upon his claim to have a well found fear of being persecuted for membership of a particular social group, in light of the relevant authorities, as they apply to the facts asserted.