



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/12773/2015

THE IMMIGRATION ACTS

Heard at Field House
On 6th March 2018 and 4th May 2018

Decision & Reasons Promulgated
On 22nd May 2018

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

T T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Hulse on 6th March 2018 and Ms J Fisher on 4th May 2018,
(instructed by Gillman-Smith Lee Solicitors)

For the Respondent: Mr L Tarlow on 6th March 2018 and Mr T Melvin on 4th May 2018
(Senior Home Office Presenting Officers)

DECISION AND REASONS

1. The Appellant was born in Tibet, spent much of his life in India, having fled via Nepal, where he says he lived without proper status having obtained a certificate of registration irregularly. The Secretary of State refused his protection claim on the basis that he could return and would be returned to India.
2. First-tier Tribunal Judge N Bennett heard the appeal on 4 October 2017 and dismissed it on protection grounds, but allowed it on Human Rights grounds (Article 8) in a Decision and Reasons dated 23rd October 2017.

3. The Appellant challenged the dismissal of the asylum and humanitarian protection appeal.
4. The Secretary of State has not challenged the decision under Article 8.
5. Judge Bennett considered the situation for the Appellant in China, his country of nationality, and found he would not be able to return in safety to China. He then went on to consider the position, as he was required to do, in relation to India because under the new provisions of the 2002 Act the Appellant has to show that removal from the UK, in this case to India, would breach the Refugee Convention or would entitle him to humanitarian protection or to succeed under the European Convention on Human Rights.
6. The Judge decided that he could go to India notwithstanding a variety of positive findings. Before me on 6th March 2018 both representatives agreed that the Judge's consideration of the situation on return to India was inadequate and that the findings in respect of the protection claim as it relates to India only should be set aside.
7. On that basis I set aside the Decision and Reasons of the First-tier Tribunal preserving all the findings save for those relating to the protection claim in India. As the only issue is the situation on return to India I decided that the matter should be redetermined in the Upper Tribunal by me.
8. Thus, the matter came before me for a resumed hearing on 4th May.
9. Before I reach findings on whether the protection claim should succeed on Article 3 grounds I find that the Appellant cannot succeed either as a refugee or on humanitarian protection grounds.
10. I refer to Council Directive (2004/83/EC) (Qualification Directive). Article 2 of the Directive contains the definition of a "refugee" as a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable, or owing to such fear, unwilling to return to it, and to whom Article 12 does not apply. Article 12 are the exclusion provisions which have no relevance in this case.
11. Article 2 defines a "person eligible for subsidiary protection" as a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17 (i) and (ii) do not apply, and is unable, or, owing to such risk unwilling to avail himself or herself of the protection of that country. Article 17 contains exclusion provisions relating to humanitarian protection and again has no relevance in this case.

12. The Appellant's country of nationality is China and it has previously been accepted by the First-tier Tribunal that he would be at risk of persecution in China. However, the decision under appeal is to refuse his protection claim and remove him to India. He has to show, in order to succeed, that removal would breach the Refugee Convention. Whilst the removal to China would breach the Refugee Convention and thus entitle him to asylum, removal to India would not. He is not a stateless person, he is a national of China. He therefore cannot succeed as a refugee.
13. For precisely the same reasons he cannot succeed in a claim for subsidiary protection (humanitarian protection) either.
14. All that is left to the Appellant therefore is the European Convention on Human Rights. It has already been established by the First-tier Tribunal that he succeeds under Article 8. The matter for me to decide is whether he succeeds under Article 3. I have to decide whether he would face inhuman or degrading treatment on removal to India.
15. I had the benefit of hearing oral evidence from an expert witness who provided a main and a supplementary report. The witness is Miss Kate Saunders. Her original report was dated May the 4th 2016 and the supplementary report May the 1st 2018.
16. Miss Saunders outlines her expertise. From 1997 until January 2003 she worked with Tibet Information Network, the leading news and research service on Tibet, as a Senior News Analyst. In that capacity she edited virtually all of the reports on the current situation in Tibet, including reports on policy towards Tibetans who escaped into exile and general refugee issues. Over the past 12 years she has spent considerable time in India and Kathmandu interviewing Indians who arrive in exile from Tibet. Over the past 12 years she has spent considerable time in India and Kathmandu interviewing Tibetans who arrive in exile from Tibet. Since 2004 she has worked as research director for the largest Tibetan group worldwide, the International Campaign for Tibet, managing a field operation of Tibetan researchers, interviewing Tibetan sources and writing analysis on the situation in Tibet. As a result, she says she is familiar with the difficulties over status and registration faced by Tibetans in exile in India and Nepal. She says that over the past decade she has travelled to Nepal and India at least annually, mostly twice a year, in order to research and write the International Campaign for Tibet's series of reports on the evolving situation for Tibetans in Nepal, both new arrivals and the established Tibetan community.
17. It seems to me unarguable that Miss Saunders is an expert on Tibet and Tibetans in India. Her evidence was that Tibetans who are perceived to be "newcomers" in India, namely those who have arrived since the 1990s are stateless nationals in India with no path to Indian Citizenship. She said that it is not possible to obtain a Registration Certificate (RC) as a "newcomer" and that even Tibetans who have lived in India before that time are not always able to obtain Identity Certificates (IC) which is the document which allows them to travel. She said that even of those born in India, only a handful have been able to obtain Citizenship. She said that when Tibetans go to India they have to resort to bribery to get basic papers. She said that if a Tibetan returned to India after claiming asylum they would be immediately in trouble and India has no obligation to take them back.

18. She explained that the procedure when a Tibetan escapes Tibet is that they are registered in India. Their first stop is Nepal and there is a "gentleman's agreement" between Nepal and India which allows them to cross to India and to live in a Tibetan community. They are registered in Nepal by the Tibetan Exile Authorities and then in India they are registered. She said that a few slip through the net and do not follow the procedure. When asked about the situation in Delhi, Miss Saunders was unable to provide any firm information or statistics. She said that she knew that there were difficulties for Tibetans all over India who have no documentation. She said that the Appellant would be at risk of being deported to China from anywhere in India and that the situation is getting worse because the Indian and Chinese Presidents have begun to develop a relationship, which places Tibetans more at risk.
19. Miss Saunders said that if the Appellant was accepted back into India he would have to report to the Foreign Regional Registration Office and there would be no option but for him to do that. In that event she said he would be at risk of being arrested, fined, imprisoned or deported. There was no guarantee that he would not be deported.
20. Miss Saunders agreed that there were some 150,00 Tibetans living in India and that although people are still travelling through Nepal into India from Tibet the numbers have reduced dramatically. She said that prior to 2008 there were some 2,500 - 3,000 annually but last year there were less than 100. In relation to the numbers who have been deported to China Miss Saunders thought there were approximately 40 in the last few years.
21. It was put to Miss Saunders on behalf of the Secretary of State that the Appellant had had an RC for twenty years and that he was working and that he had been issued with an IC card. He put to her that surely that would be documented in India in which case he ought to be able to go to the authorities, say that he had had them before and obtain another RC. She was unable to adequately answer that; simply re-stating that the document would not be available to him as someone who came in 1992. She was not able to say how that would be known.
22. She was also unable to adequately explain the comment in her supplementary report where she says: -

"Because T has travelled on an Indian issued IC and has claimed asylum abroad, it signals to the Indian Government that the IC had been issued using a manufactured birth certificate and other documents."

She was not able to adequately explain how it is that the authorities would come to that conclusion.

23. In her submissions Ms Fisher said that the starting position is the status of Tibetans in India. Firstly, they have no legal status; the Appellant will be a foreigner living on Indian soil and secondly, that India is not a signatory to the Refugee Convention so he cannot claim any rights as a refugee in India. She pointed out that it was accepted by the First-tier Judge, in findings which have been preserved, that in order to get the IC to travel he had to hand in his RC and it was unlikely that he would be able to obtain an RC on return to India. It is that document which would allow him to live in India.

Without that document he would be liable to arrest for not being in possession of that document and then would be liable to detention and/or deportation.

24. While I accept Miss Saunders' expertise and knowledge of the situation for Tibetans in India she has been unable to satisfy me as to why the Indian authorities would assume upon return that the Appellant had used false documents previously. In particular, I note that he had previously exchanged an RC for an IC and travelled out of India and returned without difficulty. He left on the last occasion having obtained another IC without difficulty. It is telling that for 20 years he lived without problems and was able to work in Delhi. He married and raised a family in India. I have been provided with no evidence that there are any problems faced by his family. I am very far from satisfied that the Appellant, if returned to India and returned to Delhi where he lived before, would face treatment that would breach Article 3 of the ECHR. I note the preserved finding at paragraph 51 of the First-tier Decision and Reasons that his original RC has been impounded and that it is reasonably likely that he would not be able to obtain a valid one if returned to India. However, that does not mean that he cannot make enquiries of the Indian authorities in the UK in an effort to obtain one. He can truthfully say that he lived in Delhi for 20 years with an RC and that he has travelled out of India and returned previously and wishes to do the same again.
25. I accept of course that without an IC and then an RC the Appellant cannot be returned to India. There is of course no obligation on India to accept him back. However, if India does then that can only be on the basis he has an IC to travel which will be replaced with an RC. With those documents he would not be at risk of inhuman or degrading treatment as he has not been in the past.
26. The situation for this appellant is not the same as for Iraqis without the necessary CSID documents. Those documents are to be obtained once in the country and the absence of such a document does not prevent removal to the country, whereas the absence of an IC would prevent removal of the Appellant to India at all.
27. The situation for this Appellant is also different from those previous asylum seekers from, for example Zimbabwe, who the Courts decided had to have their risk of persecution decided even though there was no possibility of physically returning them. The situation for this Appellant is different in that if he can be returned then he will not be at risk. The expert was vague as to the risk in Delhi. There is no evidence of past inhuman or degrading treatment. Her evidence that she thought there had been about 40 Tibetans removed in the last few years represents 0.03 of the Tibetan population in India and while it represents a risk, it does not represent a "real risk".
28. I accept, as did the First-tier Tribunal Judge, that difficulties are faced by Tibetan nationals in India that would amount to a breach of Article 8. However, they do not cross the threshold as to amount to inhuman or degrading in breach of Article 3.

Notice of Decision

29. The appeal is allowed on Article 8 grounds but dismissed under the Refugee Convention, Humanitarian Protection Grounds and Article 3 of the ECHR.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 16th May 2018

Upper Tribunal Judge Martin