EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 16
XA54/17

Lord Brodie
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD BRODIE

in the Appeal

by

MMY

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Winter; Drummond Miller LLP
Respondent: Webster; Office of the Advocate General

20 March 2018

Introduction

[1] This is an appeal under sections 13 and 14 of the Tribunals, Court and Enforcement Act 2007 against a decision of the Upper Tribunal (Immigration and Asylum Chamber), as constituted by Upper Tribunal Judge Macleman, dated 14 November 2016. Permission to appeal was granted by this court in terms of the interlocutor of Lady Clark of Calton dated 16 June 2017.

[2] The appellant is a Chinese national. She was born in 1988. She has been resident in the United Kingdom since 17 November 2011, having entered the country with a tourist visa. She moved to Glasgow in October or November 2013.

[3] Since at least 2010 the appellant has been an adherent of the Church of Almighty God, otherwise referred to as "Eastern Lightening". The appellant describes Eastern Lightening as a branch of Christianity.

[4] On 4 June 2014 the appellant applied for asylum in the United Kingdom as a person having refugee status due to her having a well-founded fear of being persecuted in her country of nationality for reasons of religion. The respondent refused the appellant's claim in terms of letter dated 5 December 2014 and notice dated 6 December 2014 requiring the appellant to remove to China.

[5] The appellant appealed refusal of her asylum claim in terms of sections 82(1) and 84(1) of the Nationality Immigration and Asylum Act 2002. That appeal was refused by the First-tier Tribunal ("the FTT"), as constituted by FTT Judge Bradshaw, in terms of decision and reasons dated 23 March 2015. The appellant's application for permission to appeal that refusal was refused by the FTT, as constituted by FTT Judge Frankish, on 13 April 2015 and then by the Upper Tribunal ("the UT"), as constituted by UT Judge Kekic on 22 June 2015. The appellant brought an application for judicial review of the decision of the UT dated 22 June 2015. That application was heard by Lord Bannatyne who, in terms of his interlocutor dated 10 February 2016, reduced the decision of 22 June 2015. On 28 July 2016 the UT, as constituted by the Vice President, having regard to Lord Bannatyne's interlocutor, granted permission to appeal the decision of 23 March 2015 to the UT. That appeal was heard on 11 November 2016 and, as already indicated, refused by the UT, as constituted by UT Judge Macleman, on 14 November 2016.

Country Guidance Determination: *QH (Christians – risk) China CG* [2014] UKUT 00086 (IAC)

[6] In terms of the Practice Directions of the Immigration and Asylum Chambers of the FTT and the UT of 10 February 2010, as amended 13 November 2014, a reported decision of the Tribunal may be designated with the letters "CG" to indicate country guidance. The object is to identify cases where, on the basis of evidence, findings have been made which are of general application to specific issues as they arise in particular countries. Paragraph 12.2 of the Practice Directions provides that unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal: (a) relates to the country guidance issue in question; and (b) depends upon the same or similar evidence.

[7] *QH (Christians – risk) China CG* [2014] UKUT 00086 (IAC) is one such country guidance case. It was convened in order to address the questions:

> "To what extent do Christians in China have the ability or freedom to openly or publicly profess and practise their faith? Such to encompass the ability to proselytise and to associate with others of their faith?"

and "To what extent and in what circumstances do Christians face persecution in China?"

[8] The determination and reasons in *QH* together with its appendices extends to 70 pages in the print with which we were provided. There, the evidence which the UT heard is discussed in detail. The evidence relates to Catholic and Protestant Christian churches with only incidental reference to other faiths and belief systems. The Falun Gong, for example, is mentioned on three occasions, at paragraphs 18, 86 and 87, but in contexts which make clear that it is not regarded as a church for the purposes of the UT's

determination. A feature of that evidence is that in China a distinction falls to be made between state-registered (and state supervised) Christian churches, on the one hand, and unregistered or "house" churches, on the other. The determination includes references to evidence to the effect that religious freedom is subject to constraint in China but the UT sets out its conclusions at paragraph 137 of its determination and reasons *inter alia* as follows:

> "(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.
> ...
> (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..."

Country Information and Guidance, China: Christians

[9] Distinct from the country guidance to be derived from a CG determination is the country of origin information contained in the Country Information and Guidance documents published by the Home Office. The purpose of such CIG documents is to provide guidance to Home Office decision-makers. One of these documents, current as at the date of the hearing of the appellant's appeal by the FTT, was Country Information and

Guidance, China: Christians updated 13 June 2014 ("CIGCC 2014"). A copy of CIGCC 2014 was before the FTT in the present case.

[10] CIGCC 2014 refers to the decision in *QH* and narrates the UT's conclusions in that case in its Annex B. However CIGCC 2014 contains material additional to that discussed in *QH*. For present purposes it is relevant to note what appears (at paragraphs 2.2.3 and 2.3.10) in relation to Eastern Lightening and what are referred to by the Chinese authorities as "evil cults":

> "2.2.3 Only religious groups belonging to one of the five state-sanctioned 'patriotic religious associations' (Buddhist, Taoist, Muslim, Roman Catholic and Protestant) are permitted to register with the government and legally hold worship services. Other religious groups, such as Protestant groups unaffiliated with the official patriotic religious association or Catholics professing loyalty to the Vatican are not permitted to register as legal entities. Proselytising in public or unregistered places of worship is not permitted. Certain religious or spiritual groups are banned by law. Amongst these, the government considers several Protestant Christian groups to be 'evil cults', including the 'Shouters', Eastern Lightning, the Society of Disciples, Full Scope Church, and many others. Individuals belonging to these groups can be sentenced to prison; on the basis that membership of these groups ('evil cults') is banned by law. The Chinese Communist Party maintains its Leading Small Group for Preventing and Dealing with the Problem of Heretical Cults and its Implementing '6-10' offices, to eliminate the Falun Gong movement and (latterly) address 'evil (Protestant) cults'?
> ...
> 2.3.10 Members of unregistered Protestant groups that the government arbitrarily deems 'evil cults' are the most vulnerable to detention, arrest and harassment. The extra-judicial security apparatus, called the 6-10 Office, has broadened its mandate beyond Falun Gong activity to include groups that self-identify as Protestant. The government has banned at least 18 Protestant groups. Examples include the Disciples Association, the 'Shouters', and the Local Church, a group that was founded by Chinese church leader Watchman Lee."

The Appellant's "Expert Country Opinion"

[11] Also before the FTT was a report, dated 27 February 2015 and headed "Expert Country Opinion: China", from Professor Christoph Bluth. Professor Bluth is the incumbent

of the chair of International Relations and Security at the University of Bradford. At paragraph 5.3.11 of his report the professor states:

> "...there is a general risk for all members of Eastern Lightening of persecution by the authorities given that their organisation is considered illegal and that the most important demands of [the appellant's] religion give rise to activities that are deemed to be criminal acts and will result in persecution by China's authorities".

The decision of the FTT of 23 March 2015

[12] In support of her appeal the appellant gave evidence to the FTT that on returning to China from studying in Denmark in October 2011 she had been involved in a street demonstration as a way of promulgating her beliefs; that she had been arrested and detained by the police; and that she had been physically abused when in custody. According to the appellant she had thereafter been placed under house arrest but had escaped and then fled from China. She explained that since coming to Glasgow she has practised her religion online. The FTT noted the terms of CIGCC 2014 without adverse comment (FTT decision paragraph 53) and it accepted that the appellant was "an ordinary member of the Eastern Lightening religion" (paragraph 100) but no more than that; the FTT did not find the appellant's account of her experience to be credible (paragraphs 68 to 70, 75, 98) and accordingly rejected the proposition that the appellant had "any profile with the Chinese authorities" (paragraph 100). The FTT recorded having given full consideration to the report from Professor Bluth (paragraphs 77 and 84, also paragraphs 79 and 80) but having done so concluded that

> "it is on the basis that the appellant was arrested and bailed that Professor Bluth specifies there is a serious risk that the appellant would be persecuted by the Chinese authorities if she is forced to return to China"

(paragraph 83). Having found that the appellant was nothing other than an ordinary member of the Eastern Lightening religion without any profile with the Chinese authorities,

the FTT referred to findings (4) (i), (iii), (iv) and (v) in the *QH* headnote and concluded that if the appellant is returned to China she will not be of any particular interest to the Chinese authorities (paragraph 106).

[13] As indicated above, the UT's refusal of permission to appeal the FTT's determination was the subject of an application for judicial review. In that application the now appellant argued that her case had been put to the FTT on two factual bases: first, that she was at risk of persecution because of what had happened in October 2011 combined with her being a member of Eastern Lightening; and, second, that she was at risk of persecution by mere membership of Eastern Lightening (FFT decision paragraph 37). The first factual basis had been rejected but the second, she said, had not. Notwithstanding that, the FTT had dismissed the appeal without considering the appellant's alternative case. In other words the FTT had not considered whether, on the evidence before it, the appellant faced the risk of persecution simply because she was a member of Eastern Lightening. The point was accepted by Lord Bannatyne. As he explains in his Note, he was unable to identify any consideration of the appellant's case by the FTT on the second factual basis. Accordingly, he reduced the refusal of permission to appeal the FTT's determination.

The determination of the UT of 14 November 2016

[14] In terms of sections 11 (1) and (2) and 12 (1) of the 2007 Act, the question for the UT on an appeal from the FTT is whether the decision of the FTT involved the making of an error on a point of law. As recorded by the UT at paragraph 10 of its determination and reasons, the argument in support of that proposition appears to have been to the effect that the FTT had erred in having regard to the country guidance in *QH* because that case did not address the circumstances of someone, like the appellant, who was an adherent of a

Christian church which was not only unregistered but which was banned as an "evil cult". Once it was recognised that membership of Eastern Lightening placed the appellant into "a further category of risk", and the background information was taken into account, it should be concluded that the FTT's conclusion that the appellant did not face a relevant risk on return to China was erroneous and the FTT's decision should be set aside and reversed. As is submitted at paragraph [5] of the respondent's note of argument to this court, the UT implicitly accepted that the FTT had not engaged with the issue of risk arising from mere membership of an "evil cult", such as Eastern Lightning. That can be said to have involved an error on a point of law. However, on the basis of its consideration of the background news reports and other materials produced by the appellant (paragraph 15 of the UT determination) the UT did not find the error to have been "such as to require the decision to be set aside".

[15] The reason why the UT did not find the error of the FTT to have been material appears in the following passages taken from paragraphs 16, 17, 18 and 19 of the UT's determination and reasons:

> "16 …The evidence shows serious outcomes for a few [members of Eastern Lightening] after a particular period of hectic activity, but not mass ongoing arrests of lower profile adherents.
> 17. There may be Christian religious groups in China at the extremes, involvement with which takes an individual beyond the QH categories of registered and unregistered churches. However, the evidence does not disclose a further straightforward category of banned 'evil cults', simple membership of which leads to a protection need. Such cases must depend on the evidence about the particular organisation and about the individual.
> 18. The inclusion of Falun Gong among the 'evil cults' is instructive. It is a movement strongly disapproved of by the government, some of whose practitioners have been found to be at risk, but involvement has never been found to require blanket protection. The position for Falun Gong practitioners, who are within the 'evil cult' legal category, is broadly similar to that of participants in unregistered churches. There is no clear distinction between the unregistered and the banned categories.
> 19. The evidence does not establish risk to the many members of Eastern Lightening, absent additional factors of a similar nature to those identified in QH in relation to

> unregistered churches. The appellant had not engaged in crime, preached the apocalypse or otherwise drawn the wrath of the authorities and was not likely to do so. The principles of QH were safely applicable. Any failure to draw a distinction between groups which were unregistered and those which have been specifically banned did not amount to a legal error such as to require the decision to be set aside."

The appeal to this court

[16] The appellant's grounds of appeal are somewhat diffuse with some overlap between grounds, but essentially her complaints are as follows:

1. The UT erred in law either by failing to take into account or by failing to explain what weight was attached to CIGCC 2014 and Professor Bluth's opinion.

2. The UT erred in law when finding that the appellant was not at real risk of persecution. In any event the appellant's position in her statement was that she would not be able to practise her religion openly for fear of persecution. Accordingly, as someone who fears persecution whose fear is well-founded she is entitled to asylum, however unreasonable refusal to resort to concealment may be: *HJ (Iran)* v *Home Secretary* [2011] 1 AC 596 at paragraphs 35 and 82.

3. The UT erred in finding *QH* safely applicable where that case gave no guidance in relation to Eastern Lightening or evil cults.

Submissions

The appellant

[17] Mr Winter, who appeared for the appellant, adopted his note of argument. In his submission the UT had failed to have regard to or at least to apply anxious scrutiny to the evidence. He drew particular attention to the expert report from Professor Bluth where it was stated that all members of Eastern Lightening were at real risk. The UT does not

explain what it made of that report and, if other evidence was preferred to it, the reason for that. That was an error: *MSYZ* v *Secretary of State for the Home Department* [2017] CSIH 41 at paragraph 43. Proselytizing is a central part of religious life in Eastern Lightening and a duty common to all believers. The UT's analogy with Falun Gong was therefore inapposite. The UT had failed to notice the country information to the effect that there is a distinction to be made as between unregistered churches and "evil cults".

[18] The UT had failed to record and then to apply the appellant's submission under reference to *HJ (Iran)* v *Home Secretary*. The appellant would not be able to practice her religion openly, including attending meetings even if she was not previously known to the authorities or if she did not proselytize. The UT's observation that she was unlikely so to conduct herself as to bring herself to the attention of the authorities ought to have been sufficient to bring her within the principle of *HJ (Iran)*. This was not a case which engages the core/marginal distinction for reasons given at paragraph 51 of *RT (Zimbabwe)* v *Secretary of State for the Home Department* [2013] 1 AC 152.

The respondent

[19] On behalf of the respondent, Mr Webster proposed that should the court take the view that the determination of the UT was inadequately expressed then the appropriate disposal would be to remit the appeal back to the UT. It would then be open to the UT to constitute itself as a first instance tribunal to reconsider the claim. However, in Mr Webster's submission, that should be unnecessary. Given the concern that the FTT had treated Eastern Lightening as if it were simply an example of an unregistered church, the UT had looked at the evidence with a view to identifying whether in China membership of Eastern Lightening, *per se*, gave rise to such a risk as to bring about a need for protection.

The available background evidence included the respondent's Country Information and Guidance Note relating to Christians in China, CIGCC 2014. That guidance noted, at paragraph 2.2.3, that there were registered and unregistered religious organisations in China; and that some unregistered organisations, designated "evil cults", were banned in law. Membership of these could result in imprisonment. Eastern Lightning and Falun Gong were identified as "evil cults". Other background information also identified Falun Gong as an "evil cult". In *QH* the UT had found, after a consideration of evidence as to the actual approach of the Chinese authorities to members of unregistered churches, that the evidence did not support a finding that there was a consistent pattern of persecution, serious harm or other breach of fundamental human rights as a consequence of membership of unregistered churches *per se*. Everything turned on the conduct of the individual in question. Whilst Eastern Lightning, as an unregistered church which is also banned by the Chinese state, might be characterised as outside the category considered in *QH*, the proper approach to the assessment of risk ought to be similar to that adopted in *QH*, in other words to consider the evidence specific to the circumstances.

[20] The information before the UT as to the actual treatment of members of Eastern Lightning by the Chinese state included the report of Professor Bluth and the background information. Professor Bluth's evidence was that proselytising was a fundamental duty of a member of Eastern Lightning (report paragraph 5.3.9); and whilst there was a general risk of persecution because of membership of Eastern Lightning, there was a serious risk for the appellant because of her asserted history of having been arrested and bailed in China for her Eastern Lightning activities (paragraph 5.3.11).

[21] The background evidence, noted by the UT, included a report of the Immigration and Refugee Board of Canada entitled China: the Church of Almighty God (Quannengshen),

also known as "Eastern Lightning". The UT noted from that report that membership of Eastern Lightning is considered to run from several hundred thousand to one million but that despite particular activity at the end of 2012 associated with a predicted Apocalypse there were limited arrests and detentions of members and even fewer prosecutions, with variable outcomes. The UT in considering the evidence had regard to the distinction to be drawn between unregistered churches (as discussed in *QH*) and "evil cults". It had then gone on to draw a legitimate conclusion on the evidence before it: that the evidence did not disclose a straightforward category of banned "evil cults" simple membership of which leads to a protection need, rather cases must depend on the evidence about the particular organisation, and about the individual. To the extent that the evidence of Professor Bluth was not consistent with the background evidence, it is clear that the UT preferred the background evidence: *R (Iran)* v *Secretary of State for the Home Department* [2005] INLR 633, paragraph 14. The UT's reference to the inclusion of Falun Gong among the "evil cults" as "instructive" was relevant and legitimate. The point being made by the UT was that within the category of "evil cults" there were organisations, membership of which, although unlawful and therefore giving rise to what Professor Bluth would describe as a "general risk", where membership alone did not *per se* lead to a protection need: one had to consider the organisation and the individual's activity within it. The appellant had not been believed in relation to her proselytising activities in China nor as to the genuineness of her claim to be proselytizing in the United Kingdom nor that she would genuinely proselytise in the event of her return to China in a manner that would bring her to the attention of the Chinese authorities. These adverse credibility findings were not challenged. The UT was therefore correct to observe that "the appellant had not engaged in crime, preached the apocalypse or otherwise drawn the wrath of the authorities and was not likely to do so". The UT was also

entitled to conclude that there had been no material error on the part of the FTT in not expressly drawing a distinction between unregistered churches and "evil cults": had that been expressly considered the conclusion would have been the same: on the evidence a risk giving rise to a protection need did not arise out of membership *per se* (in like manner, but for different reasons in the case of Falun Gong membership); and the appellant's own circumstances did not give rise to a specific risk for her.

[22] Mr Webster then addressed the appellant's contention that the decision of the UT is unsustainable in the light of the decision in *HJ (Iran)* as the appellant would have to refrain from openly practicing her religion in the event of return to China. As he had already noted, the unchallenged finding of the FTT was that the appellant was neither credible in relation to her Eastern Lightning activities whilst in China nor genuine in relation to her Eastern Lightning activities in the United Kingdom. She was therefore not a person who was likely to act, in the event of return to China, in a manner that would bring her to the attention of the Chinese authorities. The FTT did not consider the appellant to be a person who had a genuine desire to practice her religion openly in such a manner as to give rise to a protection need. She therefore could not be a person who would genuinely refrain from doing so for fear of persecution. Further and in any event, not every restriction on the manner in which one practices a religion is persecution. Whilst restrictions on activities at the core of a protected right will amount to persecution, restriction on activities at the margin will not, particularly in respect of the protection of characteristics that are not immutable: *HJ (Iran)*, Dyson JSC at paragraphs 113-115, Lord Hope at paragraph 35, Lord Rodger at paragraph 72. If the appellant has a genuine desire to practice her religion openly in a manner that will bring her to the attention of the Chinese authorities, that manner of professing her choice of religion lies at the margins of her religion. Proselytising may be part of the religion of

Eastern Lightning but the evidence does not support a conclusion that the hundreds of thousands of Eastern Lightning members (presumably practising their religion in the way that members do practise it) face persecution by the Chinese state. The appeal should be refused.

Discussion and decision

[23] The issue for this court is whether the UT erred in law. Permission to appeal having been granted, we are no longer concerned with the additional criteria set out in Rule of Court 41.57 (2).

[24] The appellant's claim that she should not to be returned to China depends upon her establishing that she is a refugee and therefore entitled to asylum.

[25] Notwithstanding the making of Council Directive 2004/83/EC, which has the object of laying down minimum standards for those in need of international protection, and the partial transposition of that Directive by the United Kingdom in terms of the Refugee or Person in Need of International Protection (Qualification) Regulations SI 2006/2525, the definition of refugee remains that contained in article 1A of the Geneva Convention of 1951 Relating to the Status of Refugees, as amended by the Protocol to the Convention of 1967. A refugee is any person who:

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protections of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"

Thus, the issue for the FTT was whether the appellant had established what she claimed: that as a Chinese national and an adherent of Eastern Lightening she had a well-founded

fear of persecution for reasons of religion should she be required to return to China. The FTT found on the evidence that the appellant had failed to establish what she claimed. However, it is now accepted on all sides that the FTT determination was flawed in that it had failed to consider that aspect of the appellant's case which was based on the proposition that, irrespective of her previous individual experience with the Chinese authorities (or lack of it), the appellant was at risk of persecution by reason of her membership of Eastern Lightening and nothing more than membership (referred to in submissions as "mere membership" or "membership *per se*"). Parties are agreed that the UT determination is to be read as including the implicit acceptance that the FTT had erred in law in this respect. The significance of this is that the UT was exercising the appellate jurisdiction conferred by sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007; appeal to the UT is on any point of law arising from a decision of the FTT. When exercising this jurisdiction the UT may, but is not obliged to, set aside a decision in the event that it finds the FTT has made an error in law; hence the approach of the UT in the present case. Starting with an implicit acceptance that the FTT had failed to consider the appellant's contention that she was at risk of persecution by mere membership of Eastern Lightening, with a view to determining whether the accepted error of the FTT had been material, the UT embarked on its own assessment of the available evidence in order to determine whether that proposition had been made out.

[26] As we have already noted, the UT concluded on its review of the evidence that

> "any failure to draw a distinction between groups which were unregistered and those which have been specifically banned did not amount to a legal error such as to require the decision to be set aside."

It did so because what it took from the evidence was that however Eastern Lightening may be described and whatever its precise legal status in China, given what actually happened in

practice its members did not have a well-founded fear of persecution simply by reason of their being members; members were in a similar position to that of members of other unregistered churches or ordinary Falun Gong practitioners.

[27] The appellant invites us to find that that conclusion discloses error on point of law. We accept that it does; and that on two bases. First, we do not consider that the UT has given adequate reasons for rejection of evidence apparently supporting the appellant's contention that mere membership of Eastern Lightening does indeed give rise to a well-founded fear of persecution. Second, the UT did not address the consideration that as an adherent of Eastern Lightening, as the appellant had been found to be, she would be suffering from persecution were it to be necessary for her to abstain from the open practice of her religion in order to avoid the adverse consequences of not doing so.

[28] It is uncontroversial that the UT decision, which was a judicial decision, required to be adequately reasoned. Thus, as a decision requiring an assessment of facts, it was necessary for the UT to demonstrate that it had had regard to the relevant evidence and, where evidence was not accepted or not given weight, to explain in sufficient detail why that was so. As Lord Glennie said when giving the opinion of the court in *MSYZ* v *Secretary of State for the Home Department* at paragraph [43], a detailed analysis is not required. However, there must be enough to disclose the decision-making process. In the present case the determination of the UT does not specifically address two sources of evidence: first, Professor Bluth's opinion and, second, the respondent's guidance as provided in CIGCC 2014. Accordingly, one cannot know what it made of them. We see that as material. Strictly, it was not relevant for Professor Bluth to express an opinion on the question of risk of the appellant facing persecution, that was for the tribunal, but in paragraph 2 of the report headed "Expert Country Opinion: China", the professor sets out a

basis upon which he might be accepted as someone having special knowledge of conditions in China which, as he explains in paragraph 4, he has augmented by specific research into Eastern Lightening and similar cults. He would therefore appear to be an appropriate source of evidence on how those identifying themselves as members of Eastern Lightening are in fact treated by the Chinese authorities. We have already noted the passage in Professor Bluth's report where he expresses the view that there is a general risk for all members of Eastern Lightening of persecution by China's authorities. That is effectively restated in the professor's conclusion at paragraph 6 of the report. While the passage at paragraph 5.3.11 and the conclusion are of the nature of expressions of opinion and therefore beyond his strict remit, Professor Bluth supports his conclusion by his references to a number of more factual points: a history of persecution of Christians (paragraph 5.3.1), the current regulation and supervision of official religions (paragraph 5.3.2), evangelism (and therefore visible public engagement) being one of the key missions required of every Christian (paragraph 5.3.5), the prohibition of proselytizing (paragraph 5.3.7), and proselytizing being one of the most fundamental duties of a member of Eastern Lightening and something considered by the Chinese authorities as a major threat to public order (paragraph 5.3.9). These points as well as the conclusion reached by Professor Bluth are at least consistent with the guidance in CIGCC 2014 which, as it will be recollected, includes the information that: "Members of unregistered Protestant groups that the government arbitrarily deems 'evil cults' are the most vulnerable to detention, arrest and harassment."

[29] Professor Bluth's report and CIGCC 2014 formed only part of the evidence before the UT. It was open to the UT to reject them or give them little weight, but *ex facie* they gave substantial support to the appellant's claim. Accordingly, the UT was required to give them careful consideration and to demonstrate in its reasoning what the result of that

consideration had been. It is no exaggeration to say that there is simply nothing of that sort in the UT's determination. Mr Webster, on behalf of the respondent, put forward his rationale for the UT's conclusion. We mean no disrespect to Mr Webster when we observe that it was his rationale and not necessarily the rationale of the UT. It was for the UT sufficiently to explain itself. We do not consider that it did so.

[30] That is sufficient for our decision but we also accept that the UT has not demonstrated that it had regard to the principle which is to be derived from *HJ (Iran)* v *Home Secretary*. At paragraph 19 of its determination the UT observes that the appellant "had not engaged in crime, preached the apocalypse or otherwise drawn the wrath of the authorities and was not likely to do so." Now that, on the evidence, might be an accurate statement, but if the UT attached significance to it, as it would appear that it did, it was necessary for it then to ask itself the question why the appellant would not be likely to do anything to draw "the wrath of the authorities". If the answer was that she would act in this way in order to avoid the persecution that would follow if she did not, then she satisfies the criteria for asylum. There is nothing in the UT determination to indicate that it turned its mind in this direction. We recognise that there may be aspects of religious practice which can be foregone without materially impinging on the right which the Refugee Convention is intended to protect (the core/marginal distinction discussed in *RT (Zimbabwe)* v *Secretary of State for the Home Department*). However, because the *HJ (Iran)* principle does not appear to have been considered, that point was not reached by the UT. Accordingly, on this matter as with Professor Bluth's report and CIGCC 2014, we would see the UT's decision as having proceeded on an error of law.

Disposal

[31] Our finding that the UT's decision proceeded upon error on point of law does not of course involve any determination, one way or the other, of the factual question of whether the appellant would be at risk of persecution if she returned to China. That question awaits lawful decision. We will therefore allow the appeal and remit to a differently constituted UT to reconsider that question. We were reminded by Mr Webster that it is open to the UT to constitute itself as a tribunal of first instance for that purpose. However, we leave it to the UT, with the assistance of parties, to determine the appropriate procedure to be followed.