Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03042/2020

THE IMMIGRATION ACTS

Heard at Manchester CJC (via Microsoft teams)	**Decision & Reasons Promulgated**
On 22 November 2021	**On 29 November 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CQ
(Anonymity direction made)

Respondent

Representation:
For the Appellant: Mr McVeety, a Senior Home Office Presenting Officer.
For the Respondent: Mr S Khan, instructed by Queens Court Law.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Joshi ('the Judge') promulgated on 11 November 2020 which the Judge allowed CQ's appeal on protection and related human rights grounds.

Background

2. CQ is a citizen of China born on 10 October 1991 who entered the United Kingdom on 23 October 2017 when he claimed asylum. CQ attended a screening interview on 25 October 2017 and was granted temporary admission to report on 1 November 2017 for his asylum interview but absconded. That claim was implicitly withdrawn on 2 February 2018.
3. On 11th February 2019 CQ was arrested by the police when he assaulted his wife in the street leading to his conviction for inflicting grievous bodily harm on her, on 17 July 2019, for which he was sentenced to 18 months imprisonment.
4. On 1 August 2019 the Secretary of State made a decision to deport CQ following which on 19 August 2019 he re-claimed asylum and asserted his removal from the United Kingdom will be contrary to his human rights. The asylum and human rights claims were refused on 26 March 2022, and it is the appeal against that decision which came before the Judge.
5. Having considered the documentary and oral evidence the Judge sets out findings of fact from [28] of the decision under challenge.
6. There are a number of issues of concern arising from this determination.
7. Permission to appeal was granted to the Secretary of State by another judge of the First-tier Tribunal on 3 December 2020 the operative part of the grant being in the following terms:

> 2. The grounds assert that the Judge erred in his assessment of credibility by failing to give adequate reasons; by misdirecting himself with respect to section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the 2004 Act); by placing weight on a document which was never produced; by failing to have regard to all deal with inconsistencies in the appellant's evidence with regard to contact with his wife and a snakehead gang he claims facilitated his departure from China.

8. The Judge accepted CQ's claim was credible. Part of this claim was that CQ's family owned 2 acres of land but in 2013 his family faced a land dispute whereby their home was confiscated by the Chinese authorities together with 1 acre of land. The family submitted a petition to reclaim the land but were never compensated for the loss of the land. In August 2017, the remaining 1 acre was confiscated and he and his family were left with no home or compensation. CQ states on the day the property was demolished the police arrived and he together with five friends attempted to resist the demolition. CQ claims he and his friends were beaten by the police after which he ran away. CQ also claims the police came to look for him and his friend who had fled and that the two other friends who had participated in the demonstration had not been seen since they were arrested. CQ claimed he keep away for two months by maintaining a low profile, during which he was told by his wife that he was wanted by the Chinese authorities who had offered a reward of 50,000 rmb to anyone who was able to find him. CQ claimed his life was in danger therefore and therefore he had no alternative but to contact a member of the Snakehead gang. CQ claimed he borrowed money from a relative amounting to £20,000 to pay the gang member, Biao, as a result of which he caught a flight from China to Spain from where he came to the United Kingdom. CQ claims that authorities in China have

placed a wanted noticed against him offering the equivalent of a £10,000 reward and claiming there had information that he was fleeing to the UK.

9. In so accepting the credibility of the claim the Judge fails to deal with a number of issues. The first is that identified at [78] of the refusal letter that the claim the family owned 2 acres of land cannot be true as all land in China was at the relevant time owned by the Chinese State with rural land sometimes being managed by local committees. CQ claims to have lived in a village. There is no indication the Judge considered this evidence or factored it into the decision-making process when accepting the credibility of CQ's account.

10. CQ's account of having the family home seized and not receiving what was considered adequate compensation is supported by the country information which refers to such events, but that does not necessarily mean the claim is true. Similarly the reaction of the authorities to anybody opposing land clearance is recorded in the country information, but that does not necessarily mean claim is true.

11. The Judge was required to analyse the evidence as a whole to ascertain whether CQ had established that his claim was credible.

12. The first document in time considered by the Judge was an earlier entry clearance application made in 2015 which suggested it was made by CQ but which was refused by an Entry Clearance Officer (ECO) as it was supported by false documents. At [31-32] the Judge writes:

> 31. He was with his cousin in 2015 and he asked him to go to the centre and take his photo and the appellant agreed. He states that the application was not for him and his wife but it was probably made by his cousin for his use. He states that his cousin wanted to come to the UK, the appellant agreed to lend him his passport and he is not sure what happened after that. He states that in the end his passport was lost and he applied for a new passport in 2015. Ms Kugendran submitted to the appellant and his wife had been trying to come to the United Kingdom since 2015 and the current asylum claim is another attempt to do so. She also submitted that the couple have colluded to make certain asylum claims and that he is likely to still be in contact with her. I note that the appellant has contended that his work at that time was as a fork lift driver and not as a salesman as described in the 2015 visa application. I have also noted that the address given for the appellant is not the same address as that referred to in his witness statement. I believe that if the appellant wanted to come to the UK, he could have given his correct address and employment details and the details provided may be his cousins details. I am also not persuaded that the appellant and his wife have colluded to make an asylum claim. I find it more likely that he has not been in contact with her as a result of his bail conditions.
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> 32. I therefore find it plausible that the appellant may have lent his passport to his cousin. In any case, the 2015 visa application was two years prior to the events that the appellant claims occurred and if the appellant was determined to come to the United Kingdom, he could have appealed or reapplied sooner than 2017. He was also questioned about why he had not claimed asylum when he was in Spain for over 10 days and also why he had absconded after the initial asylum claim. I am persuaded by the appellant's statement that he was being controlled by Biao and his associates. When he was released from the screening interview, he claims that members of another Snakehead gang took him and kept him in the house to undertake work such as rolling up cigarettes. They did not allow him to leave the house and he therefore was unable to comply with the reporting requirements. I find that this is credible because I do not see why the appellant would deliberately abscond and not wish to pursue his asylum claim, after having submitted the claim without waiting for a response or decision on his claim.

13. There is merit in the Secretary of State's argument that the Judge failed to properly consider the significance of the 2015 visa application even if the chronology shows it occurred two years prior to the time he came to the United Kingdom. The Judges comment that if the application was made by CQ she would have expected him to have appealed the refusal fails to identify if a person was able to appeal a refusal of entry clearance made in 2015. If CQ did make the visa application this shows a clear intention/desire to come to the UK using false documents prior to the alleged issues that he claims are the reason he came to the UK as he had to flee China. This undermines the credibility of his claim in this regard. If, as found by the Judge, it is an application made by a cousin there is merit in the claim CQ's own account demonstrates a fraudulent application being made in relation to which he was a willing participant for monetary gain, by providing his documents and attending a photographic session in connection with such an application, which demonstrates a propensity to deceive which, logically, supports an adverse credibility finding rather than what appears to have been found by the Judge is a positive part of the credibility assessment.
14. The Judges finding CQ failed to claim asylum in Spain and absconded and abandoned his claim in the United Kingdom as a result of it being accepted he was being controlled by a snakehead appears not take into account an important piece of evidence contained in CQ's asylum interview, and referred to in the Reasons for Refusal letter, where at questions 94 to question 95 CQ was asked whether he had any more contact with the Snakehead to which he replied *"Not ever since. He advised me as soon so I got on the aeroplane I should delete all contact details with him; I did, all of it"*. It is not clear what evidence the Judge was placing reliance upon, that was credible, of ongoing influence when CQ admitted to having no further contact with the person who allegedly arranged his journey to Spain and from there to the United Kingdom.
15. The Judge's comments in response to submission by the Presenting Officer in relation to the weight that should be placed upon CQ's failure to pursue his asylum claim and his becoming an abscond, as set in the grounds, are irrational. It is well known within this field that many claim asylum on arrival but then abscond. If they have no documents proving an entitlement to enter the United Kingdom they will be faced with a choice which is either to be returned back to their country of origin, in this case China, or to explain the presence such as by making a claim for international protection which enables them to remain in the United Kingdom even on temporary admission pending a later examination of the claim. There is merit in the Secretary of State's claim that a reading of the determination suggests the Judge completely discounted or failed to recognise this well-documented practice.
16. The Judge specifically finds there was no evidence of collusion between CQ and his wife based upon a finding that it is more likely that not that he has not been in contact with her as a result of his bail conditions. The problem with this finding is that it is completely contrary to the evidence recorded in the reasons for refusal letter at [57 (hh)] that CQ had as recently as a week before his asylum

interview spoken on the telephone to his wife and was intent on further contact with her in the future.

17. In relation to the 'Wanted Notice' the Judge records at [33]:

> 33. Ms Kugendran questioned the appellant about the 'wanted' notice he had received. He claims that it is a public security notice, that he is wanted by the authorities. He states that he received this notice in United Kingdom, his wife's aunt who is in Spain saw the message and sent it to him. The respondent has submitted that no weight should be attached to the notice. The appellant contends that the 'wanted' notices referring to embezzlement but that is not true. He states that the Chinese authorities have fabricated that he has committed an offence of embezzlement in order to persuade someone to report his whereabouts and return him to the People's Republic of China. He submits that he will be detained and harmed as he will be viewed as opposing the government's regime, I have attached slight weight to the evidence of the 'wanted' message, and this together with the appellant's plausible explanations of the events that led him to apply for asylum add overall weight to his credibility.

18. The copy of the 'wanted 'notice seen by the Judge appears to be an item appearing on a social media chat forum. Other than this the Judge has seen no evidence of any such document being issued. The document does not appear on the face of it to have been issued by an official organisation within China. There appears no reason why CQ should be charged with embezzlement, other than through the placing of a false charge which the country information indicates may occur. There appears a lack of any credible explanation for how if CQ is wanted by the authorities for demonstrating and obstructing a land clearance, that he was not arrested at the time that he was encountered by the police who were allegedly beating him. The country material refers to individuals being arrested and detained on such occasions. There also appears no consideration of the fact that, as recorded in country information, disputes such as that relied upon by CQ which he claims was in relation to a local land issue, are rarely of concern to the central authorities controlling the whole of China. It is not made out they represent a threat to the Communist Party or the State in China and are purely local issues concerning the activities of a local committee. The appellant claims that the land was cleared and sold for the setting up of a school. It is clearly a local issue which undermines CQ's claim that he is wanted by the central authorities. This issues do not appear to have been properly considered by the Judge.

19. The Judge's comment an individual is not required to claim asylum in the safe first country in which they arrive is, as a general statement, completely wrong. There is an expectation to do so in refugee law and this the foundation of section 8 of the 2004 Act. CQ arrived in a safe country, Spain, where he remained for 10 days during which time he had claimed to have no contact with the Snakehead he left China, yet he failed to claim asylum. It is noted CQ refers to the presence of a relative in Spain.

20. Whilst CQ claimed asylum on arrival in the UK he failed to provide any credible explanation for why he could not have done so in Spain.

21. There is also merit in the assertion the Judge failed to factor into the assessment the fact that if CQ's claim was genuine he did not seek protection at the point he now says he escaped control of the snakeheads in the UK in 2018, instead of

waiting until he was faced with deportation. CQ's failure to claim asylum even on his own account once he was free from any control is a relevant factor. Although Mr Khan submitted on CQ's behalf that he had no documents and having only been able recently to gain his freedom it was an understandable action, this does not provide an explanation. CQ was clearly able to live some form of life and move about openly in the UK. The Crown Court sentencing remarks show that both CQ and his wife were on a public street when the assault occurred and that they had been drinking. CQ must have had the money to be able to buy alcohol for he and his wife to drink together, which indicates he must have a source of income. There was no answer to this specific criticism which the Judge fails to factor into the assessment; including the point that the asylum claim resulting in the decision under challenge was only made once CQ was aware he is facing deportation.

22. In relation to the Rule 35 report, the Judge finds at [40]:

> 40. I note that there is no medical-legal report in relation to the claim by the appellant that he was beaten by the police in Fuqing and that he was beaten by members of the snakehead gang in the United Kingdom. However, Mr Khan has referred me to the Rule 35 Detention Centre Rules 2001 report, contained at page 19 of the appellant's bundle. Dr Sayed concluded that the appellant has scars which may be due to the history he has given (at page 23 of the appellant's bundle). He has also confirmed that the appellant suffers from depression, nightmares, flashbacks and anxiety which appears to have deteriorated whilst in detention. The respondent has submitted that less weight should be attached to this report because it is not a medico-legal report. Mr Khan has submitted that some weight should be attached to the report. I accept that it is not a medico-legal report but it is still evidence that I am able to take into account in arriving at my decision. She Rule 35 report is persuasive because the appellant has been examined by an independent doctor who confirms that he has injuries which indicate to a reasonable degree of likelihood that the appellant has experienced some violence and torture.

23. Rule 35 requires a report to be issued by the detention centre GP in three circumstances:

> (1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
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> (2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
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> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.

24. Rule 35 is essential because, if operated correctly, it provides a mechanism by which detention centre staff can notify the officials who make detention decisions that a particular person is vulnerable. A Rule 35 report is therefore not a medico-legal report.

25. Whilst the Judge refers to the report its content is very limited containing the following account provided by the appellant "*He was attacked in 2017, Collindale, London. He was beaten by members of the Snakehead gang who had promised to pay him to rollup cigarettes. He refused to work when they refused to pay him. He was beaten by*

three men with a glass which broke on his arm, he was punched in kicked him. He was beaten for an hour." There is a diagram noting the positioning of scars and lacerations following which in Section 6 assessment it is written, as noted by the Judge, that the presence of scars together with the appellant's claim to be suffering from depression etc, that the conclusion in the opinion of Dr Syed is that continued detention would lead to deterioration in the CQ's mental health due to the history given the nature of being detained with an unknown status.

26. There is no analysis compliant with the Istanbul Protocol in relation to the scars or other physical injuries or any detailed assessment by reference to an accepted international standard by a psychiatrist or psychologist supporting the claim of mental health issues. That is not the purposes of the Rule 35 report and without a proper and correct analysis of the core of the claim it is hard to see how the Judge can conclude that report indicates to a reasonable degree of likelihood that CQ has experienced violence and torture.

27. It cannot be said the errors of fact noted above was yours are concerns relating to the decision not material. It cannot be said at this stage that if such matters were resolved the decision would be the same. For that reason I find the identified errors of law material to the decision to allow the appeal.

28. Both advocates submitted that if it was found in decision is infected by legal error for the matters set out in the grounds it would be appropriate for the appeal to be remitted to the First-tier Hearing centre at Hatton Cross to be reheard by another judge de novo. I accept that submission as it is clear that the basis on which the Judge concluded CQ's claim is credible is so undermined by the identified faults that it cannot stand. I therefore set the decision aside in its entirety. On the next occasion another judge shall be required to examine all the evidence with the required degree of anxious scrutiny and to make sustainable findings supported by adequate reasons.

Decision

29. The Judge materially erred in law. I set the decision aside. This appeal shall be remitted to the First-tier Tribunal hearing centre at Hatton Cross to be heard by a judge other than Judge Joshi *de novo*.

Anonymity.

30. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……. Dated 23 November 2021
Upper Tribunal Judge Hanson