



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/02425/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 9th March 2015**

**Decision & Reasons Promulgated
On 23rd April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**MS XL
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Rutherford of Counsel
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion and to be consistent I shall continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant's representative has requested anonymity in this appeal in view of the appellant's mental illness. On that basis, and without objection from the respondent, I make the following direction:

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.

Background

3. On 12th June 2014 Designated Judge of the First-tier Tribunal R C Campbell gave permission to the respondent only to appeal against the decision of Judge of the First-tier Tribunal Tully in which she dismissed the appeal on asylum grounds but allowed it on humanitarian protection grounds against the decision of the respondent to refuse asylum and humanitarian protection to the appellant, an adult citizen of China. The appellant was, nevertheless, granted discretionary leave by the respondent to 27 September 2016 and so appeal rights were restricted by operation of Section 83(2) of the Nationality, Immigration and Asylum Act 2002.
4. The appellant renewed her application for permission to appeal to the Upper Tribunal but this was refused by Upper Tribunal Judge Kebede on 7th July 2014 on the basis that the appellant's application amounted to no more than a disagreement with the judge's adverse findings of fact in relation to the asylum element of the appeal.
5. At the hearing in the Upper Tribunal before me I heard submissions relating to the claimed error on a point of law and then, having concluded that the decision contains such an error, proceeded to re-make the decision hearing further submissions from the parties.
6. The appellant was not present for reasons said to be associated with her mental condition which had also led to her not being present at the hearing before the First-tier Tribunal. Neither representative objected to the matter proceeding in her absence.

Error on a Point of Law

7. The grounds of application by the respondent contend that the judge wrongly conflated a potential breach of Articles 3 and 8 with humanitarian protection grounds on the basis that the appellant would not receive the care required to protect her from self harm which, following the decisions in *Pretty* [2002] 35 EHRR 1 and *N (Kenya)* [2004] UKIAT 00053 would potentially breach Article 3. It is argued that self-inflicted harm does not come within the confines of "serious harm" as set out in paragraph 339C of the Immigration Rules. Humanitarian protection does not extend to protecting an individual against harm they may do to themselves. It is contended that the appropriate avenue for such protection is to be found in Articles 3 and 8 neither of

which are arguable in this case where the appellant has leave to remain until September 2016.

8. Mr Harrison confirmed that the respondent relied upon the grounds which I have summarised. He argued that the appellant was someone with a medical condition and so did not come within the meaning of serious harm in paragraph 339C of the Rules or Article 15 of the Qualification Directive.
9. Ms Rutherford relied upon her skeleton argument. She also conceded that there was no case law, as yet, to cover the position of any overlap between humanitarian protection and a human rights claim. Further, she conceded, along with Mr Harrison, that there could be no consideration of the appellant's human rights at this stage because of the operation of Section 83(2) and also because the appellant is not at risk of removal until 2016. The skeleton emphasises that the appellant suffers from psychotic illness which makes her vulnerable if returned to China where, because of failures in state care, she would be at acute risk of relapse and would be unable to look after herself and extremely vulnerable to exploitation. On this basis there is the real risk that the appellant will face serious harm of the kind defined in Article 15 of the Qualification Directive which is quoted as follows:

“Serious harm consists of:

- (a) death penalty or execution; or
 - (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
 - (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”
10. Ms Rutherford relies upon the definition in paragraph 15(b) covering “torture or inhuman or degrading treatment ...”. She further contends that, as Article 3 of the ECHR covers that kind of ill-treatment and because, in *Pretty*, the risk of suicide and self harm was said to be covered by Article 3, it follows that Article 15(b) covers suicide and self harm. She further argues that the Qualification Directive does not limit the application of Article 15 to serious harm caused by state actors because Article 6 of the Directive allows for such non-state actors if it can be shown that the state is unable or unwilling to provide protection. On this basis she contends that the state would not protect the appellant from becoming acutely ill.

Conclusions

11. I am not satisfied that the provisions of Article 15 of the Qualification Directive (which is incorporated into paragraph 339C of the Immigration Rules) can offer protection to an individual who is not a refugee who may suffer a reduction in the standard of medical treatment available to her if returned to China with a psychotic illness.
12. Ms Rutherford raises the argument that, because, in *Pretty*, it was decided that risk of suicide and self harm can be covered by Article 3 of the ECHR which prohibits torture, inhuman and degrading treatment it follows that such serious harm must also

be covered by Article 15(b). However, the decision in *Pretty* predates the Qualification Directive (2004/83/EC of 29th April 2004) by almost two years and there has been no subsequent decision or rule change to harmonise the decision in *Pretty* with that Directive. Further, it is important to note that the sad circumstances of the *Pretty* case related to someone who was seeking the right to end their life to avoid suffering yet the ECHR found there was no violation of Article 3 of the Convention where a State did not permit aided suicide. This has to be contrasted with the situation envisaged in Article 15(b) which requires torture or inhuman or degrading treatment or punishment of an applicant in the country of origin. This does not, in my view, encompass the consequences of inferior medical treatment for mental illness which the appellant might face on return to China. I am not satisfied that such inferior treatment can be categorised as “inhuman or degrading treatment” on the basis of the objective material which was examined by the First-tier Judge from paragraph 28 of her decision. Certainly, the appellant is not an activist or petitioner who would be committed to a psychiatric hospital or involuntary treatment as some of the report suggests.

13. Although the First-tier judge’s motive for trying to bring the appellant’s state of health within the Qualification Directive is understandable, she was, in effect, trying to deal with the appeal on human rights grounds which was not permissible by virtue of Section 83(2) of the 2002 Act as clearly explained in reported decisions particularly *JC(Ethiopia)* [2005] UKIAT 00030.
14. I therefore conclude that the judge erred in bringing the appellant’s mental illness within the humanitarian protection provisions of the Qualification Directive when this is a matter which should be considered as part of a human rights claim which cannot, as yet, be brought in this appeal as the appellant has leave to remain until 2016.

Notice of Decision

The decision of the First-tier Tribunal to dismiss the asylum appeal shall stand.

The decision of the First-tier Tribunal to allow the appeal on humanitarian protection grounds shows an error on a point of law. I re-make the decision by dismissing the appeal on that basis.

Signed

Date

Deputy Upper Tribunal Judge Garratt