Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00995/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008	**Decision & Reasons Promulgated**
On 17 June 2020	**On 02 July 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

Z L
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

This decision has been made without a hearing, pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008

DECISION AND REASONS

Introduction

1. The appellant is a citizen of China. His wife and young son are also citizens of that country. They are dependents on him in respect of these proceedings.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Agnew ("the judge"), promulgated on 18 February 2019, in which she dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims.

3. Following that decision, the appellant unsuccessfully sought permission to appeal from the First-tier Tribunal and then the Upper Tribunal. The decision of the latter was challenged by way of judicial review proceedings. A Joint Minute was submitted by the parties and, by an Interlocutor dated 12 February 2020, the Court of Session reduced the decision of the Upper Tribunal to refuse permission to appeal. Following this, the Vice-President granted permission to appeal on 10 March 2020.

4. Before the matter could be listed for an error of law hearing, the Covid-19 pandemic took hold and all listings were temporarily suspended. Directions were sent out to the parties on 1 May 2020. The stated provisional view of the Vice-President was that the questions of whether the First-tier Tribunal had erred in law and, if it had, whether the decision should be set aside, could be fairly determined without a hearing.

5. The appellant filed and served submissions, dated 11 May 2020. The respondent filed and served a response on the 19th of that month. A reply was received from the appellant on 28 May.

6. During the course of the appellate proceedings, the appellant had been accepted as a victim of trafficking. However, the respondent had refused to grant him a period of discretionary leave to remain. This decision was challenged by way of judicial review proceedings. In an Opinion dated 14 May 2020, the Court of Session reduced that decision and ordered that the respondent make a fresh decision on the question of discretionary leave (ZL [2020] CSOH 44). The essence of the Court's Opinion was that the respondent failed to lawfully consider evidence relating both to the risk of the appellant being re-trafficked if returned to China and the provision of appropriate treatment for his son (who suffers from a complicated form of epilepsy known as Myoclonic astatic epilepsy).

7. As a consequence of this, the respondent decided to withdraw her decision to refuse the appellant's protection and human rights claims. It was said that the appellant's circumstances as a whole should be reconsidered. The response of 19 May 2020 focused entirely on this point, with the assertion that the Upper Tribunal should not proceed to determine the question of whether the First-tier Tribunal had erred in law.

8. Following further correspondence, the appellant stated that he did not want to withdraw his appeal to the Upper Tribunal and requested that the Tribunal reached a decision on the error of law issue.

The first procedural issue: withdrawal

9. On a purely technical point, the Tribunal has not, as far as I am aware, received formal notification from the respondent that she has indeed withdrawn the refusal of the appellant's protection and human rights claims. However, in the circumstances I am prepared to accept the assertion made in the written submissions is to this effect.

10. The appellant's submissions make reference to guidance published by the respondent in respect of the withdrawal of decisions ("Withdrawing Decisions", version 3.0, dated 6 February 2020). At page 5 of the guidance, it is stated that:

> "A decision should only be withdrawn with a view to granting leave. You do not have to be certain that leave will be granted, but you must be genuinely of the view that it might."

11. After being asked for clarification as to the respondent's reasons for withdrawing the decision and the prospects of the appellant being granted leave to remain, an email response was received including the following passage:

> "The respondent can confirm that following the withdrawal of the decision, the matter has been allocated to a decision maker who is looking into this next week and a fresh decision should follow. The respondent cannot currently confirm that the reconsideration would definitely lead to a grant of some form of leave at this stage."

12. The position remained ambiguous and I asked for further clarification. In an email dated 28 May 2020, the respondent replied that:

> "As referred to in my previous correspondence, the decision was not withdrawn with a view to grant the appellant leave, but it was withdrawn so that a consistent decision can be made with the parallel decision in respect of the leave to remain decision. This does not mean that a reconsideration will automatically lead to a refusal either, as both reconsiderations are being made on the basis of previously submitted and fresh evidence as well as the views on Lord Armstrong. If either reconsideration leads to a grant of leave, this will clearly impact the other and therefore it was considered that the most sensible and pragmatic way in dealing with both decision was to reconsider them both, in light of Lord Armstrong's decision, any fresh evidence and the latest case law."

13. In my view, the approach taken by the respondent does not reflect her own guidance on withdrawing decisions.

14. In considering the appropriate course of action, I also take into account the fact that the appellant's challenge to the decision of the First-tier Tribunal involves issues beyond solely the medical condition of the son.

15. It is the case that the respondent's withdrawal of the underlying decision which led to the appeal be made under section 82 (1) NIAA 2002 does not require consent from the Tribunal order to be effective. However, following such a withdrawal, the Tribunal retains jurisdiction to decide the appeal in any event (see SM (withdrawal of appealed decision: effect) Pakistan [2014] UKUT 64 (IAC)).

16. In all the circumstances, I consider it appropriate to proceed to determine questions of whether the decision of the First-tier Tribunal is vitiated by error of law and, if it is, whether it should be set aside.

The second procedural issue: reaching a decision about a hearing

17. The issues before me have been clearly identified by the appellant. I have all of the relevant evidence referred to by the judge and in the grounds of appeal on file. Nothing has risen from the parties' respective written submissions which requires me to direct a hearing to take place. In respect of those submissions, the respondent did not address the question of whether a hearing should take place. On the appellant's side, reference is made to a hearing, but as I understand it, this is in the context of any re-making decision which might follow from a conclusion that the First-tier Tribunal erred in law and that its decision should be set aside.

18. Having regard to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the overriding objective, the parties' submissions, and the nature of the issues in this appeal as a whole, I have concluded that it is appropriate to reach a decision on whether the First-tier Tribunal erred in law without holding a hearing.

The judge's decision

19. In a detailed decision, the judge did not go behind the conclusion of the Competent Authority that the appellant was a victim of trafficking. In light of this, she found that he was a vulnerable witness.

20. The judge ultimately concluded that the appellant's account of events said to underpin the protection claim was, "not plausible and [I] do not find him to be a credible witness." (See [45]). In summary, the judge deemed the following matters to significantly undermine the appellant's evidence:

i. the lack of independent corroborative evidence as regards the claimed land dispute and consequent disturbances (see [25]-[26]);

ii. inconsistencies and implausibilities regarding the claimed contact between the appellant and family members in China (see [29]-[40]);

iii. the inconsistency in the appellant's evidence as to whether he had trained as a chef in China (see [41]).

21. In light of the overall credibility assessment, the judge concluded that the appellant was not at risk of being re-trafficked, or indeed for any other reason.

22. As regards Article 8 and the appellant's son, the judge addressed medical evidence at [50]-[54]. She found that the child had been on a course of steroids, and that this had resulted in an absence of seizures. She found that the son was doing well at nursery. Having regard to country information relied on by the respondent and competing evidence from a Paediatric epilepsy nurse consultant, the judge concluded at [54] that the appellant had failed to show that appropriate medication for the child's condition would not be available in China. Following from this, she concluded that his health and development would not deteriorate on return to China and that such a return would, in all circumstances, be reasonable and not contrary to his best interests. Having proceeded through the staged approach to Article 8, the judge concluded that the removal of the appellant, his wife, and their son China would be proportionate and therefore lawful. The appeal was dismissed on all grounds.

The grounds of appeal

23. Having regard to the grounds of appeal accompanying the permission applications made to both the First-tier Tribunal and the Upper Tribunal, the broad thrust of the appellant's challenge can be divided into three elements. First, it is said that the judge's reliance on the absence of corroborative evidence was an error of law. Second, that the judge's findings as to family contact are flawed on the basis that: (i) she failed to have a look had regard to the appellant's vulnerability as a witness; and (ii), that she misapprehended and/or left out of account relevant evidence. Third, that when considering the issue of the son's medical condition and treatment if returned to China, the judge read conclusions that were not open to her on the evidence.

The parties' written submissions

24. The appellant's written submissions, dated 11 May 2020, essentially follow the content of the two sets of grounds of appeal. They focus on the appellant's vulnerability, the absence of specific corroborative evidence as regards the land dispute, the issue of the contact that the appellant claimed to have had with family members in China, and the son's medical condition. I shall deal with various aspects of the submissions (and the associated grounds) in more detail, below.

25. In respect of the respondent's written submissions, as noted previously they focus entirely on the withdrawal of the underlying decisions. No submissions are made as to the substance of the appellant's grounds or written submissions.

Decision on error of law

26. Not each and every aspect of the grounds of appeal are, on proper analysis, made out. However, having considered the challenges and the decision in the round, I conclude that there are material errors of law in

the decision of the First-tier Tribunal, and that it must therefore be set aside.

27. It is clear from [25] and [26] that the judge considered the absence of specific corroborative evidence relating to the claimed disturbances arising from the land dispute to be adverse to the appellant's case. Corroborative evidence is never a legal requirement in protection claims. Having said that, there will be cases where such evidence is legitimately said to be easily obtainable and that its absence might properly be held against an individual's overall credibility. In the present case, I conclude that the judge's expectation that reports "would have" been placed in one or more sources of media was not justified. There was no evidence to suggest that each and every land dispute in China had (or would be) the subject of media reporting or Internet posting. As far as I can see from the country information that was before the judge (and referred to in paragraph 2 of the grounds to the First-tier Tribunal), the examples of relevant land dispute/conflicts was never said to be exhaustive in nature. On the appellant's case, he had not claimed that the disturbances were particularly large-scale. Further, the judge had accepted that land disputes involving violent clashes was a widespread problem in China. There is merit in the appellant's submission that the nature of the Chinese regime is such that reporting and Internet activity is very often effectively suppressed. In light of the foregoing, the judge's adverse view of the appellant's credibility was based upon undue speculation and a failure to consider this aspect of his claim in its proper context. There is an error here.

28. I turn to the issue of the appellant's vulnerability. The judge correctly identified him as a vulnerable witness at [16]. The fact that an individual is a vulnerable witness does not mean that any adverse credibility findings are, for that reason alone, susceptible to challenge appeal (see SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC)). It is also the case that it is for the fact-finder to determine what, if any, connection there is between the vulnerability and the assessment of particular aspects of the evidence (again, see SB).

29. In the present case, the judge makes reference to the appellant's vulnerability at three points of her decision ([16], [22], and [45]) and I exercise real caution before concluding that the recognition of vulnerability was not actually applied to the assessment of the evidence. There are, however, two aspects of the appellant's evidence in respect of which the judge did not in my view adequately consider or provide reasons. The first relates to the number of times that the appellant had contacted his mother: there was an apparent ambiguity as to whether this had occurred once or twice. A the Appellant claimed that the second occasion involved indirect contact. The judge took the view that there was a material discrepancy in the evidence. The context surrounding that aspect of the evidence was that the appellant was a victim of trafficking and that the second "contact" with his mother had occurred whilst he was still under the control of the traffickers. At the hearing, the appellant was

being asked to recall events from that time. In my view, this context required particular care to be attributed to the issue of vulnerability and the possible effect this might have had on the evidence provided (whether at the hearing itself, or to the respondent previously). I conclude that on this specific issue, the judge failed to adequately consider or provide reasons in respect of the acknowledged vulnerability. In this respect, she erred in law.

30. The third and final matter to be addressed relates to the appellant's son. The central focus of the appellant's challenge is that at [54] the judge erroneously concluded that a specified type of medication that was available in China (Valproate) was an appropriate "alternative" to that being taken by the child in the United Kingdom (Sodium Valproate). The country information adduced by the respondent and upon which the judge was presumably basing her conclusion, stated that "valproic acid or valproate" was available. I agree with the appellant's grounds and written submissions that there was no evidence to show that these two alternatives were either effectively the same as the Sodium Valproate, or that they were nonetheless medically appropriate substitutes. I fully appreciate that the burden of proof rested with the appellant to prove the essential facts upon which his case rested. However, he had provided medical evidence to show what the child was being prescribed. The respondent's evidence did not specifically contradict that evidence, but at best resulted in a lack of clarity. I am satisfied that the issue of the equivalence of medication was not raised at the hearing. In all the circumstances, I conclude that there was no sound evidential basis for the judge to conclude that the medication named in the respondent's evidence was a medically appropriate alternative to that already being prescribed to the appellant's son. This is the third error of law in the judge's decision.

31. The errors discussed above go to both the protection and Article 8 claims. They relate to material aspects of the overall assessment of those claims. I conclude that they are all material. Therefore, the judge's decision must be set aside. In all the circumstances, there shall be no preserved findings of fact, save that the appellant is a victim of trafficking and that his son suffers from Myoclonic astatic epilepsy.

Disposal

32. Neither party has provided their view on what should happen were the decision of the First-tier Tribunal to be set aside. I have had regard to paragraph 7.2 of the Practice Statement and the guiding principle that remittal is the exception to the rule.

33. I conclude that the appropriate course of action is to remit this appeal to the First-tier Tribunal for a complete re-hearing (subject to the two preserved findings of fact set out above). This is in large part because of the need to re-assess the appellant's credibility as regards the protection

claim. Oral evidence is likely to be required and the fact-finding will be relatively extensive in nature.

Additional observation

34. In view of the respondent's ongoing reconsideration of the appellant's circumstances, both parties are reminded of their obligation to inform the Tribunal if the appellant is granted any form of leave to remain in the United Kingdom.

Anonymity

35. The First-tier Tribunal did not make an anonymity direction. However, in light of the usual practice in protection cases, together with the fact that there is a minor child and that the appellant is a victim of trafficking, I consider it appropriate to make a direction at this stage.

Notice of Decision

36. The making of the decision of the First-tier Tribunal did the making of an error on a point of law.

37. I set aside the decision of the First-tier Tribunal.

38. I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. **This appeal is remitted to the First-tier Tribunal;**
2. **The remitted appeal shall not be heard by First-tier Tribunal Judge Agnew;**
3. **The remitted appeal shall be concerned with both the appellant's protection and human rights claims;**
4. **The only two preserved findings of fact from the decision of First-tier Tribunal Judge Agnew are those set out in paragraph 31, above.**

Signed: H Norton-Taylor Date: 17 June 2020
Upper Tribunal Judge Norton-Taylor