



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

Appeal Number: PA/09502/2019 (P)

THE IMMIGRATION ACTS

**On the papers
on 4 June 2020**

**Decision & Reason Promulgated
On 10 June 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**XJ
(Anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge J Robertson promulgated on the 4th February 2020 in which the Judge dismissed the appellant's appeal on all grounds.
2. The appellant is a citizen of China born on 7 January 1963 who sought a grant of international protection in the United Kingdom. That application was refused by the Secretary of State.
3. The Judge notes at [17] that the appellant's claim is based upon a fear of persecution on return to China and a claim to be at risk from her son and traffickers. The Judge found the appellant's evidence not to be plausible on the basis her account of events was said to lack detail and consistency, for the reasons set out at [20] of the decision under challenge. The findings of fact are set out from [16 – 29].

4. Permission to appeal was sought by the appellant asserting (1) procedural unfairness, (2) giving weight to immaterial matters, (3) giving inadequate reasoning, (4) in failing to apply relevant country guidance.
5. Permission to appeal was granted by Upper Tribunal Judge Martin, sitting as a judge of the First-tier Tribunal, on the basis it was arguable that the Judge ought to have adjourn the hearing to await a substantive decision from the NRM on the appellant's trafficking claim given that she had a positive reasonable grounds decision and further that she ought to have been treated as a vulnerable witness.
6. In accordance with the Covid-19 proceedings adopted by the Upper Tribunal directions were sent to the parties indicating that it was considered appropriate to determine the error decision on the papers and seeking their response. No response has been received from the Secretary of State. A response was received from the appellant's representative on 3 June 2020. It is the Tribunal's view it is appropriate to determine the merits of the case on the papers at this stage as no prejudice or unfairness to either party is made out.

Error of law

7. The first point raised by the appellant's representative is that although Upper Tribunal Judge Martin said, "it is arguable that the judge should have adjourned the hearing to await a substantive decision from the NRM." This is not an argument which the appellant put forward and does not argue that adjournment pending the completion of the NRM was necessarily in the interests of justice in her case.
8. The key points relating to the assertion the appellant did not receive a fair hearing is set out in the appellants grounds in the following terms:
 5. A submits that her hearing was marred by procedural unfairness arising from the following:
 - a. As a victim of trafficking (and SSHD accepts there are reasonable grounds to suspect she is one), A is defined as a vulnerable witness by the Joint Presidential Guidance Note No 2 of 2010, page 1, footnote 2, regarding individuals who are vulnerable by definition ("some individuals are vulnerable because of what has happened to them, e.g. They are victims of trafficking");
 - b. Contrary to that guidance at [5.1], the FTTJ did not consider whether A was a vulnerable adult and/or a sensitive witness, and whether it was in the interests of justice to adjourn the hearing either for A to obtain representation, or for her to provide any corroborating medical evidence regarding her claim to have been trafficked within the United Kingdom (and hospitalised as a result), or to obtain expert evidence regarding the effect of her vulnerability on her evidence. FTTJ did not advise A of the possibility of asking for an adjournment for those reasons;

- c. Contrary to the guidance at [9], FTTJ does not appear to have identified the issues in dispute at the outset of the hearing. Having received a positive grounds decision in relation to her trafficking claim, A was awaiting a conclusive decision from the SSHD as to whether her account of trafficking that was accepted. However, there is no indication in the determination that SSHD revealed that she did not accept that account was credible until her representative made his closing submissions;
- d. contrary to the guidance at {10.1-10.2}, FTTJ appears to have taken no steps to assist the A to give her evidence on her traumatic experiences, such as asking SSHD to ask open-ended questions, hearing the matter in camera, or offering A the opportunity to ask for a break;
- e. contrary to the guidance at [10.3], FTTJ did not consider how A's vulnerability might have affected her evidence and did not record how it had affected his/her assessment of her credibility.
- f. Contrary to the guidance at [5.1], FTTJ did not ensure that the relevant Home Office policies had been disclosed - in this instance, that regarding victims of human trafficking (Victims of modern slavery - Competent Authority guidance Version 8.0). That policy would have been highly relevant to the assessment of A's evidence. E.g. it states, "**Delayed Disclosure** a key symptom of Post traumatic stress is avoidance of trauma triggers, or of those things that cause frightening memories, flashbacks or other unpleasant physical and psychological experiences. Because of these symptoms a person may be unable to fully explain their experience until they have achieved a minimum level of psychological stability. The SCA must not to view a delay in disclosing facts as necessarily manipulative or untrue. It may be the result of an effective recovery and reflection period and the establishment of trust with the person to whom they disclose the information" (compare determination para 20 (i)-(ii)); it warns against the 'myth' that a victim is not been coerced if they don't try to escape (compare determination para 20 (iii)); it states that victims accounts may be contradictory and lack detail (compare determination para 19).
- g. Neither the Home Office nor the FTTJ apparently were aware of or alerted A to the existence of relevant Country Guidance determination *HC & RC (Trafficked women) China CG [2009] UKAIT 00027* and the issues which They would therefore need to address by way of evidence for submissions.
- h. Adjudicator Guidance Note No. 5 of 2003, on Unrepresented Appellants, states that "you must give the appellant every persistence in putting his case, and tell him so" (page 3). It suggests that the SSHD be asked to explicitly identify which parts of the Reasons for Refusal letter are relied upon and the Appellant prompted to respond to the points the SSHD makes in her submissions (page 5). There is no Indic FTTJ did this, and A's submissions recorded at para 15 do not address the SSHD's arguments. There is no indication that FTTJ gave the A any assistance in putting her case at all. He/she did not self direct of the need to do so.

- i. FFTJ did not put to A his/her own concerns about the evidence, set out at para 20 (iii), and which do not appear the SSHD's decision, the summary of evidence, or the SSHD's submissions. They therefore had no opportunity to respond to them.
9. Dealing with the fairness point, the Judge was aware the appellant was not represented and that she produced a letter dated 25 November 2019 from the National Referral Mechanism (NRM) confirming that following an assessment there were reasonable grounds to conclude that the appellant was a victim of modern slavery [9]. What is missing from the decision, even if it was in the Judge's mind at the time, is any mention of the Presidential Guidance or the manner in which the Judge considered and assessed whether the appellant is a vulnerable witness and how this impacted upon the evidence given.
10. The guidelines are to enable a judge to obtain 'best evidence', taking such steps as are necessary to enable a vulnerable witness to feel able to engage in the tribunal process and to enable a proper explanation to be given as to how any vulnerability has been factored into the decision-making process.
11. The Court of Appeal reminded us in AM (Afghanistan) v Secretary of State Stayed for the Home Department [2017] EWCA Civ 1123 of the importance of the guidelines specifically stating at [30] that a failure to follow the guidance notes on vulnerable appellants will most likely be material error of law.
12. The problem in relation to this decision is that it cannot be made out from a reading of the same that the findings made by the Judge are safe. I find that for the reasons set out above the Judge has erred in law in a manner material to the decision to dismiss the appeal by failing to take into account the appellant's vulnerability and/or to explain how such has been factored into the decision-making process in according with the guidance.
13. In relation to the other grounds, the comment by the Judge that it was of note that the referral to the NRM was made by the Salvation Army and not by his solicitors is irrational as solicitors are not permitted to make referrals to the NRM as they are not authorised "First Responders" whereas the Salvation Army is. So far as the Judge gave weight to this matter legal error arises.
14. There is arguable merit in the claim in the grounds the Judge failed to give adequate reasons for a number of key findings made in the decision and, when making brief findings in the alternative, failed to take into account relevant country guidance caselaw.
15. As none of the Judge's findings can be said to be safe in light of the matters noted above the decision is set aside with no preserved findings and remitted to the First-Tier Tribunal to be heard afresh as extensive fact-finding is required applying the appropriate guidance.
16. The decision might be the same, but I find cumulatively that the procedure which was adopted was unfair and the appellant is entitled to a fair and proper hearing which she has not received to date.

Decision

- 17. The Immigration Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remit the appeal to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge J Robertson.**

Anonymity.

18. 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
Upper Tribunal Judge Hanson

Dated the 4 June 2020