



**Upper Tribunal
002541
(Immigration and Asylum Chamber)**

**Appeal No: UI-2022-
First Tier No: PA/03042/2020**

THE IMMIGRATION ACTS

**Heard at: Bradford
On: 23rd August 2023**

**Decision & Reasons
Issued
On: 22nd September 2023**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**CQ (CHINA)
(anonymity direction made)**

Appellant

And

Secretary of State for the Home Department

Respondent

Representatives:

**For the Appellant: No appearance
For the Respondent : Ms Z. Young, Senior Home Office Presenting
Officer**

ANONYMITY

The Appellant is a victim of trafficking. I must therefore make an order protecting his identity:

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify

the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a national of China born in 1991. He appeals with permission against the decision of the First-tier Tribunal (Judge N.J Bennett) to dismiss his appeal against deportation on human rights and protection grounds.

Background

2. The Appellant first entered the United Kingdom on the 23rd October 2017 when he arrived at London City Airport and claimed asylum. He did not thereafter comply with reporting conditions and failed to attend his asylum interview. He next came to the Respondent's attention when he was arrested for brutally assaulting his wife in the street. He was convicted of Grievous Bodily Harm and on the 17th July 2019 sentenced to serve 18 months in prison as a result of that attack. On the 31st July 2019 the Respondent served the Appellant with a notice of her intention to deport him. His then solicitors responded by raising protection and human rights grounds.
3. The Appellant's appeal came before Judge Joshi of the First-tier Tribunal, who allowed it on all grounds. She accepted the Appellant's claim to have come to the adverse attention of the Chinese authorities following his participation in a protest against the compulsory state seizure of land in his village. She further accepted that he was a victim of modern slavery, as did the Competent Authority by its conclusive grounds decision of the 10th December 2020.
4. The Respondent appealed against that decision, pleading that in making her positive credibility findings about events in China Judge Joshi had failed to take material matters into account. The matter came before Upper Tribunal Judge Hanson who by his decision of the 22nd November 2021 set the decision of Judge Joshi aside. Judge Hanson remitted the appeal to be heard afresh in the First-tier Tribunal.
5. The Appellant's second appeal before the First-tier Tribunal was heard by Judge N.K Bennett on the 7th April 2022. The Appellant was represented by experienced Counsel, Mr Shahnawaz Khan. Judge Bennett considered, and rejected, the Appellant's claim that he is wanted by the Chinese authorities. He found no subsisting risk to the Appellant from any of the 'Snakehead' gangs with whom the Appellant has had experience in the past. He dismissed the appeal on all grounds.
6. The Appellant has now appealed, and it is his challenge to Judge Bennett's decision that is before me today. The grounds are that the Judge had failed to give adequate attention to evidence concerning the Appellant's mental

health, and that the negative credibility findings were flawed for a failure to treat him as a vulnerable witness in accordance with the Presidential Guidance Note No 2 of 2010.

Proceeding in the Appellant's Absence

7. Before I address the grounds it is necessary that I record that the Appellant did not attend his hearing, and my reasons for proceeding without him being present.
8. This matter was first listed in the Upper Tribunal on the 17th February 2023 when it came before my colleague Upper Tribunal Judge Reeds. The notice of that hearing had been sent to the representative then on record, Queens Court Law. There was no attendance by them, or the Appellant. Upon investigation Judge Reeds established that there had been some confusion in the preparation of the appeal by Tribunal staff: she and the parties had been informed that it was the Secretary of State's appeal, when in fact it was the Appellant's (this arose when a member of staff mistakenly took the Secretary of State's old grounds, challenging Judge Joshi's decision, to be current). In addition the order granting the Appellant permission to appeal had referred to him as 'AA' which did not assist to bring clarity to the situation. As to the latter, Judge Reeds was content to proceed on the basis that the order was valid, and that the Appellant did have permission to bring his appeal. Judge Reeds was unable to make contact with the Appellant or his representative on the day, but in view of the confusion considered it to be in the interests of justice that the matter be adjourned in the hope that the Appellant would attend once these administrative errors had been corrected.
9. Between February and July 2023 Tribunal staff made repeated efforts to contact the Appellant through the offices of Queens Court Law. Although that firm had come off the record they were eventually able to supply the Tribunal with an address and telephone number for the Appellant. Direct contact was made with the Appellant by telephone on the 28th July 2023. He confirmed his address, email and telephone number.
10. Notice was given of this hearing on the 2nd August 2023. Letters were sent to the Appellant by post and email.
11. When the Appellant did not attend the hearing before me I put the matter to the back of the list and asked that efforts be made to contact him. At 11.30am a member of staff at Field House spoke with the Appellant by telephone. He informed the caller that he was aware of the hearing today but did not intend to come to court as he was in London, and had no representative. When this information was communicated to me I asked that the Appellant be contacted to clarify whether he was seeking an adjournment. Field House spoke with him once again and at 12.35 I received an email from the Appellant as follows:

“Dear Judge, I didn't show up at the court today because I don't have a lawyer, and I don't have money to pay a lawyer, so I didn't go, sorry”.

12. I did not read this as a request for an adjournment. I nevertheless considered whether the hearing could justly proceed in the Appellant's absence. I took into account the fact that notwithstanding the administrative errors relating to case preparation, the Appellant should have attended the hearing in February before Judge Reeds. It is his responsibility to keep in touch with the Tribunal and provide up to date contact details. It took Tribunal staff numerous emails and calls to find him, and there can be no doubt that he was aware of the hearing: he confirmed this to the caller from Field House. It was open to the Appellant to come to court without a representative. There was a Mandarin interpreter here to assist him, booked at his request. Given the case history it did not seem to me likely that a further adjournment would result in the Appellant's attendance at a later date. Mindful of the overriding objective, and the already lengthy delay in resolving this matter, I decided to proceed to hear Ms Young's submissions in the Appellant's absence.

The Grounds: Discussion and Findings

13. Although the Appellant was without legal representation at the date that the grounds were filed, it looks very much like they were drafted with some legal assistance. They make two interconnected points. The first is that the Appellant should have been treated as a vulnerable or sensitive witness, and the second is that more consideration should have been given to his mental health when evaluating the value of his evidence.
14. The Presidential Guidance Note No 2 of 2010 is concerned with the approach that judges of this chamber should take when dealing with children or adults who are particularly vulnerable for some reason. The guidance outlines some of the potential reasons that an adult could be classed as vulnerable, and Judges are instructed:

The consequences of such vulnerability differ according to the degree to which an individual is affected. It is a matter for you to determine the extent of an identified vulnerability, the effect on the quality of the evidence and the weight to be placed on such vulnerability in assessing the evidence before you, taking into account the evidence as a whole.

15. The importance of this guidance in ensuring the just disposal of appeals was underlined by the Court of Appeal in its judgment in AM (Afghanistan) v Secretary of State for the Home Department & Lord Chancellor [2017] EWCA Civ 1123. At paragraph 30 of Lord Justice Ryder's speech he said: “The directions and guidance contained in them are to be followed.... Failure to follow them will most likely be a material error of law”.
16. Ms Young readily agreed that Judge Bennett does not refer to the guidance, or make any express finding about whether the Appellant was vulnerable or not. She submitted however that this makes no difference, since it is evident

from the face of the decision that the measures recommended in the guidance were in fact applied, that the Appellant's vulnerabilities were given full consideration by the Judge in the way that the hearing was run, and in the way that the credibility findings were reached. In short she agreed that there was an omission, but contended that the omission was not material.

17. The guidance note does not provide an exhaustive list of what adults might be considered as 'vulnerable' or 'sensitive'. It notes that some individuals are vulnerable by operation of statute. Reference is made to section 59 of the Safeguarding Vulnerable Groups Act 2006 which gives a list of factors that would qualify an individual as vulnerable, but on the face of it none of these apply to the Appellant. The grounds argue that the Appellant should nevertheless have been treated as vulnerable because of his mental health problems, and further that those problems should have been taken into account, with in effect, the 'benefit of the doubt' being applied when evaluating discrepancies and confusions in the Appellant's evidence.
18. The difficulty for the Appellant in advancing this argument is that the evidence of his mental health problems was extremely limited. There was no medical report before the court. The only document relating to the Appellant's mental health was very brief Rule 35 report prepared when the Appellant was being held in immigration detention at the conclusion of his criminal sentence. The doctor there recorded that the Appellant had some scars, said to have been caused during an assault in the UK, and that he reported suffering from depression, nightmares, flashbacks and anxiety. No reference is made to any diagnostic tools or criteria. The report is dated 23rd April 2020. Of this report Judge Bennett found as follows:

40. I have also taken into account that the Rule 35 report, which was issued on 23rd April 2020, records that the Appellant was suffering from depression, nightmares, flashbacks and anxiety, that this had worsened since he was detained and that he had started medication for depression. However, as this report was issued about a year after his substantive interview and about two years before the hearing, it does not necessarily provide evidence that he was suffering from depression when he was interviewed or that he is suffering from depression today. I accept that, depending on its severity, depression can affect the quality of a witness' evidence but, in the absence of medical evidence about his condition at the date of his interview and at today's date, including evidence about the extent of his depression on these dates, I can only place very limited weight on this consideration. To do more would be to engage in speculation.

19. I am satisfied that this was a perfectly rational approach for the judge to have taken. Indeed to treat the Rule 35 report in any other way would itself have been irrational. At its highest the report was evidence for the fact that when the Appellant was being held at Harmondsworth, after having spent a year in prison and immigration detention and facing deportation, he told a doctor that he was feeling depressed and anxious, and that he was experiencing nightmares and flashbacks. The report does not indicate that

the doctor conducted any assessment himself of whether the Appellant met the diagnostic criteria for any condition. The report could not therefore, without more, be regarded as probative of the Appellant's mental state at the date of hearing, over two years later. I therefore reject the ground of appeal that the Tribunal's credibility findings were somehow flawed for a failure to have regard to this evidence. It is squarely factored into the reasoning, and reasonably approached.

20. Interestingly the grounds do not assert that the Appellant should have been treated as vulnerable witness because he has been found to be a victim of trafficking. I say that he has been found as such because Judge Bennett certainly appeared to accept as much, notwithstanding the rather confusing terms in which the 'conclusive grounds' decision is couched: there are conclusive grounds for believing that he "*may*" be a victim of trafficking. The Presidential Guidance Note indicates that such status is in itself a factor that could lead to a finding that an individual is vulnerable. It is therefore arguable that Judge Bennett should have considered the consequences of this finding in the way that he approached his case management, and the final decision. Notwithstanding its omission from the grounds, I regard this point as *Robinson* obvious, and Ms Young very fairly agreed that it should be addressed.
21. Proceeding on the basis that the Appellant *is* (rather than *may be*) a victim of trafficking, and proceeding on the basis that he *should* (rather than *could*) therefore be treated as a vulnerable witness, I find as follows.
22. Judge Bennett did not, as Ms Young agrees, consider or make a finding that the Appellant was a vulnerable witness. This is, to be fair to Judge Bennett, perhaps because neither the Appellant nor his representative raised the point. Although the submissions made by Mr Khan of counsel are summarised, there is no reference to this point, and the Rule 24 response drafted by Mrs Aboni on behalf of the Secretary of State asserts that there is no mention of any vulnerabilities made in the note taken by the HOPO on the day. Nevertheless, as the guidance makes clear, the Tribunal should of its own motion consider the matter, and it does not appear that Judge Bennett did so:

"The primary responsibility for identifying vulnerable individuals lies with the party calling them but representatives may fail to recognise vulnerability"
23. What are the consequences of that? In particular did the Appellant suffer any detriment to the way he was able to present his case, or in the way that his case was considered?
24. I have considered, with reference to the Guidance Note, the procedural steps that the Tribunal could have taken had it directed itself that the Appellant, as a victim of trafficking, could be considered to be vulnerable. It does not appear that the Appellant was suffering from any physical ailment that necessitated any particular arrangement in the courtroom. The Tribunal did not need to take steps to ensure that the Appellant was represented, because he had arranged legal counsel himself. He had the services of an

interpreter, and it was explained to him how to use it (paragraph 4); his counsel had no complaint about the way that the hearing was conducted, in particular he took no issue with any of the questions put in cross examination (paragraph 35). No issue was raised, either at the hearing or in the grounds, about the Appellant's ability to understand the interpreter or to otherwise follow and participate in proceedings. In the absence of any complaint to the contrary in the grounds, and given the overall competence of the determination, I assume that all parties in the room were introduced to the Appellant, and that the process was explained to him. There is no indication that there were any spectators in court who should have been excluded: given the anonymity order in place it is safe to assume that there were not. I have been unable to identify any additional procedural advantage, if I can put it like that, which the Appellant would have enjoyed had he been properly identified as a vulnerable witness at the outset of the First-tier Tribunal hearing.

25. I now consider whether any substantive unfairness arose, particularly in regards to the Tribunal's finding that the Appellant's account of events in China were unreliable. The section of the Guidance Note relied upon is at 10.3, which mandates decision makers to "be aware" that:

"The order and manner in which evidence is given may be affected by mental, psychological or emotional trauma or disability"

26. The gist of the grounds is that this injunction was not followed. I am not satisfied that this ground is made out. First of all, because the reasons that the Tribunal gives for finding the account to be unreliable centre in the main on discrepancies arising from the documents provided by the Appellant which are found to attract very little weight. His oral evidence was of minimal significance in the overall analysis. Second because it is clear, for instance at the Tribunal's paragraph 35, that the Tribunal very fairly declined to place weight on the Appellant's agitation at being asked certain questions, and his failure to give a straight answer. Thirdly because it is apparent that the Tribunal also weighed in the balance his lack of education (paragraph 39) and the Rule 35 report (paragraph 40). As the Tribunal rightly notes, the protection claim came down to a single text message, said to be a 'wanted' notice from the Chinese authorities and communicated to the Appellant by his aunt in Spain. This 'wanted' notice was completely bizarre, amongst other things offering a 'reward', presumably to Chinese nationals, in pounds sterling. I am satisfied that these findings were all open to the Tribunal on the evidence before it, and that there was no unfairness arising from the Appellant's status as a victim of trafficking. It follows that the grounds are not made out and the appeal is dismissed.

Decision

27. The decision of the First-tier Tribunal is upheld.
28. There is an order for anonymity.

Upper Tribunal Judge Bruce
23rd

August 2023