



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05614/2018

THE IMMIGRATION ACTS

Heard at Field House
On 16 September 2019

Decision & Reasons Promulgated
On 18 September 2019

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**RUI [Z]
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Vinnasythamby P Lingajorthy, legal representative with L & L
Law, solicitors
For the respondent: Mr David Clark, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal (sitting at Hatton Cross) dismissing his appeal against the respondent's decision to refuse him international protection under the Refugee Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds. The appellant is a citizen of the People's Republic of China.

Background

2. The appellant was born in [1983] in China. He was diagnosed with paranoid schizophrenia in China, in 2009, and received treatment there for the next 7 years, before travelling to the United Kingdom in August 2016 on his own passport with a valid 2-year visit visa. The appellant did not claim asylum until November 2017, over a year after he arrived here.
3. Before coming to the United Kingdom, the appellant says he was a student at Sichuan University, where claims to have had a number of ideas about technology and engineering of high speed rail and quantum satellites, which he discussed with other students. However, both of those were developed in China in the early 1990s, while the appellant was still a very young child.
4. The appellant asserts that he was monitored by the authorities in China from about 2014, and further, that his refusal to promote government-sponsored health products (Pu'er Tea) between 2013 and 2015, and his anti-government activities, resulted in tampering with the water supply at his flat, giving him stomach pains, and also in the closure of his parents' business in China.
5. The appellant did not leave China immediately. He was able to obtain a visit visa in the usual way and travel on his own passport. In the United Kingdom, his parents send him money for food and accommodation. A letter in the bundle from the Communist Party stated that he had been removed from his village branch in July 2017, due to non-attendance and non-payment of membership dues.
6. The appellant's account says that after he arrived in the United Kingdom his QQ Social account was frozen because he continued to support anti-corruption campaigns here and that he was expelled from the Communist Party for that reason. He believes that the Chinese authorities will have continued to monitor his activities here in the United Kingdom and that he will be arrested upon return to China.
7. The appellant produced medical evidence from Dr S Dhumad, saying that he has moderate depression and met the criteria for paranoid schizophrenia. He is receiving anti-psychotic medication. Dr Dhumad considered that the appellant was at moderate risk of suicide.
8. Dr Dhumad's opinion was that the appellant was unfit to testify. He was depressed, paranoid, hopeless and had poor concentration. The appellant would be unable to participate meaningfully in the hearing and was not fit to fly.

First-tier Tribunal decision

9. The First-tier Tribunal respected Dr Dhumad's medical opinion and did not ask the appellant to testify. The Judge accepted that the appellant had a subjective fear, but not that it was objectively well founded. The more florid elements of the appellant's account were ascribed by the First-tier Judge to his paranoia, there being no evidence of any real basis in fact for his alleged monitoring in the United Kingdom by the

Chinese authorities. Given the availability of medical treatment and family support in China, the Judge did not consider that there was any good reason why he could not be returned to China.

10. The appeal was dismissed, and the appellant appealed to the Upper Tribunal.

Permission to appeal

11. Permission to appeal was granted on the basis that the appellant's significant mental health difficulties had not been considered under Article 3 ECHR. First-tier Judge Boyes, when granting leave, considered that the First-tier Judge had 'seemingly not considered any risk arising as a result of the mental health issues'.

Rule 24 Reply

12. The respondent did not serve her Rule 24 Reply promptly or within time. On 8 September 2019, just a few days before the hearing, a Reply was received from the respondent, the relevant paragraph of which is in the following terms:

"3. Article 3 is a very high threshold. This is a case where the First-tier Judge does not believe the appellant's account and finds that he can return to China where he previously received medical treatment and has family support. Regarding fitness to fly and removal, it is asserted that the Home Office will manage removal at the airport and on the flight, in the knowledge of these circumstances, and assist the appellant in returning to China."

I grant permission for that Reply to be admitted out of time, but it adds very little to the arguments before me today.

13. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

14. At the hearing today, Mr Lingajorthy for the appellant relied only on the grounds of appeal drafted by Ms Sara Anzani of Counsel, which raised the following issues:

- (1) That insufficient weight was given to the opinion of Dr Saleh Dhumad that the appellant, currently presenting only a moderate suicide risk, would suffer a serious deterioration in his mental health if returned to China and that the risk of suicide would become significant in that context;
- (2) That Dr Dhumad considered the appellant 'not fit to fly' in the light of his existing mental health problems;
- (3) That it was not open to the First-tier Judge on the evidence to find that the appellant's subjective fear of return to China was not objectively well founded, nor to give weight to his ability to leave China in 2016 with a visa, on his own passport, in the ordinary way.

15. In oral submissions, Mr Lingajorthy said that the appellant remained too ill for him to be able to take any instructions from him. The appellant was in Court, as he had been before the First-tier Tribunal (when despite Dr Dhumad's report, he indicated a wish to give evidence but was not required to do so). Mr Lingajorthy said that Dr Dhumad's report had not entirely ruled out the appellant's symptoms having been caused by his paranoid schizophrenia. The appellant's witness statement said that he had been forced into psychiatric treatment in 2009 in China and that was when the persecution began.
16. Mr Lingajorthy had been provided with a recent patient care plan dated 9 September 2019 which said that the appellant was now being treated with Sertraline and that he had low mood and suicidal thoughts. He was to be reviewed in 4 weeks. That document had not been filed or served in advance and Mr Lingajorthy accepted that it could not constitute an error of fact or law in the decision of the First-tier Tribunal following a hearing on 29 May 2019. It would only be relevant if a material error of law was found.
17. Mr Lingajorthy also relied on the decision of the Court of Appeal in *Y (Sri Lanka) and Z (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362, as summarised in guidance from the Royal College of Psychiatrists entitled *CR199 Psychiatric Reports: preparation and use in cases involving asylum, removal from the United Kingdom or immigration detention*. The Court of Appeal decision in *Y and Z* was summarised therein on page 34. Mr Lingajorthy had not read the judgment itself and was unable to take me to the passages therein on which he relied.
18. Mr Lingajorthy argued that the First-tier Judge's treatment of Dr Dhumad's report was 'woefully inadequate' and reminded me of the ill-treatment being meted out in China to Uighur Muslims, although the appellant is neither Uighur nor a Muslim. If a material error of law was found, the appellant might advance more psychiatric material. He relied on paragraphs [4-5], [9], [13] and [15] of the appellant's statement and on his online activities in the United Kingdom for Guo Wen Gui. The Chinese authorities were very sensitive about criticism and dissent.
19. Mr Lingajorthy asked me to allow the appeal.
20. For the respondent, Mr Clark observed that the standard for an Article 3 ECHR risk in foreign cases was very high. The First-tier Judge's findings were consistent with the findings of the Court of Appeal and of Strasbourg. The Judge was aware of the evidence of Dr Dhumad, but the report was lacking in that it did not reflect the appellant's previous medical treatment in China, nor that he had family support available to him. There was no objective basis for the claimed risk on return or the enhanced suicide risk. Mr Clark directed me to [61]-[63] in *Y and Z* and argued that the level of exceptionality which *N* and *Y and Z* required were not present here.
21. Mr Lingajorthy replied, relying on the assessment at page 8 of the First-tier Tribunal decision of Dr Dhumad's report. The case law was clear: if the appellant's mental health problems were caused in China, the appeal would stand or fall on the *Y and Z* test. Dr Dhumad had indicated at least some doubt as to whether the asserted history

was real and having regard to the lower standard of proof, the appeal should be allowed.

22. I reserved my decision, which I now give.

The legal framework

23. I remind myself that in *Y and Z*, the Court of Appeal was adding to the test set out in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, which held that in order for a 'foreign case' Article 3 ECHR suicide risk claim to succeed:

- (i) The appellant must be at real risk of treatment attaining 'a minimum level of severity' on return, which must 'necessarily be serious...an affront to fundamental humanitarian principles...at risk of serious ill-treatment';
- (ii) The appellant must show a causal link between the act or threatened act of removal or expulsion and the inhuman treatment relied upon (*Soering*, at [91]);
- (iii) In a 'foreign case' such as this, the Article 3 threshold is particularly high, and even higher 'where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring [physical or mental] illness' (see *D v United Kingdom* at [49] and *Bensaid* at [40]);
- (iv) An Article 3 claim can in principle succeed in a suicide case (*Bensaid* at [37]);
- (v) In deciding whether there is a real risk of a breach of Article 3 in a suicide case, 'a question of importance is whether the [appellant's] fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of Article 3'; and
- (vi) Where the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide, 'that too will weigh heavily against an [appellant's] claim that removal will violate his or her Article 3 rights'.

24. To those six tests, *Y and Z* added a gloss. At [16] in the judgment of Lord Justice Sedley (with whom Lady Justice Arden and Lord Justice Moses agreed), he expanded the fifth principle by saying that 'what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return'. It was common ground in *Y and Z* that both appellants had suffered torture and rape and had an overwhelming subjective fear of return. They were traumatised to the extent that if returned to Sri Lanka they were extremely likely to commit suicide. On that narrow grounds, the appeals of *Y and Z* were allowed.

25. That is the framework against which the First-tier Judge's decision should be made, and against which it is to be evaluated.

Dr Dhumad's report

26. Dr Dhumad saw the appellant for two hours on 30 May 2018, interviewing him through a Chinese interpreter. He used the ICD-10 Classification of Mental and Behavioural Disorders and the Istanbul Protocol.
27. Dr Dhumad recorded the appellant's account that he had mental health issues from 2004, but did not seek help initially. His mental health deteriorated, and he felt scared all the time. At university, he thought he had important ideas which people might steal from him, but despite family encouragement to seek medical help, he did not see a doctor in China till 2009, after which he was diagnosed with paranoid schizophrenic and received treatment, including medication.
28. The appellant told Dr Dhumad that he 'received online messages from the government in 2013 and 2015 trying to convince him to sell products for them...they tried to poison him, and they exposed him to an ongoing sound of a cat meowing; he has been hearing it since, he said it is scary. ...' and that even in the United Kingdom he considered that the Chinese government was listening to his calls, that Chinese men and white men were watching him, and that he heard voices, people talking about him, saying he was a bad man, not good looking, and that he heard animals, cats, and rats climbing the wall, even though there was nothing there. He could hear people calling him but when he asked them, they said they were not calling him.
29. In the United Kingdom the appellant was not working, living in privately rented accommodation on savings from China, sharing a room with three other Chinese people. He had neither family nor friends here. He was taking 2 mg of Risperidone, an antipsychotic medication.
30. Dr Dhumad's mental state conclusion is set out at 12 in his report: at 12.2 he said this:

"12.2 [The appellant] feels hopeless about his safety in China. He believes that he will be killed by the authorities, there is evidence of paranoid delusions (false unshakable beliefs), he believes his phone is bugged and he has been followed by the Chinese intelligence in China and in the United Kingdom. There is also evidence of auditory hallucinations (false perceptual abnormalities). He has been hearing animals' noises and people's voices. ...

12.4 [The appellant] lacks insight into his condition although he has seen his [general medical practitioner] for his mental health and has been compliant with medication. "

31. At 13, Dr Dhumad gave his opinion. At 13.2, he considered what the underlying factual matrix might be, but came to no settled conclusion:

"13.2 [The appellant's] presentation in my opinion meets the ICD-10 criteria for paranoid schizophrenia F20. *It is difficult to differentiate the actual cause of his fear from the Chinese authorities from the paranoid beliefs, and whether his psychotic symptoms are caused by stress due to fear of the authorities.*

13.3 The risk of suicide in my opinion is moderate, but significant in the context of removal to China. The main risk factors in his condition are depression, psychosis and hopelessness. Depression and hopelessness in schizophrenic have serious and significant association with suicide risk. The risk will be greater when he feels that the deportation is close. Threat of removal in my opinion will trigger a significant deterioration in his mental suffering and subsequently increase the risk of suicide. ...”

Emphasis added

32. At 13.6, Dr Dhumad considered the possibility of the appellant feigning his mental illness but was not satisfied that he had done so, nor that his symptoms were exaggerated. He said that he had not taken the appellant’s account at face value but ‘carefully examined his symptomatology and his emotional reactions during the interview. ...his clinical presentation is consistent with a diagnosis of depression and paranoid schizophrenia.’

Analysis

33. This is a difficult case, because the appellant is unfit to testify or to give instructions to his solicitors. Dr Dhumad found him to be so when he saw him at the end of May 2018 and that remains the appellant’s case. Counsel has stated today that he has no ability to take instructions from the appellant.

34. The Judge had nothing else to help him, except for the appellant’s statement, signed on 17 April 2019 and written in English.

35. There is no explanation in the April 2019 witness statement as to how the appellant, who needed a Mandarin Chinese interpreter to speak to Dr Dhumad and for his Home Office interview, understood the contents of the statement, nor indeed whether he was fit to give instructions to his solicitors in April 2019, when at the end of May 2018 he had not been fit to testify, nor apparently to fly, in Dr Dhumad’s opinion.

36. On the basis of the evidence before him, it was unarguably open to First-tier Judge to find that the appellant had not reached the ‘foreign case’ Article 3 ECHR standard of showing a real risk of treatment attaining a minimum level of severity on return. Dr Dhumad did not find that the appellant had been tortured or forcibly treated for his paranoid schizophrenia in China before coming to the United Kingdom.

37. While the medical evidence was that the appellant’s condition might deteriorate as deportation came closer, Dr Dhumad did not consider the protective measures which the respondent could put in place, nor that the appellant’s parents could assist him on return, as they are doing while he is in the United Kingdom, nor the available treatment in China, from which he had previously benefited.

38. This appeal is distinguishable on its facts from those of *Y and Z* where there was credible and accepted evidence of past rape and torture and of overwhelming fear of return likely to lead to suicide if deportation were carried out. There was insufficient evidence before the First-tier Judge to establish, even to the lower standard applicable to international protection, that there existed in China for this appellant an objectively

well-founded risk at the high and demanding level required for an Article 3 'foreign case'.

39. The appellant continues to receive treatment and medication in the United Kingdom: he now takes an anti-depressant, Sertraline (25 mg once a day, rising to 50 mg after two weeks), prescribed for him on 9 September 2019 but there is no background information as to the severity of the suicidal thoughts and low mood for which it was prescribed. Even if that document were admissible at the error of law stage, it would not be material to consideration of the First-tier Judge's decision.
40. There is no material error of law in the decision of the First-tier Judge and his decision is upheld.

DECISION

41. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 16 September 2019