



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

Appeal Number: PA/14037/2018

**THE IMMIGRATION ACTS**

**At: Civil Justice Centre (remote hearing) Decision & Reasons Promulgated**

**Heard on: 10<sup>th</sup> September 2020**

**On: 16<sup>th</sup> September 2020**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**XL  
(anonymity direction made)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**For the Appellant: Ms Fitzsimons, Counsel instructed by Duncan Lewis  
& Co Solicitors**

**For the Respondent: Mr Diwnycz, Senior Home Office Presenting  
Officer**

**DECISION AND REASONS**

1. The Appellant is a national of China born in 1974. She appeals with permission against the decision of the First-tier Tribunal (Judge Frantzis) to dismiss her appeal on protection grounds. Judge Frantzis allowed the appeal on human rights grounds with reference to Article 4 ECHR and the Respondent has not appealed against that decision.
2. The basis of the Appellant's case was that she feared returning to China because she owed a significant amount of money to loan sharks

there. The original sum had been borrowed in 2015 to pay for medical treatment for her father. The interest was such that the amount owed grew and grew and she had no way of paying it back. She was threatened and beaten by these people. By 2017 she was forced to give them her shop, then her only livelihood. She fled her local area in order to escape the debt but the loan sharks tracked her down. She borrowed more money from a cousin in order to give the loan sharks at least some money, but eventually she felt she had no choice but to leave China. She arranged to travel to the United Kingdom, on what she believed to be a genuine work visa. Once she was here she found that she had been deceived, and that in fact she had been trafficked for the purposes of sexual exploitation: upon her arrival the agents who facilitated her journey required her to work as a prostitute. She came to the attention of the Respondent after she was found working in a brothel in Manchester.

3. The Appellant was refused protection because the Respondent did not believe her account, which she found to be internally inconsistent in several key respects.

### **The First-tier Tribunal Decision**

4. The First-tier Tribunal begins its decision by recording that the Appellant was to be treated as a vulnerable witness. The Competent Authority has found 'reasonable grounds' to conclude that she was a victim of trafficking, and she has been diagnosed with PTSD. Having had regard to expert evidence from a Senior Caseworker at the Poppy Project the Tribunal accepted the Appellant's testimony about being trafficked and how she came to be working in the brothel. The Tribunal accepted that she was there against her will and was being held for the purpose of sexual exploitation.
5. Turning to the historical narrative the Tribunal found that it could not be satisfied, even to the lower standard, that the Appellant left China because she was living in fear of loan sharks. Noting that no one factor attracted more weight than another, the Tribunal noted that the Appellant failed to claim asylum at the first opportunity, and there was no explanation as to why. Unlike her experiences of sexual violence - for which there is a well-documented psychological phenomena of delayed reporting - no such reason had been advanced in respect of the 'loan shark' element of the account. The account she gives may well be plausible in the context of the country background material, but it was not credible. She says she had no option but to borrow the money: that is inconsistent with her evidence that she owned a shop and other property and she knew these people to be violent thugs. Despite maintaining regular contact with her family in China no supporting evidence has been produced from them. On appeal the Appellant claimed that her sister had been forced to leave her job because of threats from the loan sharks, but she had not mentioned this in interview. The Appellant's claim that these men were violent and ruthless does not appear to be consistent

with her evidence that she remained living in her home, and working in her shop, for some 18 months whilst she still owed them money. Her evidence about being physically assaulted by the loan sharks in 2016 is inconsistent. The Tribunal noted that the Appellant has at least one physical scar and PTSD, but concludes that these conditions cannot be probative of the account.

6. The Tribunal concluded its risk assessment by considering whether the Appellant would, as a victim of trafficking, face a real risk of exploitation upon return to China. It had particular regard to the views of the country expert Ms Mirjam Klann Thullesen that she would. The Tribunal placed weight on Ms Thullesen's conclusions, but did not accept them. The Appellant has a family network to whom she can turn for support, as well as property within the country. She would not therefore be particularly vulnerable to a risk of re-trafficking. The protection appeal was therefore dismissed
7. Having had regard to its own finding that the Appellant is a victim of trafficking and that she has sustained significant mental health distress as a result, the Tribunal allowed the appeal on human rights grounds. I am told that the Appellant has now been invited to enrol her biometrics and that the process to grant her leave on that ground has therefore begun.

### **The Challenge: Discussion and Findings**

8. On behalf of the Appellant Ms Fitzsimons' pursued no fewer than seven grounds of appeal. Some are without any arguable merit and serve only to clutter the pleadings, obscuring Ms Fitzsimons' otherwise well-put argument: I deal with these first.
9. Ground (2) is that the First-tier Tribunal failed to have "adequate regard" to the medico-legal evidence. Implicit in that form of words is an acknowledgement that the Tribunal did in fact take the medical reports into account. The Tribunal accepted without criticism the opinion expressed by Dr Bingham that the Appellant had a scar typical of being smashed over the head with an ashtray or other heavy object. PTSD is of course not expected in the absence of exposure to traumatic experiences. The First-tier Tribunal gave weight to Dr Bingham's opinion in that regard. What it could not sensibly do was to elevate that opinion to confirmation that the traumas, in particular the scar, were caused in the precise manner described by the Appellant: as Ms Fitzsimons agreed before me, no doctor could do that. Yet that is in effect what the grounds suggest that the Tribunal should have done. Reference is made to the Istanbul Protocol and the need to consider all of the evidence in the round. That is in my view precisely what the Judge did. The backdrop to that assessment was the fact that this is a case where was a positive finding that the Appellant had been trafficked: there was *prima facie* an alternative explanation for why she might have PTSD, and a scar

on her head. There is therefore absolutely nothing unreasonable or impermissible in the Judge's conclusion that the medical evidence could not establish *who* had caused the Appellant injury. That was a matter to be evaluated in the round, having regard to all of the available evidence.

10. Ground (3) is that the First-tier Tribunal took an "impermissible approach to plausibility". This ground is totally misconceived. The short point made is that the Judge was somehow unreasonable in rejecting this account of loan-sharking in China when it is an objective fact that loan-sharking exists. Had the Judge rejected this account on the grounds that it was utterly *implausible* that such things occur, the ground would be a good one. But this is expressly not the approach taken. At its paragraph 30(iii) the Tribunal draws a clear distinction between *plausibility*, in this jurisdiction a matter to be evaluated with reference to the country background material, and *credibility*, a question for the judge taking all relevant matters into account. A plausible account can in the final analysis be rationally rejected as not credible, and that is precisely what has happened here.
11. Ground (7) takes issue with the approach to the medical evidence in respect of the potential risk of suicide should the Appellant be forcibly removed to China. As Ms Fitzsimons' accepted in her oral submissions this ground was pointless given that the appeal has already been allowed on human rights grounds. I might also add that it was utterly without foundation since Dr Bingham's evidence fell far, far short of establishing any such risk.
12. I now turn to deal with those grounds which require rather more attention.
13. Grounds (1) and (5) are in essence concerned with the same point: that having found that this woman is an extremely vulnerable victim of sex trafficking the Judge appeared to forget those findings when assessing the quality of the evidence that she managed to give in the early stages of this process. The Judge hones in on the fact that there was a delay in the Appellant telling her story about the loan sharks, and as I note above, draws a distinction between this and the delay in disclosing sexual abuse; further adverse inference is drawn from the Appellant's failure to explain at interview that her family are continuing to experience problems in China. Ms Fitzsimons submits that the distinction drawn between the different sources of pain experienced by the Appellant is a false one. If the account given by the Appellant is true, this is a woman who has been through a prolonged period of living under immense stress. She twice lied to police officers who encountered her in the United Kingdom, telling them that she was working as a prostitute of her own accord. We now know that to have been a lie, told in fear and confusion. Having eventually been freed from her captors she was then held in immigration detention. It was in these circumstances that she was interviewed by an immigration officer in respect of her claim. Ms

Fitzsimons highlights the Appellant's evidence that at that point she was extremely afraid and stressed: extremely afraid of her traffickers, and extremely afraid of being returned to China. The Poppy Project caseworker who gave expert evidence, Ms Thulleson, identified a third source of fear for an individual in the position of the Appellant: a significant mistrust of authority. Ms Fitzsimons submits that the First-tier Tribunal failed to evaluate the evidence given in the context of these facts.

14. I agree. The First-tier Tribunal has conducted a sensitive and careful analysis of the evidence given in respect of the trafficking aspect of the claim. The decision repeatedly returns to the parts of that account which were "troubling", "delayed" or "incomplete" but with no adverse inference drawn: the Tribunal properly recognising that it would in effect be very surprising if the Appellant had been able to narrate her experiences without delay or confusion. Why the same cannot be said of the events that preceded her arrival is unclear. True there is no substantial body of psychology research pointing to routinely delayed reporting in respect of such matters, but there didn't need to be. The focus, when assessing whether adverse inference should be drawn in these circumstances, should surely be on the state of mind of the claimant. The failure to take into account the Appellant's circumstances amounted to a failure to take material matters into account.
15. Ground (4) is concerned with a specific finding, and can best be described as an error of fact. One of the key reasons given by the Tribunal in rejecting the Appellant's account as not credible was that she had no need to risk borrowing money from the loans sharks because she had a shop and owned property which she could have sold. Ms Fitzsimons submits that here the Tribunal misunderstood the position. The evidence was that the Appellant's father was told that he had a blockage on his spine. He had become paralysed and had been told that he faced imminent death unless he had an operation. The cost was RMB 180,000. The Appellant earned approximately RMB 3000 per month. She received RMB 30,000 from an insurance policy, and used all of her RMB 50-60,000 savings. She still faced a shortfall of RMB 100,000 which she needed to find urgently in order to fund her father's lifesaving treatment. The property that the Appellant owned was the house that the family lived in, and could not be sold without leaving them homeless. Ms Fitzsimons submitted that had the Tribunal had regard to all of those facts, set out in detail in the Appellant's witness statement, it could not have concluded that she had no need to borrow this money. This ground is made out.
16. The Appellant has established two material errors in the Tribunal's approach to the protection aspect of this claim and for that reason I am satisfied that the findings at paragraph 30 of the First-tier Tribunal decision must be set aside.

17. It follows that the protection aspect of this claim needs to be revisited. The findings on trafficking are unchallenged and have indeed set in motion the processes by which the Respondent will grant the Appellant the appropriate leave. The Appellant's representatives may wish to consult with the Respondent on when this is likely to happen: as Mr Diwnycz indicated it is routine practice for any grant of leave to be delayed in these circumstances to await the final outcome of the protection claim. In view of the Appellant's ongoing PTSD her representatives will of course take care to ensure that she understands that consequence of pursuing of this aspect of her appeal, and follow her instructions accordingly. Ordinarily I would retain this matter in the Upper Tribunal for remaking. I am however conscious that this is a matter that should not be dealt with remotely. The Appellant is a vulnerable witness who requires an interpreter to give her evidence. In those circumstances the interests of justice require that she be granted a live oral hearing in the ordinary way. That is likely to happen far quicker in the First-tier Tribunal than if it retained. I therefore remit the matter to the First-tier Tribunal for determination of the protection aspect of the appeal only. It should be heard by a judge other than Judge Frantzis.

### **Anonymity Order**

18. The Appellant is victim of trafficking. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

### **Decision and Directions**

19. The decision of the First-tier Tribunal is flawed for material error of law and it is set aside to the extent identified above:

- i) The decision of the First-tier Tribunal to allow the appeal on human rights grounds is upheld.
- ii) The decision of the First-tier Tribunal to dismiss the appeal on protection grounds is set aside and this aspect of the appeal is to be remade in the First-tier Tribunal.

20. There is an order for anonymity.

Upper Tribunal Judge Bruce  
14<sup>th</sup> September

2020