IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002291

First-tier Tribunal No:
HU/52052/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 October 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MG
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim of Counsel, instructed by City Heights Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 19 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

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.

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DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge G Andrews, promulgated on 11 April 2024.

2. The appellant is a citizen of Bangladesh who entered the United Kingdom in October 2009 initially as a student. His leave to remain expired in December 2011 and he claimed asylum first in 2013 and again in 2015. His appeal against the second refusal was dismissed by First-tier Tribunal Judge Aujla, for reasons set out in a decision of 15 September 2017. His case is that he is at risk on return to Bangladesh because he is gay and that it would be a breach of his rights pursuant to Article 3 of the Human Rights Convention as he has chronic myeloid leukaemia ("CML") and the necessary medical treatment would not be available to him in Bangladesh. It was also his case that he would be at risk of suicide were his application refused and that there are very significant obstacles to his integration into Bangladesh in view of his health problems, his sexuality and the length of time he had been away from Bangladesh as well as the lack of family support.

3. The Secretary of State did not accept that the appellant is gay and concluded that there was no reason to depart from the findings from Judge Aujla. Although she accepted that he has leukaemia and has a mixed anxiety disorder, it was not accepted that he was at such risk of a decline in his health and/or at such risk of suicide and his removal would be unlawful as contrary to Article 3 nor is it accepted that there would be very significant obstacles to his integration into Bangladesh such that he met the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules.

4. The appellant was represented by Mr D Balroop, of Counsel, at the hearing before Judge Andrews. The Secretary of State was not represented.

5. The appellant gave evidence with the assistance of an interpreter, adopted his statement and was asked questions by Mr Balroop and the judge. The judge observed at [15] as follows:

> "The appellant has MCL, and mixed anxiety and depressive disorder (paragraph 6(b) above). However, Mr Balroop did not ask that he be treated as a vulnerable witness at the hearing. Mr Balroop also did not submit that the vulnerable witness direction was not observed."

6. The judge considered the report from Ms Costa, psychologist and psychotherapist [18] to [22] but attached less weight to her report as she had not been provided with Judge Aujla's decision nor GP records.

7. The judge directed herself in line with Devaseelan [25] concluding [26] that the appellant was now making essentially the same claim and that she was not satisfied there were relevant new facts that should cause her to depart from the previous decision. In doing so she noted [28] that Ms

Costa's conclusions were to some extent based on him being gay and thus her report added little or no weight to the appellant's credibility on that issue. She concluded the appellant was not gay; that his claim was totally fabricated; and, that he was somebody who was willing to be untruthful in order to stay in the United Kingdom. Having found that he was not gay she was not satisfied that his family in Bangladesh had stopped communicating with him and would not support him on return [30]. She was not satisfied that the appellant would attempt suicide if returned to Bangladesh [32] and that he had not shown that he could not work or earn money and support himself in Bangladesh [36] to [37].

8. The judge considered with respect to Article 3, that he is a seriously ill person and that there were substantial grounds for believing that if he lacked access to appropriate cancer treatment then he would face a real risk of significant reduction in his life expectancy. She noticed [41] that it was not asserted that there would not be appropriate medical facilities rather that the appellant could not afford the treatment he needs but she was not satisfied that the appellant would be unable to access treatment and thus his Article 3 medical claim fell as did his claim to be at risk of suicide.

9. She considered also that paragraph 276ADE was not made out nor that his removal would be disproportionate.

10. The appellant sought permission to appeal on the grounds that the judge had erred:-

(i) in failing to follow the Joint Presidential Guidance Note No. 2 of 2010: Child, vulnerable adult and sensitive appellant guidance and the guidance given by the Court of Appeal in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 in not recognising the appellant as a vulnerable adult, the representatives making their relevant application notwithstanding;

(ii) in failing to engage sufficiently with the background evidence on the practical availability of adequate cancer treatment in Bangladesh.

11. On 17 May 2024 First-tier Tribunal Judge Haria granted permission on ground (i) only. No application was made to renew ground (ii).

12. Mr Karim submitted that despite the observations in AM (Afghanistan), it was sufficiently clear from the Equal Treatment Bench Book and the guidance that it was incumbent on a judge to consider this of her own notion.

13. Ms Nolan submitted that in this case it could not be said that the judge had failed properly to apply the guidance or the policy, the guidance, Equal Treatment Bench Book or AM (Afghanistan). There had been no Presenting Officer, no cross-examination and the grounds had failed to identify in what way the appellant had been prevented from giving his best evidence. Further, the judge had very clearly been aware, as

apparent from the decision, of the apparent vulnerabilities yet that this was not put forward and had addressed the medical evidence relating to the appellant's mental ill-health in significant detail. She had observed that no GP records had been available and had reached conclusions open to her. The error in not treating the appellant as a vulnerable witness was a material error in of itself.

14. It is sensible to start with the Joint Presidential Guidance Note which at paragraph 3 says this:

> 3. 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. As noted in the guidance at [5] the primary responsibility for identifying vulnerable individuals lies with the party calling them. At [5.1] guidance is given that the precise nature of the disability is identified so that appropriate measures and adjustments are made. There is no indication that here these were asked for, nor is there now any proper indication as to what adjustments should have been made or why.

16. Guidance is also given [10] as to the hearing of evidence and [10.3] to assessing evidence. It is stated as follows:

> Take account of potentially corroborative evidence
>
> Be aware:
>
> i. Children often do not provide as much detail as adults in recalling experiences and may often manifest their fears differently from adults;
>
> ii. Some forms of disability cause or result in impaired memory;
>
> iii. The order and manner in which evidence is given may be affected by mental, psychological or emotional trauma or disability;
>
> iv. Comprehension of questioning may have been impaired.

17. At [15] the Guidance provides:

> The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind

18. Stepping back from the detail of the guidance, it is of note that although it refers to "vulnerable adults" as being defined in section 59 of the

Safeguarding and Vulnerable Groups Act 2006, that provision was repealed in 2012.

19. The “Practice Direction First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses” again is premised on whether such a person may give evidence, which presupposes that this matter has been drawn to the attention such that it is to consider whether it is necessary for the person to give evidence and that the Tribunal must consider the giving of any evidence.

20. I turn next to AM (Afghanistan). At [1] the Senior President said this:

> 1. In this judgment the court gives guidance on the general approach to be adopted in law and practice by the First-tier Tribunal (Immigration and Asylum Chamber) ['the FtT'] and the Upper Tribunal (Immigration and Asylum Chamber) ['the UT'] to the fair determination of claims for asylum from children, young people and other incapacitated or vulnerable persons whose ability to effectively participate in proceedings may be limited.

21. It is important to note the context in that case. The difficulties that AM had, were set out in a medical report (see AM at 12). This included an observation that the expert view was that AM was not able to give evidence by answering questions in court although he could do so in some form of a witness statement where he has more time for information to be recalled and clarified. Additional arrangements were also recognised. As was observed at [23] this was a case in which the appellant’s age, vulnerability and learning disability could have been recognised and taken into account as factors but were not. At [32] the Senior President wrote this:

> 32. In addition, the Guidance at [4] and [5] makes it clear that one of the purposes of the early identification of issues of vulnerability is to minimise exposure to harm of vulnerable individuals. The Guidance at [5.1] warns representatives that they may fail to recognise vulnerability and they might consider it appropriate to suggest that an appropriate adult attends with the vulnerable witness to give him or her assistance. That said, the primary responsibility for identifying vulnerabilities must rest with the appellant's representatives who are better placed than the Secretary of State's representatives to have access to private medical and personal information. Appellant's representatives should draw the tribunal's attention to the PD and Guidance and should make submissions about the appropriate directions and measures to be considered e.g. whether an appellant should give oral evidence or the special measures that are required to protect his welfare or make effective his access to justice. The SRA practice note of 2 July 2015 entitled 'Meeting the needs of vulnerable clients' sets out how solicitors should identify and communicate with vulnerable clients. It also sets out the professional duty on a solicitor to satisfy him/herself that the client either does or does not have capacity. I shall come back to the guidance to be followed in the most difficult cases where a guardian, intermediary or facilitator may be required.

22. The Equal Treatment Bench Book sets out extensive guidance on vulnerable adults. As is said at page 30, the focus is primarily on ways to adapt criminal proceedings to accommodate children and other vulnerable witnesses and it is designed to ensure that those parties and witnesses participate effectively and give their best evidence. That said it is clear from [14] that the guidance is applicable to those with cognitive impairments and or leaning disabilities. In addition to the judiciary's role in safeguarding, which is not directly relevant here, the focus is on adapting procedures.

23. Pausing here to reflect, it is evident that the material referred to above is designed to do several things: to ensure that vulnerable people are safeguarded, and not called to give evidence where that is not necessary; to ensure that those who are disadvantaged in some way are enabled to give their best evidence; and, to ensure that where relevant, cognitive and other impairments are taken into account when assessing evidence. Much of the guidance is directed to the first two matters.

24. Turning again to the decision in this case I agree with Ms Nolan's submission that the way that the judge had phrased what is said at [15] indicates that she was aware of the relevant guidance. Mr Karim submits that this was not, however, followed.

25. I accept that in AM (Afghanistan) it was held that a failure to follow the guidance would most likely to be a material error of law. It is sufficiently clear from the judge's approach in this case that she had considered the issue as to whether the appellant was a vulnerable witness but, in the absence of any submissions from an experienced representative as to what should be done about this in terms of procedure, nothing was done.

26. It is trite law that the requirements of fairness are context specific. Here, it was accepted that that the appellant has CML, but it was not clear (nor is it clear now) what was required to enable him to give his best evidence in terms of adjustments or in assessing his evidence. While it is evident that the appellant was a vulnerable adult as defined in the now repealed section 59 as he was in receipt of health care, it does not necessarily follow that anyone in receipt of health care is by virtue of that fact alone requires any adjustments to be made. Many millions of people in the UK would appear to fall into this category which would include anyone taking medication of any sort. It would be absurd to suggest that all such persons require a judge to take the actions that Mr Karim submits should have been taken in this case, absent any request by an experienced representative.

27. Further, what the grounds failed to establish is what should have been done or why it would have made a difference. As the judge clearly recorded, the appellant's case with regards to being gay is, to all intents and purposes, exactly the same as put before the First-tier Tribunal in 2017. There was limited new evidence and that new evidence related to medical matters. In this case the judge clearly followed paragraph 3 in

that she did assess the quality of the appellant's evidence but the reason it was rejected was nothing to do with his mental or physical ill-health. On no rational basis could it be said that Ms Costa's report was capable of displacing the decision of the First-tier Tribunal in 2017. Further, whether someone is vulnerable as defined a vulnerable adult is, as the guidance shows, in the Safeguarding Vulnerable Groups Act 2006, the grounds fail to establish that the appellant is a person to whom this applies automatically. First, whether he is vulnerable is a matter of degree and to be assessed a judge. It is sufficiently clear that the judge did assess that in terms of identified vulnerability in the context of this case which was important.

28. Taking all these factors into account, I consider that the grounds fail to establish that the judge erred in her application of the relevant guidance and that there is no basis for the challenge.

29. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

(1) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 15 October 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal