Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01416/2019**

THE IMMIGRATION ACTS

Heard at Field House in London	**Decisions & Reasons Promulgated**
On 3 June 2019	**On 26 July 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

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(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rhodri-Jones (Counsel)
For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal") which it made following a hearing of 14 March 2019 and which it sent to the parties on 21 March 2019. The decision of the Tribunal was to dismiss the claimant's appeal against a decision of the Secretary of State, made on 30 January 2019, refusing to grant him international protection.

2. The background circumstances are straightforward and may be summarised quite briefly: The claimant is a national of China and he was born on 12 February 1975. He entered the UK on 26 September 2006 having obtained entry clearance. He was granted leave for temporary purposes, taking him up to 25 September 2011. Although he had returned to China (as I understand it for visits) on three occasions after his initial arrival in the UK, he did not do so after 2009. He claimed international protection on 24 October 2018 and it was that application which lead to the above decision of the Home Secretary, to the appeal to the tribunal and now this appeal. In making his claim he said that on his last trip back to China he had become involved in a fight with a person I shall call CS but that, unbeknown to him at the time, CS is, as it was put by the tribunal "the head of underground gambling as well as being a loan shark, a money launderer and head of a Triad gang". The claimant says he won the fight and so CS now wishes to harm him. He says he has subsequently received threats from him.

3. The Tribunal did not believe the claimant. In its written reasons it analysed the evidence from paragraph 13 to 21 and then set out its findings and conclusions from paragraph 23 to 29. It is right to point out, as Mr Kotas stressed before me, that the tribunal did make certain comments about the reliability or otherwise of certain emails the claimant was seeking to rely upon, in the section which it devoted to a setting out of the evidence. When it came to explain why it did not believe the claimant it said this:

> "23. The appellant claimed asylum in October 2018. On his account the had already received an important note which was central to his claim and which related to 2009. It was not produced until this morning. He was asked in the screening interview whether he had any relevant documents and he replied "none" -A10-6.2. He was asked whether he intended to have additional documents sent to him from China and again he said "None". He has been represented by solicitors since at least 13 February 2019 when the notice of appeal was filed and I note that the continued existence of this note is not referred to in his recent statement.
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> 24. I have already commented on the timing and contents of the email.
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> 25. I have looked at the documents in the context of the evidence as a whole and I have applied the well-known principles of **Tanveer Ahmed** and concluded they are not documents upon which reliance should properly be placed.
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> 26. The appellant also relies on marks on his face and wrist which date back to a fight that allegedly happened in 2009. There is no medical evidence to support his contention and in any event they could have been inflicted simply because he was in a fight. That does not mean that his claim must be accepted as I would also have to accept that his assailant was a current real risk to him.
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> 27. Even on his own his case, the appellant's last visit to China was 2009 and the last communication that he had from [CS] was 2015 and was an indirect message. There is no evidence of any current threat and even the last email hardly suggests commitment to a vendetta.
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> 28. I conclude the appellant is not a credible witness".

4. The successful application for permission to appeal to the Upper Tribunal followed. Two grounds were offered. The first, in summary, amounted to a contention (at least on my reading) that the tribunal had erred in concluding the claimant could not succeed under paragraph 276ADE of the Immigration Rules simply on the basis that it had concluded he was not entitled to humanitarian protection. There was also as part of that ground a related contention that the matters relevant to article 8 of the European Convention on Human

Rights (ECHR) had not received full consideration. The second ground was to the effect that the credibility assessment had been inadequate. The granting Judge relevantly said this:

> "1. It is arguable that the judge has set out an insufficient analysis leading to the conclusion that the appellant is not a credible witness at paragraph 28 of the decision following conclusions reached by the judge in relation to the existence or otherwise of a continuing risk based upon the chronology and the last communication constituted by an indirect message. It is arguable that the essential foundation for concluding that the appellant lacked credibility is set out at paragraph 23 of the decision following from which the judge has proceeded to apply **Tanveer Ahmed**. The judge has then proceeded to consider the evidence of marks on the appellant's face and wrist. This did not mean as the judge states at paragraph 26 that the appellant's claim must be accepted. It is arguable that the essential foundations for the conclusions as to lack of credibility do not bear the weight placed upon them for reaching the conclusion as to the lack for credibility".

5. Permission having been granted the matter was listed for a hearing before the Upper Tribunal (before me) so that it could be considered whether or not the tribunal had erred in law and, if it had, what should flow from that. Representation at that hearing was what was stared above and I am grateful to each representative. Mr Rhodri-Jones realistically, in my view, focused largely upon ground two rather than ground one. To some extent certain of what he argued fell (in my view) to be characterised as attempted re-argument with the tribunal's findings and conclusions. That sort of material, of itself, is not capable of demonstrating legal error on the part of the tribunal. But he also contended in effect, that the level of reasoning with respect to the credibility assessment was legally inadequate. He asked me to set aside the tribunal's decision and either to remit or to remake the decision myself after a further hearing. Mr Kotas sought to defend the tribunal's decision determinedly. He pointed out that what comprised the credibility assessment was not limited to what the tribunal had said from paragraph 23 of its written reasons onwards. Rather, there had also been a number of pertinent observations regarding the email evidence which had been made at an earlier point in those reasons. As to what I had suggested to Mr Kotas might represent a failure on the part of the tribunal to form any view as to the oral evidence it had heard from the claimant, he argued that such a point had not been specifically taken in the grounds and that, in any event, the oral evidence had been referred to in the written reasons. He said the case was a simple one and it was not possible to detect any aspect of the case which had not been properly considered by the tribunal. He urged me to dismiss the appeal.

6. I will, albeit briefly, explain why I am not persuaded by ground one. The tribunal noted at paragraph 2 of its written reasons that all that had been said with respect to article 8 either within or outside the Immigration Rules, was he that should succeed under paragraph 276 ADE(1)(vi) "based on the same factual basis as his other claims for international protection". Notwithstanding a point made in the grounds to the effect that it has been authoritatively decided that the question of entitlement to humanitarian protection and the question of "very significant obstacles to their reintegration into their country of origin" are separate issues, the case under article 8 had clearly been put to the tribunal on the limited basis mentioned above and on the basis that it had to assessed on the same facts as the humanitarian protection appeal. Since the tribunal rejected the claimed factual account it followed that the claimant could not succeed under 276(ADE) so long as the tribunal's factual findings were sound (a matter to which I shall return soon). In short, the

tribunal dealt appropriately with the article 8 argument on the basis of how it had been put to it.

7. As to ground two, I agree with Mr Kotas that paragraph 23-28 is not the only source of the tribunal's reasoning. The tribunal did find the content of some emails which the claimant had asserted underpinned his claim, to be unpersuasive. That is apparent from what it said at paragraph 18 of its written reasons. It was those concerns which fed into its conclusion at paragraph 25 of its written reasons that the documents provided by the claimant were not ones upon which reliance should properly be placed.

8. In truth, though, the tribunal's reasoning, as to credibility, as touched upon in the grant of permission, was somewhat sparse. There was no evaluation as to the oral evidence which the claimant had provided to the tribunal. It is true there are references to what he actually said in the written reasons but there is no assessment as to its persuasiveness or otherwise. The passage from paragraph 23 suggests that the sole point which the tribunal thought actually damaged the claimant's credibility was the late production of a "note". The concerns regarding the emails did not lead the tribunal to, for example, conclude that the claimant had concocted them. In a sense, therefore, what the tribunal had to say about the emails was a neutral factor. They did not benefit the claimant's case but they did not harm it. Faced with all of that it was necessary, in my judgement, for the tribunal to fall back upon other considerations such as, as I say, the nature of his oral evidence and perhaps the consistency or otherwise of that as compared with his written evidence. Further, there was no specific consideration as to the plausibility or otherwise of the key or core aspects of his claim. I appreciate that the standard the tribunal was required achieve, with respect to the quality of its reasons, was no more than adequacy. But in my judgement the tribunal, for the reasons set out above, failed to reach that standard on this particular occasion.

9. Mr Kotas sought to argue that even if I were to reach such a view, the tribunal's decision remained sound. That is because what he says a sustainable alternative finding appearing at paragraph 27 of the tribunal's written reasons. Essentially, what the tribunal said at that point in its written reasons, was that even if the account was true, there was no reason to think that there remained a current threat given that, on the claimant's own account, the last threating communication had been in 2015. If that is to be characterised as an alternative finding, and on balance I think it probably is, it is a very short one consisting, as it does, of a single sentence. It would have been, in my view, open to the tribunal to conclude that a lack of recent threats, was indicative of such a threat having diminished or even having been extinguished. But there had to be reasoning to justify any such conclusion. It did not inevitably follow that since there had not been a threat later than 2015, on the assumption that the claimant's account was true, the threat had gone away. It was, therefore, if the tribunal was seeking to rely upon such an alternative finding, for it to explain why it did think that the particular person aggrieved by the claimant's conduct, given the position of influence he was said to have, and given the previous expression of an adverse interest, no longer had such an interest. The tribunal might not have had to say very much at all in order to get the point home but it had to say something.

10. In light of the above I have concluded that the tribunal did err in law in making a legally inadequate and unsustainable credibility assessment. I have concluded that that error was material because the alternative finding was not adequately explained and

because it was not inevitable, had the tribunal concluded that the claimant had told the truth, that his appeal would nonetheless have failed.

11. Having decided to set aside the tribunal's decision I have also decided to remit. That is because, my having found the credibility assessment to be unsustainable, I am not able to preserve anything from the tribunal's original findings and conclusions. So, there is a requirement for further fact finding. That task is best undertaken by the tribunal as the expert fact-finding body in the field.

12. So, there will be complete rehearing before a differently constituted tribunal (a different Judge of the First-tier Tribunal). At the rehearing the tribunal will not be limited to the basis upon which I have set aside the decision. It will consider all aspects, both fact and law, entirely afresh. Further, it will not be limited to a consideration of the material which was before the previous tribunal. It will consider any new evidence, both written and oral, which it might receive. I note that the tribunal, rightly in my view, did not ask itself whether the claimant might be able to take advantage of an internal flight alternative in China or might be able to obtain protection from the authorities, on the assumption that his account is true. I say the tribunal was right not consider these matters because they were not raised in the Secretary of State's written reasons of 30 January 2019. No doubt if the Secretary of State does now wish to take any such points he will ensure that that is made clear to the tribunal and to the claimant's representatives in advance of the next hearing and in sufficient time for the claimant's representatives to prepare to meet any such arguments.

13. The claimant should not assume merely because I have set aside the tribunal's decision and decided to remit, that he is ultimately likely to succeed. He might but, then again, he might not. All of that will now be for the tribunal's own good judgement.

14. Other than what I have said above, I shall make no directions regarding the rehearing of the appeal. Any listing and related directions are best left to a Tribunal Judge to prepare and issue.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The case is remitted to the First-tier Tribunal for reconsideration.

The claimant was granted anonymity by the First-tier Tribunal. I continue that grant pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall name or otherwise identify the claimant. This applies to all parties to the proceedings. Any breach may lead to contempt of court proceedings.

M R Hemingway
Judge of the Upper Tribunal
Dated: 25 July 2019