



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2023-000829  
FtT No: PA/52014/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 9 July 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**ATP (VIETNAM)**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms M Hodgson, Counsel, instructed by Deus Nexus Solicitors  
For the Respondent: Mr A Basra, Senior Presenting Officer

**Heard at Field House on 12 June 2023**

**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.**

## **DECISION AND REASONS**

### **Introduction**

1. This is an appeal by the appellant against the decision of Judge of the First-tier Tribunal Lloyd-Smith ('the Judge'), sent to the parties on 23 February 2023, against a decision of the respondent to dismiss his international protection claim.

### **Anonymity**

2. The Judge issued an anonymity order and neither party requested that it be set aside.
3. The anonymity order is identified above.

### **Brief Facts**

4. The appellant is a national of Vietnam and presently aged 27. He states that whilst he resided in Vietnam, he was detained after a demonstration in 2016, following which he was interrogated and then assaulted. He was released after a week, upon having signed a document confirming that he would not attend another demonstration.
5. He states that in 2020 he organised a demonstration against the company he worked for, consequent to being owed four months' wages. The protest was dispersed by the police, and he fled the scene. The next month police officers attended the home of his aunt, where he resided. His aunt was told by officers to inform him that he was to surrender himself to the police and face criminal charges.
6. The appellant left Vietnam in 2021 and travelled to the United Kingdom via Romania and France. Having entered this country clandestinely he sought international protection. The respondent refused the application by a decision dated 6 May 2022.
7. In the meantime, a referral was made on the appellant's behalf to the National Referral Mechanism. By a decision dated 11 June 2021, the Single Competent Authority ('SCA') found that there were reasonable grounds to accept that the appellant may be a victim of modern slavery.
8. The appeal came before the Judge sitting in Manchester on 15 February 2023. The appellant attended and gave evidence. He was represented by counsel, not Ms. Hodgson, and his present solicitors. The issues before the Judge were:
  - (i) refugee/humanitarian protection.
  - (ii) article 3 ECHR.
9. Through counsel, the appellant conceded before the Judge that he did not rely upon article 8 ECHR.

10. The Judge found the appellant not to be credible, observing several contradictory or inconsistent accounts in his evidence, as well as noting the failure to raise several significant aspects of his claim at interview.
11. After the promulgation of the First-tier Tribunal decision, the SCA concluded by a decision dated 1 March 2023 that there were conclusive grounds to accept that the appellant is a victim of modern slavery, finding that he was subject to forced labour in Romania in 2021.

### **Grounds of Appeal**

12. The appellant advances two grounds of appeal, drafted by counsel who represented him before the Judge:
  - (i) The First-tier Tribunal failed to consider the appellant, accepted by the respondent to be a victim of trafficking, as a vulnerable person. Such failure was a procedural irregularity.
  - (ii) The First-tier Tribunal's failure to consider the appellant's history of trafficking adversely flowed into her credibility findings.
13. Ms. Hodgson accepted that the second ground was parasitic upon the first, and so required the first ground to be established in the appellant's favour before reliance could properly be placed upon it.
14. In granting permission to appeal on 6 May 2023, Upper Tribunal Judge Stephen Smith reasoned, inter alia:
  - '1. It is arguable that the Judge should have considered the impact, if any, of the appellant's vulnerability as an accepted victim of trafficking (see para. 31 of the refusal letter) on her credibility findings.
  2. I consider Ground 2 to have less merit, but in light of the guidance at paragraph 48 of the Joint Presidential Guidance 2019 No. 1 *Permission to appeal to UTIAC*, I have adopted the pragmatic approach of not seeking to restrict the scope of this grant of permission.'

### **Preliminary issues: rule 15(2A) application, and attendant amendment to the grounds of appeal**

15. The appellant made a rule 15(2A) application on 25 May 2023. Accompanying the application were:
  - i. supplemental submissions prepared by the appellant's solicitors, dated 24 May 2023;
  - ii. documents the appellant's solicitors sought to upload to the First-tier Tribunal's core case data (CCD) management system on 15 December 2022 and on 13 January 2023;

- iii. relevant CCD notes in relation to the difficulty experienced by the appellant's solicitors in uploading these documents;
- iv. medical evidence, some of which post-dates the First-tier Tribunal's decision; and
- v. the SCA's Conclusive Decision, dated 1 March 2023.

16. Paragraph 2 of the 'supplemental submissions' details:

- '2. On the 15<sup>th</sup> of December 2022 and the 13<sup>th</sup> of January 2023, the Appellant submitted his patient summary record and a letter of mental health assessment. However, the Document upload function was not available. Thus, the Appellant's representative has made an application and requested the Tribunal caseworker to upload and put forward the documents to the Documents tab in order for the judge to have access to the documents on the day of the hearing. **The Tribunal caseworker has granted the Appellant's applications on both occasions but the documents were not forwarded to the documents tab which resulted in the judge not having the medical documents presented before him on the hearing ...'**

[Emphasis added]

17. At the hearing, following discussion with Ms Hodgson, it was agreed on behalf of the appellant that the issue raised at paragraph 2 of the supplemental submissions went beyond Ground 1 and so permission had not been granted to rely upon it at the error of law hearing. However, I indicated that this Tribunal could properly consider the appellant to be advancing a *Robinson* obvious issue, and the matter could be considered *de bene esse* during the hearing. Ms. Hodgson agreed that ground 1 and the *Robinson* obvious issue could properly be considered together.
18. I did not grant permission in respect of the rule 15(2A) application at the outset of the hearing. The approach adopted was to consider the documents *de bene esse* and rule on the application at the conclusion of the hearing.
19. At the conclusion of the hearing, I dismissed the appeal and refused the attendant rule 15(2A) application. I provide my reasons below.

## **Discussion**

20. The first paragraph of Ground 1 details:

- '1. The Appellant is a victim of trafficking ... At no point does the FTJ consider this issue. There is no evidence at all that she has considered his evidence through the prism of his vulnerability as such and how it may affect his ability to recall or to give his account. This is therefore a procedural error which renders the FTJ's findings unsafe.'

21. Ms Hodgson acknowledged that the second sentence is incorrect. The Judge did note the reasonable grounds decision.
22. The starting point for this Tribunal's consideration is §31 of the respondent's decision letter, dated 6 May 2022:
  - '31. The following material facts have been accepted:
    - ...
    - You are a victim of trafficking.'
23. The next question arising is whether the appellant and his legal representatives advanced a positive case as to vulnerability consequent to the respondent's acceptance that he was a victim of trafficking.
24. As addressed below, I am satisfied that the appellant and his legal representatives not only did not place any concern as to the appellant's vulnerability front and centre as an issue arising in this appeal but failed entirely to rely upon it. It was relied on for the first time before this Tribunal.
25. The appellant lodged his appeal with the First-tier Tribunal on 27 May 2022 and so was subject to the reformed procedure in that Tribunal. *Practice Statement No 1 of 2022* came into force two weeks before, on 13 May 2022. It emphasises the requirement on the part of both parties in the First-tier Tribunal to identify the issues in dispute and to focus on addressing the evidence and law relevant to those issues in a particularised yet concise manner. This is consistent with one of the main objectives of reform, and is a modern application of the overriding objective pursuant to rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. It ensures that there is an efficient and effective hearing, proportionate to the real issues in dispute.
26. The *Practice Statement* confirms in mandatory terms the requirement placed upon a represented appellant to file an appeal skeleton argument ('ASA'). Further, it details the mandatory requirement that the respondent undertake a meaningful review of the appellant's case, taking into account the ASA and appellant's bundle, and provide the result of that review. The respondent is to engage with the submissions made and evidence provided, and to particularise the grounds of refusal relied upon.
27. The ASA is to answer the question - 'Why does the appellant say that the decision of the respondent is wrong?' An appellant is therefore required to set out concisely their objections to the respondent's reasoning in her decision letter, and the answer to the question is to be given with sufficient particularity to enable the respondent to engage in an active, effective, review of the appellant's case following the submission of the ASA and before the hearing is listed.

28. By means of her decision of 6 May 2022, the respondent relied upon the appellant providing vague answers that lacked any nuance. Additionally, inconsistency in the appellant's account was adversely relied upon. Consequent to the respondent's reasoning, if the appellant now sought to rely upon his vulnerability, it should properly have been evidenced and referenced in the ASA filed with the First-tier Tribunal on 3 October 2022. This document is silent as to the issue of vulnerability.
29. The next opportunity to raise the issue of vulnerability was by means of the appellant's witness statement filed in preparation for the appeal hearing. The appellant relied upon two witness statements of some age before the Judge. The first witness statement is dated 4 June 2021 and is identified by its title as the appellant's 'asylum statement', served upon the respondent less than a month after he made his asylum claim. It is a document supportive of his application for international protection, and pre-dates the respondent's decision of May 2022. It runs to a little over one page with reference to the appellant's journey to the United Kingdom being detailed in a little over six lines. There is no mention of any personal vulnerability.
30. The second witness statement, entitled 'appeal statement' is dated 12 September 2021, and was therefore prepared some seventeen months before the appeal hearing. In this Tribunal's experience, it is unusual for the most up-to-date witness statement to be of such age by the date of the First-tier Tribunal hearing. It briefly sets out the appellant's personal history and then eighteen paragraphs address the respondent's decision letter. As observed to Ms. Hodgson at the hearing, there are significant difficulties with this statement, not least that no reference is made to vulnerability.
31. From the outset, the legal author of the document failed to have firmly in mind that witness statements are vehicles of fact, and so inappropriately sought to entwine legal submissions into the document. The witness statement details, *inter alia*:

'It is the Decision maker's discrepancy on believing I don't have a well-founded fear of persecution. However, I believe that my fear has been established to a reasonable degree ...'

'This means that I will not be able to enjoy my private life in Vietnam under Article 8 of the European Convention on Human Rights. Thus, requiring me to leave the UK would be a breach of my human rights and it is contrary to the Human Rights Act 1998.'

'The Home Office refusal decision is unlawful in accordance with the Human Rights Act 1998.'

'I would like to further clarify that, if I were to be returned to Vietnam, there is a risk of harm that I will be persecuted by the Authority which affect the enjoyment of my private life in Vietnam.'

'I disagree with these paragraphs with the reason I have already provided reason for the exceptional circumstances in my response to the Home Office decision letter.'

I am scared of returning home and it is reasonable for me to owe a well-founded fear within a reasonable degree.'

32. I am satisfied that if cross-examined on these elements of his witness statement the appellant, a Vietnamese national with limited experience of the United Kingdom's international protection regime, would be highly unlikely to be capable of explaining the legal tests identified, or the statutory provisions referenced, despite their being said to be his thoughts and evidence.
33. It is well established that witness statements are there for an appellant or witness to say in their own words what the relevant evidence is and are not to be used as a vehicle for complex legal argument: *Alex Lawrie Factors Ltd v. Morgan* (1999) *The Times*, 18 August, *per* Brooke LJ.
34. Courts and Tribunals have regularly reminded parties that the purpose of a witness statement is to replace oral testimony. It is not to rehearse arguments. It is not to set out a case and whilst it necessarily has to be drafted with the collaboration of lawyers, it should not be a document created in the language of lawyers by lawyers, because the lawyers are not required defend it through cross-examination.
35. A Judge can properly expect the true voice of a witness to be conveyed by their witness statement, not their lawyer's efforts to address the law.
36. However, and this is averse to the appellant's present case, despite erroneously entwining legal submission into the witness statement, no challenge is advanced to the respondent's conclusions as to credibility on the ground that the appellant is vulnerable. Indeed, the statement provides little or no detail as to how the appellant was trafficked to the United Kingdom, let alone being silent as to the impact, if any, his experience of modern slavery has had upon him.
37. Thus, by the time of the hearing, no witness statement had been filed by the appellant providing detail as to his having any health concerns flowing from his being a victim of modern slavery. Further, the evidence before the Judge was entirely silent as to the substance and nature of the forced labour the appellant undertook in Romania, as well as to the evidence provided to the SCA in respect of the trafficking allegation.
38. Turning to the hearing before the Judge, the appellant continued to be represented by the same solicitors, as well as by experienced counsel. Ms Hodgson accepted with appropriate candour that the issue of vulnerability was not raised before the Judge as a discrete legal issue at the outset of the hearing, nor raised in closing submissions. She also accepted that there was no medical evidence before the Judge addressing any physical

and mental concern, save for limited evidence concerning the appellant's alopecia.

39. Reliance was placed by Ms. Hodgson upon the rule 15(2A) application. The accompanying bundle runs to thirty-four pages. Upon considering printouts from the First-tier Tribunal's CCD portal, two applications were made for First-tier Tribunal Legal Officers to upload medical evidence that the appellant's solicitors had been unable to successfully upload. Whilst Ms. Hodgson's instructions were that the appellant's solicitors had understood that a Legal Officer would upload the documents on their behalf so that they could be viewed by the Judge, she properly accepted that upon reading the relevant Legal Officers' notes, a clear representation that such step would be taken did not exist. This concession can only mean that there is no merit to the *Robinson* obvious point advanced by paragraph 2 of the 'supplemental submissions'. It cannot be said that the appellant enjoyed a legitimate expectation that a Legal Officer(s) would upload the documents on his behalf or present them to the judge hearing his appeal. In the absence of a clear undertaking there cannot be a breach of procedural fairness in this matter. Rather, the Legal Officers' notes are clear that on 29 December 2022 the appellant's solicitors were informed that they were to upload the documents by 10 January 2023, and on 17 January 2023 were informed that 'it was not clear' whether they had 'attempted to use the "Next Step" tab' to upload additional evidence. No undertaking was given on behalf of the First-tier Tribunal.
40. Consequently, I am satisfied that as at the date of the Judge's decision, the medical documents now relied upon by the appellant were not placed before her, nor had the First-tier Tribunal undertaken to provide the requested documents to the Judge.
41. Turning to the rule 15(2A) application, the key document is a letter from Dr Sunyoung Lee, Senior Psychological Therapist, South London and Maudsley NHS Trust, dated 12 December 2022. Dr Lee confirmed that the appellant had been seen in one talking therapies session on 7 October 2022 and had then engaged in three telephone review sessions to monitor his mental health conditions. Dr Lee opined that following the rejection of his asylum application in April 2022, the appellant's mental condition had worsened, 'due to severe symptoms of anxiety and low mood stemming from his posttraumatic stress disorder (PTSD) and issues of uncertainty, he has been taking Zopiclon'. Various documentary evidence accompanying the rule 15(2A) application confirms that the appellant has at times been prescribed Zopiclone and Citalopram.
42. Whilst Ms Hodgson sought to assert that additional post-hearing documents accompanying the rule 15(2A) application could properly be considered on a *Ladd v. Marshall* basis, having considered the documents they go no higher than the evidence provided by Dr Lee, save for an assertion in a letter from Theu Tien Nguyen, psychotherapist, dated 25 April 2023, that the appellant has suicidal thoughts. Noting the guidance provided in *HA (expert evidence; mental health) Sri Lanka* [2022] UKUT



00111 (IAC), no GP records have been filed, and no other document relied upon by the appellant references suicide ideation. As no article 3 suicide case was advanced before the Judge, and there was no evidence at all as to suicidal ideation being raised by the appellant himself at the hearing, there is no merit in this new matter being advanced by means of a rule 15(2A) application.

43. I am satisfied that the issue of vulnerability was not advanced before the First-tier Tribunal in any form at any time. It does not appear in the appellant's skeleton argument, it does not appear in his witness statements, it was not raised by counsel at the hearing as an issue at the beginning of the hearing, nor in closing submissions. The appellant provided no oral evidence as to being mentally vulnerable consequent to his experiences.
44. The question therefore is whether a material error of law arises in circumstances where the Judge had no notice of Dr Lee's letter, nor had been put on notice by the appellant or his counsel that the issue of vulnerability arose. The core of Ms Hodgson's argument is that the Judge knew and accepted that the appellant before her was a victim of trafficking and therefore was required to proceed on the basis that he was vulnerable.
45. However, consequent to the adoption of the reform procedure, the First-tier Tribunal can properly expect clarity as to the principal controversial issues in the case by the date of the substantive hearing of the appeal. The parties are obliged by rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to help the Tribunal to further the overriding objective, and to cooperate with the Tribunal generally. The parties are therefore under a duty to engage in the process of defining and narrowing the issues in dispute, being mindful of their obligations to the Tribunal. It was for the appellant to identify vulnerability as an issue being relied upon in the appeal proceedings.
46. The Judge knew that the appellant was accepted by the respondent to be a victim of trafficking. However, she could properly rely upon the appellant's counsel and legal representatives understanding their professional duty to identify the principal controversial issues arising. The appellant was not asked any questions on the issue in examination-in-chief. Nor did the appellant's solicitors file a witness statement explaining the difficulties experienced in uploading what they considered to be relevant medical documents. No application was made at the hearing to rely upon Dr Lee's evidence. It was not said before this Tribunal that counsel had acted beyond their instructions by failing to advance the issue. This Tribunal is properly to proceed on the basis that counsel acted on instructions, unless and until evidence to the contrary is presented and counsel has had the opportunity to respond to the serious allegation. I note that the appellant has been represented by the same solicitors throughout and they are properly to be considered as concluding that no conflict of interest arises.

47. Ultimately, Ms Hodgson's submission places far too great a burden upon a Judge to investigate a matter in the face of an alternate position adopted by both the appellant's solicitors and counsel over a period of time. It was for the appellant to detail his case, and to identify the issues which the Judge was to consider. It cannot be said that the issue of vulnerability was so obvious, in circumstances where neither counsel nor solicitors raised it, and where counsel was silent at the hearing as to the problems arising in uploading Dr Lee's short letter, a document of which the Judge had no knowledge.
48. There exists a duty upon the parties to identify relevant issues of their own motion. There is no place for hiding a jewel of a submission in the hope that it will purchase favour on appeal. A party that fails to identify an issue before the First-tier Tribunal that it subsequently asserts to have been essential for a judge to consider is unlikely to have a good ground of appeal before the Upper Tribunal. Where, as here, a point now said to be of importance has not been identified by the parties, and nor is it one which has independently drawn the attention of the judge, it is not an issue which can be appropriately raised for the first time in the context of an appeal to the Upper Tribunal.
49. In the circumstances, ground 1 identifies no material error of law.
50. Ground 2 of the appellant's challenge was not pursued with vigour before this Tribunal. This is not surprising as it relies heavily upon the Judge being required to consider the appellant's vulnerability when assessing information that he previously provided to the respondent. Ultimately, I conclude that ground 2 is parasitic upon ground 1 and so falls to be dismissed.
51. In the circumstances, the interests of justice do not require that the appellant be granted permission to rely upon the documents filed with the rule 15(2A) application.

### **Decisions and Reasons**

52. The decision of the First-tier Tribunal, dated 23 February 2023, is not subject to material error of law.
53. The appellant's appeal is dismissed.
54. An anonymity order is confirmed.

*D O'Callaghan*  
**Judge of the Upper Tribunal**  
Immigration and Asylum Chamber

**16 June 2023**