Neutral Citation Number: [2017] EWCA Civ 1123

Case No: C5/2015/0626

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
AA/04811/2013, [2014] UKAITUR AA048112013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2017

Before:

LORD JUSTICE GROSS
SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE UNDERHILL

- -

Between:

AM (Afghanistan)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
- and –	
Lord Chancellor	**Intervenor**

- -
- -

Ms Stephanie Harrison QC & Mr Raza Halim (instructed by **Brighton Housing Trust, Immigration Legal Service**) for the **Appellant**
Mr David Blundell (instructed by **Government Legal Department**) for the **Respondent and the Intervenor**

Hearing date: 17 May 2017

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Judgment Approved

Sir Ernest Ryder, Senior President:

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.

2. This is a second appeal for which permission was given by the Senior President on 2 February 2016, reported at [2016] EWCA Civ 207. An important point of principle or practice was identified concerning the effective right of access to the tribunal by incapacitated and vulnerable individuals including children and young people and how such a person might be heard.

3. The substantive issues in the appeal have been compromised and it is agreed that the appellant's asylum claim will be remitted to the FtT for a fresh decision to be made. I describe the reasons for that agreement later in this judgment. The procedural facts have also given rise to common ground between the appellant and the Secretary of State for the Home Department ['the Secretary of State']. The Lord Chancellor has been given permission to intervene. I am very grateful to leading and junior counsel for the Lord Chancellor, the Secretary of State and the appellant for the quality of their oral and written submissions on an issue of importance.

4. I shall ask that this decision be considered by the Tribunal Procedure Committee for them to independently advise whether any further or consequential issues arise.

5. The appellant is a citizen of Afghanistan. At the date of the hearing before the FtT he was assessed as being 15 years of age i.e. he was apparently born in 1998. He travelled with the help of various agents from Afghanistan across Europe to the United Kingdom, arriving here on 4 July 2012. He claimed asylum on 20 July 2012.

6. The appellant's evidence describes his history in the following way. He grew up in Afghanistan. His father was a member of the Taliban. As a consequence, he was not normally allowed outside of the compound in which he lived. His family were fed and provided for by the Taliban. When he was about 13 years old, his father was killed by British forces. A few days later the appellant was assaulted by the Afghan police and he was hospitalised. After returning home, Taliban men came and took him away to a training camp with the intention of training him to be a suicide bomber. Eight to ten days later he managed to escape. His maternal uncle handed him over to agents who facilitated his removal from Afghanistan and his journey into Europe.

7. The appellant says that he has a well founded fear of persecution in Afghanistan both from the Afghan police who consider him to be a member of a Taliban family and from the Taliban who will either want to punish him or use him as a fighter. It is said that he has mental health and psychological difficulties.

8. The Secretary of State refused the appellant's asylum application on 3 May 2013 but granted him discretionary leave to remain in the UK until he is 17 ½ years old. The written reasons include the conclusions: a) that his evidence is not credible because of inconsistencies in it; b) that he had not demonstrated that he had fled Afghanistan in fear of his life because of his failure to claim asylum in other safe EU Member States; and c) that he had not demonstrated a risk to his life and could obtain assistance from the Afghan authorities if he returned.

9. The legal framework that is relevant to the appellant's asylum claim can be summarised under three heads:

a. As a refugee under the 1951 Geneva Convention Relating to the Status of Refugees as applied by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 which are incorporated into the Immigration Rules by rule 334:

> "334. An asylum applicant will be granted refugee status in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
>
> (ii) they are a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
>
> (iii) there are no reasonable grounds for regarding them as a danger to the security of the United Kingdom;
>
> (iv) having been convicted by a final judgment of a particularly serious crime, they do not constitute a danger to the community of the United Kingdom; and
>
> (v) refusing their application would result in them being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Refugee Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group. " (emphasis added)"

b. As a person in respect of whom there is a limited right to protection on humanitarian grounds as described in paragraph 339C of the Immigration Rules:

> "339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
>
> (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
>
> (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; (emphasis added) and
>
> (iv) they are not excluded from a grant of humanitarian protection.
>
> 339CA. For the purposes of paragraph 339C, serious harm consists of:
>
> (i) the death penalty or execution;
>
> (ii) unlawful killing;
>
> (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

Rule 351 adds the following (so far as is relevant to children and young people):

"…account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of their situation. … Close attention should be given to the welfare of the child at all times."

and

c. As a person whose article 3 ECHR rights are under threat.

10. The appellant appealed the Secretary of State's decision to the FtT. At the FtT:
    a. The parties were represented;
    b. The proceedings were translated for the appellant by an interpreter; and
    c. The documents which the judge records in his determination to have been "fully taken into account" by him "included":
        i. The appellant's witness statement;
        ii. An expert's country report by Mr Peter Marsden ['the Marsden report']; and
        iii. An expert's psychological report by Mr RA Sellwood ['the Sellwood report'].

11. Aside from his preliminary acknowledgement that the Sellwood report existed, the judge in the FtT made only scant reference to its contents. The reason given by the judge for that is the surprising and unsatisfactory state of affairs referred to by him in his determination:

> "I have also seen that there is a psychological report repeated for the appellant…This was not drawn to my attention until after the hearing. I note that the appellant has some learning difficulties but I found him to be a willing witness and able to answer the questions put to him without any apparent difficulty"

12. In fact, the Sellwood report was before the judge and was referred to. In any event and with respect to the judge, everyone now agrees that that was a wholly inadequate response to the content of the report which included the following opinions about the appellant that were relevant to procedural fairness:

> "77. Because [AM] has moderate learning difficulties I would expect him to experience significant difficulties accurately recalling questions and answers during interviews and court hearings. These difficulties were evident when he tried to recall details for me and when trying to complete some of the tests. These tasks were largely visual and aided by demonstration. Interviews and hearings present more difficulties for [AM] because the content is more abstract and verbal.
>
> 78. For these reasons, I do not consider [AM] is able to give evidence by answering questions in court although I think he can do so in the form of a witness statement where he has more time for information to be recalled and clarified.
>
> 79. Without prejudice to my firm view that [AM] should not give oral evidence I consider that additional arrangements should be made should the court decide that he be required to give oral evidence. [AM] has moderate learning difficulties with some

intellectual skills significantly weaker than those of others of his age. In view of this, I recommend the following arrangements to be made:

a. Informal court dress for advocates and judge

b. Informal venue for the hearing

c. Informal seating arrangements i.e. round tables or other seating that appears less confrontational and less adversarial

d. Exclusion of members of the public when [AM] gives evidence

e. Restriction of people present in the courtroom when [AM] gives evidence, to legal representatives, judge, court clerk, and, where he requests one, a nominated person to personally support him

f. Questions asked by both parties to be open ended where possible and broken down so that each question is simple and self-contained

g. Points to be raised during cross-examination to be identified by the judge."

13. The psychologist was giving appropriate advice about the ground rules to be adopted in the proceedings to ensure that the appellant's access to justice was effective i.e. that he had a voice in the proceedings concerning him. There were a number of options open to the judge in coming to a determination in that circumstance, including hearing from the expert or reasoning a contrary or different position, but effectively ignoring the psychologist's strong advice was not one of those options.

14. In the event, the judge came to the following conclusions:

    a. There were "several inconsistencies" in the appellant's account;

    b. The appellant provided "very little detail" in his witness statements as to why he believed he would be at risk;

    c. In reference to the expert report by Mr Marsden: "There is no reason given why the appellant should not return as an adult to the area where his relatives are.";

    d. The appellant was unable to recall simple questions about his previous life, such as how often he charged his mobile phone. "…I am surprised that he could not answer a simple question concerning a common occurrence – unless he was not being truthful.";

    e. The appellant suggested that he had walked home from the hospital, but having hardly ever left his house, he would not have known the route;

    f. The appellant had managed to ring his uncle after escaping from the Taliban, yet he had not charged his phone in several days;

    g. The appellant had passed through Austria yet not claimed refugee status – this demonstrated that his aim was not to claim refugee status but to enter the UK;

    h. The appellant's trip to the UK was arranged at surprisingly short notice; and

    i. The appellant failed to demonstrate that the risks he faced in Afghanistan were particular to his own circumstances.

15. The appellant appealed to the UT. It is plain from the amended grounds of appeal and the determination of the deputy Upper Tribunal Judge that the appellant's representatives pursued the appeal on the basis that the content of the psychologist's report was relevant to the findings made about the appellant's credibility and reliability. They rightly submitted that the appellant had 'significant difficulties'. The appellant was unsuccessful in his appeal. The UT came to the conclusion that the FtT was entitled to make the credibility findings that it had and that the

FtT had taken full account of the appellant's learning difficulties. These conclusions were not reasoned by reference to the detailed opinion set out in the psychologist's report which was again ignored.

16. In like manner to my conclusion at [13] I have come to the firm view that the UT judge took no sufficient steps to ensure that the appellant had obtained effective access to justice and in particular that his voice could be heard in proceedings that concerned him. Procedurally, the proceedings were neither fair nor just. That was a material error of law. The appellant was a vulnerable party with needs that were not addressed. In my judgment the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ['the FtT Rules'] and in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ['the UT Rules'] was ignored and for the reasons which follow, there was a fundamental procedural unfairness sufficient for this court to intervene. The parties agree.

The merits of the appeal and remittal to the FtT:

17. As I have remarked, the appellant and the Secretary of State are agreed that the appeal should be allowed on all grounds and remitted to the FtT. I gratefully adopt the summary of that agreement submitted by leading counsel for the appellant.

18. In rejecting the appellant's asylum appeal, although the FtT made reference to it, it did not properly consider the impact of the appellant's age, vulnerability and the evidence of a significant learning disability contained in the Sellwood report on the appellant's ability to participate effectively and fairly in the asylum process and the appeal. In particular it is agreed that:

    a. the FtT failed properly to take into account the appellant's age, vulnerability and learning disability in making adverse credibility findings, in rejecting his account of past events because of alleged inconsistency and implausibility and in dismissing the asylum claim on that basis;
    b. no consideration was given to whether or not oral evidence was necessary and on what issues so as to enable a fair hearing and any prejudicial consequences of oral evidence in accordance with Rule 14 of the FtT Rules, the PD at [2] to [4] and the Guidance Note at [6] (see below and in the Annex to this judgment).

19. The FtT erred in law in failing to have proper regard to the objective country conditions in Afghanistan including the Marsden report. In particular it is agreed that:
    a. the FtT rejected the asylum claim on adverse credibility grounds before considering the objective country evidence (contrary to the well established principle that credibility should be made on the basis of a holistic assessment): it is an error of approach to come to a negative assessment of credibility and then ask whether that assessment is displaced by other material *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367, [2005] INLR 377 at [24] to [25];
    b. the FtT failed to direct itself and/or to take into account the Marsden report which provided evidence that supported and/or was capable of supporting the appellant's account of past events and identified objective indicators of risk on return to Afghanistan based *inter alia* on the appellant's age and vulnerability and his link to the Taliban through his father which may have been sufficient to establish his claims;
    c. the FtT failed to have regard to the obligation to give precedence and greater weight to objective evidence and indicators of risk rather than personal credibility in light of the appellant's age, vulnerability and learning disability.

20. Finally, it is agreed that the FtT erred in law in failing to consider the risk on return to Afghanistan at the date of the hearing on the erroneous basis that the appellant would not face actual removal from the UK if his family could not be traced, until he was 18 years of age and

contrary to the decision of this court in *CL (Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551 at [19]. This was relevant to the appellant's claim for humanitarian protection based upon the objective evidence including that contained in the Marsden report of the risks to and conditions for an unaccompanied child with the appellant's additional vulnerabilities, if returned to Kabul, in particular the risk of destitution and exploitation.

21. It is submitted on behalf of the appellant that the agreed basis for allowing the appeal on the merits reflects core principles of asylum law and practice which have particular importance in claims from children and other vulnerable persons namely:
    a. given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as 'a reasonable chance', 'substantial grounds for thinking' or 'a serious possibility';
    b. while an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;
    c. the findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an 'add-on' and rejected as a result of an adverse credibility assessment or finding made prior to and without regard to the medical evidence;
    d. expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below and *JL (medical reports – credibility) (China)* [2013] UKUT 00145 (IAC), at [26] to [27]);
    e. an appellant's account of his or her fears and the assessment of an appellant's credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law; and
    f. in making asylum decisions, the highest standards of procedural fairness are required.

22. Although I agree with these submissions I would like to emphasise that these principles are not an exhaustive or immutable checklist. That said, the principles were not applied properly or at all in the determination of this appellant's claim for asylum either by the FtT or the UT. I recognise that this marks a failure of the system to provide sufficient and adequate protection in the asylum process for the particular requirements, needs and interests arising out of the disadvantages that the appellant has as a highly vulnerable child. There is a consensus that the critical errors arose from the focus on the credibility of the appellant's account and the failure to properly have regard to the objective evidence and to give it priority over the ability of the appellant to provide oral testimony.

23. Given that stark context, it is important to emphasise that there is also a consensus that procedural fairness would have been provided had the tribunals had regard to the Rules, Practice Directions and Guidance that already exist and if careful consideration had been given to the same at an early stage in the process and certainly at the outset of the hearing to determine whether or not oral evidence was necessary and appropriate in this case. That would have focused attention on the key issues in the case, the objective evidence in particular from the two experts and its significance for the fair and proper determination of the appeal. Critically, the appellant's age, vulnerability and learning disability could have been recognised and taken into account as factors relevant to the limitations in his oral testimony. Likewise, the tribunals' procedures could have been designed to ensure that the appellant's needs (including his wishes and feelings) as a component of his welfare were considered to ensure that he was able to effectively participate.

Procedural fairness:

24. The FtT has a broad power to admit evidence which by rule 14(2)(a) of the FtT Rules includes evidence that would not "be admissible in a civil trial in the United Kingdom". Accordingly, strict rules of evidence do not apply (see, by analogy with the FtT Tax Chamber: *Revenue and Customs Commissioners v Atlantic Electronics Ltd* [2013] EWCA Civ 651, [2013] CP Rep 14 per Ryder LJ at [30] to [31] as applied by the UT in *Belgravia Trading Co Ltd v Commissioners of Her Majesty's Revenue and Customs* [2014] UKFTT 031 (TC) at [19]).

25. One of the consequences of the absence of a strict rule is that the civil rules about the admission of hearsay including from a party without capacity, do not apply (see section 5(1) of the Civil Evidence Act 1995).

26. The overriding objective and the parties' obligation to co-operate with the tribunal are set out at rule 2 of the FtT Rules in the following terms:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes –
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as is compatible with proper consideration of the issues.
> (3) The Tribunal must seek to give effect to the overriding objective when it –
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
> (4) Parties must –
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

27. It is accordingly beyond argument that the tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the tribunal can utilise to deal with a case fairly and justly. Within the Rules themselves this flexibility and lack of formality is made clear. The terms of Rules 4 (case management), 10 (representation) and 14 (evidence and submissions) are as follows:

> "Rule 4:
>
> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may –
> […]
> (d) permit or require a party or other person to provide documents, information, evidence or submissions to the Tribunal or a party;
> (e) […]

(f) hold a hearing to consider any matter, including a case management issue;
(g) decide the form of any hearing;
[…]

Rule 10(1):

A party may be represented by any person not prohibited from representing by section 84 of the 1999 Act.

Rule 14:

(1) Without restriction on the general powers in rule 4 (case management powers), the Tribunal may give directions as to –
(a) Issues on which it requires evidence or submissions;
(b) the nature of the evidence or submissions it requires;
(c) whether the parties are permitted or required to provide expert evidence;
(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular tissue or generally;
(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given-
(i) orally at a hearing; or
(ii) by witness statement or written submissions; and
(f) the time at which any evidence or submissions are to be provided.
(2) The Tribunal may admit evidence whether or not –
(a) the evidence would be admissible in a civil trial in the United Kingdom; or
(b) subject to section 85A(4) of the 2002 Act, the evidence was available to the decision maker.
(3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath or affirmation, and may administer an oath or affirmation for that purpose."

28. In the FtT and UT the parties are expected to co-operate with each other and the tribunal to agree case management directions. Standard directions can be given in writing by a delegated tribunal case officer in accordance with Practice Direction Statement: "Delegation of Functions to Tribunal Caseworkers First-tier Tribunal (Immigration and Asylum Chamber)" issued by the Senior President on 31 May 2017. In a case where bespoke directions are necessary and there is a need for a hearing, a case management review hearing (CMRH) should be requested. Not every case that requires bespoke directions will need a separate CMRH. Where expert evidence exists on the point, as it did in this case, and all other preparations have been made so that there is no risk of an adjournment or harm to the child or vulnerable person, the parties can deal with ground rules for a child or vulnerable person at the beginning of the substantive hearing.

29. The practice of waiting for the substantive hearing in the hope and expectation that a failure to have identified case management directions will lead to an adjournment with consequential delay and the waste of public funds is to be deprecated and must cease. It is disproportionate and in breach of the Rules.

30. To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment.

31. The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:

    a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
    b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);
    c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
    d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
    e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

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.

33. Given the emphasis on the determination of credibility on the facts of this appeal, there is particular force in the Guidance at [13] to [15]:

> "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
>
> 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those [who] are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
>
> 15. 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 this 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."

34. In *JL (medical reports – credibility) (China)* (supra), which was binding on the FtT, the UT considered that, where the FtT accepted an appellant as vulnerable, it should apply the Guidance Note. I agree. The UT found the judge erred in failing to do so:

> "26. A second error we discern consists in the judge's treatment of the appellant's vulnerability (the appellant's ground 3). It is clear from her determination that despite disbelieving much of the appellant's evidence including the account she gave of her psychological problems (the judge placed particular emphasis on the appellant's ability to perform well in her studies) the judge was prepared to accept she was a vulnerable person. To be specific, she appeared to accept that the appellant had been the victim of physical abuse at the hands of her former boyfriend in the UK [104]; and, although rejecting the reasons given, accepted that "[i]t may well be the appellant has certain mental health issues". Given that the judge described the respondent's reasons (as set out in the preceding paragraph) as "cogent" and that they included reliance on inconsistencies, it was of particular importance to see what findings, if any, the judge made about the possible relevance to these of the appellant being a vulnerable person. In the case of a vulnerable person, it is incumbent on a Tribunal judge to apply the guidance given in the Joint Presidential Guidance Note No 2 2010, Child, Vulnerable adult and sensitive appellant guidance…[the UT then set our paras 14 and 15 referred to above].
>
> 27. Applying this guidance would have entailed the judge asking herself whether any of the inconsistencies in the appellant's account (as given in her asylum interview) identified by the respondent in the reasons for refusal – and described by the judge as being "cogent" – could be explained by her being a vulnerable person. This the judge did not do."

35. The fifth of the five key features identified above relates to other relevant guidance materials which emphasise that "a child is foremost a child before he or she is a refugee" (McAdam J, Complementary Protection in International Refugee Law, P196, OUP, 2007). There are at least five documents that are particularly relevant to children and young people and to which reference can be made for further guidance. They are:
    a. 'The UNHCR Guidelines' on International Protection: Child Asylum Claims under Articles 1A(2) and 1(F) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees;
    b. Article 4(3) of Directive 2004/83/EC [the Qualification Directive];
    c. Every Child Matters – Change for Children (Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, November 2009);
    d. Paragraphs 350 to 395 of the Immigration Rules and the Secretary of State's Asylum Policy Guidance (Processing children's asylum claims, 12 July 2016); and
    e. Equal Treatment Benchbook, Ch 5, Judicial College, 2015

36. Since the Guidance Note was issued, section 55 of the Borders, Citizenship and Immigration Act 2009 has come into force which provides for relevant immigration, asylum and nationality functions to be discharged having regard to the duty to safeguard and promote the welfare of children. 'Every Child Matters' is relevant guidance issued by the Secretary of State under section 55(3) of that Act. The application of the statutory duty applies to decisions about immigration, asylum, deportation and removal including decisions taken by tribunals. A decision taken without regard to the need to safeguard and promote the welfare of any children

involved will not be 'in accordance with the law' for the purposes of article 8.2 ECHR: *ZH (Tanzania) v Home Secretary* [2011] 2 AC 166 at [24] per Baroness Hale of Richmond JSC. The significance of the best interests of a child as 'a primary consideration' is explained by Lady Hale at [25].

37. I would like to sound a note of caution given that the guidance in this judgment is provided in the context of parallel developments in other jurisdictions. The caution relates to an over elaborate interpretation of the Guidance Note. There is cautionary jurisprudence in each of the jurisdictions that have developed more sophisticated protections for incapacitated or vulnerable persons, for example in the Court of Protection, in crime and in the family courts. For example, the judges of the Family Division and the Family Court have discouraged the use of experts to provide a veracity assessment (i.e. as to reliability and credibility) on the grounds that the ultimate issue is one for the judge and in practice the assessments add little if any value (see, for example: *A London Borough Council v K* [2009] EWHC 850 (Fam) per Baker J at [162]). Furthermore, detailed practice directions on vulnerability are in preparation to assist the family courts arising out of the February 2015 recommendations of the Vulnerable Witnesses and Children Working Group.

38. The joint Presidential Guidance to which I have referred made reference to the lack of any provision for guardians, intermediaries and facilitators in the tribunals. I have already referred to the assistance that informal facilitation can provide to representatives and the tribunal alike. In a rare case where an intermediary is necessary, a direction can be made for their involvement. Care should be taken to ensure they are appropriately used and only for the parts of a hearing where they are necessary. There remains, however, no provision in tribunal rules for the provision of a litigation friend like that in Part 21 of the Civil Procedure Rules 1998.

39. In *R (C) v First-tier Tribunal* [2016] EWHC 707 (Admin) the Lord Chancellor was joined to a claim that the decision of an FtT (IAC) refusing to appoint a litigation friend for a Nigerian national who lacked capacity was unlawful. The Lord Chancellor supported the granting of permission to judicially review the tribunal on the basis that the FtT had the power to appoint a litigation friend and that it had been unlawful not to do so. Picken J agreed and held that were that not to be the case, the claimant would not be able to make representations, put forward evidence, test the evidence against his case or instruct a solicitor: a situation which would breach the common law duty of fairness.

40. This was not of course the first time that a general principle of the common law was identified to provide for natural justice in tribunal procedures. In *Wiseman v Borneman* [1971] AC 297 their Lordships' House described "a residual duty of fairness" in a tax tribunal "to take steps to eliminate that unfairness" per Lord Wilberforce at 320G-H who added at 320H "I do not think that rules need be formulated or procedures laid down." At 308B Lord Reid held that "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules." Lord Morris of Borth-y-Gest held (at 309A-B) that "The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action." Nor do we wait for directions from parliament. The common law has abundant riches: there may we find what Byles J. called "the justice of the common law" (*Cooper v Wandsworth Board of Works* (1863) 14 CBNS 108, 194)". At 310G Lord Guest held that "It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent on the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest."

41. In *BPP Holdings v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121, this court approved the practice of the FtT (Tax Chamber) and the UT (Tax Chamber) to look to the CPR for assistance on matters about which the tribunal rules are silent. The question before the court on that occasion was the applicability in the tribunals of the guidance in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3296 and in particular the stricter approach to compliance with rules and directions that the CPR cases describe. This court held that provided there is no contrary or inconsistent provision in the Tribunals, Courts and Enforcement Act 2007 ['the TCEA 2007'] or the tribunal rules, the application of the overriding objective in the tribunal rules provides a sufficient basis for the exercise of powers by analogy with CPR that protect procedural fairness including proportionality, cost and timeliness.

42. I can find nothing in the TCEA 2007 and in particular section 22 which deals with the Rules or in the tribunal rules themselves that is a contrary or inconsistent provision relevant to the power to appoint a litigation friend. The other tribunal rules described in this judgment are, if anything, supportive of the accessible, flexible, specialist and innovative approach that they facilitate.

43. There is an apparently contrary decision of Underhill J as he then was in relation to the powers of an Employment Tribunal in *Johnson v Edwardian International Hotels Ltd* UKEAT/0588/07/ZT. I would not want to doubt the conclusion reached in that case so far as employment tribunals are concerned without hearing full argument on the question, given the separate status that employment tribunals have from the rest of the tribunals, the "party : party" nature of their proceedings and their discrete rules which are the responsibility of a different rules committee. However, whether that decision ought still to be regarded as binding on employment tribunals, it is not persuasive in respect of any other tribunals.

44. I have come to the conclusion that there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached. It must be remembered that this step will not be necessary in many cases because a child who is an asylum seeker in the UK will have a public authority who may exercise responsibility for him or her and who can give instructions and assistance in the provision of legal representation of the child.

45. The appellant in his skeleton argument sought to bring together the failings in this case and the general principles that can be taken from the Rules, PDs, Guidance and extraneous persuasive materials. Although that would provide a superficially attractive checklist of issues for judges and practitioners alike, I do not propose to burden them with such a prescription. I shall leave that aspect of good practice guidance to the Tribunal Procedure Committee for it to consider.

46. I would allow this appeal, set aside the order of the FtT and remit the application to be reconsidered by the FtT.

Lord Justice Underhill:

47. There is no issue that this appeal should be disposed of in the way, and for the reasons, described by the Senior President at paras. 17-23 and 46 of his judgment. The substantial question concerns the guidance to be given to tribunals about how to handle claims brought by persons whose ability to participate in proceedings is affected by incapacity or vulnerability. As to that, I respectfully I have nothing to add to the Senior

President's exposition of the guidance that is already available and his comments on it at paras. 24-37 of his judgment.

48. The only point on which I wish to add anything is the question whether the First-tier Tribunal has power to appoint a litigation friend. I agree with the conclusion reached by the Senior President at para. 44 of his judgment. However, as he notes at para. 43, at para. 11 of my judgment in *Johnson v Edwardian International Hotels Ltd*. UKEAT/0588/07 I expressed the view that the employment tribunal had no such power: indeed I said not only that it was not conferred by the general case management powers in the then ET Rules but that power to make such a rule was not conferred on the Secretary of State by the relevant primary legislation. The Senior President rightly observes at para. 43 of his judgment that we are not bound by that decision. He also says that we ought not to decide whether it was correctly decided in circumstances where we have not been taken to the (different) statutory provisions governing the employment tribunals. I think that the latter point must be formally correct, but it might be helpful if I made it clear that my strong provisional view is that what I said in *Edwardian* was wrong. As Picken J noted in *R (C) v First Tier Tribunal* [2016] EWHC 707 (Admin) (see para. 17), my observations were obiter and made without the benefit of adversarial argument: I was also not referred to, and did not consider, the possible impact of article 6 of the European Convention of Human Rights. As at present advised, I can see no reason why the reasons given by the Senior President for his conclusions on this point in the present case should not apply equally in the case of an employment tribunal.
49. Having said that, I do still have the concerns that prompted what I said in *Edwardian*. As I said there, a litigation friend has wide authority to dispose of a party's legal rights, either directly by bringing and/or compromising proceedings, or indirectly by the way in which he or she conducts those proceedings. Those powers ought to be clearly defined and regulated, as they are by rule 21 in cases that come under the Civil Procedure Rules. It is very unsatisfactory that they should be exercised simply on the basis of the general case-management powers in rule 4 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (or its equivalent in other chambers). The Senior President says at para. 4 of his judgment that he will ask that this decision be considered by the Tribunals Procedure Committee. I hope that the Committee will consider this aspect in particular, and as a matter of urgency.

Lord Justice Gross:

50. I also agree that the appeal should be disposed of in the manner, and for the reasons, given by the Senior President in his judgment.