



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

Appeal Number: AA/06209/2013

THE IMMIGRATION ACTS

**Heard at Bradford
On 10 October 2014**

**Decision & Reasons Promulgated
On 13 January 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SM

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer

For the Respondent: Miss M Anderson, ILAC, Leeds

DECISION AND REASONS

1. The respondent, SM, was born in 1994. He is a citizen of Afghanistan. He entered the United Kingdom illegally in 2008 but, on account of his minority, he was given leave to remain. He challenged decisions of the Secretary of State between 2008-2013, ultimately challenging his removal by way of judicial review. He was last served with an appealable decision of the Secretary of State on 29 May 2013. The Secretary of State rejected the respondent's repeated asylum claim (previously rejected by a Tribunal in 2011) and also his claim that he was stateless. The Secretary of State also considered the appellant's circumstances under the provisions of

paragraph 276ADE of HC 395 and the long residence requirements of the Immigration Rules. The Secretary of State concluded that there were no exceptional circumstances which would justify his being granted leave to remain outside the Rules. The appellant appealed against that decision to the First-tier Tribunal (Judge Canavan) which, in a determination which is dated 5 August 2014, allowed the appeal on human rights grounds (Article 8 ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal).

2. Judge Brunnen granted permission in the following terms:

The grounds on which permission to appeal is sought submitted the judge's finding that the appellant's mental illness amounted to compelling compassionate circumstances was irrational. It is arguable there was insufficient evidence on which the judge's finding could properly be assessed.

The grounds submit that the judge failed to follow the approach to consideration of Article 8 outside the Immigration Rules stipulated by *Gulshan*. I do not consider that there was merit in this submission – see *MM* [2014] EWCA Civ 985 at paragraph 128. Nevertheless permission to argue the point is not refused.

Dealing with that latter point first, I agree with Judge Brennan. There is no material error in the judge's determination for failing to consider any *Gulshan* "test". Indeed, the judge was unaware of the ratio of *Gulshan* and other relevant jurisprudence as is evidenced at [37].

3. The issue in the appeal is whether the judge should not have concluded that the appellant's mental health difficulties and high levels of distress would indicate that his removal in consequence of the immigration decision would "impact on [his] right to private life in a sufficiently grave way as to amount to a disproportionate interference with his right to private life (including his physical and moral integrity) under Article 8 [ECHR]." [44]. The grounds complain that there was simply insufficient evidence for the judge to come to any proper finding on the matter.

4. I find that the ground does not have merit. The judge was very well aware that she had only limited evidence concerning the appellant's mental health. She had a letter from a Dr Miller which she described as "very brief" but which did indicate that the appellant "is likely to be suffering from moderate depression." [42]. She went on to observe that

[The letter] supports my own observations on the high level of distress the appellant seems to be experiencing following the death of his mother and the response to the prospect of removal to Afghanistan. Unfortunately due to restrictions in legal aid appellants will increasingly be unrepresented and full medical and psychiatric assessments will not be available to assist the Tribunal. In the absence of an expert report I am unable to make a full assessment of the impact of removal is likely to have upon the appellant's

mental health. His presentation at the hearing certainly indicated he might have a strong subjective fear of return and that the reason why he thinks he might be targeted are unclear from the limited information he has been able to provide. Nevertheless I am satisfied even on the limited evidence before me that his mental health is sufficiently precarious that removal is likely to cause him real fear and anguish and is capable of amounting to compelling compassionate circumstances: see also *Ireland v UK* [1978] 2 EHRR 25 and *Soering v UK* [1989] 11 EHRR 439.

5. The judge had to make findings of fact and reach a determination on the basis of the evidence available to her. Part of that evidence included her observations of the appellant at the Tribunal hearing. Whilst, for example, demeanour of appellants in such proceedings will rarely be of relevance in determining questions of credibility, I see no difficulty here that Judge Canavan, having very little documentary evidence before her, had regard to the presentation of the appellant in court. The judge was well aware of the difficulty of making findings as to an individual's mental health with only limited expert assistance but I do not find that she has reached findings which are perverse, given the limited evidence before her. In the circumstances, therefore, I find that the Secretary of State's appeal should be dismissed.

DECISION

6. This appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 19 November 2014

Upper Tribunal Judge Clive Lane