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

Appeal Number: AA/04572/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4th April 2016**

**Decision & Reasons Promulgated
On 15th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**M S
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Brown, counsel

For the Respondent: Ms Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born on [] 1995. He [was] granted discretionary leave to remain as an unaccompanied minor when his asylum claim was refused by the respondent. He applied for further leave to remain but this was refused. He appealed against the decision on 24 June 2014 to refuse to vary his leave to remain in the United Kingdom and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. His appeal came before Judge of the First-tier Tribunal Feeney (“the FTTJ”) who, in a decision promulgated on 15 June 2015, dismissed his appeal on asylum, humanitarian protection and human rights grounds.

2. The appellant sought permission to appeal. This was granted by Judge of the First-tier Tribunal Andrew on 21 July 2015 who considered it was arguable that the FTTJ had

“... misunderstood the nature of the Appellant’s claim. Further, it is arguable that the Judge did not take into account the fact that the appellant has moderate learning difficulties and a mental age of between 7 and 9 when making findings in relation to credibility, the viability of obtaining medication on return to Afghanistan and also the viability of being able to relocate in Afghanistan bearing in mind his disability. In addition in view of his disability it is arguable that the Judge came to an irrational conclusion in relation to the Appellant’s Article 8 claim”.

3. Thus the appeal came before me.

Submissions

4. For the appellant, Ms Brown relied on the grounds for permission to appeal which I summarise as follows. First, the FTTJ’s assessment for the basis for the appellant’s fear on return was materially incorrect; secondly, the FTTJ had identified the appellant’s learning difficulties as “mild” whereas the expert evidence was that they were “moderate” with the appellant having a mental age of 7-9 years; thirdly, the FTTJ had made a credibility assessment without any reference to the expert evidence of Ms Kamal, effectively giving reduced weight to her report because the appellant’s account was not credible; fourthly, the FTTJ’s conclusions on the availability of medical facilities to the appellant were not open to her given the expert evidence that appropriate healthcare was not available for this appellant with his moderate learning difficulties. The fifth ground was that the findings on the appellant’s entry to Afghanistan were unsustainable given the evidence of the appellant’s health and moderate learning difficulties. Finally, the FTTJ’s conclusions with regard to Article 8 were irrational: the appellant’s limited evidence with regard to the name of the mother of his child could not reasonably be taken as adverse to his credibility given his moderate learning difficulties and mental age.
5. Ms Brocklesby-Weller, for the respondent, relied on the Rule 24 response to the effect that the FTTJ’s conclusions were consistent with the circumstances as portrayed in the material before her. The FTTJ had considered Ms Kamal’s expert report and the appellant’s account on which that was predicated. Even if the FTTJ had mistakenly referred to the appellant’s learning difficulties as “mild”, the FTTJ’s reasoning on risk on return had been sufficiently explained. Ms Brocklesby-Weller pointed out that the report of Mr Sellwood, the psychologist, had been prepared in December 2010. There was subsequent correspondence which referred to his mild learning difficulties, including one by a specialist nurse employed by Croydon Health Centre which referred to his mild to moderate learning disability. The existence of his learning difficulties and epilepsy were not in contention between the parties; it was the degree and impact of these on his ability to integrate on return which was the live issue. The FTTJ had

given due weight to the fact the appellant was a minor at the date of interview; there had been no difficulties with his giving oral evidence at the hearing, through the interpreter [7]. The FTTJ had relied on the oral evidence of the appellant. The appellant was now an adult, living a semi-independent life in the UK. It was accepted that there was no direct reference to Mr Sellwood's report in the FTTJ's decision. It was submitted that Ms Kamal's report had no direct bearing on the assessment of credibility, which was a matter for the FTTJ; Ms Kamal's principal concern was the availability of medication and risk on return. She had had no face to face contact with the appellant. The FTTJ had noted the appellant's resourcefulness, his proven ability to endure the journey to the UK and his actions since arrival. It was reasonable for the FTTJ to conclude that he would be able to proceed in a similar fashion on return. The FTTJ's reasons were sustainable; it is a matter for her the weight she gave to the evidence.

6. Ms Brown replied that, even if some of the evidence demonstrated the appellant suffered from only mild learning difficulties, the FTTJ was bound to give reasons why she preferred that evidence to the evidence of Mr Sellwood, the psychologist. In any event, one of the documents on which the respondent relied, the letter from the specialist nurse, accepted the appellant may have a moderate learning disability. With regard to the appellant's starting to live an independent life, this was unaffected by any diagnosis of learning difficulties; the two issues were not inconsistent. Whilst one or more of the grounds individually may not establish error of law, taken together the six grounds demonstrated that this decision was not sustainable. It was not accepted that Ms Kamal's evidence had no bearing on credibility: the expert's comments on the appellant's claim, as she correctly understood it, were relevant to an assessment of the appellant's ability to articulate his circumstances on return. The FTTJ's erroneous assessment of the appellant's learning difficulties as "mild" rather than "moderate" had an impact on the outcome of the appeal, relating as it does to her assessment of credibility. The error of law tainted both the asylum and Article 8 claims.

Discussion and Findings

7. Mr Sellwood, Chartered Psychologist, was instructed by the appellant's solicitors to provide a psychological assessment to determine whether or not the appellant had a learning disability. He examined the appellant on 17 December 2010 and his report is dated 17 January 2011. The FTTJ makes no reference to Mr Sellwood's report, even at [9] where she lists the documents provided by the parties. Nor is there any reference in her decision to the opinion of Mr Sellwood. That opinion is that the appellant has "moderate learning difficulties" (paragraph 65 of his report), that his cognitive skills in all areas ... were significantly limited" (paragraph 66) or that his mental age was between 7 years and 10 months and 9 years and 8 months (paragraph 61). Given the absence of any reference to the report or its content, I am bound to conclude that the FTTJ did not take it into account in making her assessment of the evidence and her findings. Whilst the respondent makes the point that the report was somewhat

dated by the time of the hearing, it nonetheless has a significant bearing on the issues in the appeal, not least it means that the appellant should have been treated as a vulnerable witness at the hearing and during the assessment of his evidence, notwithstanding his ages at the date of examination and the date of hearing. The content of Mr Sellwood's report is also consistent with the correspondence to which I was referred by Ms Brocklesby-Weller (none of which was created by persons able to give expert evidence on the issue of learning disability).

8. I note Mr Sellwood's opinion that the appellant should not give oral evidence; that he would make a poor witness, finding the questioning and cross-examination "too difficult to deal with". Mr Sellwood states that the appellant's "working memory is severely limited". This is a factor which should have been taken into account in the FTTJ's assessment of the appellant's credibility: the FTTJ refers to "inconsistencies and implausibilities in his evidence ... [which] may seem trivial in nature". She also refers to his implausible and inconsistent explanation [37] and his failure to provide a reasonable explanation [38].
9. Alternatively, if the FTTJ had rejected the evidence of Mr Sellwood, she should have indicated why that was the case and the basis for her assessment of the appellant's learning difficulties as "mild".
10. In summary, I find that the FTTJ erred in law in failing to take into account the expert evidence of Mr Sellwood. Had she done so, her findings on the appellant's credibility might have been different. Her failure to give consideration to Mr Sellwood's expert opinion is a fundamental flaw in her assessment of the reliability and credibility of the appellant's evidence. As a result, the FTTJ's findings on that issue cannot stand.
11. I am also satisfied that the FTTJ's failure to consider the expert evidence of Ms Kamal in the round but to consider it after making adverse findings on the appellant's credibility is an error of law. I do not accept the submission for the respondent that Ms Kamal's evidence had no bearing on the appellant's credibility. Ms Kamal took into account the appellant's account of events in Afghanistan and the FTTJ should have considered her opinion, albeit not necessarily accepted it, in considering the plausibility of the appellant's account. Instead, consideration of Ms Kamal's evidence appears to be something of an afterthought in the decision-making process [77 and 78], appearing as it does under the heading "Article 8 and the 1950 Convention". Ms Kamal's evidence is of relevance to risk on return and should have been considered in that context.
12. It is also highly relevant that the FTTJ has misrepresented the appellant's asylum claim in her decision: she refers to his fear of the Taliban [44] whereas his claim relates to his being at risk from his paternal cousin's family who seek to avenge a cousin's death; he does not fear the Taliban in general. This misstatement of the appellant's case, taken with the factors above, constitutes an error of law because it calls into question the reliability of the assessment of risk on return.

13. For these reasons, the decision of the First-tier Tribunal contains an error of law in the assessment of the evidence and the FTTJ's decision must be set aside in its entirety. All parties were agreed that, in such circumstances, it was appropriate for the appeal to be heard afresh in the First-tier Tribunal. I agree with that proposal.

Decision

14. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ Feeney.
15. No anonymity direction was made in the First-tier Tribunal but, given my references to the appellant's health and learning disability, such a direction is now required.

A M Black

Deputy Upper Tribunal Judge
2016

Dated: 6 April

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.

A M Black

Deputy Upper Tribunal Judge
2016

Dated: 6 April