Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05028/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 February 2016	**On 23 February 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

WA
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms A Watterson, instructed by Irving & Co Solicitors
For the respondent: Ms A Brocklesby Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, WA, date of birth 20.3.96, is a citizen of Afghanistan.

2. This is his appeal against the decision of First-tier Tribunal Judge Sullivan promulgated 12.11.15, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 3.7.14, to refuse his asylum, humanitarian protection and human rights claims and to remove him from the UK. The Judge heard the appeal on 26.8.15 & 22.10.15.

3. First-tier Tribunal Judge Ford granted permission to appeal on 7.12.15.

4. Thus the matter came before me on 2.2.16 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Sullivan should be set aside.

6. At §81 in what was the conclusion of a careful and detailed analysis of the evidence, the First-tier Tribunal Judge was not satisfied that the appellant's medical condition or symptoms are so serious as to breach the high threshold of article 3, were he to be returned to Afghanistan, stating "Given the evidence I am not satisfied that there are substantial grounds for believing that the impact of the removal on the appellant's health would be sufficiently serious to breach article 3."

7. With regard to the "more finely balanced" article 8 assessment at §87 of the decision, although she was satisfied that the appellant's health would deteriorate with the interruption of care if removed from the UK, the judge concluded, "I am not satisfied that the deterioration which will flow from the interruption of healthcare and social support and from removal from Mr Aybi's household is sufficient to outweigh the public interest in the appellant's removal."

8. In summary, the grounds challenge the judge's reliance on an earlier period of the medical records, and on the judge's own assessment at §81 that none of the three incidents of self-harm amounted to a serious attempt at suicide, as an indication of the appellant's mental health on return to Afghanistan.

9. In granting permission to appeal, Judge Ford found it arguable that Judge Sullivan may have erred in assessing the risk to the appellant arising from the lack of mental health treatment in Afghanistan, on the basis that the appellant either did not have or did not seek mental health treatment in the period December 2013 to December 2014 and did not appear to have encountered difficulties as a result. "In using this as a yardstick as to how he would cope without treatment or support on his return it is arguable that the Tribunal may have erred. This is because it did not take adequate account of the medical evidence of the marked deterioration in the appellant's mental health (including the increased risk of suicide) after that period and did not focus on the risk to the appellant as at the date of hearing (paragraphs 70 to 73 and 81). There is an arguable material error of law."

10. The Rule 24 reply, dated 15.12.15, submitted that the judge made very clear findings of fact in respect of the appellant's mental health properly taking into account the expert's medical reports. "The judge gave adequate reasons at paragraph 81 as to why Article 3 would not be breached if the appellant was removed from the UK."

11. The decision is challenged in relation to the treatment of both article 3 and article 8. In essence, the issue before me was whether the judge accurately and properly

addressed the evidence of the appellant's mental health, Ms Watterson submitting that she did not and that the failure to do so fundamentally undermined the decision so that it cannot stand.

12. It is clear that the judge made a careful assessment of all the relevant available evidence. The medical notes are summarised in some detail at §68 and the expert report of Dr Pannu is summarised at §69, including the features that the appellant requires ongoing psychiatric treatment and there is an ongoing suicide risk, which compounded or mitigated by a number of factors. At §72 the judge detailed the accounts of three alleged attempts at self-harm.

13. The appellant has been diagnosed with severe depressive disorder with psychotic symptoms, but evidently of a severity insufficient to require detention for medical treatment in hospital under the Mental Health Act 1983. Dr Pannu's summary suggests that his deterioration in 2015 is likely to have followed a failure to remain concordant with prescribed anti-depressant and anti-psychotic medication. The letter from Dr Spirling, dated 6.10.15, states, "Unfortunately, Mr WA's mental health is currently very poor. I would be concerned that should he have to return to Afghanistan at the present time or in the immediate future that his mental health would deteriorate further and currently I do not believe he is in a fit state to return to Afghanistan." With respect, whether or not he is in a fit state to return to Afghanistan and whether or not his mental health might deteriorate, does not directly address the high threshold of risk required under article 3, which the First-tier Tribunal Judge was required to assess.

14. I agree that the comparison with an earlier period was flawed, because the Tribunal was obliged to consider the appellant's health at the date of the hearing and the evidence detailed what is said to have been a serious deterioration in his mental health in 2015, as set out at §4.1 of Dr Pannu's report. However, in making an overall assessment of the evidence, the judge was entitled to have regard to that earlier period. I find that whilst the judge referenced this earlier period, that reference was not the sole basis of the judge's assessment of the evidence in relation to risk of suicide.

15. I also agree with the submission that the implied criticism of Ms Stevenson contained within §72, where the judge found it difficult to understand why she would request additional medication if she believed he represented a real suicide risk, suggesting that Ms Stevenson could not have regarded him as such a risk, is unjustified and inconsistent with the medical notes, which shows she checked with the GP and the pharmacist as to whether the medication had been dispensed.

16. It is submitted in the grounds that in rejecting or "trivialising" the doctors' assessment of risk of suicide on the basis of the judge's own non-expert opinion that none of the three incidents of self-harm amounted to a serious attempt at suicide, the judge fell into the error identified by the Court of Appeal in Y (Sri Lanka) v SSHD [2009] EWCA Civ 362, in which it was stated that whilst no Tribunal is bound to accept everything experts say because they have gone uncontradicted, it is well

established that the Tribunal must have, and must give, acceptable reasons for rejecting such evidence. In that case the immigration judge formed the view that the appellants (who had not given oral evidence) had been calculatedly exaggerating the symptoms recounted to the expert witnesses. "That is in the first instance a matter for the experts themselves, a fundamental aspect of whose expertise is the evaluation of patients' accounts of their symptoms." In fact, the evidence detailed a fourth attempt at self-harm not mentioned by the judge, when the appellant was caught with a ligature, attempting to hang himself. It is submitted that the suicide attempts began in June 2015 but he had been ruminating about ending his life for a long time prior to that. It is pointed out in ground three that Dr Pannu's opinion is corroborated by that of other health professionals.

17. I accept the submission that it is not for the judge to make an assessment as to whether any of the attempts amounted to a serious attempt at suicide; that is the preserve of the expert. However, it was proper for the judge to rely on the limited extent of some of the self-harming incidents. For example, the entry for 11.8.15 notes that the appellant saw no point in living, "but has no intention to do anything stupid and would not commit suicide." The entry for 13.8.15 details that he tried to set fire to himself, "only small patch and not serious, but still an attempt." At 3.18 of Dr Pannu's report, the appellant claimed that he denied himself food and taken all his medication because he felt unable to cope. "… He had considered making another attempt on his life but would only do so if he felt there was no improvement in his circumstances or health." At 3.20 the appellant told Dr Pannu that "his current functioning and feelings were causing him to feel that he was better off dead. He noted that if it continued to be this difficult then he would consider suicide."

18. Undoubtedly, the evidence points to a risk of suicide but, obviously, none of the expert or medical evidence addresses the high threshold necessary to reach the article 3 threshold, as discussed below.

19. In ground four, reliance is also placed on J v SSHD [2005] EWCA Civ 629, and the six factors of the guidance in assessing the risk of suicide on return. The risk must be serious and there has to be a direct causal link between the act or threatened act of removal and the risk of suicide. The threshold is particularly high in a foreign case and even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental.

20. The sixth question, relied on by Ms Watterson, is whether the removing or the receiving state has effective mechanisms to reduce the risk of suicide, if so, that will weigh heavily against an applicant's claim that removal will violate his article 3 rights. The mental health facilities in Afghanistan are no more than basic and Judge Sullivan accepted at §81 that care facilities are "insufficient for the needs of the population," though she considered that he would have family and/or social support on return.

21. The case law has long accepted that in principle, the risk of suicide can engage article 3, suicide being a type of serious harm. However, the threshold for a risk of suicide to satisfy article 3 is very high. The evidence has to establish that there are "strong grounds for believing" that removal would expose a person to a "real risk" of committing suicide on return. In N (Kenya) [2004] UKIAT 00053, the Tribunal acknowledged that prospective suicide by reason of removal is capable of engaging both Articles 3 and 8, but concluded that there would need to be the "clearest possible evidence" of a "real risk" that this would occur which would not otherwise be preventable by appropriate medical supervision both on the part of the removing country and having regard to facilities which might reasonably be expected to exist in the country of destination.

22. On appeal to the European Court of Human Rights in N v UK Application 26565/05, a case involving HIV the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in "very exceptional circumstances" particularly as the suffering was not the result of an intentional act or omission of a State or non State body. Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost.

23. In MK (Pakistan) [2005] UKIAT 00075 the Tribunal noted N and said that the circumstances in which facts could lawfully be held to involve a breach of Article 3 in cases like this had to be not just exceptional but extreme so as to engage very strong, indeed compelling humanitarian considerations. MK was a case in which neither the Appellant nor his family could afford medication and there was a serious risk that he would commit suicide within a very short period if returned due to a deterioration in his mental condition. His life expectancy would be considerably reduced in comparison to his life expectancy in the UK where he could receive treatment. However, the Secretary of State's appeal was allowed because the evidence did not reflect the near certainty expressed in the Adjudicator's decision that the appellant would experience acute mental suffering to the point of taking his own life. The Tribunal said that D v UK was about the conditions of an imminent death, not about prolonging life.

24. In RG (Sri Lanka) [2005] UKIAT 00072 the Tribunal echoed the view expressed in MK and said that, in the light of N there was no arguable basis for confining the principles in that case to its specific facts. The Tribunal said that the judgement of the House of Lords in N made it clear that in order to succeed on an Article 3 claim the case must be "exceptional and extreme." The Tribunal noted that in Article 2 claims, a "near certainty of death" was required to reach the threshold and considered that a similar rigorous approach was required to suicide cases. The

Tribunal indicated that evidence of past harm and the seriousness of such attempts was highly relevant, albeit that the assessment depended upon evidence that was to some extent speculative.

25. Notwithstanding the debate in the submissions before me as to whether the judge was in error in various minor aspects of the assessment of the evidence, in the light of the case law cited above, including that relied on by Ms Watterson, and applied to the evidence and the facts of the present case, I find it is far from established, even taking the evidence at its highest, that the risk of suicide in this case, meets the very high, exceptional and extreme threshold necessary to demonstrate a breach of articles 3 or 8 on removal. I am satisfied the judge made a careful assessment of the evidence as a whole and in the round, reaching a conclusion that the very high and exceptional threshold was not met, either in relation to article 3 or article 8. That conclusion was cogently reasoned and is, in my view, entirely consistent with the case law and evidence. Even if one were to exclude entirely the matters complained of in the grounds, it still has not been demonstrated that this appellant presents such risk of serious harm as to render his removal a breach of articles 3, or indeed 8 ECHR. In my view, it is inevitable on the available evidence that the outcome of the appeal would have been the same, and thus there is no material error of law in the making of the decision.

Conclusions:

26. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order. Given the circumstances, I continue that anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated