IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06546/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 26th January 2016	**On 11th February 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MISS MADINA MALIK KHAIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Head (Solicitor)
For the Respondent: Mrs R Pettersen (Home Office Presenting Officer)

DECISION AND DIRECTIONS

1. This is the Appellant's appeal to the Upper Tribunal, brought with permission, against a decision of the First-tier Tribunal (Judge Perry hereinafter "the judge") promulgated on 10th November 2014, to dismiss her appeal against the Respondent's decision of 15th August 2014 refusing to grant her asylum or any other form of international protection and deciding to remove her from the UK by way of directions.

2. The Appellant is a national of Afghanistan. She was born on 9th August 1992. She says that she left that country on 2nd June 2013, travelled to the

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UK, then went to Holland, then returned to the UK, having had the assistance of an agent, and then claimed asylum. It is recorded that she made her claim on 8th June 2013 after being stopped whilst apparently attempting to board a plane to Canada with a forged British passport.

3. In claiming asylum the Appellant said that she had incurred the wrath of certain members of her family, in particular her father and also an uncle whom she claimed was involved with Hezb-e-Islami, as a result of her wishing to continue to pursue her education in Afghanistan. She claimed that the uncle had once hit her, burnt her and shot her in her ankle. She also said that her father and her uncle planned to force her to marry against her will. She feared persecution at the hands of her family members if she were to be returned.

4. The Respondent accepted that the Appellant is a national of Afghanistan as she claims but did not accept that she had given a truthful account of the events which she relied upon as underpinning her asylum claim. Hence, her application failed. She appealed to the First-tier Tribunal. As noted above, her appeal also failed. The judge identified what were perceived to be inconsistencies in the Appellant's account and in aspects of the evidence she was seeking to rely upon. The judge highlighted a number of areas where the Appellant had failed to provide corroborative evidence of aspects of her account. The Appellant had, in part, relied upon medical evidence in support of her claim, principally, a medical report prepared by Dr J Cohen of 22nd October 2014. In analysing the medical evidence, in particular that report, the judge said this;

> "70. I turn now to the evidence of the injuries sustained by the Appellant when she says she was shot by the uncle. Dr Cohen says that the Appellant's scars are "highly consistent and typical of the attributions given ... it is my view very much more likely that the injury was sustained as described [by the Appellant] than due to an accidental cause." Dr Cohen did consider a number of points; -whether more scarring would be expected; the fabrication of the physical evidence; the reported loss of consciousness; Achilles tendonitis and psychological symptoms. Dr Cohen did also consider at paragraph 46 "... the possibility of other possible causes for her psychological condition". However Dr Cohen did not consider other possible causes of the Appellant's physical condition. She does refer to spontaneous sport induced rupture but to no other accidental causes. There is no professional surmise or conjecture about what other incidents could have caused the injuries that the Appellant has sustained.
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> 71. I also bear in mind the narrative that appears in document D21 being the ongoing medical narrative of her treatment at the Rainbow Health Centre. On 12th July 2013 the medical report states 'Patient requested procedure; Pt requested to be referred to Helen Bamber. Though discussion, said she was shot in tr heel by his uncle six/twelve ago, because of this she has frequent nightmares seeing people following her with guns; also insomnia; O/euphoric mood, smiling appropriately; very well-dressed and clean, logical speech. Said her friend who was referred to Helen Bamber advised her to ask Dr/Nurse to refer her to Helen Bamber. CCI. Although being shot in right heel, mobility is not

compromised as she can mobilise without walking aid. Normal face expression and body language. Client is NOT vulnerable and is being seen by GP. Pt doesn't fulfil referral criteria to Helen Bamber Foundation. Explain to client that she is not happy. She requested to see GP. Advised rec staff to arrange GP apptmmt as requested by pt.'

72. On 17th July 2013 there is reference in the same records to the Appellant 'able to weight bear normally and walk without any discomfort'.

"There is a considerable difference in the medical evidence about the Appellant's mobility. In July 2013 'she can mobilise without walking aid ... able to wait there normally and walk without any discomfort'. In September/October 2014 'she has pain if she walks for more than twenty minutes'. This inconsistency is coupled together with two other matters; - first, the absence of any assessment as to how else the injuries that she has sustained could have been caused leads me to reduce the weight that I give to the conclusions of Dr Cohen. Second, the Appellant's recorded pressure on 12th July 2013 on the medical staff at the Rainbow Health Centre to refer her to the Helen Bamber Foundation. 'Pt doesn't fulfil referral criteria to Helen Bamber Foundation'. The notes go on to record that the Appellant was 'not happy' about the decision not to refer her to the Foundation.""

5. So, it was not accepted that the injury to the Appellant's ankle was as a result of her having been shot by her uncle and that finding and conclusion, of course, was relevant to the judge's overall assessment as to her credibility.

6. There followed an application for permission to appeal to the Upper Tribunal. Ground 1 amounted to a contention that the judge had impermissibly relied upon a lack of independent corroborative evidence regarding key aspects of the Appellant's claim. Ground 2 amounted to a contention that the judge had failed to properly consider the Appellant's account against an appropriate cultural and social background. Ground 3 was a contention that the judge's approach to the medical evidence was flawed, in particular, because, contrary to what was suggested in the determination, Dr Cohen had, indeed, considered and fully addressed alternative explanations for the injury to the ankle before concluding that it had been caused as described by the Appellant.

7. Permission to appeal was granted by a Judge of the First-tier Tribunal who commented;

"I am satisfied that it is arguable that the judge erred in the assessment of the medical evidence which would then have a subsequent impact on the overall assessment of credibility identified in the grounds."

8. There followed a hearing before me for the purpose of considering whether the First-tier Tribunal had erred in law such that its decision ought to be set aside. At that hearing I received helpful submissions from both representatives which I have fully taken into account.

9. It is apparent that it was felt, when permission was granted, that ground 3 was the stronger one. Not surprisingly, in my view, arguments at the hearing revolved largely around that ground.

10. In context, the role of the author of the report (Dr Cohen) was to assess all possible causes of the scarring and damage to the appellant's ankle and to reach a conclusion as to the most likely cause on the basis of the expertise possessed. It is evident from paragraph 35 of the report that Dr Cohen did, in fact, consider, in some detail, what other alternative causes of the injury to the ankle there might have been. It is also apparent that, in her view, the other possible causes were unlikely, indeed she described some as being "very unlikely" and, at a later point in the report, she suggested that it was "very much more likely that the injury was sustained as described".

11. The judge, in fact, did refer at paragraph 45 of the determination to the part of the report where other possible causes were canvassed but, when considering it further at paragraph 72, appeared to loose sight of it. It cannot properly be said, in my judgment, that there was an absence of any assessment in the report as to how else the ankle injury might have been sustained. Thus, what was said at paragraph 72 about that was incorrect. The judge made it clear that what was perceived to be an absence of such an assessment had led to the weight being attached to the content of the report being reduced. Further, the remaining part of paragraph 72 appears to read as if the judge was suggesting that the appellant's apparent insistence that medical staff at the Rainbow Health Centre refer her to the Helen Bamber Foundation also somehow reduced the force of the report. Whilst her apparent insistence as to a referral might or might not be regarded as suspicious for various reasons, it does not seem to me that, whatever her motivation for seeking such a referral might have been, that that, in itself, could be relevant to the question of what weight should be attached to the report itself.

12. I have, therefore, concluded that the judge did err in law in the assessment of Dr Cohen's report. I had wondered briefly whether what does appear to be something of a skating over of the possibility of the wound having been caused by shrapnel damage might save the determination but I do not think it does. The judge did not take that point and had found other reasons, which after hearing argument I do consider to be erroneous, for not attaching significant weight to the report's findings and conclusions. I agree that the error is material because, had the judge attached more weight to the findings and conclusions contained within Dr Cohen's report the overall credibility assessment might, I do not say would, have been different.

13. My having identified a material error of law on the basis of ground 3 it is not now necessary for me to say very much, if anything, about ground 1 or ground 2. Certainly, I am of the view that ground 2 does not go beyond mere disagreement with the judge's findings and conclusions. I suspect, were it not for Ground 3, I would probably have concluded that the

determination was sufficiently safe though there were points at which the judge appeared to expect corroboration and whilst it is not an error of law to simply acknowledge the lack of corroborative evidence it does always have to be borne in mind that asylum seekers fleeing a country where they are at risk will not always be in a position to obtain and subsequently provide such evidence.

14. Finally, I would just like to comment that, although I have found reasons to set aside this determination, it is apparent that the judge set about what is always a difficult task with diligence and thoroughness.

15. In view of the fact that I have concluded the credibility assessment is unreliable, such that it will be necessary for extensive fact-finding, and bearing in mind the agreement of the representatives that such was the appropriate course, I have decided to remit to the First-tier Tribunal for the decision to be remade. Accordingly, I have issued the following directions.

Directions

(A) The case is remitted to the First-tier Tribunal and nothing is preserved from the earlier decision of the First-tier Tribunal promulgated on 10th November 2014.

(B) The time estimate for the new hearing shall be three hours. The appeal will be heard at the Birmingham Hearing Centre. An interpreter who speaks the Dari language is to be provided.

(C) The new hearing shall take place before a judge other than Judge of the First-tier Tribunal Perry.

(D) If either party wishes to file additional witness statements, background material or other documentary evidence of any sort, that should be contained in a paginated and indexed bundle and lodged with the First-tier Tribunal and sent to the other party, so that it is received at least five working days prior to the date which will be fixed for the next hearing. The parties should not assume that any such evidence not filed in compliance with these directions will be admitted.

Notice of Decision

The decision of the First-tier Tribunal involved an error of law and is set aside. The case is remitted to the First-tier Tribunal for the decision to be remade.

Anonymity

The First-tier Tribunal did not direct anonymity. I was not asked to do so and do not do so either.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

As no fee is paid or payable there can be no fee award.

Signed Date

Upper Tribunal Judge Hemingway