IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06895/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th March 2016	**On 13th April 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

R S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Loughran, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan born on [ ] 1991. His appeal against removal under Section 10 of the Immigration and Asylum Act 1999 was dismissed on asylum, humanitarian protection and human rights grounds by First-tier Tribunal Judge Suffield-Thompson in a decision dated 2nd October 2015.

2. Permission to appeal was sought on five grounds:

   (i) The failure to have regard to the fact that the Appellant's claim was decided within the Detained Fast Track Process; procedural unfairness and failure to make a finding on a matter in issue.
   (ii) The failure to adjourn which amounts to a procedural irregularity and the failure to have regard to relevant evidence.
   (iii) The failure to have regard to relevant evidence, speculation and misdirection in law.
   (iv) The failure to have regard to a letter from the Taliban or to give any reasons for rejecting such evidence.
   (v) The failure to have regard to the evidence of Dr Liza Schuster and the letters from Eva Jolly MEP and Jean Lambert MEP and the up-to-date background evidence.

3. Permission to appeal was granted on 5th November 2015 by First-tier Tribunal Judge P J G White for the following reasons:

   "(a) It is arguable that there may have been procedural unfairness. The judge made adverse comment on the lack of medical evidence. However, the judge also notes that the Appellant's constant requests for adjournments had been refused and a further application for adjournment was refused at the outset of the hearing. It is arguable that the judge failed to give proper consideration to the difficulties arising from the fact this was originally a fast track case and funding had to be secured.

   (b) Although the judge remarks on the absence of medical evidence from the time during detention the judge arguably contradicts herself by referring later to the Rule 35 report.

   (c) It is arguable that in reaching her decision that the judge failed to take into account the evidence referred to at 28 and 29 of the grounds seeking permission (the letter from the Taliban and the expert evidence and background material)."

Submissions

Ground 1 – detained fast track procedure

4. Ms Loughran submitted that the judge had failed to consider the fact that the Appellant had been detained in fast track. He was not interviewed and the Respondent had made a decision on the basis of the Appellant's witness statement which he was given only one day to prepare. The judge did not accept that the Appellant was too unwell to attend the scheduled interview. The detained fast track procedure failed to deal with vulnerable individuals and this had impacted on the judge's assessment of the

Appellant's credibility. The judge had failed to make a finding that the detained fast track procedure was relevant to the assessment of the Appellant's claim.

5. The detained fast track procedure had been declared unlawful at the date of hearing. The judge failed to take this into account and this was a material error in relation to his finding that the Appellant had failed to attend an interview. It was appropriate and necessary for the judge to find that the process was unlawful. The judge's subsequent findings at paragraphs 52 and 53 were not open to the judge on the basis that the detained fast track procedure had been declared unlawful. Had the judge considered this point he may not have come to the conclusions he did at paragraphs 52 and 53. The unlawfulness of the detained fast track procedure was not considered at all.

Ground 2: the adjournment

6. There was a Rule 35 report before the judge and the opinion of the doctor in that report was that his account was plausible and the Appellant had visible scars. It was clear from paragraphs 19 and 20 of the decision that the Appellant would be granted legal aid funding if further evidence of his ill-health was provided. There had been written applications for an adjournment in order to be able to secure funding. This application was renewed at the hearing. This was not a case where a previous hearing had been adjourned or that there had been numerous previous adjournments. The judge concluded that the Appellant's representatives could have instructed experts some time ago but she made no reference to the Rule 35 report. There was no fault on the part of the Appellant in the failure to instruct experts. It was clear from the Rule 35 report that the request for medical evidence was not a fishing exercise. There was independent evidence of torture before the judge and therefore the refusal of the adjournment was unfair in all the circumstances.

Ground 3: the Rule 35 report

7. The medical evidence which was before the First-tier Tribunal amounted to a Rule 35 report and a note of a telephone conversation at L1 of the Respondent's bundle which stated that the Appellant was fit to be interviewed. There was no evidence to support the judge's finding that the Appellant had been seen by medical professionals the entire way through his detention and he had been declared fit to be interviewed. The unlawfulness of the detained fast track procedure was not considered.

8. The Rule 35 report was completed two days before the Appellant's scheduled interview. From the ruling in the detained fast track cases it was clear that vulnerable clients were not being identified. The judge found that the Appellant started suffering from PTSD on the day of his interview.

This was factually wrong but also failed to have regard to the fact that PTSD would not have been identified in the detained fast track procedure.

9. The judge rejected the Rule 35 report as proof of torture but failed to take it into account as corroborative of the Appellant's account. Accordingly, the judge misdirected himself in law in failing to have regard to this evidence and it was irrational for the judge to note the absence of medical evidence despite the repeated requests to adjourn to enable medical reports to be obtained.

Grounds 4 and 5: Taliban letter and expert report

10. There was no mention in the decision of the letter from the Taliban, the expert report or the letters from MEPs. This was relevant to the risk on return and the risk of indiscriminate violence on return to Kabul. The judge failed to consider relevant evidence and it is clear from the decision that the judge failed to consider up-to-date evidence on indiscriminate violence preferring older case law.

Respondent's submissions

11. Mr Duffy relied on the Rule 24 response and submitted that the Appellant had had time to obtain medical evidence and had failed to do so. There was no error of law or unfairness in refusing to grant the adjournment. The failure to have regard to relevant evidence (grounds 4 and 5) was not material because following country guidance returns to Kabul were safe and the new evidence relied on by the Appellant did not show that the situation has changed.

12. It was at this point that there was an expression of concern in relation to the lawfulness of the fast track procedure and as to whether the original decision of the Secretary of State was lawful given that the Appellant was not interviewed. The judge had found the Appellant's account not to be credible as a result of numerous inconsistencies. This was of concern because of the failure to conduct a substantive interview in the Appellant's case.

13. The Secretary of State had refused the Appellant's application for asylum on 14th April 2015 and made a decision to remove him. The Appellant had only been given one day in which to submit a written statement and representations.

Discussion and Conclusions

14. The Appellant's immigration history is relevant in assessing this claim. The Appellant first came to the UK in 2007. He claimed asylum and was

interviewed substantively on 25th March 2008. His claim was refused and the Appellant was removed from the UK on 8th December 2009.

15. On 12th February 2015 the Appellant was arrested in the UK for possession of drugs and illegal entry. He claimed to have re-entered the UK in a lorry the year before. He also gave a false name and date of birth and claimed to be Pakistani.

16. The Appellant was detained and claimed asylum again on 26th February 2015 claiming he had arrived in 2013. His screening interview took place on 3rd March 2015 and his substantive asylum interview was scheduled for 13th April 2015 but he did not attend because he was unwell. He was given a date to submit further representations.

17. The judge found that the Appellant was not a credible witness because the account he had given in 2008 was inconsistent with his asylum claim in 2015. The judge found that he was vague and deliberately evasive in answering questions and he had also failed to claim asylum in a safe third country or soon after his arrival in the UK.

18. In relation to the Appellant's failure to attend his interview because he was ill the judge found at paragraphs 52 and 53:

> "52. I turn now to the Appellant's claim that he was ill on the day of his asylum interview. He had been seen by the doctor at the detention centre two days earlier and was passed as fit to be interviewed. On the day he suddenly found he had a headache, flash backs and deafness in his ears. He denied that he had hung up the phone when he was called by the Immigration Officer to find out why he had not attended. He said he could not hear as he had deafness in one ear. I find that he did in fact do this as the officer would have no valid reason to terminate the call at his/her end.
>
> 53. The entire way through his detention the Appellant has been seen by medical staff and has been assessed as fit and then on the very day of the interview he starts randomly suffering from symptoms akin to PTSD. I find this to be highly implausible. A Rule 35 report was obtained by a doctor at the detention centre who saw him and made a mental health referral saying 'he may have been a victim of torture'. I do not remotely accept the Appellant's representative's submission that this is proof that he has been subjected to torture. Despite the Appellant's constant requests for Tribunal adjournments to seek medical reports there was nothing before the Tribunal from his GP or from the detention centre medical staff to show that the Appellant has demonstrated any sign of physical or mental health issues until the day of his asylum interview. I find this was a cynical ploy on the part of the Appellant to avoid an interview which he knew

would almost inevitably lead to a refusal of his asylum claim just as he has sought to continually adjourn the Tribunal proceedings to give him more time in the UK."

19. Ms Loughran challenges the judge's findings at paragraphs 52 and 53 on the basis that the Appellant was seen by a doctor whilst in detention and a Rule 35 report dated 11th April 2015 was before the judge. It was clear from that report that the Appellant had been diagnosed as suffering from poor sleep, nightmares, anxiety and flashbacks and that he had been referred to the mental health team for this. Accordingly the Appellant had not started randomly suffering from symptoms akin to PTSD on the day of the interview. These were disclosed to a medical professional two days before the interview in the Rule 35 report.

20. Further, at paragraph 22 the judge found that "there is also other litigation under way that pertains to the fast track procedure whereas the issue for me is one of asylum". Ms Loughran submitted that the judge's failure to take into account the fact that the detained fast track process had been declared unlawful, in that it failed to identify vulnerable clients, had affected his assessment of the Appellant's credibility.

21. The judge failed to acknowledge the rulings under the detained fast track procedure. He found that the Appellant had deliberately sought to avoid an interview, but it is clear from the Rule 35 report that the Appellant had been potentially identified as a vulnerable detainee who may have been tortured and therefore he was unsuitable for the fast track procedure.

22. Whilst I accept the Appellant was released on 22nd April 2015 his asylum claim was assessed and refused without the benefit of a substantive interview and without the benefit of further medical evidence. The Appellant indeed was unable to submit more than a brief witness statement.

23. There was also the failure to adjourn to obtain a medical report. Again the judge failed to take into account the fact that the Appellant was subject to the detained fast track procedure, although arguably his representatives, given that there was five months between the Appellant's release and the hearing, could have produced some evidence from his GP to support the application for funding or indeed to demonstrate to the judge that it was likely that funding would be granted if further evidence of the Appellant's ill-health was submitted. There was no plausible reason why such evidence was not submitted to obtain funding or indeed why it was not before the judge and the refusal to grant an adjournment in itself would not amount to a procedural irregularity.

24. However, given the previous conduct of the Appellant's asylum claim and the fact that he was detained under the detained fast track procedure which had been declared unlawful it is another element that leads me to

conclude that the judge should have properly considered whether the refusal of the Secretary of State was in fact in accordance with the law.

25. The medical evidence which was before the judge did not support his finding that the entire way through his detention the Appellant had been seen by medical staff and assessed as fit. Other than the Rule 35 report and the conversation which took place on the telephone on 13th April 2015 there was no evidence to show when or how often the Appellant had been seen by medical professionals during his detention. The telephone note states:

> "Mr Safi was due to be interviewed about his asylum claim this morning but did not attend as he claimed to be unwell. I refer to my telephone conversation with Jeanette of Healthcare at Harmondsworth at 12 noon today. Jeanette kindly checked with Dr Jabbar who stated he prepared Rule 35 report on Mr Safi on Saturday, 11th April 2015 and considered Mr Safi fit for interview."

26. The judge's conclusion that the Appellant had sought to avoid his interview and had been disingenuous about his ill-health was not supported by the evidence which was before him and this inevitably led him into error in his failure to consider whether the Respondent's decision was in accordance with the law.

27. The last two points potentially would amount to an error of law. There was no mention of the letter from the Taliban threatening the Appellant given that the judge found the Appellant's account to be lacking in credibility. It was incumbent on the judge to deal with evidence which potentially corroborated the Appellant's account and give good reasons for why he rejected it. The judge failed to do so.

28. In relation to the expert report of Dr Liza Schuster, whilst I accept it does not deal specifically with the Appellant's case, it deals in general with the situation of returns to Kabul, it was more recent than the country guidance and certainly more recent than the two cases relied on by the judge at paragraph 71. I therefore find that the judge failed to assess whether, in the light of the up-to-date background evidence and expert evidence which was before him, the current country guidance case of AK (Afghanistan) should be followed or should be departed from. The judge found that the Appellant could relocate to Kabul on the basis of evidence which did not include the expert report or the background material which was before him. The judge therefore erred in law in failing to assess the current situation and deciding whether the Appellant would be at risk on return.

29. In relation to the last two points it is not possible to say whether the judge could have come to an alternative conclusion had he properly considered the evidence before him. I find that the judge erred in law in failing to

make a finding on whether the evidence of Dr Schuster and the background material warranted a departure from AK (Afghanistan).

30. Accordingly, having found that the judge made an error of law in the decision of 30th September 2015, I set it aside and re-make it. Given that the detained fast track procedure was found to be unlawful and that the Appellant's asylum claim was decided without the benefit of an interview and in circumstances where he was unable due to lack of funding to obtain medical evidence which, had he not been detained in an unlawful procedure he may well have been able to obtain, I find that the refusal of the 14th April 2015 was not in accordance with the law.

31. The expert report of Dr Schuster states that:

> "Those who return as young men to Kabul without social networks are also vulnerable to recruitment by insurgents. There was a further risk for those forcibly returned and criminals have been targeting recent returnees from Europe and Australia assuming that they must have money and refusing to believe that they would be deported without resources. The withdrawal of international troops, the long period of uncertainty before the formation of the new government following the election emboldened the insurgents and the beginning of 2014 saw a number of spectacular attacks that have continued into 2015. Currently, the Taliban/insurgents are active in 32 out of 34 provinces and the security forces are having to battle for the control of many, especially in the south, especially Helmand, Kandahar, Zabul and east. There are serious issues in Paktia and Khost where there has been an influx of refugees from Waziristan, plus the forced removal of 30,000 Afghan refugees from Pakistan following the attack on the school in Peshawar. However, it makes little sense to single out particular provinces as almost all have seen a sharp decline in security and an increase in attacks and casualties. The capital has not been immune from these developments. For the election days in April and June 2014, the security forces put a ring around Kabul – the only way they could manage security – so that it was not possible to enter until after polling had finished. On both days, the only vehicles on the streets of the city were those of election officials. As a result of a massive security operation, the 'spectacular' Taliban attack that was expected did not materialise but the numbers of casualties this year have nonetheless been very high. From 1 January to 30 June 2014, UNAMA documented 4,853 civilian casualties, up 24% over the same period in 2013. In summary it would be more accurate to say that Kabul is less insecure than other parts of Afghanistan, it cannot currently be described as secure."

32. Given the possible change in the security situation I am of the view that the Appellant's claim has not been fairly processed and the refusal of 14th April 2015 is not in accordance with the law. The discrepancies referred to in the refusal letter between the substantive interview in 2008 and the

screening interview with further representations did not amount to anxious scrutiny given that the Appellant was not substantively interviewed and was detained in fast track despite the existence of a Rule 35 report and the declaration that the procedure was unlawful.

Conclusion

33. I find that there is an error of law in the First-tier Tribunal decision of 2nd October 2015. I set aside the decision and remake it. I allow the Appellant's appeal insofar as the decision of the Secretary of State dated 14th April 2015 was not in accordance with the law.

Notice of Decision

The appeal is allowed in so far as the Respondent's decision of 14th April 2015 was not in accordance with the law.

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 her or any member of her 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.

J Frances

Signed Date: 31st March 2016

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

J Frances

Signed Date: 31st March 2016

Upper Tribunal Judge Frances